

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
MISCELLANEOUS PROCEEDINGS NO 707 OF 2021

\_\_\_\_\_

LH

1<sup>st</sup> Applicant

LW

\_\_\_\_\_

2<sup>nd</sup> Applicant

Before: Hon Au-Yeung J in Chambers (Not Open to the Public)

Date of Hearing: 24 June 2021

Closing Date for Further Submission: 2 July 2021

Date of Decision: 8 July 2021

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DECISION

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*A. INTRODUCTION*

1. This case raises a novel issue as to whether the Court has jurisdiction to give prior authorization for expenses intended to be paid under a contemplated surrogacy arrangement.

2. The Applicants are **Husband** and **Wife** respectively. They are Hong Kong permanent residents born and raised here and are ■ aged

50 or so. They have been married for ■ over 10 years. The Husband is a ■ and the Wife is a ■.

3. The Husband and the Wife came from large families with 4 or 5 siblings. They have always wanted to build a big family of their own. They have one daughter (C), now ■ in secondary school. Together they form a close-knit family and with the extended families.

4. After many years of trying, the applicants explored options such as IVF in 2015. That hope vanished when the Wife was diagnosed with ■ disease in 2016, although she has fully recovered. The Wife will not be able to conceive again naturally in view of her age and medical treatment. However, the Applicants' wish not to leave C alone upon their passing is reinforced. They are not amenable to the idea of adoption as they want the future `child to be genetically linked. They therefore want to pursue a surrogacy arrangement.

5. In May 2019, the Applicants searched out a surrogacy agency ("the Agency") in Minnesota in the United States. Having sought legal advice in Hong Kong in relation to the proposed surrogacy arrangement, the Applicants ceased communication with the Agency.

6. The Applicants filed the present originating summons to seek a declaration that all payments for what is a commercial surrogacy agreement with the Agency are reasonably incurred, or that the Court should authorize such expenses in advance. According to the latest estimate, the total estimated expenses are US\$130,950 to US\$197,700.

7. It is the Applicants' case that the Court does have power under section 12(7) or the Parent and Child Ordinance, Cap 429 ("PCO") to give such declaration or authorization. Applying the tests laid down in authorities for approving expenses, the Applicants submit that the payments to the Agency are either reasonable expenses, or "non-reasonable" expenses that are not disproportionate to those approved in previous cases. The Applicants are acting with the utmost good faith and without moral taint. They took out the present application to ensure that their future child will enjoy the full protection of the law and that all proper legal requirements are adhered to.

8. However, the Court's concern is whether it has power at all to approve expenses under a commercial surrogacy arrangement in view of section 17 of the Human Reproductive Technology Ordinance, Cap 561 ("HRTO").

#### *B. ISSUES*

9. The pertinent issues are (1) whether the Court has power to give authorization in advance for expenses under the intended surrogacy arrangement and, (2) if it does, what tests should be applied.

#### *C. PRELIMINARY OBSERVATIONS*

10. The "default" position as to parenthood, as set out in sections 9(1), 10(2) and 10(3) of PCO is that the surrogate mother is the legal mother of the child under Hong Kong law. If the surrogate mother has a husband or male partner whose sperm is not used, then the husband is deemed the legal father if he consented to the pregnancy. The male

partner would be deemed the legal partner if he and the surrogate mother obtained treatment for the surrogacy. Otherwise, the child does not have a legal father. A parental order would shift the parental status, with all the attendant legal rights and responsibilities to the couple who commissioned for the child.

11. Parental orders are of fundamental importance to the welfare of children born via surrogacy. The order creates a permanent parent-child relationship throughout the child's lifetime which reflects the reality of that particular situation and recognizes the child's genetic link to one or both of the parents. Such an order does not just govern the welfare of a child up to the age of 18 or when he finishes full-time education. It has far-reaching, life-long, implications for the child, his/her surrogate mother or the commissioning parents. It has transformative effect on the legal relationship between the child and the commissioning parents. It confers legal identity and status on the child, and defines whose child he/she is and the family to which the child belongs. It is irreversible for the surrogate mother, the commissioning parents and the child. There are no other orders (eg adoption, wardship) which can aptly serve such a vital function. See *FH v WB* [2019] HKCFI 1748 at §§34, 36 and 40.

12. Section 12 of PCO governs the path towards the making of a parental order and provides as follows:

“(1) The court may make an order providing for a child to be regarded in law as the child of the parties to a marriage (referred to in this section as “the husband” and “the wife”) if—

- (a) the child has been carried by a woman other than the wife as the result of the placing in her of an embryo or sperm and eggs or her artificial insemination;

|   |                                                                                                                                                                                                                                                                                                                     |   |
|---|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|
| A |                                                                                                                                                                                                                                                                                                                     | A |
| B | (b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo; and                                                                                                                                                                                                       | B |
| C | (c) the conditions in subsections (2) to (7) are satisfied.                                                                                                                                                                                                                                                         | C |
| D | (2) The husband and the wife must apply for the order within 6 months of the birth of the child or, in the case of a child born before the commencement of this section, within 6 months of such commencement.                                                                                                      | D |
| E |                                                                                                                                                                                                                                                                                                                     | E |
| F | (3) At the time of the application and of the making of the order—                                                                                                                                                                                                                                                  | F |
| G | (a) the child's home must be with the husband and the wife or either of them; and                                                                                                                                                                                                                                   | G |
| H | (b) the husband or wife, or both of them, must—                                                                                                                                                                                                                                                                     | H |
| I | (i) be domiciled in Hong Kong;                                                                                                                                                                                                                                                                                      | I |
| J | (ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or                                                                                                                                                                                                           | J |
| K | (iii) have a substantial connection with Hong Kong.                                                                                                                                                                                                                                                                 | K |
| L | (4) At the time of the making of the order both the husband and the wife must have attained the age of 18 years.                                                                                                                                                                                                    | L |
| M | (5) The court must be satisfied that both the father of the child (including a person who is the father by virtue of section 10), where he is not the husband, and the woman who carried the child have freely, and with full understanding of what is involved, agreed unconditionally to the making of the order. | M |
| N |                                                                                                                                                                                                                                                                                                                     | N |
| O | (6) [not applicable]                                                                                                                                                                                                                                                                                                | O |
| P | (7) The court must be satisfied that <u>no money or other benefit (other than for expenses reasonably incurred) has been given or received by the husband or the wife for or in consideration of—</u>                                                                                                               | P |
| Q | (a) the making of the order;                                                                                                                                                                                                                                                                                        | Q |
| R | (b) <u>any agreement required by subsection (5);</u>                                                                                                                                                                                                                                                                | R |
| S | (c) <u>the handing over of the child to the husband and the wife; or</u>                                                                                                                                                                                                                                            | S |
| T | (d) <u>the making of any arrangements with a view to the making of the order.</u>                                                                                                                                                                                                                                   | T |
| U |                                                                                                                                                                                                                                                                                                                     | U |
| V |                                                                                                                                                                                                                                                                                                                     | V |

unless authorized or subsequently approved by the court.  
(underline added)

(8) Subsection (1)(a) applies whether the woman was in Hong Kong or elsewhere at the time of the placing in her of the embryo or the sperm and eggs or her artificial insemination.  
...”

13. I have no doubt as to the good faith of the Applicants. They have a genuine need to resort to surrogacy. It was not a hasty decision but one carefully thought through and discussed between the Applicants. The Applicants are law-abiding, intending to comply with the law even before any surrogacy arrangement is entered into. Their wish to protect even a child yet to be conceived is strong and the Court respects that. There is no suggestion that the Applicants may not be suitable parents. The basic conditions in section 12(3) and (4) of PCO for seeking a parental order in future are likely to be fulfilled.

14. This is clearly not a case of buying a child overseas or any specie of objectionable conduct on the part of the Applicants. It is plain that they have not abused the law or the process of the Court. Nor have they any intent to defraud the authorities. There is no moral taint that I can see on their part.

*D. WHETHER THE COURT HAS POWER TO GIVE AUTHORIZATION FOR EXPENSES IN ADVANCE*

15. The closing words of section 12(7) do anticipate prior authorization of money and benefits. Law-abiding commissioning parents may wish to invoke that sub-section to ensure that the payments are lawful

so that those payments would not stand in the way of the eventual application for a parental order.

16. This interpretation in fact tallies with the legislative intent as shown in the legislative history. The original version of clause 12 of the Parent and Child Bill used the phrase "... unless authorized by the court" indicating prior authorization. However, this was revised to its present form at the Second Reading of the Bill on 10 March 1993<sup>1</sup>:

"Clause 12 of the Bill stipulates a number of conditions that have to be fulfilled before a parental order, that is, in layman terms, a permission for the transfer of parentage in case of surrogacy from the carrying parents to the commissioning parents, is to be made by the court. One condition is that no financial payment can be made between the parties concerned other than those already authorized by the court. While Members acknowledged the good intention of the rule, they considered it unnecessarily restrictive. This is because there may be some genuine cases where payments were made out of good will but the parties concerned just failed to apply for the court's authorization before payment. It would be unfair to them as well as to the child if an order were to be rejected solely for this reason. The ad hoc group considered that the final decision in these circumstances should be left to the court. (underline added)

The Administration has agreed to the above proposals. Suitable amendments will be moved by me later in the Committee stage to amend the relevant clauses."

17. This led to the addition of the words "or subsequently approved" in section 12(7) to make clear that, in addition to giving prior authorization, the Court could exercise the power after the fact.

18. I am satisfied that the Court does have power to give authorization in advance for expenses under section 12(7) of PCO.

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<sup>1</sup> *Official Record of Proceedings dated 10 March 1993*, pp 2413, 2421-2424.

*E. TESTS FOR GIVING AUTHORIZATION*

19. Mr Parker, counsel for the Applicants, relies on the 2-stage test laid down in *FH v WB*, at §110, and summarized in *Re A and B* [2019] 5 HKLRD 366, §34, Au-Yeung J, for subsequent approval of expenses:

- (1) Were the expenses reasonably incurred?
- (2) If the expenses (or any part of them) were not reasonably incurred (ie non-reasonable expenses), should the Court exercise its discretion to authorize or approve them?

20. Although *FH v WB* and *Re A and B* are cases of subsequent approval of expenses, Mr Parker submits that there should not be any difference in the tests for prior authorization.

21. I do not entirely agree. Whilst commercial surrogacy arrangements are involved, there are some significant features that distinguishes *FH v WB* and *Re A and B* from the present case:

- (1) *FH v WB* and *Re A and B* were situations of *fait accompli*, ie the subject children were born whereas the surrogate mother has not even been identified in the present case.
- (2) The welfare principle was a paramount consideration in those 2 authorities; and the children's rights were independently considered: Sections D and E (§§49-108) of *FH v WB*. At §24 of *Re A and B*, the Court even went to the extent of holding that balancing the welfare of a child and the public policy of adhering to legislation, the Court would decisively determine in favour of welfare. In the present case, any rights that the

Court needs to consider are those of the Applicants. There is not even the welfare of a conceived but unborn child to take into account.

(3) Precisely because it was due to the best interests of the children, the Courts have toned down the test to find that the non-reasonable expenses did not “raise the concern of the court” (eg *FH v WB*, at §§126 and 133) in situations where the commissioning parents had not abused public policy or defrauded the authorities. In the present case, the Court may place more emphasis on the policy, letter and spirit of legislation against commercial surrogacy when considering the non-reasonable expenses.

(4) There was no issue of prosecution under section 17 of HRTA as the 6-month period for commencing prosecution had lapsed before the applications were made to the Court in *FH v WB* and *Re A and B*. In the present case, the risk of prosecution of the Applicants may arise. The Court should not, in authorizing the payments, be seen to be creating a “defence” for the Applicants and tying the hands of the criminal court.

22. It would be putting the cart before the horse to consider the reasonableness of the expenses under the 2-stage test before considering the legality of the intended surrogacy arrangement. In my view, the tests for prior authorization under section 12(7) of PCO are as follows:

(1) Whether the intended surrogacy arrangement is legal under Hong Kong law;

(2) Whether the intended surrogacy arrangement is legal under the law of the jurisdiction where the intended surrogacy agreement will be entered into and where it is intended that the baby would be delivered;

(3) Whether the child is conceived or born;

(4) In the case of a commercial surrogacy, whether there is criminal prosecution under HRTTO;

(5) Whether the projected expenses are reasonable (this being the first of the 2-stage test in *FH v WB*); and

(6) If the projected expenses (or any part of them) are not reasonably incurred, whether the Court should exercise its discretion to authorize them (this being the second of the 2-stage test in *FH v WB*).

23. Since the Court is looking at projected expenses, there will be variables, contingencies and emergencies which require extra expenses. Costs may increase between the time the Court gives authorization and the time when payment falls due. The Court may consider giving a range of figures, subject to final approval when the time comes for making a parental order. This will avoid the applicants coming back to Court every time there is a change, engendering increased costs, delay and uncertainty. There should be a provision for liberty to apply.

24. It is not the usual practice of the Court to grant a declaration on an ex parte application where there are no real contestants or when giving judgment without trial. However, it is a rule of practice and not of

law, and will give way to the paramount duty of the Court to do the fullest justice to the plaintiff to which he is entitled. *Hong Kong Civil Procedure 2021*, Vol 1, §15/16/2.

25. If the expenses are authorized, it will be useful for the Court to make a declaration to that effect as there is a practical need for the applicants to know that they can pursue a surrogacy arrangement at a certain level of fees.

*F. WHETHER THE INTENDED SURROGACY ARRANGEMENT IS LEGAL UNDER HONG KONG LAW*

26. The PCO is not concerned with regulation of surrogacy, only its effect on legitimacy: *Legislative Council Brief on Parent and Child Bill dated 3 June 1992*, §§13-14, cited in *FH v WB*, at §73.

27. It is section 17 of HRT0 that regulates, amongst others, the practice of reproductive technology and surrogacy arrangements:

“(1) No person shall—

- (a) whether in Hong Kong or elsewhere, make or receive any payment for— (underline added)
  - (i) initiating or taking part in any negotiations with a view to the making of a surrogacy arrangement;
  - (ii) offering or agreeing to negotiate the making of a surrogacy arrangement; or
  - (iii) compiling any information with a view to its use in making, or negotiating the making of, surrogacy arrangements;
- (b) seek to find a person willing to do any act which contravenes paragraph (a);

(c) take part in the management or control of a body of persons corporate or unincorporate whose activities consist of or include any act which contravenes paragraph (a); or

(d) carry out or participate in any act in furtherance of any surrogacy arrangement where he knows, or ought reasonably to know, that the arrangement is the subject of any act which contravenes paragraph (a).

(2) Without prejudice to the generality of subsection (1)(b), no person shall cause to be published or distributed, or knowingly publish or distribute, an advertisement relating to surrogacy arrangements, and whether or not the advertisement invites persons to do any act which contravenes subsection (1)(a)."

28. Section 2 of HRTO defines "payment" as

"payment" (付款) means payment in money or money's worth but does not include any payment for defraying or reimbursing—

(a) the cost of removing, transporting or storing an embryo or gamete to be supplied;

(b) any expenses or loss of earnings incurred by a person and attributable to the person supplying an embryo or gamete from the person's body;

(c) in the case of a surrogacy arrangement, any expenses incurred by the surrogate mother for—

(i) any reproductive technology procedure; or

(ii) bona fide medical expenses arising from pregnancy and delivery of a child born pursuant to the arrangement."

29. It can be seen that section 17 HRTO bans commercial surrogacy and has extra-territorial effect. Its penal sanctions, however, is targeted at the adult perpetrators, not the child born out of surrogacy: *FH v WB*, §172. The definition of "payment" excludes all elements of profit, bonus or reward.

30. There is an intended **Agency Agreement** between the Applicants and the Agency which will govern the expenses. If the Agency Agreement is entered into:

(1) The Agency will contravene section 17 of HRTO.

(2) The Applicants will contravene at least sub-section 17(1)(d). The Applicants stopped negotiation with the Agency after having sought legal advice. The irresistible inference is that they were aware of the potential infringement of HRTO.

31. Notwithstanding that the Agency Agreement provides for Minnesota law to apply, section 17 of HRTO will still regard the Agency Agreement as illegal under Hong Kong law.

32. Given the illegal nature of the Agency Agreement, it is futile to ask the Court to authorize projected expenses, reasonable or non-reasonable, as it will be akin to condoning an illegal agreement.

33. In Mr Parker's submission, section 17 HRTO is treated as a public policy consideration in assessing whether the payments are reasonable. I am unable to agree. The application of section 17 to a surrogacy arrangement precedes any assessment of the expenses.

34. Mr Parker submits that this approach would be rewarding non-compliant applicants if the Court were to approve their expenses after a child was born out of surrogacy but slamming the door against applicants who have come forth with utmost good faith where surrogacy is just contemplated. There would be a tension between section 17 of HRTO

which bans surrogacy arrangement and certain types of payments and section 12(7) of PCO which gives jurisdiction to the Court to authorize payments. The Legislature could not have been so absurd as to have passed 2 pieces of legislation which are inconsistent.

35. I am unable to agree with Mr Parker. The 2 pieces of legislation are not inconsistent. HRT0 bans commercial surrogacy whilst under section 12(7) PCO the Court may authorize or subsequently approve payments under altruistic surrogacy. In *FH v WB*, at §§158 and 166, this Court has already referred to the legislative materials which clearly stated that the intention of the Legislature in passing section 12 of PCO was not to stop married couples who had a genuine need to resort to surrogacy and used their own sperm or egg. (Note: Mr Parker has kindly pointed out this Court's error in *FH v WB* in using the term "sperm and egg". See section 12(1)(b) of PCO.) The tension between the 2 pieces of legislation only arose in the authorities because commissioning parents breached HRT0 (though not deliberately). The Courts fought the necessary evil in approving payments as part of its exercise under PCO to give the necessary identity to innocent children.

36. I hasten to add that it is not the intention of the Court to express any view in favour of or against altruistic surrogacy. Surrogacy is a complex issue that requires public debate and legislation. It is necessary to bear the weighty words of Hedley J in *Re S* [2009] EWHC 2977 (Fam), §7 in mind, if commercial surrogacy is allowed in Hong Kong:

- (1) To ensure that the commercial surrogacy agreement is not used to circumvent childcare laws in Hong Kong so as to

result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in Hong Kong;

(2) To ensure that the surrogacy arrangement does not effectively allow people to buy children overseas; and

(3) To assess if sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate mother.

37. At present, there is simply no recognized scheme or legal procedure for seeking prior approval of surrogacy. By way of example, there is no designated body (eg Director of Social Welfare) to assess the *bona fide* need of the commissioning parents to resort to surrogacy, or to assess their suitability as parents, or to guard against exploitative surrogacy, commercial or otherwise.

38. Mr Parker has indicated a wish to challenge the constitutionality of section 17 of HRTA. An opportunity was given to him to lodge written submission within 7 days of this hearing. In the end, he did not pursue the challenge.

39. The above finding that the Agency Agreement is an illegal agreement under Hong Kong law is sufficient to dismiss this application. I deal with the other tests only for completeness' sake.

*G. WHETHER THE AGENCY AGREEMENT IS LEGAL UNDER MINNESOTA LAW OR THE LAW OF THE STATE WHERE THE BABY WOULD BE DELIVERED*

40. The Agency Agreement expressly provides that Minnesota law will govern the agreement although there is a possibility that the surrogate mother may deliver outside that State.

41. There is no legal opinion as to the legality of surrogacy in Minnesota or the State of delivery. However, I do not think this should stand in the way of this application. Had the Agency Agreement been legal under Hong Kong law, I would have adjourned this application to enable the Applicants to obtain the proper legal opinion of the relevant State(s).

*H. WHETHER THE CHILD IS CONCEIVED OR BORN?*

42. The child is not even conceived in this case. Accordingly, the welfare principle does not apply.

*I. WHETHER THERE IS CRIMINAL PROSECUTION UNDER HRTO*

43. This is a relevant consideration. Where there is potential or ongoing prosecution, the civil court may decide to adjourn the application until after the criminal proceedings are over. This will avoid infringing the Applicants' right against self-incrimination.

*J. WHETHER THE PROJECTED EXPENSES ARE REASONABLE*

*J1. The general principle*

44. Whether the projected expenses are reasonable is a pure question of fact. The Court should not just look at the payments that may

be made to the surrogate mother but at the wider picture and the circumstances in which payments are to be made, eg to agencies: *FH v WB* at §§112-113.

45. Ordinarily, payments that do not result in the making of profit by the agency and/or the surrogate mother are considered reasonably incurred and do not require authorization or subsequent approval by the Court. These include: (i) reimbursement for loss of wages, transportation costs, housekeeping or general allowance for food and/or for childcare; and (ii) costs incidental to the surrogacy arrangement, such as medical expenses, legal expenses and insurance costs: *FH v WB* at §§124 & 125; *Re P-M* [2013] EWHC 2328 at §16; *Re C (A Child)* [2013] EWHC 2408 (Fam) at §15.

46. “Non-reasonable expenses”, such as payments to a surrogacy agency (“**agency fees**”), or remuneration for the surrogate mother (“**surrogate fees**”), require authorization or subsequent approval by the Court. In deciding whether to exercise that discretion, the Court held at §116 of *FH v WB* that it ought to ask three further questions:

- (1) Was the sum paid disproportionate to reasonable expenses?
- (2) Were the applicants acting in good faith and without ‘moral taint’ in their dealings with the surrogate mother?
- (3) Were the applicants party to any attempt to defraud the authorities?

47. What is reasonable can vary greatly from place to place. The Court will take into account factors such as the standard of living in the jurisdiction where the surrogacy arrangement is expected to take place: *FH v WB* at §117; *Re A and B* at §36.

48. When approving payments under section 12(7) PCO, each case has to be decided on its own facts. Unfortunately, as the jurisprudence on surrogacy are developing in Hong Kong, the Court is in lack of objective data as to the costs involved in surrogacy. Doing the best it could, the Courts in *FH v WB* and *Re A and B* compared the expenses incurred in a similar country/state where the surrogacy took place, as referred to in other common law cases. However, in *FH v WB* (§173), the Court has laid down the caveat that the approval in that case “should not be taken as a precedent that the court accepts payments to the tune of US\$108,198 (concerning surrogacy in California in 2015) is the norm in these applications”.

*J2. The projected expenses in this case*

49. The draft Agency Agreement sets out the likely expenses as at 28 December 2019 (before the Applicants ceased communication with the Agency). The expenses are in the range of US\$130,950 to US\$197,700 plus actual expenses for additional costs such as pumping breastmilk and psychological counselling. They are over 30% higher than those in *FH v WB*.

50. In accordance with *FH v WB*, expenses are classified into “reasonable” and “non-reasonable” expenses.

51. The purported “reasonable” expenses are tabulated as follows:

**Table 1 – Reasonable Expenses**

|                           | <b>Definite Expenses<br/>(ie costs that will certainly arise)</b>                                                          | <b>Costs (USD)</b>           |
|---------------------------|----------------------------------------------------------------------------------------------------------------------------|------------------------------|
| 1.                        | Legal Fees – Agency Agreement                                                                                              | \$1,750                      |
| 2.                        | Legal Fees – Surrogate’s Attorney                                                                                          | \$1,500                      |
| 3.                        | Legal Fees – Parentage Establishment (international parents)                                                               | \$6,400-\$9400               |
| 4.                        | Legal Expenses (court fees, birth certificates, apostilles, passport)                                                      | \$1,000-\$1,500 child        |
| 5.                        | Intended Parent Educational Counselling                                                                                    | \$250-\$400                  |
| 6.                        | Fertility Clinic & Ovum Donor Program Costs                                                                                | \$30,000-\$50,000            |
| 7.                        | Surrogate Psychological Evaluation & Background Check                                                                      | \$800/surrogate              |
| 8.                        | Surrogate Expense – Monthly Contribution for Daily Expenses (\$200 per month, from contract signing to 60 days post-birth) | \$3,000                      |
| 9.                        | Surrogate Expense – Embryo Transfer Complications Insurance                                                                | \$200/transfer               |
| 10.                       | Surrogate Expense – Medications                                                                                            | \$500-\$1,500                |
| 11.                       | Surrogate Expense – Estate Planning                                                                                        | \$750                        |
| 12.                       | Surrogate Expense – Life Insurance Policy                                                                                  | \$500                        |
| 13.                       | Surrogate Expense – Maternity Clothing Allowance                                                                           | \$500-\$750                  |
| 14.                       | Communications Expenses                                                                                                    | \$100-\$200                  |
| 15.                       | Marketing Expenses for Surrogate Recruitment                                                                               | \$1,250                      |
| <b>SUB-TOTAL</b>          |                                                                                                                            | <b>\$48,500 to \$73,500</b>  |
| <b>Potential Expenses</b> |                                                                                                                            |                              |
| 16.                       | Clinic Fee – Embryo Genetic Screening                                                                                      | \$4,000-\$5,000              |
| 17.                       | Clinic Fee – Frozen Embryo Transfer                                                                                        | \$2,000-\$8,000/<br>transfer |
| 18.                       | Surrogate Fee – Psychological Counselling                                                                                  | Actual Expenses              |

|     |                                                                                          |                            |
|-----|------------------------------------------------------------------------------------------|----------------------------|
| 19. | Surrogate Expense – Pumping Breastmilk <sup>2</sup>                                      | \$150/week                 |
| 20. | Surrogate Expense – Physician-Recommended Bed Rest (Childcare, housekeeping, lost wages) | Actual Expenses            |
| 21. | Surrogate Expense – Travel to Fertility Clinic                                           | \$2,000-\$4,000            |
| 22. | Surrogate Expense – Travel Companion for First Transfer                                  | \$750-\$1,500/trip         |
| 23. | Surrogate Expense – Lost Wages (appointment and travel)                                  | \$0-\$4,000                |
| 24. | Surrogate Expense – Cycle Monitoring                                                     | \$1,000-3,500/<br>transfer |
| 25. | Surrogate Expense – Pregnancy Care                                                       | \$4,000-\$8,000            |
| 26. | Newborn Expense – US Newborn Insurance & Medical Expenses                                | \$2,000-\$8,000/child      |
| 27. | Alternative Pregnancy Care Insurance Premiums                                            | \$5,000-\$7,000            |
|     | <b>SUB-TOTAL</b>                                                                         | <b>\$20,750-49,000</b>     |
|     | <b>TOTAL</b>                                                                             | <b>\$69,250-122,500</b>    |

*J3. Reasonable expenses that should be authorized*

52. The ‘marketing expenses’ in item 15 are a one-off contribution to the cost of locating suitable surrogates for introduction to the Applicants. That item, together with item 1 (legal fees for the Agency Agreement) arise wholly due to the commercial nature of the surrogacy arrangement. They should be included in Table 2.

53. With regard to the other expenses in Table 1:

- (1) Medical expenses, counselling and insurance costs are necessary as they are incidental to the scientifically assisted

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<sup>2</sup> This item is not included in the total potential expenses as it is unclear whether breastmilk will be necessary for the child.

pregnancy. They protect the Applicants, the surrogate mother and the child. Similar to the arrangement in *FH v WB*, the Applicants and the surrogate mother will go through a careful process of consulting medical professionals before entering into the Agency Agreement. Thereafter, the surrogate will have to go through multiple medical procedures and attend regular check-ups during pregnancy.

(2) There are a number of necessary legal steps that the Applicants and the surrogate mother will have to take in connection with the contemplated surrogacy. The parties will first seek independent legal advice before signing the Agency Agreement. The surrogate mother executes a health care directive and/or a will to protect the interests of the unborn child, the fees of which are provided for. After the child is born, the Applicants will have to go through legal procedures for establishing parenthood and obtaining identity documents for the child in the US.

(3) Maternity clothes, travelling, housekeeping and childcare expenses for the surrogate are also reasonable, as recognized by this Court in *FH v WB*.

(4) As to lost wages, the draft Agency Agreement provides that the surrogate mother and her partner would only receive reimbursement if they are required to miss work due to an obligation related to the surrogacy program. The surrogate mother is required to provide proof of actual wages lost. This

item is not for general loss of wages arising out of her pregnancy and is capped at US\$4,000.

- (5) The monthly contribution for daily expenses in the sum of US\$200 per month is to covers expense related to local appointments, prenatal vitamins and supplements, feminine hygiene products and other miscellaneous expenses. Those expenses are incidental to the surrogacy arrangement and maternity. In any event, the subsidy of US\$200 per month is a small fraction of an average Minnesotan's monthly expenses ie US\$2,747 (based on publicly available data).

- (6) All payments made in relation to the above items will be held in the Applicants' expense account maintained by the Agency, who is contractually bound to refund all remaining funds in the expense account after the surrogacy program has concluded.

54. Accordingly, the *items* in Table 1 may be authorized as being reasonable expenses, if the Agency Agreement had been legal. I make no comment on the quantum until an appropriate case.

***K. WHETHER THE NON-REASONABLE EXPENSES SHOULD BE AUTHORISED***

55. The projected non-reasonable expenses are tabulated as follows:

**Table 2 – non-reasonable expenses**

|     | <b>Definite Expenses</b>                                           | <b>Costs (USD)</b>     |
|-----|--------------------------------------------------------------------|------------------------|
| 28. | Agency Fee                                                         | \$24,500               |
| 29. | Surrogate Fee – Gestational Fee                                    | \$25,000-\$38,000      |
| 30. | Surrogate Fee – Medication Start & Embryo Transfer Fee             | \$700/transfer         |
|     | <b>Potential Expenses</b>                                          | <b>Costs (USD)</b>     |
| 31. | Surrogate Fee – Invasive Medical Procedures                        | \$500-\$1,000          |
| 32. | Surrogate Fee – Early Miscarriage (prior to 8 weeks post-transfer) | \$1,000                |
| 33. | Surrogate Fee – Loss of Reproductive Organs (rare)                 | \$2,500                |
| 34. | Surrogate Fee – Multiple Pregnancy                                 | \$5,000                |
| 35. | Surrogate Fee – Caesarean Section Delivery                         | \$2,500                |
|     | <b>TOTAL</b>                                                       | <b>\$61,700-75,200</b> |

56. These, together with the US\$3,000 for items 1 and 15 in Table 1, are what give the Agency Agreement a commercial element. They form 47-38% of the total likely expenses.

57. Mr Parker has referred me to various authorities which show the level of surrogacy fees approved by the Court where the surrogate mother delivered the child in the United States:

- (1) In *FH v WB*, the surrogacy arrangement took place in California. This Court authorised payments for an Agency Fee of US\$20,000 and a Surrogate Fee of US\$42,500 retrospectively as they did not raise the concern of the Court and were close to the level of expenses authorised on past occasions (§§126, 133-134).

- (2) In *JV v AR* [2015] EWHC 4756 (Fam), the English Court sanctioned a payment of GBP19,284 (approximately US\$27,200) to the surrogate mother as it was similar to the expenses authorised in other cases involving American surrogacy (§§13-14).
- (3) In *CC v DD* [2014] EWHC 1307 (Fam), the surrogate lived in Iowa. The English Court was satisfied that a Surrogacy Fee of US\$19,200 was not disproportionate to reasonable expenses and thus authorised the said sum (§§30-31).
- (4) In *Re G, M* [2014] EWHC 1561 (Fam), the English Court found that an Agency Fee of US\$20,750 and a Surrogate Fee of US\$38,950 were not significantly different than payments approved in other cases (§§36-39).
- (5) In *J v G* [2013] EWHC 1432 (Fam), the surrogacy agreement was entered into under Californian law. A total fee of US\$56,750 was authorised as there was no evidence to suggest that the expenses would overbear the will of the surrogate (§§14, 22).
- (6) In *Re W* [2013] EWHC 3570 (Fam), the commissioning parents engaged a California based agency and a surrogate who lived in Nevada. The English Court approved an Agency Fee of US\$22,000 and a Surrogate Fee of US\$38,500 as they were close to the amounts that have been approved in similar cases (§§6, 23-24, 27).

(7) In *Re C (A Child)*, the Court authorised payments totalling US\$51,200 to the surrogate mother and US\$15,000 to the surrogacy agency. The Court took into account that these amounts were not dissimilar to payments made in similar cases and found that the level of payment did not overbear the will of the surrogate mother (§§16, 18).

(8) In *Re P-M* (decided in 2013), the English Court authorised a payment of US\$21,500 to the agency based in California (§24).

58. Those cases involved surrogacy fees approved *after* the subject child/children were born and where the Courts applied the welfare principle to make the best out of a situation of *fait accompli*. In *FH v WB*, the Court has expressly commented that the non-reasonable expenses (58%) were disproportionate to the reasonable ones in *FH v WB*, §133.

59. The agency fees of US\$24,500 are payments in consideration of the services to be provided by the Agency. Although they cover administrative costs, there is also a profit element. The amount of US\$24,500 is within the range previously approved by the courts in the authorities cited in paragraph 57 above.

60. Surrogate fee (gestational fee), which ranges from US\$25,000 to US\$38,000, is a payment in consideration of the surrogate mother's gestational services.

61. The gestational carrier embryo transfer fee, in the sum of US\$700 per transfer, does not seem to be specifically attributable to any expenses incurred in connection with the medical procedure. It is a stand-alone pre-determined lump sum payable to the surrogate mother for undergoing the procedure.

62. The identity of the surrogate mother is not even known at this stage, still less her potential loss of income arising out of the pregnancy. The question of whether her will will be overborne by the fees in paragraphs 60-61 is difficult to answer.

63. However, there is evidence that a woman in Minnesota has an average income of US\$4,885 per month according to publicly available data. The total surrogate fees of US\$25,700-US\$38,700 in Table 2 is not enough to cover the loss of 10 months' wages of a woman. It appears that the surrogate fees are unlikely to be too low as to exploit the potential surrogate mother or too high as to overbear her will.

64. The uncertainty in this case, of course, is that one does not know where the surrogate mother will come from and the average income of a woman in that State.

65. The range of surrogate fees appear to be within the range of fees approved in the authorities cited in paragraph 57 above.

66. The Agency Agreement ensures that the surrogate mother would have access to legal advice and psychological service, diminishing the risk of a possibility of undue pressure on her. In any case, the

Applicants can always come back to the Court for authorization if there is change of circumstances, under the liberty to apply provision.

67. The surrogate fees for “multiple pregnancy” has been described as a “bonus” in *FH v WB*. This item is a lump sum which is not on reimbursement basis, but one can expect that bearing an additional child may bring more inconvenience or discomfort to the surrogate mother.

68. Invasive medical procedures, “loss of reproductive organs” and Caesarean section delivery are additional, pre-determined fees that appear to be compensation for pain and suffering of the surrogate mother in the event of those contingencies. There is no precedent for these.

69. Item 32 relates to miscarriage and would not be related to an application for a parental order. The Court has no power to authorize it.

70. There appears to be no policy reason as to why the items in Table 2 cannot be included in a commercial surrogacy arrangement. It is to be remembered that those expenses are to be incurred with the informed consent of the Applicants and with legal advice.

71. Save for item 32, the *items* in Table 2 may be authorized, if the Agency Agreement had been legal. I make no comment on the quantum until an appropriate case.

*L. CONCLUSION*

72. As the intended Agency Agreement is a commercial surrogacy arrangement in breach of section 17 of HRTO, the Court would not authorize any of the expenses, reasonable or non-reasonable. I dismiss the originating summons.

73. I was informed by CRB that the legal representatives have capped their costs/fees in this case due to the Applicants' situation and novelty of the issue. The Court appreciates their generosity towards their clients and is most grateful to the quality assistance rendered by the whole legal team.

(Queeny Au-Yeung)  
Judge of the Court of First Instance  
High Court

Mr Timothy Parker and Ms Samantha Lau, instructed by CRB, for the 1<sup>st</sup>  
and 2<sup>nd</sup> Applicants