

HCMP 1571/2018
[2019] HKCFI 1749

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1571 OF 2018

IN THE MATTER of an application
under Section 12 of the Parent and
Child Ordinance, Cap 429

A 1st Applicant
B 2nd Applicant

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

Dates of Hearing: 18 April and 24 September 2019

Date of Judgment: 14 October 2019

J U D G M E N T

A. INTRODUCTION

1. This is the application of A (“**the Husband**”) and B (“**the Wife**”) (collectively referred to as “**the Applicants**”) for an order that:

(1) C and D (“**the Twins**”), both girls be regarded in law as the children of the Applicants under section 12 of the Parent and Child Ordinance, Cap 429 (“**PCO**”); and

(2) the payment in the sum of RMB300,000 made by the Applicants pursuant to and in connection with the surrogacy agreement are expenses reasonably incurred as referred to in section 12(7) of PCO and be retrospectively authorized.

B. THE FACTUAL BACKGROUND

2. The Applicants are a married couple and have lived in Hong Kong together since 2008. The Husband is a permanent resident of Hong Kong. The Wife got her permanent ID card on ■ 2019.

3. They entered into a surrogacy arrangement via the Agency in Mainland China, with E acting as the surrogate mother in a ■ hospital using ovum from an anonymous female donor and sperms of A. The Applicants paid a total of RMB300,000 for the surrogacy arrangement.

4. As a result of the surrogacy arrangement, the Twins were born in Mainland China on ■ 2017. The Applicants have been the primary carers of the Twins since their birth. The Twins have lived in Hong Kong with the Applicants in their family home since they were brought to Hong Kong in ■ 2017 on dependent visas.

5. The Husband has been confirmed to be the biological father of the Twins by the DNA test reports of GDT Ltd dated 24 January 2019.

6. The Twins have acquired US citizenship at birth and their US passports were issued on ■ 2019.

7. Having obtained E's consent to the present application and an anonymity order, the Applicants commenced these proceedings on **27 September 2018**.

8. Upon the court's directions, E and the Official Solicitor have been served.

9. E has confirmed via Ho & Associates that she agreed to the application for parental orders and the court excused her from further participation in these proceedings since 4 January 2019.

10. The Official Solicitor has no objection to the present Application. The court is thankful to the Official Solicitor for rendering assistance in this and another surrogacy case, *FH & MH v WB & HB* (HCMP 1313/2018), [2019] HKCFI 1748, Au-Yeung J ("**the Judgment**") the research of which is equally useful to this case.

C. THE LEGISLATIVE FRAMEWORK

11. Section 9(1) of PCO provides that:

"The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be regarded as the mother of the child."

12. Section 10 of PCO provides that:

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“(1) This applies in the case of a child who is being or has been carried by a woman as the result of the placing in her of an embryo or of sperm and eggs or her artificial insemination.

(2) If –

(a) at the time of the placing in her of the embryo or the sperm and eggs or her insemination, the woman was a party to a marriage; and

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage,

then, ... [inapplicable] the other party to the marriage shall be regarded as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her insemination (as the case may be).”

13. Section 12 of PCO provides that:

“(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;

(b) the gametes of the husband or the wife, or both, were used to bring about the creation of the embryo; and

(c) the conditions in subsections (2) to (7) are satisfied.

(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.

(3) At the time of the application and of the making of the order—

(a) the child’s home must be with the husband and the wife or either of them; and

(b) the husband or wife, or both of them, must—

(i) be domiciled in Hong Kong;

(ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or

(iii) have a substantial connection with Hong Kong.

(4) At the time of the making of the order both the husband and the wife must have attained the age of 18 years.

(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.

(6) Subsection (5) does not require the agreement of a person who cannot be found or is incapable of giving agreement and the agreement of the woman who carried the child is ineffective for the purposes of that subsection if given by her less than 6 weeks after the child's birth. (inapplicable)

(7) The court must be satisfied that 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—

(a) the making of the order;

(b) any agreement required by subsection (5);

(c) the handing over of the child to the husband and the wife; or

(d) the making of any arrangements with a view to the making of the order,

unless authorised or subsequently approved by the court.

(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.”

14. Thus, in accordance with Hong Kong law, E was the legal mother of the Twins. Her husband was regarded as the father unless it was shown that he had not consented to the surrogacy arrangement.

D. JOINDER OF SURROGATE MOTHER AND HER HUSBAND

15. E has not been joined as a party. However, I do not regard this procedural non-compliance to be fatal because E has been served with the OS. She has made clear to the representative of the Agency that she would relinquish all her parental rights in respect of the Twins and subsequently made a declaration in writing to that effect.

16. E's husband was not aware of the surrogacy arrangement and therefore was not regarded as the father of the Twins under section 10 of PCO. His consent to the parental order was not required and thus he was not served or made a party.

E. THE APPLICATION AND THE ISSUES

17. Of the requirements in section 12(2) to (7) of PCO, it is beyond dispute that the following requirements have been complied with:

- (1) The Twins' home is with both of the Applicants: section 12(3)(a) of PCO;
- (2) The Applicants have been habitually resident in Hong Kong 1 year prior to the present Application and/or have a substantial connection with Hong Kong because they have worked and lived in Hong Kong for over 10 years. The Husband is a permanent resident of Hong Kong since 2016: section 12(3)(b) of PCO; and
- (3) Both of the Applicants have attained the age of 18: section 12(4) of PCO; and

(4) Upon request of the Applicants, E has, by declaration, freely and unconditionally relinquished all parental rights in respect of the Twins. S.12(5) of PCO has been satisfied.

18. The Applicants have, however, in breach of s.12(2) of PCO, failed to apply within 6 months of the birth of the Twins. They also need the court's approval or retrospective authorization of expenses incurred in connection with the surrogacy under s.12(7) of PCO.

19. The issues are whether the court should extend time for them to make this application and whether to approve or authorize the expenses.

F. EXTENSION OF TIME FOR APPLICATION

F1. Legal principles for grant of a parental order

20. The following principles in respect of an application for a parental order under s.12 PCO have been laid down in the Judgment.

21. S.12(1) PCO defines a parental order as “an order providing for a child to be regarded in law as the child of the parties to a marriage”, ie the commissioning 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: *A v P* [2012] Fam 188, §24, Theis J. 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. It has implications extending far beyond the merely legal. (§34 of the Judgment)

22. An adoption order or wardship order is no comparison to a parental order. What entails from a parental order are (i) the establishment of legal parenthood and responsibility of the commissioning parents; (ii) removal of the surrogate mother and her husband's rights and responsibility over the child; (iii) enhancement of the chance of the child acquiring immigration status; and (iv) conferment of inheritance rights on the child. (§§36-38 of the Judgment)

23. Having regard to s.3(1) of the Guardianship of Minors Ordinance (Cap 13), Article 3 of the Convention on the Rights of the Child and the UK authorities on legislation similar to s.12 PCO, the "welfare principle" applies to an application for a parental order notwithstanding that it is not so stated in PCO. The court therefore regards the best interests of the child as the first and paramount consideration. (§51 of the Judgment)

24. In general, the court would balance between the welfare of a child (as a paramount consideration) and the public policy of adhering to legislation and decisively determine in favour of welfare. It would only withhold an order only in the clearest case of abuse of public policy. (§84 of the Judgment)

F2. Time for making an application for a parental order

25. An application for a parental order has to be made within 6 months of the birth of the child born out of surrogacy. However,

(1) The court has power to extend the time having regard to the welfare principle and principles of statutory interpretation. Though public policy requires adherence to legislation, welfare of a child prevails over his/her parents' delay. A parental order will be granted except in the clearest case of abuse of public policy.

(2) If sub-paragraph (1) above is not enough, the court will read down s.12(2) of PCO to protect the fundamental rights of the child under:

- (a) Article 14(1) of the Hong Kong Bill of Rights Ordinance, Cap 383 (“**HKBOR**”) which protects privacy and family;
- (b) Article 19(1) of HKBOR which protects rights in respect of family;
- (c) Article 20 of HKBOR which protects the rights of a child against discrimination as to birth; and
- (d) Article 35 of the Basic Law which guarantees the right of access to courts.

(§§88, 89 & 109 of the Judgment)

26. The court will consider a basket of factors including the length of the delay, the explanation for the delay, merits of the application and the prejudice that may be caused if no parental order is granted. These factors will be considered in the light of the welfare of the child as the first and paramount consideration of the court.

F3. Length of delay

27. The OS was taken out 8½ months out of time, a relatively short delay compared the lifelong welfare and irreparable damage to the child if no parental order is granted.

F4. Explanation for the delay

28. The reason for the delay was the Applicants' ignorance of the law and the novelty of this application. The fact that there was no precedent which granted a parental order spoke for itself.

29. Notwithstanding the Applicants' wish to make this application as soon as possible, the difficulty in locating E contributed to the delay. The Applicants were legally advised that they needed to obtain E's unconditional consent to this application. The Applicants immediately contacted the Agency with a view to locating E, as all their contacts with E had to be done via the Agency. The Applicants had only met E once in 2016.

30. E lived in a remote village in ■. After locating her, a representative of the Agency had to travel to the village to meet E and explain the situation to her.

31. It was only in September 2018 that the Agency could meet E. The OS was taken out on 27 September.

32. I am satisfied that the Applicants have acted as quickly as possible upon receiving legal advice. There was no bad faith behind the delay.

33. I next proceed to analyze the merits of this application.

G. APPROVAL AND/OR AUTHORIZATION OF EXPENSES

G1. Legal principles in respect of approval or authorization of expenses

34. S.12(7) involves 2 questions (§110 of the Judgment):

- (1) Whether the expenses were reasonably incurred is a pure question of fact; and
- (2) If any part of the expenses was not reasonably incurred, whether the court should exercise discretion to authorize or approve such expenses retrospectively?

35. The court should not just look at the payments that were made to the surrogate mother but at the wider picture and the circumstances in which payments were made, eg to agencies: *Re P-M* [2013] EWHC 2328 (Fam), §19, Theis J. (§113 of the Judgment)

36. What was reasonable is a question of fact and the amount could vary greatly from place to place. Reasonable expenses do not require approval of the court. (§§112 & 114 of the Judgment)

37. “Non-reasonable expenses” require subsequent approval or authorization by the court after meeting 3 tests:

(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?

(§116 of the Judgment, following *Re X and another (Children)*, §21, Hedley J)

38. What was reasonable under question (1) could vary depending on the place where the surrogacy arrangement took place. In coming to a conclusion to these questions, the Court would be sensitive to, on the one hand, the policy decision that commercial surrogacy agreements should not be regarded as lawful, and on the other hand, there might sometimes be reasons to approve payments in light of the welfare of the child under consideration. (§§117 & 120 of the Judgment, following *Re X and another (Children)(Parental Order: Foreign Surrogacy)*, Hedley J at §20; *J v G (Parental Orders)* [2014] 1 FLR 297, §20; *Re P-M* [2013] EWHC 2328, §19, Theis J; *LB, DB v SP, SP, B* [2016] EWFC 77 (Fam), §45.

39. Where the welfare considerations demand that an order should be made, the court will only consider not making an order in the clearest case of abuse of or affront to public policy; or the expenses were of such a level as to raise the concern of the court. The fact that the agency has made a profit where the surrogate has acted on an altruistic basis is a factor to take into account. (§121 of the Judgment)

40. When considering the expenses, the court bears in mind that commercial surrogacy is prohibited in Hong Kong. S.17(1) of the Human Reproductive Technology Ordinance, Cap 561 (“**HRTTO**”) provides as follows:

“No person shall—

(a) whether in Hong Kong or elsewhere, make or receive any payment for—

(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).”

41. Section 2 of HRTTO defines payment narrowly as:

“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”. (emphasis added)

42. As a summary offence, the time for prosecution under s.17(1) and s.39 of HRTO is 6 months “from the time when the matter of such complaint or information respectively arose” for prosecution: s.26 of the Magistrates Ordinance, Cap 227.

43. Having regard to the legislative purpose, the mischief that the HRT Bill targeted at was the commercialization of surrogacy which could give rise to abuse and the legislation was to penalize both the payor and payee. The intention of the Legislature was not to stop a married couple who had a genuine need to resort to surrogacy and used their own sperm and egg. (§158 of the Judgment)

44. S.17(1) as it stands has extra-territorial effect and penalizes commercial surrogacy. Payments by the commissioning couple may be penalized by virtue of the narrow definition of s.2 HRTO. As prosecution under the HRTO is now out of time, any reading down should be left to an appropriate case in future.

45. Any penal sanction that HRTO might impose is plainly not targeted at the child but the adult perpetrators. The child’s rights under PCO and fundamental rights remain unaffected when one considers the

best interests of the child to be of paramount importance. (§172 of the Judgment)

46. Mr Pun SC cited the following examples of the expenses (all incurred in surrogacy arranged in India in 2010/11) which were retrospectively authorized by the UK Courts:

(1) In *Re X (A Child) (Parental Order: Time Limit)* [2015] Fam 186, the total expenses were £6,875 (equivalent to approximately HK\$68,750), the court remarked that this amount appeared to be modest by western standards (§§72, 73);

(2) In *Re X and Y (Parental Order: Retrospective Authorisation of Payments)* [2012] 1 FLR 1347, the total expenses were £27,405.22 (equivalent to approximately HK\$270,405); and

(3) In *Re D and another (Children) (Parental Order: Foreign Surrogacy)* [2013] 1 WLR 3135, the expenses authorised were US\$27,000 (equivalent to approximately HK\$210,000) (§36).

47. It can immediately be seen that what was reasonable could vary greatly even in the same jurisdiction where the surrogacy was arranged. It is often difficult for the court, without empirical evidence and sometimes without full documentation from the applicants, to determine what was reasonable, still less to lay down any yardstick. The point is novel in Hong Kong. Ultimately it is a question of applying the principles in paragraph 37 above to the evidence before the court.

G2. Application of the legal principles to the expenses

48. According to Professor Yang Lixin, there was no legislation regulating expenses of surrogacy. In the present case, the Applicants incurred a total of RMB300,000 (about HK\$342,000). The Wife did not know the breakdown for this sum except being told by the Agency that E had received RMB 150,000. The Applicants have adduced evidence of webpages of various agencies showing the amounts charged and stated that in fact the Applicants had paid less to their own agency. Professor Yang opined that the expenses were reasonable but, without disrespect, he had no data to support that opinion. I do not accept this aspect of his opinion.

49. The surrogate mother should have given some justification for the money received, eg as compensation for loss of income, tonic food, medical check-ups and transport expenses. However, E had made no comments on the amount of RMB150,000 received. This court could only presume that it was not too low as to unfairly exploit her or too high as to overbear her will.

50. The other RMB150,000 (50% of overall expenses) appeared to cover agency fees which would have included a commercial and profit element. An unidentifiable part was not permitted under ss.2 and 17(1) of HRTA. The Applicants should have made enquiries of the agency.

51. The Applicants have acted in good faith and had no intention to defraud the authorities. They have frankly disclosed to the Director of Immigration the surrogacy arrangement in March 2018 and to the court in their very first supporting affirmations.

52. There was no moral taint shown in their single contact with the surrogate mother before birth of the children and another contact by the Husband for the purpose of these proceedings. There was nothing to show the court that there was an abuse or affront to public policy. The payments were not so disproportionate as to be an affront to public policy.

53. Having regard to the welfare of the children, I give retrospective authorization of the expenses.

H. WHETHER A PARENTAL ORDER SHOULD BE GRANTED

54. The court should make a holistic assessment of the circumstances surrounding the surrogacy arrangement when applying the legal principles set out in Section F1 above.

55. Just as judgment was to be handed down in July, this court discovered on the internet that surrogacy might be against public policy in Mainland China. Accordingly, a joint expert report was obtained by the Applicants and Official Solicitor and Professor Yang in August 2019. I am satisfied as to Professor Yang's expertise and accept his report.

56. Professor Yang made several propositions.

57. Firstly, surrogacy was and is not prohibited in the Mainland. However, there was and is no legislation governing surrogacy or rights of children born out of surrogacy. In December 2015, there was a draft provision to the amendment bill to the Population and Family Planning Law Act (人口和計劃生育法) suggesting prohibition on surrogacy.

However, after deliberation, Standing Committee of the National People's Congress ("NPCSC") decided against incorporation of that draft provision.

58. Secondly, the Management of Human Assisted Reproduction Technology Rules (人類輔助生殖技術管理辦法) ("**the Rules**") issued by the Ministry of Health in 2001 prohibit *medical institutions and their staff* from carrying out, amongst others, any surrogacy arrangements, and sale and purchase of gametes. The Rules are administrative rules that did not and do not restrict the civil rights of the people. Nor do the Rules bind patrons of those medical institutions like the Applicants in the present case. Contravention of the Rules did not and do not attract criminal consequences but penalties like a fine or administrative punishment may be imposed.

59. This proposition was supported by a judgment of the Wuxi Intermediate People's Court ((2014) 錫民終字第 01235 號), which concerned rights to human embryos. There, a married couple caused the embryos (created using the sperm of the husband and ovum of a female donor) to be stored in a hospital and agreed to have the embryos discarded after the agreed period of storage. Unfortunately, the couple died in an accident. The parents of the couple claimed for those embryos. The hospital relied on the Rules which barred surrogacy arrangement and sale and purchase of embryos. The Wuxi IPC held that the hospital could not rely on ministerial rules to restrict civil rights. The Wuxi IPC granted custody and right of disposal of the embryos to the parents of the couple.

60. Thirdly, whilst the Mainland Courts have not directly ruled on the legality of a surrogacy arrangement, it appears that the Mainland Courts did recognize a child born out of surrogacy pursuant to the agreement of a married couple as a child of the marriage, even though only one party to the marriage was biologically linked to the child.

61. In 1991, the Hubei Higher People's Court submitted a request for ruling on the legal status of a child born out of artificial insemination after divorce of a couple. The child was not biologically linked to the husband. On 8 July 1991, by a judicial explanation known as 《關於夫妻關係存續期間以人工授精所生子女的法律地位的函》, the Supreme People's Court held that during the subsistence of a marriage, if both parties agreed to IVF, children born out of that process shall be viewed as children born out of that marriage; the Marriage Act governing the rights, obligations and relationship between parents and children shall apply ("**the SPC Explanation**"). The SPC Explanation stands till today.

62. In (2015) 滬一中少民終字第 56 號, Luo and Chen were married. They got children out of a surrogacy arrangement involving use of the Luo's sperms and the eggs of a donor. After the death of Luo, his parents sued Chen for custody of the children. The Shanghai First Intermediate People's Court applied the SPC Interpretation. It held that the dispute was not about the legality of a surrogacy arrangement but the custody rights over the children born out of that arrangement. Such children had the same protection as children born out of wedlock, born naturally or through human assisted reproduction means. Treating welfare

of the children as of paramount importance, the Court granted Chen custody as a *de facto* step-mother.

63. It was plain that the Mainland Courts regarded the children's welfare as of paramount importance. I accept Professor Yang's opinion that surrogacy was and is not prohibited in Mainland China.

64. In choosing to carry out the surrogacy arrangement in Mainland China rather than overseas, the Applicants did not have any ill intentions but did so out of genuine and practical considerations, including the Wife's physical condition and demanding work schedule.

65. Prior to entering into the surrogacy arrangement, they took steps to satisfy themselves that surrogacy was not prohibited in the Mainland, noting in particular NPCSC's decision not to prohibit surrogacy. The Applicants, however, were not aware of the Rules at that time. Hence, they did not discuss legality of surrogacy in their earlier supporting affirmations.

66. According to Professor Yang, the hospital at which E gave birth to the Twins was a formal medical organization. It would have received the pregnant mother for delivery but did not arrange the surrogacy. The hospital was able to state the Wife as mother on the birth certificate because the Father's status was established and so the Wife became the mother.

67. In March 2018, during the correspondence with the Immigration Department, the Applicants frankly disclosed that the Twins were born out of surrogacy.

68. Upon being advised that it was necessary to obtain consent of E in order to apply for a parental order, the Applicants immediately took steps to locate her and promptly took out the OS upon obtaining her consent.

69. The Applicants had gone through 3 parental training sessions with professional trainers in order to be prepared for parenting. They went to Mainland China to take care of the Twins almost immediately after their birth. The Applicants were not there at the hospital on the day of birth only because the surrogate mother went into labour earlier than expected. The Wife took 1 months of “maternity leave” to give full time care to the Twins.

70. Since birth, the Twins have always been taken care of by the Applicants. Family life has existed as a matter of fact. The Twins are biologically related to the Husband. E and her husband had never been involved in their lives.

71. The Applicants are devoted to the upbringing of the Twins. The four of them have an established family home in Hong Kong. The Applicants have demonstrated their love towards the Twins as their own children. The Twins are happy, healthy and enjoying a close relationship with the Applicants. These are all borne out by the Social Investigation Report.

72. The Applicants have the financial ability to raise the Twins. The extended families are supportive of this family.

73. The Husband is the biological father of the Twins as a sperm donor. However, as he is not the husband or male partner of the surrogate mother, he is not recognized as their father owing to the effect of s.10(6) of PCO.

74. E was aware of her rights and had voluntarily given her consent to a parental order under independent legal advice. All the persons concerned (ie the Applicants and E) have intended from the outset for the Applicants to be the parents of the Twins. They have faithfully carried out that intention. No one has been or will be prejudiced.

75. On the other hand, to deny a parental order just because of expiry of the 6-month limitation time is an interference with the family life of the Twins as children and the Applicants. Not only the Twins but the Applicants would be devastated if they are deprived of the opportunity to regularize their relationship.

76. The Applicants are in every sense the psychological parents of the Twins. It is wholly against the interest of the Twins to leave them without identity and status as the Applicants' children.

77. A parental order is in the best interests of the Twins. This application is meritorious. I therefore extend the time by 9 months for the application to be made and the filing of the OS shall stand. I make a parental order accordingly.

I. ORDER

78. I order as follows:

- (1) The time for the Applicants to apply for an order under s.12 PCO be extended by 9 months and the originating summons filed on 27 September 2019 shall stand.
- (2) The payment in the sum of RMB300,000 made by the Applicants pursuant to and in connection with the surrogacy arrangement are hereby retrospectively authorized;
- (3) The Twins be regarded in law as the children of the Applicants under s.12 PCO; and
- (4) The Applicants shall, within 7 days, serve a sealed copy of this order on Registrar of the High Court, who shall inform the Registrar of Births and Deaths of this order in writing.

J. PROCEDURAL MATTERS

79. Applications for parental order pose difficulties to the court because they are usually sought without opposing parties. Often when an application is made beyond the 6-month period, there is the added difficulty of documentary proof of the reasonableness of expenses related to the surrogacy arrangement.

80. In the interests of the child, the court would not rubber stamp an application for parental orders. Applicants should make full and frank disclosure of facts surrounding the surrogacy arrangement and the court will adopt an inquisitorial role to investigate the circumstances before giving the parental order.

81. There has been some discussion in the present case and counsel in the Judgment as to whether or not the surrogate mother should be a party.

82. In my view, she should be, as she is the only person recognized by law as the mother of the child born out of surrogacy. Regardless of any consent to surrender her parental role in another jurisdiction, she has rights and responsibilities in law in Hong Kong over the child until the making of a parental order that takes those rights and responsibilities away. She has a right to make representation to the court in support or in opposition. She may act in person or through lawyers *independent* of the commissioning parents.

83. The surrogate mother's husband stands in a different position. He may or may not have rights over the child depending on his knowledge and consent to the surrogacy arrangement. This court notes from its experience with surrogacy cases that some husbands were aware of and consented to the surrogacy. As the husband is potentially "regarded as the father of the child" under s.10 PCO, he should be made a party: eg the Judgment. In other cases, the surrogate mothers kept the surrogacy arrangements secret from their husbands, like the present case. It is only in the clearest cases where the husband was not aware of and had not consented to the surrogacy that he need not be joined or served.

84. As for expenses, it is not sufficient for the Applicants to state the expenses in the form of a lump sum. They should give a breakdown of the expenses eg the medical check-up fees, hospital expenses, foreign legal fees, counselling fees, insurance, loss of income of the surrogate mother,

accommodation, travelling expenses, etc (*cf* §123 of the Judgment).
Documentary evidence of the expenses should be produced.

85. Where the surrogacy arrangement and/or birth took place outside Hong Kong, expert evidence should be adduced to show, at least, whether or not surrogacy is permitted in that jurisdiction, how the law defines the legal relationship amongst the surrogate mother, her husband, the child and the commissioning parents. This would assist the court in the issue of whether there has been abuse of public policy.

86. I thank counsel for their assistance. In particular, part of their research has been adopted in the Judgment which involved similar issues.

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

Mr Hectar Pun, SC leading Ms Tara Liao and Ms Allison Wong, instructed
by JCC Cheung & Co, for the 1st and 2nd applicants

Mr T Lee of the Official Solicitor (on 24 September 2019 only)