

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 461 OF 2021**

IN THE MATTER OF an application
for an order to be made providing for
the children namely STP, also known
as XZ, a boy born on xx day October
2020 (“the Minor”) to be regarded in
law as the child of the parties to a
marriage and to make the Children
wards of the Court

and

IN THE MATTER OF Section 12 of
Parent and Child Ordinance (Cap 429)

and

IN THE MATTER OF Section 26 of
the High Court Ordinance (Cap 4)
and Order 90 of the Rules of the High
Court (Cap 4A)

BETWEEN

S

1st Applicant

W

2nd Applicant

and

T

Respondent

Before: Hon B Chu J in Chambers (Not Open to Public) (By Paper Disposal)
Date of Applicants' Submissions: 8 September 2021
Date of Judgment: 23 September 2021

J U D G M E N T

INTRODUCTION

1. The applicants are husband and wife (respectively “**H**” and “**W**” and collectively “**Applicants**”), and the respondent is the surrogate mother (“**Surrogate Mother**”) of a child STP also known as XZ (“**Minor**”), born in October 2020 in the Ukraine.

2. The Applicants issued the originating summons in these proceedings on 8 April 2021 making the Minor a ward of this Court and seeking the following orders that:

- (1) the Minor be regarded in law as the child of the Applicants, being the parties to a marriage, under section 12 of the Parent and Child Ordinance, Cap 429 (“**PCO**”), ie a parental order (“**Parental Order**”);
- (2) the Minor not to be removed from the jurisdiction of Hong Kong without leave of the Court until further order (“**Non-removal Order**”);
- (3) a declaration that the payments made by the Applicants in the surrogacy arrangements were expenses reasonably incurred or

otherwise were expenses authorized or subsequently approved by the Court pursuant to section 12(7) of the PCO (“**Declaration**”);

- (4) leave for the originating summons be served on the Surrogate Mother out of jurisdiction at her last known address (“**Service Out Order**”).

3. The originating summons was fixed for a hearing before this Court on 7 June 2021 (“**1st Hearing**”) and this Court granted the Non-removal Order and also the Service Out Order and gave directions in relation to the filing of affirmations. This Court granted interim care and control of the Minor to the Applicants until further order and directed a social investigation report be called for.

4. The social investigation report was submitted on 2 August 2021 (“**SIR**”). On 3 August 2021, this Court further directed the Applicants to serve the originating summons on the Director of Immigration (“**Director**”).

5. The 2nd hearing took place before this Court on 18 August 2021 (“**2nd Hearing**”). The Surrogate Mother was duly served with a copy of the originating summons and the accompanying documents and on 10 August 2021, an acknowledgment of service was lodged on her behalf in which she indicated she did not intend to contest the proceedings. The Court was also informed that the Director had been served with the originating summons and accompanying documents, but the Director did not turn up at the 2nd Hearing nor had they taken any steps to participate in these proceedings.

6. At the 2nd Hearing, the Applicants sought leave to file a legal advice dated 1 August 2021 on the Ukrainian law on surrogacy (“**Ukraine Legal Advice**”) within 7 days. This was allowed by this Court and the Court further directed that the Applicants to lodge skeleton submissions and their applications for the Parental Order and for the Declaration to be dealt with on paper.

BACKGROUND

7. H and W were both born in Hong Kong. H is now 47 years old and W is now 41 years old. They have been living and working in Hong Kong since they graduated from university more than 10 years ago. They are Hong Kong permanent residents and Chinese nationals. They have not obtained any other foreign citizenship.

8. The Applicants married in October 2014 in Hong Kong. As soon as after their marriage, they tried to start a family. W had all along had gynaecological and fertility problems and she had consulted a professor for IVF treatments in around February 2016.

9. Suffice to say, W underwent two IVF treatments which unfortunately were unsuccessful. W was then told by her doctor that it would be very difficult for her to get pregnant without serious risks to her health. W sought further opinion but was then told that she had to undergo laparoscopic hysterectomy to have her uterus removed as there were some abnormal cervical cells in her uterus which were likely to develop into cancerous cells.

10. As a result thereof, W underwent laparoscopic hysterectomy in June 2019. With her uterus removed W could no longer carry any babies.

11. The Applicants did not give up hope to have their own children. In around June 2019 they started looking into surrogacy as this was the only viable option if they were to have their own biological babies. After conducting research on their own and without obtaining proper legal advice in Hong Kong, they decided to proceed with making surrogacy arrangements in Ukraine.

12. According to the Applicants, surrogacy is legal in Ukraine and this is one of the few countries which would allow the genetic parents' names to be registered on the birth register instead of the names of the surrogate parents.

13. In September 2019 the Applicants entered into an agreement with a clinic called the Medical and Information Surrogate Motherhood Centre Le Vita Nova ("**La Vita Nova**") in Ukraine.

14. In early October 2019, the Applicants travelled to Ukraine to start the surrogacy arrangements. In December 2019, La Vita Nova helped the Applicants to find a suitable surrogate mother, and the Surrogate Mother was identified. The Applicants entered into a separate surrogacy agreement with the Surrogate Mother in around January 2020 ("**Surrogacy Agreement**").

15. In January 2020, the Applicants flew to Ukraine again to have their respective gametes collected and extracted. On 30 January 2020, their gametes were implanted into the Surrogate Mother's womb to form two embryos. In or around February 2020, the Applicants were informed that the procedure was successful and the Surrogate Mother was pregnant with one of the embryos.

16. In October 2020, the Surrogate Mother gave birth to the Minor. On 13 October 2020 upon being discharged from the hospital, the Surrogate Mother gave a written consent before a notary public to unconditionally surrender all parental and custody rights over the Minor so that the Applicants could be named as the parents on the Minor's birth register and certificate.

17. On about 20 October 2020 the Applicants attended the Registry Office at the City of Kharkiv to register the birth for the Minor. On 12 November 2020 they underwent a DNA paternity test with the DNA Diagnostics Centre in Ukraine and the test report on 19 November 2020 confirms that the Applicants are the biological parents of the Minor¹.

18. Due to the COVID-19 situation the Applicants were only able to obtain a temporary travel document issued by the Embassy of the People's Republic of China in Ukraine for the Minor to come to Hong Kong. On 7 December 2020 they brought the Minor back to Hong Kong on the strength of the temporary travel document and the Minor was given a "Visitor Visa" by the Immigration Department to remain in Hong Kong for

¹ HB:102-109

21 days. The Applicants and the Minor then stayed at the Holiday Inn Hotel for their compulsory quarantine.

19. Unfortunately on 19 December 2020 the Minor was tested to be Covid positive and had to be admitted to hospital immediately for further testing and treatment. Eventually the Minor was discharged on 22 December 2020 and the Applicants and the Minor were then sent to Penny Bay Quarantine Centre to continue their compulsory quarantine until 6 January 2021.

20. On 11 December 2020, the Applicants had applied for a Hong Kong Permanent Identity Card for the Minor based on the genetic links to the parties. During the process, the Director raised issues whether the Minor was born out of surrogacy arrangements and asked the Applicants to seek legal advice as soon as possible.

21. This eventually led to the Applicants issuing the originating summons herein.

22. On 7 April 2021, the Surrogate Mother signed a written statement in Ukraine before a notary public indicating that she has no intention of having custody or any parental rights or responsibilities over the Minor, and she has confirmed her consent to the Applicants to be the legal parents of the Minor.

23. In May 2021, the Applicants underwent a further DNA paternity test with GenePro Diagnostic Technology (HK) Limited and the

test report dated 6 May 2021 confirms that the Applicants are the biological parents of the Minor².

24. Subsequently, upon the Director being satisfied that the Applicants are the biological parents of the Minor, a Hong Kong Permanent Identity Card and a HKSAR passport were issued for the Minor in June 2021.

THE LAW

The statutory provisions

25. Section 12 of the PCO sets out the relevant provisions for parental orders in favour of gamete donors as follows:

“12. Parental orders in favour of gamete donors

(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—

² HB:153-138

A		A
B	(a) the child's home must be with the husband and the wife or either of them; and	B
C	(b) the husband or wife, or both of them, must –	C
D	(i) be domiciled in Hong Kong;	D
E	(ii) have been habitually resident in Hong Kong throughout the immediately preceding period of 1 year; or	E
F	(iii) have a substantial connection with Hong Kong.	F
G	(4) At the time of the making of the order both the husband and the wife must have attained the age of 18 years.	G
H	(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.	H
I		I
J	(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.	J
K		K
L		L
M	(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 –	M
N		N
O	(a) the making of the order;	O
P	(b) any agreement required by subsection (5);	P
Q	(c) the handing over of the child to the husband and the wife; or	Q
R	(d) the making of any arrangements with a view to the making of the order, unless authorized or subsequently approved by the court.	R
S	(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.	S
T		T
U		U
V		V

(9) Where an order is made under subsection (1), the Registrar of the court shall notify the Registrar of Births and Deaths, in such manner as may be prescribed, of the making of that order.”

Best Interests of first and paramount consideration

26. As said by Au-Yeung J in *FH v WB* [2019] HKCFI 1748, HCMP 1313/2018, 15.07.19, what entails from a section 12 parental order³ 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.

27. Pursuant to section 12(1), the court may make a parental order in the situation of (a), (b) and (c), and section 12(1)(c) stipulates that the conditions in section 12(2) to (7) have to be satisfied. Sections 12(2) – (6) are largely questions of facts, save that an application for an extension of time under subsection (2) will involve the court’s discretion. As for section 12(7), this will be considered in detail as seen below.

28. What is clear is that in exercising the court’s discretion in relation to an application for a parental order under section 12 of PCO, as held by Au-Yeung J in *FH v WB*⁴, the best interests of the child is of first and paramount consideration. In particular, Au-Yeung J has referred to section 3 of the Guardianship of Minors Ordinance and Article 3 of the

³ At para 38

⁴ See paras 59 and 60 of the Judgment

Convention on the Right of the Child and has further in paragraphs 61 and 62 set out the “welfare checklist” which our judges have been referring to in making a holistic assessment of a child’s best interests. The “welfare checklist” set out by Au-Yeung J was based on the checklist in section 1(3) of the Children Act 1989 (“**1989 Act**”).

29. In fact, in England & Wales, section 1(2) of the Adoption and Children Act 2002 (“**2002 Act**”) stipulates that the paramount consideration of the court or adoption in coming to a decision relation to the adoption of a child must be *the child’s welfare, throughout his life* and has further introduced in section 1 (4) a welfare checklist which the court or adoption agency must have regard to in.

30. This Court has referred to the above checklist in the 2002 Act as the “Adoption Checklist” in considering any decision in relation to the proposed adoption of a child⁵. As said by Hedley J in *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030(FAM), [2009] 1 FLR 733, the checklist in Section 1 of the 2002 Act concerns the *‘lifelong’ perspective* of welfare rather than the *‘minority’ perspective* of the welfare checklist in the 1989 Act⁶. The Adoption Checklist was in the views of Hedley J the more appropriate checklist.

31. In England, the Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (SI 2010/985) (“**2010 Regulations**”) has imported into section 54 of the Human Fertilisation and Embryology Act

⁵ See paras 69 and 70 in *Re YC (a Child)*, HCMP 705/2020, 08.09.20

⁶ See para 20, at pg 742, *Re X and Y (Foreign Surrogacy)*

2008 (“**2008 Act**”) the provisions of section 1 of the 2002 Act, subject to modifications. Section 12 of PCO was similar to section 30 of the Human Fertilisation and Embryology Act 1990 (“**1990 Act**”), which precedes section 54 of the 2008 Act under which the scope of applicants has been enlarged.

32. Hence, in my view, the more appropriate checklist to be referred to, as an aide-memoire in applications for a parental order under section 12 of PCO would be the Adoption Checklist as modified by the 2010 Regulations. Insofar as this Court can gather and for easy reference, the modified checklist is as follows:

- (a) the child’s ascertainable wishes and feelings regarding the decision (considered in the light of the child’s age and understanding),
- (b) the child’s particular needs,
- (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become the subject of a parental order,
- (d) the child’s age, sex, background and any of the child’s characteristics which the court or agency considers relevant,
- (e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,
- (f) the relationship which the child has with relatives, and with any other person in relation to whom the court considers the relationship to be relevant.

Section 12(7)

33. In relation to section 12(7) of PCO, Au-Yeung J has set out in paragraph 110 of *FH v WB supra* and also in paragraph 34 of her judgment in *Re A and B* [2019] 5 HKLRD 366 that section 12(7) involves 2 questions namely:(1) Whether the expenses were reasonably incurred? (2) If any part of the expenses was not reasonably incurred, should the court exercise discretion to authorize or approve such expenses retrospectively?

34. Pausing here, as the words “*money*” and “*benefit*” in section 12(7) of PCO may be wide enough to cover various kinds of monetary payments and/or monetary and non monetary benefits, the enquiry under Question (1) may perhaps be expanded as follows:

Question (1)

- (i) whether *any money or any other benefit* (“**Money/Benefit**”) has been given or received by the husband or the wife in consideration of the 4 matters (a)-(d) set out in section 12 (7);
- (ii) if the answer to (i) is YES, then
 - (a) whether the Money/Benefit, or any part thereof, was for expenses, and
 - (b) if so, whether such expenses or any part thereof was reasonably incurred;

Question (2)

If the answer to Question (1)(ii)(a) is NO, or if the expenses or any part thereof was not reasonably incurred, whether the Money/Benefit or the

expenses or the part thereof not reasonably incurred should be authorized by the court or approved retrospectively.

35. Question (1) involves questions of fact. Question (2) concerns the court's exercise of discretion.

36. As pointed out by Hedley J in relation to the then section 30(7) of the 1990 Act in *Re X and Y (Foreign Surrogacy)*, the 1990 Act afforded no guidance as to the basis of approval under the then section 30(7), and that it was clearly a policy decision that commercial surrogacy agreements should not be regarded as lawful, equally there was clearly a recognition that sometimes there might be reasons to do so, and it was difficult to see what reasons Parliament might have in mind other than the welfare of the child under consideration⁷. Hedley J has also pointed out in *Re L (A Child) (Parental Order: Foreign Surrogacy)* [2010] EWHC 3146 (Fam), [2011] Fam 106 sub nom *Re L (Commercial Surrogacy)* [2011] 1 FLR 1143 that the statutory phrase 'reasonable expenses' remains a somewhat opaque concept⁸.

37. In *Re X and Y*, Hedley J had pointed out in paragraph 19 that "Whether the expenses were reasonably incurred is a pure question of fact" and in paragraph 21 had said in relation to the public policy issues, the cases had in effected suggested (which he agreed) that the court posed itself 3 questions as follows:-

⁷ At para 20, pg 742

⁸ At para 7

- (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; and
- (3) Were the applicants party to any attempt to defraud the authorities.

38. The above approach was followed by Au-Yeung J in *Re A & B*.

39. Sir J Munby P in *Re X (A Child) (Surrogacy: Time Limited)* [2015] 1 FLR 349 had further endorsed the relevant principles set out by Theis J in *Re WT (Foreign Surrogacy Arrangements)* [2014] EWHC 1301 (Fam) at paragraph [35] as follows⁹:

“(1) the question whether a sum paid is disproportionate to “reasonable expenses” is a question of fact in each case. What the court will be considering is whether the sum is so low that it may unfairly exploit the surrogate mother, or so high that it may place undue pressure on her with the risk, in either scenario, that it may overbear her free will.

(2) the principles underpinning section 54(8), which must be respected by the court, is that it is contrary to public policy to sanction excessive payments that effectively amount to buying children from overseas.

(3) however, as a result of the changes brought about by the Human Fertilisation and Embryology (Parental Orders) Regulations 2010, the decision whether to authorise payments retrospectively is a decision relating to a parental order and in making that decision, the court must regard the child's welfare as the paramount consideration.

(4) as a consequence it is difficult to imagine a set of circumstances in which, by the time an application for a parental order comes to court, the welfare of any child,

⁹ See para [75] in *Re X*

particularly a foreign child, would not be gravely compromised by a refusal to make the order: As a result: “it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making”, per Hedley J in [*In re L (A Child) (Parental Order: Foreign Surrogacy)*] [2010] EWHC 3146 (Fam), [2011] Fam 106, [2011] 1 FLR 1143] at paragraph 10.

- (5) where the applicants for a parental order are acting in good faith and without 'moral taint' in their dealings with the surrogate mother, with no attempt to defraud the authorities, and the payments are not so disproportionate that the granting of parental orders would be an affront to public policy, it will ordinarily be appropriate for the court to exercise its discretion to give retrospective authorisation, having regard to the paramountcy of the child's lifelong welfare.”

40. With the above principles in mind, I turn to the present case.

THE CONDITIONS IN SECTIONS 12 (1) –(6)

41. Subsections (1) (a) and (b) are satisfied as H and W were parties to a marriage when the Minor was born and the Minor was carried by the Surrogate Mother as the result of the placing in her of an embryo, and the gametes of H and W were used to bring about the creation of the embryo.

42. The Applicants issued the originating summons herein within the 6 months stipulated in subsection (2).

43. At the time of the issue of the originating summons and as of todate, the Minor’s home is with H and W. H and W are both over 18 years of age at the time of the Minor’s birth. H and W are both domiciled in Hong Kong and the Minor has now obtained Hong Kong Permanent Identity

Card and is entitled to permanent residence in Hong Kong. Subsections (3) and (4) are both satisfied.

44. According to the Applicants' knowledge, the Surrogate Mother is divorced and single at the time when she entered into the Surrogacy Agreement. The Surrogate Mother has signed (i) the Surrogacy Agreement in January 2020; (ii) a notarised statement dated 3 February 2021; (iii) a notarised statement dated 7 April 2021; and (iv) the acknowledgment of service filed on 10 August 2021. I am satisfied that the Surrogate Mother has freely and with full understanding of what is involved, fully relinquished her rights over the Minor and she has agreed unconditionally to the making of the parental order sought by the Applicants. Subsection (5) is satisfied. Subsection (6) is not applicable.

THE CONDITION IN SECTION 12(7)

45. The evidence shows that the Applicants have spent a total of approximately HKD 310,000 for a period or more than one year since September 2019 for the surrogacy arrangements. These consisted of 4 main categories, namely (i) payments made to the agency La Vita Nova of €14,880, or about HKD 135,408; (ii) payments made to the Surrogate Mother of €13,250, or about HKD 120,575, for loss of earnings and bonus, food expenses, and maternity clothing; (iii) Medical tests for the Applicants and the Surrogate Mother of about €5,642 + HKD 6,380, totaling about HKD 56,090; (iv) Miscellaneous expenses such as legal fees, translation fees, DNA tests, bank charges etc of about HKD 27,752.

46. The items in (iii) and (iv) are in my view clearly reasonable expenses. As for item (i), in *Re X (A Child) (Surrogacy: Time Limit)*, where the surrogacy arrangements were made in India, the payments included a payment to the “mediator” whose role was to locate an appropriate woman to act as a surrogate, and Sir J Munby P was of the view that this payment fell foul of the statutory prohibition¹⁰. Nevertheless, having considered the legal principles set out earlier and the welfare of the child concerned, he authorized all the payments.

47. Further, in the recent case of *Re LH and LW*, HCMP 707/2021, 08.07.21, Au-Yeung J has pointed out that section 17 of the Human Reproductive Technology Ordinance, Cap 561 (“**HRTO**”) bans commercial surrogacy and has extra-territorial effect and that under section 29(1), a person who contravenes section 17(1) or (2) commits an offence. The Applicants have produced a copy of the Legal Opinion, to the effect that commercial surrogacy is lawful in Ukraine.

48. The payments in item (i) to the agency for a package included preparation tests for the Surrogate Mother of Euro 3,000, advance payment by contract with the Surrogate Mother of Euro 600, and various medical checks, psychological assessments and medicine for the Surrogate mother during pregnancy of Euro 6,630 and 2nd payment for the preparation of the Surrogate Mother for IVF program of Euros 4650. There was no detailed breakdown of these amounts. Although there is no evidence as to which part of those payments would have been profits for the agency, there seems

¹⁰ At para [74]

no doubt that La Vita Nova is a commercial agency and the payments in item (i) or parts thereof were likely to fall foul of statutory prohibition.

49. The surrogacy arrangements in *Re X and Y*, and also in *R v S* [2015] EWFC 22 (Fam), were made in Ukraine. In *Re X and Y*, the applicants paid sterling 235 per month to the surrogate mother during the pregnancy and sterling 25,000 on the live birth of the twins. Hedley J in *Re X and Y* accepted that expenses in terms of loss of earnings, medical care and so on would have to be incurred by a surrogate mother¹¹

50. In *R v S*, the applicants paid a surrogacy package which cost sterling 26,000 all inclusive and later they ended up paying sterling 31,000 because of twin pregnancy.

51. In both the above cases, the payments were authorized and a parental order made.

52. The Applicants have provided statistical data issued by the State Services of Ukraine, a Ukrainian government agency in 2021. The current exchange rate is about 1 Euro to 31.20 UAH. Upon looking at the statistical data, the amount paid by the Applicants to the Surrogate Mother for her loss of earnings was on the high side (in fact more than double) as compared to the average income in Ukraine in 2021. The food expenses paid by the Applicants were also slightly above the average expenditure for a household with a child under the age of 18.

¹¹ At para [18]

53. Without knowing or conducting any research on the general living standard in Ukraine prior to the surrogacy arrangements, the Applicants had verily believed that the amount paid to the agency and the Surrogate Mother was reasonable as the Surrogate Mother is divorced and a single mother, and the expenses paid by the Applicants covered her loss of earnings starting from the time she prepared for the pregnancy, including conducting the prenatal medical and psychological assessment tests, doing the IVF treatments and taking medicine till several months after she gave birth to the Minor for her health to recuperate.

54. In any event, having considered the Applicants' evidence, and having considered the figures in the two UK cases on surrogacy conducted in Ukraine, I do not find that the payments in item (ii) disproportionate to reasonable expenses.

55. Further, even if the payments in items (i) and (ii), or part thereof, could fall foul of statutory prohibitions, the question is whether this Court should authorize those payments.

56. The evidence shows that the Applicants have acted in good faith throughout, and they honestly believed that the expenses incurred were reasonable and did not disclose a commercial element in the arrangements that would run foul of section 12(7) of the PCO. The amount paid to the Surrogate Mother was to compensate her for the loss of earnings and to ensure that the Surrogate Mother and her child were well provided for during the pregnancy period. The payments made to the Surrogate Mother was paid to her directly, not through the agency, by way of cash via bank transfer

at the Western Union, to ensure that the Surrogate Mother was not being exploited by the agency.

57. Having considered the evidence, I accept that the Applicants were acting in good faith and without ‘moral taint’ in their dealings with the Surrogate Mother.

58. There is also no evidence that the Applicants have any intention to defraud the authorities. They have disclosed the surrogacy arrangements to the Director and upon being alerted, they sought legal advice immediately and have tried to rectify the problem without further delay and used their best endeavours to provide as much information as they can to facilitate the process in applying for the parental order for the Minor.

59. So far as the prohibition in HRTO is concerned, the main purpose of this legislation is for public policy reason, namely to protect children from being commodities and to prohibit commercial surrogacy. Given that the Applicants have engaged in the surrogacy arrangement out of desperation and genuine need to start a family and have shown unconditional love and care for the Minor as seen in the SIW, it cannot be said that there has been an abuse of public policy on their part . Further, it seems that prosecution against the Applicants for contravention of section 17(1) of the HRTO may have been time barred under section 26 of the Magistrates Ordinance, Cap 227, as all payments were made over 6 months ago.

CONCLUSION

60. The SIR indicates that the Applicants have provided good care and they have showed much concern towards the Minor. They have a close and intimate relationship with the Minor, who has never been cared for by the Surrogate Mother or any one else apart from the Applicants since his birth. The paternal grandmother lives nearby and is also willing to provide support to the Applicants in caring for the Minor.

61. Having considered the circumstances of this case and those applicable and relevant factors in the Adoption Checklist, there appears to be no affront to public policy if I exercise my discretion in authorising those payments made by the Applicants, and I am satisfied that it is in the best interests of the Minor for the Court to do so and to make a parent order under section 12 of PCO. There is no need for this Court to make any specific declaration as sought by the Applicants. Upon making the parental order, there is also no need for the Minor to remain a ward of this Court, and he is to be dewarded. There be no order as to costs.

(Bebe Pui Ying Chu)
Judge of the Court of First Instance
High Court

Ms Christina Tseng, instructed by Boase, Cohen & Collins, for the 1st and 2nd Applicants

The Respondent, acting in person and absent