

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 1731 OF 2023

IN THE MATTER of a joint
application by [REDACTED]
[REDACTED] [CS] (“1st Applicant”)
and [REDACTED] [CTW]
 (“2nd Applicant”)

and

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

and

IN THE MATTER of [REDACTED]
[REDACTED] [M], a boy, and
[REDACTED] [A],
a girl, both born on [REDACTED] 2018
 (“Twins”)

BETWEEN

CS 1st Applicant
CTW 2nd Applicant
and
SW Respondent

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

Dates of Hearing: 26 February and 24 September 2024

Date of Judgment: 25 September 2024

J U D G M E N T

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A. INTRODUCTION

1. This case illustrates the undesirable consequences of entering into a commercial surrogacy agreement in one country, but the surrogate gave birth in another. The laws of both countries and Hong Kong were breached. The commissioning parents found out the need to seek a parental order only upon their application for divorce.

2. The surrogacy arrangement was entered into between the 2nd Applicant and an agency in **Cambodia**. [M] (a boy) and [A] (a girl) (“**the Twins**”) were born in **Thailand** to a Thai young lady (“**the Surrogate**”), i.e. the Respondent.

3. By way of their Originating Summons dated 6 October 2023 (“**OS**”), the Applicants (“**Wife**” and “**Husband**”, respectively) seek:

- (1) A parental order pursuant to PCO s. 12 in respect of the Twins;
- (2) A time extension of 59 months to make this application; and
- (3) A declaration that the payments made by the Applicants pursuant to and in connection with the surrogacy agreement were expenses reasonably incurred, or otherwise authorised or subsequently approved by the Court.

4. The parties have previously applied for a parental order under HCMP 278/2022. The application was dismissed by this Court on 20 July 2023 due to various procedural problems.

B. *FACTUAL BACKGROUND*

5. The Wife (aged [REDACTED] at the time of the OS) and the Husband (aged [REDACTED] at the time of the OS), are both Hong Kong permanent residents. They got married in [REDACTED].

6. Since late [REDACTED], the Wife has had multiple gynaecological issues. From [REDACTED] [9 years], her attempts to conceive through IVF had been unsuccessful. Due to the Wife's infertility problem, the Applicants had started to explore the possibility of surrogacy since 2015. They were introduced to [REDACTED], a fertility clinic in [REDACTED] [REDACTED], Cambodia ("the Agency").

7. In April 2016, the Husband entered into the surrogacy agreement with the Agency ("Agreement"), whereby the Agency agreed, amongst others, to locate a suitable egg donor(s) and surrogate(s) for the Applicants at the initial cost of RMB 650,000.

8. Pursuant to the Agreement, 3 attempts to impregnate have been made between 2016 and 2017, but failed.

9. Finally, on [REDACTED] 2017, two embryos formed with a donor's eggs and the Husband's sperms were placed into the Surrogate's womb in Cambodia and she became pregnant with the Twins.

10. The Surrogate was a young Thai lady, aged 19 at the time of the Twin's birth, living in Thailand.

11. On [REDACTED] 2018, the Surrogate gave birth to the Twins prematurely in Bangkok, Thailand.

12. On [REDACTED] 2018, through the help of the Agency's agent in Thailand ("Thai Agent"), birth certificates of the Twins were obtained in Thailand. The Thai Agent advised that since the Surrogate was not married, the Husband would be registered as the father. The Surrogate was named as the mother on the birth certificates. On [REDACTED] 2018, the Twins were issued Thai passports.

13. On [REDACTED] 2018, the Applicants, the Surrogate and the Twins travelled to Hong Kong together. The Twins were granted visitors' visas on the strength of their Thai passports.

14. A DNA test conducted on [REDACTED] 2018 in Thailand, and another DNA test conducted on [REDACTED] 2018 in the Government Laboratory in Hong Kong, established the Husband to be the Twins' biological father.

15. In [REDACTED] 2018, the Twins were issued Hong Kong identity cards and HKSAR passports on the strength of their biological linkage with the Husband.

16. Since the Twins' arrival in Hong Kong, they have lived together with the Applicants as a family. They have been growing up and receiving education in Hong Kong. They should be studying primary 1 now.

17. The Husband is a businessman and the Wife a housewife. They are both hands-on in the upbringing of the Twins, together with the assistance of 2 domestic helpers.

18. In September 2021, the Husband filed for divorce on the basis of 1-year separation with the Wife's consent. It was then that the Applicants first learned, from his divorce lawyers of the need to apply for parental orders in respect of the Twins. The divorce proceedings have since been stayed.

C. *COMPLIANCE WITH STATUTORY REQUIREMENTS*

19. s.12 of the Parent and Child Ordinance, Cap 429 (“PCO”) 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;

(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.

(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 authorized 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.

(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.”

20. Accordingly, before a parental order may be granted, 9 statutory requirements have to be met. All references to “sections” below shall be to the PCO, unless otherwise indicated.

21. First, the Applicants must apply as a married couple: s.12(2). As the divorce proceedings have been stayed, this requirement is met.

22. Secondly, the Twins have to be carried by a woman other than the Wife as a result of placing embryos in her: s.12(1)(a). This has been met as the Surrogate carried the Twins, after being impregnated with embryos.

23. Thirdly, the gametes of at least one of the Applicants must have been used: s.12(1)(b). This requirement has been met as the embryos were created with the Husband’s sperms, fused with an egg donor’s eggs.

24. Fourthly, the application must be made within 6 months of birth: s.12(2). In the present case, the application should have been made on or before [REDACTED]. The Applicants are around 4 years and 11 months out of time. They say that they had genuinely been unaware of the need to make

A this application until after the commencement of their divorce proceedings.
B Thereafter, they had tried to put forward this application as soon as possible.
C Extension of time to apply is in issue.

D 25. Fifthly, at the time of the application and the making of the
E order, the Twins' home must be with the Applicants: s.12(3)(a). This was
F fulfilled at the time of issue of the OS and it was confirmed at this hearing
that the family is currently living together in Canada.

G 26. Sixthly, either or both of the Applicants must be domiciled in
H Hong Kong, habitually resident in Hong Kong, or have a substantial
I connection with Hong Kong: s.12(3)(b). This requirement is fulfilled in
respect of both Applicants, who are Hong Kong residents.

J 27. Seventhly, the Applicants have to be over 18 years old: s.12(4).
K This is fulfilled.

L 28. Eighthly, both the father of the Twins (including a person who
M is the father by virtue of s.10) and the Surrogate have freely, and with full
N understanding of what was involved, agreed unconditionally to the making
of the order: s.12(5). The question is: who is the father under PCO?

O 29. s.10(2) provides that if the Surrogate was married at the time of
P the placing of the embryo, her husband who consented to the procedure is
Q the father. This does not apply here as the Surrogate was not married.

R 30. s.10(3) provides that if no man is regarded as a father under
S s.10(2) (which is the case here), but:
T
U
V

(1) the Surrogate and her male partner who together obtained treatment services¹ in the course of which the embryos were placed in the Surrogate; and

(2) the creation of the embryo[s] carried by her was not brought about with the sperm of that man,

the male partner would be regarded as the father.

31. The Surrogate has a cohabiting boyfriend (“**the Boyfriend**”) but he did not participate in the treatment, as confirmed by the Wife and the Surrogate. Accordingly, he is not a father by virtue of s.10(3) and need not be joined as a respondent. Nor is consent required from him under s.12(5). Anyhow, the Applicants’ solicitors have taken the caution of seeking a signed consent form from the Boyfriend.

32. While the Husband is stated on the birth certificates of the Twins as the father, as the birth certificates were issued in Thailand rather than Hong Kong, s.5(1)(b) does not assist him. That section provides that “if [a man] has been registered as the father of the child by an entry made ... in any register of births *kept by the Registrar of Births and Deaths* under any Ordinance”, then he will be presumed to be the father. The birth registrations in Thailand were not entries made in any register of births in Hong Kong.

33. The Wife has exhibited 3 consent forms signed by the Surrogate on 22 July 2018, 27 August 2018 and 20 February 2024. She relies only on the last (Exhibit CSTE-6), which expressly states that the Surrogate has freely, and with full understanding of what was involved and the parental

¹. Defined in PCO s. 2 to mean ‘medical, surgical or obstetric services administered for the purpose of assisting a woman to carry a child’.

order sought, agreed unconditionally to the making of the parental order in the present application. This met the requirement of s.12(5).

34. Ninthly, as this Agreement involved payment, the Court must be satisfied that the payment was for expenses reasonably incurred or otherwise authorised or approved by the Court: s.12(7) PCO. As shall be demonstrated below, this is the most troubling aspect in this case as the surrogacy arrangement was plainly commercial in nature.

35. The issues disclosed in this case are:

- (1) Whether the surrogacy arrangement was in breach of Hong Kong and foreign laws;
- (2) Whether the Court should extend the time limit imposed by s.12(2);
- (3) Whether the payments should be authorized or approved by the Court under s.12(7); and
- (4) Whether parental orders should be granted.

D. PROCEDURAL MATTERS

36. The papers have been served on the Surrogate, who resides in Thailand, through Thai lawyers. She has signed the Acknowledgement of Service to confirm that she would not contest the OS. All subsequent affirmations have also been served on her.

37. The Court gave leave to serve the proceedings on Secretary for Justice (“SJ”), which was done. SJ takes a neutral stance and does not participate.

38. The Court gave leave to refer to the Social Investigation Report dated 16 May 2022 prepared for HCMP 278/2022. In that Report, the social investigation officer made positive observations in respect of the Applicants as parents and their close relationship with the Twins.

39. An updated Social Investigation Report dated 8 February 2024 made similar observations.

40. With leave of the Court, the Applicants rely on 2 notarized opinions on Cambodian law and 3 on Thai law.

E. CAMBODIAN LAW ON SURROGACY

E1. Prakas No. 679 on the Management of Human Blood, Reproductive Cells, Bone Marrow and Cells issued by the Ministry of Health dated 24 October 2016 (“Prakas No. 679”)

41. The Applicants were first introduced to the the Agency in 2015. The Agreement was entered into on **24 April 2016**, before the effective date of the Prakas but the bulk of the performance which led to the birth of the Twins was after, and the births took place in Thailand.

42. There is nothing to differentiate treatment between Cambodian nationals and foreigners. Under Prakas No.679, it is not illegal to undergo egg extraction or donation and IVF treatment in Cambodia (whether or not the arrangement was to be carried out in or outside Cambodia), or to make payments for surrogacy arrangements, if the conditions under Articles 10 and 17 of the Prakas No.679 are complied with:

- (a) A donor who donates reproductive cells must be based on a voluntary basis. The present case involved the eggs of a donor,

with whom the Applicants had no direct communication. There is nothing suggesting that the donor did not offer the egg voluntarily.

(b) The donor must be healthy and without hereditary disease and contagious disease. There is no direct evidence as to that, but there is nothing suggesting non-compliance, because there is no evidence that the Twins have, in the past 6 years, suffered from any such diseases.

(c) The donor must be at least 18 years old. There is no evidence as to whether this was complied with.

(d) Donation for commercial purposes is prohibited.

(e) Embryo creation for commercial purposes is prohibited for any purpose other than creating an embryo for a legally married couple to conceive children.

(1st Cambodian Opinion §§11, 12, 16, 20).

43. The Cambodian legal expert is of the opinion that if payment was made to the egg donors (which was the case here) and the Thai Surrogate underwent IVF procedures order for surrogacy outside Cambodia, that would mean that the procedures were prohibited under Prakas No. 679. It was for commercial purposes other than creating an embryo for a legally married couple to conceive children. It was illegal to undergo the IVF procedures in Cambodia for such purposes.

44. Article 12 of Prakas No.679 prescribes that “all surrogacy arrangements which are part of a service package to assist in conceiving children through assisted reproductive technology shall be prohibited.” This was obviously breached.

E2. Law on Suppression on Human Trafficking and Sexual Exploitation dated 15 February 2008 (“Law on SHTSE”)

45. Article 13 of the Law on SHTSE, in existence before Prakas No. 679, criminalizes the selling or buying of a person:

“The act of selling, buying or exchanging a person shall mean to unlawfully deliver the control over a person to another, or to unlawfully receive the control over a person from another, in exchange for anything of value including any services and person.”

46. Article 16 of the same Law further punishes “any person who sells, buys or exchanges another person for the purpose of delivering or transferring that person outside of the Kingdom of Cambodia.”

47. According to the Cambodian legal expert, there is no law on surrogacy as such before Prakas No. 679, but Cambodian courts may interpret surrogacy as an act of human trafficking. However, there has been no prosecution relating to commercial surrogacy prior to Prakas No. 679.

48. Article 4 of the Law on SHTSE states that “an accomplice and instigator shall include, but not limited to the form of organizing or directing another to commit any of the felonies or misdemeanors stipulated in this law.”

E3. Cambodian Criminal Code dated 30 November 2009

49. Articles 28 and 29 of the Cambodian Criminal Code also extends criminal liability to an instigator and accomplice as described above.

49. Hence, the Applicants who used the Agency and paid for their services could be seen as accomplices subject to the aforementioned provisions. See the 1st Cambodian Opinion, §§17 and 23.

50. Article 332 of the Cambodian Criminal Code criminalizes the act of being an “intermediary for pecuniary gain between a person or a couple desiring to adopt a child and a woman agreeing to bear the child with the intent to give up the child to them.”

51. On 12 June 2017, guidelines were issued, pursuant to a Letter No. 253 dated 28 March 2017 by the Office of the Council of Ministers to the Ministry of Interior, regarding the procedures for bringing infants of surrogacy to live abroad. Amongst others, a father who was the owner of the sperms could claim guardianship to bring the infant to live abroad. The court may decide in favour of the father if the unmarried surrogate agreed to hand over the infant to the father. The guidelines provided that it was applicable from the issuing date to 8 January 2018 only. As the Twins were born after this date, the guidelines were not applicable to this case.

E4. Opinion of the Cambodian legal expert

52. Even though there appeared to have been violations to Prakas No.679, the Cambodian legal expert points out that under Prakas No.679, no provisions criminalize its violation. Consequently, it would be unlikely to constitute criminal offences if the embryo was created in Cambodia, and the surrogacy was conducted outside Cambodia without the involvement of a Cambodian surrogate. See the 1st Cambodian Opinion §25.

53. The Cambodian legal expert further points out that (1st Cambodian Opinion §26):

“Prakas No. 679 was issued under the umbrella of Law on the Management of Donation and Transplantation of Human Cells, Tissues and Organs dated 9 August 2016. Despite there being no provision under Prakas No. 679 that stipulated criminal penalties, Article 23 of this law provided that cell transplantation for commercial purposes was sentenced from ten to twenty years imprisonment. To our knowledge, however, there has not been

any case that this law was used to prosecute any violation of Prakas No. 679.”

54. It was concluded at §30 of the 1st Cambodia Opinion that, given that the IVF procedure was conducted on the Thai Surrogate for surrogacy and commercial purposes in Cambodia, it was illegal under Cambodian laws. The Law on SHTSE, Cambodian Criminal Code, and Prakas No.679 prohibited the Applicants from using the Agency and paying for its services in identifying and confirming the egg donors and for all medical procedures involving the egg donors. Under the applicable laws, there were no provisions on the reasonableness threshold of the payment. The current case concerns mainly the IVF procedure which was principally governed by Prakas No. 679, of which its violation is unlikely to give rise to criminal offence. Even if the case was to be considered surrogacy and thus subject to criminal liability, competent authorities in Cambodia had also in the past considered relevant factors such as the interests of the infants, surrogates and intended parents in determining whether to prosecute such actions. See §31 of the 1st Cambodian Opinion.

55. The above conclusions are not dissimilar to those drawn by the Cambodian expert in *A v. B & C* [2021] EWFC 103 at §§14, 39-40 which Knowles J accepted:

“The expert report of Mr Stephen Page on Cambodian law, dated 18th January 2021 confirms that, although the Cambodian government issued a declaration (known as a prakas) prohibiting surrogacy in very general terms on 24th October 2016, there is in fact no law in Cambodia which expressly regulates or prohibits surrogacy and no criminal offence arises as a breach of the declaration or prakas. There have been prosecutions in connection with the practice of surrogacy in Cambodia which have relied on other laws concerning human trafficking. However, none of these laws apply to this case given that the parties and the birth were based outside the jurisdiction and the arrangement was not commercial. It is, therefore, very unlikely that any criminal offence was committed in Cambodia by either the applicant, the respondents or the clinic. I am satisfied with

the conclusions drawn by the expert in his report.” (underline added)

56. However, unlike the present case, *A v B & C* did not involve a commercial arrangement.

57. The Cambodian legal expert cited examples of agency operators being imprisoned in 2017 for acting as intermediaries; and surrogates being arrested and released on condition that they were made to raise the children born of out surrogacies themselves. However, since the Twins were born, the Applicants have not been subject to the threat of prosecution.

58. In my view, a jurisdiction has the right to set its own law and policy (including moral policy) and it is not open to a foreigner to breach them even if he/she happens to have been spared criminal penalties. The limited period in which the guidelines in paragraph 51 above took effect indicated that Cambodia rejected commercial surrogacy. The making and execution of the Agreement was plainly in breach of Cambodian law.

F. THAI LAW ON SURROGACY

F1. Governing law of the Agreement under Thai law

59. Under s.13 of the Act on Conflict of Laws, B.E.2481 of Thailand, the applicable law is determined by the intention of the parties. If such intention, express or implied, cannot be ascertained, “the law applicable is the law common to the parties when they are of the same nationality, or, if they are not of the same nationality, the law of the place where the contract was made.

60. The Agreement did not stipulate the law applicable. As the Agency is incorporated under Cambodian law and the Applicants are

Chinese, Cambodian law applied because the Agreement was made in Cambodia. Cambodian law was breached, as held above.

F2. Legality of the surrogacy under Thai law

61. Under s.21 of the Protection of a Child Born by Medically Assisted Reproduction Technology Act B.E. 2558 (2015) of Thailand (“**PCBMART Act**”), “an operation of surrogacy” shall at least comply with the following:

(1) Lawful husband and wife, when a wife is unable to carry pregnancy, intending to have a child by surrogacy, shall hold Thai nationality. In the case where a husband or a wife does not hold Thai nationality, the registration of their marriage shall not be less than three years;

(2) A surrogate mother shall not be an ascendant or a descendant of the lawful husband and wife under (1);

(3) A surrogate mother shall be blood relative of the lawful husband or wife under (1), in the case where there are no blood relative of the lawful husband or wife, other woman may undergo the surrogacy, as prescribed by the rules, procedures, and conditions of the Minister of Public Health with the advice of the Committee;

(4) A surrogate mother must have previously given birth to a child. If such surrogate mother has lawful husband or cohabits with a man as husband and wife, consent must be obtained from such lawful husband or such man.

See 1st Thai Opinion, pp2 and 4.

62. Whilst the Agreement was governed by Cambodian law, it appears that the birth of the Twins was governed by the PCBMART Act itself. If so, s.21(1), (2) and (4) were satisfied. The Surrogate had a child before the Twins were born. It is not clear what her Boyfriend had to consent to under s.21(4), but her Boyfriend clearly knew about the surrogacy and had consented to giving up his and the Surrogate's rights to the Twins.

63. With regard to s.21(3), the Surrogate was not a blood relative of the Applicants. Although the Applicants did have female blood relatives, they had not thought of any of them as a surrogate. Although another woman could be a surrogate, the rules, procedures and conditions of the Minister of Public Health with the advice of the Committee had yet to be prescribed. The law, however, did not prescribe the consequences for the Applicants or the Surrogate. According to the 3rd Thai Opinion, the liability was with the medical practitioner and not the Surrogate.

64. The surrogate shall be of the same nationality as the legal husband or wife who wished to have a child. Additionally, a surrogate shall be at least 20 years of age and not more than 40. See 2nd Thai Opinion, §2(I).

65. It is not clear where these requirements were prescribed but if they were legal requirements, they were breached as well. The Husband is not a Thai. The Surrogate was aged 19 at the time she gave birth to the Twins. She was regarded as a minor under s.19 of the Thailand Civil and Commercial Code.

66. However, the Thai lawyer points out that in case the nationality of the Surrogate is not the same as the Husband, the law does not aim to punish the Surrogate or the Husband. It is only the medical practitioner who

fails to comply with section 21 who shall be deemed to have violated ethics of medical profession under the law on medical profession: s.45 of PCBMART Act. See 2nd Thai Opinion, p3, §2(I).

67. According to the 3rd Thai Opinion there is no penalty for the Surrogate unless she was preparing the surrogacy for commercial benefits.

68. The Thai lawyer is of the view that the Agreement did not comply with Thai law and was unenforceable and invalid but the degree of criminality was very limited. The Husband was not expected to be subject to liabilities *unless a commercial arrangement occurred*. See 1st Thai Opinion, p3.

69. With respect, there is no issue of enforceability here. Rather there was a commercial arrangement.

70. Under s.24 of the PCBMART Act, “No person shall operate the surrogacy for commercial benefits”. Any violation, according to s.48, shall result in imprisonment for a term not exceeding 10 years and to a fine not exceeding 200,000 baht.

71. The Thai legal expert is of the opinion that the jurisdiction of the laws and regulations of Thailand apply to acts performed inside Thailand. It is illegal for anybody to profit from commercial surrogacy. Applying these principles, the Agency and the Surrogate had profited.

72. However, the Thai lawyer was of the opinion that in order to proceed with criminal legal action against the Husband in Thailand, a report of complaint had to be made by the injured person to the inquiry official at the police station. There is no precedent case in Thailand. See 2nd Thai Opinion, §2(I) on p3.

73. I find that the surrogacy was in breach of Thai law and the policy against commercial surrogacy. Again, it is not open to a foreigner to breach them even if he/she happens to have been spared criminal prosecution.

F3. Parentage under Thai law

74. According to s.1546 of the Civil Code of Thailand, “A child born of a woman who is not married to a man is deemed to be the legitimate child of such woman.”

75. In a case that a father registered a marriage with a mother and conceived a child, the father is a lawful legal representative of the child. As the Husband did not register a marriage with the Surrogate Mother, the Husband can only be de facto father of the Twins. Approval for legitimation of the Twins for the Husband is required. Section 1548 provides that “when legitimation is applied for by the father, the child and the mother must give consent to the applicant.” See 2nd Thai Opinion, § 2III, p4.

76. There was no legitimation. Obtaining the birth certificates of the Twins was not legitimation. The Husband will be considered as legitimated father only when he requests for adoption of the Twins. There was no request for adoption, which involved a lengthy investigative process.

77. According to s.1547 of the Thailand Civil and Commercial Code, the Twins born of parents not married to each other is legitimate by 3 means only: (i) subsequent marriage of the parents; (ii) the registration made on application by the father; or (iii) a judgment of the court. These are apparently not complied with.

78. Chapter 5 of the Thai Civil and Commercial Code gives 2 main scopes of parental powers – parental power over a child and managerial

A power over a child's property. The Thai lawyer is of the opinion that a matter
B of parental power over a child is related to public order and good moral of
C people in society. Therefore, by law a revocation order could only be
D obtained from the court only. The mother and father of a child are prohibited
E from jointly revoking a parental power over a child and transferring such
F parental power to a third party by themselves. But a revocation of parental
G power is not feasible in this case because there is no evidence that the
H Surrogate or the Husband is adjudged incompetent or quasi-incompetent, or
I has abused his or her parental power as regards the Twins' person, or is guilty
J of gross misconduct: s.1582 of the Civil and Commercial Code.
K

79. Although the Hong Kong High Court renders a parental order
I to the Applicants, the Thai lawyer is of the opinion that it does not affect the
J Surrogate's rights as a mother. To revoke her rights, it is required that "the
K person who really takes care of the Twins to request the [Thai] Court for the
L revocation of her parental power over the Twins".

80. I find that this is a case where the surrogacy was unlawful under
M Thai law, which does not permit privately arranged transfer of parental rights.
N The Twins were legitimate children of the Surrogate only. Thai law which
O permits revocation of parental rights is not applicable. Notwithstanding the
P consent of the Surrogate and her Boyfriend, the Surrogate's rights and
Q responsibilities over the Twins have not been removed. The Husband has not
R applied for legitimation or adoption. He has no legal rights over the Twins
S under Thai law.

R *G. WHETHER THE SURROGACY ARRANGEMENT WAS IN BREACH*
S *OF HONG KONG AND FOREIGN LAWS*

T 81. The findings under Sections E and F above reveal breaches of
U law and policies of both Cambodia and Thailand. There is also breach of
V

s.17 of the Human Reproductive Technology Ordinance, Cap 561 (“**HRTTO**”), in Hong Kong which prohibits surrogacy arrangements on a commercial basis (discussed below), whether made in or outside Hong Kong.

H. WHETHER TIME EXTENSION SHOULD BE GRANTED

82. Despite the statutory time limit, the Court has power to extend the time for application, having regard to the period of delay, the reasons for delay, the prejudice to anybody and public policy: see *FH v. WB* [2019] 5 HKC 99, §88.

83. As children are involved, the Court will take into account their best interests (whether pursuant to s. 3(1) of the Guardianship of Minors Ordinance (Cap. 13) or otherwise: *FH v WB*, at §34:

“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.”

84. The following matters in this case are pertinent.

85. Firstly, the Applicants were not legally trained and were told by their friend and Agency that surrogacy was legal in both Cambodia and Thailand. I find it doubtful whether those persons were qualified to do so and what the bases of their advice was. It is hard to believe that the Applicants would not even sense something against the law for them to enter into the Agreement at a place outside Hong Kong, where they had no

A apparent connection. Anyway, it is their evidence that it did not occur to
B them to seek legal advice in Hong Kong or abroad.

C 86. That said, I do not think there is evidence of the Applicants
D entering into the Agreement in deliberate violation of the law of either
E Cambodia or Thailand. It was their desperate wish to have children (arising
F also out of pressure from in-laws in a traditional Chinese family) that drove
G them to enter into the Agreement without proper advice and they were
 probably victims of the Agency as well.

H 87. Secondly, the Applicants had been unaware of the need to make
I this application until after the commencement of their divorce proceedings.

J 88. It took them another 6 months to issue the OS in HCMP
K 278/2022 on 2 March 2022. By then the Applicants were already out of time
 by 40 months.

L 89. On 8 March 2022, this Court raised requisitions in that case.
M There was further correspondence between the Court and the Applicant's
N then legal team as to the further conduct of the matter. Unfortunately, the
O case had not progressed expeditiously, such that the validity of that OS
 expired without the Surrogate being served.

P 90. The Applicants had twice changed counsel, until the present
Q team came on board since July 2023. Upon legal advice, the Applicants
R obtained legal opinions. The 1st Thai Opinion and 1st Cambodian Opinion
S were available in late September 2023. The OS was filed on 6 October 2023.
T By then, it was already about 2 years after the Applicants first learned of the
U need to do so.

91. There is nothing suggesting that the late filing of the OS was caused by the Applicants deliberate delay or ill-intention. The involvement of foreign law in two countries complicated the matter. There was language barrier and sudden loss of contact with the Surrogate. The fact that the Surrogate lived in a remote part of Thailand made service difficult. Efforts have also been made to be fair to the Surrogate by having Thai lawyers explain relevant documents and procedure to her. The progress of this case was further delayed by the need to notarize documents, the lawyers' failure to promptly seek certified translation as directed on 26 February 2024 and the delay in answering the Court's requisitions dated 11 June 2024 due to financial constraints of the Applicants.

92. Thirdly, the Twins' best interests are important. They, being wholly innocent, should not be barred from the benefits that parental orders would bring, simply because of their parents' failure to ascertain fully the legal requirements, if all other conditions are met.

93. For the reasons given in Section H, there are good reasons shown and I extend the time for application to 6 October 2023.

[There is no section I.]

J. WHETHER PAYMENTS SHOULD BE AUTHORIZED OR APPROVED BY THE COURT UNDER PCO s.12(7)

J1. Legal principles under s.12(7)

94. To decide whether the payment was for expenses reasonably incurred or should otherwise be authorised or approved the Court should ask the following questions:

(1) Whether any money or any other benefit had been given or received by Husband or the Wife in consideration of various matters in s.12(7)(a) to (d);

(2) If the answer 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.

(3) If the money/benefit was not for expenses, or if the expenses or any part thereof were not reasonably incurred, whether the money/benefit or the expenses or any part thereof which were not reasonably incurred should be authorised by the Court or approved retrospectively.

See *FH v. WB* at §110, Au-Yeung J; *Re A & B* [2019] 5 HKLRD 366 in §34, Au-Yeung J; *Re STP* [2021] 4 HKLRD 719, §33 B Chu J.

95. This Court in *A & B v. E* at §35-45 has summarized the relevant considerations as follows:

(1) 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, including payments to agencies.

(2) What was reasonable is a question of fact and the amount could vary greatly from place to place depending on where the surrogacy agreement took place [and I would add here, where it was executed as well]. Reasonable expenses do not require approval of the Court.

(3) “Non-reasonable expenses” require subsequent approval or authorisation by the court after meeting 3 tests:

(a) Was the sum paid disproportionate to reasonable expenses?

(b) Were the applicants acting in good faith and without moral taint in their dealings with the surrogate mother?

(c) Were the applicants party to any attempt to defraud the authorities?

(4) 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, considerations of the child's best interests.

(5) Where the considerations of best interests 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.

(6) 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.

(7) While the commercialization of surrogacy is prohibited under s.17(1) of HRTA, the legislative purpose is to prevent its abuse, not to prevent a married couple who had a genuine need to resort to surrogacy and used their own sperm and egg in so doing, and certainly not to penalize the child.

J2. Money/benefit given or received by the Applicants

96. No money/benefit had been received by the Applicants under s.12(7). However, they had given around HK\$1,034,900 pursuant to and in connection with the Agreement, the breakdown of which was as follows:

Table 1

<u>No.</u>	<u>Description</u>	<u>Amount</u>
1	Payments to the Agency pursuant to the Agreement (covering all payments made to the egg donors and the surrogates, and all medical and administrative costs incurred)	RMB700,000 (~HK\$764,000)
2	Payments to the hospital in which the Twins stayed as further medical expenses incurred due to their extended stay (paid by the Applicants and reimbursed by the Agency)	RMB148,762 (~HK\$162,400)
3	The Surrogate's tonic food, supplement and extra food subsidy (paid voluntarily by the Applicants via the Agency)	RMB 78,429 (~HK\$86,000)
4	Cash gift to the Surrogate (paid voluntarily by the Applicants)	~HK\$22,500
	<u>Total sum paid</u>	<u>~RMB 927,191</u> <u>~HK\$1,034,900</u>

97. The payments made to or via the Agency were: (1) referable to Clause B of the Agreement; and (2) largely documented. They fell within the terms of s.12(7)(c) and (d).

98. The payments were made in stages according to Clause B of the Agreement:

Table 2

<u>No.</u>	<u>Stage</u>	<u>Amount</u>
1	Confirmation of egg donor	RMB50,000
2	Donor starting to receive hormone treatment	RMB100,000
3	Extraction of eggs	RMB50,000
4	Confirmation of surrogate	RMB100,000
5	Implantation of embryo	RMB50,000

6	Successful insemination	RMB100,000
7	3 months of pregnancy	RMB100,000
8	Birth and DNA reports	RMB100,000
9	Additional charges for carrying of twins (pursuant to Clause D3 of the Agreement)	RMB50,000
	<u>Total sum paid</u>	<u>RMB700,000</u>

J3. *Whether the money/benefit was for expenses*

99. Item 1 in Table 1 (RMB700,000 paid to the Agency) included:

(1) Payment to the Surrogate pursuant to the Agreement, namely, RMB100,000 for her loss of earnings and food expenses. The Surrogate had confirmed receipt of the same.

(2) The remaining sum of RMB600,000 was for payments to the egg donors; all medical procedures (including 4 unsuccessful attempts of embryo implantations) and administrative costs.

(3) RMB50,000 was added to make up to RMB700,000 due to twins being carried.

100. Item 1 would have covered expenses and profits. The level of profits to the Agency is unknown due to lack of breakdown.

101. Item 2 in Table 1 (RMB148,762) was incurred because the Twins were born prematurely and they stayed in incubators for over a month. It was an expense.

102. Item 3 in Table 1 would have been partly expenses and partly benefits. This is because HK\$86,000 incurred over a period of, say, 10

months of pregnancy and post-natal care was huge, in view of the low living standard in Thailand, compared to Hong Kong.

103. Item 4 of Table 1 was a “benefit” and not expense.

J4. Reasonableness of the expenses

104. As regards item 1 in Table 1, there were no provisions under Cambodian law governing the reasonableness of such payments. As Cambodian law prohibited any payment to the Agency, donors and surrogates on a commercial basis, Item 1 was unreasonable.

105. I see no cause for regarding item 2 in Table 1 to be unreasonable.

106. What troubles the Court was the overall expenses which gave a clear picture of the commercial nature of the surrogacy arrangement. Ms Choy, counsel for the Applicants, has very helpfully prepared a table summarizing the expenses on surrogacy for cases decided in Hong Kong.

Table 3

No.	Case (in chronological order of year of surrogacy)	Country of birth of children	Facts relevant to expenses	Amount of expenses approved/ authorised
1.	<i>FH v WB</i> [2019] 5 HKC 99, §123	USA California	-Surrogacy agreement with Californian agent reached in 2015 -Twins born in 2016 after one IVF & implantation attempt	US\$108,198 (around HK\$850,000) -US\$ 20,000 as agency fees (18.5%) -US\$ 64,088 paid to surrogate (59%) for travelling expenses, allowance, lost wages,

				participation bonus, basic reimbursement, bonus for bearing twins, childcare & housekeeping expenses, clothing and milk pumping fees -US\$24,110 misc. (22.5%) for legal fees, insurance, counselling expenses, medical expenses and misc. expenses
2	Present case	Cambodia & Thailand	-Surrogacy agreement with Cambodian agent reached in 2016 -The agreement (and the price) included an unlimited no. of attempts to inseminate until birth -Twins were born in 2018 after 4 IVF & implantation attempts (in 2016, 2017 x 3) -RMB100,000 paid to Surrogate roughly equalled to 22 months' income of her family	HK\$1,034,900 -RMB600,000 paid to agent (included payment to egg donors, medical and admin fees (64%) -plus RMB50,000 for twins -HK\$210,000 paid to surrogate (20%) -RMB100,000 for loss of earnings and food -RMB78,429 as voluntary tonic food etc -HK\$22,500 as voluntary extra cash gift -HK\$162,400 as extra hospital fees (16%)
3.	<i>Re A & B</i> [2019] 5 HKLRD 366, §48	PRC	-Surrogacy agreement with PRC agency reached in about 2016-2017 -Twins were born in PRC in 2017	RMB300,000 (around HK\$342,000) -RMB150,000 as agency fees + misc. expenses (50%)

				(breakdown unknown) -RMB150,000 paid to surrogate (50%) (breakdown unknown)
4.	<i>T v. L</i> [2022] 2 HKLRD 685, §106	Georgia	-1 st agreement with Georgian agent reached in 2018 -2 nd agreement with Georgian agent reached in 2019 -One child was born in 2020 after 3 IVF & implantation attempts (in 2018, 2019 and 2020) -Average monthly earning in Georgia in 2020 was USD365 (§107)	USD52,575 (around HK\$412,000) -USD21,800 as agency fees (41.5%) -USD15,835 paid to surrogate (30%) for 2 embryo transfers, monthly payments during pregnancy, after birth of child, accommodation and travelling expenses -USD14,940 misc. (28.5%) for medical expenses and disbursement
5.	<i>Re STP</i> [2021] 4 HKLRD 719, §45	Ukraine	-Agreement with a clinic in Ukraine reached in 2019 -Surrogacy agreement with surrogate reached in 2020 -One child was born in 2020 after 1 IVF & implantation attempt -Amount paid to surrogate for loss of earnings was more than double the average income in Ukraine in 2021; court noted ‘on the high side’; food expenses also slightly above average expenditure (§52)	HK\$310,000 -HK\$135,408 as agency fees (43%) -HK\$120,575 paid to surrogate (loss of earnings, food, clothing) (38%) -HK\$83,842 others (27%) -HK\$56,090 as medical expenses -HK\$27,752 as legal & misc. expenses
6.	<i>A & B v. E</i> [2023] HKCFI 3143, §7 and 26	PRC	-Agency agreement with a PRC agent reached in 2020	RMB750,000 (HK\$850,000)

			-Twins were born in 2021	-RMB185,000 as agency fees (25%) -RMB100,000 as another agent's referral fee (13%) -RMB250,000 paid to surrogate (33%) -RMB215,000 as medical and IVF cost (29%)
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107. There are 4 special features in the expenses in this case:

- (1) Without disrespect to Cambodia, its costs of living would have been much lower than in California and probably Mainland China. And yet the overall payments was almost 20% higher than the contemporaneous surrogacy arrangements in *FH v WB*; and 3 times that in *Re A & B*.
- (2) The percentage of expenses charged by the Agency for donors, medical treatment and administrative costs in the present case (64%) was highest compared to other cases, whereas that paid to the Surrogate (20% and that already included voluntary payments of over HK\$100,000 from the Applicants) was the lowest compared to other cases.
- (3) Verbal inquiries were made by the Cambodian legal expert on no-name basis with 2 clinics offering IVF services in Cambodia. The fees for IVF treatment to legally married couples covering all medical procedures such as health checks, IVF treatment and confirming the gender of a child was approximately US\$12,300 and US\$13,100. This further illustrated the highly unreasonable level of fees charged by the Agency under Item 1 of Table 1.
- (4) Upon research of the living standards of Phetchabun in Thailand (where the Surrogate lived), it was revealed that the

sum of RMB100,000 paid by the Agency to the Surrogate roughly equalled 22 months' income of *her family*. This sum would have provided great incentive to the Surrogate (still a minor then and unemployed) to become a commercial surrogate.

108. Those 4 features pointed to nothing but a commercial arrangement, prohibited by Hong Kong, Cambodia and Thailand.

109. The payments to the Agency and the Surrogate were plainly unreasonable when the Court considers the wider picture of what actually happened in this case and compared it to different parts of the world where surrogacy took place. This case was a plain case of violation or affront to public policy of 3 jurisdictions.

110. The Surrogate had freely and voluntarily provided her service and her Boyfriend consented to it. Her 3rd consent form confirmed that she was not subject to exploitation or undue pressure in entering into the surrogacy arrangement. From her conduct on learning about this application, the assistance she rendered to the Applicants, and the lack of signs of any emotional/psychological problems on her part, I am satisfied that she had not been exploited when she entered into the surrogacy arrangement but, rather, obtained huge profits from it. She had used the money to purchase land for farming and to run a grocery shop.

111. As for item 4 of Table 1, it was a very generous post-natal gift, as opposed to an inducement, to thank the Surrogate for enabling the Applicants to have a family with adorable twins. It does not require approval or authorization of the Court.

112. Despite part of the expenses being unreasonable, I have considered other factors.

113. Firstly, the best interests of the Twins. Without approving or authorizing the expenses, it is virtually impossible to consider granting a parental order.

114. Secondly, I accept that the Applicants had genuinely been unaware of the need to apply for a parental order before the Husband's divorce lawyers alerted them to the same. Having learnt of the need to do so, the Applicants took steps to locate the Surrogate in order to properly serve her with the proceedings. They were fair to her, procuring translation of documents to ensure that she understood the purpose of the present proceedings. They have also made no attempt to defraud the authorities and made their best endeavours to comply with the laws of Hong Kong.

115. Thirdly, this is a case where the Applicants are effectively using ignorance of the law in 3 jurisdictions to support their application for a parental order out of time. Ignorance of the law has never been a defence for breaching the law. This Court takes the view that the duty has always been on the commissioning parents to ascertain the legality of an intended surrogacy arrangement.

116. However, one can see from Table 3 that back in 2016 when the Agreement was entered into, there had not been any precedent in Hong Kong on the issue of surrogacy. It was not surprising that commissioning parents were unaware of the full implications of commercial surrogacy.

117. In the present case, despite the breaches of law and policies against commercial surrogacy in 3 jurisdictions, the dubious explanation of the Applicants (§85 above) and taking into account that the law was entirely untested in 2016, there is room for the Court to exercise leniency where the best interests of the Twins demand it. The Twins' lifelong legal status with the Applicants surpass the latter's ignorance of the law.

118. Considering all the factors in this Section, I approve the unreasonable expenses in items 1 and 3 of Table 1 in the total amount of RMB778,429 (~ HK\$850,000), ie about 84% of the total sum incurred. Item 2 was a reasonable expense; and item 4 was a reasonable benefit to the Surrogate. They do not require approval or authorization of the Court.

K. WHETHER PARENTAL ORDERS SHOULD BE GRANTED

119. All the statutory requirements under section 12 are met with the grant of extension of time and approval of unreasonable expenses/benefits.

120. Although the Husband is named as the father on the birth certificates of the Twins, he is not the “legal” father according to Hong Kong or Thai law. Neither is the Wife the legal mother.

121. Throughout the past 6 years, the Applicants have been the only parents known to the Twins. The Social Investigation Reports confirm that both Applicants have good relationship with the Twins. Going forward, without the Applicants being acknowledged as the legal parents of the Twins, there can be difficulties and embarrassment both to parents and children.

122. The Surrogate has never taken interest in the lives of the Twins. Given the love, care and quality of life that the Applicants have given to the Twins over all these years, it could not be in the Twins’ interests to send them back to the Surrogate, a stranger who lives in a foreign land. Parental orders would reflect the intentions of the Applicants and the Surrogate and the reality of lives of the Twins, but would not prejudice anyone.

123. The relinquishment of parental rights is not recognized in Hong Kong: *S v J* [2017] 5 HKLRD 129, at § 27, Au-Yeung J. Nor is it recognized under Thai law. I have to acknowledge that any parental order to be granted

may not have the full transforming, irreversible effect on the Surrogate as described in *FH v WB* (paragraph 83 above), because there has not been valid removal of her rights and responsibilities as a mother under Thai law.

124. Ms Choy submits that a parental order is a judgment *in rem* as opposed to a judgment *in personam*. Once granted, a judgment in rem binds *the whole world*. She relies on several authorities:

(1) *AS (by his litigation friend the Official Solicitor) v London Borough of Croydon* [2011] EWHC 2091 (Admin), §50.

However, this was not a case on parental order but age assessment of an alleged asylum seeker. §50 of that judgment states that in the personal field, declarations in rem are made as to parentage, legitimacy, legitimation, adoption and the validity of marriage *by virtue of sections 55-60 of the Family Law Act 1986*. Those statutory provisions provide expressly, or are construed as proving, that the relevant judgment that they provide for is one in rem. However, there is no comparable legislation in Hong Kong in the sphere of surrogacy law.

(2) *The Amphill Peerage* [1977] AC 547 (HL) at 576F, was a case concerning declaration of legitimacy. The House of Lords held that if the judgment is as to the status of a person, it is called a judgment in rem and everyone must accept it.

(3) “Status” is defined as “the legal position of an individual in or with regard to the rest of the community”: *Spence Bower and Handley: Res Judicata*, 5th ed, §10.05.

125. Without disrespect, I have reservations as to the breath of Ms Choy’s proposition. Each jurisdiction has the right to decide its law on parentage and it is not binding on another jurisdiction. For example, in *FH*

v WB, §§12-13, the commissioning parents already obtained an order in California declaring them to be genetic and legal parents of the twins and declared the surrogate and her husband not to be legal parents. On the twin's birth certificates in California, the commissioning parents were stated to be their parents. Even so, the Californian order did not bind the Hong Kong courts and parental orders had to be sought under s.12.

126. Accordingly, the parental orders would only bind the Surrogate and the domestic community in Hong Kong. They would not bind, eg the Thai government. See also the opinion of the Thai legal expert in paragraph 79 above.

127. Considering all factors, it is appropriate to grant parental orders.

L. RE-REGISTRATION OF BIRTHS?

128. Ms Choy raises an issue as to whether there should be re-registration of the Twins' birth under BDRO s.12C, which provides that:

"Where the Registrar receives notification issued pursuant to section 12 of the Parent and Child Ordinance (Cap. 429) of an order under that section providing for a child to be treated in law as the child of the parties to a marriage, in respect of a child whose birth has previously been registered, he shall authorize the re-registration of that child's birth." (underline added)

129. Re-registration is an administrative act for the Registrar of Births and Deaths. It is not an issue before the Court and I decline to express any view on it.

M. CONCLUSION

130. For the reasons given, parental orders are justified. I therefore order as follows:

(1) That [REDACTED] [M], a boy born on [REDACTED] 2018 is to be regarded in law as the child of [REDACTED] [CS] (the 1st Applicant) and [REDACTED] [CTW] (the 2nd Applicant) pursuant to PCO s.12(1);

(2) That [REDACTED] [A], a girl born on [REDACTED] 2018 is to be regarded in law as the child of [REDACTED] [CS] (the 1st Applicant) and [REDACTED] [CTW] (the 2nd Applicant) pursuant to PCO s.12(1);

(3) There be an extension of time of 59 months for the Applicants to file the present originating summons and the filing on 6 October 2023 shall stand;

(4) There be a declaration that the payments of RMB 778,429 (equivalent to about HK\$850,000) made by the 2nd Applicant pursuant to and in connection with the Agreement be authorised by the Court; whereas the rest of the payments in the amount of RMB 148,762 (equivalent to about HK\$162,400) and HK\$22,500 were reasonable;

(5) There be no order as to costs, save that the Applicants shall bear costs of the Respondent on indemnity basis;

(6) The Registrar of the High Court do notify the Registrar of Births and Deaths of this order pursuant to s.12(9) of the Parent and Child Ordinance (Cap.429);

131. I thank Ms Choy for her assistance.

132. It is regrettable that this OS has taken such a long time to come to conclusion. Whilst part of the reasons have been set out in §§87-91, practitioners should be alert to the needs to comply with legal requirements and any timetable laid down by the Court. It would not be conducive to the

quick disposal of children cases if the Court has to raise requisitions on fundamental matters like legal qualifications of an expert, who provided translations and whether that person was conversant with the English and foreign language, whether there are legible copies of documents and remind lawyers to serve documents on a respondent. It would also be helpful if there is clear summary of breaches of the law in each jurisdiction, however many there may be, so that the Court can assess the extent of breach of law.

N. *WAY FORWARD*

133. It has always been the law and policy of Hong Kong to prohibit commercial surrogacy arrangements, whether entered into or outside Hong Kong. Lately, on 24 May 2023, the Acting Secretary for Health, Dr Libby Lee, wrote to the Legislative Council explaining the current public policy:

“...the Government's prevailing policy stance is neither to oppose nor to actively encourage the use of surrogacy arrangements, the Government nevertheless considers it necessary to regulate surrogacy arrangements to safeguard the role of families and welfare of children born as well as prevent abuse of the arrangement, and to ensure that all parties involved in the relevant arrangements are aware of the risks and consequences that they should bear...

Prohibiting surrogacy arrangements on a commercial basis is the decision upon extensive deliberations by the Legislative Council prior to the enactment of the HRTO.”

S.17 of HRTO still stands in our statute books.

134. In the past 7 years since *S v J* [2017] 5 HKLRD 129, the Courts have, by various judgments, clarified the law of surrogacy. A summary of the development of surrogacy law in Hong Kong, the legal principles for interpreting s.12 and the procedure for application have been set out in B Chu J's comprehensive and helpful judgment in *Re T & L (Parental Order: s.12 Parent and Child Ordinance (Cap.429))* [2022] 2 HKLRD 685. The

A Courts have identified examples of commercial surrogacy arrangements and
B frowned upon the exorbitant charges, eg *FH v WB*, §122 and Table 3 above.
C The Courts of Hong Kong should not condone or be seen to condone
commercial surrogacy arrangements.

D 135. A trend can be seen from the cases. At the start of 2017, where
E commissioning parents entered into surrogacy arrangement because they had
F resided or studied in jurisdictions where commercial surrogacy arrangement
was lawful: *FH v WB*, §202. It was not surprising that they mistakenly
G thought that the same applied to Hong Kong. There then emerged cases
H where there appeared to be no connection at all between the commissioning
I parents and the place where the surrogacy took place: eg *Re STP* [2021] 4
HKLRD 719, §§12-13; *Re T&L* [2022] 2 HKLRD 685; and the present case.
J The present case even involved 2 jurisdictions.

K 136. This case that breached the laws in 3 jurisdictions sounds out a
L serious warning to commissioning parents. If, in future, they want to run the
M argument that they were ignorant of the law when entering into the surrogacy
arrangement, they should satisfy the Court as to the following:

- N (1) Why did they not enter into a surrogacy arrangement in Hong
O Kong? What due diligence have they done to ascertain the
P Hong Kong law on surrogacy and satisfy themselves that it was
lawful to enter into a surrogacy arrangement?
- Q (2) Why did they enter into a surrogacy arrangement out of Hong
R Kong? What due diligence have they done to ascertain the law
S on surrogacy of the foreign jurisdiction(s) and satisfy
T themselves that it was lawful to enter into a surrogacy
U arrangement there? It is unlikely to be satisfactory for the
commissioning parents to rely on a surrogacy agency to give

such advice on the law. This is especially so when there are 2 jurisdictions involved as in the present case.

(3) Who, in law, are the parents of the child born out of surrogacy? The law governing commercial surrogacy and that governing parentage are 2 different matters.

(4) What steps have been taken to remove the parental rights of that/those parents? If no such steps have been taken, why not?

137. It is genuinely hoped that commissioning parents would not choose to commence the precious life of a child with an illegal arrangement, thereby putting their child at risk of not being able to obtain a parental order.

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

Ms Alison Choy, instructed by Cheng & Ng, for the 1st and 2nd Applicants at the first hearing and subsequent written submission

Ms Esther Cheng of Cheng & Ng for the 1st and 2nd Applicants at the second hearing

The Respondent was not represented and did not appear