

HONG KONG / JUDGMENT

C AND ANOTHER v. A AND OTHERS

[2022] HKCFI 556

COURT

Court of First Instance

DECIDED

23 February 2022

CASE / FILE NUMBER

HCMP607/2021

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HCMP 607/2021

[2022] HKCFI 556

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO 607 OF 2021

IN THE MATTER OF an application for an order to be made providing for the child K, a girl born on xx May 2019 (“the Child”) as ward of Court

and

IN THE MATTER OF Section 26 of the High Court Ordinance and Order 90 Rule 3(2) of the Rules of the High Court (Cap 4A)

BETWEEN

C

1st Plaintiff

L

2nd Plaintiff

and

A

1st Defendant

D

2nd Defendant

The Director of Social Welfare

3rd Defendant

Before: Hon B Chu J in Chambers (Not Open to Public) (By Paper Disposal)

Date of Plaintiffs' Written Submissions:

4 November 2021 and 10 February 2022

Date of the 3rd Defendant's Written Submissions: 5 November 2021

Date of Decision: 23 February 2022

DECISION

Introduction

These are wardship proceedings issued by the plaintiffs (respectively referred to as "H" and "W" and collectively as "Ps") for the Child to be made a ward of court. The Child is a girl who will be 3 years old in May this year.

Counsel Mr Philip Dykes SC and Ms Christina Tseng represent Ps and lodged written submissions on their behalf. The 1st and 2nd defendants (collectively "Ds" and respectively "D1" and "D2") have returned their respective acknowledge of service indicating that they do not intend to contest the proceedings since when they have not participated in the proceedings.

Ms Christine Wong, Senior Government Counsel of the Department of Justice, represented the Director of Social Welfare ("Director") and lodged submissions on behalf of the Director.

Procedural issues

As a start, there had been a number of procedural errors in these proceedings which were commenced by Ps issuing an ex-parte summons on 30 April 2021 for leave to issue an originating summons naming the Child as the Respondent. In so far as the Court can see, there was no draft originating summons attached to the ex-parte summon, nor was there any affirmation in support of the ex-parte application. Further, the title of the action indicated that Ps were seeking only orders in wardship proceedings under the section 26 of the High Court Ordinance. The filing of the ex-parte summons was followed by various requisitions raised by Master Rita So. Ps later

sought leave to amend their ex-parte summons by issuing a 2nd ex-parte summons on 6 May 2021, and lodge a draft affirmation of Ps.

As it turned out, the Child was born through surrogacy arrangements in the USA. Eventually, on 3 June 2021, Master So, quite rightly, informed Ps that it was not necessary to name the Child as a party in the wardship proceedings and that Ps did not require any leave to issue wardship proceedings.

Finally on 22 June 2021, Ps issued the originating summons herein (“OS”) naming K’s gestational mother and her husband as defendants. Leave was given for a concurrent originating summons to be filed. Later, upon a further requisition from Master So, Ps then applied and obtained leave to withdraw their two ex-parte summonses.

Pausing at this stage, my observation is that it is really for the parties’ legal representatives to ascertain the proper procedure for any proceedings and they should not have to rely on the Registry for enlightenment and those procedural errors had led to unnecessary delay and waste of the court’s time , not to say increase of legal costs.

In the OS, Ps seek, amongst other things, that the Child to remain a ward, interim care and control of the Child and leave for the Child to be free for adoption.

As the Child was carried by a woman other than W as a result of artificial insemination and the gametes of H and W were not used to bring about the creation of the embryo, Ps were not able to satisfy the conditions in section 12(1) of Parent and Child Ordinance, Cap 429. Thus, in the OS, Ps seek that the Child be free for adoption. This means what they seek in the OS is a “freeing order”, under section 5A of the Adoption Ordinance, Cap 290 (“AO”). In Director of Social Welfare and YKK, HCMP 767 of 2020, [2021] HKCFI 2078, this Court has set out the proper approach in relation to section 5A applications.

Prior to the 1st directions hearing before this Court on 30 July 2021, it appeared that without obtaining leave from this Court, Ps issued an application in the Family Court on 28 July 2021 for the adoption of the Child in the Family Court (“FCAD 46/2021”). This is again procedurally wrong, since under section 26(2) of the High Court Ordinance, upon the issue of the OS, the Child has already become a ward of this Court. No major steps concerning the Child’s welfare or interests should be taken by anyone without leave of this Court.

Service on Ds had not yet been properly effected at the 1st directions hearing on 30 July 2021. At that hearing, this Court only dealt with the interim arrangements for the Child and ordered that, amongst other things, the Child to continue to be a ward and Ps be granted interim care and control of the Child pending a social investigation report to be submitted in relation to the care arrangements of the Child. A further direction hearing was fixed for 8 November 2021.

It transpires that what Ps are applying for is leave for Ps themselves to adopt the Child, and not simply for the Child to be free for adoption by any other suitable adopters, and the order Ps should have sought in the OS is leave for them to make private arrangements to adopt the Child under section 23A of the AO and/or the Child be placed with them for adoption.

On 7 October 2021, Ps finally issued an ex-parte summons under section 23A(1) of the AO to seek retrospective leave for them to commence those adoption proceedings. Ps' attention was then drawn to this court's decision in *Re M*, HCMP 439/2021, [2021] HKCFI 2699. The Court directed that the Director be made a party to the proceedings and to lodge any written submissions in relation to policy considerations.

At the 2nd direction hearing on 8 November 2021, Ms Wong appeared for the Director and set out the legislative history of section 23A as summarized in *Re M* supra and the policy considerations in relation to section 23A of AO and also in relation to sections 14, 17 and 39 of the Human Reproductive and Technology Ordinance, Cap 561. There were no submissions made in relation to there being any particular policy concerns on the part of the Director. At the hearing, this Court directed a suitability assessment report to be conducted by the Director to assess the suitability of Ps to adopt the Child.

The matter was originally fixed for a further direction hearing on 15 February 2022, but due to the worsening Covid situation, this Court directed the matter be dealt with on papers. There was no objection to this course. Ms Wong sought leave to reply on her written submissions of 5 November 2021 on behalf of the Director and leave was given. Mr Dykes lodged his Supplemental Submissions on 10 February 2022.

The background

W was born in Mainland China and H was born in Hong Kong. They were married in Hong Kong in March 1985. H and W are now 59 and 62 years old respectively. They have three biological children, namely two daughters, now aged respectively 36 and 26 and a son KY aged 22.

H and W are owners of their own group of business which is said to be very successful and generates an annual profit of over HK\$300M.

In or around 2002, Ps noticed their son KY then 3 years old, had started having developmental issues. In July 2002 he was diagnosed with autism, global delay and severe language disorder. Since then, he had attended schools for children with special needs and has required special attention in his upbringing.

However, in or around 2011, KY's temperament drastically changed. His mood became very volatile, and he would hurt himself by banging his head against the wall or forcing himself to vomit after over-eating. He was so hyperactive that he would not sleep at night and started to throw things around the house. Ps were extremely distressed. They worried about KY's future and whether he would be able to take care of himself as he grew older. They wanted to ensure KY had sufficient family support so that when one day they were no longer around him, there would be

some family members providing him with love and support.

In or around 2014, Ps were introduced to the topic of surrogacy by their friends who knew about KY's situation. Ps had considered adopting a child, but knowing that there can be unforeseen issues with adoption, such as unknown congenital defects and other medical or behavioural issues, they decided to go down the surrogacy route instead of adoption.

In or around 2016, Ps were introduced to a fertility clinic in the United States by their friends who had successfully had children born out of surrogacy and had brought them back to the Mainland after birth with no issues. A US attorney had advised Ps that surrogacy was legal under US law, and they would be the child's legal parents upon the child's birth and could bring him or her back to Hong Kong. As Ps had no legal background, it had not occurred to them that they needed to seek legal advice on the issue with regards to the position under Hong Kong law.

In 2016, Ps were already in their 50's and extracting eggs from W was not an option. As H had a vasectomy in 2000, having a child using his sperm was also not an option. As such, Ps started looking into using the gametes from donors to assist them in making surrogacy arrangements.

In or around 2017, Ps contacted a fertility clinic in California and received gametes from donors to be transferred to two surrogate couples in or around April 2018. They entered into an agreement that set out all the terms and conditions of the surrogacy arrangements, including using donated sperms and eggs. Both the egg and the sperm donors fully relinquished all rights over their genetic materials and to any child born from the donated eggs and sperm, including parental rights, the right of custody and naming rights. They acknowledged that Ps would have full custody and control of all genetic material created from the eggs and sperm given to them.

On 31 July 2018, Ps entered into a gestational carrier agreement that set out all the terms and conditions of the surrogacy arrangements, including the use of sperms and eggs from the donors ("1st Agreement"). In the 1st Agreement, the surrogate mother, namely D1, expressly agreed that neither herself nor her husband D2 (then fiancé) should have any custody or parental rights over any child carried by D1 under the 1st Agreement and that Ds would give up their rights over any such child unconditionally. Ps would have all rights over the child the moment he or she was born. The 1st Agreement was signed before a notary public.

D1 gave birth to the Child in May 2019.

As Ps' other biological children are already adults, Ps then decided to have two children around the same age growing up together. On 29 August 2019, they entered into another gestational carrier agreement with Ds ("2nd Agreement"). The 2nd Agreement is identical to the 1st Agreement.

D1 conceived and delivered a boy J in July 2020.

The Child's surrogate parents, namely Ds, have voluntarily surrendered their legal rights in respect of the Child and J at the time they entered into the 1st and the 2nd Agreements. They have since made no claims of rights over the Child and J.

On 7 February 2019 and 27 May 2020 respectively, Ps obtained a judgment from the Superior Court of the State of California for the County of Los Angeles that they were the legal parents of the Child and of J at their birth. Ps were registered as the legal parents of the Child and J on their respective “Certificates of Live Birth”.

On 23 July 2019, the Child obtained a US passport and came to Hong Kong on a visitor’s visa on 31 July 2019, which permitted her to stay for a limited time (90 days) until 29 October 2019. The visa has been extended.

On 1 August 2019, Ps applied for a Hong Kong Permanent Identity Card for the Child. In a letter dated 9 October 2019, the Immigration Department asked Ps to provide all of the antenatal records of the Child’s mother with personal particulars in support of their application. As they are not the natural parents of the Child, Ps could not further proceed with the application and voluntarily withdrew their application on 16 October 2019.

Because of the travel restrictions due to the Covid pandemic, Ps were not able to fly to the United States to await the birth of J. J could only obtain a permit to enter Mainland China and to stay there for up to 2 years. H is working in the Mainland and could not come back to Hong Kong due to the Covid pandemic. Both J and KY are now in the Mainland with H.

As a result, Ps cannot proceed with an adoption application for J until he is able to come to Hong Kong.

The social investigation report (“SIR”)

As said earlier, the SIR was called for in relation to the interim arrangements of the Child.

As reported, Ps have bought 3 units at 9B, 15B and 16B in a building in a residential development in Tsuen Wan. According to the SIR, Ps’ eldest daughter and her family occupy Unit 15B. There are 3 bedrooms in Unit 9B, namely a master bedroom with an ensuite bathroom which is occupied by Ps’ second daughter and the other two bedrooms are being occupied by Ps’ two domestic helpers. Unit 16B is a duplex with two roof tops. There are two bedrooms in the lower floor and the Child occupy the master bedroom and a domestic helper occupy the other bedroom. Ps occupy the master bedroom on the upper floor and KY occupy the other bedroom on the upper floor.

Ps have employed 4 foreign domestic helpers in total and 2 drivers for the family. One helper was responsible for cooking and one was responsible for cleansing and since November 2019, the third helper was employed to take care of the Child, and the 4th helper had been employed to take care of J, who was staying at Mainland China at the date of the SIR. Although the daily caring of the Child was entrusted to the designated helper, W was reported to oversee and manage the daily arrangement of the family including the issues of the Child.

The Child would get up at around 6 am every day and went to sleep at around 9 pm. She was reported to have dinner earlier with her “nephew” (ie Ps’ eldest daughter’s son who is now about 5 or 6 years old and who is older than the Child) at around 6 pm and the Child has learnt to take food by herself.

The social work officer Ms Shum conducted only one home visit on 26 August 2022 and had observed the relationship and interaction between W and the Child. As H was in Mainland China, the social work officer only spoke to H on facetime with the Child. On the same day, the social work officer also observed the interaction between the Child and the family of Ps’ eldest daughter.

Ms Shum concluded that Ps and their eldest daughter had demonstrated their dedication in taking care of the Child and had placed her well-being as their paramount concern, and that the Child had built up a secure, trustful and attached relationship with her family members, and under their case, the Child was observed to be brought up pleasantly and healthily.

The suitability assessment report (“SAR”)

The social work officer Ms Leung reported on Ps’ respective background, their education and their employment history. Ms Leung reported, among others, on Ps’ respective health, interests, financial condition, living condition and community resources, and Ms Leung confirmed that according to Ps’ respective Certificates of No Criminal Conviction dated 22 December 2021, Ps did not have any criminal record in Hong Kong. According to Ps, they had no criminal record outside Hong Kong.

Ms Leung had also contacted a good friend of Ps who provided character reference for Ps.

In short, it was Ms Leung’s conclusion that Ps are considered to be suitable prospective adoptive parents to make arrangement for adopting the Child.

Discussion

Ps’ purpose in making the surrogacy arrangements appeared to be that they wanted to ensure that there would be some family members to care for their biological son KY. This was also referred to in both paragraph 11 of the SIR and paragraph 16 of the SAR. However, whether Ps’ purpose accords with the best interests of the Child is this Court’s main concern.

This Court is also concerned that the SIR appeared to have placed much emphasis on Ps’ financial situation and living environment. W is now 62 years old and it was reported that W herself felt she was in advanced age and was not familiar with the educational system in Hong Kong while Ps’ eldest daughter had more knowledge on children’s resources, having a son who is now about 5 or 6 years old. There seems to be no investigation as to whether W, or indeed H, will be able to meet the Child’s other needs such as emotional and educational needs.

Although there was observation on the interaction between the Child and the family of Ps' eldest daughter, there was no such observation by the social work officer on the Child's interaction with Ps' 2nd daughter, and in particular no such observation on the Child's interaction with KY who had been in Dongguan with H together with J since, apparently, early 2020. Although there was observation on the Child's interaction with H through facetime during which the Child appeared to have regarded H as father, there was no such observation on the Child's interaction with KY, or with J.

I therefore find the SIR does not contain sufficient information to assist this Court to consider the Adoption Checklist factors and/or to form any view as to whether it is in the best interests of the Child for her to be adopted by Ps and/or for leave to be given to Ps under section 23A to adopt her. Having said this, to be fair to the social work officer, the SIR was called for only for the purpose of care and control of the Child and not an in-depth or full report on the proposed adoption. Further, although it is open to this Court for a further social investigation report and/or an international social investigation report, this will no doubt cause further delay to the adoption proceedings.

It was submitted on behalf of Ps that the Child was made a ward of the Court because of her uncertain legal status. Ps are not the Child's biological parents and under the Hong Kong law, they are not the Child's legal parents. There is no uncertainty in the Child's legal status in Hong Kong. There is no sufficient evidence that the Child will be removed from the jurisdiction of Hong Kong unilaterally by H or W without the other's consent. Nor is there any sufficient evidence that the Child's visitor visa will not be extended by the Director of Immigration upon expiration. According to the SIR, the Child appears to be well cared for and there is no evidence that she needs any protection from this Court, nor is there any evidence at this stage as to why she should continue to remain a ward of this Court. The District Court (Family Court) has jurisdiction to entertain both section 5 and section 23A applications under the AO in relation to a local adoption. Only applications under Part 5 and section 23B of the AO are in the exclusive jurisdiction of the Court of First Instance (CFI). I am therefore of the view there is no reason for the Child to continue to remain a ward of this Court.

Ps has sought an order for the adoption case of FCAD 46/2021 to be transferred up. It is not clear under which statutory provision the application is being made. In my view, any application for transfer up should have been made to the judge having conduct of FCAD 46/2021. However, as pointed out by Miss Wong on behalf of the Director, referring to *Mrs B & Anor v the Official Solicitor as guardian ad litem for C* [2021] HKCFI 3534, subject to section 4A(2) of the AO and Rule 17(a) of the Adoption Rules, Cap 290A ("AR"), the proper venue for hearing of an adoption application is the District Court.

In any event, even if this Court has inherent jurisdiction in these wardship proceedings to order a transfer up, there is no evidence at this stage that there is likely to be any opposition from the biological parents of the Child or the gamete donors (if they have any legal rights) to the proposed adoption. At present, I can see no sufficient reason or ground for FCAD 46/2021 to be transferred to the CFI. I decline to make such an order.

Ps also seek leave to add the Director as the respondent in the adoption proceedings in the event those proceedings are transferred up. As I decline to make the order for the transfer up, this is no longer an issue for this Court to consider. However, it is not clear why this order is necessary, whether there is a transfer up or not. Ps have not produced to this Court copies of any documents filed in FCAD 46/2021. This Court has no knowledge as to who is the guardian ad litem of the Child in that application. Neither Ps should be the guardian ad litem. Under Rule 8 of the AR, normally, the Director is to be the guardian ad litem subject to Rule 9 thereof and under Rule 13, being the guardian ad litem, the Director has the duty to investigate as fully as possible all circumstances relevant to the proposed adoption with a view to safeguarding the interests of the Child.

I am thus not clear why Ps would need to join the Director in the FCAD 46/2021. Ps should also refer to paragraph 31 of the judgment of Au-Yeung J. in the case of *Mrs B v C*. In any event, this is an application for the adoption judge to consider.

Having considered all the circumstances of this case, in my view, the appropriate course for this Court is to debar the Child, and Ps are free to make their section 23A application afresh in the District Court. I will grant leave to Ps to produce copies of any affirmations or documents filed in these proceedings for the purpose of their application.

Finally, Ps have applied for an order that no person is allowed to have access to the court files and/or documents without leave of the court. As these are wardship proceedings and all hearings were held in chambers not open to public, no person should be allowed to search the documents filed in these proceedings. I do not see why it is now necessary for Ps to apply for any such order.

Order

In light of all said above, the order I make is as follows:-

The Child do cease to be a ward of this court.

Any application under section 23A and/or section 5A of AO is to be made in the Family Court of the District Court.

Leave to Ps to produce copies of any affirmations or documents filed in these proceedings including the SIR and SAR for the purpose of their application.

no order as to costs.

Although this decision is delivered in chambers not open to public, I authorize a copy of this decision, which has been anonymized, to be published and uploaded to the Legal Reference website of the Judiciary of Hong Kong, subject to any written objections received within 7 days hereof.

(Bebe Pui Ying Chu)

Judge of the Court of First Instance

High Court

Mr Philip J Dykes SC and Ms Christina Tseng, instructed by Chow & Chow Solicitors, for the 1st and 2nd Plaintiffs

The 1st Defendant, acting in person and absent

The 2nd Defendant, acting in person and absent

Ms Christine Wong, Senior Government Counsel, Department of Justice, for the 3rd Defendant

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