

HONG KONG / JUDGMENT

S v. J

COURT

Court of First Instance

DECIDED

8 September 2017

CASE / FILE NUMBER

HCMP1857/2016

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bjbj HCMP 1857/2016 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO 1857 OF 2016

IN THE MATTER of an application for an order to be made providing for the children namely
EJC, a boy and JJC, a girl both born on 7th September 2013 to be regarded in law as the children
of the parties to a marriage and to make the children wards of 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 Plaintiff and J Defendant DIRECTOR OF IMMIGRATION Intervener

Before: Hon Au-Yeung J in Chambers (Not Open to the Public) Date of Hearing: 5 September 2017
Date of Judgment: 5 September 2017 Date of Reasons for Judgment: 8 September 2017

REASONS FOR JUDGMENT

INTRODUCTION

The parties are husband and wife. They have 2 children of the family, a boy and a girl (the Children) both born through surrogacy. By this originating summons, the plaintiff (the Husband) sought to make the Children wards of court and applied for a parental order for the Children under section 12 of the Parent and Child Ordinance (), Cap 429. The Defendant (the Wife) had not joined in the application although she had told the court orally at the pre-trial review that she would join in. The issues were:

- (1) Whether the court could proceed with the application for a parental order without the Wife joining as an applicant?
 - (2) If a parental order was not made, what orders should be made to secure the welfare of the Children?
 - (3) In relation to (2), what was the immigration status of the Children? If they were Hong Kong permanent residents, what was its effect on PCO and wardship? After the hearing, I gave leave to the Husband to withdraw the application for a parental order. I made the Children wards of the court. I also extended the access to the Husband. I ordered the Wife to bear the costs of this hearing with certificates for 2 counsel. Here are my reasons for the decision.
- Undisputed facts The Husband is now aged 35 and the Wife 41. They were married in Guam in 2011. The Husband was born in Hong Kong and is a Chinese national. He moved to Canada with his family at the age of 9 and has obtained Canadian citizenship. The Wife is a Canadian citizen by birth. Both of them are Hong Kong permanent residents. In 2013, after conducting research on their own and without proper legal advice, the parties made surrogacy arrangements in India with 2 surrogate mothers. This was one of the few countries where the genetic parents names would appear on a child s birth certificate. The Children were conceived using gametes of the Husband and Wife. On 7 September 2013, the Children were born to 2 surrogate mothers on the same day in a hospital in India. On 11 September 2013, the Children obtained birth certificates in India. On 17 October 2013, the Canada Embassy in India issued temporary passports to the Children. On the following day, the Children were taken from India to Hong Kong on the strength of their Canadian passports and were granted visitor visas for their entry into Hong Kong. On 10 February 2014, the Immigration Department approved the Children s applications for verification of eligibility for permanent identity card, based on their genetic link to the Husband. On 26 November 2015, the Wife filed a petition for divorce in the Family Court and sought, amongst others, custody of the Children. The lack of a parental order was raised by Her Honour Judge Melloy in the divorce proceedings. Consequently, the Husband took out this originating summons on 21 July 2016. APPLICATION FOR A PARENTAL ORDER Section 12 of the 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 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.
- (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. It was clear from the wording of section 12(2) of the PCO that an application for a parental order by a single applicant was incompetent. This was also the position in UK: *B v C (Surrogacy: Adoption)* [2015] 1 FLR 1392; *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73. In each of those cases, the child was conceived using the male applicant's sperm and a donor's egg. Each of the male applicants was unmarried. The courts declined to make parental orders. Both before and during the course of these proceedings, the Husband's side had very fairly urged the Wife to join him in this application and asked her to seek independent legal advice. The Wife was granted legal aid for the present proceedings but prior to the pre-trial review on 13 April 2017, she decided to act in person. At the pre-trial review, the Wife orally said that she would consent to making the application. However, at this hearing, the Wife said that she was very confused and did not understand why she had to go through all these and the implications on the Children and the parents. She still wanted to apply for legal aid. She considered that the future of the Children was in Canada. Mr Todd appearing for the DOI had very kindly ascertained from the Wife that her concern was that an application for a parental order might affect her right to remove the Children to Canada. Mr Todd informed her (correctly in my view) that the parental order would not so affect her. Nor would her decision not to join in this application give her any advantage. Despite that, the Wife decided not to join in. This court has already explained in previous hearings the need for a joint application to be made under PCO. Mr Dykes SC has prepared a full set of submission for the hearing on 14 December 2016. He very helpfully summed up the gist of his submission in laymen's terms and a copy of the summary was given to the Wife. Despite all the time given to her, the Wife apparently did not understand the significance of getting a parental order. She had declined legal aid and there was no point adjourning the proceedings for her to apply for legal aid again. She did nothing to apply for removal of the Children to Canada either. Accordingly, I gave leave to the Husband to withdraw the application for a parental order. WHAT ORDERS SHOULD BE MADE TO SECURE THE WELFARE OF THE CHILDREN? Three options had been considered:

- (1) Application by the Official Solicitor for an order under section 6 of PCO;
- (2) Appointment of a guardian for the Children; and
- (3) Adoption. Option 1: Official Solicitor to make an application under section 6 of the PCO
Section 6 PCO provides as follows:
 - (1) Any person may apply to the court for a declaration that a person named in the application is or was in law his parent; he is the legitimate child of his parents; or he has become, or has not become, a legitimated person.
 - (2) A court shall only have jurisdiction to entertain an application under this section, if at the date of the application, the applicant is domiciled in Hong Kong; has been habitually resident in Hong Kong throughout the period of 1 year ending with that date; or has a substantial connection with Hong Kong.
 - (3) Where on an application for a declaration under this section the truth of the proposition to be declared is proved to the satisfaction of the court, the court shall make that declaration unless to do so would manifestly be contrary to public policy. The Official Solicitor did not represent the Children but was here to assist the court as an amicus. She has declined to make a section 6 order, as it would circumvent section 12 of PCO, as explained in her report dated 6 January 2017. This is not a judicial review of the Official Solicitor's decision, which in my view was a rational one anyway. Section 6 PCO appeared to cover children born out of natural births and the applicant need not be a parent. However, if the Wife would not join in making the application under section 12, there was no reason for the Official Solicitor to force an application under section 6 against her wishes. The first option was not feasible. Option 2: Appointment of guardian Under section 8D(2)(b) of the Guardianship of Minors Ordinance, Cap 13 () the court can appoint a guardian if a child does not have any parent, guardian, or other person having parental rights with respect to the minor. Under section 9(1) of PCO, the woman who has carried a child as a result of placing in her of an embryo or sperm and eggs, and no other woman, is to be regarded as the mother of the child. This section 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: section 9(3) of PCO. Under section 10(2) of PCO, if at the time of the placing in the woman of the embryo or the sperm and eggs, the woman was a party to a marriage and the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, the other party to the marriage shall be regarded as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs. Under section 10(6) of PCO, where the sperm of a man other than the other party to the marriage was used, that man is not to be regarded as the father of the child. Pursuant to section 11 of PCO, where a person is to be regarded as the mother or father of a child by virtue of section 9 or 10, that person is to be regarded in law as the mother or father of the child for all purposes. Where a person is not to be regarded as the mother or father of a child, that person is to be regarded in law as not being the mother or father of the child for any purpose. The combined effect of

those sections in PCO was that the Children's legal parents were their birth mothers and their husbands in India. The legal parents were contactable. Their relinquishment of parental rights was not recognized in Hong Kong. The court had no jurisdiction to make any guardianship order under section 8D(2)(b) of GMO. Option 3: Adoption The parties were not recognized as the legal parents and had no rights over the Children. They may consider using adoption as a long term solution for the Children to have a proper and stable family life. That was the position achieved in B v C. Under section 5(1)(d) of the Adoption Ordinance, Cap 290 (), a sole applicant aged 25 or above may adopt. A male sole applicant shall not be allowed to adopt a female infant except in special circumstances. If the applicant is married, consent from the spouse is required unless the couple is separated and the separation is likely to be permanent. Of course an applicant has to go through assessment under section 27 of AO. As the application for adoption was not before the court, I shall not make further comments. The Children were thus made wards of court under the inherent jurisdiction of the court, to fill the lacuna of the law until better arrangements are made as to their legal identities and status. Care and control was given to the Wife with access to the Husband. For the avoidance of doubt, the parties or any of them are at liberty to apply for adoption. They should act promptly in the interests of the Children.

PERMANENT RESIDENT STATUS OF THE CHILDREN Under Article 24 of the Basic Law (): The permanent residents of the Hong Kong Special Administrative Region shall be:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region; (2)
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2); (underline added) This was implemented by paragraph 2 of the Schedule the Schedule) to the Immigration Ordinance (Cap 115), which provides, amongst others, that:
 - (c) A person of Chinese nationality born outside Hong Kong before or after the establishment of the Hong Kong Special Administrative Region to a parent who, at the time of birth of that person, was a Chinese citizen falling within category (a) or (b) (underline added) is a permanent resident. Paragraph 1(2) of the Schedule further provides: The relationship of parent and child is taken to exist as follows
 - (a) of a parent and child, between a person and a child born to such person in or out of wedlock; (underline added) For the purpose of Article 24 BL and paragraph 2 of the Schedule, Article 5 of PRC nationality law () is applicable to determine whether a person born outside Hong Kong is of Chinese nationality: Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality. (underline added) DOI was of the view that immigration status, on the basis applied for, did not depend on the existence of parenting rights but on the basis of an issue of fact whether the child was of his

or her alleged parents. Questions like best interests of the child or rights under PCO were irrelevant. The phrase born in Article 24 BL refers to natural children: *Tam Nga Yin & ors v Director of Immigration* [2001] 2 HKLRD 644. Born and natural refer to parent and child with blood/genetic relationship, not the method of delivery of the child, nor by way of legal fiction: *Xie Xiaoyi & ors v DOI* [2000] 2 HKLRD 161, 173G-J, Leong JA. DOI could request for DNA tests of paternity pursuant to section 2AB(7) of the Immigration Ordinance: Where the Director in processing an application made under subsection (1) is not otherwise satisfied that the applicant is born of a person of whom the applicant claims to be born, the Director-

- (a) may request the applicant and the person to undergo a genetic test conducted in such manner as the Director may specify by notice published in the Gazette to establish the claimed parentage; and
- (b) shall consider the result of the test and determine the application accordingly. DOI had asked for DNA paternity test reports to show the genetic relationship between the Husband and the Children. The probabilities of the Husband being genetically related were found to be over 99.99% for each child. DOI considered that the Children fell within category (c) of Article 24 BL, ie born outside Hong Kong of the Husband who at the time of birth of the Children was a Chinese citizen. That was based on the genetic link to the Husband but not the Wife (despite her provision of eggs to the surrogates), as the Wife did not submit to a status verification procedure. According to the Mainland legal experts, whether the Children born out of surrogacy had Chinese nationality was not a settled legal question and would depend on the approach of the Mainland courts in interpreting parents under NL5. Biological connection was an important factor in determining parentage in Mainland China. Both of the experts were of the opinion that the commissioning parents were the legal parents. This case was not a judicial review of the DOI's decision. The soundness of the DOI's reasoning may have to be tested in an appropriate case. Suffice to say that in the context of this case, notwithstanding that no parental order could be issued, the Children could permanently reside in Hong Kong. The Hong Kong courts could exercise their jurisdiction over these Children. The paradox was of course that notwithstanding the Children's relationship to the HKSAR was established, their legal relationship with the parties who have been taking care of them was not. Access At the request of the Husband, I have extended the staying access and granted one dinner access per week to the Husband. The Children started K2 just a few days ago. Their timetables were still flexible. Access during the summer holidays largely worked well. As the Wife confirmed, there were occasions that the Husband did not exercise access but there were also others when he wanted more and was given more. There was a professional mediator to help the couple. I am of the view that the Husband (who had flexible working hours as a consultant) should be given as much access as possible. I therefore extended the terms of access. Costs The Husband and his lawyers had used their best endeavours to try and persuade the Wife to do what was in the best interests of the Children. But for her indication of consent, the present application would have ended at the pre-trial review. The Wife did not make use of the legal aid granted to her to seek legal advice. I therefore ordered the Wife to bear costs of this hearing. I thank

counsel, the Official Solicitor and the DOI for their helpful input. (Queeny Au-Yeung) Judge of the Court of First Instance High Court Mr Philip Dykes, SC and Ms Christina Tseng, instructed by Boase, Cohen & Collins, for the plaintiff The defendant appeared in person Ms Juliana Chan Miu Kuen of the Official Solicitors Mr Richard Todd and Ms Grace Chow, instructed by the Department of Justice, for the Intervener PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V ~tgZt h`D8 h`D8 raYLF gdZ{ vg[gL h0AE gdMNJ hMNJ hgZ gdw= gd B gdw= hqHL hd-t h#AD gd#AD gd?C gd#AD gdJg h#AD gdR8 gdw= gd?C gd?C h#AD |tm|m hy#V hy#V hy#V h#CK gd J gd J h#CK h#CK gd!8 gdw= gd J gd J ~uj_jWOG h.Ws h0AE hMNJ znfnYn h P5 hd-t hd-t hd-t h9|> gd\ gd!8 h P5 gd!8 hd-t :p/D [Content_Types].xml _rels/.rels theme/theme/themeManager.xml K Y, sQ}# theme/theme/theme1.xml \$O}) Xp90 +PHI| PP yu 9xu5 fs+W VF7H q=. 8}d- qyI@ j!Q_ jyV` |PZ+ T ""p <4V O&x\$ A8>v ;EUC n 8r *~P(5 .}x E /,EE} theme/theme/_rels/themeManager.xml.rels 5 6?\$Q K(M&\$R(.1 [Content_Types].xmlPK _rels/.relsPK theme/theme/themeManager.xmlPK theme/theme/theme1.xmlPK theme/theme/_rels/themeManager.xml.relsPK <?xml version="1.0" encoding="UTF-8" standalone="yes"?> <a:clrMap xmlns:a="http://schemas.openxmlformats.org/drawingml/2006/main" bg1="lt1" tx1="dk1" bg2="lt2" tx2="dk2" accent1="accent1" accent2="accent2" accent3="accent3" accent4="accent4" accent5="accent5" accent6="accent6" hlink="hlink" folHlink="folHlink"/> &tBL ` `#- ,>2j ddw4 BXj@ ITmDb g|JW XLKY` P-^o( g|JW XLKY ddw4 ` `#- BXj@ P-^o ITmD B+" HCAP 8/2007 Judiciary Normal.dotm Betty Microsoft Office Word Judiciary Hong Kong HCAP 8/2007 Title <?xml version="1.0" encoding="UTF-8" standalone="no"?><b:Sources SelectedStyle="\APA.XSL" StyleName="APA" xmlns:b="http://schemas.openxmlformats.org/officeDocument/2006/bibliography" xmlns="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"></b:Sources> <?xml version="1.0" encoding="UTF-8" standalone="no"?> <ds:datastoreItem ds:itemID="{CEDC034F-5BBD-4922-B03B-85BCAE7E0E4F}" xmlns:ds="http://schemas.openxmlformats.org/officeDocument/2006/customXml"><ds:schemaRefs><ds:schemaRef ds:uri="http://schemas.openxmlformats.org/officeDocument/2006/bibliography"/></ds:schemaRefs></ds:datastoreItem> Microsoft Word 97-2003 Document MSWordDoc Word.Document.8

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