



BE ENGAYGED

#### **4. MOOT PROBLEM<sup>1</sup>**

FACV 52/2022

IN THE COURT OF FINAL APPEAL OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
FINAL APPEAL NO. 52 OF 2022 (CIVIL)  
(ON APPEAL FROM CACV 150 OF 2021)

BETWEEN

LIAM WANG, by his next friend DAVINA WANG Applicant

and

SECRETARY FOR JUSTICE Respondent VIVIAN XU Interested Party

#### **MOOT PROBLEM**

##### **Facts**

1. Davina is a female Hong Kong permanent resident (with BNO status) born in 1992. She identifies as bisexual. In 2010, she commenced her undergraduate degree in psychology at University College London.
2. In July 2011, Davina attended the annual London Pride Parade, where she was introduced through a mutual friend to Vivian, another permanent resident of Hong Kong (with BNO status) studying mathematics at King's College London. Vivian was born in

<sup>1</sup>With heartfelt gratitude we thank Dr Amy Barrow from Macquarie University and Azan Marwah from Pantheon Chambers for drafting this problem.

1990. She was assigned male at birth but at the age of 12 she started to experience gender dysphoria and realized that she identified as female. When they met, Vivian was in the process of saving up money for her gender-affirming surgery (also known as sex reassignment surgery), as she planned on commencing the procedures in a few years' time. They bonded over their shared passion for basketball and photography and soon developed a passionate and stable romantic relationship throughout their studies at university and after graduation.

3. In 2014, Vivian and Davina returned to live in Hong Kong, where Vivian started working full-time at a multinational company and Davina became a part-time research assistant. As their financial situation improved, Vivian underwent gender-affirming surgery at Ruttonjee Hospital in December 2014. Shortly afterwards, Vivian's HKID card was reissued with female gender markers.
4. In July 2015, Davina was appointed as a lecturer at the University of Hong Kong. Vivian and Davina then decided that they wanted to have children. However, since Hong Kong hospitals were unwilling to provide access to reproductive technology procedures for unmarried couples, they put off their dream and decided to wait until they were able to be married.
5. In July 2017, Vivian and Davina both took a one-year sabbatical leave from their jobs and relocated to the United Kingdom. In December 2017, they married at Chelsea Old Town Hall under the Marriage (Same Sex Couples) Act 2013 (UK).
6. In early 2018, they visited the Wolfson Fertility Centre at Hammersmith Hospital, and Davina underwent several rounds of IVF treatment, eventually conceiving using her

own egg and anonymous donated sperm. They returned to Hong Kong in July 2018 to resume their jobs.

7. In January 2019, Davina gave birth to a son, Liam, at Queen Mary Hospital.
8. After Davina's labour, when Vivian was holding Liam, one of the nurses remarked that it was sad that Vivian's name would not be allowed on the birth certificate. When Vivian explained that the couple were legally married and that they had obtained IVF treatment together in London, the nurse said she would speak to her supervisor and see what she could do. Later on, once the nurse had spoken to her supervisor they said it would be against the law for them to give the couple any documentation recording Vivian as a parent, and that they should take it up with the Immigration Department.
9. Shortly afterwards, when Vivian and Davina attended the Births and Deaths General Register Office in Queensway, they were told by the staff that only Davina's name could be recorded as Liam's parent on his birth certificate. Both Davina and Vivian were distressed and upset by the encounter. Shortly afterwards, Davina experienced a depressive disorder and had to resign from her position at the University.
10. In May 2019, Vivian and Davina inquired with the Adoption Unit of the Social Welfare Department about the possibility of step-parent adoption by Vivian of Liam. However, the social worker assigned informed them that adoption by a step-parent was only available to married couples, in a marriage recognized under Hong Kong law – and would not include a same-sex marriage celebrated in the United Kingdom.

## Proceedings

11. In June 2019, Davina (acting as next friend for Liam) applied for and was granted leave to bring judicial review proceedings against the Secretary for Justice, seeking declaratory relief that, consistent with Article 25 of the Basic Law and Articles 1 and 22 of the Hong Kong Bill of Rights, the terms ‘married’, ‘marriage’, and ‘spouse’ in the Adoption Ordinance (Cap 290) (“**AO**”) should be read to include parties to a same-sex marriage performed abroad.
12. At the full hearing of the judicial review proceedings in March 2020, the Secretary for Justice argued that there could be no discrimination as the right to raise a family is covered by Basic Law Article 37, which is a *lex specialis*, limiting such constitutional protection to opposite sex couples. Further and alternatively, the Secretary argued that limiting joint adoption to heterosexual married couples was justified and proportionate to protect traditional families, and to protect children who would be better protected by parents in lawful marriages.
13. Vivian, who was an interested party represented separately, argued that she should be recognized as the ‘father’ of Liam under s.10(3) of the Parent and Child Ordinance (Cap 429) (“**PCO**”), on the basis that failing to recognize her as a parent of the child was discriminatory against her on grounds of her transgender status and contrary to the legislative intent.
14. In her judgment, granting the declaration sought, Madam Justice Chew held in favor of Liam and Davina, that there should be a declaration, as a blanket ban on second-parent adoption by same-sex couples was disproportionate and contrary to the best interests of

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15. The Secretary was granted leave to appeal to the Court of Appeal, whereupon Vivian filed a Respondent's Notice, respectively challenging the decision of Chew J. Both were rejected but the Court of Appeal then gave leave to appeal to the Court of Final Appeal, certifying the following questions of great and general public importance.

### **Questions of Great and General Public Importance**

16. The questions approved by the Court of Appeal are as follows:

- (1) Should the words 'spouse' (and the associated terms 'married' and 'marriage') be interpreted within the Adoption Ordinance (Cap 290) to include a party to a same-sex marriage performed abroad?
- (2) Should section 10(3) of the Parent and Child Ordinance (Cap 429) be interpreted to include the transgender female partner of a woman who together with her obtained fertility treatment services?