

For hearing on 20 August 2023 at 1:45 p.m.

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

1st Appellant

VIVIAN XU

2nd Appellant

and

SECRETARY FOR JUSTICE

Respondent

SKELETON ARGUMENTS FOR THE APPELLANTS

A. Overview

1. This document herein contains the Appellants' submission in relation to the judgment made by Madam Justice Chew in the Court of Appeal ("**the Judgment**"). In the Judgment, Chew J ruled on two separate issues pertaining to the family relationship of the Appellants:-
 - a. The first issue addressed is whether Ms. Davina Wang ("**1st Appellant**") and Ms. Vivian Xu ("**2nd Appellant**") should be recognized as spouses under the Adoption Ordinance (Cap 290) ("**AO**").

- b. The second issue addressed is whether the 2nd Appellant should be recognized as the father of Liam (“**the Child**”) under the Parent and Child Ordinance (Cap 429) (“**PCO**”).

B. Background

2. In July 2017, the 1st Appellant (a cisgender woman) and the 2nd Appellant (a transgender woman with female gender marker in HKID) travelled to the United Kingdom and married each other, under the Marriage (Same Sex Couples) Act 2013. Shortly after, the 1st Appellant sought for IVF treatment in the United Kingdom, where the sperm of an anonymous donor and her own egg were used to conceive a child.
3. In January 2019, the 1st Appellant gave birth to the Child in Hong Kong. Upon birth of the Child, the 1st and 2nd Appellant were informed by various departments that only the 1st Appellant will be recorded as the parent in the Child’s birth certificate, and the option of step-parent adoption is unavailable to the 2nd Appellant, as a recognized marriage is a prerequisite for step-parent adoption (same-sex marriage celebrated in the United Kingdom is not recognized).
4. In June 2019, the Appellant commenced judicial review proceedings against the Respondents, arguing for the inclusion of same-sex married couples performed abroad in the terms ‘spouse’ and ‘marriage’ under the AO, as the contrary would be inconsistent with Art. 25 of HKBL and Arts. 1 and 22 of HKBOR. The Appellants contend that the constitutional protection for marriage only applies to opposite sex couples, as such, the exclusion of same-sex married couples in the AO is not discriminatory, but justifiably and proportionately protects children in lawful marriages.
5. The 2nd Appellant (acting as an interested party with separate representation), argued that she should be recognized as the ‘father’ of the Child under s.10(3) of the PCO, as failure to do so is discriminatory and contrary to legislative intent.

6. Chew J, sitting in the Court of Appeal, gave the following rulings:-
- a. **Firstly**, the declaration sought by the 1st Appellant was granted, as a “*blanket ban on second-parent adoption by same-sex couples [under the AO] was disproportionate and contrary to the best interests of the child.*” (“**the 1st Decision**”)
 - b. **Secondly**, the 2nd Appellant’s argument that she should be recognized as the father of the Child is rejected. Being a transgender woman, the 2nd Appellant is “*a ‘woman’ for all legal purposes.*” (“**the 2nd Decision**”)
7. The Appellant’s submissions shall anchor itself upon two assertions:-
- a. The 1st Decision should be **upheld**, not only was the word ‘spouse’ not expressly defined by the AO, restricting the definition of terms such as ‘marriage’ or ‘spouse’ constitutes disproportionate discrimination against same-sex spouses whilst acting in contrary to the best interests of the Child.
 - b. The 2nd Decision should be **quashed**. The courts shall be empowered to read in the legislative provisions to ensure relevant laws are in compliance with the relevant constitutional rights enshrined by the HKBL and HKBOR.

C. Dismissing the Respondent’s appeal on the 1st Decision

8. The Appellant’s argument against the Respondent’s appeal shall be as follows:-
- a. **First**, the words ‘spouse’ and ‘marriage’ shall be interpreted to include same-sex marriage, as the blanket exclusion of same-sex couples from adoption violates the Art. 25 of the HKBL and Arts. 1 and 22 of the HKBOR.
 - b. **Second**, there is no cogent explanation justifying the how the differential treatment is relevant for the best interest of the child.

C.1 'Spouse' in the AO should include same-sex spouses

9. The Appellants submit that the Judgment demonstrates Chew J's correct exercise in her judiciary discretion in expanding the constitutional rights enshrined under HKBL and HKBOR to spouses in a same-sex marriage. Even if we base the analysis purely on the correct approach to interpretation, including couples in a same-sex marriage in the category of 'spouse' remains faithful to the legislative intent.

10. Whilst strict adherence to the intent of the Matrimonial Causes Ordinance (Cap. 179) in determining the legal status of marriage would mean '*the voluntary union for life of one man and one woman to the exclusion of all others*' (a maxim that has been reiterated in s.4 of the Marriage Reform Ordinance and s.40 of the Marriage Ordinance), s.19 of the Interpretation and General Clauses Ordinance (Cap. 1) [AB/428], "*an ordinance shall...receive such **fair, large, and liberal construction** and interpretation as will best ensure the attainment of the object of the Ordinance according to **its true intent, meaning, and spirit.***"

11. Ordinarily, 'spouse' refers to a party to **any** marriage. As such, it would be unduly restrictive to use this 'liberal' interpretation process to confine the meaning of 'spouse' and 'marriage' to deprive the rights of a same-sex couple.

12. It is also submitted that the inclusion of same-sex married couples under the context of the AO does not betray the true '*intent, meaning and spirit*' of the AO [AB/415].
 - a. **Firstly**, the word 'spouse' is not explicitly defined, and they have not been gendered. As per s.4(b), the courts are empowered to make an order to authorize the adoption for 'applicants who apply jointly as 2 spouses – **not** '*a father and a mother*' or '*the male and female parent*'. As such, so long as the parties seeking adoption are protected under the institution of monogamous marriage, the genders of these persons are not under the paramount consideration of the legislative intent.

- b. **Secondly**, the highly similar nature between same-sex and opposite-sex marriage imparts individuals in the marriage with the same rights, obligations, and vulnerabilities. Apart from the gender of the parties, marriages celebrated in the UK is, in form or substance, identical to each other. Even if a same-sex marriage falls outside the stringent definition of the legislation, providing same-sex couples the right to adopt stays true to the spirit of the ordinance by protecting individuals in comparable situations.

13. Following the same vein, it is no surprise that the highly similar status of same-sex and opposite sex marriage resulted in the readiness of Hong Kong courts to accept members of same-sex marriage as ‘spouses’. In *Leung Chun Kwong v Secretary for the Civil Service* [2019] 22 HKCFAR 127 [AB/3], it has been stated that same-sex couples married abroad are, *prima facie*, parties to a marriage. Similarly, in *Ng Hon Lam Edgar v The Hong Kong Housing Authority* [2021] HKCFI 1812 [AB/44], policies excluding same-sex spouses as a ‘spouse’ under the Home Ownership Scheme was unlawful. In *QT v Director of Immigration* [2018] HKCFA 28 [AB/121], it was held unlawful to exclude same-sex couples from policies pertaining to spousal employment benefits.
14. Whilst Hong Kong courts have rejected the right to introduce a new policy like same-sex marriage (see: *MK v HKSAR* [2019] HKCFI 2518) [AB/140], it affirms that the court has a role to ‘change *existing social policy*’. As same-sex spouses are in comparable situations with opposite-sex spouses in the context of adoption, it could be said that changing this policy could be justified.
15. In relation to how this ‘*liberal*’ interpretation is ‘*truthful*’ to the legislative intent, it should be averred that if the legislation’s objective is to protect individuals with the same nature, rights, obligations, and vulnerabilities, then accepting same-sex marriage is, objectively, staying true to the legislative intent.

C.2 Infringement the Right to Equality

16. The Appellants also submit that the failure to allow same-sex spouses to adopt amounts to an unjustifiable, disproportionate act of discrimination.
17. The correct approach to assess the existence of discrimination is succinctly presented in *Ng Hon Lam Edgar* [AB/21],

C2.1 Comparable Position and Differential Treatment

18. The first pertinent issue is to determine if the Appellants would have been subject to differential treatment in relation to the person in a comparable position. As noted in the previous submissions, a same-sex marriage displays the same nature, rights, obligations and vulnerabilities with a heterosexual marriage; thus, it can be rightly said that both are in a comparable position *vis-à-vis* each other.
19. The next issue would be to determine whether the differential treatment exists. Under s.13(2) of the AO, heterosexual spouses can adopt the child as lawful parents as if the child has been born in a lawful wedlock regardless of the genetic relations of the second parent, same-sex couples cannot, rendering this a manifest example of differential treatment.

C2.2 Legitimate Aim, Rational Connection and Proportionality

20. The next step is to determine if such treatment is justified under the four-step justification test, per *Leung Chun Kwong* [AB/10].
21. Applying the current facts to this test would reveal that such differential treatment cannot be justified due to the following reasons:-
22. **First**, the blanket exclusion of same-sex couples from adoption did not have a genuine need, per *Secretary for Justice v Yau Yuk Lung Zigo* [2007] 10 HKCFAR 335 [AB/171]. Per *AA v BB* [2021] HKCFI 1401, the courts have recognized that same-sex parents, even without genetic relations with the child, can have a vital role

in the process of social and psychological parenting [AB/207]. Per a review by Manning¹, Fetto², and Lamidi³ [AB/429], a compilation of numerous studies, literature, reviews and books have shown that children residing within same-sex parent households ‘fare just as well as those children residing in different-sex parent households over: academic performance, cognitive development, social development, psychological health, early sexual activity and substance abuse.’ As such, excluding same-sex parent adoptions does not specifically target or mitigate issues in all parent-child relationships.

23. Additionally, *Ng Hon Lam Edgar* emphasized the importance of using ‘*impact analysis and concrete empirical studies to elucidate how the differential treatment would have any meaningful positive impact, and if so, to what extent.*’ [AB/37] Without this calibre of evidence, the Respondents cannot show such differential treatment has a legitimate aim. It should be averred that the present case can even be further distinguished from *Infinger, Nick v The Hong Kong Housing Authority* [2020] HKCFI 329, which already supports a higher degree of proof required by policymakers to justify the purported legitimate aim of their policy: where *Infinger*’s respondents deals with the pressures of allocating a *highly scarce resource* [AB/235], no economic pressures are present in justifying the exclusion of same-sex adoptions.
24. **Second**, due to the reasons above, there cannot be a rational connection to the purported legitimate aims when justification for their existence is built on tenuous grounds.
25. **Third**, such differential treatment is not ‘no more than necessary’. As per *QT*, it is averred that a blanket ban would create ‘*irrebuttable presumption that no [persons of a specified group] could make suitable adoptive parents.*’ [AB/107] For the case at hand, unless there is concrete empirical analysis to illustrate the veracity of this sweeping presumption, the blanket ban on same-sex spouse adoptions would

¹ Wendy. D Manning, Distinguished Professor of Sociology in Bowling Green State University; PhD in Sociology at University of Wisconsin-Madison;

² Marshal Neal Fetto, PhD at Bowling Green State University

³ Esther Lamidi, Professor at the Department of Sociology at University of Colorado Colorado Springs, PhD at Bowling Green University.

disproportionately discriminate against same-sex spouses with the capacity to make suitable adoptive parents. This blanket ban on adoption also survives the ‘intense scrutiny’ required by *Fok Chun Wa v Hospital Authority* [2012] 15 HKCFAR 406 [AB/65, 287], pertaining to differential treatments that strikes at the heart of a core value such as an individual’s sexual orientation.

26. **Fourth**, depriving same-sex couples with the rights to adopt is oppressive and unfair. Whilst it can be averred that the non-gestational parent of a same-sex marriage can, instead, apply for a guardianship order (thereby giving effect to a different type of relationship), this arbitrary legal invention to distinguish between ‘parent’ and ‘guardian’ is also ruled not to be in a child’s interest [AB/213]. Given that there are no legal alternatives means for adoption, same-sex spouses are unfairly oppressed.

D. Appealing against the 2nd Decision

27. The Appellants submit that the 2nd Decision blatantly discriminates the Appellants on the grounds of her status as a transgender woman for the following reasons:
- a. **First**, based on a literal reading of the PCO, ‘father’ can refer to the non-gestational second parent that is in a spousal relationship with the gestational parent.
 - b. **Second**, mandating that a non-gestational parent to be of a certain gender is unfair and oppressive.

D1. The 2nd Appellant should be considered as a ‘father’

28. There are two reasons as to why the 2nd Appellant should be considered as a ‘father’ and be granted with parental rights:-
- a. Firstly, there can be a material difference between a person’s legal gender and their relation to the gestational process of the child.

- b. Secondly, given the PCO has demonstrated a clear purpose, remedial techniques should be adopted by the court to strike out offending provisions.
29. Whilst it was once held that full sexual reassignment surgery is required for the gender markers to be changed, the longstanding rule has been overturned in ***Q v. Commissioner of Registration [2023] HKCFA 4 [AB/351]***, where it was ruled that it was no longer a requirement female-to-male transgender persons to undergo genital removal surgery to gain legal status as a male. Thus, a person who has undergone legal transition in Hong Kong can now retain their pre-transition genitals.
30. As per ***TT v YY [2019] EWHC 2384 [AB/388]***, it was held by the Court of Appeal in the United Kingdom that a transgender man, having given birth to the child, cannot be legally recognized as the ‘father’ (and transgender men who have not given birth is not construed as a ‘mother’); hence, it is accepted in law that there may be male mothers and female fathers.
31. The element that the legal parental role is reflective of their gestational process is also hinted in the PCO **[AB/421]**. For instance, ‘mother’ in s.9(1) is defined as having ‘*carried a child as a result of the placing in her an embryo or of sperm and egg.*’ The father, contrarily, is presumed to be the man married to the mother and fulfilled the obligations for the child’s birth registration. (s.5(1)(a)&(b) of the PCO).
32. Considering these s.10(2) and (3), in isolation, would reveal that the 2nd Appellant actually fulfil the criteria as a ‘father’ for the following reasons:-
 - a. **First**, s.10(2)(b) did not necessitate a specific gender to ‘*the other party*’ to the marriage. As such, it could mean that a ‘*woman for all legal purposes*’ could be construed and recognized as a ‘*father*’.
 - b. **Second**, genetic relation with the child is irrelevant in establishing the ‘father’ at this instance, as repeatedly stipulated in s.10(2)(b) and s.10(3)(b). Thus, this establishes the validity of status despite the sperm used for fertilization was anonymously donated.

- c. **Third**, the entire process was completed with the 2nd Appellant's consent and she had obtained services with the 1st Appellant together (satisfying s.10(3)(a)).

33. Considering the fact that the 1st and 2nd Appellant are, in fact, married during the time of insemination, and the 2nd Appellant consenting to the fertility treatment, the statute reads clearly to mean the 2nd Appellant is the 'father'.

34. In light of recent developments in case law, legal gender would no longer equate to the parental role of a transgender person. As such, the fact that the 2nd Appellant is '*for all legal purposes a woman*' cannot justify why she also cannot be a father.

D2. **It is oppressive to mandate the 2nd Appellant to be of a certain gender**

35. Viewed under the lens of the 4-step justification test (see: *Leung Chun Kwong* [AB/3]; *Ng Hon Lam Edgar* [AB/44]), it can be averred that rejecting the 2nd Appellant as the second parent is discriminatory.

D2.1 Comparable Position and Differential Treatment

36. If the 2nd Appellant were a cisgendered or transgendered man under an opposite-sex marriage with the 1st Appellant, she would be entitled to be recognized as the Child's parent. As such, there is differential treatment towards the 2nd Appellant vis-à-vis the comparable position of a cisgendered or transgendered man.

D2.2 Legitimate Aim and Rational Connection

37. The analysis put forth in para. 24 & 25 can also apply here, whereby the party discriminated against would be the transgendered woman.

D2.3 Proportionality and Oppressive Unfairness

38. In contrast to the 1st Decision, the oppressive unfairness is far greater than the one in the 1st Decision.

39. Whilst the analysis from para. 26 can explain how such a ban is not proportionate to a transgender person, the greater degree of oppressiveness is observed in comparison with individuals in a same-sex spouses.
40. Transgender individuals often get treatment for gender dysphoria out of necessity that results in irreversible effects. Completing the full course of treatment would mean the removal of reproductive organs, which was ruled *majorly invasive and medically unnecessary* (see: *Q* [AB/327]). This limits the available avenues of the person, who has undergone full gender transition under medical necessity, in relation to forming a family, as they would have lost the ability to produce gametes (foregoing the opportunity to create genetically related children).
41. If adoption is also denied for the transgender person having undergone all sexual reassignment procedures (such as the 2nd Appellant), there would be no alternative means, not just to adopt, but to create a family.

E. Conclusion

42. By reason of the aforesaid, the Appellants submit that the court uphold the 1st Decisions and dismiss the 2nd Decision.

Dated 10th Day of August 2023

ROXY KWONG
Counsel for the Appellant

For hearing on 20 August 2023 at 1:45 p.m.

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LIST OF AUTHORITIES FOR THE APPELLANTS

Cases

1. *Leung Chun Kwong v Secretary for the Civil Service* [2019] 22 HKCFAR 127
2. *Ng Hon Lam Edgar v The Hong Kong Housing Authority* [2021] HKCFI 1812
3. *QT v Director of Immigration* [2018] HKCFA 28
4. *MK v HKSAR* [2019] HKCFI 2518
5. *Secretary for Justice v Yau Yuk Lung Zigo* [2007] 10 HKCFAR 335
6. *AA v BB* [2021] HKCFI 1401
7. *Infinger, Nick v The Hong Kong Housing Authority* [2020] HKCFI 329
8. *Fok Chun Wa v Hospital Authority* [2012] 15 HKCFAR 406
9. *Q v. Commissioner of Registration* [2023] HKCFA 4

10. *TT v YY* [2019] EWHC 2384

Legislation and Provisions

Adoption Ordinance (Cap 290)

Parent and Child Ordinance (Cap 429)

Matrimonial Causes Ordinance (Cap. 179)

Marriage Reform Ordinance (Cap. 178)

Marriage Ordinance (Cap. 180)

Interpretation and General Clauses Ordinance (Cap. 1)

Others

Manning WD, Fetto MN, Lamidi E. Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief. *Popul Res Policy Rev.* 2014 Aug 1;33(4):485-502. doi: 10.1007/s11113-014-9329-6. PMID: 25018575; PMCID: PMC4091994.