

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 RESPONDENT

A. Overview

1. This is an appeal against 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 respondents:-

- a) The first issue addressed is whether Ms. Davina Wang (“**1st Respondent**”) and Ms. Vivian Xu (“**2nd Respondent**”) should be recognized as spouses under the Adoption Ordinance (Cap 290) (“**AO**”).
- b) The second issue addressed is whether the 2nd Respondent 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 Respondent (a cisgender woman) and the 2nd Respondent (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 Respondent 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 Respondent gave birth to the Child in Hong Kong. Upon birth of the Child, the 1st and 2nd Respondent were informed by various departments that only the 1st Respondent will be recorded as the parent in the Child's birth certificate, and the option of step-parent adoption is unavailable to the 2nd Respondent, 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 Respondents commenced judicial review proceedings against the Appellants, 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 Respondent (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 Respondent 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 Respondent’s argument that she should be recognized as the father of the Child is rejected. Being a transgender woman, the 2nd Respondent is “*a ‘woman’ for all legal purposes.*” (“**the 2nd Decision**”)

7. Leave was then given by the Court of Appeal to the Court of Final Appeal, whereby two questions of great and general public importance have been posed by the Court of Appeal:-
 - a) Firstly, should the words ‘spouse’ be interpreted within the AO to include a party to a same-sex marriage abroad?
 - b) Secondly, should s.10(3) of the PCO be interpreted to include the transgender female partner of a woman who together with her obtained fertility treatment services?

8. the Appellant’s submissions shall anchor itself upon two assertions:-
 - a) The 1st Decision should be **overruled**, as it is based on the presumption that radical departure from the original legislative intent rectifies unresolved inequalities.
 - b) The 2nd Decision should be **upheld**. Construing a transgender female as a male, for the sole purpose of accessing rights under the PCO, necessitates a deceptive reinvention of relevant facts. Apart from a blatant rejection of the legislative intent of s.10(3) of the PCO, overturning The 2nd Decision unduly undermines the recognized legal status of a transgender person,

simultaneously creating uncertainty as to the child's welfare under the traditional concept of a family.

C. Appeal against the 1st Decision

9. The Appellant's argument against the 1st Decision shall be supported by the following arguments:-

- a) **First**, the terms 'spouse' and 'marriage' should only be interpreted to refer to monogamous heterosexual marriage.
- b) **Second**, Chew J has erred in presuming the differential treatment as discriminatory, disproportionate, and against the best interests of the child.

C.1. Interpretation of 'Spouse' in AO

10. The Appellants submit that, whilst the Judgment could be justified on the basis that the word 'spouse' has not been expressly defined under the AO, it is inaccurate to construe the absence of a definition in the AO as permission to neglect methods of legislative interpretation, the *stare decisis* doctrine, and the true intent exhibited through the drafting of the AO.

11. In accordance with s.19 of the Interpretation and General Clauses Ordinance (Cap. 1) [RB/405], "*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.*" It can be averred at this juncture that, whilst the process allows for a 'liberal' interpretive process, the aim of the exercise is to distil a '**truth[ful]**' understanding of the legislation.

12. As per *The Medical Council of Hong Kong v Chow Siu Shek* [2000] 3 HKCFAR 144, general words (like 'spouse' and 'marriage') must, at its first instance, be read conjunction with its context in the widest sense. This includes the existing state of the law and other statutes *in pari materia*. [RB/15].

- a) Spouse ordinarily refers to parties to a marriage. Although the AO does not specifically define the meaning of ‘spouse’ and ‘marriage’, such terms are unequivocally defined under other legislative provisions in Hong Kong. For instance, in the Matrimonial Causes Ordinance (Cap. 179), specifically, ‘*if [a marriage] took place outside of Hong Kong, celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed and recognized by such law as involving the **voluntary union for life of one man and one woman to the exclusion of all others.***’ The same requirement of ‘one man with one woman to the exclusion of all others’ has been echoed in the s.4 of the Marriage Reform Ordinance (Cap. 178) s.40 of the Marriage Ordinance (Cap. 181). **[RB/406-408]**
- b) The unique status of marriage is also confirmed by multiple cases in the Court of Final Appeal. In *W v Registrar of Marriage* [2013] 16 HKCFAR 112, the institution of marriage refers to the voluntary union of one man and one woman. **[RB/22]** In *QT v Director of Immigration* [2018] HKCFA 28, the CFA clarified that ‘by [the definition in s.40 of the Marriage Ordinance], [marriage] is not a status open to the couples of the same sex. **[RB/108]**

13. Read in conjunction with these legislation and precedents, it can be deduced that the AO’s true intent is to refer to a monogamous heterosexual marriage when referring to generic terms such as ‘spouse’ and/or ‘marriage’.

- a) In multiple instances (such as s.4(b), s.5(2), s. 5(5)(b) etc.), the AO refers to applications involving ***two*** spouses. Furthermore, per s.13(2)(d), in describing the effect of the adoption order, it is stated that ‘the infant shall stand to [the spouses] respectively in the same relation as to a lawful ***father*** and ***mother*** respectively.’
- b) By allowing a maximum of two persons in this spousal relationship, with one being a man and the other a woman, it is more accurate to assert that

the truthful intention of the AO is to respect the form of marriage recognized by the MCO (Cap. 179).

14. To include same-sex marriages celebrated overseas for the terms ‘spouse’ and ‘marriage’ in the AO would result in radical alterations to the law: this grants the judiciary the right to change the practical effect of multiple legislative provisions (namely the MCO, MO and the AO) while unilaterally transforming the fundamental change in the concept of marriage. As per *MK v HKSAR* [2019] HKCFI 2518, “social policy issues should not be decided by the court”, but that it should be rendered a “democratic process” [RB/170].
15. In the *obiter* of *Bellinger v Bellinger* [2003] UKHL 21, it is suggested that the judiciary is not the appropriate actor to instil such a significant change. Rather, complex problems, such as those pertaining the recognition of same-sex marriages, shall be left to the legislature. [RB/201]

C.2. The differential treatment does not contravene the 1st and 2nd Respondents’ right to equality

16. The respondents allege that the differential treatment in question would be the refusal to recognize the 1st and 2nd Respondents as a married couple, thereby depriving them of the right to adopt the Child as stepparents.
17. To evaluate whether the differential treatment constitutes discrimination would be to apply the four-step justification test stipulated by *Ng Hon Lam Edgar v The Hong Kong Housing Authority* [2021] HKCFI 1812 [RB/235]. The elements of the test are as follows:-
 - a) Does the differential treatment pursue a legitimate aim;
 - b) Is the differential treatment rationally connected to that legitimate aim;
 - c) Is the differential treatment no more than necessary to accomplish the said legitimate aim; and

- d) Has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights.

18. Per *Hyson Development Co v Town Planning Board* [2016] HKCFA 66, it should be averred that the standard of 'manifestly without reasonable foundation' should be applied: to this day, same-sex marriage remains to be a controversial social issue generating differing opinions in the democratic society; as such, entitling it to a wider margin of appreciation. [RB/255-292]

19. Whilst provisions such as s.13(2)(d) indicate that a heterosexual married couple does have more rights compared to a same-sex married couple under the AO. Assuming, *arguendo*, that the limitations of the AO is the sole variable that determines the existence of the differential treatment, it should be submitted that the justification test can be satisfied based on the reasons listed hereinbelow:-

- a) **First**, exclusively allowing the recognized form of marriage in Hong Kong not only pursues the legitimate aim of protecting the traditional concept of a family, but it also serves the child's best interest, as this would ensure the adopted children would be protected by the legal obligations of the biological and/or adopted parent, even when upon the dissolution of the marriage. As same-sex marriage is not recognized in Hong Kong, the courts may not be able to enforce relevant legal schemes to for the child's best interest.
- b) **Second**, the legitimate aim is rationally connected to the differential treatment. If unrecognized forms of marriage (whether it be marriages that are polygamous, bigamous unions or have prohibited degrees of consanguinity etc.) are permitted due to liberal statutory interpretation, such an adoption could act against the best interests of a child. Per *MK*, the legislature—not the courts—should be endowed with the responsibility of giving recognition to valid types of familial relationships permitted for adoption.

- c) **Third**, the differential treatment at hand is not manifestly without reasonable foundation. The reason that the differential treatment exists is to distinguish protect the adopted child from the lack of protection of legally unrecognized relationships.

20. More importantly, if other legal options are considered, then the court's rejection of the 1st the 2nd Respondent's request to become the parent of the child cannot be construed as unfair or oppressive. In fact, in *AA v BB* [2021] HKCFI 1401 [RB/293-307], it is shown that even if an adoption order was not granted, the non-gestational mother of a same-sex couple can be allowed to given custody, care and control of the minor in question under the **Guardianship of Minors Ordinance (Cap. 13)**. In granting relevant guardianship rights to the non-gestational mother, the courts not only consider the objective facts as to whether the non-gestational mother exhibited behaviours of social and psychological parenthood, but the rationale for such decision is also made with the children's best interest as paramount consideration. [RB/299].

21. Whilst the guardianship order is not an identical replacement for all parental rights, certain rights (such as testamentary guardianship or postmortem financial arrangements) can be arranged separately to ensure the children receive adequate protection.

22. In light of the aforementioned reason, the Appellants to humbly invite the Court to overrule the 1st Decision made by the Court of Appeal.

D. Dismissal of the Cross Appeal Against the 2nd Decision

23. In crux, the 2nd Decision arose from the 2nd Respondent's submission in the Court of Appeal to be recognized as a father under s.10(3) under the PCO (Cap. 429). Chew J rejected her submissions in the Court of Appeal and a Cross Appeal was brought before the Court of Final Appeal.

24. The Appellants (respondent of the cross appeal) shall argue against the 2nd Respondent (appellant of the cross appeal) by challenging the 2nd Respondent's original contention as a 'father' contravenes rules of statutory interpretation and *stare decisis*.

D1. Interpretation of 'Father' under PCO

25. Per the rules of s.19 IGCO and *Medical Council*, the truthfulness of the legislation's meaning can be extracted through the existing state of law and other statutes in *pari materia*.

- a) Per *W*, the usage of the word 'woman' or 'female' has been expanded to include post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery.
- b) The scope has considerably expanded in *Q v. Commissioner of Registration* [2023] HKCFA 4, where it was ruled that female-to-male invasive sexual reassignment surgery would not be necessary for the gender marker of the ID to be regarded as female, upon certification of relevant medical specialists. **[RB/308-350]**

26. The 2nd Respondent has completed gender affirming surgery in December 2014 and her HKID card was reissued with female gender markers before the *Q* ruling in 2023. Thus, this confirms that the 2nd Respondent has taken all relevant medical and legal steps to be recognized as a woman under Hong Kong law.

27. A literal interpretation of s.10(3) of the PCO would blatantly exclude the transgender female partner of a woman to be the parent of the embryo.

- a) In a similar vein, 'marriage' referred to in s.10(2) would also refer to the definition of marriage per MCA, as previously explained in submission C1.

- b) The notion that the legislation refers only to a heterosexual marriage is reiterated in s.10(3), where only ‘male partner’ and ‘father’ is mentioned, in relation to the gestational parent.

- c) The way the PCO is phrased also renders it difficult to read down. Unlike ambiguous phrasing akin to *Ghaidan v Godin-Mendoza* [2004] UKHL 30, it unequivocally presents the woman as the gestational parent (providing the female gamete) and the other partner being a male partner, father, or the man. **[RB/352-393]**

28. For this reason, the PCO does not provide for the right of the non-gestating transgender woman as a parent.

E. Conclusion

29. By reason of the aforesaid, the Appellants humbly invites the Court to dismiss the 1st Decision and uphold the 2nd Decision.

Dated 10th Day of August 2023

ROXY KWONG

Counsel for the Respondent

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

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LIST OF AUTHORITIES FOR THE RESPONDENT

Cases

1. *The Medical Council of Hong Kong v Chow Siu Shek* [2000] 3 HKCFAR 144
2. *W v Registrar of Marriage* [2013] 16 HKCFAR 112
3. *QT v Director of Immigration* [2018] HKCFA 28
4. *MK v HKSAR* [2019] HKCFI 2518
5. *Bellinger v Bellinger* [2003] UKHL 21

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6. *Ng Hon Lam Edgar v The Hong Kong Housing Authority* [2021] HKCFI 1812
7. *Hyson Development Co v Town Planning Board* [2016] HKCFA 66
8. *AA v BB* [2021] HKCFI 1401
9. *Q v. Commissioner of Registration* [2023] HKCFA 4
10. *Ghaidan v Godin-Mendoza* [2004] UKHL 30

Legislation and Provisions

1. Adoption Ordinance (Cap. 290)
2. Parent and Child Ordinance (Cap. 429)
3. Interpretation and General Clauses Ordinance (Cap. 1)
4. Matrimonial Causes Ordinance (Cap. 179)
5. Marriage Reform Ordinance (Cap. 178)
6. Marriage Ordinance (Cap. 181)
7. Guardianship of Minors Ordinance (Cap. 13)