IN THE FAMILY DIVISION OF THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHCF 18

HCF/District Court Appeal No 2 of 2018

Between

UKM

… *Appellant*

And

ATTORNEY-GENERAL

… *Respondent*

In the matter of Originating Summons (A) No 355 of 2014

In the matter of the Adoption of Children Act (Chapter 4)

And

In the matter of AB

UKM

… *Applicant*

JUDGMENT

[Family Law] — [Adoption] — [Discretionary power] — [Public policy] [Statutory Interpretation] — [Construction of statute]

Version No 1: 11 Oct 2022 (19:31 hrs)

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UKM
v
Attorney-General

[2018] SGHCF 18

High Court (Family Division) — District Court Appeal No 2 of 2018
Sundaresh Menon CJ, Judith Prakash JA and Debbie Ong J
17–18 July 2018

17 December 2018 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The appellant is a gay man. He wishes to adopt his biological son, whom we shall call the Child and who is currently four years old. The Child was conceived through in vitro fertilisation and birthed in the US by a surrogate mother. She was paid by the appellant and his same-sex partner for what, in essence, were the reproductive services she provided. In these circumstances, the usual, principal question of whether an adoption order would serve the best interests of the child to be adopted implicates a set of weighty considerations concerning the propriety of his parenting arrangement and the ethics of the means by which his birth was procured. These considerations pertain to fundamental values of our society, and bring into sharp focus the difficult interplay between law and public policy in the determination of the particular case before the court. The law is asked to provide the answer to a dilemma that

Version No 1: 11 Oct 2022 (19:31 hrs)

challenges the mores of a largely conservative society, and this arises partly because science has devised a new paradigm for procreation. In such a case, it is especially critical that the court's approach to resolving the issues which arise is established upon the bedrock of the Judiciary's proper role within our constitutional setting. That role is to apply the law and to determine the particular dispute in the case at hand. It is not to determine social policy in our country or to be a player in what has sometimes been seen as the "culture wars" that assail society.

2 In this judgment, we answer the question presented, which is whether the appellant should be allowed to adopt his son. In doing so, we also set out what, in our view, is the appropriate methodology to be applied in determining and weighing the material considerations of public policy that may bear on the central issue that we are required to deal with.

Background

The Child's birth

3 The appellant is 46 years old and a pathologist by vocation. He has been in a relationship with a man of the same age for about 13 years. Both of them are Singapore citizens. They have cohabited since around 2003, and currently reside with the Child and a domestic helper in a three-bedroom condominium apartment in Singapore.

4 Sometime during the course of their relationship, the appellant and his partner decided that they wanted to raise a child together. They considered the possibility of adopting a child, but were advised by adoption agencies that because of their homosexual orientation, they would not be allowed to adopt in

Version No 1: 11 Oct 2022 (19:31 hrs)

Singapore. So they turned to the possibility of conceiving a child biologically related to one of them through assisted reproductive technology ("ART").

5 ART is a technical label which refers to a range of fertility procedures involving the manipulation of both male and female sex cells (or gametes) through the use of technology. The World Health Organisation defines it in this way in F Zegers-Hochschild *et al*, "International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) revised glossary of ART terminology, 2009" (2009) 92 Fertility and Sterility 1520 ("WHO Glossary") at p 1521:

> **Assisted reproductive technology (ART):** all treatments or procedures that include the in vitro handling of both human oocytes and sperm or of embryos, for the purpose of establishing a pregnancy. This includes, but is not limited to, in vitro fertilization and embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, tubal embryo transfer, gamete and embryo cryopreservation, oocyte and embryo donation, and gestational surrogacy. ART does not include assisted insemination (artificial insemination) using sperm from either a woman's partner or a sperm donor.

6 The Ministry of Health in Singapore has adopted a similar definition of ART. The Licensing Terms and Conditions on Assisted Reproduction Services (26 April 2011) ("the ART Licensing Terms") promulgated under s 6(5) of the Private Hospitals and Medical Clinics Act (Cap 248, 1999 Rev Ed) provide as follows in cl 2.2:

> For the purposes of these licensing terms and conditions, Assisted Reproduction ("***AR***") involves clinical treatments and laboratory procedures that include:
>
> > *(a)* the removal or attempted removal of oocytes from a woman for any purpose; and
> >
> > *(b)* the handling of human oocytes or embryos for the purpose of procreation.
>
> This includes In-vitro Fertilisation (IVF); Gamete Intrafallopian Transfer (GIFT); Zygote Intrafallopian Transfer (ZIFT); Intra-

Version No 1: 11 Oct 2022 (19:31 hrs)

> cytoplasmic Sperm Injection (ICSI); gamete/embryo/ovarian tissue crytopreservation; gamete/embryo donation (for any purpose); and embryo biopsy for Preimplanation Genetic Diagnosis (PGD). However, AR does not include the surgical excision of ovarian tissue.

A substantially similar definition was set out in the previous directions issued by the Ministry of Health to private healthcare institutions providing ART services: see cl 1.2 of the Directives for Private Healthcare Institutions Providing Assisted Reproduction Services (31 March 2006) ("the ART Directives"), issued under Reg 4 of the Private Hospitals and Medical Clinics Regulations (Cap 248, Reg 1, 2002 Ed). The ART Directives have since been superseded by the ART Licensing Terms.

7 The form of ART that the appellant and his partner used was gestational surrogacy, which involves a woman who carries a pregnancy under an agreement that she will give the offspring to the "intended" or "commissioning" parent or parents: see the WHO Glossary at p 2686. The gametes in a gestational surrogacy arrangement can originate from one or both commissioning parents or from a third party. This is distinct from what is sometimes called traditional surrogacy, where the surrogate mother is artificially inseminated with the intended father's sperm. The appellant and his partner found an agency in the US that provided gestational surrogacy services, and they both donated their sperm for the procedure. An egg from an anonymous donor was fertilised by the appellant's sperm and then implanted in the womb of a surrogate mother, a US citizen, whom we shall call M.

8 The arrangement was for M to carry the baby to term, to deliver him, and then to relinquish her rights over him. This was provided for in a Gestational Surrogacy Agreement ("GSA") dated 16 January 2013. The parties to the GSA were M, M's husband, the appellant and the appellant's partner. For the entire

Version No 1: 11 Oct 2022 (19:31 hrs)

arrangement, the appellant paid a total of about US$200,000, including medical fees, insurance, legal costs, agency fees and a payment to M of US$25,000. Clause 17 of the GSA provided that the payment made by the appellant and his partner to M and her husband under the GSA was to be regarded as reimbursement for carrying the baby, and not as a fee for M's services.

9 On 19 November 2013, M gave birth to the Child in Pennsylvania, USA. The Child's birth certificate, issued by the State of Pennsylvania, states that the appellant and M are his father and mother respectively. About a month later, M swore an affidavit relinquishing her parental rights over the Child. In it, she stated that she would "not oppose any procedure which shall confirm permanent residency status or citizenship in Singapore for [the Child], through his father, [the appellant]". She also gave her consent for the Child to travel with the appellant anywhere in the world.

10 The appellant then brought the Child to Singapore, where the Child has since remained. The appellant applied for Singapore citizenship for the Child soon after this. In August 2014, the Immigration and Checkpoints Authority ("ICA") rejected the Child's citizenship application, but granted the Child permission to remain in Singapore until April 2015 under a Long-Term Visit Pass ("LTVP"). Separately, in October 2014, the appellant obtained a certificate from the Health Sciences Authority confirming, based on his and the Child's DNA profiles, that he is the Child's biological father.

The adoption application

11 In October 2014, the appellant wrote to the Ministry of Social and Family Development ("MSF") explaining that he was a Singapore citizen and a single father with a ten-month-old son who was a US citizen staying with him

Version No 1: 11 Oct 2022 (19:31 hrs)

in Singapore on a temporary visit pass. The appellant asked the MSF to "advise [him] on how [his] son can be allowed to stay in Singapore permanently".

12 The MSF replied to say that the appellant "may choose to adopt [his] biological child (if conceived out of wedlock) to establish a legal nexus with him". The MSF also informed the appellant of the documents he would need to prepare for this purpose. In a later communication, the MSF stated that while the decision "essentially lies" with the ICA, the appellant's establishing a legal nexus with the Child "does improve [the Child's] eligibility for Permanent Residency/citizenship". In November 2014, the MSF informed the appellant that "to enable" him to apply to adopt the Child, the Child would be granted a dependant's pass on certain conditions.

13 In December 2014, the appellant filed the present application to adopt the Child under the Adoption of Children Act (Cap 4, 2012 Rev Ed) (referred to hereafter as either "the Act" or "our current Act", as may be appropriate to the context). In January 2015, M filed her consent to this application. In an affidavit filed the same month, the appellant stated that he was making this application because the MSF had informed him that his adopting the Child would establish a legal nexus between him and the Child, and thereby improve the Child's chances of acquiring Singapore citizenship or permanent residency. But the appellant also stated that this was "not the sole or main reason" for his application. He said that he was also "aware of the stigma of a single parent in Singapore" and wished to "formalise" his legal status as the Child's father "so as to give him a good head-start in life". This last stated purpose does not make sense on its terms because making an adoption order would not on any view remove any alleged stigma which the Child might face for being raised by a single parent. It is possible that the appellant meant to refer to any stigma that

Version No 1: 11 Oct 2022 (19:31 hrs)

might be associated with illegitimacy, which could be negated by an adoption order.

14 The Director of Social Welfare of the MSF was appointed the Child's Guardian-in-Adoption ("the Guardian"). She conducted an extensive investigation process, taking almost three years to assess the merits of the proposed adoption. In August 2017, she filed an affidavit exhibiting a report prepared by a Senior Child Welfare Officer with the MSF. The report sets out information on the Child and the appellant, and concludes with the officer's recommendations. The report states that the appellant appears to have the financial means to meet the Child's basic needs and the home environment is comfortably furnished and child-safe. It details the Child's care arrangements and pre-school and enrichment programmes. It also records that the appellant and his partner are committed to parenting the Child together as two fathers, and sets out the appellant's thoughts on how he would help the Child to cope with possibly having to face social stigma in the future and to make sense of his unconventional family structure. The officer ultimately recommended against allowing the adoption on the basis that an adoption would be "contrary to public policy". In her view, this was because "[s]ame-sex marriage is not recognised under Singapore law" and the appellant is "seeking to form a family unit with his male partner". The appellant does not contest the factual statements in the report, apart from highlighting minor inaccuracies and disagreeing with the officer's usage of the word "lifestyle" to describe the circumstances of his life as a homosexual.

15 In September 2017, the appellant filed a further affidavit explaining that his goal in seeking to adopt the Child was not to "circumvent national laws against same-sex marriage", but to "secure [the Child's] long term residence in Singapore". He also described his financial means, the Child's living

Version No 1: 11 Oct 2022 (19:31 hrs)

environment, and various pre-school and enrichment activities that the Child has been enrolled in under his care.

The decision below

16 The learned District Judge heard the parties in November 2017, dismissed the appellant's adoption application in December 2017, and issued written grounds for her decision in March 2018: see *Re UKM* [2018] SGFC 20 ("GD"). It is evident from the GD that the District Judge, who is an experienced Family Court judge, wrestled with wide-ranging policy considerations that she considered were built into the law and with what she perceived would be the social implications of her decision.

17 The District Judge saw the case fundamentally as "an adoption application in form but not in substance": GD at [41]. She took this view because the Child was already the appellant's biological child, and would remain in the appellant's custody and care regardless of the outcome of the application: GD at [19]. Unlike in the usual adoption application, "no one stood responsible for the [Child] prior to him being handed over to his biological father and the latter's partner": GD at [22]. She also considered that the case did not turn on whether same-sex parenting was effective or appropriate, and therefore declined to base her decision upon the existence of a public policy, for which the Guardian contended, against making an adoption order where the child in question would be parented by a same-sex couple: GD at [27]–[28].

18 She then turned to consider whether the three legal requirements under s 5 of the Act for making an adoption order had been satisfied. There was no dispute that the first requirement, which is that all the relevant persons "whose consent is necessary under [the] Act and whose consent is not dispensed with" have provided their informed consent to the adoption, was satisfied: see

Version No 1: 11 Oct 2022 (19:31 hrs)

s 5(1)(*a*). Here, both the appellant and M had consented to the proposed adoption: GD at [30].

19 However, the District Judge did not accept that the second requirement was made out. This was the requirement that the adoption would be for the welfare of the Child: see s 5(1)(*b*). She observed that the appellant had travelled to the US to procure ART services even though he knew that to the extent that services of this nature were available in Singapore, they were available to heterosexual married couples only. He also knew that gestational surrogacy was not legally available here to anyone, whether homosexual or heterosexual, married or single. Hence, in the District Judge's view, by seeking to adopt the Child, the appellant was "in reality … attempt[ing] to obtain a desired result – that is, formalising the parent-child relationship, by walking through the back door of the system when the front door was firmly shut": GD at [33]. While it was nevertheless "still the duty of the court to consider unlocking the back door if the welfare of the child demands it", the Child's welfare, in her view, did not so demand: GD at [33]. Even without being adopted by the appellant, the Child would continue to have food, shelter, a good education and an adequate support system: GD at [33] and [42].

20 The District Judge also examined the advantages that the appellant suggested would accrue to the Child as a result of his being adopted. These included enhancing his prospects of acquiring Singapore citizenship, removing the stigma associated with his being an illegitimate child, and conferring upon him inheritance rights in the event of the appellant's intestacy. None of these advantages, in her view, meant that an adoption order would be for the Child's welfare:

Version No 1: 11 Oct 2022 (19:31 hrs)

(a) To the District Judge, adoption involved a separate and independent inquiry from citizenship. Even if being adopted might enhance the Child's prospects of acquiring Singapore citizenship, it would be unjust to make an adoption order because it would amount to ratifying the appellant's conduct in engaging surrogacy services overseas, and would circumvent the prevailing social policy here to the contrary effect. It was objectionable, she thought, that the appellant was effectively using the Child as a shield to protect his own interests: GD at [34].

(b) The District Judge reasoned that there was no dispute that the appellant was the Child's biological father, and accordingly concluded that there was no need to reinforce that biological link through an adoption order: GD at [35]. An adoption order could not address any stigma associated with the circumstances of the Child's birth or the fact that he was being raised by two male parents. She also lamented that the Child would be denied the right to know his mother, and considered this to be against his welfare: GD at [36].

(c) The District Judge did not think that the Child's obtaining inheritance rights under the intestacy regime was a material factor because he could be provided for by means of a will: GD at [37].

21 The District Judge also held that the third requirement was not satisfied because the appellant's payment to M under the GSA was a payment in consideration of the adoption: see s 5(1)(*c*) of the Act. In view of the "local position" that doctors in Singapore are not permitted to facilitate the provision of surrogacy services, she considered that the surrogacy arrangement in this case contradicted the spirit of the Act: GD at [38]. She felt unable to sanction the

Version No 1: 11 Oct 2022 (19:31 hrs)

payment, which she had the power to do under s 11 of the Act, because she took the view that the surrogacy arrangement "promotes the idea of the child as a commodity and is drawn up to facilitate the severance of human ties so as to enable the creation of new ones at a fee to be paid to the surrogate, the physician and the lawyer": GD at [38]–[39]. In her view, "commercial surrogacy demeans and exploits human beings at various levels, especially women in poverty", and this partly explained "Singapore's position on the practice": GD at [39].

22 In the final analysis, the District Judge saw the appellant's adoption application as an attempt to "legitimise a relationship" in a country where the appellant could not have lawfully created that relationship in the first place: GD at [41]. She reiterated that the Child's welfare would not be affected by an adoption order, which, in her view, would serve only the appellant's wishes: GD at [42]. She stated that "the courts must never be used to sanction a *fait accompli*" and considered that the Child's welfare in the present circumstances did not oblige the court to "[look] past [the appellant's] deliberate acts which bind the hands of the court": GD at [43]. Accordingly, she dismissed the application. The appellant now appeals against that decision.

The parties' cases on appeal

The appellant's case

23 The appellant's case consists of three main limbs. First, he contends that an adoption order would be for the Child's welfare because it would bring the Child the following benefits:

(a) An adoption order would grant the Child the legal status of being the appellant's legitimate child, which is a status that carries with it profound personal, emotional, psychological, social and cultural

Version No 1: 11 Oct 2022 (19:31 hrs)

consequences. It ought to be immaterial that an adoption order would make no difference to the Child's day-to-day life and care arrangements, or that M is not competing for parental rights over the Child. In this regard, the appellant draws on English case law pertaining to the making of parental orders affecting children born under surrogacy arrangements, and argues that such orders are analogous to adoption orders.

(b) An adoption order would enhance the Child's prospects of securing Singapore citizenship, which would ensure that the Child continues to be cared for by the only family he has ever had and known.

(c) An adoption order would ensure that the appellant is the sole person with parental rights over the Child and remove M's rights as a legal parent.

(d) An adoption order would entitle the Child, as the appellant's legitimate child, to inherit from the appellant and his family in the event of the appellant's intestacy.

24 Second, the appellant responds on three levels to the Guardian's public policy objections:

(a) First, the appellant argues that public policy considerations are irrelevant to the determination of an adoption application. He contends that, as a general proposition, the court is not the proper forum to ventilate and resolve contentious issues of public policy. He also argues that under the Act, once the court is satisfied that the requirements of s 5 have been met and that none of the restrictions in s 4 apply, the court has

Version No 1: 11 Oct 2022 (19:31 hrs)

no discretion to refuse to make an adoption order on the basis of public policy.

(b) Second, even if public policy considerations were relevant to determining an adoption application, the appellant questions the existence of the public policies which he understands the Guardian to be relying on, namely: (i) a public policy against the adoption of one's biological child born overseas through surrogacy; and (ii) a public policy against homosexuals adopting children. As will be seen below, the Guardian's formulation of the public policies which she relies on is different.

(c) Third, even if public policy considerations were relevant, and even if they militated against making an adoption order in this case, the appellant contends that this ought not to displace the concern to reach an outcome that is for the welfare of the Child, which should be the court's paramount consideration pursuant to s 3 of the Guardianship of Infants Act (Cap 122, 1985 Rev Ed) ("the GIA"). The appellant submits that it is only in the "clearest cases" of a breach of public policy that the concern to prevent the breach should trump the welfare of the child concerned and affect the court's determination of the adoption application. This case, he submits, is not such a case.

25 The third and final limb of the appellant's case is that the payment to M under the GSA does not contravene s 11 of the Act, which prohibits the making of payments "in consideration of the adoption" to (among other persons) the parent of the child to be adopted. This is because M has no genetic link to the Child and should not be regarded as the Child's biological mother. On this basis, the appellant contends that she was not a "parent" within the meaning of the

Version No 1: 11 Oct 2022 (19:31 hrs)

Act. Further, the appellant claims that the payment to M under the GSA was made not "in consideration of the adoption" but in consideration of the surrogacy, and was in the nature of a reimbursement rather than a reward. And even if the payment under the GSA did contravene s 11, the appellant contends that an adoption order should nonetheless be made if the Child's welfare warrants it.

The Guardian's case

26 The Guardian's case is premised on the idea that the court has a discretion under s 3(1) of the Act to decide whether to make an adoption order. It is that discretion, the Guardian contends, which allows the court to take public policy considerations into account in making its decision on an adoption application. This goes directly against the appellant's submission that it is mandatory for the court to make an adoption order once it finds that the requirements for making an adoption order under s 5 have been satisfied and that none of the restrictions in s 4 apply. Further, the Guardian highlights that unlike other legislation concerning the custody and upbringing of children which specify that the child's welfare is the paramount consideration, the Act does not so stipulate. On this basis, the Guardian submits that the concern to promote the Child's welfare may in this case be outweighed by other considerations.

27 In the first place, however, the Guardian objects even to the view that an adoption order would advance the Child's welfare, for the following reasons:

(a) An adoption order would not by itself guarantee that the Child would acquire Singapore citizenship, which is a separate matter within the independent purview of another agency (namely, the ICA). Also, the appellant's stated aim of acquiring Singapore citizenship and other

Version No 1: 11 Oct 2022 (19:31 hrs)

benefits for the Child is, according to the Guardian, contrived and raised only as an afterthought.

(b) Although an adoption order would grant the Child legal status as the appellant's legitimate child, this would not benefit the Child significantly because the distinction between legitimate and illegitimate children is today virtually inconsequential. Moreover, the appellant is already willing and able to provide for the Child. Legitimacy would therefore result in purely formal consequences and would not affect the factual reality surrounding the Child's birth and his parenting arrangement. Any stigma arising from these circumstances would not be removed by an adoption order.

(c) Since the appellant is the Child's biological father and his status as such is recorded in the Child's birth certificate, an adoption order is not necessary for the appellant to obtain legal parental rights over the Child, or to exercise parental responsibilities over the Child. The English cases concerning parental orders that the appellant relies on must be distinguished because such parental orders were designed to provide for commissioning parents to be treated in law as the parents of children born under surrogacy arrangements, and commissioning parents would have no parental rights and responsibilities without such an order. There is also no need to extinguish M's parental rights because there is no basis for thinking that M might assert any such rights.

28 Second, the Guardian submits that public policy *is* a relevant consideration in adoption applications. According to the Guardian, allowing the appellant's adoption application would be contrary to three distinct and independent public policies: (a) a public policy of encouraging parenthood

Version No 1: 11 Oct 2022 (19:31 hrs)

within marriage; (b) a public policy against planned and deliberate parenthood by singles through the use of ART or surrogacy; and (c) a public policy against the formation of same-sex family units. Each of these policies, contends the Guardian, is evidenced in Parliamentary statements as well as legislation or regulations.

29 Finally, the Guardian argues that the payment to M under the GSA constitutes a reward in consideration of the adoption of the Child and therefore contravenes s 11 of the Act. This argument is based on a detailed analysis of the obligations set out in the GSA. In deciding whether a payment should be sanctioned under s 11 of the Act, the court should consider, in the Guardian's submission: (a) whether the payment is consistent with the welfare of the child; (b) whether it contravenes the purpose of s 11, which is to safeguard children against commodification; and (c) whether it is part of an arrangement which circumvents adoption laws. Considering these factors, the Guardian submits that the payment to M under the GSA should not be sanctioned, and that the breach of s 11 strongly militates against making an adoption order in this case.

30 Accordingly, the Guardian submits that the appeal should be dismissed. The Guardian also submits that the appellant's adoption application is aimed at furthering the interests of the appellant and his partner, and that the present circumstances are entirely of their own making because they went to great lengths to circumvent the laws of Singapore to start a family unit.

The issues raised and our analytical approach

31 We first outline the four broad issues which, in our judgment, arise for determination in this appeal, as well as the approach that we will take in this judgment to resolve them. To provide the context for this, we think it is useful

Version No 1: 11 Oct 2022 (19:31 hrs)

here to set out those provisions of the Act which are of particular relevance to the present case. They are as follows:

> **Power to make adoption orders**
>
> **3.**—(1) Upon an application in the prescribed manner by any person desirous of being authorised to adopt an infant who has never been married, the court may, subject to the provisions of this Act, make an order (referred to in this Act as an adoption order) authorising the applicant to adopt that infant.
>
> …
>
> **Matters with respect to which court to be satisfied**
>
> **5.** The court before making an adoption order shall be satisfied —
>
> (*a*) that every person whose consent is necessary under this Act and whose consent is not dispensed with has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights;
>
> (*b*) that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant; and
>
> (*c*) that the applicant has not received or agreed to receive, and that no person has made or given, or agreed to make or give to the applicant, any payment or other reward in consideration of the adoption except such as the court may sanction.
>
> …
>
> **Restriction on payments**
>
> **11.** It shall not be lawful for any adopter or for any parent or guardian except with the sanction of the court to receive any payment or other reward in consideration of the adoption of any infant under this Act or for any person to make or give or agree to make or give to any adopter or to any parent or guardian any such payment or reward.

Version No 1: 11 Oct 2022 (19:31 hrs)

32 In the light of these provisions and the parties' respective cases, the first broad issue to be determined is whether making an adoption order would be "for the welfare of the infant" within the meaning of s 5(*b*) of the Act. This requires us to examine the meaning of the word "welfare" in this context so as to determine the criteria for analysing the relevance and materiality of the advantages that the appellant suggests would accrue to the Child if he were adopted by the appellant. We will also need to examine the effect in this context of s 3 of the GIA, which requires any court, in proceedings concerning the custody or upbringing of an infant, to regard the welfare of the infant as "the first and paramount consideration". The answer to these questions of law will then pave the way for an analysis of whether, in this case, the appellant's adoption of the Child will be for his welfare.

33 The second broad issue is whether there is any basis for taking public policy considerations into account in the present case, and if so, what that basis is. This issue arises because the Guardian relies on a number of public policy considerations to oppose the making of an adoption order, and therefore, the anterior question to be resolved is whether such considerations may be taken into account by the court in the first place. This question requires us first to look at the Act and determine whether any provision in it permits the court to take public policy considerations into account in making its decision on an adoption application. Attention will be focused on s 3(1) of the Act, which the Guardian has contended confers upon the court a "discretion" to decide whether to make an adoption order. The existence, nature and scope of that discretion must therefore be examined. In addition, we will consider whether there is any separate basis in the common law for taking public policy considerations into account in the present case.

Version No 1: 11 Oct 2022 (19:31 hrs)

34 The third broad issue, which arises if we consider that public policy may be taken into account (and we foreshadow here that we do so conclude), is *how* that should be done. This issue arises because the analytical process for doing so is not immediately apparent. To elucidate that process, it seems necessary, in our view, first to develop a conceptual analysis of what public policy means, mainly to highlight as well as to resolve the difficulties which have historically clouded its analysis and application. Upon that foundation, we will then be able to examine the proper role of public policy in judicial decisions generally, and explain its proper role in the present case. Thereafter, we will develop an analytical framework for identifying and applying public policy, and apply that framework to each strand of public policy that the Guardian relies on in this case.

35 The fourth and final issue is whether the payment made by the appellant to M under the GSA is unlawful under s 11 of the Act. If it is, we will also have to decide whether to sanction the payment, which s 11 enables us to do, and determine the effect of granting or withholding sanction on the appellant's adoption application. These issues ultimately turn on the true interpretation of s 11 and its application to a phenomenon – namely, the adoption of a child born through gestational surrogacy – which did not exist at the time that s 11 and its precursors were passed.

36 We turn now to consider each of these four broad issues in sequence.

Issue 1: The welfare of the Child

37 In this section of the judgment, we consider the meaning of "welfare" in s 5(*b*) of the Act, the effect of s 3 of the GIA on adoption proceedings, and the question whether making an adoption order in this case would be for the Child's

Version No 1: 11 Oct 2022 (19:31 hrs)

welfare, in this sequence. For reasons which will become apparent, we answer the last-mentioned question in the affirmative.

The meaning of "welfare" in s 5(b) of the Act

38 Section s 5(*b*) of the Act embodies the principle that the child's welfare should play *at least* a prominent role in determining the outcome of disputes relating to his custody and upbringing. As observed in Leong Wai Kum, *Elements of Family Law in Singapore* (LexisNexis, 3rd Ed, 2018) ("*Leong Wai Kum*") at para 11.036, that section was "the first statutory expression of the equitable concern to achieve the welfare of a child" in Singapore legislation, "the provision having been included in the original 1939 version of the statute". This equitable concern is commonly referred to as the welfare principle, and it originates from the practice of the Court of Chancery in wardship and guardianship proceedings: see Judith Masson, Rebecca Bailey-Harris & Rebecca Probert, *Cretney: Principles of Family Law* (Sweet & Maxwell, 8th Ed, 2008) ("*Cretney*") at para 19-001. It follows that the meaning of the word "welfare" in s 5(*b*) of the Act must be informed by what the Chancery courts understood the welfare principle to mean at or around the time the earliest version of the Act – namely, the Adoption of Children Ordinance 1939 (Ord No 18 of 1939) ("1939 Adoption Ordinance") – was enacted. As shall be seen, their decisions embraced an expansive understanding of "welfare".

39 It is common wisdom that equity developed as a corpus of principles to mitigate the rigours of the common law. The development of the welfare principle is no exception to this. Before the enactment of the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) (UK), the common law courts in England recognised an almost absolute right in the father to the custody of his child and assumed no discretionary power to interfere with his right, even on

Version No 1: 11 Oct 2022 (19:31 hrs)

the basis of the child's welfare, except in extreme cases: see *J and Another v C and Others* [1970] 1 AC 668 ("*J v C*") at 702G *per* Lord MacDermott. But the Court of Chancery exercised a wider discretion on the basis of its right to exercise the Crown's sovereign authority as *parens patriae* (literally "parent of the country") and its concomitant responsibility to oversee the maintenance and education of all subjects of the Crown: see *Hope v Hope* (1854) 4 De G M & G 328 at 344–345 *per* Lord Cranworth LC. The authority usually cited as an example of this jurisdiction is *In re Fynn* (1848) 2 De G & Sm 457, where a father who was abusive, unemployed and often drunk, and who had spent time in prison, was denied custody of his sons. Nevertheless, even this jurisdiction was initially exercised in only the most exceptional of cases. Thus, in *In re Fynn*, Knight Bruce V-C said that it would be called into action only where interfering with the father's natural right to custody of his children was "not merely better for [them], but essential to their safety or to their welfare, in some very serious and important respect" (at 475). And as Brett MR put it in *In re Agar-Ellis; Agar-Ellis v Lascelles* (1883) 24 Ch D 317 at 328, the court "could not" interfere with the right of the father "except in the utmost need and in the most extreme case".

40 Although the Chancery courts were reluctant to interfere with the natural right of the father, this did not mean that they adopted a parochial view of the welfare of the child. Indeed, that reluctance concerned only the relative weight to be given to the father's right and the child's interests and welfare in the discretionary exercise. The meaning of welfare, on the other hand, concerned the conceptually distinct matter of the criteria for assessing what would be good for the child. The position was that welfare would in the usual case be subject to the father's right, not that welfare was to be narrowly construed. Thus, in *In re Fynn* itself, Knight Bruce V-C applied a sweeping conception of the kinds of

Version No 1: 11 Oct 2022 (19:31 hrs)

matter that pertained to the welfare of the children in that case, stating at 477–478:

> If they are now returned to his custody and guardianship, how is he to educate them? how to provide them with the care so important to their welfare? how to maintain them? I do not see and cannot conceive. It is plain, I think, that he has not at present the means; nor does it appear to me that there is any probability that he will have the means to do so. To restore the boys to him will, as it seems to me, be in all human probability to consign them to unsettled and irregular modes of life, adverse in the highest decree to culture, to discipline, to all by which they ought to be formed for occupying a station worthily in the higher or middle rank; to say nothing of the occasional or frequent, if not constant, privation of the ordinary comforts, perhaps decencies, of life in their class of society, to which they will, in my judgment, be likely, very likely, to be exposed. …

41 As concern for the welfare of children grew in England towards the end of the 19th century and during the early 20th century, the courts maintained an expansive view of the meaning of welfare. After all, this growing concern was reflected in the written law that the courts had to apply. Thus, in the first version of the Guardianship of Infants Act (49 & 50 Vict c 27) (UK), passed in 1886, the child's welfare was for the first time prescribed as a relevant consideration in proceedings concerning the custody of a child following the death of his father: see *Cretney* at para 19-001. This was followed by the Custody of Children Act (54 & 55 Vict c 3) (UK), passed in 1891, which provided that the court could interfere with the rights of parents in the interests of the welfare of the child. In *In re McGrath (Infants)* [1893] 1 Ch 143 ("*In re McGrath*"), the English Court of Appeal declined an application by a grandaunt of five children to replace their guardian with one who would bring them up in the Roman Catholic religion rather than in the Protestant religion in which the three youngest children were then being raised. The court was not persuaded that granting the grandaunt's application would serve the children's welfare because their father, although buried a Roman Catholic, had been "indifferent" as to

Version No 1: 11 Oct 2022 (19:31 hrs)

which of the two faiths his children were brought up in, and because the two elder children had already been raised as Protestants (at 151). Lindley LJ, with whom Bowen and A L Smith LJJ agreed, set out the principle by which the court approached the case in these terms (at 148):

> The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. *The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being*. Nor can the ties of affection be disregarded. [emphasis added]

42 Lindley LJ's embracing view of welfare in this passage has proved influential in this jurisdiction. In *Soon Peck Wah v Woon Che Chye* [1997] 3 SLR(R) 430, the Court of Appeal granted a mother sole custody, care and control of a child who had hitherto been placed under the care and control of her husband because she had earlier been suffering from illnesses which were thought to have affected her ability to care for the child. In the context of observing that s 3 of the GIA required the welfare of the child to be regarded as the first and paramount consideration, the court referred to a textbook definition of the word "welfare" which had clearly been derived from Lindley LJ's definition of that word in *In re McGrath*. In this regard, Yong Pung How CJ said as follows at [25]:

> The learned authors of *Rayden and Jackson's Law and Practice in Divorce and Family Matters* (Butterworths, 16th Ed, 1991) provide an insight on the welfare principle at p 1004:
>
> > The welfare principle is universal in its application and applies to disputes not only between parents but between parents and strangers and between strangers and strangers. But the welfare of the child is only to be regarded as the court's paramount consideration where the child's upbringing or proprietary interests are directly in issue: the principle does not apply to a case

Version No 1: 11 Oct 2022 (19:31 hrs)

> where such matters are not directly in question but only arise incidentally in relation to other matters which are directly in question. *The word 'welfare' must be taken in its widest sense. It has been said that the welfare of the child is not to be measured by money only or by physical comfort only; the moral and religious welfare of the child must be considered as well as his physical well-being; nor can the ties of affection be disregarded.* The rights and wishes of parents must be assessed and weighed in their bearing on the welfare of the child in conjunction with all other factors relative to that issue. The question for the judge is not what the essential justice of the case requires but what the best interests of the child require.
>
> Thus, the court should look at all the circumstances of the case and come to a decision on the issue of custody, always bearing in mind that the welfare of the child should be given paramount priority.
>
> [emphasis added]

43 To return to the development of the welfare principle in England, in 1925, the Guardianship of Infants Act (c 45) (UK) ("the 1925 GIA (UK)") was passed, which, by s 1, made the child's welfare the "first and paramount consideration", and declared that neither parent had an inherently superior claim to the custody or upbringing of a child. We will shortly discuss the meaning of that expression and its significance in the present case. For now, the point is that the English courts continued to apply an expansive view of welfare after the 1925 GIA (UK) was passed. Thus, in *In re Thain* [1926] 2 Ch 676, the father, who was employed in the air force and whose wife had died, entrusted the care of his young daughter to his sister-in-law and her husband. He later remarried and desired custody of his daughter, who had by then turned seven, but the couple refused. His application for her custody was granted at first instance, and that decision was upheld by the English Court of Appeal on the basis that it would be for the child's welfare for her to return to her rightful home, even if she might initially be distressed. In explaining the proper approach, Lord Hanworth MR observed that the court had to apply s 1 of the 1925 GIA

Version No 1: 11 Oct 2022 (19:31 hrs)

(UK), and in that context, explained what he understood "welfare" to mean in these terms (at 689):

> The other statute referred to is the Guardianship of Infants Act, 1925, which by s. 1 provides that the Court, in deciding any such question as we have here, "shall regard the welfare of the infant as the first and paramount consideration." That is no new law, and the welfare referred to there *must be taken in its large signification as meaning that the welfare of the child as a whole must be considered. It is not merely a question whether the child would be happier in one place than in another, but of her general well-being.* … [emphasis added]

44 In 1926, just one year after the 1925 GIA (UK) was passed in England, the Adoption of Children Act 1926 (c 29) (UK) ("the 1926 Adoption Act (UK)") was passed to introduce the institution of adoption into the English legal system: see *Cretney* at para 22-001. Under s 3(*b*) of the 1926 Adoption Act (UK), the court before making an adoption order had to be satisfied that "the order if made will be for the welfare of the infant". This wording is identical to s 5(*b*) of the 1939 Adoption Ordinance, which introduced the institution of adoption in Singapore and is the earliest version of our current Act. What little was said during the passage of this Ordinance in the Legislative Council pointed to its origin in the 1926 Adoption Act (UK). In particular, this Ordinance was intended to "give effect to customs of adoption which are so common amongst both Chinese and Indian communities", and was "based largely on the English Act of 1926": see Straits Settlements, Colony of Singapore, *Proceedings of the Second Legislative Council*, 1939 (27 February 1939) ("*Proceedings of the Second Legislative Council* (1939)") at B14 (Charles Gough Howell, Attorney-General of Singapore). Section 5(*b*) of our current Act has remained unchanged in wording since it first appeared in the 1939 Adoption Ordinance.

45 In these circumstances, we consider that the judicial statements in *In re McGrath* and *In re Thain* on the meaning of "welfare" fairly represent what the

Version No 1: 11 Oct 2022 (19:31 hrs)

Legislative Council would have understood the term "welfare" to mean when it passed the 1939 Adoption Ordinance, and therefore how that word in s 5(*b*) of the Act ought now to be understood. In our judgment, the concept of the welfare of a child refers to his well-being in every aspect, that is, his well-being in the most exhaustive sense of that word. It refers to his physical, intellectual, psychological, emotional, moral and religious well-being. It refers to his well-being both in the short term and in the long term. The inquiry under s 5(*b*) requires an assessment of the impact of making an adoption order on the child's welfare thus understood, and if the court is not satisfied that the impact of such an order would be for the child's welfare, then the court cannot make the order.

46 It is understandable that in many cases concerning the custody or upbringing of a child, the court's focus will be on the satisfactoriness of the parenting arrangement. Thus, in *Re C (an infant)* [2003] 1 SLR(R) 502, the Court of Appeal observed that "greater emphasis" must be placed on the stability and security, love and understanding, care and guidance, as well as warm and compassionate relationships that are essential for the full development of the child's own character, personality and talents (at [16] *per* Yong Pung How CJ). Similarly, in *Re Wan Yijun and another* [1990] 2 SLR(R) 157 ("*Re Wan Yijun*"), where it was said that the proposed adoption must be shown to be to the infant's "benefit", the court concluded that the adoption would not be for the children's welfare because the proposed adopters' unstable relationship created a home environment that would be detrimental to the children's growth and development (at [30] and [45]–[47] *per* Wee Chong Jin CJ, citing *In re A (An Infant)* [1963] 1 WLR 231 ("*In re A*") at 234 *per* Cross J). Factors relevant to assessing the benefit to the child may include the suitability of the proposed adopter or adopters, the relationship between the proposed adopters, and the suitability of the home environment. They may also include the legal consequences which follow an adoption order: see *Re Wan Yijun* at

Version No 1: 11 Oct 2022 (19:31 hrs)

[31]–[32], discussing *In re A*, where the relevant "benefit" was the child's acquiring British nationality upon being adopted, as well as *In re D, An Infant* [1959] 1 QB 229 ("*In re D*") *per* Lord Denning, where the relevant "advantage" was the prospect of acquiring property succession rights as the child would otherwise be illegitimate.

47 However, the breadth of the concept of welfare in s 5(*b*) of the Act means that it is equally critical to account for the intangible components of a child's well-being in a broader sense. This means that attention must be given not only to his psychological and emotional development, but also to the environment within which his sense of identity, purpose and morality will be cultivated. For example, the decision in *In re Fynn* was evidently motivated at least in part by a concern not to expose the children to the corrupting influence of their father: see [40] above and Knight Bruce V-C's reasoning in the passage quoted there; for similar reasoning, see the Singapore High Court's decision in *Re S S* [1974–1976] SLR(R) 230 ("*Re S S*"), which also involved an unfit father, who was described by the court as a "drug addict", "architect of a broken home" and "rolling stone", and whose consent to his daughter's adoption was in the circumstances dispensed with under s 3(4) of the Adoption of Children Act (Cap 43, 1970 Rev Ed) (at [21]–[23] *per* A V Winslow J). It follows from this that the court should assess whether the proposed parenting arrangement might cause any injury or detriment to the morals of the child in question. And this must extend to the nature of the relationship between the parents. Thus, if, for example, the proposed parenting arrangement is that the child would be brought up in a polyamorous five-parent household in which each parent is in a sexual relationship with the other four, the court would, in our judgment, be fully entitled, in the light of the prevailing morality of our society, to reject an application by any one of those parents to adopt the child on the basis that the

Version No 1: 11 Oct 2022 (19:31 hrs)

child's being raised in such a family would be injurious to his sense of identity, purpose and morality.

The effect of s 3 of the GIA

48 Next, we consider the effect of s 3 of the GIA in the present proceedings. In particular, we examine whether s 3 applies to adoption proceedings and, if it does, the meaning of the expression "first and paramount" in that provision and its significance in the context of adoption proceedings. Section 3 of the GIA reads:

> **Welfare of infant to be paramount consideration**
>
> **3.** Where in any proceedings before the court the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the income thereof is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration and save in so far as such welfare otherwise requires the father of an infant shall not be deemed to have any right superior to that of the mother in respect of such custody, administration or application nor shall the mother be deemed to have any claim superior to that of the father.

Applicability of s 3 of the GIA to adoption proceedings

49 The appellant submits that s 3 does apply to adoption proceedings because of its "wide ambit", in that it purports to apply to "any proceedings" concerning the upbringing or custody of an infant, with the result that the court must, even in adoption proceedings, regard the welfare of the child to be adopted as the first and paramount consideration. The Guardian does not take a firm position on whether s 3 applies, preferring instead to highlight that the Act does not expressly make the welfare of the child the first and paramount consideration. This is in contrast to other provisions relating to the custody and upbringing of children, such as s 125(2) of the Women's Charter (Cap 353,

Version No 1: 11 Oct 2022 (19:31 hrs)

2009 Rev Ed) ("the Women's Charter"), which do expressly provide so. She also submitted during oral argument that even if paramountcy were the standard, "other factors would still come into play".

50 In our judgment, s 3 does apply to adoption proceedings. The adoption of a child clearly concerns his "upbringing", and therefore, an adoption proceeding must be a proceeding concerning the upbringing of a child within the meaning of s 3. Indeed, s 3 has been said to apply "whatever the proceedings, as long as within such proceedings an issue of the custody or upbringing of a child arises", such that the consideration of the child's welfare is the "ubiquitous" standard by which all such proceedings are to be guided: see *Leong Wai Kum* at paras 7.058 and 9.128. In *BNS v BNT* [2015] 3 SLR 973, the Court of Appeal affirmed this view, as expressed in an earlier edition of the same textbook. The court treated the paramountcy of the child's welfare as the "golden thread that runs through *all* proceedings directly affecting the interests of children" [emphasis in original] (at [19] *per* Andrew Phang Boon Leong JA). Although that case did not concern adoption proceedings, the court's observations are broad enough, in our judgment, to apply to the present context.

51 Against this, the Guardian submits that legislative developments in England after the passing of the 1926 Adoption Act (UK), upon which the 1939 Adoption Ordinance and our current Act are based, suggest that that Act did not, prior to these developments, regard the child's welfare as the paramount consideration in adoption proceedings. Thus, provisions for the welfare of the infant to be the "first consideration" and the "paramount consideration" were inserted into only the Children Act 1975 (c 72) (UK) and the Adoption and Children Act 2002 (c 38) (UK). During the legislative debates on the Children Bill 1975, Lord Wigoder, who introduced the amendment specifying that the infant's welfare was to be the "first consideration", clarified that the child's

Version No 1: 11 Oct 2022 (19:31 hrs)

welfare was not to be "paramount" in adoption proceedings because the claims of the natural parents must be considered equally without undue emphasis being placed on, for example, the material advantages offered by the adoptive parents: see United Kingdom, House of Lords, *Children Bill* (4 February 1975) vol 356 ("*Children Bill Debate*") at cols 783–785 (Lord Wigoder, Chief Whip of the Liberal Party). Lord Hailsham of St Marylebone also observed that unlike the position in proceedings concerning the care and control, custody and guardianship of a child, the child's welfare was historically not regarded as "paramount" in adoption proceedings because adoption severed the link between the child and his or her natural parents, and therefore required due consideration for the latter's rights: see *Children Bill Debate* at cols 32–33 (Lord Hailsham of St Marylebone). Lord Hailsham's and Lord Wigoder's position has judicial support: see *Hitchcock v WB and FEB and Others* [1952] 2 QB 561 at 569 *per* Lord Goddard CJ.

52 We see the force of this view, and we agree with it to the extent that it holds that the welfare of the child is not the *exclusive* consideration in adoption proceedings. And we are prepared to grant that when the 1939 Adoption Ordinance was passed, this was the understanding of the role of the concept of the welfare of the child. This is plain from both that Ordinance and the Act as it currently stands, of which the latter stipulates as a condition of making an adoption order not only that making the order will be for the welfare of the child, but also that the consent of "every person whose consent is necessary under [the] Act and whose consent is not dispensed with" has been obtained, and, in particular, that any natural parent of the child, in giving such consent, "understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights": s 5(*a*) of the Act. In that sense, the welfare of the child certainly appears to be neither first nor paramount. That said, we recognise that consent may be dispensed with in the circumstances

Version No 1: 11 Oct 2022 (19:31 hrs)

provided for in s 3(1)(3) of the 1939 Adoption Ordinance and now s 4(4) of the Act. But short of these circumstances, even if it may be in the child's welfare for him to be adopted by the applicant, an adoption order will not be granted without the requisite consent. To this extent, the welfare of the child does not appear to be an exclusive or invariably overriding consideration.

53 However, to the extent that the requisite consent has been provided, there is no reason why the child's welfare should not be "first and paramount" by virtue of s 3 of the GIA, the plain effect of which cannot be denied. The real question is what "first and paramount" means, particularly with respect to the kind of considerations outlined by Lord Wigoder and Lord Hailsham which are specific to adoption proceedings.

The meaning of "first and paramount"

54 The leading case on paramountcy of the child's welfare is *J v C* ([39] above). The question there was whether a ten-year-old boy should be returned to his natural parents, who were Spanish nationals resident in Spain, or should remain with his English foster parents, who had looked after him for all but 18 months of his life. The House of Lords upheld the decision of the trial judge and the English Court of Appeal that he should remain in England. The governing provision was s 1 of the 1925 GIA (UK) ([43] above), from which s 3 of our GIA is derived. In a well-known passage, Lord MacDermott, with whom Lord Pearson agreed (at 728B), explained the concept of the paramountcy of the child's welfare, as contained in s 1 of the 1925 GIA (UK), in these terms (at 710H–711A):

> The second question of construction is as to the scope and meaning of the words "… shall regard the welfare of the infant as the first and paramount consideration." Reading these words in their ordinary significance, and relating them to the various classes of proceedings which the section has already

Version No 1: 11 Oct 2022 (19:31 hrs)

> mentioned, *it seems to me that they must mean more than that the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed.* … [emphasis added]

55 Lord MacDermott's exposition has been affirmed in later House of Lords decisions, including *In re O and another (Minors) (Care: Preliminary Hearing)* [2004] 1 AC 523 at [24] *per* Lord Nicholls of Birkenhead (in the context of deciding whether it was in the best interests of children who had been abused to make a care order) and *In re G (Children) (Residence: Same-sex Partner)* [2006] 1 WLR 2305 at [27] *per* Baroness Hale of Richmond (in the context of deciding which of two separated lesbian partners should have custody of their children, whom they had procured through ART). It is also cited with approval in *Leong Wai Kum* at para 9.132. We, too, respectfully adopt Lord MacDermott's explanation of the concept of the paramountcy of the child's welfare. But what may be elaborated is how that concept should be applied. In this regard, two points may be made.

56 First, the welfare of the child ought to define the scope of the inquiry. This means that the court's analysis must take the shape of assessing the impact of the order sought in the light of all the relevant indicia of welfare as enumerated at [45]–[47] above. This gives practical effect to the idea that the child's welfare is a "first" consideration, in that it determines in a significant way the criteria for and the trajectory of the court's analysis of the merits of the application in question. A similar rationalisation of the expression "first and paramount" was developed in *TSH and another v TSE and another and another appeal and another matter* [2017] SGHCF 21 ("*TSH*"). There, the court

Version No 1: 11 Oct 2022 (19:31 hrs)

discussed the list of factors which the Family Law Review Working Group proposed (in its report titled *Recommendations for Guardianship Reform in Singapore* dated 23 March 2016) to guide the application of the welfare principle in the GIA, and the court noted that the proposed factors were sequenced to help the court first to identify the child's needs, and then to ascertain the means by which those needs could be met: see *TSH* at [76] *per* Valerie Thean JC (as she then was).

57 Second, when a certain outcome is shown to be for the welfare of the child, the court should generally make an order which achieves that outcome unless there are compelling reasons to do otherwise. This gives practical effect to the notion that the child's welfare is "paramount", in that it ensures that the welfare of the child is of such supreme importance that it generally overrides any countervailing interest, such as the wishes of a parent. This is a general proposition, however, because although the child's welfare is "paramount", it is neither "absolute" nor "exclusive", and therefore does not override any other relevant consideration in every case. After all, those are not the words used in s 3 of the GIA. This leaves room for exceptional circumstances, particular to the context of the specific case, which may justify an outcome which serves the child's welfare less than optimally. In the context of adoption, for example, the welfare of the child and the concern to protect his relationship with his natural parents may, in a particular case, pull especially hard in different directions, as Lord Wigoder and Lord Hailsham foresaw. Whether the outcome favoured by the welfare of the child ought to prevail in every such case cannot be categorically answered here, and must be left to the discretion of the court determining the particular case. Another category of reason – namely, the concern not to violate a countervailing public policy – may also require a more sophisticated analysis than simply holding that the child's welfare trumps all other considerations, and we develop this at [148]–[161] below.

Version No 1: 11 Oct 2022 (19:31 hrs)

58 In the light of the principles outlined above, we turn now to consider whether making an adoption order in the appellant's favour would be in the Child's welfare.

The welfare assessment in this case

59 There is no dispute that the Child will be amply provided for in the appellant's care and that the appellant's home environment as a physical space is suitable for a child. Since the Child will remain in the appellant's custody and care regardless of whether an adoption order is made, the focus here must be on the benefits which would accrue to the Child if an adoption order is made.

Immigration and citizenship

60 We first address the immigration status of the Child. The Child is a US citizen, not a Singapore citizen. The ICA has issued him a dependant's pass (see [12] above), which allows him to remain here at least until the conclusion of these proceedings. Beyond that, the position is unclear. During oral argument, we invited counsel for the Guardian to address us on the Child's prospects of remaining in Singapore in the long term irrespective of the outcome of these proceedings. She informed us that she had no instructions on this. This was perhaps understandable because it was not a matter within the Guardian's purview. But the result is that there is uncertainty over whether the Child can remain in Singapore. As the Child's natural father and family support structures are situated in Singapore, it would be in the Child's interests to reside in Singapore in the long term. This much does not appear to be seriously disputed before us. Therefore, making an adoption order would be for the Child's welfare if it increases his chances of acquiring Singapore citizenship or long-term residence in Singapore, and thereby enhances his prospects of remaining here

Version No 1: 11 Oct 2022 (19:31 hrs)

with his current caregivers. For the reasons that follow, we find that making an adoption order would indeed have these consequences.

61 We begin with the legal position on the Child's eligibility for Singapore citizenship. Under the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Constitution"), the natural mother of an illegitimate child is treated as his parent for the purpose of his acquiring citizenship. Consequently, if his mother is not a Singapore citizen, he cannot acquire Singapore citizenship by descent even if his father were a Singapore citizen. The relevant provisions are Arts 122, 124 and 140 of the Constitution, and para 15 of the Third Schedule, which read:

> PART X
>
> CITIZENSHIP
>
> …
>
> **Citizenship by descent**
>
> **122.**—(1) Subject to clauses (2) and (3), a person born outside Singapore after 16th September 1963 shall be a citizen of Singapore by descent if, at the time of his birth —
>
> …
>
> (*b*) where the person is born on or after the date of commencement of section 7 of the Constitution of the Republic of Singapore (Amendment) Act 2004, *either his father or mother is a citizen of Singapore*, by birth, registration or descent.
>
> (2) A person born outside Singapore shall not be a citizen of Singapore by descent by virtue of clause (1) unless —
>
> (*a*) his birth is registered in the prescribed manner at the Registry of Citizens or at a diplomatic or consular mission of Singapore within one year, or such longer period as the Government permits, after its occurrence; and
>
> (*b*) he would not acquire the citizenship of the country in which he was born by reason of his birth in that country where —

Version No 1: 11 Oct 2022 (19:31 hrs)

…

(ii) in the case of a person born on or after the date of commencement of section 7 of the Constitution of the Republic of Singapore (Amendment) Act 2004, *either his father or mother is a citizen of Singapore* by registration at the time of his birth.

…

Registration of minors

124.—(1) The Government *may* if satisfied that a child under the age of 21 years —

(*a*) is the *child of a citizen of Singapore*; and

(*b*) is residing in Singapore,

cause such child to be registered as a citizen of Singapore on application being made therefor in the prescribed manner *by the parent or guardian* of such child.

(2) The Government may, in such *special circumstances* as it thinks fit, cause any child under the age of 21 years to be registered as a citizen of Singapore.

…

Application of the Third Schedule

140. Until the Legislature otherwise provides by law, the supplementary provisions contained in the Third Schedule shall have effect for the purposes of this Part.

…

THIRD SCHEDULE

(Article 140)

CITIZENSHIP

…

Illegitimate children and adopted children

15.—(1) For the purposes of Part X, references to a person's father or to his parent or to one of his parents *shall, in relation to a person who is illegitimate, be construed as references to his mother*.

Version No 1: 11 Oct 2022 (19:31 hrs)

> (2) In relation to an adopted child who has been adopted by an order of a court in accordance with the provisions of any law in force in Singapore, references to a person's father or to his parent or to one of his parents shall be construed as references to the adopter.
>
> [emphasis added]

62 Here, the Child is currently an illegitimate child at common law, having been born out of wedlock. (To be sure, he was born to a married woman, M; but his biological father, the appellant, was not a party to that marriage, and that makes the Child illegitimate at common law: see Leong Wai Kum, "The Next Fifty Years of the Women's Charter—Ripples of Change" [2011] SJLS 152 ("*Ripples of Change*") at p 157.) M is not a Singapore citizen. Therefore, the Child cannot acquire Singapore citizenship by descent under Art 122 of the Constitution or by registration under Art 124(1) because para 15(1) of the Third Schedule requires references to his father or parent in those provisions to be read as references to his mother. But if he were to be adopted by the appellant, then by virtue of para 15(2) of the Third Schedule, all references to his father or parent in those provisions would be construed as references to his adopter, namely, the appellant. This would make him eligible to apply through the appellant to be registered as a Singapore citizen under Art 124(1). And if he succeeds, then he would have the right to remain in Singapore.

63 During oral argument, the Guardian submitted that it is already open to the appellant to apply for the Child to be granted Singapore citizenship under Art 124(2) of the Constitution. That provision applies to "any child under the age of 21 years" and, unlike Art 124(1), is not limited to children of Singapore citizens. The Guardian contended that the Child's eligibility to apply for citizenship through two doors rather than one does not meaningfully enhance his prospects of success. Whether he applies under Art 124(1) or Art 124(2), the success of his application for citizenship would ultimately depend on the ICA's

Version No 1: 11 Oct 2022 (19:31 hrs)

judgment of what it regards as the relevant features of the case. Therefore, in the Guardian's submission, an adoption order would have no tangible impact on the Child's prospects of acquiring Singapore citizenship.

64 We are not persuaded by this argument. In our judgment, it would be advantageous to the Child to be eligible to apply for Singapore citizenship under Art 124(1) as opposed to only under Art 124(2). On its face, Art 124(2) provides for an exceptional power to confer citizenship in "special circumstances", whereas Art 124(1) appears to make the grant of citizenship the ordinary course for children born of a Singapore citizen and residing in Singapore. This is so even if the Government retains a discretion to deny citizenship under Art 124(1), and we are not concerned here with whether the Government would have grounds to do so in a case such as the present. The fact remains that having the ability to apply for citizenship under Art 124(1) is better than having the ability to apply only under Art 124(2) based on *exceptional* circumstances.

65 As an adoption order would constitute the appellant the parent of the Child for the purposes of Art 124(1) and thereby render the Child eligible to be registered as a Singapore citizen under that provision, we accept that an adoption order would enhance the Child's prospects of remaining in Singapore. In our judgment, this would significantly promote the Child's welfare. If the anticipated application for the Child to become a citizen or permanent resident of Singapore were to be successful, it would undoubtedly stabilise the Child's care arrangements by enabling his caregivers to plan on the basis that they will remain together in Singapore in the long term. This would give the Child a sense of security, which is vital to his well-being and development. Although the Child is presently too young to comprehend fully the benefits of being able to remain in Singapore indefinitely, it is the relief experienced by his caregivers

Version No 1: 11 Oct 2022 (19:31 hrs)

which would very likely feed into his own sense of security. As the appellant deposed:

> To my knowledge, if adoption is not allowed … [the Child] will have to apply for a LTVP [*ie*, Long-Term Visit Pass] again. The grant (and later, extension) of the LTVP, to my knowledge, is at the ICA's discretion. If the ICA refuses the application for an LTVP (or its extension), [the Child] will need to return to the United States. What happens then? I am based in Singapore and my job requires that I be here. [The Child] would effectively be sent out of Singapore to the United States where he has no family or caregivers.

66 The concern to enable the Child to continue enjoying the benefits of his existing care arrangements is supported by the fact that these arrangements have been assessed by the Guardian herself as materially and financially adequate. The Senior Child Welfare Officer observed in her report that the Child was "adequately cared and provided for" by the appellant, his parents, his partner and their domestic helper, who took turns looking after the Child. The appellant had installed cameras in his and his parents' homes to monitor the Child while he was at work. The Child was attending a Montessori preschool, and the principal of the school had reported that the Child was "progressing well". The Child was also regularly engaged in a variety of leisure activities suitable for his stage of development.

67 In the circumstances, we hold that an adoption order would be for the Child's welfare. It would strengthen the prospects of regularising his citizenship or residency status in Singapore, and that, in turn, would enable the aforesaid care arrangements to be maintained for the foreseeable future for the Child's benefit. That prospect would give the Child's caregivers a peace of mind, which would in turn contribute to the Child's sense of security and overall emotional well-being. In arriving at this view, we are aware that the Child's somewhat precarious immigration status in Singapore is in large part the result of the

Version No 1: 11 Oct 2022 (19:31 hrs)

appellant's own actions. It was the appellant who went overseas and procured a child out of wedlock through the reproductive services of a foreigner, and thereby created this situation in which, under Singapore law, the Child is treated as illegitimate and a non-citizen. However, none of this conceptually affects the point that the Child's well-being would be improved should the appellant be allowed to adopt him, and that is the only relevant point at this stage of the inquiry. We consider the significance of the circumstances of the Child's birth at [167]–[186] below.

Social, psychological and emotional impact

68 Next, the appellant submits that apart from the benefits associated with the Child's acquiring Singapore citizenship, an adoption order would have a positive social, psychological and emotional impact on the Child. The appellant's first contention in this regard is that the mere formalisation in law of the relationship between a natural parent and his or her child constitutes a benefit to the child. But we do not think the cases which the appellant has cited support this proposition. One of them is *In re R (Adoption)* [1967] 1 WLR 34. There, the court was faced with an application to adopt a child who was a refugee in England. Without an adoption order, the child would have been a stranger to the proposed adoptive parent who had taken him in. It was in this context that Buckley J found that the adoption would confer on the child not merely the benefit of British nationality, but also the social and psychological benefits of truly belonging to a family, as a member of it, "with the attendant legal status and rights" (at 41). However, the same cannot be said in the present case, because the evidence is that the Child will enjoy such benefits whether or not an adoption order is made, given that he will remain in the care of the appellant, his natural father, either way. The simple point is that whether an adoption order contributes to the social, psychological and emotional welfare of

Version No 1: 11 Oct 2022 (19:31 hrs)

the child must depend on the facts of the case. Here, the circumstances affecting the Child's welfare – namely, his care arrangements and the relationships which he shares with his family – will not change whether or not an adoption order is made.

69 The appellant's second contention is built on an analogy between the effect of an adoption order in this case, if made, and the effect of what are known as "parental orders", which are granted in jurisdictions such as England for the purpose of determining the parentage of children born through ART or surrogacy. Like a parental order, an adoption order in the present case, says the appellant, would go to "the most fundamental aspects of status and, transcending even status, to the very identity of the child as a human being: who he is and who his parents are": see *In re X (A Child) (Parental Order: Time Limit)* [2015] Fam 186 ("*In re X*") at [54] *per* Sir James Munby P.

70 To evaluate this submission, it is important first to appreciate that in England, the law essentially treats the gestational mother (that is, the woman who carried and gave birth to the child) and her husband *prima facie* as the legal parents of a child born through ART, including through gestational surrogacy: see ss 33 and 48(1) of the Human Fertilisation and Embryology Act 2008 (c 22) (UK) ("the HFEA"). Hence, if the commissioning parents wish to acquire parental rights and assume parental responsibility over the child, they would have to apply under s 54 of the HFEA for a court order to that effect, also known as a parental order.

71 Since it appears that, without a parental order, those who procured the child's birth and intend to care for him would have no legal nexus to the child, their obtaining such an order has been considered by the English courts to have a transformative effect on the child's life. Thus, in *In re X*, which was decided

Version No 1: 11 Oct 2022 (19:31 hrs)

under the HFEA, the applicants sought permission to apply for a parental order out of time in relation to a child over whom they had no rights and responsibilities because he had been born to surrogate parents in India who had been commissioned by the applicants for that purpose. It was in that context that the court highlighted the "transformative effect" of the parental order since it would operate to sever the child's relations with his surrogate parents (at [54]). *Re C (Parental Order)* [2014] 1 FLR 654 also concerned a surrogacy arrangement, with surrogate parents in Russia. The problem was that Russian law treated the commissioning parents as the child's legal parents, whereas the HFEA, as a starting point, treated the surrogate parents in Russia as the child's legal parents. In that context, the court observed that without a parental order, the child would be consigned to a "legal vacuum, without a full legal membership of any family in the world" (at [34]).

72 By contrast, no such transformative effect on the Child's life would obtain in the present case upon making an adoption order in view of the applicable legal regime governing his parentage. While a regime similar to that established by the HFEA exists in Singapore under the Status of Children (Assisted Reproduction Technology) Act (Cap 317A, 2015 Rev Ed) ("the SCARTA"), it does not apply to the Child because he was born before it came into force (in May 2015). In any event, as we shall explain at [171]–[172] below, there are crucial differences between the HFEA and the SCARTA. In the present case, it is the common law which governs the question of the Child's parentage, in the absence of any applicable statute governing that question as a matter of substantive law. Under the common law, it is clear that a child's biological parent is regarded as his parent: see *Leong Wai Kum* at para 7.025. Biological parentage may be proved from the results of a DNA test and may be *prima facie* indicated by the record of who the child's mother and father are on his birth certificate: see *Leong Wai Kum* at paras 7.173 and 7.188. In the present case,

Version No 1: 11 Oct 2022 (19:31 hrs)

the appellant should have little difficulty establishing that he is the biological parent, and therefore the parent, in law, of the Child, because he has a DNA profile report attesting to their genetic link, as well as the Child's birth certificate, which records that the appellant is the Child's father.

73 We note that under s 114(1) of the Evidence Act (Cap 97, 1997 Rev Ed), any person born during the continuance of a valid marriage between his mother and any man is presumed to be the "legitimate child" of that man unless the contrary is proved. This means that the Child is presumed to be the "legitimate child" of M's husband. But this presumption does not affect the appellant's biological parentage of the Child because it goes to legitimacy, which is a different concept from parentage. As Lee Seiu Kin J observed in *WX v WW* [2009] 3 SLR(R) 573 at [14], "s 114 only applies to confer legitimacy in the circumstances set out in the provision, and not to rebut or invalidate evidence that a man is the biological father of a child". In any event, there is no dispute that the Child is the appellant's biological as well as illegitimate child.

74 Hence, the Child's present circumstances already reflect the reality that he is the appellant's biological son. It seems clear from the evidence before us that the appellant has had no trouble asserting his legal rights as the Child's father. In this situation, there is hardly an analogy between the effect of an adoption order and the effect of a parental order under the HFEA in terms of their social, psychological and emotional impact on the Child. Accordingly, we are not persuaded that an adoption order would result in any positive social, psychological or emotional impact on the Child of the kind described by the appellant.

75 That said, we acknowledge that in the present case, an adoption order would give the Child the legal status of a legitimate child and the social

Version No 1: 11 Oct 2022 (19:31 hrs)

acceptance attached to this status. In this connection, it has been said that by refusing to "*reinforce* the biological link" [emphasis in original] between the appellant and the Child (GD at [35]), the District Judge "downplayed the significance of the child acquiring legitimate status with his father": *Leong Wai Kum* at paras 11.041–11.043. We agree to the extent that making an adoption order will, in our view, have some positive social, psychological and emotional impact on the Child, and this is in addition to the psychological benefits, discussed at [65] and [67] above, that come with a more secure immigration status. But the more pertinent benefits, in our judgment, are those that flow from improving his prospects of residing in Singapore and maintaining his present care arrangements. Besides social, psychological and emotional benefits, the appellant also claims that having the status of a legitimate child carries practical benefits. To this contention we now turn.

Inheritance rights

76 The appellant submits that an adoption order carries with it the practical benefits of the Child's acquiring the status of a legitimate child. These benefits are said to consist in the Child's rights of inheritance as an offspring of the appellant and an issue of the appellant's extended family in the event that the appellant dies intestate. As against this, the Guardian argues that changes to the law have rendered the distinction between legitimate and illegitimate children virtually inconsequential, and that any residual effects on intestacy may be overcome by providing for the Child through a will.

77 The distinction between legitimate and illegitimate children has indeed been eroded, and it is significant today only for the purposes of succession law. As Prof Leong Wai Kum ("Prof Leong") explains in *Ripples of Change* ([62] above) at p 162:

Version No 1: 11 Oct 2022 (19:31 hrs)

> … [T]he disadvantageous effects of being an illegitimate child in Singapore are today of residual nature. There are many more areas where the law treats all children alike than those that discriminate or, at least, differentiate between the illegitimate and the legitimate siblings.
>
> One residual area is succession. The *Intestate Succession Act*, section 2, continues to define "child" as "means a legitimate child" thereby disentitling the illegitimate child from sharing the "child's share" under its s. 7 Rule 3. There used to be a common law rule that valid wills ought to be interpreted so that any family relationship is limited to a legitimate family relationship. This rule has been repealed by statute in England and it is still not clear what a court in Singapore might decide here. …

78 The appellant relies on an English case in which an unmarried mother was allowed to adopt her natural child, whom she bore out of wedlock, so as to overcome the effects of illegitimacy. In *In re D* ([46] above), Lord Denning held that the adoption would not legitimise the illegitimate child, but would certainly give her an advantage by freeing her from the disabilities attached to illegitimacy, particularly in relation to property succession (at 236). Similarly, the adoption of an illegitimate child by her natural mother and stepfather was ordered by the Singapore High Court in *Re S S* ([47] above). The court found it in the child's "best interests to be adopted by [the petitioners], one of whom is her own natural mother" (at [6] *per* A V Winslow J). However, we note that the adoption came with the benefit of regularising the child's relationship with the male petitioner (who was the child's stepfather), and the court did not base its decision on any practical benefits of avoiding illegitimacy.

79 In our judgment, the possibility of intestate succession by virtue of becoming the appellant's legitimate child through the proposed adoption would not constitute a meaningful practical benefit to the Child because regardless of whether an adoption order is made, he may be provided for in the event of his family members' deaths by means of a will. The Child's inheritance rights are hence entirely within the control of the appellant, his family and his partner.

Version No 1: 11 Oct 2022 (19:31 hrs)

Indeed, the Senior Child Welfare Officer noted in her report that the appellant's partner has made provision for the Child in his will. In our judgment, beyond the benefit which we have identified at [75] above, the legitimation of the Child by making an adoption order would not result in a material advancement of the Child's welfare.

Removal of M's parental rights

80 The appellant next argues that an adoption order would be for the Child's welfare because it would conclusively remove M's rights as the Child's mother. In our judgment, this does not qualify as a factor advancing the Child's welfare. The prospect of a challenge by M, or by the egg donor for that matter, is fanciful on the evidence before us. It is evident that the appellant is not in fact troubled by this prospect in the least. We therefore disregard it.

Impact of same-sex parenting

81 Finally, the Guardian suggests that there could be concerns for the Child's welfare arising from the fact that he is being brought up in what would be regarded in our society as an unconventional household with same-sex parents. In her report, the Senior Child Welfare Officer stated that when she interviewed the appellant and his partner, she expressed the concern that the Child might face social stigmatisation and confusion because he was being brought up in an "unconventional family" in the context of a "predominantly conservative society" in Singapore. The appellant and his partner were asked how they would deal with the challenges that the Child might face when interacting with children from conventional family backgrounds. The appellant responded that he and his partner would protect the Child by, among other things, loving him and surrounding him with like-minded people who accepted his unconventional family structure and other children brought up in family

Version No 1: 11 Oct 2022 (19:31 hrs)

structures that were similar to his own. The appellant also said that he would guide and equip the Child to overcome any potential negative responses from his peers. The officer did not state her view on the adequacy of these responses.

82 In our judgment, the reservations expressed by the officer are based only on her perception and have not been substantiated by any other evidence. More importantly, if and to the extent that they were well founded, they would be neutralised by the *fact* that the Child will remain in the care of the appellant and his partner regardless of whether an adoption order is made. The Child will simply have to confront the challenges alluded to by the officer if and when they arise. None of this will be affected by either making or withholding an adoption order. We therefore disregard it in this context.

83 To this extent, the appellant's sexual orientation is irrelevant to our assessment of the welfare of the Child. Moreover, the Guardian does not contend that being brought up by a gay person, such as the appellant, would adversely affect the Child's sense of identity or morality and therefore undermine his welfare: *cf* [47] above. However, the appellant's sexual orientation does implicate public policy considerations on parenthood and the family, which, as will be seen, do militate against the making of an adoption order in the present case. We address this at [187]–[192] and [202]–[209] below.

Conclusion on the welfare assessment

84 All things considered, we conclude that an adoption order would be for the Child's welfare essentially because it would increase the Child's prospects of acquiring Singapore citizenship and securing long-term residence in Singapore. This consideration carries significant weight, given its bearing on the Child's sense of security and emotional well-being, as well as the long-term

Version No 1: 11 Oct 2022 (19:31 hrs)

stability of his care arrangements. In addition, as we have noted above (at [75]), to a limited extent, the legitimation of the Child by the making of an adoption order would have some positive social, psychological and emotional impact on him due to the social acceptance attached to being a legitimate child. Beyond this, the other considerations raised by the appellant do not, in our judgment, carry material weight.

Issue 2: The legal basis for taking public policy considerations into account

85 Having concluded that making an adoption order in this case would be for the welfare of the Child, we now turn to consider the Guardian's submission that nevertheless, the order should not be made because it would be in violation of public policy. In evaluating this submission, the first question we must address is whether there is any legal basis for the court to take public policy considerations into account in arriving at its decision in this case. For reasons which will be apparent, we hold that there is both a statutory basis and a common law basis for doing so, although, having regard to the specific public policies that the Guardian relies on, it is the statutory basis that is applicable here.

The statutory basis

86 Section 3(1) of the Act reads:

> **Power to make adoption orders**
>
> **3.**—(1) Upon an application in the prescribed manner by any person desirous of being authorised to adopt an infant who has never been married, the court may, subject to the provisions of this Act, make an order (referred to in this Act as an adoption order) authorising the applicant to adopt that infant.

87 The Guardian's position is that this provision empowers the court to take public policy considerations into account in deciding whether to make an

Version No 1: 11 Oct 2022 (19:31 hrs)

adoption order because it confers a discretion on the court, as evidenced by the use of the word "may".

88 During oral argument, the appellant responded to this position by arguing that s 3(1) does not in fact give the court any discretion, in the sense that once all three conditions in s 5 have been satisfied, the court must make an adoption order. The Act, said the appellant, is explicit and specific where it intends to confer a discretion. One example given by the appellant is s 4(2): while s 4(1) provides that an adoption order shall not be made where the applicant is under 25 or is less than 21 years older than the infant in question, s 4(2) provides that notwithstanding s 4(1), it shall be lawful for the court to make the order "if it thinks fit" where certain circumstances exist, such as where the applicant and the infant are within the prohibited degrees of consanguinity or where there are other special circumstances. Given that the Act affords the court such specific areas of discretion, the appellant argues that s 3(1) does not give the court a general discretion of the nature contended by the Guardian. Instead, s 3(1) simply confers a *power* on the court to make an adoption order once the relevant statutory conditions have been satisfied.

89 We reject this argument. In our judgment, s 3(1) confers on the court not only a power to make an adoption order, but also a general discretion to determine whether to make such an order once the relevant statutory conditions have been satisfied. That s 3(1) is power-conferring is evident from the title of the section, which is "Power to make adoption orders". That s 3(1) also confers a discretion is established by its use of the word "may". It seems to us that the word used would have been "must" or "shall" instead if the Act truly required the court to make an adoption order upon the fulfilment of the relevant statutory conditions: see *In re Baker; Nichols v Baker* (1890) 44 Ch D 262 at 270 *per* Cotton LJ. Instead, "may" has been used, and that word, in the absence of

Version No 1: 11 Oct 2022 (19:31 hrs)

express or implied limitation, is generally taken to confer a discretion: see Ruth Sullivan, *Sullivan on the Construction of Statutes* (LexisNexis, 6th Ed, 2014) ("*Sullivan*") at para 4.61. Save for s 5, no other express limitation is placed on the court's exercise of the power that is conferred by s 3. We appreciate the appellant's point that there are specific provisions in the Act which give the court a discretion with respect to particular matters. But what follows from this is not that s 3(1) does not contain a general discretion, but simply that the court, in exercising its general discretion under s 3(1), ought not to account for those matters for which a specific discretion has been provided elsewhere in the Act.

90 The question then becomes whether the general discretion contained in s 3(1) entitles the court to take public policy considerations into account in deciding whether to make an adoption order. This turns on the scope of the discretion. In this regard, it is well established that the scope of a statutory discretion is limited by the purpose for which it is conferred: see *Sullivan* at para 4.61. That purpose in turn limits the kinds of considerations that the court may take into account in exercising the statutory discretion.

91 The purpose for which a statutory discretion is granted must be discerned from the context of the provision and the purpose of the statute, as the cases show. In *Julius v Lord Bishop of Oxford* (1880) 5 App Cas 214, the appellant complained that the Lord Bishop of Oxford had a duty to exercise a statutory power to commence disciplinary proceedings against clergy under his diocese for committing ecclesiastical offences, but had failed to exercise that power in relation to a particular alleged offence. Before the House of Lords, the issue was whether the relevant statutory provision imposed a duty on the Lord Bishop to exercise that power or left it in his complete discretion as to whether to do so. In setting out the applicable principles, Lord Selborne made the following general observations on the circumstances in which a statutory power

Version No 1: 11 Oct 2022 (19:31 hrs)

might be limited either in scope or by an obligation to exercise that power, emphasising that attention must be given to the context above all. He said (at 235):

> The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved *aliunde*, and, *in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.* [emphasis added]

92 A similar observation was made in the Canadian Supreme Court's decision in *R v Lavigne* [2006] 1 SCR 392, where Deschamps J said (at [27]) that the effect of the word "may" is to grant a discretion which is "necessarily limited by the objective of the provision, the nature of the order and the circumstances in which the order is made". Therefore, to determine whether public policy considerations may be taken into account under s 3(1) of the Act, it is necessary to consider, in the context of the Act, the purpose for which that provision exists. To that end, we shall examine the scheme and the legislative history of the Act with a view to discerning the purpose of s 3(1).

93 The preamble to the Act states that it is "An Act to make provision for the adoption of infants". Adoption refers to the legal process whereby a court irrevocably extinguishes the legal ties between a child and his natural parents or guardians, and creates analogous ties between the child and his adopters: see *Cretney* at para 22-001. In *O'Connor and Another v A and B* [1971] 1 WLR 1227, Lord Simon of Glaisdale observed that this process enables natural parents who "do not wish to enjoy the rights, with their concomitant obligations, of bringing up their natural child" to surrender them to "those who wish to assume them" (at 1235G–1236B). The provisions of the Act therefore seek both to ensure that this process of surrendering and acquiring rights and obligations is undertaken consensually, and to protect the welfare of the child who is the

Version No 1: 11 Oct 2022 (19:31 hrs)

principal subject of that process. The former concern is addressed by such provisions as ss 4(4) and 5(*a*), which make the consent of the parent or guardian of the child a condition of making an adoption order. The latter concern is addressed by all the provisions of the Act which impose restrictions on the making of adoption orders (relating, for example, to the age and sex of the applicant: see ss 4(1) and 4(3)), and by the requirement in s 5(*b*) that the court must be satisfied that an adoption order would be for the welfare of the child. The other provisions of the Act deal with the consequences of adoption. As observed in *Leong Wai Kum* at para 11.001, "[m]uch of legal regulation of adoption reflects the gravity of what the adults are seeking to achieve because of the effect on the child concerned", and the Act bears this out.

94 Next, we consider the Act's legislative history. On the one hand, there have been no Parliamentary pronouncements on the purpose of the Act apart from a statement in the Legislative Council during the passage of the 1939 Adoption Ordinance (the earliest version of the Act: see [38] above) to the effect that the Ordinance was intended to "give effect to customs of adoption" and was "based largely on the English Act of 1926 [*ie*, the 1926 Adoption Act (UK)]": see [44] above. On the other hand, the purpose of the 1926 Adoption Act (UK) is clearer. Mr James Galbraith, the Member of Parliament ("MP") who introduced the Bill which led to that Act, explained that the reason for the clause conferring the general discretion now contained in s 3(1) of our current Act was that a judicial determination of all the facts of the particular case before the court would be necessary to ensure that a proposed adoption was indeed for the welfare of the infant concerned, and that it was justified, in the circumstances, to sever the tie between the infant and his natural mother: see United Kingdom, House of Commons, *Adoption of Children Bill* (26 February 1926) vol 192 at cols 917–977 ("*1926 Debates*"). Mr Galbraith said:

Version No 1: 11 Oct 2022 (19:31 hrs)

> I think I am right in saying that this Clause is the keynote of the whole Measure, because it makes adoption possible, provided and provided only, that the Court, *after a judicial determination of the question, after hearing all the facts, and after considering whether the matter is for the welfare of the infant, comes to the conclusion that the adoption ought to be sanctioned*. Every hon. Member will agree that, having regard to the importance of this question, *having regard to the very serious effect of severing the tie between the mother and the child*, it is only right that adoption should not be legalised until there has been a judicial determination, and after the whole of the facts have been ascertained. … [emphasis added]

95 Mr Galbraith emphasised the welfare of the child again when he explained that the Bill would do away with what had hitherto been the long-standing practice of concealing adoption arrangements from natural parents, who, as the law then stood, would not be precluded from reclaiming the child many years after giving him up for adoption. He stated (see the *1926 Debates*):

> The practice of adoption societies up to now has been this. They have taken every step to prevent the natural parents knowing where the child has gone. Their practice has been shortly as follows: Before the child is adopted they have, quit[e] properly of course, given to the person who proposes to adopt the child the fullest information they can procure with regard to its parentage, its surroundings and, so far as they can ascertain, its hereditary tendencies. But all that the person who is giving up the child is told it [*sic*] that it is going to a home where the society is satisfied, as the result of its inquiries, that it will be adequately and properly and carefully maintained and looked after. That programme of secrecy was, I believe, essential so long as there was no legal ratification or sanction of the adoption, because as the law now stands these arrangements do not prevent, *subject always to the overriding welfare of the infant*, the natural parent reclaiming the child after he has parted with it for many years. … [T]he Tomlin Committee has come to the conclusion that the necessity of secrecy is done away with once legal effect and force is given to adoption, and although this is a matter obviously as regards which there may be considerable difference of opinion, I have come to the conclusion that that is the right view, and that once you give legal effect to adoption in the way proposed, the necessity and the desirability of secrecy goes too. Those shortly are the provisions of the Bill. This is in no sense, as far as party politics are concerned, a controversial or party Measure. It is a matter in which Members of all parties have taken a great interest and

Version No 1: 11 Oct 2022 (19:31 hrs)

> to the solution of which Members of all parties have contributed a great deal. I believe this Bill will do much to *promote the welfare and serve the interests of a class of children* in which Members in all parts of the House have a particular interest, and in that spirit I commend it to the sympathetic consideration of the House. [emphasis added]

96 Appreciated against the scheme and the legislative history of the Act, the general discretion in s 3(1), in our judgment, has at least two purposes. The first is to enable the court to take into account any consideration which is not provided for in the Act, but which may be relevant to assessing the propriety of the transaction between the two sets of parents involved in an adoption as well as the welfare of the child concerned. Proceedings involving the upbringing of children, including adoption proceedings, arise from a wide variety of factual scenarios which do not conduce towards a rigid rule-based regime for determining the merits of granting the order sought. The restrictions in the Act express the basic requirements that must be satisfied to enliven the court's power to make an adoption order. But the court ought to exercise that power only after having regard to all the relevant circumstances of the case, and not just the particular factors stipulated in the Act. The general discretion in s 3(1) gives the court as much room as possible to do that.

97 Second, we consider that s 3(1) must also have the purpose of enabling the court to consider any public policy which may be relevant to any aspect of the institution of adoption. This is because adoption is the very institution which the Act has established and seeks to regulate. In this regard, adoption is premised on other foundational social institutions, such as parenthood and family. Viewed in the context of its scheme and its legislative history, the Act may properly be regarded as an instrument for the establishment of new families and parental relations, and to that extent, any attempt to use it in a way which undermines the institutions of family and parenthood, as society understands

Version No 1: 11 Oct 2022 (19:31 hrs)

them, ought to be cautiously examined and, in an appropriate case, resisted. Similar reasoning was employed in *S-T (formerly J) v J* [1998] Fam 103, where the English Court of Appeal dismissed a claim for ancillary relief brought by a female-born transsexual who had deceived the defendant woman into a marriage which was later declared a nullity on the ground that the parties were of the same sex. Ward LJ declined to exercise the court's statutory discretion to grant ancillary relief on the basis that "the deception goes to the fundamental essence of marriage" (at 141G). It was "[t]o cheat in respect of" the "core elements" of marriage as "the union of one man and one woman", and therefore "to *undermine the institution*" [emphasis added] which conferred the "peculiar right" to claim ancillary relief (at 139E–F and 141G); see also *The Ampthill Peerage* [1977] AC 547 at 577A *per* Lord Simon of Glaisdale. We therefore hold that the Guardian is entitled to rely on s 3(1) to introduce public policy considerations relating to family, parenthood and the well-being of children.

98 Such public policy considerations, we hasten to add, are conceptually distinct from arguments of the kind mentioned at [47] above which seek to show that the child in question will suffer moral detriment as a result of an adoption order being made, even though the normative grounds traversed in both instances may be similar. Thus, to borrow from an earlier example, where the proposed parenting arrangement is that the adopted child would be brought up in a polyamorous five-parent household in which each parent is in a sexual relationship with the other four, such a family arrangement may be regarded as so out of step with the prevailing morality in our society that the court would be entitled to consider that making an adoption order would not only be morally injurious to the child and therefore not for his welfare under s 5(*b*), but also contrary to a public policy concerning traditional family structures (if such a policy is proved to exist) and therefore capable of influencing the discretion under s 3(1) in favour of not making the order.

Version No 1: 11 Oct 2022 (19:31 hrs)

The common law basis

99 We are also satisfied that the common law enables and, indeed, obliges the court to take into account public policy considerations in exercising any statutory discretion. The common law has developed a number of specific principles of statutory interpretation based on the assumption that, in the absence of any clear indication to the contrary, Parliament intends to conform to established principles of public policy: see Diggory Bailey & Luke Norbury, *Bennion on Statutory Interpretation* (LexisNexis, 7th Ed, 2017) ("*Bennion*") at section 26.1. While these principles may be expressed as principles of statutory construction, many of them may also be expressed in terms of the wider principles of public policy that they embody. For example, the principle that penal legislation should be strictly construed is but an aspect of the principle of justice and fairness that a person should not suffer under a doubtful law, whether written or unwritten: see *Bennion* at section 26.1.

100 Where a statutory discretion is concerned, Parliament is presumed to intend that the discretion shall be exercised in a manner that is reasonable, fair and just: see *Bennion* at section 26.3. This principle is distinct from the principle which we have mentioned that a statutory discretion ought to be exercised in accordance with the object of the statute and the provision conferring that discretion. The former principle, with which we are now concerned, concerns what Parliament is presumed to have intended in the absence of contrary indication, and what therefore may be implied into the statute, whereas the latter concerns what Parliament is shown to have intended through the language that it has chosen, the scheme within which it has set out that language, and the history behind the enactment in question. That is why it is sensible to regard the former as a common law basis for taking public policy into account in exercising a statutory discretion. It is also significant, in this context, that the former is not

Version No 1: 11 Oct 2022 (19:31 hrs)

based on the particular features of the statute in question before the court, but applies generally to all statutes.

101 One example of this presumptive principle is the rule that a statutory discretion must be exercised in accordance with procedural fairness. Thus, in the decision of the UK Supreme Court in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, it was held that "[t]he duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute", and that the fact that the statute makes provision for a certain procedure to be followed "does not of itself impliedly exclude either the duty of fairness in general or the duty of prior consultation in particular, where they would otherwise arise": at [35] *per* Lord Sumption, citing Byles J's *dictum* in *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at 194 that "the justice of the common law will supply the omission of the legislature". Another example is the maxim *nullus commodum capere potest de injuria sua propria*, which means "no one can derive an advantage from his own wrong": see *Bennion* at section 26.6. Examples of this principle affecting the exercise of a statutory discretion are discussed at [122]–[123] below as part of our discussion on how public policy ought to be taken into account.

The applicable basis in this case

102 In view of the content of the public policies that the Guardian relies on in this case (see [28] above), we consider that the applicable basis for taking them into account in determining the appellant's adoption application is the statutory basis, that is, the statutory discretion in s 3(1) of the Act. We do not think it is the common law basis because the content of these public policies appears different from that of those long-established public policies embedded in the common law to which Parliament may be presumed to have intended

Version No 1: 11 Oct 2022 (19:31 hrs)

legislation to conform, such as the policy that no man may benefit from his own wrong. That said, we do not express a final view on the kinds of public policy which the common law basis permits consideration of.

Issue 3: Taking public policy into account

103 Having established that there is a statutory basis for the court to take public policy into account when exercising its discretion under s 3(1) of the Act in this case, we turn now to consider *how* public policy ought to be taken into account. We will first undertake a conceptual analysis of what public policy means and explain its proper role in judicial decisions as well as in the present case. We will then develop a two-stage analytical framework for taking public policy into account. In brief, the framework will require us first to articulate and identify the relevant public policy, having regard to the appropriate authoritative sources, and second, if the public policy is found to exist, to perform a balancing exercise. The proper approach to giving effect to the paramountcy of the welfare of the child at this stage will require careful attention. The framework will then be applied to each strand of public policy that the Guardian relies on. After completing the analysis of the first step, we shall defer the analysis of the second step until we have explained our views on the impact of s 11 of the Act in this case.

The concept of public policy

104 Public policy has long been regarded as an elusive concept. Burrough J in *Richardson v Mellish* [1824–34] All ER Rep 258 at 266 famously described it as a "very unruly horse, and when once you get astride it you never know where it will carry you". Courts are wary of relying on it because it is often seen as a "cover for uncertain reasoning" (see James D Hopkins, "Public policy and the formation of a rule of law" (1971) 37 Brooklyn Law Review 323 at pp 322–

Version No 1: 11 Oct 2022 (19:31 hrs)

333), or perhaps because, as Justice Oliver Wendell Holmes suggested, "the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics" (see Oliver Wendell Holmes Jr, "Privilege, Malice and Intent" (1894) 8 Harvard Law Review 1 at p 7). In the present case, the Guardian has relied expressly on public policy considerations to persuade us not to grant the appellant's adoption application and to dismiss this appeal. This is not the first and certainly will not be the last time an argument of this nature is attempted. It therefore seems profitable for us to make some effort at taming the unruly horse to clarify the role of public policy in judicial determinations. And it is only apt to begin with what the concept of public policy really means.

105 As with many legal concepts, the meaning of the concept of public policy may be discerned from its origins in the common law: see generally Farshad Ghodoosi, "The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements" (2016) Nebraska Law Review 685 ("*Ghodoosi*") at pp 691–695. Historically, judicial discussion of public policy was enmeshed with the law of contract. The earliest cases that employed the concept of public policy involved contracts which were regarded as constituting a restraint on trade and therefore contrary to the public interest and, in turn, unenforceable. In *Mitchel v Reynolds* (1711) 24 ER 347, for instance, Lord Macclesfield invalidated a contract on the basis that "to obtain the sole exercise of any known trade throughout England, is a complete monopoly, and against the policy of the law" (at 349). Gradually, the influence of public policy as a concept extended to other areas of private law, such as the rule against perpetuity, sales of offices, marriage contracts and wagering.

Version No 1: 11 Oct 2022 (19:31 hrs)

106 What judges and writers themselves understood public policy to mean during the course of the common law's development is also illuminating. In *Earl of Chesterfield v Janssen* (1750) 2 Ves Sen 125, Lord Hardwicke LC explained that a contract against public policy was of no effect not because either of the parties had been deceived, but because it was a "public mischief" (at 156). This was what the courts meant, he explained, "when they profess to go on reasons drawn from public utility" (at 156). Just over a century later, a similar conception was put forward by Lord Truro in *Egerton v Earl Brownlow* (1853) 10 ER 359 (HL). He held that public policy was "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed … the policy of the law or public policy in relation to the administration of the law" (at 437). And writing more than seventy years later, Sir Percy Winfield held that public policy was "a principle of judicial legislation or interpretation founded on the current needs of the community": see Percy Winfield, "Public policy in the English Common Law" (1928) 42 Harvard Law Review 76 ("*Winfield*") at p 92. Various accounts of public policy in modern discourse continue to converge in this central idea that public policy refers to considerations directed "not at doing justice as between the parties to the immediate dispute before the court, but, rather, to further the interests of the community as a whole": see Ross Grantham & Darryn Jensen, "The Proper Role of Policy in Private Law Adjudication" (2018) U Toronto LJ 187 ("*Grantham & Jensen*") at p 191.

107 The core of the concept of public policy, therefore, is that it involves arguments about the public or common good. Once this is appreciated, it is not difficult to discern why public policy, when applied in judicial determinations, has appeared unruly. We would suggest that there are at least two such reasons.

Version No 1: 11 Oct 2022 (19:31 hrs)

108 First, the logic of public policy cuts against the logic of the essential judicial task of deciding individual cases, especially cases involving a dispute between private individuals. Whereas public policy focuses on what is good for the community at large, the adjudicative task focuses on correcting the injustice between the parties in the particular case at hand. To take contract law as an example, unlike reasons for not enforcing a contract which go towards a defect in its formation or which concern unfair or unconscionable conduct on the part of one or both of the disputing contractual parties, public policy as a reason for unenforceability hearkens to the interests of the community. In this sense, public policy has been described as possessing an "exogenous nature vis-à-vis the logic of legal reasoning": see *Ghodoosi* at p 695.

109 Second, what is or is not for the public or common good is often incapable of complete consensus and changes with the times. Thus, as Kekewich J observed in *Davies v Davies* (1887) 36 Ch D 359 at 364, "[p]ublic policy does not admit of definition and is not easily explained … One thing I take to be clear, and it is this – that public policy is a variable quantity; that it must vary and does vary with the habits, capacities, and opportunities of the public."

110 Accordingly, an account of when public policy ought to be taken into account by the court, and how that ought to be done, must explain why there are good reasons for having regard to the common good when deciding an individual case, and for relying on a certain formulation of that common good as authoritative or persuasive as a justification for deciding the case in a particular way. In our judgment, what these "good reasons" are must depend on the legal context of the case before the court. Hence, it is necessary to provide a brief general account of the types of legal context which exist in order to ascertain the proper role of public policy in this particular case.

Version No 1: 11 Oct 2022 (19:31 hrs)

The role of public policy in judicial decisions

General principles

111 In our judgment, for the purpose of analysing the proper role of public policy in judicial decisions, the type of legal context into which a case falls may be analysed along two axes. The first rests on the distinction between judge-made and statutory law. By judge-made law, we mean those areas of law where the bulk of the substantive rules are judge-made, such as the law of contract and the law of torts, even if there may also be some statutes in play; and by statutory law, we mean those areas of law where the bulk of the substantive rules are statutory, such as land law. This distinction involves the idea that in some areas of law, the courts have been given the power to develop the rules, while in other areas, Parliament has retained the principal rule-making role. The second axis is based on the subject matter of the public policy that is relied upon. It involves the distinction between what might, for simplicity, be called socio-economic policy on the one hand and legal policy on the other. Legal policy involves arguments for the common good that relate to the conduct and consequences of legal practice, whereas socio-economic policy is shorthand for arguments for the common good that relate more broadly to what would be good for society in general, especially from a social, economic, cultural and political perspective. The interaction between these two axes may, for practical purposes, be represented in the form of the following matrix of legal contexts:

Matrix of legal contexts	**Type of public policy**	
	Socio-economic	Legal

Version No 1: 11 Oct 2022 (19:31 hrs)

		Type of public policy	
Type of law	Judge-made law	Category 1A	Category 1B
	Statutory law	Category 2A	Category 2B

112 In our judgment, where the legal context falls under Categories 1A or 1B, the court may, as a general rule, rightly consider itself able to rest its decision on public policy, subject to the constraints of precedent, established principles, and the analogical reasoning of the common law: see Andrew Robertson, "Constraints on Policy-Based Reasoning" in *The Goals of Private Law* (Andrew Robertson & Tang Hang Wu eds) (Hart Publishing, 2009) ch 11 ("*Robertson*") at pp 269–270. This is because in these contexts, the court has effectively been delegated the role of law-maker by the Legislature and, having principal responsibility for making and changing the law, must do so not only with the individual case in view, but also with the common good in sight. But even within these contexts, the court's power to establish the law on the basis of public policy considerations is limited in at least three general senses. First, the "bipolar structure of the private law" compels the court to reconcile any community interests that it takes into consideration with the need to do justice between the disputing parties: see *Robertson* at p 272; *Grantham & Jensen* at p 199. Second, the principles established by the court remain subject to legislative overruling. Third, the court may in an appropriate case decide that a change in the law would represent such a significant development that legislative action would be more informed, nuanced and legitimate. In line with this, the court should, as a general rule, be more cautious in resting its decision on public policy where the legal context falls under Category 1A. That is

Version No 1: 11 Oct 2022 (19:31 hrs)

because judges have no special expertise in socio-economic matters. Moreover, the bipolar nature of legal proceedings may inhibit the effectiveness of the courtroom as a forum for pursuing community interests because of the limited range of views and information placed before the court: see Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard Law Review 353 at pp 394–395. By contrast, where the legal context falls under Category 1B, the court may claim at least some expertise acquired through the experience of adjudication and legal practice. As Lord Mance observed in *Willers v Joyce and another* [2016] 3 WLR 477 at [134], legal policy "does not normally depend on statistics, but rather on judges' collective experience of litigation and litigants".

113 Accordingly, the reason for the court to be restrained in resting its decision on public policy in Category 1A cases is largely practical, in that the court lacks expertise or information. It is not so much a constitutional reason, given that the court has been delegated the role of law-maker, although it tends, even then, to make law in an incremental fashion, leaving sweeping or otherwise radical changes to be made by the Legislature. Because of its law-making ability in Category 1A cases, where it is appropriate for the court to rest its decision on public policy to some degree, such as where the court is being asked to recognise a new tort, the court may establish its decision upon as an informed a perspective on the implicated area of socio-economic policy as is possible and appropriate, drawing upon the assistance of counsel, *amici* and expert witnesses. This approach is permissible and, indeed, imperative, if the court is to perform well the law-making responsibility with which it has been entrusted. By contrast, the court ordinarily should not rest its decision on public policy in Category 2 cases, even with such assistance, because in such cases, it is not the court's task to decide the merits of any implicated policy. It is a different matter, however, where there is clear evidence of a relevant public policy, emanating from the

Version No 1: 11 Oct 2022 (19:31 hrs)

branches of Government with the appropriate constitutional and institutional competence, even in Category 2 cases. We will come back to this point shortly.

114 A prominent example of an area of law that is judge-made is the law of torts, as we have mentioned. Within this area of law, some cases fall under Category 1A and others under Category 1B. An example of a tort case falling under Category 1A is the decision of the Court of Appeal in *ACB v Thomson Medical Pte Ltd and others* [2017] 1 SLR 918 ("*Thomson Medical*"). In that case, the plaintiff's baby was conceived after a negligent mix-up in the in vitro fertilisation procedure which she had undergone. The court rejected the contention that the plaintiff could recover damages for the costs of raising the child, and did so on the basis of arguments that were explicitly about the common good in socio-economic terms. The court relied, for example, on the notion of the "dual character of parenthood", which comprised "a custodial relationship between parent and child and a relationship of trusteeship between the parents and the wider society", and held that neither of these relationships gave rise to obligations which were capable of valuation as "loss" in any meaningful sense (at [90] *per* Andrew Phang Boon Leong JA). An example of a tort case falling under Category 1B is the decision of the Court of Appeal in *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866 ("*Lee Tat*"). There, the court rejected the appellant's argument that the torts of malicious prosecution and abuse of process should be recognised, partly on the basis that doing so would "encourage unnecessary satellite litigation" (at [105] *per* Andrew Phang Boon Leong JA) and "impose a chilling (or deterrent) effect on regular litigation in its various aspects" (at [117]) – arguments that were explicitly founded on legal policy.

115 By contrast, where the legal context falls under Categories 2A and 2B, the court should, as a general rule, be very cautious about resting its decision on

Version No 1: 11 Oct 2022 (19:31 hrs)

public policy. That is because Parliament has already spoken. In areas of statutory law, the Legislature, being that democratically elected body which is charged specifically with deliberating matters of public policy, representing the polity's interests, and formulating rules to govern all aspects of society, would have already put in place a legislative regime which embeds the public policies which the Legislature regards as relevant and which have been subject to democratic debate. The courts have the responsibility not to ignore or modify the regime, but to interpret and apply it faithfully. They must therefore be very slow to decide a case based on any adaptation of the legislative regime founded on what they themselves happen to think about the asserted public policy, whether socio-economic or legal, even if the relevant legislation is revealed to be lacking in some respect. The courts must be particularly cautious in this regard in Category 2A cases because socio-economic policy is outside the court's expertise. But where regard may appropriately be had to such policy, this must be done in accordance with policy emanating from Parliament and the Parliamentary Executive (see [138]–[142] below) and not the courts. And even in Category 2B cases, due deference must be shown to the Legislature's intention, even if (or perhaps, especially since) the courts may think they know better.

116 A good example of an area of law which falls under Category 2A is land law. The kind of policy restraint necessary in such a case is well demonstrated by the Court of Appeal's decision in *United Overseas Bank Ltd v Bebe bte Mohammad* [2006] 4 SLR(R) 884. The broad issue in that case was whether the grounds for seeking an order to rectify the land-register, as set out in s 160(1) of the Land Titles Act (Cap 157, 2004 Rev Ed) ("the LTA"), were wider than the grounds for challenging a registered proprietor's indefeasible title, as set out in s 46(2) of the LTA. Whereas infelicitous wording had suggested an affirmative answer, the court gave a negative answer having regard to the

Version No 1: 11 Oct 2022 (19:31 hrs)

context of the LTA and Parliament's intention of preserving the certainty of the land-register – and, in the court's own words, "without having to resort to policy considerations" (at [47] *per* Chan Sek Keong CJ). An example of an area of law which falls under Category 2B is civil procedure. For instance, in *Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354, the Court of Appeal took the *obiter* view that the word "order" under para (*e*) of the Fifth Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) had to mean "interlocutory order"; otherwise, all orders made on interlocutory applications, whether interlocutory or final, would be appealable to the Court of Appeal only with leave (at [81]–[85] *per* Sundaresh Menon CJ). Importantly, the court adopted this interpretation because it promoted the *legislative intention* behind that provision, which was to preserve the right of appeal in cases where an order on an interlocutory application affected the final outcome of the case.

117 In addition to the matrix of legal contexts which we have just described, a further analytical tool for understanding the proper role of public policy, we suggest, is the way in which public policy is used to justify a position, and there are at least two ways in this respect. The first is where public policy is used to justify the *existence and scope* of a claimed right. The second is where public policy is used to justify the *curtailment* of a claimed right which would otherwise be established under the law. Where the former is concerned, the analysis proceeds, in theory, on a blank canvas, and the goal is to find the solution which is best supported by the relevant public policy considerations. For example, in *Lee Tat*, the court, in considering whether to recognise the torts of malicious prosecution and abuse of process, stated that "the only rational way in which the proper direction might be decided is by reference to specific arguments of principle and policy" (at [69]). Democratic debate in the Legislature on the passing of a new law proceeds in like manner. So deployed,

Version No 1: 11 Oct 2022 (19:31 hrs)

public policy considerations are encapsulated within the formulation of the law itself.

118 But where public policy is used to justify the curtailment of a claimed right which would, but for the invocation of public policy, be established under the law, the court's analysis tends to take the form of an attempt to balance: (a) the need to give effect to the default regime, whether that be statutory or judge-made; and (b) the need to protect the common good from injury if that default regime were to apply. Indeed, Winfield observed that this, in fact, is typically how public policy has operated in private law (see *Winfield* at p 99):

> … The caution which is characteristic of the judicial use of public policy is also illustrated by the curious fact that *it generally (though not exclusively) has a negative effect.* Most of the cases turn upon forbidding a man to do something or other. To a certain extent this has been the natural result of the terms in which the doctrine is described, and not simply a consequence of judicial caution. Public policy subordinates individual gain to public benefit. The law repeatedly says, "You must not do this because you will injure the public." It rarely says, "You may do this because you will thereby benefit the public." Of course it does not follow that this common negative statement of principle will add no constructive additions to our law, for the denial of a private person's liberty of action in a particular case may very well be an indirect affirmation of a corresponding right in every other citizen. [emphasis added]

119 In a similar vein, another commentator has observed that public policy is employed to denote the "reserved power of a court to refuse a claim or cause of action in the absence of precedent or statute": see Kent Murphy, "The Traditional View of Public Policy and *Ordre Public* in Private International Law" (1981) 11(3) Georgia Journal of International and Comparative Law 591 at p 592.

120 Where the common law is concerned, the prime example of how the courts have grappled with carrying out an appropriate balancing exercise is

Version No 1: 11 Oct 2022 (19:31 hrs)

contractual illegality and public policy, in which context public policy is used as a ground for curtailing the enjoyment of an otherwise established right to enforce the contract. In that context, the common law has seen a range of methods, from a discretionary range-of-factors approach, to a rule-based approach with a degree of remedial flexibility, to a strict rule-based approach. Exemplifying each of these methods is, respectively, the majority's approach in *Patel v Mirza* [2017] AC 467, the Court of Appeal's approach in *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363, and Lord Sumption's minority approach in *Patel v Mirza*. While these analytical methodologies differ, what is critical for present purposes is that they share the common aim of improving the search in each case for the best reason to justify an outcome which prefers the common good to that of the individual. And this must be the correct aim, because the courts must strive to apply "a rational, reasoned judicial process" when taking public policy into account: see Robert F Brachtenbach, "Public Policy in Judicial Decisions" (1985) 21 Gonzaga Law Review 1 at p 17.

121 In our judgment, the same is true where the default regime is statutory. The need to conduct a balancing exercise does not disappear merely because the default regime bears the stamp of the Legislature. To begin, where public policy is used to justify the curtailment of a statutory right, the court is not in the business of painting over the Legislature's canvas. In that regard, it seeks not to exceed its constitutional position as the interpreter and applier of the law in that context. Yet, because its duty is to visit the consequences of the law on members of society, it has a concomitant duty to consider the effect of applying the established regime on the common good. In those exceptional cases where applying the default regime would violate an established public policy or a fundamental purpose of the law itself, the court must have the right not to enable this. And the court must find a rational method of balancing its concerns in these

Version No 1: 11 Oct 2022 (19:31 hrs)

circumstances against the need to allow the law as written to take its course as far as possible.

122 These propositions are borne out by the cases. Thus, in the English Court of Appeal's decision in *R v Chief National Insurance Commissioner, Ex parte Connor* [1981] 1 QB 758 ("*Ex parte Connor*"), a widow's claim for a widow's allowance failed despite her apparently absolute statutory entitlement because she had been convicted of the manslaughter of her husband. The American equivalent is the famous case of *Riggs v Palmer* 115 NY 506 (1889), where a man who had murdered his grandfather to prevent him from varying his will was precluded from receiving an inheritance under the will. That principle has been extended to the principle that the court will depart from plain statutory language in order not to facilitate the commission of a wrong. For instance, in *R v Registrar General, Ex parte Smith* [1991] 2 QB 393 ("*Ex parte Smith*"), the applicant was denied his statutory right to a copy of his birth record because he was a mental patient who had been convicted of the manslaughter of a cell-mate whom he mistook for his foster mother. The fear was that he would use the information to trace his real mother and do violence to her. The English Court of Appeal upheld the decision to deny him that information. Significantly, Staughton LJ was careful not to suggest that this would be the outcome in every case. Outlining the balancing exercise to be undertaken, his Lordship said at 404C–D:

> Nor would I limit the principle, as Mr. Gordon does, to cases where performance of the statutory duty is required for the purpose of a serious crime which the applicant intends to commit. *It must be a matter of degree. The likelihood of future crime and the seriousness of the consequences if crime is committed must both be taken into account.* For present purposes, it is sufficient to hold that a statutory duty is not to be enforced if there is a significant risk that to do so would facilitate crime resulting in danger to life. Parliament is presumed not to have intended that, unless it has said so in plain terms. … [emphasis added]

Version No 1: 11 Oct 2022 (19:31 hrs)

123 A similar balancing exercise was undertaken by the UK Supreme Court in *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government and another* [2011] 2 AC 304. There, the court held that certain time limits set out in a statute for enforcement actions in respect of breaches of planning control did not apply in a case where the party allegedly in breach had engaged in positive deception in order to avoid an enforcement action being brought against him within those time limits. Lord Mance, who gave the leading speech, and with whom Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Clarke of Stone-cum-Ebony agreed, discussed and endorsed the *Ex parte Connor* and *Ex parte Smith* line of authorities. He then stated the principle and applied it to the case as follows (at [53]–[54]):

> Since the ultimate question is whether it can have been the intention of the legislator that a person conducting himself like Mr Beesley can invoke the benefits of [the provisions prescribing the time limits], *I do not consider that there can be any absolute principle that public policy can only bear on the legislator's intention in a context where there has been the commission of a crime.* The principle described in the passages cited from *Halsbury* and *Bennion* is one of public policy. The principle is capable of extending more widely, subject to the caution that is always necessary in dealing with public policy. Some confirmation that the need for an actual crime is not absolute can also be found in another case, [*Ex parte Smith*], where the Court of Appeal held it sufficient to disentitle a prisoner from exercising his on its face absolute right to inspect his birth certificate that there was a current and justified apprehension of a significant risk that he might in the future use the information thereby obtained to commit a serious crime.

Version No 1: 11 Oct 2022 (19:31 hrs)

> *Whether conduct will on public policy grounds disentitle a person from relying upon an apparently unqualified statutory provision must be considered in context and with regard to any nexus between the conduct and the statutory provision.* Here, the four-year statutory periods must have been conceived as periods during which a planning authority would normally be expected to discover an unlawful building operation or use and after which the general interest in proper planning control should yield and the status quo prevail. Positive and deliberately misleading false statements by an owner successfully preventing discovery take the case outside that rationale. …
>
> [original emphasis omitted; emphasis added in italics]

124 The collection of general principles which we have just set out is ultimately predicated on a number of fundamental propositions about the proper function of judges, which ought now to be expressly articulated. For more than two decades in this jurisdiction, the highest court has recognised that Sir William Blackstone's declaratory theory of law – that the judge is not delegated to pronounce a new law but to maintain and declare the old one – is "fiction": see *Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 at [68] *per* Yong Pung How CJ; *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 at [241] *per* Chan Sek Keong CJ. Judges do make law, and as Lord Bingham of Cornhill has observed, appellate judges "know, and the higher the Court the more right they are, that decisions involve issues of policy": see Tom Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press 2000) at p 28. Indeed, the modern view is that law-making is a proper judicial function, provided it is exercised within its proper limits.

125 The preceding discussion represents our attempt to draw some of these limits in dealing with the specific but highly consequential issue of the role of public policy in judicial decisions. These limits are predicated on a few fundamental principles. The first is the protection of our democratic process and respect for the democratic legitimacy of our elected institutions. This requires

Version No 1: 11 Oct 2022 (19:31 hrs)

deference by the courts to the Legislature on matters of public policy, especially socio-economic policy and especially in areas where legislation already exists. In that last-mentioned scenario, which is Category 2A in our matrix, it remains appropriate for the courts to pronounce upon the existence and scope of public policy. What the courts cannot do is to create or be the source of public policy. The courts are not the vanguard of social reform. In an evolving society, the courts will increasingly be asked to resolve disputes which involve matters of social controversy, and the courts must be prepared to do so competently and with a proper understanding of their constitutional role as adjudicators primarily: see also *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 at [77] *per* Andrew Phang Boon Leong JA.

126 The second principle is institutional competence, which concerns questions of which branch of government is best placed to make the decisions in issue due to its expertise and experience and its role and function in the constitutional framework of powers: see Eugene Tan, "Curial deference in Singapore Public Law: Autochthonous Evolution to Buttress Good Governance and the Rule of Law" (2017) 29 SAcLJ 800 at p 804. As the Court of Appeal observed in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779, the courts are "not the best-equipped to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations" (at [93] *per* Sundaresh Menon CJ). This is because, in Lord Diplock's words, these policy issues are not "of a kind to which the best solution can be found by applying a judicial process or which the experience and training which a judge has acquired in the course of his career equips him to deal with better than other men": see "Judicial Control of Government" [1979] MLJ cxl at p cxlvii. Such matters are "remote … from ordinary judicial experience", in the words of Sir Thomas Bingham MR (as he then was) in

Version No 1: 11 Oct 2022 (19:31 hrs)

Regina v Ministry of Defence, Ex parte Smith [1996] QB 517 at 556B. Ultimately, if the courts carelessly make certain kinds of decisions which they are simply not well placed to make, the result will not only be unsoundness in principle, but also, in all likelihood, actual injustice and unintended consequences on the ground.

127 With all of these principles in mind, we now turn to identify the legal context of the present case and to understand the impact of that on the role of public policy here.

The role of public policy in the present case

128 In our judgment, the present case falls under Category 2A of the matrix of legal contexts. First, we are operating in an area of statutory law. The governing law is the Act. This is a piece of legislation that embodies a set of policy decisions already made by our elected Legislature. Second, the policy considerations which the Guardian says are in play are socio-economic in nature. They concern matters of tremendous social significance, including the proper conception of the family, the appropriateness of parenthood by persons of homosexual orientation, and the ethics of ART, including surrogacy. The desirability of the various moral, political, social and cultural norms implicated by each of these matters, both individually and in combination, is something that the court as an unelected institution lacks the democratic mandate to pronounce upon. To the extent that these norms compete with each other, the question of which ought to be prioritised is a matter beyond the court's institutional expertise. So too is the task of calibrating the effect of policies which pull on one another.

129 Next, if public policy considerations have to be taken into account at all in this case, they would have to be balanced against any applicable

Version No 1: 11 Oct 2022 (19:31 hrs)

countervailing factor. This is because public policy, it may be said, is being relied upon to justify the curtailment of a claimed statutory right, that is, the appellant's claimed right to adopt the Child on the basis that an adoption order would be for the Child's welfare and would violate no restriction expressed in the Act. To be more precise, public policy, it is contended, ought to influence the court's discretion under s 3(1) of the Act *against* granting the appellant an adoption order, and to the extent that the court is exercising a discretion, the appellant is not, strictly speaking, asserting a right. But given that we have concluded that it would be for the Child's welfare to make the adoption order, and it is undisputed that all the other legal requirements in ss 4–5 of the Act have been satisfied, the Guardian's reliance on public policy may, for analytical purposes, be conceived as an attempt to persuade us not to give effect to a right claimed by the appellant. Therefore, any relevant public policy will have to be balanced against the concern to promote the Child's welfare.

130 Bearing in mind the present legal context, therefore, we consider that we have little scope for resting our decision on any public policy of our own formulation. Particularly appropriate here, therefore, is Lord Thankerton's well-known observation in *Fender v St John-Mildmay* [1938] AC 1 that the court's duty is "to expound, and not to expand" public policy (at 23). To be significant to us, the alleged public policy has to be expressed in an authoritative source, namely, in pronouncements by the Legislature or the Executive, or be found to reflect some fundamental purpose of the law. What is necessary and suitable to the present legal context, in our view, is an approach which tames the unruly horse using the reins of those formal characteristics that define the law itself: just as a rule of law is one which proceeds from the proper source of authority, whether that be Parliament in the form of a Bill which has received the President's assent or the accretion of historical judicial wisdom in the common law through precedent upon precedent, an applicable public policy is one that

Version No 1: 11 Oct 2022 (19:31 hrs)

emanates from the proper source of authority. As Prof John Bell suggests (see John Bell, "Conceptions of Public Policy" in Peter Cane & Jane Stapleton (eds), *Essays for Patrick Atiyah* (Clarendon Press, 1991) ch 5 at p 92):

> Public policy, like equity, should operate as a form of rule-based justice which can be clearly located on the legal map. It may be general in formulation and defeasible in particular circumstances, but it is at least statable and containable. As such it does not fall outside the predictability of law.

131 Against the general approach to engaging with public policy which we have just outlined lies the appellant's contention that to give effect to the Guardian's public policy objections would amount to "judicially graf[ting]" onto the Act new "statutory bars" that do not appear on its face. The appellant relies on two cases in this regard. The first is *T, Petitioner* 1997 SLT 724, where a single man in a stable homosexual relationship applied to adopt a child who had been placed under his care. Lord Hope allowed the application on the basis that "[t]he suggestion that it is a fundamental objection to an adoption that the proposed adopter is living with another in a homosexual relationship *finds no expression in the language of the statute*" [emphasis added] (at 732). The second is *In re W (A Minor) (Adoption: Homosexual Adopter)* [1998] 1 Fam 58 ("*In re W*"), where a single lesbian who had lived with her partner of ten years applied under the Adoption Act 1976 (c 36) (UK) ("the 1976 Adoption Act (UK)") for an order to free a child for adoption, which was a necessary order as the child's mother refused to consent to the adoption. Singer J held that the 1976 Adoption Act (UK) permitted an adoption application to be made by a single applicant, even if she were living in a "homosexual … relationship with another person who it is proposed should fulfil a quasi-parental role towards the child" (at 66B); that there was no certain basis upon which the court could formulate a public policy to the contrary effect (at 63–64); and that even if there should be such a policy, it was not for the court to formulate it (at 64D).

Version No 1: 11 Oct 2022 (19:31 hrs)

132 We do not accept the appellant's submission. First, the fact that a certain public policy finds no expression in the Act does not mean that it has no place in the inquiry. Neither of the two cases relied on by the appellant examined the legal basis, if any, for taking public policy into account in their respective contexts. In the present case, s 3(1) of the Act gives us a statutory basis to consider matters which are not provided for in the Act, but which are relevant to assessing the propriety of the proposed adoption and any aspect of the institution of adoption itself (see [96]–[97] above).

133 Second, the appellant conflates the task of formulating public policy and the task of factoring public policy into the court's deliberations. While we agree that the court is not the appropriate institution to *formulate* public policy in the present legal context (see [115] and [128] above), it is entitled, in accordance with its constitutional role, to *take into account* public policies that can be shown to emanate from the Legislature and the Executive ([130] above). It appears to us that in *In re W*, the court came to the view, on the basis of various government reports and the practice of government agencies, that there was no public policy against homosexuals adopting children, and it was against that backdrop that the court concluded that it would not introduce such a restriction (at 63–64). *In re W* and *T, Petitioner* do not suggest that the court is precluded from considering the effect of a public policy in a given case where such public policy has been clearly articulated by the Government.

134 Third and finally, the appellant's argument assumes that public policy, if it were to feature in the court's deliberations, must operate as an absolute "bar". But this is not so. In our view, the appropriate place of public policy in the present application is for it to be balanced against the countervailing concern to promote the Child's welfare (see [118], [121] and [129] above). Balancing is a case-specific exercise, and to factor in public policy in this way does not

Version No 1: 11 Oct 2022 (19:31 hrs)

amount to "judicially graft[ing]" in entire classes of absolute restrictions that are not specified in the Act. Therefore, the approach which we have outlined is one that fully accords with the proper role of the courts in our constitutional system.

135 With these points in mind, we turn now to develop an analytical framework for taking public policy into account for the purposes of the present case.

The applicable analytical framework

136 In our judgment, the proper approach to taking public policy into account in a case such as the present – meaning one that falls under Category 2A and where the court is being asked to curtail a claimed statutory right on the basis of public policy – involves two steps. The first is a forensic exercise, and the second is a balancing exercise. At the first step, the court must identify whether the alleged public policy exists by examining the appropriate authoritative sources. If the policy is found to exist, then the court must undertake the second step, which is to consider the weight to be given to the policy and the weight to be given to any countervailing concern in favour of giving effect to the claimed statutory right, and then to reason towards an outcome which strikes the proper balance between the competing considerations. We emphasise that this two-step framework applies to only cases falling under Category 2A, and we say nothing about how public policy should be addressed in the other categories in the matrix of legal contexts set out at [111] above. We turn now to explain the principles in respect of each step.

Version No 1: 11 Oct 2022 (19:31 hrs)

Step 1: The forensic exercise

137 We consider that in the analysis of the first step, there are three main criteria for assessing whether the material in question bears out the alleged public policy. These are authority, clarity and relevance.

(1) Authority

138 The first requirement is that the alleged public policy must be attributable to a constitutionally authoritative source. That is because the policy is expected to rub against an existing statutory regime which already embodies legislative will. In our judgment, the alleged public policy must come principally from the Legislature, that is, Parliament, or from the Executive – and not just any segment of the administrative state, but specifically, the Parliamentary Executive, that is, the Cabinet. It is these institutions that are in the business of formulating and applying policies which govern society, and that do so legitimately as representatives of the people and advocates for their interests and values. Parliament "institutionalises popular will and embodies the chief institutional link between the State and the Citizen", while the Cabinet plays "a central role in the administration of the state, dealing with a wide range of matters ranging from managing the economy, foreign relations, flood control and water resources, public housing and transport, health and censorship policy", and so forth: see Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) ("*Thio Li-ann*") at paras 06.009 and 08.005.

139 Beginning, then, with the Legislature, we consider that the first source from which public policy in the present legal context may be derived is primary legislation, that is, statutes or Acts of Parliament. A rule contained in a statutory provision is not itself a public policy, of course. It is simply a rule which must be given effect in the appropriate case. Underlying the provision, however, will

Version No 1: 11 Oct 2022 (19:31 hrs)

be a value or purpose that the provision embodies, and that may be confirmed or illuminated by other provisions, whether in or outside the same statute. That value or purpose, in our judgment, may properly be regarded as a public policy. Consider, for example, s 378 of the Penal Code (Cap 224, 2008 Rev Ed), which creates the offence of theft and is part of a chapter in the Penal Code titled "Offences against property" containing provisions such as s 383, which creates the offence of extortion, and s 390, which creates the offence of robbery. It may reasonably be inferred from the content of s 378 and from the collection of provisions within which it exists that there is a public policy in favour of protecting private personal property from non-consensual interference. Whether such a vaguely cast public policy is of any utility in any legal analysis may be questioned, but the point here is that it cannot be gainsaid that such a policy exists.

140 Still with the Legislature, we consider that the second source from which public policy may be derived in the present legal context is subsidiary legislation, which takes the form of orders in council, proclamations, rules, regulations, orders, notifications, by-laws or any instrument made under any Act of Parliament: see s 2(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) ("IA"). These are a form of delegated legislation, in that the Legislature shares its law-making power with executive agencies to whom are delegated the power to make law for a specific administrative purpose: see *Thio Li-ann* at para 06.073. Subsidiary statutory instruments have been judicially recognised as being "a necessary feature of governing in Singapore long before the Constitution was enacted": see *Cheong Seok Leng v Public Prosecutor* [1988] 1 SLR(R) 530 at [35] *per* Chan Sek Keong JC (as the former Chief Justice then was). By the force of an Act of Parliament itself, namely, s 23 of the IA, these instruments take effect and come into operation on the date of their publication. In our judgment, therefore, they are susceptible to the same kind of analysis

Version No 1: 11 Oct 2022 (19:31 hrs)

outlined in the preceding paragraph by which a value or purpose may be extracted from a specific provision or a collection of provisions, and this value or purpose in turn may fairly be said to represent a public policy.

141 Turning to the Parliamentary Executive, we consider that the third source from which public policy may be derived in the present legal context consists of statements made by Cabinet ministers. Such ministerial statements are authoritative of public policy not only because the Cabinet is responsible for charting the Government's position as to what is appropriate for the people's collective future and the common good, but also because of two important and related constitutional conventions. The first is the convention of public unanimity, which obliges all ministers to support all Government decisions in public, and the second is the convention of collective responsibility, which obliges all ministers to assume responsibility for a Government policy: see *Thio Li-ann* at paras 08.004 and 08.018. The Cabinet's constitutional responsibility, coupled with these two constitutional conventions, endows statements made by Cabinet ministers with a special authority that is absent from statements made by ordinary MPs. Ministerial statements ought properly to be regarded as persuasive of the policy direction which the Government has adopted and which is representative of the people's will. And perhaps most persuasive among the ministerial statements in this category of source are statements made by the Prime Minister, who, as *primus inter pares*, that is, first among equals, is elected by the ruling party, leads the Cabinet, selects its members and is politically pre-eminent: see *Thio Li-ann* at para 08.007.

142 We consider too that a ministerial statement is authoritative only if the minister making the statement does so in his official capacity and purports to speak on the Government's behalf. That is because it is that posture which gives his statement the special authority discussed above. This means that the court is

Version No 1: 11 Oct 2022 (19:31 hrs)

not restricted to looking at only ministerial statements made in Parliament. The court may also, in our view, take into account any such statement made in an official capacity in public.

143 Finally, the fourth source from which public policy may be derived in the present legal context, we consider, comprises judicial decisions – but only those which express long-held values which concern in some way a fundamental purpose for which the law exists and on which reasonable persons may be presumed to agree. The chief example of such a public policy is the principle that no one can derive an advantage from his own wrong, which we mentioned at [101] above. The origins of this principle may be traced back to the dawn of the 17th century: see R H Kersley, *A Selection of Legal Maxims: Classified and Illustrated, by Herbert Broom* (Sweet & Maxwell, 10th Ed, 1939) ("*Broom*") at p 191, citing Sir Edward Coke's commentaries on *The Laws of England* by Littleton, first published in the 1600s. Also originating from around that era is the maxim *nemo iudex in causa sua* ("no man shall be a judge in his own cause"), a principle of natural justice so fundamental and well established that it may also reasonably be understood as a public policy embodied in the common law: see *Broom* at p 68.

(2) Clarity

144 Not only must the alleged public policy be drawn from the appropriate authoritative source, it must, in our judgment, also be clearly expressed in order to be persuasive. By this, we refer firstly to the clarity with which the alleged public policy is expressed in the particular authoritative source. A similar criterion is applied when discerning the purpose of a statute from the record of Parliamentary debates. In that context, the statements made in Parliament "must be clear and unequivocal to be of any real use": see *Tan Cheng Bock v Attorney-*

Version No 1: 11 Oct 2022 (19:31 hrs)

General [2017] 2 SLR 850 at [52], citing *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [70]. Applied to the exercise of discerning public policy, this criterion enables the court as far as possible to articulate an alleged public policy upon a clear and definite basis, for the hazier the expression of that policy in the source, the greater the risk that the court may be imposing its own policy preferences through what may be nothing more than vague and ambiguous material.

145 Also important is the consistency with which the alleged public policy is expressed across multiple authoritative sources. A persuasive case for the existence of a public policy will, as far as possible, draw on multiple kinds of authoritative source to demonstrate a consistent expression of the policy in question. This would enable the court to be confident that the authoritative sources in question have not been taken out of context, and that the alleged policy genuinely reflects the position of the Government of the day. In this context, while public policies sometimes pull in different directions, that is not the kind of ambiguity which should lead the court to conclude that no public policy exists on the relevant issue. Consistency in the expression of a given public policy is a distinct concept from consistency between the substance of several different public policies. The court is concerned in this context with only the former and not the latter, for its task is to assess the formal qualities of the authoritative sources relied upon and decide whether a public policy ought to be inferred from these sources, regardless of how that public policy may sit with any other alleged public policy as a matter of substance.

(3) Relevance

146 The source of an alleged public policy must be authoritative; it must have clarity of expression; and finally, it must be relevant to establishing that

Version No 1: 11 Oct 2022 (19:31 hrs)

policy, in the sense that it must support the existence of that policy. It is for the party asserting the existence of a public policy to articulate in a precise manner the substance of the alleged policy in the form of a proposition, and then to demonstrate that the material relied upon does in fact bear out that proposition. Public policy, like legislative purpose, may be formulated at different levels of abstraction: see *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [85] *per* Quentin Loh J. The more abstract the formulation, the less utility the alleged public policy will tend to have, for the precise way in which it ought to influence the court's decision will not be clear. For example, the idea that the Government should reward good and punish evil will not be of any useful application in any given case for the concepts of rewarding good and punishing evil are too open-textured to be of any assistance to the court's determination of whether to make a particular order in a particular legal context based on a particular set of facts. At the same time, the more precise the formulation of the alleged public policy, the more persuasive the material will tend to have to be in order for the court to find that the policy in question exists.

(4) Assessing whether there would be a violation

147 Having assessed the alleged public policy against the criteria of authority, clarity and relevance, the court will then be in a position to pronounce upon the policy's existence. If the policy is found to exist, then the court must go on to consider whether it would be violated should the court give effect to the claimed right. Whether there would be a violation turns on the content of the specific policy that has been shown to exist. This will be case-specific, and close attention must therefore be given to the way in which the policy is articulated. Once it is established that the public policy would be violated, then the concern not to violate it enters the balancing exercise as a competing element to be

Version No 1: 11 Oct 2022 (19:31 hrs)

weighed against any value that would be promoted by giving effect to the claimed right.

Step 2: The balancing exercise

148 We turn to the second step of the analytical framework. As we have mentioned, where public policy is being relied upon to persuade the court to curtail a claimed right, the analysis that the court must undertake usually involves balancing the need to give effect to the claimed right and the concern not to violate the public policy which has been proved to exist. Where the claimed right arises from statute, as in the present legal context, the court must have regard to the values embodied in the statutory regime too. Here, that regime is the adoption regime, which is governed by the Act and supplemented by the GIA in so far as adoption proceedings concern the upbringing of a child, and the principal value which is embodied within this statutory framework is that the welfare of the child is the first and paramount consideration.

149 The concept of the balancing exercise may be described in the following general terms. The competing elements in the balancing exercise comprise: (a) any value which underlies the claimed right; and (b) the concern to avoid violating any public policy whose existence has been demonstrated. The court must attribute weight to each element and determine which of them is weightier than the other (or weightiest, if there are more than two elements), and will incline towards an outcome that gives effect to that element.

150 For the balancing exercise to be meaningful, the attribution of weight must, as far as possible, be based on a set of objective criteria. However, taken on their own, the values represented in each element to be balanced, whether emanating from a public policy or from a claimed right and the regime giving rise to it, are likely to be incommensurable as a matter of moral and political

Version No 1: 11 Oct 2022 (19:31 hrs)

philosophy. It is not possible for the court to say in the abstract, for example, that parenthood within marriage is more or less valuable than the welfare of a particular child in proceedings concerning his custody and upbringing. Nor would it be appropriate for the court to make value judgments of this kind. Therefore, in order for the balancing exercise to be meaningful and also legitimate, it must be conducted with reference to objective criteria that are consistent with the court's essential role as adjudicator and as the interpreter of the written laws which embody democratic will.

151 We have already mentioned the importance of institutional competence and respect for the democratic process as the fundamental principles underlying the whole exercise of taking public policy into account: see [125]–[126] above. It is appropriate to elaborate on this further here where the nuts and bolts of the analysis, in the form of the balancing exercise, are being set.

152 The principal task of the court is that of adjudication. The court's task is not to resolve society's problems on its own motion, but rather, to adjudicate disputes that are brought before it by the people and the Government. The legal system preserves this role for the courts in various ways, perhaps most noticeably through the rules of standing, which ensure that only a person who has a genuine interest in a disputed issue, as opposed to a "mere busybody" (in the words of Lord Reed in *Walton v Scottish Ministers* [2012] PTSR 51 at [94]), may bring the issue before the court: see also *Karaha Bodas LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 2 SLR(R) 112 at [14] *per* Judith Prakash J (as she then was). Another important device is the well-established rule that judicial power may be exercised only upon the presentation of an actual controversy: see *Sun Life Assurance Company of Canada* [1944] 1 AC 111 at 114 *per* Viscount Simon LC, cited with approval in *Foo Jong Peng and others v Phua Kiah Mai and another* [2012] 4 SLR 1267 at [24] *per* Andrew Phang

Version No 1: 11 Oct 2022 (19:31 hrs)

Boon Leong JA. This rule ensures that future litigants are not prejudiced by the court "laying down principles in an abstract form without reference or relation to actual facts", and avoids the difficulty of "defin[ing] a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied": see *Attorney General for the Province of British Columbia v Attorney General for the Dominion of Canada* [1914] AC 158 at 162 *per* Viscount Haldane LC. And where a matter is permitted to be brought before the court for adjudication, the court must decide it not according to its own policy preferences, but according to the applicable law. Where that law consists mainly of a statutory framework established by Parliament, the court's essential task is to interpret and apply that framework, not to supplement it.

153 Bearing in mind the court's proper role and function, we consider that there are at least three factors that ought to influence the weight to be given in the balancing exercise to a value underlying the claimed right or to a countervailing public policy consideration.

154 First, the more rationally connected or proximate the public policy in question is to the legal issue that the court is being asked to decide, the greater the weight it should be given. As the court's principal task is adjudicative, its deliberation has ultimately to be controlled by the legal dispute before it. Assessing the public policy's connection to the dispute maintains the court's focus on that principal task, and helps the court to identify genuinely relevant reasons for deciding the dispute one way or the other. In this case, for example, if the payment made to M were found to be illegal, that may raise a possible public policy concern not to let the appellant benefit from his wrong by obtaining an adoption order; however, in the absence of evidence that the payment was an indication that the welfare of the Child would be harmed, that public policy concern would seem far less connected to the central issue of

Version No 1: 11 Oct 2022 (19:31 hrs)

whether making an adoption order is in the Child's best interests, compared to, say, a concern to prevent a violation of a public policy against the formation of same-sex family units. This is because that last-mentioned concern involves precisely the situation that would be created by the making of the adoption order.

155 Second, if the public policy or value is one which emanates from the applicable statutory regime, it should be given significant weight. After all, the applicable statutory regime is what the Legislature may be taken to have intended the courts principally to give effect to when resolving the dispute in question. Therefore, as a matter of legislative intention, any policy or value embodied in that regime ought to have a natural priority in the court's mind. This is all the more so when the applicable statutory regime itself expressly provides that the policy or value ought to be of particular significance. The present statutory regime is a case in point because it requires the court to regard the welfare of the child as the "first and paramount" consideration in any proceedings concerning his custody or upbringing. However, as we have mentioned, it is not an exclusive or absolute consideration. Hence, it is in principle capable of being overridden by other considerations, depending on the circumstances of the case and the application of the set of factors outlined here.

156 Third, the greater the degree to which the countervailing policy consideration would be violated if the claimed right were given effect, the less willing the court should be to give effect to the claimed right. By the same token, the greater the degree to which the value underlying the claimed right would be advanced if the right were given effect, the more willing the court should be to give effect to that right. The general point here is that the court should approach the balancing exercise with a sense of proportion. In this context, it is also important to bear in mind that the balancing exercise is directed at assessing the

Version No 1: 11 Oct 2022 (19:31 hrs)

result of giving effect to the claimed right. That is why what is being examined is the degree to which any countervailing policy consideration would be violated and the degree to which any value underlying the claimed right, which is sought to be curtailed by the party relying on countervailing public policy considerations, would be advanced.

157 To illustrate how the degree of violation of a countervailing public policy might be analysed, let us suppose there is established a public policy against the formation of non-traditional family units. Permitting the adoption of a child by a pair of gay parents would, we think, violate that policy to a lesser degree than permitting the adoption of a child by a set of five parents in a polyamorous relationship, to draw on the example that we used earlier. Accordingly, in the latter instance, greater weight would be given to the concern not to reach an outcome that would violate the policy in question. Ultimately, the court is in the business of administering justice, and for that reason, has an interest in not allowing its process to be used to obtain a result which it knows will violate public policy. Yet, while giving effect to that interest is important, it is necessary always to keep in perspective the degree of violation. It would be inappropriate if the most minor of possible infractions of a public policy would suffice to determine the case.

158 The degree of violation has to be measured according to the degree of departure from the normative standard contained in the public policy in question. In the example given in the preceding paragraph, permitting the adoption of a child by a set of five parents in a polyamorous relationship would violate a public policy against the formation of non-traditional family units to a greater degree because it would result in an even more significant departure from the traditional familial configuration of one man married to one woman with one or more children of their own. Violations of public policy can also be

Version No 1: 11 Oct 2022 (19:31 hrs)

serious in more tangible ways, depending on the policy concerned. For example, in *Ex parte Smith* ([122] above), the court was concerned not to permit the applicant to have recourse to his statutory right to a copy of his birth record because it was feared that he would use it to commit a wrong, and this concern was particularly strong because that wrong was that he would promptly use the information obtained to take a life. Thus, describing his approach to the issue, Staughton LJ said that "[t]he likelihood of future crime and the seriousness of the consequences if crime is committed must both be taken into account" (at 404C).

159 Another aspect of the degree of violation is the degree to which the party seeking to enforce the claimed right set out intentionally to violate the countervailing public policy in question. It seems to us that where it is clear that a party knew of the existence of a countervailing public policy but nevertheless sought to assert a right in a way which he knew would contravene that public policy, his actions and state of mind would connote a level of culpability which would make the court especially reluctant to reach a result that endorses his wilful contravention of the public policy. In our judgment, this is something which is entirely proper for the court to take into account, especially because it increases the court's focus on the particular facts of the case before it, and thereby ensures that the court fulfils its essential adjudicative role in this context.

160 Next, to illustrate how the degree of advancement of a value underlying the claimed right might be analysed, let us consider the claimed right or interest in the present case and the value underlying it. Here, the claimed right or interest is the adoption of a child. (To avoid doubt, we hasten to note that, for the reasons mentioned at [129] above, this is not, strictly speaking, a right, but is being treated as such only for analytical purposes here.) The value underlying that

Version No 1: 11 Oct 2022 (19:31 hrs)

right is the concern that the welfare of the child in question ought to be protected. That this is the relevant value which underlies the claimed right may be discerned from the fact that the statutory regime requires the court to regard the welfare of the child as the first and paramount consideration. This being the case, in the balancing exercise, which is directed at assessing whether the right to adopt should be given effect, the court should assess the degree to which the welfare of the child in question would be promoted if an adoption order were made. The analysis would necessarily be fact-specific, and must be conducted with the expansive view of the concept of welfare through which the court decided why the requirement under s 5(*b*) of the Act that the adoption be for the welfare of the child was satisfied in the first place: see [45]–[47] above.

161 We conclude this section by observing that these three factors are not intended to be exhaustive. Also, they may well point in different directions in any one case. In addition, it is not necessary for all of them to feature, or to feature to the same degree, to justify giving a public policy significant weight. Ultimately, the court must apply them with care and rigour to each value that underlies the claimed right and each countervailing policy consideration in question, and set out a reasoned view on why one is said to outweigh the other.

Summary of the analytical framework

162 We now summarise the two-step analytical framework that we have set out above:

(a) The first step is a forensic exercise by which the court determines whether the alleged public policy exists based on authoritative sources and by reference to three main criteria. If the alleged public policy is found to exist, then the court must consider whether it would be violated if the claimed right were given effect.

Version No 1: 11 Oct 2022 (19:31 hrs)

(i) The first criterion is that the public policy must be attributable to a constitutionally authoritative source. This means that it must come principally from the Legislature, that is, Parliament, or from the Parliamentary Executive, for it is these institutions that have the constitutional prerogative to formulate and apply policies that govern society. On this basis, there are at least four authoritative sources of public policy:

(A) First is primary legislation, that is, Acts of Parliament. A value or purpose which is embodied in a statutory provision, and which may be confirmed or illuminated by other provisions in or outside the same statute, may be regarded as a public policy.

(B) Second is subsidiary legislation, enacted by the Executive in the exercise of its delegated law-making powers. Again, a value or purpose extracted from a specific provision or a collection of provisions in subsidiary legislation may be regarded as a public policy.

(C) Third are statements made by Cabinet ministers, who are collectively responsible for determining the Government's policy positions and representing the people's will. Most persuasive in this regard are statements made by the Prime Minister.

(D) Fourth are judicial decisions, but only those which express long-held values which concern a fundamental purpose for which the law exists and on which reasonable persons may be presumed to agree.

Version No 1: 11 Oct 2022 (19:31 hrs)

(ii) The second criterion is that the public policy must be clearly expressed in the source material and must, as far as possible, be consistently expressed across multiple authoritative sources.

(iii) The third criterion is that the alleged public policy must be articulated in the form of a proposition at an appropriate level of abstraction, and this proposition must be supported or borne out by the source material relied upon.

(iv) If the court, having applied all three criteria, concludes that the alleged public policy exists, then the court must consider whether the policy would be violated if the claimed right were given effect. Whether there would be a violation turns on the content of the policy that has been shown to exist. If the policy would be violated, then the concern not to violate it enters the second step of the analytical framework as a competing element to be weighed against any value that would be promoted by giving effect to the claimed right.

(b) The second step is a balancing exercise, in which the court considers the weight to be given to the value underlying the claimed right and the countervailing public policy consideration, and then reasons towards an outcome which strikes the proper balance between the competing considerations. There are at least three factors that ought to influence the weight to be given to a value underlying the claimed right or a public policy consideration in this exercise:

(i) The more rationally connected or proximate the public policy is to the legal issue that the court is being asked to decide, the greater the weight it should be given.

Version No 1: 11 Oct 2022 (19:31 hrs)

(ii) A public policy or value that emanates from the applicable statutory regime should be given significant weight.

(iii) The greater the degree to which the countervailing public policy consideration would be violated if the claimed right were given effect, the less willing the court should be to give effect to that right. An aspect of this factor is that the greater the degree to which the party asserting the claimed right deliberately violated the countervailing public policy consideration, the less willing the court should also be to give effect to that right. On the other hand, the greater the degree to which the value underlying the claimed right would be advanced if the right were given effect, the more willing the court should be to give effect to it.

Applying Step 1: The forensic exercise

163 Having set out our analytical framework, we now turn to apply it to the public policies relied upon by the Guardian. We begin with the first step of the framework, namely, the forensic exercise, and our conclusions are briefly as follows:

(a) We find that it is unclear what the public policy on surrogacy is, and we are therefore not inclined to place any weight on it in determining this case.

(b) We are not satisfied that there is a public policy against planned and deliberate parenthood by singles through the use of ART or surrogacy.

Version No 1: 11 Oct 2022 (19:31 hrs)

(c) However, the Guardian has satisfied us that there is a public policy in favour of parenthood within marriage and a public policy against the formation of same-sex family units. As between the two, we consider that it is the latter which would be violated if an adoption order were made in this case. We will therefore have to consider only that policy in the balancing exercise at [242]–[249] below.

164 Before proceeding, we think it is useful to characterise properly the Guardian's position on the last of the aforesaid public policies because it evolved during the course of these proceedings. In the Guardian's written case, which was filed before the hearing of the appeal, the Guardian's position was that there was an overarching public policy in Singapore that parenthood should take place within marriage, and as a "corollary" of this policy, it was against public policy: (a) for singles to embark on planned and deliberate parenthood through the use of ART or surrogacy; and (b) for same-sex family units to be formed. On the second day of oral argument, the Guardian clarified that (b) was not a corollary of, and instead was independent from, the alleged public policy in favour of parenthood within marriage. Later, in the Guardian's further submissions which were filed after the hearing, the Guardian further clarified that (a), too, is a "standalone" policy.

165 The Guardian's final position, therefore, is that there are three separate and independent public policies: first, a public policy in favour of parenthood within marriage; second, a public policy against singles embarking on planned and deliberate parenthood through the use of ART or surrogacy; and third, a public policy against the formation of same-sex family units.

166 We will therefore take the Guardian's case on this basis. It is also important to note that the Guardian does not purport to rely on a public policy

Version No 1: 11 Oct 2022 (19:31 hrs)

against surrogacy. But the issue arises because that public policy formed the basis of the District Judge's decision, and because the Guardian has impressed upon us that the Government does have a position on surrogacy, even if the Government may not have been clearly articulated it, and even if the Guardian may not be relying on it in this case. We shall therefore address surrogacy first, and then deal with the three public policies that the Guardian does rely on.

Surrogacy

167 As just mentioned, the Guardian does not rely on a public policy against surrogacy *per se*. Instead, she argues that public policy is against planned and deliberate parenthood by singles *through the use of ART or surrogacy*. The District Judge based her decision on a public policy against surrogacy, intertwined with s 11 of the Act. Thus, on the one hand, she observed that under the ART Licensing Terms ([6] above), surrogacy services are not available in Singapore. She regarded this as normative and representative of "the local position": GD at [38]. On the other hand, in refusing to sanction under s 11 of the Act the payment made to M under the GSA, the District Judge stated her objections to surrogacy in these terms: it "promotes the idea of the child as a commodity and [the GSA] is drawn up to facilitate the severance of human ties so as to enable the creation of new ones at a fee to be paid to the surrogate, the physician and the lawyer"; and "commercial surrogacy demeans and exploits human beings at various levels, especially women in poverty": GD at [39]. When considering the Child's welfare, she also lamented that the Child has been denied the right to know his mother because he was conceived and birthed in the context of a surrogacy arrangement: GD at [36].

168 Before we consider the evidence for any policy against surrogacy, it is necessary first to clarify what is meant by surrogacy. The concepts of traditional

Version No 1: 11 Oct 2022 (19:31 hrs)

and gestational surrogacy have already been introduced: see [7] above. In addition, it is relevant to distinguish between altruistic and commercial surrogacy: see John Pascoe, "Sleepwalking through the Minefield: Legal and Ethical Issues in Surrogacy" (2018) 30 SAcLJ 455 ("*Pascoe*") at para 7. In the former, the surrogate mother receives no payment or only reimbursement for her pregnancy-related expenses. In the latter, the surrogate mother is paid a fee, beyond reimbursement for her pregnancy-related expenses, to carry and give birth to the child.

169 We turn now to set out the relevant authoritative material from which the Government's position on surrogacy may be ascertained. Surrogacy, whether traditional or gestational, altruistic or commercial, is unavailable in Singapore due to cl 5.48 of the ART Licensing Terms. The clause states:

> 5.48 [Assisted Reproduction] Centres shall **not** carry out any of the following activities:
>
> …
>
> (*b*) Surrogacy (surrogacy is where a woman is artificially impregnated, whether for monetary consideration or not, with the intention that the child is to given and adopted by some other person or couple);
>
> …
>
> [emphasis in original]

170 This appears to be a position that the Government endorses, given that when Parliament debated the Bill leading to the SCARTA, it was stated that surrogacy would not be addressed by the SCARTA, but would be regulated separately by the Ministry of Health. In his Second Reading speech and in response to questions by MPs about the status of children born through international surrogacy where the commissioning parents were Singaporean, the Minister for Law, Mr K Shanmugam, explained (see *Singapore Parliamentary*

Version No 1: 11 Oct 2022 (19:31 hrs)

Debates, Official Report (12 August 2013) vol 90 ("*SCARTA Debates*") at 5.03pm and 5.56pm):

> The Bill does not go into or seek to regulate the provision of ART services in Singapore. Neither does it seek to deal with surrogacy issues. *These will continue to be regulated by the Ministry of Health.*
>
> …
>
> Turning now to parenthood, Ms Tan Su Shan advocated intention-based parenthood. While she did not specifically say as such, I think in essence, this would lead to an argument for surrogacy, because the natural conclusion of her suggestion is that an ART child would be regarded as the child of the commissioning couple if all the parties involved so intended.
>
> As I have said in my Second Reading speech, this Bill is a technical one dealing with the parenthood of children born through the ART process. It is not intended through this Bill to address the larger question of surrogacy. *That is an issue within the purview of the Ministry of Health. It has also been raised with them before.*
>
> [emphasis added]

171 Further, the scheme of the SCARTA does *not* envisage surrogacy or endorse what the Minister for Law termed "intention-based parenthood". This may be readily appreciated through the principles for the determination of parenthood under the SCARTA. The SCARTA contemplates that the gestational mother, defined as a woman who has carried a child as a result of a fertilisation procedure, is in every case carrying the child for herself and not as a surrogate for someone else. Under s 6, the gestational mother is treated as the mother of the child, whether she was in Singapore or elsewhere at the time of the fertilisation procedure. By s 7, the husband of the gestational mother, or her *de facto* partner whom she marries after undergoing the fertilisation procedure, is treated as the father of the child where his sperm was used, where he consented to the fertilisation procedure, or where he has accepted the child as a

Version No 1: 11 Oct 2022 (19:31 hrs)

child of the marriage. It will be recalled that the HFEA adopts the same starting point for the determination of parenthood: see [70] above.

172 However, there is a key difference between the HFEA and the SCARTA that is relevant in this context. Whereas the HFEA provides for "parental orders" by which commissioning parents may be declared the lawful parents of a child born through surrogacy, it appears to us – and we make this point provisionally and without the benefit of argument – that the SCARTA does not provide any means for transferring parental rights to commissioning parents. An application to determine parenthood may be made under s 10 of the SCARTA, but in such an application, parenthood is to be determined "under the Act": s 10(1) of the SCARTA. None of the provisions in the SCARTA contemplate that the gestational mother may be displaced as the mother of the child, or that a man who is not the husband or *de facto* partner of the gestational mother may be declared the father of the child. Section 10 itself refers to and contains no provision for such a displacement. Although the court is given a discretion under s 10(7) to determine parenthood based on a range of factors including the child's welfare, that discretion is enlivened only for applications made pursuant to s 8 (under which the court may order the gestational mother's *de facto* partner to be treated as the child's father) or s 9(3) (which governs parenthood where the gamete or embryo used was not intended to be used).

173 Therefore, while the SCARTA does not pronounce on the legality of surrogacy arrangements (see the *SCARTA Debates* (Mr K Shanmugam, Minister for Law) excerpted at [170] above), its provisions reflect the regulatory position that the provision of gestational surrogacy services is not permitted here. This is significant because to the extent that there is a public policy against surrogacy, the grant of an adoption order to the appellant would be a significant violation of such a policy. This is because the appellant would, by way of an

Version No 1: 11 Oct 2022 (19:31 hrs)

adoption order, be allowed to achieve a result which he, as a commissioning parent, would not have been able to achieve even under the SCARTA. Whether the adoption regime can in fact be used to achieve this result is an open question because it presents a request that is radically different to what the institution of adoption was designed to address. This degree of difference was remarked upon in *Re A and B* [2000] 26 Fam LR 317, which concerned an application to adopt a child born through surrogacy before the State of New South Wales had legislated to provide a means of transferring parental rights to commissioning parents. Bryson J put the matter in these terms (at [17]):

> An adoption order as a confirming step in a surrogacy arrangement is also a *significant adaptation* and *a large step away from* what were, initially, the *usual circumstances* of an adoption. The adoption of the child and the conferral on the child of legal relationships with other persons contributes to the child's welfare interests in a respect which has been wholly preconcerted and has not befallen the child through adverse circumstances, chance or misadventure. *There have been significant changes in what appears, on the surface, to be the same institution*; the advantages which the adoption order is proposed to confer on the child reciprocate disadvantages which have been imposed by the deliberate and preconcerted action of those who ask the court to act in the infant's welfare and interests. Whatever disadvantages for the child are proposed to be cured by the process have been imposed on the child by the process. [emphasis added]

174 While the materials we have referred to above might suggest the existence of a public policy against gestational surrogacy, there is a noticeable absence of statements from authoritative sources positively denouncing the use of surrogacy arrangements. For one, the use of such surrogacy services locally or abroad has not been criminalised. More recently, a question regarding the legalisation of surrogacy was posed to Deputy Prime Minister Teo Chee Hean at a public forum hosted by the Lee Kuan Yew School of Public Policy. DPM Teo stated that the Government was approaching the issue very carefully and has "not moved (with regards [*sic*] to) surrogacy in Singapore, especially

Version No 1: 11 Oct 2022 (19:31 hrs)

international surrogacy, because it is a very sensitive, delicate… issue". His response did not suggest a settled position for or against surrogacy (as reported by Kelly Ng, "The nation may be ageing, but its leadership cannot be aged: DPM Teo" *Today* (22 January 2018)):

> At the end of the dialogue, ambassador-at-large Chan Heng Chee was prompted to chime in, asking how Singaporeans would relate to the practice of surrogacy. …
>
> To that, Mr Teo said: "This is something which we would want to take very, very carefully… These are important, serious, ethical issues which one has to deal with."
>
> …
>
> "Now, we have to ask ourselves about the ethics of surrogacy, especially in cases like these. There are difficult ethical choices around surrogacy, especially paid surrogacy. That is why we have not moved (with regards [*sic*] to) surrogacy in Singapore, especially international surrogacy, because it is a very sensitive, delicate… issue," Mr Teo stressed.
>
> He added: "The position which we have in Singapore is, I think a good position – in that almost all children in Singapore are born in wedlock with fathers and mothers, and that gives society a certain stability and a certain framework in which we bring up children. I think those societies which have undergone very, very rapid social and familial transitions have encountered some serious challenges. We don't know who is right; we don't know who is wrong. I think this is one of those issues (which requires) a little prudence (and that) is probably the better part."

175 On 5 February 2018, the Minister for Social and Family Development, Mr Desmond Lee, was asked a Parliamentary Question regarding international surrogacy. Mr Lee's response was equivocal, and he did not definitively state that engaging surrogacy services overseas was prohibited or that children conceived through such procedures would receive no legal recognition. In fact, he stated that the Government did not track the number of children whom Singaporeans had had through such procedures overseas, suggesting that the Government was aware that Singaporeans may be engaging surrogacy services

Version No 1: 11 Oct 2022 (19:31 hrs)

abroad. It may be helpful to quote the exchange in full here (see *Singapore Parliamentary Debates*, *Official Report* (5 February 2018) vol 94):

> **CHILDREN CONCEIVED THROUGH SURROGACY OVERSEAS AND BORN TO SINGAPOREANS**
>
> **Assoc Prof Daniel Goh Pei Siong** asked the Minister for Social and Family Development regarding children born to Singaporeans who were conceived through surrogacy overseas (a) how many of such children are currently residing in Singapore; (b) what percentage of these children are being cared for by married couples who may not be their biological parents; (c) whether these couples are legal guardians of these children; and (d) what options are available to these couples to secure the children's well-being.
>
> **Mr Desmond Lee:** The Government does not track the number of children that Singaporeans have through overseas surrogacy procedures.
>
> How the law treats the relationship between a couple and their child conceived through overseas surrogacy procedures varies from jurisdiction to jurisdiction. Such couples may wish to seek legal advice on their rights and responsibilities for the child under Singapore law.

176 There is yet another indication that the Government is still deliberating its policy stance on surrogacy. Prior to the hearing of the present appeal, the appellant asked the Guardian to provide the number of adoption cases the MSF has handled which involved the use of surrogacy. The Guardian made the relevant inquiries and, during the hearing, disclosed that from 2008 to 2018, the MSF oversaw 14 applications for adoption which involved the use of surrogacy. Ten were supported by the Guardian, and the remaining four were, at the time of the hearing, pending investigation. In the ten cases, the applicants were married couples applying jointly to adopt. And in all 14 cases, surrogacy had been resorted to overseas because the couple was infertile. During its investigations into each of these cases, the Guardian recorded the payments that were made and what they were made for, but the surrogacy-related agreements were not requested or produced.

Version No 1: 11 Oct 2022 (19:31 hrs)

177 That the Guardian has supported applications to adopt children born to Singaporeans through surrogacy procedures overseas gives us pause in coming to any concluded view on the Government's position on surrogacy, and certainly makes it difficult to hold, as the District Judge seemed to assume, that there is a strong and clear public policy against surrogacy. The Guardian emphasises that every case has been and has to be assessed on its own merits, and we accept that the Guardian's support may be contingent on a variety of factors. We also accept that a number of characteristics that the Guardian takes objection to in the present case did not feature in these precedents. For instance, it may be possible that the Guardian considers that there is a public policy against surrogacy, but, in the ten cases mentioned at [176] above, reasoned that this policy was outweighed by concerns for the child's welfare. Nonetheless, the Guardian's practice, in so far as it represents the MSF's policy as applied, reveals that the Government has been willing to accommodate Singaporeans who have engaged surrogacy services overseas. This practice would be incongruent with a finding that there is a public policy against surrogacy locally, because such a finding might suggest a double standard by which surrogacy services may be obtained, but only by those who can afford to pay for such services overseas. This would be wholly unpalatable.

178 Having reviewed all the relevant material, we find that absent express Government confirmation, we are not in a position to articulate a public policy against obtaining surrogacy services, whether in or outside Singapore. It is simply unclear from the evidence whether there is a settled public policy against surrogacy at present and, even if there is, what that policy would be. The Government's statements may be consistent with more than one reading: the ART Licensing Terms may prohibit surrogacy in Singapore because the Government is regulating surrogacy for health-related reasons, or because the Government is still grappling with the ethical issues raised by surrogacy, or

Version No 1: 11 Oct 2022 (19:31 hrs)

because of a combination of the two; alternatively, the Government may be considering these issues and adopting an interim stance against surrogacy locally but allowing specific and narrow exceptions in adoption applications. The Guardian was unable to confirm which position was a better approximation of the Government's policy.

179 This is not to say that it would be unreasonable for public policy objections to be taken to surrogacy. Surrogacy is an ethically complex and morally fraught issue. To some, surrogacy represents a medical solution of last resort to the problem of infertility. It offers hope that the desire to procreate and raise a child may be fulfilled. But to entertain this solution, one must grapple with its profound moral and social implications.

180 It would not be an understatement to say that legitimising surrogacy would involve a radical reconsideration of established paradigms of family, intimacy, parenthood, gender relations, sexuality and the creation of life. Surrogacy fragments the concept of motherhood by separating gamete contributor, gestational carrier and caregiver. It regards these roles as links in a supply chain for the on-demand production of human life. It interposes a third, sometimes a fourth, person into the reproductive process, neither of whom may intend to care for the child after birth. It "promote[s] a world of private ordering" in which family relations are less a matter of circumstance and more a matter of choice: see Radhika Rao, "Surrogacy Law in the United States: The Outcome of Ambivalence" in *Surrogate Motherhood: International Perspectives* (Rachel Cook, Shelley Day Sclater & F Kaganas, eds) (Hart Publishing, 2003) ("*Surrogate Motherhood*") ch 2 at p 33. And unlike adoption, surrogacy is designed to eliminate from the outset not only part of the child's biological heritage because he must leave his birth mother, but also part of his genetic heritage if donor gametes were used. Surrogacy prompts us to examine our

Version No 1: 11 Oct 2022 (19:31 hrs)

values and decide which of them, if any, we are prepared to surrender if we decide to embrace technology's promise of ultimate self-determination.

181 At a fundamental level, surrogacy, especially commercial surrogacy, implicates issues of human dignity and autonomy. Some object that surrogacy commodifies children by treating them as products to be manufactured to fulfil a consumer demand and goods to be bought and sold. It is said to reduce children to a marketable commodity and thereby to deny their intrinsic worth and dignity as human beings and devalue the sanctity of human life in general: see A M Capron & M J Radin, "Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood" (1988) 16 Journal of Law, Medicine and Ethics 34 at p 36; Lori B Andrews, "Reproductive Technology Comes of Age" (1999) 21 Whittier Law Review 375 at p 379. Others say that surrogacy dehumanises women by commodifying the womb and industrialising the reproductive process, and that there are parallels to be drawn to prostitution and slavery: see Adeline A Allen, "Surrogacy and Limitations to Freedom of Contract: Toward Being More Fully Human" (2017) 41 Harvard Journal of Law and Public Policy 753 ("*Allen*") at pp 782 and 789. Yet others argue that a woman's autonomy is not fettered but enhanced if she is empowered to offer her gestational function as a service to bestow the gift of life on others: see Rachel Cook, Shelley Day Sclater & Felicity Kaganas, "Introduction" in *Surrogate Motherhood* ch 1 at p 9; John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton University Press, 1994) at pp 130–132.

182 There are also concerns over how the birth mother can be adequately protected. It is feared that commercialising surrogacy would lead to poor and uneducated women being exploited or coerced into providing a service that carries significant health risks: see *Allen* at p 784. Hemmed in by economic pressure and unequal bargaining power, the surrogate mother may find herself

Version No 1: 11 Oct 2022 (19:31 hrs)

bound to relinquish control over her body and subordinate her health interests to the goal of delivering the baby: see *Pascoe* at paras 22–26; Sonia Allan, "Commercial Surrogate and Child: Ethical Issues, Regulatory Approaches, and Suggestions for Change (Working Paper)" (30 May 2014) <https://ssrn.com/abstract=2431142> (accessed 28 November 2018) at pp 12–14. Also, the obligatory breaking of the maternal bond forged through the mysteriously intimate experience of gestation and childbirth may have profound consequences on the mother, as has already been seen in the cases. In *Farnell and Another v Chanbua* [2016] 56 Fam LR 84, a Thai surrogate mother birthed twins for an Australian couple, who brought one twin home. The surrogate mother later applied unsuccessfully in Australia for custody of that twin. The Family Court of Western Australia found that contrary to news reports, the couple had not abandoned the other twin because he had Down's Syndrome. Instead, it was because the surrogate mother had "fallen in love with the twins she was carrying and had decided she was going to keep the boy" (at [15]). The case, in the view of Thackray CJ, showed that surrogate mothers are not "baby-growing machines", but are "flesh and blood women who can develop bonds with their unborn children" (at [757]).

183 There are also anxieties about how to protect children born through surrogacy. Children should be brought into existence with someone to care for them in a safe environment. Yet, in a world where parental relations are chosen and revocable, there is a danger that surrogacy can create too many potential parents or no parents at all. This can happen when the surrogate mother decides to keep the child, when contractual relations break down, or when the commissioning parents divorce or change their minds before the surrogate mother has carried the baby to term. *Anna Johnson v Mark Calvert* (1993) 19 Cal Rptr 2d 494 illustrates the complications for children if transactional values were to play a part in making claims to parenthood. In that case, relations

Version No 1: 11 Oct 2022 (19:31 hrs)

between the surrogate mother and the commissioning parents soured during the pregnancy due to allegedly unfulfilled obligations by both sides. The surrogate mother decided to keep the child unless she was paid the balance due under the surrogacy contract. The commissioning parents sought a declaration that they were the child's legal parents, and the surrogate mother sought a declaration of her own. The Supreme Court of California granted a declaration to the commissioning parents in a landmark decision which upheld a surrogacy contract for the first time in the US. Another example is *In re: Marriage of Cynthia J and Robert P Moschetta* (1994) 25 Cal App 4th 1218, where the surrogate mother agreed to be artificially inseminated with the husband's sperm, to terminate her maternal rights and to support the wife's adoption application after the child was born. When she was in labour, she learnt that the couple was on the cusp of a divorce. She refused to let them see the baby until they assured her that they would not divorce. Several months later, the couple filed for divorce, and the surrogate mother applied to establish her maternal rights to the child. The California Court of Appeal ruled that the child's legal parents were the commissioning husband and the surrogate mother, a result that undoubtedly complicated the child's care arrangements. In yet another case, an Australian couple was reported to have abandoned one of a pair of twins birthed by an Indian surrogate mother because they could not afford to have another son and wanted to complete their family with a daughter: see Samantha Hawley, Suzanne Smith & Michael McKinnon, "India Surrogacy Case: Documents Show New South Wales Couple Abandoned Baby Boy Despite Warnings" *ABC News* (13 April 2015). The abandoned boy was left in a very vulnerable position as the Indian surrogate was not regarded as his mother under Indian law. Indeed, children are even more vulnerable where international commercial surrogacy is concerned because the variation in national laws regarding parentage and surrogacy may leave a child parentless, with neither the surrogate mother nor

Version No 1: 11 Oct 2022 (19:31 hrs)

the commissioning parents having legal rights to the child in their respective jurisdictions: see, *eg*, *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* [2015] EWFC 73. There are also concerns that, far from producing children to be loved and cared for in a stable home, surrogacy may be readily used as a cover for child trafficking: see *Pascoe* at paras 37–40.

184 The consequences that may follow if access to surrogacy (and ART) is unrestricted and inadequately regulated also raise serious concerns. Consider the example, relied upon by the Guardian, of the 24-year-old Japanese businessman who was in the news for fathering 13 children through ART, and in particular, through gestational surrogacy, and who was reported to desire to have up to 1,000 children and to continue making babies until he was dead: see Nur Asyiqin Mohamad Salleh, "Japanese behind 'baby factory' wants more surrogate kids" *The Straits Times* (25 February 2018). The ethical implications are numerous, but two may be outlined. First, is it acceptable that access is available to a form of ART that enables the production, even mass production, of human lives at will for any private purpose? Should such access be restricted, and if so, on what grounds and to what extent? Second, will a child who is "produced" in this way be able to experience the emotional attachment and security that are integral to his proper development? Even if he is able to, how will he be impacted by the loss of genetic relationships, by being denied knowledge of his biological heritage and by the knowledge of the fact that he was, in some sense, a commercial product? There has yet to be systematic research on the long-term psychological and social impact on children born through surrogacy: see Stuart John Oultram, Caroline Jones & Lucy Frith, "Gestational Surrogacy, Ethics, and the Family" in *Handbook of Gestational Surrogacy: International Clinical Practice and Policy Issues* (E Scott Sills ed) (Cambridge University Press, 2016) ("*Handbook of Gestational Surrogacy*"), ch 3 at p 18 (noting the dearth of empirical data on the impact of surrogacy on

Version No 1: 11 Oct 2022 (19:31 hrs)

the welfare of children born through surrogacy); *cf* Emily Koert and Judith C Daniluk, "Psychological and Interpersonal Factors in Gestational Surrogacy" in *Handbook of Gestational Surrogacy*, ch 10 at p 73 (citing studies on the psychological well-being of children born through surrogacy).

185 In the circumstances, given the still evolving nature of the Government's position in the light of the complexities surrounding the substantive issue, we find that the court certainly should not articulate a public policy against surrogacy and give it weight in the present case. To do so would be to fill a space in deliberative social policy-making that the other branches of government, in which the legislative imprimatur lies, have not stepped into or are not yet prepared to step into. Indeed, it is perhaps for this reason that the Guardian clarified during oral argument that she was not relying on a public policy against surrogacy.

186 We have no doubt that the Government is studying the position carefully and will in time determine its policy stance and take the appropriate legislative and enforcement action. But it is perhaps not out of place for us to observe that there is a case for some urgency in this regard. Should a similar case come before the court in the future, the parentage of the child would likely fall to be determined under the SCARTA, which, as we have noted, does not seem to permit the commissioning parents to displace the gestational mother and her husband or *de facto* partner as the legal parents of the child under any circumstance. The commissioning parents will therefore almost certainly attempt to circumvent this restriction by applying to adopt the child, and as we have suggested at [173] above, this would require at least a significant adaptation of the adoption regime. What should the court do in such a case if no clear policy on surrogacy has been expressed and no governmental action has been taken? Would the court not be compelled to take the child as he is, and

Version No 1: 11 Oct 2022 (19:31 hrs)

give at least significant weight to his welfare in determining the proper course for his future? Indeed, it is difficult to imagine a set of circumstances in which, by the time the case comes to court, the welfare of any child would not be gravely compromised by a refusal to make an adoption order granting parental rights to the parties who intend to care for the child: see *Re X and Y (Foreign Surrogacy)* [2009] 1 FLR 733 at [24] *per* Hedley J. This may have been what the District Judge had in mind when she expressed the concern that in a case like the present, the court is simply presented with a *fait accompli* and may feel inexorably compelled by welfare considerations to make the order sought by the applicant: GD at [43]. Yet, to make an adoption order in such a case would introduce dissonance in the law, for the commissioning parents would be allowed, by means of an adoption order, to achieve a result which the SCARTA – the latest legislative word on the status of children born through ART – does not appear to embrace. And such may well be the state of the law barring further clarity from the Government.

Parenthood within marriage

187 Next, in our judgment, there is strong evidence of a public policy in favour of parenthood within marriage. The first piece of evidence in this regard is the speech of Prime Minister Lee Hsien Loong during the 2007 Parliamentary debates on whether to repeal s 377A of the Penal Code. In the debates, the Prime Minister set out unequivocally to put forward the Government's view on this issue, which he regarded to be also reflective of the view of most of Singapore society. In doing so, he endorsed specifically the traditional understanding of a family as a married heterosexual couple having and raising children within their household. He also said that it was family units, so understood, which together contributed to the preservation of a stable society. He put it in the following

Version No 1: 11 Oct 2022 (19:31 hrs)

terms (see *Singapore Parliamentary Debates, Official Report* (23 October 2007) vol 83 ("*s 377A Debates*") at cols 2397–2400 and 2406–2407):

> Let me, today, focus on the policy issue – what we want the law to be, and explain our thinking, our considerations, why we came to this conclusion. I would ask these questions: what is our attitude towards homosexuality? "Our", meaning the Government's attitude and Singaporeans' attitude too. How should these attitudes and these values be reflected in our legislation?
>
> … Singapore is basically a conservative society. *The family is the basic building block of our society. It has been so, and, by policy, we have reinforced this and we want to keep it so. And by "family" in Singapore, we mean one man one woman, marrying, having children and bringing up children within that framework of a stable family unit.*
>
> …
>
> This is the way Singapore society is today. *This is the way the majority of Singaporeans want it to be. So, we should strive to maintain a balance, to uphold a stable society with traditional, heterosexual family values*, but with space for homosexuals to live their lives and contribute to the society.
>
> …
>
> On issues of moral values with consequences to the wider society, first we should also decide what is right for ourselves, but secondly, before we are carried away by what other societies do, I think it is wiser for us to observe the impact of radical departures from the traditional norms on early movers. These are changes which have very long lead times before the impact works through, before you see whether it is wise or unwise. …
>
> … We were right to uphold the family unit when western countries went for experimental lifestyles in the 1960s … But I am glad we did that, because today if you look at Western Europe, the marriage as an institution is dead. Families have broken down, the majority of children are born out of wedlock and live in families where the father and the mother are not the husband and wife living together and bringing them up. *And we have kept the way we are. I think that has been right.*
>
> [emphasis added]

188 Since 2007, the Government has continued to promote the policy that parenthood within marriage is the desired social norm and the traditionally-

Version No 1: 11 Oct 2022 (19:31 hrs)

defined family unit is the building block of society. In 2016, the Minister for Social and Family Development, Mr Tan Chuan-Jin, in response to questions about the Government's policy of not recognising children of unwed mothers as legitimate, said that "[t]he family is the basic building block of our society. Strong marriages are the key to strong families, and parenthood within marriage is the desired and prevailing social norm": see *Singapore Parliamentary Debates, Official Report* (10 October 2016) vol 94 at p 89. And in 2017, the Parliamentary Secretary to the Minister for Social and Family Development, Assoc Prof Dr Muhammad Faishal Ibrahim, in response to a query as to whether the Government could do away with the concept of "illegitimacy" in inheritance and tax reliefs, said, "Our society continues to desire parenthood within marriages, and we should promote it": see *Singapore Parliamentary Debates, Official Report* (8 March 2017) vol 94.

189 In addition, legislation supports the existence of a public policy in favour of parenthood within marriage. The main evidence for this is s 46(1) of the Women's Charter, which states that "[u]pon the solemnization of marriage, the husband and the wife shall be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for children". It has been said that s 46(1) "sets out society's aspirations of how marriage partners should behave", and enshrines a legal expectation that husbands and wives are to take their marriage seriously as a permanent union which should be safeguarded: see Debbie Ong, *International Issues in Family Law in Singapore* (Academy Publishing, 2015) at para 4.1. In support of this exhortation, the law imposes other obligations which set out society's fundamental expectations for parties in a marital and parental relationship: see *International Issues in Family Law in Singapore* at para 4.2. The social norm, which our laws embody and promote, is for children to grow up in the context of a stable and committed union between a man and a woman.

Version No 1: 11 Oct 2022 (19:31 hrs)

190 The existence of a public policy in favour of parenthood within marriage is also supported by other statutes and regulations:

(a) The Act assumes that where two persons are interested in raising an adopted child together, they should be a married heterosexual couple: see ss 3(3)–3(5) and 7(1) of the Act. Although the Act allows a single person to adopt a child, this does not set the social norm or contravene public policy in so far as adoption was devised to make provision for children who have lost their parents or who have been given up by their parents.

(b) The SCARTA envisages that assisted reproduction will be carried out for the benefit of only heterosexual couples, with the child having a father and a mother; paternity is determined by reference to the gestational mother's husband or *de facto* partner whom she later marries, neither of whom may have provided sperm: see [171] above.

(c) The ART Licensing Terms envisage that only a married woman may receive assisted reproductive services, and only with the consent of her husband: see cl 5.2.

(d) Where a formal order may be required to declare who has guardianship authority over a child, the GIA nevertheless presupposes that infants are under the care of a father and a mother, and so expresses the legislative presupposition that children are to be raised by a man and a woman: see ss 3, 4 and 6 of the GIA.

191 In the light of these materials, we accept the Guardian's submission that there is in Singapore a public policy in favour of parenthood within marriage. This means that the position to be encouraged is that the family unit should be

Version No 1: 11 Oct 2022 (19:31 hrs)

understood as comprising a married heterosexual couple having and raising children, and in addition, this should be regarded as the optimal parenting conditions under which a child here may be raised.

192 In our judgment, however, making an adoption order in this case would not be contrary to this public policy. The reason is that a public policy in favour of parenthood within marriage is not the same thing as a public policy against other forms of parenthood. In fact, there is indication to the contrary. The Act, for example, contemplates adoption orders being made in favour of single applicants. It may well be that many single applicants are in a stable heterosexual relationship. But even on that count, they may not be married. And the Act contains no requirement that a single applicant must at least have a partner of the opposite sex at the time of the adoption. Given that single parenthood is permitted by the Act, and is therefore not contrary to the public policy in favour of parenthood within marriage, the same conclusion must also hold for single parenthood on the part of a person of homosexual orientation, unless there is a policy which relates specifically to homosexuals, and we consider this at [202]–[207] below.

Planned and deliberate parenthood by singles through the use of ART or surrogacy

193 Next is the alleged public policy against planned and deliberate parenthood by singles through the use of ART or surrogacy, regardless of sexual orientation. The Guardian argues that such a public policy is evident from the following:

(a) First, singles, meaning unmarried persons, are not permitted to undergo assisted reproduction in Singapore. ART services may be provided to only married women with the consent of their husbands.

Version No 1: 11 Oct 2022 (19:31 hrs)

This is the result of cl 5.2 of the ART Licensing Terms (and, prior to this, cl 4.1.2 of the ART Directives). In the Guardian's view, this "evidences public policy against the use of ART (and, even more so, surrogacy) by single (meaning unmarried) persons as a means of having a child".

(b) Second, the use of ART by singles "gives rise to real potential for serious abuse". The Guardian relies on the example of the 24-year-old Japanese businessman referred to at [184] above. The Guardian argues that "[t]he welfare of the children birthed in such circumstances is seriously at risk, reinforcing the concerns which underlie public policy against planned and deliberate parenthood by singles through the use of ART and/or surrogacy".

194 We are not satisfied that there is such a public policy for three reasons. First, we respectfully doubt that this alleged policy can conceptually be regarded as a "standalone" policy. We are unable to see how such a policy makes sense on its own. It seems to us that such a policy must contain a prior commitment to either: (a) a policy of *ensuring* parenthood only within marriage, which would entail a policy against planned and deliberate single parenthood, with the use of ART or surrogacy being evidence of such planning and deliberation; or (b) a policy in favour of limiting the abuse of ART or surrogacy, which might lead to a specific policy against the use by singles of ART or surrogacy on the ground that such use carries a greater risk of abuse.

195 To that extent, the Guardian has to demonstrate that either (a) or (b) as set out in the preceding paragraph is established, and we do not think she has succeeded in doing that. As regards (a), while there is evidence of a public policy in favour of parenthood within marriage, there is no evidence before us

Version No 1: 11 Oct 2022 (19:31 hrs)

that that policy, for the Government, entails a policy of discouraging singles from taking steps to have children. It is one thing to promote as a public policy the goal of securing the traditional family unit as the basic building block of society. It is quite another to promote, as a matter of public policy, restrictions on the choices of individual citizens in relation to the relational bonds that they may form. We are not saying that the Government may not promote such a policy. The question is simply whether there is sufficient evidence that it has purported to do so. Currently, we do not think there is such evidence.

196 As regards (b), in so far as surrogacy is a form of ART, the appellant contends, and we agree, that the Guardian is being potentially inconsistent with her original position that her case is not premised on any public policy against surrogacy stemming from its potential harms and ethical problems. As we have explained at [185] above, it is presently unclear what the Government's public policy position is on surrogacy.

197 In any event, the relevant materials do not, in our judgment, support the existence of a public policy against planned and deliberate parenthood by singles through the use of ART or surrogacy. Nor do they enable us to articulate the contours and limits of any such policy with confidence. On the one hand, we accept that under the ART Licensing Terms, only a married woman may have access to ART services with the consent of her spouse. On the other hand, the SCARTA provides for the legal parenthood and status of children born to *unmarried* women using ART.

198 During the Parliamentary debates on the Bill which led to the SCARTA, several MPs noted that the Bill contemplated that ART might be used by single women. Notably, no member said anything about whether this was desirable or not. Mr Hri Kumar Nair, MP, observed that the SCARTA "gives a man parental

Version No 1: 11 Oct 2022 (19:31 hrs)

rights where he is not married to the mother at the time of the procedure", and that "[t]here will be concerns that we are sanctioning ART for single women and compromising the family unit": see the *SCARTA Debates* at 5.11pm. Assoc Prof Tan Kheng Boon Eugene, Nominated MP, noted that "the Bill is clear that it only applies to heterosexual couples, *whether married or not to each other* at the time of the fertilisation procedure" [emphasis added]: see the *SCARTA Debates* at 5.21pm. And the Minister for Law, Mr K Shanmugam, said, "The Bill requires the 'de facto partner' to be 'living in a relationship [with the gestational mother] as if he were her spouse'. So really, it is a quasi-spousal relationship that entails living together. Again, we prefer not to be prescriptive about this": see the *SCARTA Debates* at 5.56pm. These sentiments do not sit easily with the notion of a clear policy stance in favour of parenthood *only* within marriage. There are certainly suggestions of parenthood – and specifically, parenthood through the use of ART – being contemplated or even supported within the context of *de facto* partnerships, which, at least in Singapore society, are not seen as having the same quality of permanence, durability or acceptance as marriage.

199 That said, access to ART services in Singapore continue nonetheless be governed by the ART Licensing Terms. Under the ART Licensing Terms, there will not be a situation where ART is provided *in Singapore* to an unmarried gestational mother or her partner. This does not mean that those provisions in the SCARTA which provide for the legal parenthood and status of children born to unmarried women using ART are redundant, because they still govern the situation where ART is provided overseas but the sperm or egg donor, gestational mother, or the husband or *de facto* partner of the gestational mother is domiciled in Singapore: see s 3 of the SCARTA. Since the SCARTA countenances the prospect that unmarried persons may parent children born through ART, in the absence of clearer statements from authoritative sources, it

Version No 1: 11 Oct 2022 (19:31 hrs)

cannot be stated definitively that there is a free-standing public policy against singles becoming parents through ART or surrogacy.

200 Third, we agree with the appellant that the ethical problems raised in the Guardian's example of the 24-year-old Japanese man who fathered 13 children through ART cannot stand as evidence of a public policy against planned and deliberate parenthood by singles through ART or surrogacy; rather, these ethical problems evidence the need for the development and articulation of a clear policy stance. We think that the weight to be given to these ethical problems should be appreciated in the light of the proper role of the court, which we have explained at [125]–[126] above. Thus, in so far as the Guardian is asking the court to create public policy on the basis of these ethical problems, it would be inappropriate for the court to do so. In the present legal context, the court may only pronounce upon the existence and scope of public policy based on appropriate authoritative sources such as statutes, regulations and ministerial speeches. The ethical problems which we have discussed in our judgment (at [179]–[184] above) demonstrate the ethical complexities of surrogacy and highlight only the need for the Government to state its position on the issue, not for the court to reach any judgment on it.

201 Accordingly, we do not think it can be said that there is in place a clear public policy against planned and deliberate parenthood by singles through the use of ART or surrogacy. It therefore does not feature in our consideration of whether an adoption order should be made in this case.

Formation of same-sex family units

202 Finally, the Guardian submits that separate from the public policy in favour of parenthood within marriage, there is a public policy against the formation of same-sex family units. For the purposes of this submission, the

Version No 1: 11 Oct 2022 (19:31 hrs)

Guardian defines the concept of a same-sex family unit as including a family where there are two homosexual co-parenting individuals, as well as a family where there is a single homosexual parent and a child, regardless of the gender of the parent. We accept this submission. In particular, we consider that the policy means that at the present time, the Government is opposed to the advancement of any right claimed by a homosexual for the purpose of forming a same-sex family unit. However, we do not consider, nor do we understand the Guardian to be contending, that the policy involves the enforcement of any law which may penalise homosexuals for making such an effort.

203 We also accept the Guardian's submission that while this public policy may share the same normative roots as the public policy in favour of parenthood within marriage, it is conceptually independent from that policy in the following sense. Whereas the public policy in favour of parenthood within marriage would appear to entail a policy that does not encourage any form of alternative family unit, including, for example, a family unit comprising a single heterosexual and a child, the public policy in question here is aimed specifically at just one category of alternative family unit, namely, a same-sex family unit as defined at [202] above. The appellant has not argued that such a public policy would be unconstitutional. He has instead focused his efforts on disproving its existence. For the reasons that follow, we are not persuaded.

204 The first piece of evidence which supports the existence of a public policy against the formation of same-sex family units is, again, PM Lee's speech during the 2007 Parliamentary debates on the question whether s 377A of the Penal Code should be repealed. Early in his speech, PM Lee said that "we should recognise that homosexuals are part of our society" and that they are "our kith and kin": see the *s 377A Debates* at col 2398. He then observed that the Government allowed this group of citizens their space, did not "harass" them,

Version No 1: 11 Oct 2022 (19:31 hrs)

and did not proactively enforce s 377A against them: see the *s 377A Debates* at col 2401. But he warned that repealing s 377A might send the "wrong signal that our stance [on the traditional family unit] has changed, and the rules have shifted": see the *s 377A Debates* at col 2402. He also cautioned the House against being "carried away by what other societies do", and stated that it was instead wiser to "observe the impact of radical departures from the traditional norms on early movers": see the *s 377A Debates* at col 2406. He ended his speech by saying, "I think we have also been right to adapt, to accommodate homosexuals in our society, but not to allow or encourage activists to champion gay rights as they do in the West": see the *s 377A Debates* at col 2407.

205 In our judgment, all of this clearly indicates that the Government's position as it stands is to maintain the *status quo* such that the traditional family unit remains the societal norm, but to achieve this within the context of a more inclusive society. Part of the effort towards greater inclusiveness is to recognise that homosexuals are part of our society and to accept them as such. The Government's position, we gather, is neither to interfere with their lives, nor to allow them to be persecuted or victimised. But it is clear that the Government's stance is also that homosexual conduct, as much as it may be accommodated in so far as the individual is concerned, should not be advanced in a way or to a degree that compromises traditional values and structures that are a feature of mainstream Singapore society. This is an extremely delicate balance to maintain in a multi-religious, multi-cultural society that is also modern and cosmopolitan. It may not be progressive enough for some; it may be too progressive for others. But a delicate balance it is that the Government has struck. Thus, PM Lee raised the example of a schoolteacher who, in his view, had been rightly asked by the Ministry of Education to cease publishing an online blog which "described [the schoolteacher's] own sexual inclinations, and explained how he was gay". The Prime Minister thought that "what [the schoolteacher] disseminate[d] [came]

Version No 1: 11 Oct 2022 (19:31 hrs)

very close to promoting a lifestyle", and implied that the Ministry had been right to take action, observing, "So there is space, and there are limits": see the *s 377A Debates* at col 2400.

206 The Guardian also relies on various legislative provisions to support the existence of a public policy against the formation of same-sex family units. First is s 377A of the Penal Code, which criminalises sexual conduct between males. Second is s 12(1) of the Women's Charter, which provides that a marriage solemnised between persons who, at the date of marriage, are not respectively male and female, is void. We agree that these provisions are consistent with the public policy advanced by the Guardian. Although s 377A is not enforced, it has not been repealed. For the avoidance of doubt, we note that one or more fresh challenges against its constitutionality is or are pending before the courts and nothing which we say here bears on that. As things stand, the presence of s 377A on our statute books and the evident unwillingness of the Government to repeal it continues to signal public sentiment against sexual conduct between males, even in private. Section 12(1) of the Women's Charter also communicates that society does not accept same-sex family units. It follows *a fortiori* from the existence of such disapproval that the Government does observe a public policy against the formation of same-sex family units. We therefore accept that there is a public policy against the formation of same-sex family units. For completeness, however, we reject the Guardian's submission that the Act itself supports the existence of this policy. While the Act contemplates that a couple who applies to adopt a child must be heterosexual (see ss 3(3) and 3(4)), there is nothing in the Act which requires that *single* applicants be heterosexual.

207 Having found that there is a public policy against the formation of same-sex family units, we also consider that making an adoption order in this case

Version No 1: 11 Oct 2022 (19:31 hrs)

would violate that policy. The substance of the policy is illustrated by a distinction drawn by the Guardian – between the positive affirmation and the reticent accommodation of homosexual persons. The former would be contrary to the policy, while the latter would not. The latter refers to the kind of acceptance that PM Lee was referring to when he said during the *s 377A Debates* that homosexuals must be accommodated and given a place in our society, but should not be allowed to advance the normalisation of homosexuality or to campaign for more extensive rights. In our judgment, making an adoption order in this case would constitute a positive affirmation of the appellant's attempt at forming a same-sex family unit. If the order is made, this would be the first case in Singapore in which the court allowed a gay adult to adopt a child, and it seems fair to say that that could have an appreciable effect on traditional parenting norms in Singapore, which the Prime Minister was eager to preserve. Hence, making an adoption order in this case would violate the public policy against the formation of same-sex family units.

208 We think it is important to emphasise that we express no subjective personal judgment on the appellant's attempt to form a same-sex family unit. All that is relevant, and all that we are concerned with here, is whether making an adoption order, which would undoubtedly facilitate that attempt, would objectively be a violation of public policy. Against this lies the suggestion, which Prof Leong has made in her commentary on the decision below, that the court should at least empathise with the appellant and his partner's "basic human impulse to create and raise a child": *Leong Wai Kum* at para 11.046. To illustrate the point, Prof Leong referred to *Thomson Medical*, where the Court of Appeal, in her view, "exhibited remarkable empathy for the mother who used [ART] services in order to conceive a child with her husband", which led it to recognise that the mother had suffered a compensable loss of genetic affinity as a result of a botched in vitro fertilisation procedure (at para 11.046). Prof Leong

Version No 1: 11 Oct 2022 (19:31 hrs)

then ventured that "[p]erhaps the only difference between the mother and her husband in [*Thomson Medical*] when compared with the father and his partner in [the decision below] is that the latter couple were on the 'wrong' side of the gender divide" (at para 11.046).

209 We have some difficulty with this view of *Thomson Medical* and the present case, and we think it is important to mention this so that the decision below as well as our reasoning here are properly understood. Two points may be made. First, the sexual orientation of the parents who sought to procure a child of their own through ART is not the only difference between *Thomson Medical* and the present case. The two cases differ also in the form of ART that was used. *Thomson Medical* involved just in vitro fertilisation, while the present case involves surrogacy. While we have decided that the authoritative materials do not permit a clear judicial articulation of any public policy on surrogacy, the fact remains that surrogacy raises unique ethical challenges that do not necessarily depend on the sexual orientation of the commissioning parents. The District Judge based her decision on her own view of the ethics of the procedure (albeit incorrectly), and therefore certainly did not dismiss the application because the appellant and his partner were "on the 'wrong' side of the gender divide". Indeed, she expressly declined to determine the application on that basis: GD at [28]. Second, in so far as our reasoning is concerned, we regard the appellant's and his partner's sexual orientation as material to this case only because we have identified a public policy against the formation of same-sex family units. Hence, their sexual orientation is made relevant by the law as we understand it, and not by any personal judgment or sentiment on our part concerning their desire and attempt to raise a child of their own. Nor would it have been appropriate for any such considerations to have influenced our decision.

Version No 1: 11 Oct 2022 (19:31 hrs)

Our conclusion on the forensic exercise

210 For all these reasons, we are satisfied that there is a public policy in favour of parenthood within marriage and a public policy against the formation of same-sex family units, and that making an adoption order in this case would violate the latter policy. But before analysing how that latter public policy affects the exercise of the court's discretion under s 3(1) of the Act to make an adoption order in this case, we will consider the impact of s 11 of the Act because within the scheme of the Act, it is a matter which logically precedes the final balancing exercise under the second step of the analytical framework set out earlier.

Issue 4: Payment under s 11 of the Act

211 Section 11 of the Act raises two broad issues. First, does the payment that the appellant and his partner made to M under the GSA constitute a restricted payment under s 11? Second, if it does, should the court sanction the payment, and if the court does not grant sanction, what effect will that have on the merits of the present adoption application? We will consider these issues in turn.

Payment in consideration of adoption

212 In brief, our view is that the payment made to M under the GSA does constitute "any payment or other reward in consideration of the adoption of any infant" that has been received by "any parent" within the meaning of s 11 of the Act. It was made in consideration of the Child's adoption because M had a contractual obligation under the GSA to "cooperate fully" with the appellant's and his partner's actions to take steps to confirm their relationship as the sole parents of the Child, and such cooperation would have had to include consenting

Version No 1: 11 Oct 2022 (19:31 hrs)

to the present application. And M is a "parent" of the Child under s 11 because she is his birth mother.

213 For convenience, we reproduce s 11 of the Act, which reads:

> **Restriction on payments**
>
> **11.** It shall not be lawful for any adopter or for any parent or guardian except with the sanction of the court to receive payment or other reward in consideration of the adoption of any infant under this Act or for any person to make or give or agree to make or give to any adopter or to any parent or guardian such payment or reward.

214 This provision originates from, and is identical in wording to, s 9 of the 1926 Adoption Act (UK), which introduced the institution of adoption into the English legal system: see [44] above.

215 Based on the parliamentary debates and the case law, the purpose of s 11 of the Act is to safeguard the interests of the infant who is the subject of an adoption application by ensuring that an adoption order is made in favour of only persons who wish to adopt him with a sincere desire to promote his welfare. The thinking is that the kind of payment described in s 11 is usually made in circumstances where the child in question is being trafficked or otherwise exploited. The provision addresses this mischief by making the payment unlawful, but at the same time empowers the court to sanction the payment. The circumstances in which the court will sanction the payment are necessarily delimited by the purpose of the provision itself. Thus, where evidence had been adduced that the payment was nothing more than a customary gift, and that the prospective adopters had every intention of giving the infant a good upbringing, the court did not regard the payment as unlawful: see *Re Sim Thong Lai* [1955] 21 MLJ 25 ("*Sim Thong Lai*"). The question of whether the absence of sanction entails that an adoption order ought not be made will be addressed below.

Version No 1: 11 Oct 2022 (19:31 hrs)

216 The appellant first argues that M is not a "parent" within the meaning of s 11 of the Act, and therefore, s 11 is not engaged in this case. He refers to s 2, which states that "'parent', in relation to an illegitimate infant, does not include the natural father", and concludes from this that "parent", in so far as an illegitimate infant's mother is concerned, must refer to his "natural, biological mother". He then contends that since M has no genetic link to the Child, she is not his biological mother, and therefore is not a "parent" under s 11. The appellant goes on to submit that "parent" in s 11 cannot mean a "surrogate parent" because when s 11 was first enacted in 1939 in the form of s 10 of the 1939 Adoption Ordinance, surrogacy was not a technological possibility, and therefore, Parliament cannot have intended that meaning.

217 The appellant's argument is misconceived. The idea that a woman is not to be regarded as a child's natural mother because, notwithstanding that she gave birth to the child, she has no genetic link to the child, is an idea that has arisen only because of the modern possibility of gestational surrogacy through in vitro fertilisation. As one commentator puts it, "[t]he procedure has allowed the role of motherhood to be partitioned into separate roles: genetic contribution, gestation of the fetus, and the social responsibilities of raising the child": see Flavia Berys, "Interpreting a Rent-a-Womb Contract: How California Courts Should Proceed When Gestational Surrogacy Arrangements Go Sour" (2006) 42 California Western Law Rev 321 ("*Berys*") at p 330. In 1939, there was no reason, scientific or otherwise, not to regard any child who was born of a woman as the natural child of that woman, or that woman as his natural mother. Therefore, what Parliament must have meant by "parent" at that time, in so far as a mother was concerned, was simply a mother who had given birth to the infant in question. And that meaning applies squarely to M because she carried the Child to term.

Version No 1: 11 Oct 2022 (19:31 hrs)

218 Next, the appellant argues that the payment which he made to M is not a payment "in consideration of the adoption" because it was for the surrogacy and not for the adoption. The appellant builds this argument on two facts. The first is that M was going to receive the payment regardless of whether the appellant proceeded with an adoption. The second is that cl 17.1 of the GSA expressly provides that the payment to M is to be regarded as a "reimbursement" and not as a "fee" for surrendering her parental rights or consenting to the adoption of the child that is born to her.

219 We reject this argument as well. The fact that M was going to receive the payment regardless of whether the appellant proceeded with an adoption is irrelevant. The question which we are concerned with here is the purpose for which M received the payment under the GSA. That question may be answered simply by looking at what M was obliged to do under the GSA in exchange for the payment that she received. One of those obligations is the obligation to give her consent to any application by the appellant or his partner to adopt the Child. That obligation is contained in cl 3.4 of the GSA, which reads as follows:

> Surrogate [*ie*, M] and Husband [*ie*, M's husband] shall cooperate fully with [the appellant's and his partner's] actions to confirm [the appellant's and his partner's] relationship as sole parents of the Child, including, without limitation, timely *signing court pleadings, signing any document reasonably necessary or convenient to confirm [the appellant and his partner] as the sole and exclusive legal parents of the Child, signing all documents requested by [the appellant and his partner] or their legal representatives,* and timely providing any documentation requested at any time by any medical provider, governmental agency or any of the Parties' legal representatives, and appearing in court as necessary. [emphasis added]

220 It is clear that cl 3.4 imposes an obligation on M to cooperate with the appellant and his partner in the present proceedings. The effect of the adoption order that the appellant seeks is precisely to constitute him (in the words of cl 3.4) the "sole and exclusive legal [parent]" of the Child because the order, if

Version No 1: 11 Oct 2022 (19:31 hrs)

made, would extinguish all rights and duties that M may have in relation to the Child by operation of s 7(1)(*a*) of the Act. Therefore, M's provision of her consent on paper for the appellant to pursue the present adoption application must constitute the "signing [of a] document reasonably necessary or convenient to confirm [him]" as such a parent.

221 The broader point to be made is that the GSA is not simply an agreement that M carry a baby to term, but also an agreement that she hand over the baby to the appellant and his partner with no strings attached, and cooperate with them to formalise their relationship with the baby after the handing over. The fact that the GSA imposes on M this obligation to cooperate, including the obligation to consent to the adoption of the baby by the appellant, means that as a matter of substance, this obligation is part of the services that M is being paid to provide to the appellant and his partner. If M were to decide to withhold her consent to the adoption, she would likely be in breach of contract and be liable to be sued for that by the appellant and his partner (although we say nothing about whether such a claim would pass muster in this jurisdiction).

222 What we have suggested to be the true nature of the GSA is perhaps most evident from the payment structure provided for in Exhibit A of the GSA. By cl 2.1 of that exhibit, M's remuneration is capped at US$25,000. She is entitled to receive US$1,850 every four weeks starting on the first day of the seventh week after the embryo transfer. She would be entitled to receive the remaining balance of the aforesaid sum of US$25,000, which would be the bulk of that sum, only within 14 days after delivery. This must be read with cl 14 of the GSA, which requires M and her husband to surrender custody of the baby to the appellant and his partner immediately upon birth. The clear intention is for the bulk of the payment to M to be made only after the appellant and his partner receive the baby. It is evident from this that M's surrendering of the

Version No 1: 11 Oct 2022 (19:31 hrs)

baby is an integral part of the services which she is providing to the appellant and his partner. This is made even clearer by cl 2.1B of Exhibit A, which provides that if the baby is born prior to 30 weeks from the date of the embryo transfer and the baby does not survive, M will not be entitled to the balance. The giving up of the baby to the appellant and his partner is therefore clearly part of the services that M is being paid for.

223 This arrangement, in our view, means that the GSA is properly to be regarded as a kind of contract for services. As one commentator has put it (see *Berys* at p 342):

> … In many gestational surrogacy agreements, payment is dependant [*sic*] on relinquishment of the baby upon birth. In cases where the arrangement deteriorated only because the birth mother refused to release the custody of the child, the intended parents refused to pay the fee to the birth mother. Therefore, in one view, the surrogate is not only providing the service of physical care for the baby, but she is also earning her fee by handing the child over after its birth. …

224 We are not moved from this position even though cl 17.1 of the GSA provides that "no payments shall be construed as compensation for services and all parties agree that all payments are to be construed as reimbursements and/or payments for expenses". It is obvious that a court will not decline to construe a payment as a compensation for services merely because a clause in the contract says that the payment should not be so construed. In so far as cl 17.1 is an indication of the parties' intentions, it is an indication at best of their *intention* that the payment to M should not be construed as compensation for services; it says nothing about whether such payment *ought*, *as a matter of substance*, to be so construed. In our judgment, having regard to the substance of the GSA, the payment made by the appellant and his partner to M should be seen, at least in part, as payment for her giving up of a baby for their adoption and for her cooperation in proceedings such as these to regularise the appellant's parent-

Version No 1: 11 Oct 2022 (19:31 hrs)

child relationship with the Child. It must therefore be a payment "in consideration of the adoption" within the meaning of s 11 of the Act.

Sanctioning a payment under s 11

225 Having said this, we are also of the view that the payment to M should be sanctioned under s 11 of the Act. We consider that the test for granting sanction of a payment caught by s 11 is whether the payment was made for the purpose of adopting the child with a sincere desire to benefit and promote his welfare. The appellant, in our judgment, satisfies this test. However, because the grant of sanction is a matter of statutory discretion, sanction ought not to be granted if to do so would violate public policy. In this case, we do not think that sanctioning the payment to M would violate any public policy. We shall elaborate, beginning with the applicable principles.

The applicable principles: The grant of sanction

226 As we have mentioned, the earliest version of our current Act was passed in the Straits Settlements in the form of the 1939 Adoption Ordinance. What little was said during its passage pointed to its origin in the 1926 Adoption Act (UK), as we have noted: see [44] above. The 1939 Adoption Ordinance was intended to "give effect to customs of adoption which are so common amongst both the Chinese and Indian communities", and was "based largely on the English Act of 1926": see *Proceedings of the Second Legislative Council* (1939) at B14 (Charles Gough Howell, Attorney-General of Singapore). Section 11 of our current Act, which was then s 10 of the 1939 Adoption Ordinance, is identical in wording to s 9 of the 1926 Adoption Act (UK). And in relation to the intention behind s 9 of that Act, Mr Galbraith, the MP who introduced the Bill which led to that Act, said (see the *1926 Debates* ([94] above)):

Version No 1: 11 Oct 2022 (19:31 hrs)

> Clause 9, which everyone, I think, will agree is a perfectly proper provision, prevents any payment of any sort or kind being made … to the person who is adopting a child in connection with the adoption. That is obviously a provision which will tend to safeguard the interests of the infant, and to bring about the result that Orders of this kind will only be applied for by persons who are adopting the child with a sincere desire to benefit and promote the welfare of the infant itself.

227 It appears from this that the Legislature's intention was that the court may sanction a payment caught by s 11 if it is satisfied that the payment was made for the purpose of adopting the child with a sincere desire to benefit and promote his welfare. Naturally, cogent evidence would have to be put forward to establish the existence of such a desire. Such evidence, we think, would be particularly persuasive where there is no indication that the child in question has been or is likely to be trafficked or otherwise exploited. While the jurisprudence on s 11 is very limited and, in some respects, somewhat unclear, the cases, in our view, may be reconciled and explained through an application of the propositions we have just stated.

228 In *Sim Thong Lai* ([215] above), the applicants arranged to adopt a child soon after he was born, with the consent of his natural parents. The applicants gave the natural parents a red packet containing $200, a few yards of cloth and two bottles of wine as a customary gift. The evidence was that the gift was a token of compensation to the natural parents for the expenses incurred in bearing and rearing the child up to the time of the adoption, and that a possible reason for this custom was to enable the adopting parents to consider the adopted child more truly their own if they could claim to have paid for his maintenance from birth (at 27). Taylor J considered that the issue was whether the payment was "[a] reward in consideration of the adoption" within the meaning of s 10 of the 1939 Adoption Ordinance. He concluded that it was not, for the following reasons (at 28):

Version No 1: 11 Oct 2022 (19:31 hrs)

> The real question in the case is whether such recoupment amounts, in the words of the statute, to "A reward in consideration of the adoption." In one sense the money was certainly paid in consideration of the adoption; without the payment the natural parents would not have agreed to transfer the child. But that is not to say that the adoption was for reward in the sense which the Ordinance seeks to make unlawful. A middle view is possible.
>
> The case could be compared with one where the custody of a child is transferred temporarily, as for instance where he is sent to another country for education. The parents might put him in the care of a relative who would maintain him gratuitously. They might send him to a relative, less fortunately circumstanced, who accepted money representing the bare cost of maintenance. They might send him to a [*sic*] some kind of a boarding establishment avowedly on a commercial basis; this would obviously involve reward, though the amount would be only a proportion of the money paid. In the second example the host might fairly say that mere reimbursement did not mean that he was accepting money for his services and that he was in truth taking care of the child without reward. The present case appears to be similar in principle.

229 With respect, we have some difficulty with this reasoning. Taylor J appears to have overlooked the fact that s 10 of the 1939 Adoption Ordinance, like s 9 of the 1926 Adoption Act (UK) and s 11 of our current Act, prohibited not only "rewards", but also "payments" made in consideration of the adoption. Hence, even though the customary gift in *Sim Thong Lai* might not have been a *reward* in the sense of connoting the sale of the child concerned, it was certainly a payment. And as Taylor J recognised, without the gift, which he himself called a "payment", the natural parents would not have agreed to transfer the child. In our view, therefore, the conclusion in *Sim Thong Lai* should have been that there was a payment in consideration of the adoption, and the question should have been whether the court ought nonetheless to sanction the payment. In this regard, it is useful to consider Taylor J's reason for not considering the gift in question a "reward" within the meaning of s 10 of the 1939 Adoption Ordinance because that sheds light on why he thought the adoption should be allowed despite the gift.

Version No 1: 11 Oct 2022 (19:31 hrs)

230 Taylor J's reasoning appears to be that the gift was not unlawful under s 10 of the 1939 Adoption Ordinance because it was akin to a payment to cover the expenses incurred in sending a child to a boarding establishment. But if the point is that payment was made in both instances purely for the maintenance of the child, then the question which arises is: what is the principle which makes that fact relevant? In our judgment, the only rational principle is that the payment was made for the purpose of adopting the child with a sincere desire to benefit and promote his welfare. The payments that were made to the natural parents in *Sim Thong Lai* and to Taylor J's hypothetical boarding establishment were unobjectionable because they were made simply for the purpose of covering the costs of providing for the child. They betrayed no ulterior indication that the child was being taken into another's care for him to be exploited.

231 Next, there is the decision of the English High Court in *In re Adoption Application (Payment for adoption)* [1987] Fam 81 ("*In re Adoption Application*"). The applicants in that case were an infertile couple who had engaged a woman to carry and deliver the husband's child as a surrogate mother for £10,000. The husband impregnated the woman, who carried the baby to term. She was paid £1,000 during her pregnancy and £4,000 shortly after the baby was born. She refused to accept the remaining £5,000 out of goodwill. Latey J held that on the facts, the payments were not made in consideration of the adoption because it was only after the payments had been made and the baby was born that the parties really considered adopting him (at 86). But Latey J said that even if he were wrong on this point, he would have sanctioned the payment because the child was doing extremely well under the applicants' care (at 88). He explained his reasons in these words (at 87–88):

> It follows that in each case the court has a discretion whether or not to authorise any payment or reward which has already

Version No 1: 11 Oct 2022 (19:31 hrs)

> been made or may be contemplated in the future. In exercising that discretion the court would no doubt balance all the circumstances of the case with the welfare of the child as first consideration against what [counsel for the guardian ad litem] well described as the degree of taint of the transaction for which authorisation is asked. …
>
> The evidence and the full and balanced reports are all one way. As I have said this little child is thriving and it and its family are supremely happy. It is all accurately and clearly summarised in the guardian ad litem's report and I cannot do better than quote from it: …
>
> I agree unreservedly with every word of that [quotation from the guardian ad litem's report]. If I am mistaken in my finding that the payments did not fall within the prohibited ambit, I should without hesitation exercise discretion by authorising them and making the adoption order.

232 We agree with Latey J's reasoning in so far as it places the focus on whether the payment in any way indicates that the welfare of the child has been compromised. Latey J found that overwhelmingly not to be case on the evidence, and we respectfully consider that he was right, for that reason, to have considered that sanction of the payment, if it were needed, would have been justified. However, his suggestion that the welfare of the child should be balanced against "the degree of taint of the transaction" needs, we think, to be clarified. As we have suggested, because s 11 of the Act confers on the court a discretion to sanction a payment made in consideration of an adoption, the court, in exercising its discretion, should consider whether sanctioning the payment would be inconsistent with any public policy. For example, if there were evidence of a public policy against surrogacy, then sanctioning a payment made to the surrogate mother would be contrary to public policy. And the court would have to decide, on a balance of considerations, whether it should nonetheless sanction the payment.

233 *Re C (A Minor) (Adoption Application)* [1993] 1 FLR 87 ("*Re C*") might be regarded as an example of a case in which sanction of a payment made in

Version No 1: 11 Oct 2022 (19:31 hrs)

consideration of an adoption was withheld on the ground that the payment was contrary to public policy. The applicants in that case were a married couple who had entered into an arrangement with a pregnant woman to adopt her child. To bypass adoption restrictions, it was arranged that the husband would pass himself off as the baby's father. He was by occupation a long-distance lorry driver, and the plan was to say that he had met the woman in the course of his journeys and had had an affair with her, by which she conceived a child of whom he was the putative father. Various payments were made to the woman. In the event, the woman decided not to give up her child and told the social worker about the scheme. The applicants had by then made an adoption application, and did not withdraw the application until late into the adoption hearing. The English High Court dismissed the application, holding that, among other things, the payments were payments in consideration of the adoption, and ought not to be sanctioned because they had been made pursuant to a scheme which undermined the protections of the adoption regime. Booth J put the matter this way (at 100–101):

> … [H]ad I to consider [assuming the application had not been withdrawn] whether or not I should authorise the payments that I find to have been made by Mr and Mrs S to the mother in regard to the adoption by them of C, I would have to take into consideration the purpose for which they were made and all the circumstances of the case. I have no doubt at all that they were payments made by Mr and Mrs S for the handing over to them of C, and that they were made with a view to ensuring that the mother would continue to adhere to the false story and to the deceit which would lead, in the end, to their adoption of their baby. To authorise such payments would be to sweep aside the protection given by the [1976 Adoption Act (UK)] to children and it would, in effect, amount to ratifying the sale of a child for adoption. I would not, in the circumstances, have considered it right to authorise any of the payments which I find to have been made by Mr and Mrs S to the mother, nor would I have thought it right to have authorised the payments which Mr and Mrs S admit to having made to her.

Version No 1: 11 Oct 2022 (19:31 hrs)

234 By way of contrast, the last case to be discussed here is an example of when sanction of a payment made in consideration of an adoption may be justified notwithstanding a contrary public policy. In the decision of the First Division of the Scottish Inner House in *C v S* 1996 SLT 1387, a married couple entered into an arrangement with a single woman pursuant to which it was agreed that she would be artificially inseminated by the husband and bear a child, which she would give up to them at birth, and that she would be paid £8,000 as "loss of earnings and inconvenience". After bearing the child, delivering him to the couple, and being paid the agreed sum, the woman refused to consent to the making of a parental order. The couple then applied to adopt the child. The sheriff held that although it was in the child's best interests to remain with the couple and for access by the woman to be refused, he was unable to make an adoption order because the payment contravened ss 24 and 51(1)(*c*) of the Adoption (Scotland) Act 1978 (c 28) (UK) ("the 1978 Scottish Act") (which are *in pari materia* with s 11 of our current Act) as well as the Human Fertilisation and Embryology Act 1990 (c 37) (UK). He thus made only a custody order in favour of the couple. Both parties appealed. The court allowed the couple's appeal, holding, among other things, that the payment did not contravene the 1978 Scottish Act. Giving the lead judgment, the Lord President, Lord Hope, cited with approval *In re Adoption Application* and *Re C*, and said at (1398B–C):

> … [I]f it had been necessary to reach a decision as to whether the sheriff was wrong to hold that the payment should not be authorised retrospectively in this case, I would have held that the making of the payment should have been authorised. But in any event, I consider that, *when regard is had as the first consideration to the need to safeguard and promote the welfare of the child throughout his childhood, the public policy objection resulting from the fact that the payment was made as part of a surrogacy arrangement is outweighed in this case.* As the sheriff has held that it would certainly be in the child's best interests for him to be adopted by Mr and Mrs C, the appropriate course here is for an adoption order to be made. [emphasis added]

Version No 1: 11 Oct 2022 (19:31 hrs)

235 These cases, in our view, confirm that the governing test for whether sanction should be granted under s 11 of the Act is whether the payment in question was made for the purpose of adopting the child with a sincere desire to benefit and promote his welfare of the child in question. If it was, then the court should go on to consider whether any public policy exists which militates against granting sanction, and if so, apply the principles stated at [148]–[161] above and determine after a balancing exercise whether sanction ought nevertheless to be granted.

The applicable principles: The effect of sanction

236 We turn now to the consequences of granting and withholding sanction. In our judgment, if a court decides to sanction an unlawful payment, that does not necessarily mean that an adoption order would be granted. That is because the court may go on to conclude that on the facts of the case, it would not be in the child's welfare for the adoption order to be granted. It is not difficult to see how this could be so. The court may first form the view that the payment in question was made out of a *bona fide* desire to adopt the child. The court would then sanction the payment on this basis. The court may then consider that it is not satisfied as to the applicants' ability to care for the child. And for that reason, the court may ultimately decide not to grant the adoption order sought notwithstanding that it has or would have sanctioned the payment.

237 If a court decides not to sanction an unlawful payment, and where it so decides on account of the child's welfare, it would naturally be unwilling to make the adoption order sought, given that the child's welfare is also the governing consideration for the exercise of the discretion under s 3(1) of the Act. In contrast, where the court decides not to sanction an unlawful payment for some reason other than the welfare of the child, such as on account of some

Version No 1: 11 Oct 2022 (19:31 hrs)

public policy reason unconnected to the child's welfare, this may not necessarily preclude the making of an adoption order. This is because nowhere in the Act is it provided that if a payment falling under s 11 is not sanctioned, the adoption application should automatically fail. This may be contrasted with what used to be the position in England under the 1976 Adoption Act (UK), which, by s 24(2), expressly barred an adoption where an illegal payment had been made in consideration of the adoption: see *Cretney* at para 22-069. What the court will have to do is to take into account the reason why sanction was withheld in the overall balancing exercise that it performs under s 3(1) of the Act on the basis of the principles which we have set out at [148]–[161] above.

Application to the payment to M under the GSA

238 As we have mentioned, in this case, the payment to M under the GSA was made in consideration of the adoption under s 11 of the Act, and was therefore *prima facie* unlawful. However, we think that it was made out of a sincere and genuine intention on the part of the appellant to adopt the Child and thereby to promote his welfare. The payment was no indication that their transaction with M was one through which the Child would be exploited. There is also no other evidence that the Child would be exploited. To the contrary, the Guardian's affidavit attests to how the Child's needs are being adequately met by the appellant and his partner.

239 Against this, the Guardian raises two reasons why the payment to M should not be sanctioned. First, the purpose behind s 11 "is to safeguard against commodification of children and exploitation of persons into giving up their children". The suggestion is that the payment to M engages this concern because it constitutes a commodification of the Child. We disagree with this argument because s 11 does not have as broad a purpose as that. The parliamentary

Version No 1: 11 Oct 2022 (19:31 hrs)

debates on the Bills that introduced the 1926 Adoption Act (UK) in England and the 1939 Adoption Ordinance in the Straits Settlements do not suggest that the mischief targeted by s 11's predecessors was the commodification of children. They certainly were intended to protect against the *exploitation* of children, but that is a different concept. We accept that surrogacy, especially gestational surrogacy, raises weighty ethical concerns: see [179]–[184] above. However, that is not the concern which lies behind s 11. As we have seen, the real concern behind s 11 is to safeguard the welfare of children who have been given up for adoption for a price. And in the present case, there is no evidence that the Child's welfare has been or is likely to be undermined as a result of the transaction under which the payment to M was made. Thus, the purpose of s 11 simply does not require that sanction of that payment be withheld.

240 The Guardian's second argument is that the court should be wary of "sanctioning a payment … that would have the effect of circumventing childcare laws in Singapore so as to result in the approval of arrangements in favour of persons who would not have been approved as parents (adoptive or otherwise) under arrangements in Singapore". The Guardian builds this argument on the authority of English cases which hold that the court must ensure that commercial surrogacy agreements are not used to achieve that effect. We are not persuaded by this argument mainly because it is an argument that is more rationally connected to the exercise of the discretion under s 3(1) rather than s 11 of the Act, and ought to be addressed in that context. Logically, it is not the payment but the adoption application which most directly has the circumventive effect alluded to by the Guardian. Public policy is most relevant to the discretion under s 11 when it pertains to the circumstances under which the illegal payment was made, whether it be a scheme to deceive the authorities as in *Re C* or a commercial surrogacy arrangement as in *C v S*. In the present case, the only conceivably relevant public policy for the purposes of s 11 is a public policy

Version No 1: 11 Oct 2022 (19:31 hrs)

against surrogacy, but as we have said, we are not prepared at this stage to recognise this public policy for the reasons we have given at [167]–[185] above. Accordingly, the Guardian's second argument must fail.

241 For these reasons, pursuant to s 11 of the Act, we sanction the payment that the appellant and his partner made to M under the GSA.

Applying Step 2: Balancing the Child's welfare and public policy

242 We turn now to the final step in our analysis, that is, the second step of the analytical framework set out earlier. On the one hand, the welfare of the Child favours making the adoption order sought by the appellant. As we elaborate below, this is a case where the appellant's claim is not only supported by but in fact derives from a compelling public policy consideration, namely, the protection of the welfare of the child in any proceedings concerning his custody or upbringing, and we are mandated to treat this consideration as "first and paramount" in the present adoption application. On the other hand, the only public policy which making of an adoption order in this case would violate is the public policy against the formation of same-sex family units. As we have decided to sanction the payment that the appellant and his partner made to M, that payment is no longer illegal under s 11 of the Act, and therefore is not a countervailing consideration against making an adoption order. Accordingly, our task is to ascribe the appropriate weight to the concern to protect the Child's welfare and the concern to avoid a violation of the public policy which we have identified, by reference to the three factors outlined at [148]–[161] above, and then consider whether that public policy consideration or the welfare of the Child should prevail.

243 First, the greater the degree to which the public policy is rationally connected or proximate to the legal issue that the court is being asked to decide,

Version No 1: 11 Oct 2022 (19:31 hrs)

the greater the weight that ought to be given to it. In our judgment, the public policy in question here is very closely connected to the issue which we have to decide. What we are deciding is whether the Child should be adopted by the appellant, and what the public policy is telling us is that endorsing an arrangement of that very nature would be injurious to the common good. This point is perhaps the Guardian's strongest point, and it is perhaps also the most difficult point in this analysis because it juxtaposes the Child's best interests in the circumstances of this case against an incommensurable concern – the consequences which the framers of the public policy in question contemplate would befall society at large should the formation of same-sex family units be endorsed.

244 Second, the greater the degree to which the public policy concerned emanates from the applicable statutory regime, the greater the weight that ought to be given to it. Here, it is clear that the public policy against the formation of same-sex family units does not arise from the Act at all. Hence, no weight can be added on this count. For the avoidance of doubt, this is distinct from the point that because the public policy against the formation of same-sex family units is a policy related to the institution of family and parenthood, the court is entitled to take it into account: see [97] above. That point, it might be said, concerns the *admissibility* of this public policy in the discretionary balancing exercise, whereas the present point concerns the *weight* to be given to this public policy in that exercise. What remains to be said here is that by contrast, the concern to reach an outcome that promotes the welfare of the Child is a consideration which is expressly provided for in the applicable statutory regime, and for this reason, that concern ought to be attributed significant weight.

245 Third, the greater the degree to which the countervailing policy consideration would be violated if the claimed right were given effect, the less

Version No 1: 11 Oct 2022 (19:31 hrs)

willing the court should be to give effect to it. Here, if an adoption order is made, the public policy against the formation of same-sex family units would be violated significantly. This is partly a function of the specificity with which this policy has been framed, in that making an adoption order would result in a situation which is precisely what the policy forbids: the appellant, a gay man, would obtain the benefit of having his relationship with his son formalised by a court that knows that he will take care of the Child together with another gay man, all of them living as one family.

246 Next, the greater the degree to which the party asserting the claimed right deliberately violated the countervailing public policy consideration, the less willing the court should be to give effect to the claimed right. On this metric, we think that what the appellant sought to do must be assessed with some nuance. On the one hand, there is nothing to indicate that the appellant set out deliberately to violate any *law*. We are therefore much less willing to draw the conclusion that the District Judge drew, namely, that the appellant is attempting to obtain through the back door what he cannot obtain through the front. On the other hand, we find it difficult to say that the appellant was wholly unaware that his adoption of the Child would be inconsistent with the Government's position against the formation of same-sex family units. In the light of the prevailing law, it seems to us that this position at least represents an official *attitude* to which a reasonable member of the public would be alive. Further, the appellant engaged surrogacy services overseas precisely because he had been advised by adoption agencies in Singapore that homosexuals would not be allowed to adopt. However, that is not sufficient, in our judgment, to demonstrate that the appellant set out deliberately to violate a *public policy* to that or similar effect. In our judgment, the fact that even the Guardian struggled in these proceedings to articulate the precise content of the public policies which, she contended, would be violated by making an adoption order evidences the difficulty with

Version No 1: 11 Oct 2022 (19:31 hrs)

finding that the appellant had deliberately set out to violate them (or it, as we have found). It also appears from the appellant's evidence that he did not contemplate commencing adoption proceedings until he encountered difficulties acquiring Singapore citizenship for the Child. Accordingly, on the whole, we are not prepared to infer that the appellant's pursuit of his adoption application is tainted with culpability of the kind that would weigh significantly against making an adoption order. (With the publication of this decision, however, it may be more defensible to draw such a conclusion in an appropriate future case.)

Version No 1: 11 Oct 2022 (19:31 hrs)

247 Still on the third factor, the greater the degree to which the value underlying the claimed right would be advanced if the right were given effect, the more willing the court should be to give effect to it. In this regard, we draw on the conclusion which we reached earlier in the welfare assessment. The relevant value in this case is the promotion of the welfare of the Child, and, as we have noted at [242] above, this not only underlies or supports the putative right but is in fact the very source of that right. In our judgment, that value would be not just advanced but significantly advanced by our making the adoption order sought. The evidence has demonstrated to us that it is very much in the interests of the Child that the adoption order be made, having regard principally to the fact that his prospects of acquiring Singapore citizenship could be significantly enhanced by making an adoption order, which would in turn lead to an overall increase in the stability of his life in Singapore.

248 On balance, it seems appropriate that we attribute significant weight to the concern not to violate the public policy against the formation of same-sex family units on account of its rational connection to the present dispute and the degree to which this policy would be violated should an adoption order be made. However, having regard to all the circumstances before us, we think that neither of these reasons is sufficiently powerful to enable us to ignore the statutory imperative to promote the welfare of the Child, and, indeed, to regard his welfare as first and paramount. That statutory imperative is not only intrinsically weighty, having emanated from the Legislature, but is also supported by the evidence, which shows that the welfare of the Child, which is the value opposed by the countervailing public policy consideration in this case, would be materially advanced by our making an adoption order. With not insignificant difficulty, therefore, we conclude that an adoption order ought to be made in this case.

Version No 1: 11 Oct 2022 (19:31 hrs)

249 In arriving at this conclusion, we feel compelled to underscore two points. First, our decision is a decision on the particular facts of this case, and should not be taken as an endorsement of what the appellant and his partner set out to do. As we have mentioned at [209] above, our decision was reached through an application of the law as we understood it to be, and not on the basis of our sympathies for the position of either party. Second, the Guardian did not rely on any public policy against surrogacy, nor did she consider herself able to state clearly what the Government's position on that issue is. Had the position in this regard been different, our decision may or may not have been different. However, given that the appellant's use of surrogacy was such a critical step in his path to obtaining an adoption order, it is somewhat unsatisfactory that in the end, we could place no weight on that conduct either way due to the equivocality of the materials presented.

Conclusion

250 For all these reasons, the appeal is allowed. Unless the parties come to an agreement on costs, we will hear them on the question of costs. In that event, they are to file and serve written submissions, limited to eight pages each, setting out their respective positions on the appropriate costs orders that should follow from this decision.

Sundaresh Menon Chief Justice	Judith Prakash Judge of Appeal	Debbie Ong Judge

Version No 1: 11 Oct 2022 (19:31 hrs)

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Version No 1: 11 Oct 2022 (19:31 hrs)