

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2020/0116

BETWEEN:

[1] O Trustee
[2] P Trustee

Claimants

and

[1] Q
[2] R
[3] S (A MINOR)
[4] T (A MINOR)
[5] U (A MINOR)

Defendants
Non-Party/Applicant

C

Appearances:

Mr. Richard Wilson, QC with him Ms. Sophia Hurst, Mr. Niki Olympitis and Ms. Sara-Jane Knock for the Claimants

Mrs. Elspeth Talbot Rice, QC with her Mr. Oliver Clifton, Ms. Tamara Cameron and Ms. Yegâne Güley for the Non-Party/Applicant

2021: January 20, 21;
February 15, 18;
June 10.

JUDGMENT

[1] **WALLBANK, J. (Ag.)** On 27th July 2020, the Claimants filed a Fixed Date Claim Form. They did so in their capacity as the sole trustees ('the Trustees') of two trusts, known as the O Trust and the P Trust respectively ('the Trusts'). Both Trusts are subject to the laws of the Territory of the Virgin Islands ('BVI'). The Trustees seek certain directions which would affect the Defendants, who are beneficiaries to the Trusts.

- [2] There are two related applications before the Court. These have been brought by C. C describes herself as the full-time mother of the Third, Fourth and Fifth Defendants, who are minor children ('the Minor Children' or 'Minor Beneficiaries') and as the only person having custody and care of them, their father having died. I shall refer to the Third Defendant as S, the Fourth Defendant as T and the Fifth Defendant as U. The first of these applications, filed on 14th September 2020, seeks an order that C be appointed as the Next Friend for the Minor Children and such further and/or other relief as the Court may consider appropriate. The second application brought by C, on 13th November 2020, seeks recognition by this Court of orders made by courts in California and Texas which, she claims, conferred on her the status of mother and/or guardian, or a person otherwise having legal responsibility for each of the Minor Children. This is the Court's judgment in respect of each of these three applications (so far as the Court can and is required to determine them now).
- [3] Concerning the Claimants' claim, relief is sought pursuant to the Trustee Ordinance 1961, as amended,¹ rules 67 and 23.8, Civil Procedure Rules 2000 ('CPR') and/or the inherent jurisdiction of the Court. The goal of the Claimants is to obtain the Court's directions in relation to proposed revisions to the Trusts and the arrangements in respect of them, and approval of what they call certain 'momentous' decisions of the Trustees. Before determining that aspect though, which it is premature to do now (as all concerned agree), the Claimants seek orders that would set up an orderly hearing at which the Court will be asked to sanction the proposed decisions. The Claimants seek an order that a Mr. Loh, a senior lawyer, should be appointed as the Next Friend for the Minor Children, so that they can participate in the directions hearing. The Claimants also seek orders that would authorize Mr. Loh additionally to:
- (1) correspond with the Trustees on behalf of the Minor Children in respect of the Trusts generally and in connection with the proposed restructuring;
 - (2) interact with the relatives and carers (including C) of the Minor Children as to their needs and requirements;
 - (3) give good receipt to the Trustees in connection with any distributions made to him by the Trustees from the Trusts for the benefit of the Minor Children;
 - (4) instruct and retain any relevant professional advisers, including tax accountants, to complete tax returns for the Minor Children if distributions for their benefit are made from

¹ Cap. 303.

the Trusts giving rise to tax obligations, and to sign such returns on their behalf so far as may be required.

- [4] We can thus see that there are disputes between the Claimants and C as to who should be the Next Friend for the Minor Beneficiaries and as to who would be able to give good receipt for distributions from the Trusts in favour of the Minor Beneficiaries.
- [5] Regarding the dispute as to who should be appointed as the Next Friend, this has been a particularly hard-fought contest. It is clearly important to the Claimants and to C, respectively, that their own choice be appointed. The Claimants do not want C to be the Next Friend nor the person who should receive future distributions on behalf of the Minor Beneficiaries from the trust assets. Conversely, C does not want Mr. Loh to take on these roles. C wants to be the Next Friend. She also wants to be the person who can give good receipt of future distributions from the trust assets. Since, she contends, it goes beyond the remit of a Next Friend to give good receipt for trust assets in future distributions (that is, outside the ambit of legal proceedings), she seeks to be recognized under BVI law as the Minor Children's mother, or guardian, or person otherwise having legal responsibility for each of the Minor Children.
- [6] The reason why C wishes to seek this recognition is because the Trusts are governed by BVI law and the Trust Deeds provide that where there are minor beneficiaries, their 'parent or guardian or other person having legal responsibility' for them can receive funds on their behalf and give good receipt to the Trustees.
- [7] Until such time as C obtains such recognition, she apprehends, she would not be able to receive distributions and give good receipt on behalf of the Minor Children. Conversely, if Mr. Loh were to be appointed Next Friend, and C were to obtain the recognition she hopes for, she would in that capacity be able to receive the distributions and there would be no good reason why she should be by-passed with the payments going through Mr. Loh.
- [8] The basic facts that have given rise to the present dispute can be stated quite briefly. There was a very successful international businessman called X. He was married to a lady named Z. During their marriage, X fathered two children, Q and R. They are now adults. They are the First and Second Defendants. Q and R were born as a result of what appear to have been 'commercial surrogacy arrangements'. X's spermatazoa, deposited in a 'sperm bank' in

California, United States of America, was used for their conception. Z died in 2008. Around the following year, in 2009 (claims C), when X was 84 years old, he and C met. C was then around 40 years old. She was a commercial real estate agent and had worked as a private banker. They started living together in 2011, in Tokyo, Japan. They did not marry. On 10th January 2012, X settled the Trusts by way of trust deeds (the 'Trust Deeds'). Both Trusts are irrevocable discretionary trusts in favour of Q, R and any other children 'conceived and born with the Settlor's sperm currently deposited in a sperm bank in California' and any other persons that might be added by the Trustees under a general power of addition. Both Trusts are governed by BVI law. C was not a stated beneficiary of the Trusts. Nor was she ever added as a beneficiary. The trust period was 20 years from the date of the respective Trust Deeds, whereupon the assets would vest in the beneficiaries. Around the time the Trusts were settled, or very shortly afterwards, X and C went together to the United States to arrange that X should father more children, using his sperm stored in California. Consequently, with the assistance of three surrogate women and two 'egg donors', and pursuant to what the Claimants say were 'commercial surrogacy arrangements' (although C takes issue with this characterization), S was born on x August 2013 in California, T was born on x September 2013 in Texas and U was born on x October 2015 in California. X was their biological father. C was not their biological or gestational mother. Nonetheless, birth certificates were issued from the authorities in these respective states recording C as the mother of these Minor Children. The Minor Children then resided with X and C in Hong Kong. Substantial distributions from the Trust assets ensued, including for the benefit of the Minor Children, with the monies being paid to X on the Minor Children's behalf as their father. Each of the Minor Children received quarterly payments of AUS\$225,000. The Court was told that the value of the Trusts' assets stands at around US\$450million. Unfortunately, relations between X and his eldest son, Q, deteriorated over a number of years. By 2016, when X was about 91 years old, going by certain written communications passing between them it appears that there was considerable friction between Q and his father, at least partly to do with Q's view that it was irresponsible of X, at his very advanced age, to procreate more children. X passed away in May 2020. The quarterly payments to the Minor Beneficiaries then stopped in July 2020. The Minor Children have continued to reside with C in Hong Kong. The Court was told that the Minor Children, who are United States nationals, reside in Hong Kong under student visas. C has not adopted them under Hong Kong law. Nor has she sought or obtained recognition in Hong Kong of parentage orders C and X obtained in the United States ('the US Orders'). C has the role of their mother, although formally, under the laws of Hong Kong, as I understand the position, she

has no legal status in relation to the Minor Children. C has, in the past, attempted to become a beneficiary of the Trusts, claiming that X wished this, but she did not succeed in this regard. C has had some other dealings with the Trusts which the Claimants say indicate she has interests that conflict with those of the Minor Beneficiaries, which I will consider in some further detail below. The Claimants, for their part, are not professional trustees. Both are companies which, historically at least, and possibly, still today (although this is denied), were (or are) under the direct and/or ultimate but indirect control of Q. The Claimants contend that one of the reasons they want to appoint Mr. Loh as the Next Friend is to enable the process of preparing the directions hearing will go smoothly, contrasting this with suggestions that historic tensions between Q and C threaten to make the process a lot more difficult than it need be. The Claimants accept that the Court's task upon such a directions hearing is not to decide whose version of events is right or wrong, nor to decide whether the intended course or restructuring is commercially prudent, but to determine whether the restructuring proposals ultimately settled on by the Claimants are legal, intra-vires the terms of the Trust instruments, in good faith and not unreasonable in all the circumstances. Thus, the Claimants accept that the sanction they seek is not strictly necessary, but desirable for their eventual protection. Concerning the proposed restructuring, the Claimants intend to propose that the Trusts be reorganized into segregated sub-funds or new separate trusts and possibly to extend the trust period. Their thought process in this regard appears to have originated in 2018, when they began to take initial Japanese tax advice in relation to Q's tax residency position. They had been aware that there could be tax issues since before 2015, when Q had (around then) come under an obligation to file a tax return in Japan. Q resides in Japan. In October this year, Q will have been residing there for 10 years, exposing him to a series of potential tax consequences under Japanese law by virtue of his interests in the Trusts.

- [9] Xeric debate about trusts and civil procedure find itself, in this case, intertwined with novel (for this jurisdiction at least) considerations of recognition of foreign parentage orders following apparent commercial surrogacy arrangements. By 'commercial surrogacy arrangements' this Court understands to be meant contractual relations whereby one or more persons, as 'intended parent or parents', directly or indirectly pay(s) a woman, who is not the source of the egg (or 'ovum'), to receive within her body an egg, whether fertilized beforehand *in vitro* or afterwards *in vivo*, and then to carry the child within her womb until birth, whereupon the woman gives up the child to the 'intended parent or parents'. The woman can be referred to as the 'gestational mother'. This type of arrangement is to be contrasted with arrangements

wherein the gestational mother does not receive payment, other than indemnification for disbursements and expenses actually incurred. The latter is sometimes referred to as an 'altruistic' surrogacy arrangement. The BVI Status of Children Act, 2014² ('Status of Children Act') calls such an *in vitro* or *in vivo* fertilization procedure an 'artificial conception procedure'.³ The difference between *in vitro* and *in vivo* artificial conception procedures is that in the case of the former, a new human life is started in a laboratory before being transferred to the gestational mother's body for further development, whereas with *in vivo* fertilization, conception is allowed to occur inside the gestational mother's body.

- [10] The Claimants have obtained an opinion from an English Barrister, Mr. Andrew Powell, who specializes in family law, with a particular specialism on the international movement of children, surrogacy and fertility law. Leaving aside procedural disagreements whether the Court should accept Mr. Powell's opinion as expert evidence (the Claimants say they are not adducing it as expert evidence), Mr. Powell summarizes the position thus. This much does not appear to be controversial between the parties:

"There is no settled international approach to surrogacy. There are a variety of approaches adopted in different jurisdictions. Surrogacy is viewed as a complex, moral and ethical issue and therefore attitudes vary where public policy considerations for each state weigh in heavily. For example, it is of note that there is no private international law agreement between contracting states that would allow for judicial comity, unlike in cases of adoption."

- [11] A commercial surrogacy arrangement may be treated as lawful and enforceable in one jurisdiction but not in others. The parties disagree whether Hong Kong law recognizes them: the Claimants say such arrangements are not recognized there, whereas C's Counsel suggested they may be in certain circumstances. The Court was taken to the Hong Kong Parent and Child Ordinance⁴, sections 9 to 11, to the effect that the default position in Hong Kong is that the gestational mother is to be regarded as the mother of the child, other than through adoption. It would be remiss of me not to observe that reading on to section 12, it appears that Hong Kong law does allow for parentage orders to be made following surrogacy arrangements, but such orders can only be made in favour of married applicants and where the gametes of one or both are used. If this is correct (it may not be, as this is not a point on which this Court was given expert evidence of Hong Kong law) it would seem to exclude C from

² No. 6 of 2014.

³ Status of Children Act, 2014 section 6(4).

⁴ Cap. 429 of 1993 as amended.

obtaining a parentage order in Hong Kong as she was never married to X. It is, though, common ground between the parties that, as a matter of Hong Kong law, C is not regarded as the parent or guardian or person with legal responsibility for the Minor Children. Mr. Powell mentions that commercial surrogacy is lawful 'in some States in the USA', implying (as the Claimants also submit) that in one or more other States they are not. This too does not appear to be controversial between the parties. The Court has been provided with evidence of both California and Texas law that they can be, and in this case were found to be, lawful in those States.

[12] The parentage orders C seeks to have recognized in this jurisdiction concern the following:

- (1) in respect of S, a 'Judgment of Maternity and Paternity' dated 23rd July 2013 of the Superior Court of the State of California for the County of Madera, in which X was declared the father and C was declared to be the 'presumed natural mother' of the then, as yet, unborn S, and full and sole custody and financial responsibility for S was conferred upon X and C. This order was obtained and made about a month before S was born;
- (2) in respect of U, a 'Judgment of Maternity and Paternity' dated 1st September 2015 of the Superior Court of the State of California for the County of Shasta, in which X and C were each declared to be the 'legal parent' of the then, as yet, unborn U, and in which X and C were awarded full, sole, exclusive and permanent legal and physical custody of U, with sole financial responsibility. This order was also obtained and made about a month before U was born;
- (3) in respect of T, in Texas, there was a two-stage process. X and C obtained an order dated 19th July 2013 from the 304th Judicial District Court of Dallas County, Texas, validating the gestational agreement that they had entered into with the gestational mother and an order and decree that X's name should be entered as the father upon the birth certificate and C's name as the mother. Then, on 20th September 2013, the same court made a 'Final Order' declaring X the father and C the mother. It is this second order that C seeks to have recognized here. It was obtained and made about two weeks after T was born.

[13] Validity of the gestational agreement in accordance with the requirements of Texas law was clearly a substantive legal consideration. The Texas District Court found that the gestational

agreement (concerning T) met 'the requirements set forth in Section 160.754 of the Texas Family Code'.

[14] The general scheme of the commercial surrogacy arrangements in this case was, materially for present purposes, as follows. I shall refer primarily to T's arrangement. It is a long document, in several parts, and much of it does not immediately concern us here. S's and U's are materially similar, up to a point. That point is readily identifiable. The contract pertaining to T was amended by the incorporation of additional terms to bring the contractual provisions within the requirements of the Texas Family Code. These can conveniently be referred to as 'the Texas Addendum'. At its most basic, the main body of the three contracts was the same. It set out the rights and responsibilities of the parties. The expressed intent was that the gestational mother and her husband would 'promptly terminate all presumptive parental rights' to the child following birth (per paragraph 4 of the Gestational Carriage Agreement) and, further, that they would promptly do all things necessary 'in order to effectuate the finalization of the Intended Parents' parental right', including to assist the Intended Parents with any requisite legal proceedings to that end (per paragraph 24 of the Gestational Carriage Agreement). That end was expressed to be 'for the Intended Parents to be legally established as the parents of the Child'.⁵ In other words, the terms contained in the main body itself did not memorialize any contractual agreement that the Intended Parents would be the legal parents of any child born pursuant to the arrangement by reason of the contractual agreement itself: the terms envisaged that something more – a court order – would be required to make the Intended Parents the legal parents. The Texas Addendum however purposefully took the contract two steps (materially for our purposes) further. The **first** step (in terms of importance for our present purposes) was to add that 'the Parties agree ... [t]he Intended Parents will be the parents of any child conceived by means of assisted reproduction under this Agreement'.⁶ The **second** step was to introduce a term that '[n]otwithstanding anything to the contrary contained in this Agreement, the Gestational Mother shall have the unrestricted right to make decisions to safeguard her health or the health of an embryo.'⁷ In terms of the other provisions of the commercial surrogacy arrangements:

- (1) The key document is styled a 'Gestational Carrier Agreement' ('the Agreement'). This memorialized a contract between X and C as 'Intended Father' and 'Intended Mother'

⁵ Paragraph 24 of the Gestational Carriage Agreement.

⁶ Clause 1(c) to the Texas Addendum.

⁷ Clause 1(i) of the Texas Addendum.

respectfully, for the one part, and the gestational mother as 'Surrogate' and the Surrogate's husband as 'Husband' for the other part. There must have been other agreements, such as between X and C and the surrogacy agency which coordinated the arrangements, as well as involving the 'egg donor' and the in-vitro fertilization procedure envisaged by the Agreement. But such agreements are not presently material.

- (2) In the Recitals, it was stated (at Recital 1) that X and C, as 'Intended Parents', are a married couple. That was not the case. It was then recited (at Recital 4) that the Intended Parents desired 'to have a Child or Children ... from the embryo(s) belonging to them and to take such Child or Children into their home to care for, financially provide for and otherwise raise'.
- (3) The Surrogate and her Husband represented and warranted (at Clause 7) that they did not desire a parental relationship with any child born pursuant to the Agreement and that they believed and intended any child born to the Surrogate 'is morally, legally, ethically and contractually that of the Intended Parents'.
- (4) Clause 9 records that surrogate parenting is a new and unsettled area of the law and that the parties 'understand that this Agreement may be held unenforceable in whole or in part as against public policy'.
- (5) Clause 11 provided: 'It is expressly understood that this Agreement in no way constitutes payment for a child or relinquishment of a child, or payment for consent to adoption.'
- (6) The ensuing paragraph 1 then related the purpose and intent of the Agreement. This was that the Surrogate would 'be implanted with the embryo(s) belonging to the Intended Parents, so that the Surrogate may bear a child on behalf of the Intended Parents to be taken into the home of the Intended Parents as their child. The birth of the child shall take place in a hospital in Texas or California unless otherwise agreed upon in writing.' C has contradicted this in her evidence, stating that '[t]he surrogate mother would receive for gestation in her body sperm donated by X and an ovum donated by a third party.' The difference is that the contracts envisaged fertilization to be effected *in vitro*, i.e. outside the gestational mother's body, whereas C's explanation suggested that fertilization *in vivo*. What ultimately happened in this case is not important to its outcome. The Agreements are however clear that they dealt with *in vitro* fertilization.
- (7) Paragraph 2 defined what the Agreement meant by a child:

“‘Child,’ as referred to in this Agreement, shall include multiple births resulting from the conduct, including the implantation, contemplated by this Agreement, provided the parentage of the Child is determined pursuant to the terms of this Agreement.”

As we shall see, this definition of ‘child’ is different from that under BVI law. The Agreement refers to a child as someone who has already been born. The Agreement refers to an unborn human being as an ‘embryo’ or ‘fetus’.

- (8) Paragraph 8 provided that the Surrogate and her Husband agreed that the Intended Parents would be privy to all medical information relating to the Surrogate’s mental and physical health and any other pertinent information relating specifically to the Agreement.
- (9) Paragraph 11 set forth ‘Prohibited Conduct’ during, in particular, the pregnancy. This included:
 - (a) use of tobacco or nicotine products or remaining in the ‘prolonged presence’ of second-hand smoke;
 - (b) use of illegal drugs;
 - (c) consuming alcoholic beverages;
 - (d) obtaining permanent tattoos or body piercing;
 - (e) participating in dangerous sports or activities;
 - (f) travelling ‘outside the state of Texas after ultra-sound confirmation of pregnancy and before the commencement of the twenty-fourth (24th) week of pregnancy without prior notice to the agent’, but in no event traveling outside Texas if so restricted by the Surrogate’s obstetrician;
 - (g) applying hair dye or permanent solution during the first trimester of pregnancy, and subsequently without ‘proper ventilation’;
 - (h) Drinking more than one cup of coffee per day;
 - (i) Air travel during pregnancy without prior written consent of the Surrogate’s obstetrician and notice to the agent and no air travel after the 24th week of pregnancy; and
 - (j) various activities involving potentially toxic substances.
- (10) Paragraph 11 set out further restrictions upon out of state travel, ‘[i]n order to facilitate a Texas or California delivery’.
- (11) Paragraph 12 provided that birth would take place in a hospital under the supervision and care of an obstetrician selected and approved by the Intended Parents.

- (12) Paragraph 12 provided that the Surrogate agreed to submit to any test or procedure requested by the Intended Parent's reproductive endocrinologist, including amniocentesis and Chorionic Villus Sampling.
- (13) Paragraph 12 provided that the Surrogate agreed 'to have the embryos belonging to the Intended Parents transferred to her' by the Intended Parents' selected Reproductive Endocrinologist. Additionally, 'the number of embryos transferred shall be determined by the Intended Parents after consultation with the Intended Parents' Reproductive Endocrinologist'. The paragraph records that the parties 'have contemplated that the surrogate shall undergo at least three (3) separate embryo transfer procedures...within a two (2) year period to achieve a viable pregnancy and birth'.
- (14) Paragraph 13 concerns 'Pregnancy/Termination of Pregnancy/Medical Emergency'. Materially, this provides:

"The Surrogate agrees that she will not abort or undergo a selective or fetal reduction of the Child except as specifically stated herein. If in the opinion of the treating physician or her independent obstetrician there is potential physical harm to the Surrogate, the decision to abort or not to abort is to be made by the Surrogate. In the event the Child has been determined to be physiologically, genetically, or chromosomally abnormal, the decision to abort or not to abort is to be made by the Intended Parents, and, in such a case the Surrogate agrees to abort, or not to abort in accordance with the Intended Parents' decision. The Surrogate agrees to carry a multiple pregnancy. Surrogate specifically acknowledges and agrees that (i) any decision to abort because of potential harm to the Child, or (ii) to reduce the number of fetuses for any reason whatsoever, is made by the Intended Parents, except in a medical emergency (meaning imminent loss of life or severe physical harm) and where the Intended Parents are unavailable after at least four (4) attempts to contact and/or to locate them, in which case said decision shall be made by the Surrogate's attending physician."

- (15) Paragraph 13 also provided that:
- "Notwithstanding the foregoing or anything to the contrary, all Parties understand that a court may determine that a pregnant woman has the absolute right to abort, or not abort, any fetus she is carrying and any promise to the contrary may be unenforceable."
- (16) Paragraph 20 provided that payment to the Surrogate and her Husband was to
- "constitute a reasonable amount to reimburse Surrogate for all discomfort, pain, suffering, and inconveniences, for pre-pregnancy and pre-birth child support expenses and post-birth expenses including reasonable and necessary living expenses, and for all of Surrogate and her Husband's foreseen and unforeseen losses, costs, and expenses incurred in carrying out

their obligations in this Agreement.” In the event, US\$39,000 was payable to the Surrogate mother and her Husband for S' and T's gestation and birth and US\$35,000 for that of U, plus additional expenses.

(17) Paragraph 20 moreover provided that the payments would

“in no way be construed as a fee for termination of the Surrogate's parental rights or a payment in exchange for surrender of a Child, Surrogate's placement of a Child with Intended Parents or for consent to an adoption. Additionally, 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.”

(19) Paragraph 40 provided, inter alia, that:

“The Surrogate agrees to take all prescribed medications as prescribed by the Intended Parents' Reproductive Endocrinologist. Failure to perform these obligations in a timely manner shall be considered a breach of this Agreement.”

(20) Paragraph 48 provided:

“**Severability**. In the event any of the provisions, whether sentences or entire paragraphs, of this Agreement are deemed to be invalid or unenforceable, the same shall be deemed severable from the remainder of this Agreement and shall not cause the invalidity of the remainder of this Agreement. If such provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.”

(21) Other provisions recorded consent, insurance, detailed stipulations concerning payment and assumption of risk by the Surrogate, including the risk of death, loss of or damage to reproductive organs, and psychological harm.

[15] Expecting that T would be born in Texas, his Agreement was amended to incorporate provisions to ensure that it would qualify as a valid 'Gestational Agreement' under the Texas Family Code. A provision was therefore added in terms that:

“1(i). Notwithstanding anything to the contrary contained in this Agreement, the Gestational Mother shall have the unrestricted right to make decisions to safeguard her health or the health of an embryo.”

This term was not included in the Agreements pertaining to S and U, which were governed by California law and anticipated birth in California.

[16] The parties expressed an expectation and intention (in Clause 10) that the Agreement concerning T would be construed, enforced and governed under Texas law.

Next Friend

The Issues

- [17] Suitability for appointment as a Next Friend has, as its starting point, consideration of CPR 23. CPR 23.2(1) lays down a general rule that a minor must have a Next Friend to conduct proceedings on his or her behalf. The default position, pursuant to CPR 23.2(5), is also that a Next Friend must act by a legal practitioner unless the Court otherwise orders. CPR 23.6(1) lays down the conditions for being a Next Friend. These are few and apparently straightforward:

“A person may act as a next friend if that person –

(a) can fairly and competently conduct proceedings on behalf of the minor...;

and

(b) has no interest adverse to that of the minor... .”

- [18] The Claimants refer to *dicta* of Norris J. in the English High Court case of **OH v Craven**⁸ in respect of the equivalent English provision:

“I should here briefly note the role of a litigation friend in these circumstances. The issue was considered by Brightman J (as he then was) in Re Whittall [1973] 1 WLR 1027. The context was an application under the Variation of Trust Act 1958 in which the guardian ad litem had simply acquiesced, and the judge said the guardian:

“... should not be encouraged to regard himself as a mere cipher, lending his name to the application for formal purposes but devoid of all responsibilities”.

Brightman J had earlier (pp 1030-1031) described those responsibilities in the following terms. That a guardian is required to take all measures he or she sees fit for the benefit of the infant defendant, supplementing the want of capacity and judgment of the minor, his or her function being to guard or safeguard the interests of the minor who becomes his ward or protégé for the purposes of the litigation. The discharge of that duty involves the assumption by the guardian of the obligation to acquaint him or herself of the nature of the action and, *under proper legal advice*, to take all due steps to further the interests of the minor.” [Emphasis in the original.]

- [19] Pausing there, the Claimants observe that a Next Friend must ‘approach the litigation with objectivity’, per MacDonald J in **R (on an application of Raqeeb) v Barts Health NHS Trust**⁹

⁸ [2017] 4 WLR 25 at paragraph 14 (Norris J).

and also that MacDonald J emphasized the central role of obtaining and acting on appropriate legal advice in the discharge of the duties of a litigation friend. MacDonald J said more, however. Paragraphs 23, 24 and 25 of this judgment merit quoting in full, as they provide a concise yet reasonably full enunciation of principle:

“23. Within the foregoing context, two matters emerge with respect to the duty of the litigation friend to fairly and competently conduct proceedings. The first is the central role of legal advice in the discharge of the duties of the litigation friend has been emphasised by the courts. As noted above, in *In Re Whitall* Brightman J emphasised the need for the guardian ad litem to act "under proper legal advice". In *OH v Craven* Norris J also emphasised the central role played by the legal advice received by the litigation friend in the discharge of his or her duties.

24. The second is that whilst the litigation friend is required to act on legal advice, he or she must be able to exercise some independent judgment on the legal advice she receives (*Nottinghamshire CC v Bottomley* [2010] EWCA Civ 756). In doing this, the litigation friend must approach the litigation with objectivity. In *In Re Barbour's Settlement Trust* [1974] 1 WLR 1198 Megarry J observed as follows, albeit in the context of the court being asked to approve a compromise of a dispute involving the interests of a minor, as follows regarding the interrelationship between the minors' interests and the role of the litigation friend:

"Second, there is the important matter of the minors' benefit. When the court is asked to give its approval on behalf of minors to a compromise of a dispute, the court has long been accustomed to rely heavily on those advising the minors for assistance in deciding whether the compromise is for the benefit of the minors. Counsel, solicitors, and guardians ad litem or next friends have opportunities which the court lacks for prolonged and detailed consideration of the proposals and possible variations of them in relation to the attitudes of the other parties and the apparent strength and weakness of their respective claims. When the matter comes before the court, the terms of settlement are in final form and the time for consideration is of necessity less ample. The court accordingly must rely to a considerable extent on the views of those whose opportunities of weighing the matter have been so much greater. Expressing a view on whether the terms of a proposed compromise are in the interests of a minor is a matter of great responsibility for all concerned. The solicitors must see that all the relevant matters are put before counsel, that the right questions are asked, and that the guardian ad litem or next friend of the minor fully understands and weighs counsel's advice when it is given. Counsel has to discharge what in my judgment is one of the most important and responsible functions of the Bar, that of helping those unable to help themselves; and the guardian ad litem or next friend must understand the advice given and carefully weigh the advantages of the proposed compromise to the minor against the disadvantages."

25. Within this context, there is longstanding authority that a litigation friend who does not act on proper advice may (not must) be removed (see *Re Birchall* (1880) 16 ChD

⁹ [2019] EWHC 2976 at paragraph 24 (MacDonald J).

41 at 42 per Sir George Jessel MR). The corollary of this latter position is articulated in the White Book at 21.7.1 which makes clear that:

"If a solicitor is acting for child or protected party, it is thought that they would be under an obligation to inform the court of any concern that the litigation friend was not acting properly."

Thus, to adopt the words of Brightman J in a further passage in *In Re Whittall*, the litigation friend is not "a mere cypher".

[20] The Claimants say C does not fulfill these conditions for a number of reasons. These include the following:

- (1) C is at least potentially conflicted in that she has previously pursued an interest in the Trusts or Trust property adverse to the Minor Beneficiaries. The Claimants say C has repeatedly claimed that X wished for her to be added as a beneficiary of the trusts or for shares in the Trustees' companies to be transferred to her. Moreover, they say C requested payment of US\$30 million for herself in 2018 because she was caring for the Minor Beneficiaries and that she later requested a distribution of US\$150million for herself. The Claimants say that in June 2018 C claimed that X had agreed to give her some US\$47 million owed to him by a company held by one of the Trusts, although X had no recollection of such agreement. C also claimed, say the Claimants, that all money owed to X should be transferred to her because the relevant companies had been set up for her benefit. The Claimants say C sought the money not to provide for the Minor Beneficiaries but to engage in property investments, and that C had suggested making speculative property investments using the Trusts' funds. Moreover, say the Claimants, in September 2017 C had requested and obtained a loan of some AUS\$15million from a company owned by one of the Trusts to a company of which C is the sole shareholder, and she had then breached the terms of the loan, with the principal and interest not being paid as at the time the application came before the Court, and lawyers had been instructed to pursue repayment. The Claimants say that C has also said that X wished her to have control of the Trust assets via a 90% shareholding in the Trustees.
- (2) In the face of these matters, to which C has proffered answers, C has, the Claimants say, advanced a number of explanations that do not allay their concerns. In many instances, they say, C states that she does not recall the relevant events but claims that she was acting in accordance with what she perceived to be X's wishes. She

states that she does not seek to be added as a beneficiary, but, say the Claimants, she nonetheless maintains that X wished her to have control of the Trusts and trust assets, not simply for the Minor Beneficiaries' benefit but for her own. The Claimants thus say that they cannot be confident that C does not continue to maintain an interest in the Trusts or trust property in some form, which is potentially adverse to the interests of the Minor Beneficiaries.

- (3) Moreover, issues of conflict aside, the Claimants argue that C gives them little confidence that she will conduct the proceedings fairly and competently. This concern arises, say the Claimants, from an apparent intent on the part of C to obstruct the Claimants in this claim, which needs to be conducted expeditiously. The tone conveyed by C and her solicitors, is, say the Claimants, hostile. This is reflective of personal animosity between Q, R and C. C has, the Claimants say, failed to comply with deadlines of the Court. She has also introduced evidence and issues, such as the recognition application, which go well beyond matters that can properly be said to concern the claim for directions. C has also apparently breached confidentiality restrictions by procuring the surrogate mothers to write letters in support of her recognition application.

[21] Exclusion of C would leave Mr. Loh as the only other candidate for Next Friend, submit the Claimants. They say Mr. Loh is an ideal candidate. He is an experienced independent legal professional of good standing who is the senior partner of the Singapore branch of a major international law firm. That firm also has offices in Hong Kong. The firm handles trust and taxation matters. Mr. Loh can clearly fairly and competently conduct the proceedings on behalf of the Minor Beneficiaries and he has no interest adverse to their interests, say the Claimants. They explained further that they had taken soundings and interviewed a number of candidates before selecting Mr. Loh. His appointment is supported by Q and R. The Claimants submit his independence is unimpeachable.

[22] C disagrees. She remarks that Mr. Loh is a complete stranger to the children and *vice versa*, and he does not love or care for them. Moreover, C suggests that Mr. Loh's independence may be called into question on the basis that he has been instructed by the Trustees and the fact that he is a partner in his firm, which would provide him with legal advice, gives him a personal interest in acting as Next Friend which potentially conflicts with the Minor Beneficiaries' interests.

- [23] Such concerns are rejected by the Claimants. They contend that Mr. Loh's lack of familiarity with the Minor Children does not affect his ability to conduct the proceedings fairly and competently on their behalf. Moreover, Mr. Loh does not take instructions from the Trustees. They simply identified and engaged him to act on the Minor Beneficiaries' behalf. The Claimants say there is nothing wrong with a professional Next Friend taking legal advice from his own firm; that this is quite normal and has obvious cost saving attractions.

Discussion of Next Friend Issues

- [24] In my considered and respectful judgment, C ought to be appointed as the Minor Beneficiaries' Next Friend. I shall explain why.
- [25] Under CPR 23.6(1) the requirements are that a proposed Next Friend 'can' fairly and competently conduct 'proceedings' on behalf of the minor; and that he or she 'has' no interest adverse to that of the minor.
- [26] The first issue that arises is to ask what sort of 'proceedings' are contemplated. It is only in the context of particular proceedings that issues of fairness, competence and potential conflict can be answered. For example, C might clearly be a suitable Next Friend in, say, a lawsuit in negligence on behalf of one of the Minor Children against his or her school. On the other hand, if C were, for example, to petition this Court for orders that assets of the Trusts be transferred to her beneficially, then clearly, because the Minor Beneficiaries would thus be deprived commensurately of the benefit of such assets, she would have an adverse interest to theirs, and that would disqualify her. But, as I understand it, no such claim is presently foreshadowed. The Claimants intend to seek the Court's sanction or approval for a proposed restructuring scheme. Such sanction is the relief I understand the Claimants wish to seek, and not direct Court orders that the Trusts be reorganized in such and such a manner. There is a major difference between such scenarios: in a sanction application the Court's concern will be limited to whether the Trustees' proposal is being put forward honestly and reasonably so as (eventually) to be able to accord the Trustees the personal indemnity provided for by section 63 of the Trustee Act, and, secondly, to be satisfied that the proposed scheme is legal and valid.¹⁰

¹⁰ See section 66 of the Trustee Act 1961.

- [27] Notwithstanding the limited role envisaged for the Court's exercise of powers under the Trustee Act, a Next Friend might nonetheless conduct proceedings in an unfair and/or incompetent manner, in his or her own interests adverse to those of the minor. That is clearly undesirable, not least because it can cause costs to be run up unnecessarily and delay conclusion of the matter, thereby prejudicing one or more of the other beneficiaries.
- [28] This concern can be managed by the Court in various ways. An example is given by the New Zealand High Court case of **Causer v Causer**.¹¹ Similar legal principles apply in that jurisdiction. In that case, there was a risk that the proposed Next Friend (a 'litigation guardian') of a farmer's aged widow, who described herself as 'an unsophisticated farming girl', caught up in a dispute between her children, might steer the legal proceedings in a direction inimical to her interests. The court accepted that the proposed litigation guardian, who was one of the daughters, was better placed than an independent professional to understand and represent her mother's interests and to relate better to her elderly mother despite a potential conflict of interests. The court made it a condition of the appointment that the proceeding should not be withdrawn, abandoned, or settled without the prior approval of that court, as the litigation guardian would be responsible to the court for the conduct of the litigation.¹²
- [29] Included in the ways of managing the risks of a Next Friend falling short of the conditions for appointment, are maintaining a requirement for the Next Friend to act by a legal practitioner, which is the default position under CPR 23.2(5). The legal practitioner is under a professional obligation to provide the Next Friend with proper legal advice.¹³ The legal practitioner also has a professional obligation to ensure all the relevant matters are put before counsel, that the right questions are asked, and that the Next Friend fully understands and weighs counsel's advice when it is given.¹⁴
- [30] I am in no doubt in this case that C will be capable of understanding and weighing counsel's advice. I am not certain that she would exercise independent judgment on the legal advice she receives, but I am in no doubt that she would be able to do so. The latter is the test, not the former. I am also satisfied that her legal practitioner would be under an obligation to inform the

¹¹ CIV-2008-488-000830, Whangarei Registry.

¹² *Causer v Causer* CIV-2008-488-000830 at paragraphs [31] and [30] (Associate Judge Bell).

¹³ *R (on an application of Raqeeb) v Barts Health NHS Trust* [2019] EWHC 2976 at paragraph 23 (MacDonald J).

¹⁴ *R (on an application of Raqeeb) v Barts Health NHS Trust* [2019] EWHC 2976 at paragraph 24 (MacDonald J).

Court of any concern that the Next Friend was not acting properly in the interests of the minor children. Put differently, the Next Friend's legal practitioner should exercise professional judgment independently of the Next Friend, even if he or she incurs the displeasure or the ire of the Next Friend. The Next Friend's legal practitioner is not just there to dress and sell the Next Friend's dictates to the Court. The Court retains the discretion to remove a particular individual as Next Friend, depending upon the circumstances. In this case, if C might be disinclined to exercise independent judgment, it would be an important safeguard that she should be legally represented in these proceedings and that she should be given proper legal advice. I will therefore not dispense with that default requirement.

[31] Conflict of interest appears upon the rival contentions to be more problematic. In reality, though, I do not see that it is. C is not seeking orders that would be placing her own interests ahead of those of the Minor Beneficiaries. It is the Claimants who would be seeking orders. Nor is C 'defending', in a strict sense, claims to orders that the Claimants wish the Court to make. Her role at a hearing would be limited to showing that a proposal put forward by the Claimants is not honestly made, or is outside the bounds of reasonableness, or is legally invalid or unenforceable, and then, should she so wish, to put forward a reasonable, valid or enforceable alternative proposal. The Court's remit will not normally be to decide which of two competing proposals it might consider to be 'better' for the beneficiaries, unless the Claimant moves the Court to do so. C's own interests, such as they may be, are in such a case of little or no moment.

[32] At the preparatory stage, though, C's interests can be used to disrupt matters, if she does not like the direction the Trustees' proposal takes. The Court has ground for concern in this regard. C does seem prone to take an indiscriminately detailed approach to issues, as well as an unhelpfully adversarial litigious approach. The role of her legal representative will be to keep the essential issues in check so that they do not mushroom unnecessarily. The Next Friend and/or her legal representatives will be at risk as to costs if they do not. The Court does not expect to see every disputed fact fought over or responded to. The envisaged proceedings are not, and will not be allowed to become, a platform on which general historical differences and tensions between the parties will be ventilated and adjudicated upon. What happened in the past, and who was right and wrong about it, is of extremely limited utility in ascertaining how the Minor Beneficiaries' present and likely future interests can appropriately be served going forward.

- [33] In the present case, I agree that C would have a better understanding of the Minor Children's needs than Mr. Loh. She should be allowed to communicate these to the Court without the filter of the Claimants' choosing. C would also have a better rapport with them than the complete stranger to them that Mr. Loh is. This is an important consideration, as it was in **Causer v Causer**. It is, I think, fanciful to expect young children to confide meaningfully and with any degree of independent judgment with a complete stranger, particularly when it comes to matters of financial provision.
- [34] Moreover, a Next Friend should be able to choose her or his own legal practitioner. Obviously, this discretion must be considered fettered by the requirements of competence in relation to the matters in issue and the legal practitioner's willingness to take on a role which carries with it a particularly onerous responsibility to the Court.
- [35] In essence, in my respectful and considered judgment, the Claimant's attempt to have Mr. Loh appointed comes down to an attempt to:
- (1) chaperone and corral C's narrative such that it does not obstruct the Claimants' – and in particular, Q's – tax-planning timing;
 - (2) impose a filter between C's representations and the Court;
 - (3) dictate who should be the Minor Children's legal adviser and advocate;
 - (4) exclude C's *in limine* from acting as Next Friend.
- [36] Convenient though it would, of course, be to have neatly and dispassionately summarized and presented representations on behalf of the Minor Children, there is a significant risk of much being lost in the transition. A simple example, by way of illustration, is the Claimants' advocates' reference to **R (on an application of Raqeeb) v Barts Health NHS Trust**. It was summarized as authority for propositions that a Next Friend should approach the litigation with objectivity and that there should be a central role of obtaining and acting on appropriate legal advice in the discharge of the duties of a litigation friend. That is so, but had the Court then not turned to the case itself, it would have missed the important exposition of principle set out at paragraphs 23 to 25. As seen above, some of those principles were problematic for the Claimants' position and thus important for the Court to take into account in reaching its decision.

- [37] Particularly where the long-term financial future of minor children is at stake, it is better, in the Court's respectful judgment, to risk the somewhat more disorderly exchanges that will probably arise if C is able to present her concerns in a more raw and unfiltered fashion than for a third party, who is not an officer of this Court, nominated by the Claimants, to control the narrative.
- [38] It is thus clear to me that C ought to be appointed as the Minor Beneficiaries' Next Friend for the duration of these proceedings or until further order. She should also have conferred on her the express right to correspond and communicate with the Trustees on behalf of the Minor Beneficiaries in relation to the proposed restructuring of the Trusts and to instruct and retain any relevant professional advisers pertaining to the proposed reorganization.
- [39] The Claimants contended that the Court has jurisdiction to confer upon the Next Friend authority to deal with the Trustees in respect of the Trusts generally, including to give good receipt to the Trustees in connection with any distributions made by them. C disputed that. C submitted that there is nothing in CPR 23 that would allow a Next Friend's role to extend beyond representing minors in the proceedings to which it relates. I accept that submission.
- [40] The Claimants responded that section 59 of the Trustee Act confers the necessary jurisdiction upon the Court.
- [41] Section 59 provides as follows:
- “59. (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for that purpose, on such terms, and subject to such provisions and conditions, if any, as the Court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
- (2) The Court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.
- (3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.”
- [42] The Trustees have, in the present instance, not applied to receive a power to make distributions to C. Nor have any of the beneficiaries made any such application. In the Minor

Beneficiaries' case, they could only do so through a Next Friend. Subject and without prejudice to the outcome of C's recognition application, it appears to me to be most appropriate for issues which ultimately come down to mechanics (and adequate protection of distributions for the benefit of the Minor Children) to be held over for resolution as part of the further substantive directions hearing.

Recognition

[43] C seeks recognition in this jurisdiction of the US Orders. The grounds upon which she seeks such recognition are stated in her Notice of Application filed on 13th November 2020 as follows:

- (1) The Third to Fifth Defendants are United States citizens. Orders were made by the state courts of California (with respect to S and U) and the state court of Texas (with respect to T), declaring C to be the parent and guardian of these children, for each of whom C had parental responsibility.
- (2) C has undertaken all the responsibilities and obligations of a mother and guardian with respect to the Minor Children since their birth.
- (3) Further, at all material times C and the Minor Children have lived with each other and developed a family life together, such family life being protected by section 19(1) of The Virgin Islands Constitution Order 2007 (the 'Constitution Order').
- (4) The Claimants and First and Second Defendants are refusing to acknowledge the Applicant's status in these proceedings. The Court is therefore asked to recognise the US Orders by granting the declarations for the following reasons:
 - (a) Pursuant to the principle of 'judicial reciprocity';
 - (b) Best to protect the rights of C and the Minor Beneficiaries to respect for their private and family life, as protected by s.19(1) of the Constitution Order, particularly in circumstances where no other adequate remedy is available best to protect such rights;
 - (c) Since the state courts of California and Texas had jurisdiction to appoint C as the guardian of the Minor Children on the basis of their United States citizenship, the US Orders should be recognised in this jurisdiction as legitimately appointing C as the guardian of the Minor Children.

- [44] C's first point in her argument at the hearing was that, quite apart from any need to obtain recognition of the US Orders, upon a proper construction of clause 38 of the Trust Deeds, she should be recognized as being able to receive funds on the Minor Beneficiaries' behalf and to give a good receipt to the Trustees. C says that that clause in terms provides that where there are minor beneficiaries, their 'parent or guardian or other person having legal responsibility' for them can do so. C submits this is an exercise in discovering what X meant when he referred to that category of persons. C contends it is obvious that X had C in mind.
- [45] The Claimants argue, on the other hand, that this contention overlooks the fact that the Trust Deeds are governed by BVI law. As a matter of BVI law, C is not 'a parent or guardian or other person having legal responsibility' for the Minor Beneficiaries, the Claimants say. X must be assumed to have intended that BVI law should determine who is to be regarded as falling within those categories of persons.
- [46] I agree on this point with the Claimants. X and C made certain choices. These included:
- (1) establishing the Trusts governed by BVI law;
 - (2) entering into surrogacy arrangements under California and Texas law;
 - (3) obtaining California and Texas parentage orders;
 - (4) taking the Minor Children born from those arrangements to reside with them in Hong Kong, a jurisdiction where neither X nor C have obtained parentage, adoption or guardianship orders.
- [47] Legal choices have legal consequences. The Court cannot simply ignore all the circumstances that X and C willed, or allowed, to take place, and make orders that the Court might think would promote the welfare of the Minor Children. Nor would it be proper for the Court to cherry-pick circumstances and ignore those that run counter to a desired result. Moreover, the Minor Children are not resident, nor domiciled, nor nationals of this jurisdiction. This Court has no jurisdiction over them currently. Neither are they at present before the Court in relation to the Trusts, as no Next Friend has yet been appointed. The Minor Children have C as their legal mother under California and Texas law. The Court is unaware of any circumstance which prevents C from organizing her life in such a way that she and the Minor Children can enjoy that status, whether in California, Texas or elsewhere that will recognize it.

[48] Of course, this may mean that the Minor Beneficiaries cannot, as of right, currently receive distributions from the Trust assets, because there may be nobody who qualifies as a 'a parent or guardian or other person having legal responsibility' for them under BVI law. This is in essence both a practical and a legal problem, in that the Minor Beneficiaries are clearly intended to receive distributions from the Trusts during their minority. But, quite apart from obtaining recognition orders, section 59 of the Trustee Act provides the possibility of both a practical and legal solution to enable the financial welfare of the Minor Beneficiaries properly to be catered for. The Trustees and any beneficiaries can seek additional powers for the Trustees from the Court, should the powers in the Trust Deeds not suffice, in order for someone to be appointed who could give good receipt for distributions on the Minor Beneficiaries' behalf.

[49] The way C developed her argument in relation to recognition of the US Orders was as follows. What follows in this paragraph are C's submissions in skeletal form, not the findings of the Court:

- (1) The Minor Children are US nationals. As a matter of the domestic law of their nationality they are certainly the children of C and C is certainly their parent with legal and financial responsibility for them, as is clear from the US Orders summarised above and expert evidence she has adduced (pursuant to the Court's leave for such expert evidence):
 - (a) Ms. Diane Goodman gives evidence of the position as a matter of Californian law (where S and U were born) and confirms that C is the mother of S and U and that she has 'full parental responsibility and therefore all of the rights and duties that one could associate with being a guardian' and therefore the right to: (i) nominate somebody to act on behalf of their estate; (ii) represent them in legal proceedings; and (iii) receive social security benefits on their behalf.
 - (b) Ms. Laura Dale gives evidence of the position as a matter of the law of Texas and confirms that C is the mother of T as a matter of Texas law and that as the sole parent of T, C is also 'the only conservator of the child'. As a result, C has, with respect to T, the right or duty to: (i) manage his estate; (ii) represent T in legal proceedings; and (iii) receive and give receipt for payments for his support.
- (2) C invites the Court to recognise the US Orders, and thus her undoubted status as legal parent and guardian of the Minor Children under the US Orders:

- (a) as a matter of judicial comity;
 - (b) so as to deal with this matter consistently with, not inconsistently with, the European Convention of Human Rights and Constitutional right of respect for private and family life (section 19(1) of the Constitution Order); and
 - (c) because the Minor Children are United States nationals and the US Orders give C the full rights and obligations of a guardian of the Minor Children.
- (3) There is no Convention to which the BVI is a party which applies to the recognition of the US Orders. Recognition of the US Orders is therefore a question of common law.
- (4) The Privy Council recently considered whether the Jersey Court should recognise a Latvian order declaring the Jersey-domiciled appellant to be the father of a child in **C v C**.¹⁵ The Board held that the question was one of jurisdictional reciprocity: did the Jersey court have jurisdiction to grant a free-standing declaration of parentage such as was made by the Latvian courts, and if so in what circumstances?¹⁶
- (5) On the face of it, the answer to that question was ‘no’, the Jersey Court did not have jurisdiction to grant a free-standing declaration of parentage,¹⁷ so the Board looked to English law for the answer to the question and held that if the Jersey domiciled father had made an application to the English Court for a declaration of parentage of a boy domiciled or resident throughout the preceding year in England,¹⁸ the English Court would have had jurisdiction to entertain his application.¹⁹ The result of this analysis was that by the application of jurisdictional reciprocity it was right, subject to any contrary reasons of public policy, for the Jersey courts to have recognised the declaration of paternity made in Latvia²⁰ (where the boy had been born and his birth, including the identification of his parents, had been registered, where he was a national and present and habitually resident).²¹

¹⁵ [2019] UKPC 40.

¹⁶ At paragraph 45.

¹⁷ At paragraph 46.

¹⁸ A requirement under the English Family Law Act 1986 (as amended) section 55A.

¹⁹ At paragraph 52.

²⁰ At paragraph 53.

²¹ At paragraph 37.

- (6) Applying that logic in this case, subject to any contrary reasons of public policy, the BVI Court can and should recognise the US Orders, because the BVI Court does have jurisdiction to a grant free standing parentage order under the Status of Children Act, section 3, and that Act applies to a child whether or not he or she was born within the Territory, whether or not the father or mother is a person who belongs to the Virgin Islands or whether or not the father or mother of the child has ever been domiciled in the Territory. In other words, there is no question but that the BVI Court has jurisdiction to make the orders which the US Courts made, and on that basis it can and should, as matter of jurisdictional reciprocity, recognise the orders which the US Courts made.
- (7) Once the jurisdictional gateway is passed, the domestic court should not go behind the reasonableness of the foreign court's order:
- “In fact, however, the reasonableness of the Latvian court's conclusions in both sets of proceedings is irrelevant. Otherwise than by rare reference to public policy, a court's recognition of a foreign order under private international law does not depend on any arrogant attempt on the court's part to mark the foreign court's homework.”²²
- (8) Mostyn J summarised the **C v C** decision succinctly in **VB v TR**²³ by simply saying:
- “The common law on the recognition of foreign orders about children was recently analysed by the Privy Council in **C v C (Jersey)** [2019] UKPC 40. As I understand it such a foreign order can and should be recognised unless it would be contrary to public policy to do so. The Privy Council's analysis demonstrates that in determining the question of public policy the court does not embark on a full welfare-based enquiry.”
- (9) On the basis of the reasoning set out in these authorities, C submitted that this Court should recognise the US Orders without any further enquiry unless to do so would be contrary to BVI public policy.
- (10) Public policy exceptions are exceptional: as Sir James Munby P said, citing Dicey, Morris & Collins,²⁴ in the context of a recognition of a foreign adoption order in **Re N (A Child) (Recognition of Foreign Adoption)**:²⁵

²² **C v C** [2019] UKPC 40 at paragraph 58 (Wilson LJ)

²³ [2020] 2 FLR 193 at paragraph [8] (Mostyn J).

²⁴ Dicey, Morris & Collins: The Conflict of Laws (14th edn. Sweet & Maxwell 2006), paragraph 20-133.

²⁵ [2018] Fam. 117 at [129] (Munby P).

“If the foreign adoption was designed to promote some immoral or mercenary object, like prostitution or financial gain to the adopter, it is improbable that it would be recognised in England. But apart from exceptional cases like these, it is submitted that the court should be slow to refuse recognition to a foreign adoption on the ground of public policy merely because the requirements for adoption in the foreign law differ from those of English law...public policy should only on the rarest occasions be invoked in order to deny recognition to the status itself.”

- (11) Further, in **Re L (A Child) (Parental Order: Foreign Surrogacy)**²⁶ Hedley J held, in the context of a commercial surrogacy arrangement, at [10]:

“...it will only be in the clearest case of the abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making.”

- (12) C submitted that it would be contrary to BVI public policy not to recognise the US Orders, for a non-recognition of the US Orders would leave the Minor Children ‘utterly parentless’ and would be contrary to C’s and the Minor Children’s rights to family and private life.

- (13) In **D and G v ED and DD**,²⁷ the English High Court held that issues concerning parentage engage rights to family life such that a determination of parentage falls within the protective scope of Article 8 of the ECHR. Further, the court went on to hold²⁸ that such rights equally apply to both a non-biological mother and children born pursuant to a surrogacy arrangement if they have developed a family life together.

- (14) Section 19(1) of the Constitution Order is in materially identical terms to Article 8(1) of the ECHR. This also applies in the BVI by virtue of the Declaration of the Permanent Representative of the United Kingdom to the Council of Europe dated 3rd April 1984, as extended to cover the present date, by virtue of the Declaration of the Permanent Representative of the United Kingdom dated 25th September 2009. Section 19(1) states:

“Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications.”

²⁶ [2011] Fam. 106 at paragraph 10 (Hedley J).

²⁷ [2016] 2 FLR 530 at paragraphs [40]-[41] (Russell J).

²⁸ [2016] 2 FLR 530 at paragraphs [60] – [63] (Russell J).

- (15) In **King v Attorney General**,²⁹ the BVI High Court noted that section 19 of the Constitution Order is 'in very similar terms' to Article 8 of the ECHR, with the English case-law interpreting Article 8 of the ECHR relevant to the interpretation of section 19. The BVI High Court further stated³⁰ that the ECHR 'is just as applicable to the Constitution'.
- (16) Accordingly, given that the protective scope of Article 8 of the ECHR has been held to include issues concerning parentage, C submitted that the issue of recognition of the US Orders should be regarded as falling within the scope of section 19 of the Constitution Order, which affords 'every person' the right to respect for their family life. 'Every person' on whom section 19 bestows the right to respect for their private and family life must include any person who comes before the Courts of the BVI (regardless of residence). Otherwise, there would be one law for BVI residents and another for non-residents. That cannot be right, and would be discriminatory, contrary to s.26(3) of the Constitution Order: it would afford different treatment to different persons on the ground of national origin or other status, which includes residence:
- (a) in **Artha Master Fund LLC v Dufry South America**,³¹ in the context of an application for security for costs against a non-resident, the Bermudian court held that its rules should be interpreted in a manner that does not discriminate against foreign parties 'on the grounds of their place of origin' (Bermuda's Constitution Order 1968 section 1 being in very similar terms to section 9 of the BVI Constitution); and
 - (b) in **Bestfort Developments LLP v Ras Al Khaimah Investment Authority**,³² Gloster LJ, also in the context of security for costs and Article 14 of the ECHR, held that the ECHR prohibits a court from discriminating on grounds of residence, 'residence' falling within the scope of the words 'other status', and the court not being permitted to exercise its discretion in a discriminatory manner on grounds of residence.

- (17) Therefore, in deciding whether or not to recognise the US Orders, this Court must act in a manner which is compatible with, not incompatible with, respecting C's and the

²⁹ BVIHCV2013/0324 (unpublished, delivered 2nd July 2014) at paragraphs [38], [50] (Byer J).

³⁰ BVIHCV2013/0324 (unpublished, delivered 2nd July 2014) at paragraph [82] (Byer J).

³¹ [2011] Bda LR 17 at paragraphs [9], [16] (Kawaley J).

³² [2016] EWCA Civ 1099 at paragraphs [63], [67]-[69] (Gloster LJ).

children's right to family life, which includes issues relating to parentage. It is respectfully submitted that that means respecting C's status, bestowed on her by the US Orders, of the children's legal parent.

- (18) It is clear on the evidence that since the birth of the children, C has developed a family life together with the children. C has been the children's primary caregiver and cared for the children with all the love and affection that one would expect from a mother. In turn, the Minor Children are dependent on her. They have nobody else to turn to, and nobody else whom they can call their parent: the surrogate parents have waived all parental rights and responsibilities in relation to them and have written to confirm that they have no rights or responsibilities in relation to them.
- (19) Therefore, a refusal to recognise the US Orders and, by such recognition, recognise C as the mother of the Minor Children would be an interference with the family life of both the Minor Children and C for no justifiable reason that can be said to be either necessary or proportionate.
- (20) The Californian and Texas law experts opine that the effect of the US Orders is to confer upon C the full rights and responsibilities of a guardian of the Minor Children, including the right and/or duty to take decisions in respect of their estates and to receive payments on their behalf.
- (21) Rule 107 of Dicey, Morris & Collins on the Conflict of Laws states:
- “(1) A court of a foreign court has (*semble*)³³ jurisdiction to appoint a guardian for a child who at the time when the proceedings were begun was a national of that country or owed local allegiance by virtue of ordinary residence or presence there.
- (2) Such a foreign guardian will *prima facie* be recognised in England as a guardian of the child, but can only exercise such control over the person of his ward in England and over movables belonging to his ward situate in England as a foreign parent can exercise.”³⁴

³³ ‘*Semble*’ is a Latin shorthand expression which, in a legal context, means that the proposition to which it is applied has not yet been settled authoritatively.

³⁴ (15th edn. Sweet & Maxwell 2018.) at Vol. 2, §19-073.

- (22) The Minor Children are nationals of the United States and were present there when the US Orders were made. Accordingly, the US courts had jurisdiction to appoint guardians for them and that guardian will *prima facie* be recognised in the BVI as a guardian of the child in relation to the child's affairs in the BVI. In this case, that is the Minor Children's interests under the Trusts.
- (23) In **Nugent v Vetzera**³⁵ Sir Page Wood VC recognised and refused to interfere with an order for guardianship made by the courts of Austria, of which the children were nationals, but otherwise temporarily residing in the UK on that basis.
- (24) More recently, in **A v A**,³⁶ Lady Hale confirmed that the jurisdiction of a court to appoint a guardian on the basis of the child's nationality continues to exist.
- (25) Therefore, on the basis that the US Orders have been made by competent courts of jurisdictions of which the Minor Children are nationals, C argues that the Court should recognise the US Orders as conferring on her the duties and obligations of a guardian of the Minor Children.

The Claimants' position on recognition.

- [50] The Claimants argued against recognition. That said, their position was that C's application for recognition was redundant. The Claimants contended that it is unnecessary for dealing with the various trust issues before the Court. The Claimants concluded that as the matters at issue did not directly concern the Trusts, they were not the proper respondents to the application and could not properly, as Trustees, expend trust money fully defending that application. However, having taken advice and concluded that they could not consent to the application, the Claimants endeavoured to present that advice and legal submissions to the Court in order to assist it so far as they were able within the constraints of their role. The result was that the Court had less full argument and evidence before it than would have been ideal. This is no criticism of the Claimants, or their Counsel as their priorities lay elsewhere. Nonetheless this is unfortunate, since recognition issues are of great public importance, they are likely to arise

³⁵ (1866) LR 2 EQ 704 at.714 (Sir Page Wood VC).

³⁶ [2014] AC 1 at paragraph [60] (Hale LJ).

again in the future, and, importantly, this Court, as a Commercial Court, is not specialized in family and child law matters and so could have done with the added assistance.

[51] The following submissions proffered by the Claimants appear to me to have been the most relevant. Again, this is a skeletal summary and does not include any findings of the Court.

- (1) It should be noted from the outset that the United States' expert evidence confirms that the US Orders do not provide that C is the guardian or 'person otherwise having legal responsibility' for the Minor Beneficiaries. Accordingly, they cannot be 'recognised' as having that effect.
- (2) The following thus proceeds on the assumption that C's application is now confined to seeking to be recognised as the Minor Beneficiaries' 'mother' only.
- (3) The Trustees instructed Mr. Andrew Powell, an English barrister specialising in the legal aspects of surrogacy arrangements, to advise on the question of whether C would be regarded as the mother of the Minor Beneficiaries (the 'Powell Advice') at common law, which represents the starting point for consideration of this issue.
- (4) The Trustees submitted that the position at common law is that at birth the surrogate is always the child's legal mother:
 - (a) Regardless of whether there is any genetic link between the child and the intended parent, the legal status of 'mother' at common law is afforded to the woman who gestated and gave birth to the child (see **The Ampthill Peerage**:³⁷ '[m]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition'; and **R(on the application of TT) v Registrar General for England and Wales**).³⁸
 - (b) It requires a statutory scheme to provide a legal framework for regularising the relationship of a child born via surrogacy with the intended parents. Mr. Powell gives the example of the statutory framework in England and Wales under the Human Fertilisation and Embryology Act 2008.

³⁷ [1977] AC 547 per Lord Simon at 577B.

³⁸ [2020] Fam. 45.

- (c) Jurisdiction at common law in matters concerning children and their parentage looks primarily to the domicile or habitual residence of the children or their intended parent. A court which has no connection to either the child or the intended parent will lack jurisdiction to make an order as to parental status.³⁹
- (d) There is no international convention for the recognition of orders made as to parentage following a surrogacy arrangement. Surrogacy is a matter of public policy on which attitudes vary widely between jurisdictions. It is open to a jurisdiction, in line with its public policy, to restrict the circumstances in which surrogacy arrangements, and in particular commercial surrogacy arrangements, will be recognised and enforced, either by recognising orders of a foreign court or making its own 'mirror' parentage orders or otherwise.
- (e) The Trustees submit that the common law position is not altered by any BVI statute. There is no legislation in this jurisdiction which makes provision for surrogacy arrangements. As to the legal status of a parent, the Status of Children Act provides as follows:
 - i. 'parent' is defined in that Act as 'a natural father or natural mother of a child as the circumstances require, and includes an adoptive mother or father';⁴⁰
 - ii. By section 6(1):

"if a child is born to a woman as a result of the carrying out of an artificial conception procedure (a) while the woman was married to a man; and (b) the procedure was carried out with their consent, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of the Act."
 - iii. That provision has no application where the Minor Children were not 'born to' C, and she was not married to X.
 - iv. Section 6(2) provides that:

"unless there is a valid contract to the contrary, if a child is born to a woman as a result of the carrying out of an artificial conception procedure, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act".

³⁹ W v L (Forum Conveniens) [2019] EWHC 1995 (Fam).

⁴⁰ Section 2.

- v. That provision would not confer parental status on C because: (a) the Minor Children were not 'born to' C; and (b) the definition of 'artificial conception procedure' at section 6(4) does not include surrogacy arrangements.
- (f) As such, C is not regarded as the legal mother of the Minor Beneficiaries as a matter of BVI law.
- (g) The manner in which the Recognition Application has been brought within the existing proceedings masks the fact that, had C sought the relief under appropriate procedural avenues, her application would have met with significant hurdles.
- (h) The US Orders do not fall within the statutory regime for registration under the Reciprocal Enforcement of Judgments Act 1922 and CPR part 72, as Texas and California are not territories designated by that Act.
- (i) Foreign money judgments may usually be recognised and enforced in the BVI at common law by a claim for the amount due under the judgment, provided that the Court is satisfied that:
 - a. the foreign court had jurisdiction over the parties;
 - b. the judgment is for a debt or liquidated sum;
 - c. the judgment is final and conclusive; and
 - d. the judgment was not obtained by fraud or a denial of natural justice, and enforcement of the foreign judgment would not be contrary to the public policy of the BVI.
 - e. However, the US Orders are not money judgments. Non-money judgments are typically not recognised and enforced in BVI absent an international convention, because it would require the BVI Court to police and supervise the terms of the original Order. To achieve recognition of such an Order at common law, the judgment creditor may only commence a fresh action in BVI seeking the same relief pursuant to the domestic laws of the BVI. In order to do this, the applicant must have a cause of action or right under BVI law and be able to establish that the BVI Court has jurisdiction to grant

the relief sought. The Trustees doubt that the domestic laws of the BVI would permit an order such as the US Orders to be made.

- (j) It is also important that in any such application, the Minor Beneficiaries would need to be separately represented. It is procedurally back-to-front to have their status determined in order (on C's case) to decide whether she should be the Next Friend; the Minor Beneficiaries require to be represented in any application (by a Next Friend) which has at its heart fundamental questions as to their legal status.
- (k) The suggestion that the BVI Court should recognise the US Orders on grounds of 'judicial comity', ignores the fact that there is a proper procedure for the recognition and enforcement of foreign judgments which C seeks to bypass entirely. Moreover, it is a well-established common law principle that the Court can refuse to recognise a judgment on grounds that it contravenes the public policy of the BVI. For example, a foreign judgment that contravenes the 'firewall' provisions of the Trustee Act 1961 will not be enforced in BVI.
- (l) The Powell Advice makes clear that attitudes to surrogacy vary widely between states and that California and Texas are two of the few places in which a commercial surrogacy arrangement can be entered into legally. There is no automatic presumption that such orders are to be recognised and enforced elsewhere, precisely because surrogacy raises complex issues of social policy over which each jurisdiction may take a different view. The BVI does not recognise surrogacy arrangements and the domestic laws of the BVI regard the woman who gives birth as the legal mother of the child. The Court may consider that those issues are value judgments which are sufficiently important as to constitute matters of public policy within BVI which would justify refusing to recognise the US Orders.
- (m) To the extent that 'judicial comity' is relevant outside of the above procedure for recognition and enforcement, it is appropriate to consider not just the position of the courts of California and Texas, but also those of Hong Kong. The Minor Beneficiaries are most closely connected with Hong Kong. They are habitually resident in Hong Kong and would seem to be Hong Kong domiciliaries. Hong

Kong is also the place where C appears to be habitually resident. As such, it is the courts of Hong Kong which, *prima facie*, have jurisdiction over them to determine issues relating to their status, parentage, family life and welfare. Hong Kong is clearly the appropriate forum for C to seek to establish any status as mother of the Minor Beneficiaries. It is said, without explanation, in the Notice of Application, that there is 'no other adequate remedy available' to protect C and the Minor Beneficiaries' right to family life. It is not clear whether C claims she would not be able to seek orders of the kind described in the Powell Advice conferring parental status in Hong Kong, but it is telling that she has not sought to regularise her legal status *vis-à-vis* the Minor Beneficiaries in that jurisdiction. The Court does not need to speculate as to what rights or avenues for relief C or the Minor Beneficiaries might have in Hong Kong in order to regularise their arrangements, save to note that it is clearly that court which would have jurisdiction to grant such remedies, according to its own laws.

- (n) There is, at the very least, significant doubt that a Hong Kong court would recognise a judgment of the BVI Court purporting to confer legal parental status on C, particularly in circumstances where the BVI Court does not have personal jurisdiction over either the Minor Beneficiaries or C, and in circumstances where conferring parental status on C may well be contrary to Hong Kong's own laws and/or public policy regarding commercial surrogacy arrangements.
- (o) Accordingly, judicial comity requires the BVI Court to exercise extreme caution before making an order in respect of an issue over which is *prima facie* one over which the Hong Kong Courts have jurisdiction, even more so if it is doubtful that the Hong Kong Court would entertain or make such an order itself.
- (p) Finally, C's Recognition Application invokes her and the Minor Beneficiaries' right to family life under Article 19 of the Constitution Order. This is likewise procedurally and substantively problematic.
- (q) Firstly, there is a fundamental hurdle as to standing. It is well established that only BVI Islanders, Belongers or those ordinarily resident in BVI have standing to bring a claim under the BVI Constitution: see Articles 2 and 9. None of C or the Minor

Beneficiaries has any connection to the BVI; their family life is carried out in Hong Kong.

- (r) Secondly, claims that protected rights under the Constitution Order have been or will be infringed are made pursuant to Article 31 thereof and CPR 56 (by Fixed Date Claim Form). The correct defendant for such a claim is the Attorney General, which reflects the proposition that it is the State against whom claims concerning breaches of the BVI Constitution are brought.
- (s) For example, in **Mark de Freitas v Attorney General**,⁴¹ Ellis J explained:

“the Claimant’s pleadings must therefore not only allege but provide cogent evidence that the Defendant has through action or inaction disproportionately interfered with his right to private and family life as enshrined in Article 19 of the Constitution... The Claimant must therefore first satisfy the Court that the claim raised falls within the scope of this provision. The complaint must concern one or more of the personal interests protected under this constitutional provision namely private life, family life, home or communications. The Claimant must clearly characterise the interest which he seeks to protect and advance it in such a way that it is clear that it falls within the scope of this provision.”
- (t) The Claimant must a) establish the existence of family life and b) establish that the State’s action or inaction has interfered with her right to family.⁴²
- (u) In any event, C and the Minor Beneficiaries have no family life in BVI which could be protected by the Constitution Order. The question for the Court would be to consider whether the refusal by the BVI Court to make an order as to their parental status would interfere with their ability to have a family life elsewhere. It is hard to see how failing to recognise the US Orders in BVI could possibly interfere with her family life in Hong Kong. Likewise, it is difficult to see why the focus of this hearing ought to be the protection of C’s family life at all. The Trustees are simply concerned to ensure that the Minor Beneficiaries have adequate representation in the context of these proceedings and that they have clarity as to who may give a good receipt on their behalf.

⁴¹ BVIHCV 208 of 2014 (unpublished, delivered 19th May 2015) (paragraphs 29-30) (Ellis J).

⁴² See BVIHCV 208 of 2014 (unpublished, delivered 19th May 2015) (paragraphs 34 - 36) (Ellis J).

- (v) In light of the foregoing, the Trustees consider that there are insuperable legal hurdles to the Recognition Application, which in any event is not relevant to the determination of the issues on the Next Friend Applications.

[52] Mr. Powell's advice, upon which the Claimants rely, makes no mention of the Privy Council decision in **C v C**⁴³ a decision delivered on 31st October 2019. Nonetheless, Mr. Powell usefully (and, it would appear, uncontroversially, as between the parties) explains, with reference to English law, that:

"At common law, at birth, the surrogate is always... the child's legal mother and her husband, if she is married, is the child's legal father owing to the presumption of legitimacy. At common law no distinction is made in terms of any genetic link to the child. The key point that is always the case, whether or not it is a donor egg or the egg of the intended mother, the legal mother is *always* the woman who gave birth irrespective of genetics." [Emphasis in original.]

[53] Mr. Powell explains that at common law, surrogacy arrangements are unenforceable.

[54] Moreover, Mr. Powell explains that in the United Kingdom, commercial surrogacy has been prohibited by the Surrogacy Arrangements Act 1985.⁴⁴

[55] He explains that in England and Wales it is however possible to apply for and obtain a parental order following a surrogacy arrangement, currently pursuant to the Human Fertilisation and Embryology Act 2008. He observes that in that statutory scheme at least one of the intended parents must be domiciled within the jurisdiction (i.e., in England or Wales). For a court to have locus to make parentage orders, says Mr. Powell, it must first be satisfied that it has jurisdiction over the Minor Children. As we have just seen, under English law the source of the Court's jurisdiction is statutory, in the form of the Human Fertilisation and Embryology Act 2008.

[56] Mr. Powell advised that the 1996 Hague Convention on parental responsibility and protection of children, ratified in the United Kingdom in November 2012, does not refer to, nor make provisions in relation to surrogacy.

[57] In relation to guardianship, Mr. Powell advised the Claimants that at common law, in the absence of an order from a Court of competent jurisdiction appointing C as the Minor's

⁴³ [2019] UKPC 40.

⁴⁴ 1985 c. 49.

guardian, or conferring parental responsibility, C would not be considered the Minor Children's guardian in a legal sense. He advises that the term 'guardian' lacks any status in law unless it is accompanied by some form of court order that affords the guardian legal status conferring some form of legal responsibility to the guardian in respect of the child.

Discussion on Recognition

Recognition through jurisdictional reciprocity

- [58] My considered judgment is that all three of the US Orders fail the test for jurisdictional reciprocity.
- [59] The two California US Orders fail for two reasons:
- (1) BVI courts have no jurisdiction to make parentage declaration orders before a child's birth; and
 - (2) BVI law does not recognize as 'valid' contracts that purport to agree that a woman other than the woman who gives birth to a child is the mother of the child.
- [60] The Texas US Order fails because BVI law does not recognize as 'valid' contracts that purport to agree that a woman other than the woman who gives birth to a child is the mother of the child.
- [61] Since we are dealing here with the recognition of foreign parentage declaration orders by reason of jurisdictional reciprocity, the starting point for the applicable analysis has to be the Privy Council decision in **C v C**.⁴⁵ That decision directly concerned recognition of foreign parentage declaration orders. It is a decision of the highest authority and binding upon this Court.
- [62] Before we look more closely at that decision, it is worth reminding ourselves, as a preamble, how C's Counsel summarized that case. As we shall see, she mischaracterized the Judicial Committee ('the Board') of the Privy Council's reasoning in several ways, through one error and four omissions. She said the following:

⁴⁵ [2019] UKPC 40.

“The Privy Council recently considered whether the Jersey Court should recognise a Latvian order declaring the Jersey-domiciled appellant to be the father of a child in **C v C**.⁴⁶ The Board held that the question was one of jurisdictional reciprocity: did the Jersey court have jurisdiction to grant a free-standing declaration of parentage such as was made by the Latvian courts, and if so in what circumstances?⁴⁷

On the face of it, the answer to that question was ‘no’, the Jersey Court did not have jurisdiction to grant a free-standing declaration of parentage,⁴⁸ so the Board looked to English law for the answer to the question and held that if the Jersey domiciled father had made an application to the English Court for a declaration of parentage of a boy domiciled or resident throughout the preceding year in England,⁴⁹ the English Court would have had jurisdiction to entertain his application.⁵⁰ The result of this analysis was that by the application of jurisdictional reciprocity it was right, subject to any contrary reasons of public policy, for the Jersey courts to have recognised the declaration of paternity made in Latvia⁵¹ (where the boy had been born and his birth, including the identification of his parents, had been registered, where he was a national and present and habitually resident).⁵²

Applying that logic in this case, subject to any contrary reasons of public policy, the BVI Court can and should recognise the US Orders, because the BVI Court does have jurisdiction to grant a free standing parentage order under the Status of Children Act 2014, section 3, and that Act applies to a child whether or not he or she was born within the Territory, whether or not the father or mother is a person who belongs to the Virgin Islands or whether or not the father or mother of the child has ever been domiciled in the Territory. In other words, there is no question but that the BVI Court has jurisdiction to make the orders which the US Courts made, and on that basis it can and should, as matter of jurisdictional reciprocity, recognise the orders which the US Courts made.”

[63] The first paragraph is a correct summary. The fundamental question concerns whether or not the domestic court has jurisdiction to make a certain type of order.

[64] It is in the first line of the second paragraph that Counsel for C starts to go wrong. In **C v C** the Privy Council did not consider that the Jersey court appeared to lack jurisdiction. The Privy Council considered, rather, that it was ‘unclear’ whether the Jersey court had jurisdiction.⁵³ It was for that reason that the Privy Council looked to English law to resolve the question whether or not the court had jurisdiction. This first mischaracterization is not fatal to C’s analysis. But it

⁴⁶ [2019] UKPC 40.

⁴⁷ At paragraph 45.

⁴⁸ At paragraph 46.

⁴⁹ A requirement under the English Family Law Act 1986 (as amended) section 55A.

⁵⁰ At paragraph 52.

⁵¹ At paragraph 53.

⁵² At paragraph 37.

⁵³ See the Headnote and paragraph 47.

impels us to look more closely to see if all else Counsel said about the judgment tallies with the case report.

[65] It does not. In the third phrase of the first sentence to the second paragraph, Counsel stated that ‘the Jersey Court did not have jurisdiction to grant a free-standing declaration of parentage’⁵⁴. What the Board in fact said was that the Jersey courts ‘appear to have no **statutory** jurisdiction to make a free-standing declaration of parentage’ (emphasis added). The omission of the word ‘statutory’ from Counsel’s summary is crucial for our present purposes. That is so, because by omitting it, the reader does not ask the next question, does the BVI Court have **statutory jurisdiction** to make declarations of parentage? The answer is ‘yes’, in carefully delineated circumstances, pursuant to section 8 of the Status of Children Act 2014. Counsel for C’s analysis overlooks those provisions. As we will see, they are fatal to the Claimants’ case on recognition. This was Counsel’s first omission.

[66] Having thus postulated (incorrectly) that the Board considered that the Jersey court had no jurisdiction, Counsel narrated the Board’s referral to English law and summarized that the Board found that ‘the English Court would have had jurisdiction to entertain his application.’⁵⁵ Again, it is clear from the Board’s judgment that it was referring to a **statutory** jurisdiction of the English court, but Counsel omitted to allude to this. This was Counsel’s second omission.

[67] Having thus left out the statutory source of the Court’s jurisdiction, Counsel immediately continued:

“The result of this analysis was that by the application of jurisdictional reciprocity it was right, subject to any contrary reasons of public policy, for the Jersey courts to have recognised the declaration of paternity made in Latvia.”

[68] This conclusion gives the impression that jurisdictional reciprocity is some general principle that, if the domestic court has jurisdiction to make a declaration of parentage, it ought to recognize foreign parentage orders. This takes us to Counsel’s third omission: she does not explain the test for jurisdictional reciprocity.

[69] As we shall see shortly, this test lays down precise circumstances in which jurisdictional reciprocity applies.

⁵⁴ At paragraph 46.

⁵⁵ At paragraph 52.

- [70] Counsel for C ended by submitting that:
- “there is no question but that the BVI Court has jurisdiction to make the orders which the US Courts made, and on that basis it can and should, as matter of jurisdictional reciprocity, recognise the orders which the US Courts made.”
- [71] She did so without considering the jurisdictional requirements of section 8 of the Status of Children Act 2014, and the test for jurisdictional reciprocity.
- [72] In Counsel’s conclusion lies the fourth omission: the question arises, what were ‘the orders which the US Courts made’? Counsel for C did not analyse these. It is only by looking carefully at the nature of the orders made by the foreign court, and carefully at the domestic court’s jurisdictional requirements, that the court can decide whether or not jurisdictional reciprocity requires (save for public policy considerations) the foreign orders to be recognized in the domestic forum. Counsel for the Claimants skirted these requirements. She reasoned from a far looser statement of principle than **C v C** in fact propounds.
- [73] With this preamble in mind, let us now look more closely at **C v C**.
- [74] The Board acknowledged that **C v C** appears to have been the first case which ‘directly addresses the rules for recognition of a foreign declaration of paternity’.⁵⁶
- [75] There is no conceptual difference between a declaration of paternity and a declaration of maternity.
- [76] The Board recognized that ‘the principle of jurisdictional reciprocity, endorsed at the highest level, remains part of the common law in relation to certain family matters’.⁵⁷
- [77] The Board considered that the relevant statement of principle is to be derived from the reasoning of the majority in **In Re Valentine’s Settlement**⁵⁸ expressed by Lord Denning MR in the context of adoption, at paragraph 43:

⁵⁶ [2020] 1 WLR 1711 at 1719 paragraph 35 (Lord Wilson JSC).

⁵⁷ [2020] 1 WLR 1711 at 1719 paragraph 44 (Lord Wilson JSC).

⁵⁸ [1965] Ch 831.

“But when is the status of adoption duly constituted? Clearly it is so when it is constituted in another country in similar circumstances as we claim for ourselves. Our courts should recognise a jurisdiction which *mutatis mutandis* they claim for themselves: see *Travers v Holley* [1953] P 246. We claim jurisdiction to make an adoption order when the adopting parents are domiciled in this country and the child is resident here. So also, out of the comity of nations, we should recognise an adoption order made by another country when the adopting parents are domiciled there and the child is resident there.”

[78] The decision in **Travers v Holley**⁵⁹ warrants consideration, to flesh out the one-line summary given by Lord Denning MR.

[79] In **Travers v Holley** the issue was whether an English court would recognize a decree of divorce granted by a New South Wales court under a statute of that state. The husband and wife were married in England before emigrating to Australia. Whilst there, the husband deserted his wife and returned to England. The wife petitioned her local New South Wales court for divorce on grounds of desertion. She then married a Mr. Holley. Her first husband, on the other hand, petitioned an English court for divorce, on grounds of his wife’s adultery with Mr. Holley. He did so on the basis (so he thought) that English law would not recognize the New South Wales decree of divorce. He had not formed this conclusion on the basis that the substantive domestic law of New South Wales was materially different from English law, but because he had not been domiciled there at the time his wife brought her petition there. The English Court of Appeal decided that he was wrong.

[80] Hodson LJ reasoned thus:

“... where it is found that the municipal law is not peculiar to the forum of one country but corresponds with a law of a second country, such municipal law cannot be said to trench upon the interests of that country Where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognize a jurisdiction which *mutatis mutandis* they claim for themselves.”⁶⁰

[81] So, a court tasked with considering whether to grant recognition to the order of a foreign court, under the principle of jurisdictional reciprocity, must consider whether:

- (1) domestic municipal law corresponds with that of a foreign country;
- (2) there is in substance reciprocity between the two systems of municipal law.

⁵⁹ [1953] P 246.

⁶⁰ *Travers v Holley* (1953) 3 W.L.R. 507 at 516.

- [82] Where there is such correspondence and substantive reciprocity, comity requires (save perhaps for other exceptions) the domestic court to recognize the jurisdiction of the foreign court to make the order it did.
- [83] It should be noted and stressed here that the domestic court does not simply look to comity. The court must first check for correspondence and substantive reciprocity between the two sets of municipal law.
- [84] Returning to **C v C**, the Board referred to this test (at paragraph 43) and acknowledged that this raised the question whether the Jersey courts 'have jurisdiction to grant a free-standing declaration of parentage such as was made in Latvia..., and, if so, in what circumstances?' (at paragraph 45).
- [85] There were thus two parts to this question:
- (1) did the Jersey court have jurisdiction to make a parentage order such as was made by the foreign court; and
 - (2) if so, in what circumstances?
- [86] It is important to note here that the domestic court does not simply ask itself whether it can make any kind of parentage order whatsoever. The domestic court must ask itself whether it can make a parentage order **such as was made by the foreign court.**
- [87] In **C v C** the Board resolved this question, in both its parts, by reference to statute. In the circumstances of that case, the Board found the answer in the United Kingdom Family Law Act 1986, as amended by the Child Support, Pensions and Social Security Act 2000, with the insertion of section 55A (at paragraph 51). This statute laid down certain domicile or habitual residence criteria for persons wishing to apply for declarations of parentage of a child in England. This same regime was applied by extension, to Jersey. The Board found (at paragraph 52) that since the applicant and child there would have fulfilled those requirements, the domestic court (the Jersey court) would have had jurisdiction to entertain the application to make the same type of order as had been granted in the foreign jurisdiction. The Board thus ruled that the court below had been right to recognize the foreign parentage declaration order (at paragraph 58).

- [88] For the purposes of the present determination, it will not be necessary to decide the recognition application upon public policy considerations. It would however be remiss of me not to mention that the Board observed that an English court would exercise a jurisdiction (in the sense of a discretion or power) to deny recognition to the judgment of a foreign court of competent jurisdiction on public policy grounds ‘with extreme reserve’ (at paragraph 54). In doing so, the Board relied upon the House of Lords case of **Vervaeke (formerly Messina) v Smith**.⁶¹
- [89] This Court must therefore ask itself whether it has jurisdiction to make a parentage order such as was made by the California and Texas courts, and if so, in what circumstances.
- [90] We must therefore consider what were the characteristics of the US Orders.
- [91] The particularly material characteristics of the US Orders were as follows:
- (1) the California US Orders were made before the child’s birth;
 - (2) the California US Orders declared X to be the father and C the ‘presumed natural mother’ of the then as yet unborn S⁶² and as the ‘legal parent’ of U, respectively;
 - (3) S’s US Order was made in California in 2013;
 - (4) U’s US Order was made in California in 2015;
 - (5) the California US Orders expressly conferred upon X and C the rights, powers and responsibility of parents of the Minor Children S and U;
 - (6) the Texas US Order was made after T’s birth;
 - (7) the Texas US Order declared X and C to be T’s parents;
 - (8) the applicant intended mother had no domicile, nor residence, ties with California nor Texas.
- [92] A court’s jurisdiction to make parentage orders can be either inherent (as was recognized by the Board in **C v C** at paragraph 46) or statutory.
- [93] In the BVI, there are specific statutory provisions dealing with parentage declaration applications and orders. The Court should first consider these, as they would modify any inherent jurisdiction. Then I will address inherent jurisdiction.

⁶¹ [1983] 1 AC 145 at 164(Simon LJ).

⁶² Expressly pursuant to a statute (sections 7611(a) and 7613(a) of the California Uniform Parentage Act.

- [94] The Status of Children Act, by section 3, lays down that statute's application:
- "3. This Act shall apply to a child, whether or not
 - (a) the child was born before the commencement of this Act;
 - (b) the child was born within the Territory;
 - (c) the child's father or mother is a person who belongs to the Virgin Islands pursuant to section 2 (2) of the Virgin Islands Constitution Order; or
 - (d) the father or mother of the child has ever been domiciled in the Territory."
- [95] Thus, there are no residence or domicile requirements stipulated for the child or his or her parents for the statute to apply.
- [96] The Status of Children Act applies to children born before the commencement of Act. The enactment date was 31st October 2014. That means that C could, in principle, bring an application under this Act now for parentage declarations of the three Minor Children, even though two of them (S and T) were born before this Act came into force.
- [97] To ascertain who is entitled to apply for a declaration of parentage order, and in what circumstances, we must turn to section 8 of the Status of Children Act. This materially provides:
- "8. (1) A person who
 - (a) alleges that any named person is a parent of a child;
 - (b) alleges that the relationship of father and child exists between him and another named person;
 - (c) alleges that the relationship of mother and child exists between her and another named person; or
 - (d) having a direct interest in the result, wishes to have determined the question whether the relationship of parent and child exists between two named persons, may apply to the Court for a declaration of parentage and the Court may, if it is satisfied that the relationship exists, make such declaration whether or not the mother, father or child is, or all of them are, living or dead.
- (2) ...
- (3) ...
- (4) In any proceedings in the Court, a declaration made pursuant to this section shall be conclusive evidence of the matters contained in the declaration."
- [98] A key word in section 8(1) is 'person'. The Status of Children Act does not define 'person'. In the context of this section, a 'named person' can be either a parent or a child or both.

- [99] Where the 'named person' is a child, it appears that this must, as a matter of law, refer to a child who has already been born. I say this for the following reasons.
- [100] First, quite simply, I know of no legal authority that a child can be named (so as to have legal effect) before birth.
- [101] Secondly, I apprehend that, under BVI law, the term 'person' does not include someone who is yet to be born.
- [102] I am constrained by legal authority to reach this conclusion so far as concerns BVI law, for the following reasons.
- [103] 'Personhood', in the English common law context, is a juridical concept. There are other contexts in which the concept of 'personhood' arises (and indeed from which the juridical concept originated), but it is beyond the Court's remit to comment upon such other contexts here. In the analysis that follows, I will merely observe what I perceive to be the state of the law that binds this Court and then attempt to apply it.
- [104] Whether or not 'person' includes an unborn child, as a matter of law, depends upon the laws of a particular jurisdiction. An appropriate starting point is to look at what is written in the Constitution of the BVI. Under the BVI Constitution Order,⁶³ the 'fundamental rights and freedoms of the individual', as referred to in Chapter 2, apply to a 'person' and 'persons'. A 'person' is not defined there either.
- [105] The Constitution Order does not, expressly in terms, directly protect unborn children, as 'persons'.
- [106] Nonetheless, I understand the BVI has had extended to it in 1994 the United Nations Convention on the Rights of the Child ('the CRC'), which was ratified by the United Kingdom in 1991. The CRC extends analogous fundamental rights and freedoms to children. The CRC

⁶³ The Virgin Islands Constitution Order 2007, 2007 No. 1678.

indicates that its protections are also intended to apply to unborn children.⁶⁴ But the CRC does not in terms address the concept of 'personhood' either.

[107] Article 30 of the Constitution Order however makes provision for other laws, apart from the Constitution Order, to protect children:

"30. The Legislature may, in addition to any rights and freedoms provided in this Chapter which afford protection to children, enact such laws as it considers fit to promote the well-being and welfare of children and to afford them protection from any harm, exploitation, neglect, abuse, maltreatment or degradation and to provide them with such facilities as would aid their growth and development."

[108] Reference here to 'children' clearly includes children already born, and it is wide enough to include unborn children.

[109] For other laws designed to protect unborn children, we need to look at the Criminal Code 1997 of the Virgin Islands.

[110] We see that, at Part XI, provisions deal with 'Homicide and Other Offences Against The Person'. The term 'person' thus appears here too. Once again, it is not specifically defined. But then there is this:

"160. A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, whether it has independent circulation or not and whether the naval [*sic*] string is severed or not."

[111] Criminal offences concerning the unborn are addressed in a different part, Part VIII, entitled 'Abortion'.

⁶⁴ Cf: the 9th recital to the preamble:

"Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "**the child**, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, **before as well as after birth**" (emphasis added); and

Article 6:

"1. Parties recognize that **every child has the inherent right to life**.

2. **States Parties shall ensure to the maximum extent possible the survival and development of the child.**"; and Article 24:

"1. States Parties recognize the right of **the child** to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) ...; (b) ...; (c) ...; (d) To ensure appropriate **pre-natal** and post-natal health care for mothers;" (emphasis added).

- [112] In this part, by section 139, the procuration, or attempted procuration, of the miscarriage of a 'person' (i.e. the mother-to-be) who is 'with child', is proscribed as a criminal offence, subject to exceptions. Similarly, section 140 proscribes what can loosely be called assisting the commission of offences under section 139. Section 141 proscribes the destruction of 'the life of a child capable of being born alive'. This latter offence is entitled 'Child destruction'.
- [113] Thus, an unborn child is not treated as a 'person capable of being killed'. That does not mean, though, that an unborn child is considered not to be a human being. This is apparent, because the maximum penalties attaching to abortion, from the start of a pregnancy, are comparable to those for certain 'offences against the person' where death or serious bodily harm are inflicted or risked.
- [114] The penalty for section 139 offences (a maximum of 14 years imprisonment), though less than for murder and manslaughter (which attract liability to life imprisonment), is higher than, for example, making death threats (section 155, maximum 10 years), poisoning so as to endanger life (section 168, maximum 10 years) and unlawful discharge of a firearm at a person (section 176, maximum 5 years). The maximum penalty for section 139 offences is the same, for example, as for unlawfully and maliciously causing an explosion of a nature likely to endanger life (section 174, maximum 14 years), or aiding, abetting, counselling or procuring the suicide of another (section 157, maximum 14 years). The maximum penalty for child destruction under section 141 is the same for murder and manslaughter, life imprisonment.
- [115] It is also to be noted that for the purposes of sections 139 and 140, a mother is recognized as being 'with child' from the start of her pregnancy.
- [116] The term 'child' is not defined by reference to birth, or to other criteria such as viability. This reflects the ordinary, current, English usage of the word 'child'. The first meaning for 'child' given in the online Oxford English Dictionary is:

"An unborn or newly born human being; a fetus, an infant."⁶⁵

⁶⁵ <https://oed.com/viewdictionaryentry/Entry/31619>.

[117] Thus, from the moment the gestational mother carries within her body an unborn human being, i.e., once she is 'with child', the protections afforded by the Criminal Code to the life of the child apply.

[118] But this still does not mean that our law treats an unborn child as a 'person'. English law, from which BVI derives, does not reveal many direct pronouncements on what is precisely to be meant by a 'person'. An extremely terse law dictionary definition of a 'person' is: 'the object of legal rights'.⁶⁶

[119] Once our attention is turned to the question of what, if any, legal rights the unborn have, we are constrained to see that, under English common law as applicable in the BVI, unborn children have no directly enforceable private legal rights, with one narrow and partial exception (see the reference to **Elliot v Joicey**⁶⁷ below). Conversely, the unborn cannot be sued. That said, our law does not treat the unborn child as a mere thing. Thus, our law does not treat the unborn child as something that can be owned by another or disposed of at will. (In contrast, the Gestational Carriage Agreements in this case are predicated on the basis that the unborn are not yet human beings, but what our law would recognize as chattels. The Gestational Carriage Agreements treat unborn children as 'belonging to' the Intended Parents and permit the latter to dispose of them through abortion at will – see, e.g., Recital 4, Clauses 1, 12 and 13 thereof.) Legal protection of the unborn in the English common law context has historically been the preserve of the criminal law. The unborn child, though, cannot itself enforce the protections afforded to him or her by the Criminal Code and the CRC. This is left to the state to do.

[120] As was stated in 1979 by the English High Court in **Paton v British Pregnancy Advisory Service Trustees and another**:⁶⁸

"The foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother. That permeates the whole of the civil law of this country (I except the criminal law, which is now irrelevant [by reason of the passage of the United Kingdom Abortion Act in 1967]), and is, indeed, the basis of the decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia, and, I have no doubt, in others.

For a long time there was great controversy whether after birth a child could have a right of action in respect of pre-natal injury. The Law Commission considered that and

⁶⁶ Collins Dictionary of Law (Collins, 2006)

⁶⁷ [1935] AC 209.

⁶⁸ [1979] QB 276 by Sir George Baker, P.

produced a working paper in 1973, followed by a final report, but it was universally accepted, and has since been accepted, that in order to have a right the foetus must be born and be a child. There was only one known possible exception which is referred to in the working paper, an American case, *White v Yup*, where the wrongful death of an eight month old viable foetus, stillborn as a consequence of injury, led an American court to allow a cause of action, but there can be no doubt, in my view, that in England and Wales, the foetus has no right of action, no right at all, until birth. The succession cases have been mentioned. There is no difference. From conception the child may have succession rights by what has been called a 'fictional construction' but the child must be subsequently born alive. See per Lord Russell of Killowen in *Elliot v Joicey* ([1935] AC 209 at 233.)

- [121] Moreover, the English Court of Appeal in **CP (A child) v CICA**⁶⁹ ruled that the claimant child, who had been injured prior to birth in her mother's womb due to her mother's excessive alcohol drinking during the pregnancy, was not able to claim criminal compensation. The claimant child argued that section 23 of the English Offences Against the Persons Act 1861 applied to her. This provides:

"Maliciously administering poison, etc so as to endanger life or inflict grievous bodily harm.

Whosoever shall unlawfully administer to... any other person, any poison or destructive or noxious thing, so as thereby...to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable...to be kept in penal servitude for any term not exceeding ten years."

The equivalent of this provision appears at section 169 of our Criminal Code.

- [122] The claimant child argued that she came within the term 'any other person'. The English Court of Appeal disagreed. It said, by Treacy LJ:

"At that stage [i.e. before birth] the child did not have legal personality so as to constitute "any other person" within the meaning of s23."⁷⁰

- [123] The Court of Appeal made this finding in light of the House of Lords decision in **Attorney General's Reference (No 3 of 1994)**.⁷¹ Treacy LJ summarized the material part of that decision, thus:

"Both Lord Mustill and Lord Hope were in agreement that a foetus is not to be regarded as another person. It was neither a distinct person nor a adjunct of the mother but was a unique organism."⁷²

⁶⁹ [2014] EWCA Civ 1554.

⁷⁰ At paragraph 44.

⁷¹ [1998] AC 245.

⁷² At paragraph 37.

[124] Treacy LJ continued:

“If the foetus is not another person at the time of the administration of the noxious substance then the offence cannot be complete at that point.”⁷³

[125] These English cases, would seem to represent the state of BVI law as well on the issue whether an unborn child is to be treated in law as a ‘person’. This appears to be so because:

- (1) An unborn child has no clearly stipulated constitutional rights;
- (2) The Constitution Order makes provision for protection to be afforded to children through laws other than the Constitution Order, suggesting that the direct protection for fundamental constitutional rights and freedoms expressly accorded in the Constitution to ‘persons’ does not apply to unborn children;
- (3) Although the Criminal Code protects the life of an unborn child from the moment a woman is ‘with child’, the Criminal Code deals with criminal abortion separately from ‘offences against the person’;
- (4) The Criminal Code provides that a ‘person capable of being killed’ is one who has already been born;
- (5) As under English law, in the BVI, an unborn child is not capable of suing or being sued.

[126] Returning to section 8 of the Status of Children Act, the section envisages that parents as well as children have the right to apply for a parentage declaration order in respect of the other. The respondent to such an application would have the right to oppose the application. A child could be either an applicant or a respondent. To have the right to apply for a parentage declaration order or the right to oppose it, a child must already have been born, because, as we have seen, in the BVI the unborn have no private law rights that they can enforce. Where the section thus refers to parents and children as ‘persons’, this can only be referring to children who have already been born.

[127] The consequence is that, in the BVI, someone who claims a parentage declaration order can do so, under the Status of Children Act, only in respect of a child who has already been born.

⁷³ At paragraph 41.

- [128] To use Lord Denning MR's language in **In Re Valentine's Settlement**,⁷⁴ the courts of the BVI do not claim for themselves a jurisdiction to make parentage declaration orders in respect of children who have yet to be born.
- [129] Or, to adopt the language of Hodson LJ in **Travers v Holley**: the municipal law of California, which permits intended parents to apply for parentage declaration orders prior to the birth of a child, does not correspond with BVI law, which permits parentage declaration orders to be made only in respect of children who have already been born. There is in substance no reciprocity between the municipal law of California and the BVI in this regard.
- [130] This entails that the US Orders made in California are not liable to be recognized in this jurisdiction under the principle of jurisdictional reciprocity.
- [131] This particular difficulty does not arise in respect of the US Order made in Texas, in respect of T, after his birth.
- [132] The analysis above pertains only to consideration of this Court's statutory jurisdiction under the Status of Children Act. I will separately consider whether the position is any different under the Court's inherent jurisdiction.
- [133] Before doing so, however, we also need to consider other aspects of the Status of Children Act.
- [134] Adopting the explanation given by Lord Denning MR in **In Re Valentine's Settlement**,⁷⁵ this Court would recognize the parentage declaration order of a foreign court where 'it is constituted in another country in similar circumstances as we claim for ourselves'.
- [135] We have already seen how timing of an application can affect the Court's jurisdiction. There are two other fundamental aspects to the issue of jurisdiction, as applied to the present case. We again need to ask what jurisdiction has been conferred upon this Court: i.e., what has this Court been empowered to do? The second aspect pertains to the factual circumstances: how

⁷⁴ [1965] Ch 831 at paragraph 43 (Lord Denning MR).

⁷⁵ [1965] Ch 831 at paragraph 43 (Lord Denning MR).

would this Court determine parentage in light of the factual background to the birth of these Minor Children?

[136] The Status of Children Act conclusively answers the first question but gives only a partial answer to the second.

[137] Section 8 specifies what the Court is empowered to do:

“...the Court may, if it is satisfied that the relationship [of parent and child] exists, make such declaration [i.e., a declaration of parentage] whether or not the mother, father or child is, or all of them are, living or dead.”

[138] In short, the Court has power to consider whether or not the relationship of parent and child exists, and if it is so satisfied, it can declare who the parent(s) of the child is or are.

[139] The Status of Children Act provides two bases upon which the Court can satisfy itself. Both are substantive and not procedural:

- (1) Section 9 provides for a factual finding of biological parentage through DNA testing. That clearly does not apply here, as it is common ground that C has no biological connection with the Minor Children.
- (2) For cases in which artificial conception procedures have been used, section 6 lays down certain presumptions as to parentage. The Court is thus empowered to satisfy itself, on the basis of these presumptions, whether or not the legal relationship of parent and child exists.

[140] Section 6 carries the following margin note:

“Presumption where child is born as a result of artificial conception procedures.”

[141] Section 6 warrants being set out here in full:

“6. (1) If a child is born to a woman as a result of the carrying out of an artificial conception procedure

(a) while the woman was married to a man; and

(b) the procedure was carried out with their consent, whether or not the child is biologically a child of the woman and of the man, the child is their child for the purposes of this Act.

(2) Unless there is a valid contract to the contrary, if a child is born to a woman as a result of the carrying out of an artificial conception procedure, whether or not the child is biologically a child of the woman, the child is her child for the purposes of this Act.

(3) Subsection (1) applies to cohabitants where neither of them was married to any other person.

(4) For the purposes of this section “artificial conception procedure” means

- (a) where a woman conceives a child as a result of her own ovum being fertilized by the sperm of a donor in a procedure involving either in vitro or in vivo fertilisation;
- (b) where a woman conceives a child as a result of her own ovum being fertilised by the sperm of her spouse (without sexual intercourse) in a procedure involving either in vitro or in vivo fertilisation;
- (c) where a child is conceived as a result of a woman receiving for gestation in her body an ovum donated by a donor, which ovum has been
 - (i) fertilised in vitro; or
 - (ii) fertilised in vivo, with sperm provided by her spouse;
- (d) where a child is conceived as a result of a woman receiving for gestation in her body an ovum provided by a donor, which ovum has been
 - (i) fertilised in vitro; or
 - (ii) fertilised in vivo, with sperm donated by a donor; or
- (e) any other conception procedure that is prescribed by Regulations;

“donor” means any person not being a woman or her spouse who donates her ovum or his sperm, as the case may be, for an artificial conception procedure; and

“spouse” includes the male partner in a cohabitant relationship.

(5) For the purposes of subsection (1), a person is to be presumed to have consented to an artificial conception procedure being carried out unless it is proved, on the balance of probabilities, that the person did not consent.”

[142] The follow question arises: would these presumptions apply to enable the Court to make orders declaring C to be the mother of the Minor Children, based upon the surrogacy arrangements she and X used in California and Texas? The answer appears to be ‘no’.

[143] Applying first section 6(1), since the Minor Children were born to gestational mothers who were married to men other than X, the Minor Children so born are treated by section 6(1) as having the gestational mother as their mother and her husband as their father.

[144] Section 6(2) provides for a potentially different result. Applying this subsection, the child born to the gestational mother would still have the gestational mother as its legal mother, ‘[u]nless there is a valid contract to the contrary’.

[145] On the face of it, these provisions, when read together, present us with the following problems:

- (1) Both section 6(1) and 6(2) are described as creating presumptions, but section 6(1) is expressed in terms of a definite statement. It does not say that this subsection gives rise to an irrebuttable presumption. At the same time, nothing in the Status of Children Act lays down how, if at all, the presumption contained in that subsection can be rebutted.
- (2) The presumption in subsection 6(2) can clearly be rebutted, if 'there is a valid contract to the contrary'. But let us say there is such a valid contract to the contrary. The gestational mother's status as legal mother would be displaced in favour of another woman (such as C), but the father would remain the gestational mother's husband. That would be a result that none of the parties to these surrogacy arrangements intended. It also seems that the legislature cannot sensibly have intended that someone in C's position should have to share parental rights and responsibilities with a man who is complete stranger to her. The same applies, *mutatis mutandis*, to the man, who would have to share parental rights and responsibilities for the child, not with his wife, but with a woman who is a complete stranger to him. One would have to wonder how such a result could promote the welfare of the child.

[146] A first reaction might be that these provisions must therefore have been the result of particularly inept drafting. On more profound consideration it becomes clear that this is not so.

[147] These apparent problems only arise if it is to be assumed that the Status of Children Act either recognizes that BVI law already treats surrogacy agreements as 'valid' contracts in certain circumstances, or that the Status of Children Act establishes their validity. C has argued here that the Status of Children Act does this. The Claimants argued that it does not.

[148] I agree with the Claimants that the Act does not. In this regard, we should note that the Status of Children Act does not lay down in what circumstances a 'contract to the contrary' would be 'valid'.

[149] We should also ask, contrary to what? The answer must be that the contract would have to reflect an agreement between parties that a woman other than the gestational mother 'is' the legal mother after the child's birth.

[150] However, no authority was brought to my attention for a proposition that, at common law, parties can contract out of the operation of law in relation to parentage.

[151] I accept the Claimants' submission that as a matter of common law, at birth the gestational mother is always the child's legal mother; regardless of whether there is any genetic link between the child and the intended parent, since the legal status of 'mother' at common law is afforded to the woman who gestated and gave birth to the child, following **The Amphill Peerage** case.⁷⁶

"[m]otherhood, although a legal relationship, is based on a fact, being proved demonstrably by parturition."

[152] When we see that the Status of Children Act does not itself establish the 'validity'⁷⁷ of a 'contract to the contrary', and that this Act itself does not lay down circumstances in which the presumptions in section 6(1) can be rebutted, we are led to conclude that the Status of Children Act anticipates eventual further statutory provisions that will address these aspects. Seen in this light, sections 6(1) and (2), together with their description as being presumptions, make more sense.

[153] No such further legislation, nor indeed eventual Regulations anticipated by section 6(4)(e), have been brought to my attention. I shall therefore assume there are none.

[154] If that is right, this means that BVI law does not, as it stands, regard a 'contract to the contrary' as 'valid'. This entails that the Court cannot treat the presumptions in section 6(1) and (2) as rebutted. The Court simply has no power to do so. Put differently, it has no jurisdiction to declare C to be the parent or mother of the Minor Children. This means that, for these reasons too, this Court cannot recognize the US Orders pursuant to the principle of jurisdictional reciprocity.

[155] It is irrelevant that the Texas court declared the Texas Gestational Carriage Agreement to be 'valid'. For the purposes of the test for jurisdictional reciprocity that this Court is called upon to apply, the issue is whether that agreement would be treated as 'valid' under BVI law if C were to petition the BVI courts for a declaration of parentage order, on the basis of the same

⁷⁶ [1977] AC 547 per Lord Simon at 577B.

⁷⁷ What 'valid' means in this context is left unclear. Our law usually speaks in terms of a contract being lawful, legal, and/or enforceable.

agreement, under the Status of Children Act. The answer is 'no', because the BVI has no law at present that would give effect to such an agreement.

Inherent jurisdiction

- [156] For the same reason, the BVI does not have an inherent jurisdiction to make any kind of parentage declaration order other than that the woman who gives birth to a child is in law the child's mother. At common law, the beginning, middle and end of it is that the woman who gives birth to the child is the mother. Thus, no jurisdictional reciprocity arises between the BVI courts and the courts of California and Texas in terms of an inherent jurisdiction.

Article 8 of the European Convention on Human Rights

- [157] C argues that this Court should recognize the US Orders on the basis that they are parentage orders and that by section 19 of the Constitution Order, which is in very similar terms to Article 8 of the ECHR:

"Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence, including business and professional communications."

- [158] C argues that she has standing to run this argument, since she has submitted to the jurisdiction of the BVI courts. I agree. She does not claim direct protection of the Constitutional Order in the same way a resident or believer of the Territory might do. Nor is she challenging the constitutionality of a BVI enactment or order. She simply asks this Court to apply BVI law, in the fullness of its proper interpretation. This much is entirely proper, in my view.

- [159] C's arguments on the substance of the issue are quite another matter. Having considered these, I have come to the view that C is mistaken.

- [160] C argues that a refusal to recognize the US Orders, and, thereby refusal to recognize C as the mother of the Minor Children, would be an interference with the family life of both the Minor Children and C for no justifiable reason that can be said to be either necessary or proportionate.

- [161] There are a number of fatal difficulties with this line of argument.
- [162] The first difficulty: C's argument assumes that the US Orders have some status or effect that this Court should have regard to, prior to their recognition in this jurisdiction. That assumption is wrong. The US Orders have no status and no effect here. That is precisely why the US Orders would need to be recognized here.
- [163] A second difficulty is that, as the English High Court (Chancery Division), by Rose J, explained in **In re Hand's Will Trust**:⁷⁸
- “...there can be no question of the court acting ‘unlawfully’ when giving effect to mandatory statutory provisions.”
- [164] The mandatory statutory provisions here would be those in the Status of Children Act.
- [165] A third difficulty is that section 19 and Article 8 are protective, and not enabling, provisions. In legal idiom, they operate as a shield, not a sword. C seeks to use them to obtain a recognition order that she would otherwise not be entitled to.
- [166] C starts her argument with reference to the English High Court case of **D & G v ED and DD**.⁷⁹ C submitted that the court there held that issues concerning parentage, including in the context of surrogacy arrangements, engage rights to family life, such that determination of parentage falls within the ‘protective scope’ (*sic* – i.e. the shield) of Article 8 of the ECHR.
- [167] That is unobjectionable as a characterization of that case, but it is also the most that C can usefully derive from it. In **D & G v ED & DD** the court was faced with a situation where the parents under a foreign law, following commercial surrogacy arrangements, had brought the children back to live with them in the United Kingdom. They did not know they had to apply for a declaration of parentage order under a particular statute, and so they happened to be several years out of time. That statute provided that an application for a parentage order had to be made within six months of a child’s birth. Another United Kingdom statutory provision provided that the welfare of a child should be given paramount importance (as opposed to being the first consideration amongst possibly others). The court made a parentage order, despite the

⁷⁸ [2017] Ch 449 at 473, paragraph 71 (Rose J).

⁷⁹ [2016] 2 FLR 530 at paragraphs [40]-[41] (Russell J).

lateness of the application. It did so, on the basis of prior English law authority that the six-month requirement was directive and not mandatory and that the welfare of the children favoured the making of a parentage order, as opposed to an adoption order. The court rather obliquely and in general terms intimated that this result was consistent with the 'jurisprudence' 'in this area'⁸⁰ but without referring further to Article 8 of the ECHR. That Article was not in terms relied upon as part of the court's *ratio* for its decision. Certainly, the court did not treat that Article as directly overriding the six-month requirement, so as to require it to be ignored.

[168] The second case that C prays in aid is **King v Attorney General**.⁸¹ C cites this for the proposition that the English case-law interpreting Article 8 of the ECHR is relevant to interpretation of the very similar section 19 of the Constitution Order.

[169] Again, this is unobjectionable, but it does not help C further than that. In **King v Attorney General** the claimant invoked section 19 of the Constitution Order to avoid a deportation order. He argued that the deportation order infringed his and his family's right to family life. The deportation order was set aside, *inter alia*, on that ground. The section was not used as an enabling provision for a positive order to be made to confer a right, but to prevent an order being put into effect that would or could harm his family life.

[170] **In re Hand's Will Trust**⁸² Article 8 of the ECHR was indirectly used to allow adopted children to inherit under a will in circumstances where, upon the prior state of English statute law, adopted children would have had no such right. This is the closest to an instance of use of Article 8 as an enabling provision as C was able to get. Yet, the court was at pains, in a long and involved judgment that is perhaps not the easiest to follow, to explain that it was, in reality, not enabling anything. It was merely interpreting legislation in a way that rendered its provision compliant with human rights legislation.

[171] This result was achieved by 'reading down' the legislation in question in such a way that it could and would be interpreted in a manner that accorded with the human rights legislation in issue. The court recognized that the court's power to 'read down' legislation is a powerful tool, whose use is obligatory, but that it is not a canon of construction, nor is it dependent upon the

⁸⁰ At paragraph 71.

⁸¹ BVIHCV2013/0324 (unpublished, delivered 2nd July 2014) at paragraphs [38], [50] (Byer J).

⁸² [2017] Ch 449.

existence of an ambiguity in the statutory wording. The test for the outer limit, however, of the 'reading down' tool, was expressed to be whether 'a [new] meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment'.⁸³

- [172] In the present case, a 'reading down' of the Status of Children Act would, in the first place, mean ignoring the restriction that parentage declaration orders can only be sought in respect of children that have already been born, not in anticipation of birth. This restriction is however not incompatible with Article 8, as that Article does not in terms treat the unborn as 'persons'.
- [173] A 'reading down' of section 6(1) and 6(2) is moreover not necessary, as these provisions manifestly await further legislation. Such further legislation could specify in what circumstances, if any, the presumptions contained therein can be rebutted and in what circumstances, if any, contracts rebutting the presumption that the birth mother is the legal mother might be valid. Those are matters of policy for the legislature, not the courts, to determine. Article 8 would in principle apply to such further legislation. Such further matters would go beyond questions of interpretation and cross the boundary into amendments.
- [174] Rose J explained in **In re Hand's Will Trust** that 'reading down' can include supplying additional words that are appropriate to ensure that legislation is read in a way which is compatible with ECHR rights.⁸⁴ However, what would be required in the present case would be the supplying of whole new provisions to make sections 6(1) and (2) 'work' in a way that would satisfy the intentions of parties to surrogacy arrangements, i.e. amendment, not interpretation, would be needed.
- [175] In short, C seeks to use Article 8 of the ECHR and its equivalent section 19 of the Constitution Order as a short cut to the result she wants, circumventing a statutory scheme the legislature has already seen fit to put in place with a view eventually to regulating this area. The changes that would be required to the Status of Children Act to make it produce C's desired result go well beyond interpretation and would be substantive amendments. **In re Hand's Will Trust** is persuasive authority that the Court should not go that far.

⁸³ [2017] Ch 449 at paragraph 100 (Rose J).

⁸⁴ [2017] Ch 449 at paragraph 103 (Rose J).

- [176] I therefore cannot see how C can succeed with her argument that this Court should recognize the US Orders on the basis that she and the Minor Beneficiaries have the right to respect for their private and family life under section 19 of the Constitution Order or under Article 8 of the ECHR.
- [177] Similarly, C cannot succeed in her recognition simply by appealing to the welfare of the Minor Children as compelling recognition of the US Orders. Child welfare is not a stand-alone source of the Court's jurisdiction. C provided no authority that under BVI law 'child welfare' is a short-cut past other jurisdictional, legal, social and political checks and balances the legislature has seen fit to impose by way of legislation, including in the Status of Children Act. If that were so, the BVI courts could simply ignore legislation and other legal principles on a case-by-case basis in furtherance of an elastic concept that would all too easily allow results to be reverse engineered from subjectively desired outcomes. *A priori*, that is not how the law works.
- [178] C appeals to *dicta* of Hedley J in **Re L (A Child) (Parental Order: Foreign Surrogacy)**⁸⁵ that:
 "...it will only be in the clearest case of abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making."
- [179] C takes this out of its United Kingdom statutory context, which adopts a different scheme from the BVI Status of Children Act.
- [180] Hedley J's point was that following the passage in the United Kingdom of Regulation 2 of the United Kingdom's Human Fertilisation and Embryology (Parental Orders) Regulations 2010, a child's welfare, under the United Kingdom legislation, is no longer merely the court's first consideration but its paramount consideration. Only the clearest case of abuse of public policy would then suffice to refuse the making of a parentage order under the pre-existing legislation.
- [181] That case is no authority for a proposition that child welfare considerations confer a jurisdiction or power upon the Court where it would otherwise have none. Rather, it explains how an already existing jurisdiction is to be applied.

⁸⁵ [2011] Fam. 106 at paragraph [10] (Hedley J).

Guardianship

- [182] C argues that this Court should recognize the US Orders because the effect of the US Orders is to confer upon C the full rights and responsibilities of a guardian or conservator of the Minor Children, including the right/duty to take decisions in respect of their estates and to receive payments on their behalf. C has led expert evidence of California and Texas law opining that this was the effect of those US Orders.
- [183] C argues there is an established principle of private international law that where a foreign court appoints a guardian for a child at a time when the child was a national of that country or owed local allegiance by virtue of ordinary residence or presence there, then such a foreign guardian will *prima facie* be recognized in the domestic forum as a guardian of the child.⁸⁶
- [184] C says (and the Claimants do not dispute) that the courts of California and Texas respectively had competent jurisdiction to make guardianship orders in respect of the Minor Children.
- [185] Therefore, says C, this Court can and should recognize the US Orders as conferring upon her the duties and obligations of a guardian of the Minor Children.
- [186] The Claimants disagree. They say that the US Orders are parentage declaration orders, not guardianship appointment orders.
- [187] I agree with the Claimants' submission. It is apparent from each of the US Orders that what X and C had been seeking were only orders declaring their parentage and the rights and duties parentage entails. There is no indication in the US Orders that X and C had sought such rights and duties as guardians alternatively to the declarations of parentage. As a result of their applications, they and the Minor Children received a document (a birth certificate) reflecting their respective California and Texas law status as parents and children. They did not receive a document saying that in the event some other jurisdiction might not recognize the parentage then X and C could represent themselves to be the guardians.

⁸⁶ Dicey, Morris & Collins: The Conflict of Laws (15th edn. Sweet & Maxwell 2018) at Vol.2 paragraph 19-073.

[188] I am satisfied that X and C were not accorded rights and duties in any other capacity than as 'Intended **Parents**' [emphasis added].

[189] Thus, if the US Orders declaring parentage are not liable to be recognized in this jurisdiction for the reasons I have outlined above, the rights and duties appertaining to parentage should logically not be recognized either. There is no reason for holding that the rights and duties somehow detach themselves from the underlying finding of parentage and should be recognized independently therefrom.

Justice and fairness

[190] C submits that if this Court does not make the recognition orders she seeks, then the Minor Beneficiaries will be 'utterly parentless' and will be left without a remedy. That emotive submission is mistaken.

[191] As I have already observed, the Minor Children have C as their legal mother under California and Texas law.

[192] Moreover, as the Claimants observed, there is no evidence that C could not obtain the same rights and duties as a parent (if not the title) according to the law of her and the Minor Children's habitual residence, Hong Kong.

[193] Furthermore, the interests which this Court is being called upon to protect are limited to the Minor Beneficiaries' interests under the BVI Trusts. Those interests do not include any home or family life of C or the Minor Children in this jurisdiction. I am satisfied that the Trustee Act provides the Trustees and the beneficiaries with ample powers in which to achieve sufficient arrangements for application of distributions from the Trusts for the benefit of the Minor Beneficiaries. Equally, I am satisfied that the Minor Beneficiaries are adequately catered for by the provisions of the CPR for the appointment of a Next Friend to enable them to take part in proceedings concerning the Trusts, including to ask the Court for directions if they consider their interests are not properly being looked after by the Trustees. I thus see no injustice nor unfairness to C nor to the Minor Beneficiaries in declining to accede to her recognition application.

[194] Moreover, clause 9 of the Gestational Carriage Agreement provided, as I have mentioned above, that surrogate parenting is a new and unsettled area of the law and that the parties ‘understand that this Agreement may be held unenforceable in whole or in part as against public policy’. That was a risk C took, with her eyes open. The risk that a foreign court might decline to recognize parentage orders made on the back of such an agreement falls in the same category. It is not part of the task of this Court to save C from the consequences of her choices, particularly where there exist alternative channels through which the welfare of the Minor Children can be safeguarded.

Public policy

[195] Since I have found that the application for recognition fails on grounds other than public policy, I do not need to consider whether recognition of the US Orders should be denied on grounds of public policy.

[196] Since however, this is an area in which there is likely to be future interest, I would add the following brief general comments, without attempting any in depth analyses of law or facts. They are necessarily *obiter*.

[197] The parties disagreed whether the BVI has a public policy in relation to commercial surrogacy arrangements. The Court heard some forceful submissions on this from both sides. I shall assume that the present surrogacy arrangements were indeed commercial in nature, without deciding the point. They would, I think, be so treated under English law. It is difficult to see how the payment of a pre-agreed lump sum of the magnitudes in question here, between legal strangers, could sensibly be treated as non-commercial in nature. While the Gestational Carriage Agreements are at pains to stress that the payments were not to be construed as a fee for services but were ‘compensation’, the reality is pellucid that X and C were paying the gestational mothers to rent their wombs and their bodies to incubate unborn children.

[198] Unlike in the United Kingdom, where statute expresses the public policy in relation to surrogacy arrangements at least in outline, in this jurisdiction statute does not directly do so. In the United Kingdom, the current legislation that would be applicable to an applicant such as C is the Human Fertilisation and Embryology Act 2008 (‘HFEA’).

[199] By section 54A of HFEA, provision is made for a single applicant to apply for a parentage order in cases where a child has been conceived and born pursuant to a surrogacy agreement. For present purposes, the most material subsection is subsection (7), which provides:

“(7) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by the applicant for or in consideration of—

- (a) the making of the order,
 - (b) any agreement required by subsection (5),
 - (c) the handing over of the child to the applicant, or
 - (d) the making of arrangements with a view to the making of the order,
- unless authorised by the court.”

[200] As explained by the English High Court in **In Re S (Parental Order)**,⁸⁷ which concerned a California Gestational Carriage Agreement apparently not dissimilar from those used here, a surrogacy arrangement which breaches the United Kingdom rule against payment for surrogacy services, other than expenses reasonably incurred, means that such an arrangement would not be considered lawful, and thus would not be recognized by the United Kingdom courts.⁸⁸

[201] The court explained further:

“This clearly raises matters of public policy and those matters really relate to, as it seems to me, three things:

(1) To ensuring that commercial surrogacy agreements are not used to circumvent childcare laws in this country, so as to result in the approval of arrangements in favour of people who would not have been approved as parents under any set of existing arrangements in this country.

(2) The court should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.

(3) The court should be astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate.”

⁸⁷ [2009] EWHC 2977 (Fam).

⁸⁸ [2009] EWHC 2977 (Fam) at paragraph 7 (Hedley J).

- [202] Whilst these public policy considerations derive directly from a statute, which does not apply in this jurisdiction, they can be seen to be more fundamentally grounded. As such, these considerations are likely to apply also in the BVI, without needing to be expressly legislated for, although this will ultimately be a matter for the legislature to settle.
- [203] It is hardly controversial that in this jurisdiction there must already be a public interest in ensuring that childcare laws are not circumvented. To allow this would infringe numerous Articles of the United Nations Convention on the Rights of the Child.
- [204] Equally, in relation to the purchase of children abroad, the attempted selling and purchase of persons would run contrary against the right to liberty and security of the person enshrined in the Constitution Order.⁸⁹
- [205] The third public policy reason cited by the English court concerns a desire to deprecate and discourage the exploitation of women. In the BVI, this could engage various sections of the Constitution Order, including
- (1) Section 13 - protection from inhuman treatment;
 - (2) Section 14 - protection from slavery and forced labour;
 - (3) Section 18 - the right to freedom of movement;
 - (4) Section 19 - the right to respect for private and family life;
 - (5) Section 21 - the enjoyment of freedom of conscience, including freedom to change religion or belief;
 - (6) Section 24 - the enjoyment of freedom of peaceful assembly and association.
- [206] Other expressions of public policy can be ascertained from civil and criminal statutes. The latter, in particular, reflect interests and values that the legislature considers it important to protect.
- [207] In this regard, it is quite possible that BVI courts would be bound to treat parts of surrogacy agreements, or indeed entire such agreements, unenforceable. Provisions such as those that allow intended parents to control the pregnancy management, including, for example, by requiring the gestational mother promptly to take whatever medicine the Intended Parents'

⁸⁹ At paragraph 15.

reproductive endocrinologist might prescribe, may be seen to run counter to the public policies reflected in clauses 13, 19 and 21 of the Constitution Order.

- [208] The same would apply to terms that vest in the intended parents the power to decide whether or not the pregnancy(ies) should be aborted.
- [209] Under BVI law, there is no abortion on demand. This is commensurate with BVI law recognizing that the new life developing within a woman's body is a human being, a child, from conception and not something less, such as a *potential* human life. Such recognition by BVI law accords perfectly with the point of *in vitro* artificial conception procedures, namely, to start a new human life before it is transferred into the gestational mother. Contractual provisions purporting to let intended parents decide at will whether to abort the pregnancy(ies) would appear to be unenforceable for illegality. Such provisions would appear to run directly contrary to the public policies reflected in sections 139, 140 and/or 141 of the Criminal Code as well as the fundamental rights and freedoms of children contained in the CRC. It would depend upon the terms of each contract whether or not such provisions do infringe these public policies, and if so, whether they could be severed.
- [210] Provisions whereby the gestational mother purports to agree to let the intended parents decide whether or not her pregnancy is to be aborted, could also fall foul of a public policy, reflected in clause 21 of the Constitution Order, that a gestational mother has a fundamental right to change her beliefs.
- [211] That concerns such as these are to be taken seriously appears to be demonstrated by the fact that the Texas Gestational Carriage Agreement was specifically amended to return to the gestational mother the right to make decisions in relation to her own and the unborn child's health. It is apparent that this change was required to prevent the California terms offending against Texas law requirements. It is salutary that different states within the same federal system, such as in the United States, do not uncritically accept agreements that are lawful in other states. The public policies of the domestic forum require careful consideration, particularly where markedly different approaches to bioethical issues are apparent.
- [212] In seeking to apply the public policy of this jurisdiction, it is well established that this Court should not engage upon 'any arrogant attempt on the court's part to mark the foreign court's

homework'. It is not part of this Court's remit to protect the processes of a foreign court, let alone to presume what such processes are. A salient example in this case is that it was stated at Recital 1 to the Gestational Carriage Agreement that X and C were a married couple. This Court has been told that they were not married. It is possible (but not necessarily the case) that the California and/or Texas courts were misled into making the orders they did on this false basis. Equally, the conclusion that C should have been found, in respect of one of the children, to be the 'presumed natural mother' would appear to be surprising, when it is uncontroversial that she was not and there appear to be absolutely no facts that suggest she was or might have been. Quite how the foreign court reached that result is unclear. But it is not part of this Court's function to go through the motions of deciding the California or Texas applications afresh, applying the foreign law and procedure, to see whether those courts had reached a correct decision under the foreign law.

- [213] On the other hand, this Court could not ignore the nature of the surrogacy arrangement itself. It would be a matter for this Court to decide whether or not the arrangements would be illegal under our law or contrary to public policy. Whatever process a foreign court engaged upon that led it to accept such an agreement, with or without a proper inquiry as to the veracity of the documentation before it, when it comes to a BVI Court deciding whether a surrogacy arrangement complies with BVI public policy, the BVI Court must ascertain the true facts for itself. This may mean requiring the parties to adduce evidence as to how payments to a gestational mother and her husband are treated for tax purposes in the foreign jurisdiction where the surrogacy took place, and in what terms, if any, the surrogacy agency that the parties used advertises the financial 'compensation' to prospective gestational mothers. If such an agency does so in terms calculated to entice prospective gestational mothers to offer their wombs and bodies with promises of financial benefits, that would be a strong indicator of an arrangement that is commercial in type. I am unaware of any binding authority which constrains this Court to accept uncritically as fact matters upon which contractual counterparties have combined to agree upon, particularly where matters of public policy and public record, such as marriage and parentage, are concerned. A case in point is parties' inability at common law to contract out of the operation of law in relation to parentage, as discussed in greater detail above.

Disposition

[214] Thus, in terms of relief to be granted now:

In relation to the Claimants' claim for directions:

- (1) The first order sought in the Claimant's Fixed Date Claim Form is stood over for further hearing;
- (2) The second and third orders there sought are denied;

In relation to C's application to be appointed as the Next Friend of the Minor Beneficiaries, filed on 14th September 2020:

- (3) This application succeeds.
- (4) C shall also have the express right to correspond and communicate with the Trustees on behalf of the Minor Beneficiaries in relation to the proposed restructuring of the Trusts and to instruct and retain any relevant professional advisers pertaining to the proposed reorganization. This direction is made under the second order C sought in her Notice of Application filed on 14th September 2020.

In relation to C's application, filed on 13th November 2020, seeking orders that the US Orders be recognized by this Court as conferring on C the status of mother and/or guardian, or person otherwise having legal responsibility for each of the Minor Children:

- (5) This application fails.

The Court will hear the parties further in relation to the issue of costs.

[215] The Court extends its gratitude to learned Counsel for all parties for their assistance to the Court.

Gerhard Wallbank

High Court Judge

By the Court

Registrar