

**Paper for the meeting of the Bills Committee to Study the
Human Reproductive Technology Bill
to be held on 29 October 1998**

At the last meeting of the Bills Committee, Members asked the Legal Service Division to assist in the following two questions. In view of the complexity of the matters we put the information into this paper for the assistance of Members.

Can a husband or wife give evidence in respect of his or her spouse?

2. Under clause 22, the person responsible for securing certain standards under a licence can be the husband or wife of the licensee. Members were concerned that where there was a legal proceeding in which the person responsible and the licensee were husband and wife, would they be able to give evidence for or against the other.

3. The general rule on evidence of spouses is in section 5 of the Evidence Ordinance (Cap. 8). The rule is in all legal proceedings husbands and wives are competent and compellable to give evidence for or against his or her spouse.

4. However, in criminal proceedings a different rule applies. Section 6 of the said Ordinance provides that in criminal proceedings a husband or wife is not competent or compellable to give evidence for or against his or her spouse. There are various exceptions to this rule. The more notable ones being a spouse may testify against the other in cases of personal violence against the spouse, and theft of the property of the spouse. The law also permits a spouse of the defendant to give evidence for the defence on the application of the defendant (section 54(1), Criminal Procedure Ordinance (Cap. 221)). Even if a spouse is giving evidence in criminal proceedings, he or she cannot be compelled to disclose communication made by his or her spouse if the communication was made when they are married (section 7, Evidence Ordinance).

What is the implication of clause 32?

5. In essence, clause 32 provides for a mechanism for disclosure of information where the court has to determine a question whether a person is or is not the parent of a child by virtue of sections 9, 10 and 11 of the Parent and Child Ordinance (Cap. 429) (i.e. determining who is the mother or father of a child who is a result of medical treatment. Details of the three sections are given in paragraphs 7 to 9 below). Making of an order of disclosure is subject to the conditions set down in clause 32(2) (i.e. the disclosure should be for the interests of justice and before making any order the court has to take into account any representation made by any individual who may be affected by the disclosure,

and the welfare of any minor who may be affected by the disclosure). When the conditions are satisfied, the court may order the Council on Human Reproductive Technology to disclose whether any information relevant to that question is contained in Register A and, if it is, to disclose so much of the information as specified in the order.

6. The information to be kept in Register A (and to be disclosed under the court order) is:-

- (a) the provision of a reproductive technology procedure to an individual, and the result; and
- (b) the identity of the spouse of the individual;

where the procedure involves the use of the gametes not from the spouse of the individual, or involves an embryo of another woman and an identifiable man. It would seem that under clause 32(1) the court may not order the Council to disclose the identity of the individual who received a reproductive technology procedure nor that of his/her spouse if the procedure involves the use of the gametes or embryo of another individual not a party to the marriage. We have discussed a technical drafting aspect in clause 32(1) with the Administration and understand that the Administration is reviewing the reference to “section 30(2)(i) or (ii)” therein.

7. Turning to sections 9, 10 and 11 of the Parent and Child Ordinance. They provide for the meaning of “mother” and “father” where birth or pregnancy results from medical treatment. In section 2 of the Ordinance, “treatment services” is defined as medical, surgical or obstetric services administered for the purpose of assisting a woman to carry a child. In section 9, “mother” means the woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs. The section specifies that this meaning does not apply to adoption situation.

8. Under section 10 of the Parent and Child Ordinance, “father” means, in the case of married couples, the husband of a woman who has been placed with an embryo or sperm and eggs or insemination if the creation of the embryo was not brought about with his sperm, unless it is shown that he did not consent to the procedure. In the case of cohabitees, “father” means the male partner who sought treatment together with the woman who has been placed with the embryo etc. and the embryo was not created with his sperm. And, for the purposes of the law of succession, where the sperm of a man was used after his death or an embryo was created after the death of the man whose sperm was used for the creation, the man is not to be regarded as the father of the child.

9. Under section 11 of the Parent and Child Ordinance, a person regarded as mother or father of a child by virtue of sections 9 and 10 is regarded in law as the mother and father for all purposes in any Ordinance, instrument or document unless the contrary intention appears.

10. Prima facie, it would appear that clause 32 mainly concerns with civil cases such as succession and custody. However, the drafting of the clause is wide enough to cover all legal proceedings in which the question arises as to who is the parent of a child where the birth or pregnancy results from medical treatment. The clause is essentially similar in wording to section 34 of the UK Human Fertilisation and Embryology Act 1990 which came into operation on 1 August 1991. We are not aware of any judicial decision under the UK section at this stage.

Prepared by:

LEE Yu-sung

Senior Assistant Legal Adviser

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