

Why surrogacy can be a fertile ground for legal complications

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Adoption was once the only route to parenthood for couples with fertility issues. But advances in medical technology have given rise to other options.

Surrogacy is increasingly in the headlines, having been used by older, high-profile parents, such as Elton John, Nicole Kidman and Sarah Jessica Parker. A surrogacy arrangement involves a woman who agrees to carry, for someone else, a child conceived using reproductive technology. The intention is that at birth, or soon after, the child will be handed to those parents who will exercise parental rights.

But few people are aware of the legal complexities and practical pitfalls that accompany surrogacy arrangements.

Across the globe, surrogacy arrangements are subject to different restrictions. In the United States, surrogacy operates as a regulated, commercial activity. Other jurisdictions, such as Britain and Hong Kong, take a more conservative stance. Only the gametes of the two people who intend to exercise parental rights may be used and commercial surrogacy, either at home or abroad, is prohibited.

Since pregnancy and getting ready for the birth necessarily involves expenditure, for which the aspiring parents might reasonably expect and wish to be responsible, this gives rise to a significant issue.

Treading the tightrope between what might possibly be permitted and what is illegal requires careful forethought and specialist legal advice to avoid falling foul of the rules.

In Hong Kong while non-commercial surrogacy is permitted, such arrangements are not enforceable as contracts.

Therefore, they always carry the risk that the surrogate mother may decide at any time not to give up the child.

Before the baby is handed over, the surrogate mother remains the child's legal parent. If she is married at the time of the surrogacy, her husband will be the legal father of the child until a parental order is made – unless it can be proved that he did not consent. If the birth mother is not married, the sperm donor is deemed to be the legal father. The legal father must, therefore, also take care that any arrangements made do not land him with a liability to maintain a child he did not think would be his responsibility.

Until the Court agrees to grant an order by which parental rights are transferred to the would-be parents, they have no legal status. In this way the Court retains the ultimate power to oversee surrogacy arrangements.

Because of this uncertainty, some couples may be tempted to look abroad to take advantage of a less restrictive jurisdiction or one where an unregulated "underground" surrogacy system has sprung up. But upon return with any child to Hong Kong there are immigration and parental issues to consider.

Perhaps the most serious consequence is that the children may be considered to be without a fixed country of residence. Without such a status, they are not subject to the Hague Convention, which protects children in the event of abduction.

The price of getting it wrong – in particular, the potential adverse effect on the child are serious, scary and potentially lifelong. It is therefore crucial to the welfare of the children that all parties concerned – the birth mother, the couple hoping for a child, and the legal father if not the husband – all fully understand the implications of surrogacy and take professional advice before embarking on this route to a family.

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