Imagine you are a woman who has tried everything to have a child with your husband, and failed. The adoption process seems complicated and uncertain. Moreover, you want a child who is genetically related to you. The answer may well seem to be surrogacy.

But with rapidly developing medical technology and a mobile world population, legal issues arising in this area are becoming more prevalent.

The public is generally well informed about the medical advances but it is often uninformed about the legal ramifications of surrogacy and fertility law.

There are a number of potentially major problems which need to be considered.

First, even if the egg and the sperm are from a woman and her husband, when the embryo or sperm and eggs have been placed in the surrogate mother’s womb, the child is legally hers – even though she has no genetic relation to the child.

If the surrogate mother is married, or has a male partner who “obtained treatment services” with her – her husband or that male partner is the legal father, not the husband who donated his sperm.

The “biological” mother carrying essentially the couple’s genetically related child, may refuse to hand over the child on birth. The legal father is legally bound to support the child financially, and it is possible that there are many husbands of surrogate mothers who are completely unaware that they have any financial responsibilities to the child at all.

Second, surrogacy agreements are unenforceable in Hong Kong. Therefore, while it may be prudent to enter into a surrogacy agreement at the outset, making clear all the arrangements, intentions and expectations, not least the position of the surrogate’s husband or male partner if she has one, such an agreement is persuasive only.

The agreement may not be sufficient to overrule a surrogate mother’s decision to keep the child. Plus, fertility treatment often results in multiple fetuses.

The Helen Beasley case, which hit the headlines in England in 2002, is an example of how things can go badly wrong. The surrogate mother fell out with the commissioning couple and refused to comply with a term in a Californian surrogacy agreement requiring “selective reduction” – abortion – of one of the twins she was carrying for the couple.

So, the advice is to proceed with extreme care. Most couples in Hong Kong prefer to enter into a surrogacy arrangement overseas, where it can be enforced. Once the baby is born, apply without delay for a parental order. This must be applied for within six months of the birth.

Parental orders recognise that the child is to be regarded in law as your child and that of your husband.

Third, it is not easy to find someone who is willing to bear a child for you and then give it up at birth. This is particularly so in Hong Kong (and England and Wales), where commercial surrogacies are illegal and there are criminal sanctions relating to payment. So you cannot pay the surrogate, which gives her little incentive to carry it through.

The surrogate can, however, claim costs such as medical and travel expenses. Unreasonable or excessive payments can jeopardise the all-important parental order. The court must be satisfied that no money or other benefit has been given to the surrogate in consideration of handing over the child.

Fourth, parental orders will only be made in favour of certain applicants, in particular, married couples. So the process is not open to same sex couples in Hong Kong, or unmarried couples, or single people.

Parental orders will only be made if the parties are over 18 and either are domiciled, habitually resident, or have a substantial connection with, Hong Kong; the gametes of either or both of the parties were used to bring about the creation of the embryo; and the surrogate and her partner have agreed unconditionally to the making of the order. It must also be shown that the child’s home will be the applicants’ home.

Finally, immigration advice will be required to ensure the child is legally brought into the jurisdiction.
In practice, since surrogacy agreements are not enforceable in Hong Kong, leading to concern that the mother may change her mind, most couples go outside the jurisdiction to make a surrogacy arrangement, and then bring the child into the jurisdiction and apply for parental orders.

The unregulated nature of international surrogacy has been examined by the Permanent Bureau of the Hague Conference on Private International Law. The bureau has been asked to provide a report that would encourage a more unified approach, due in 2014.

So, bearing in mind the current restrictions in Hong Kong, the surrogacy route may not be so attractive after all.

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