

Surrogacy in Hong Kong: all you need to know about the risks and legal ramifications involved

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The controversial topic of surrogacy has again hit the headlines recently with the story of the Japanese billionaire who has fathered 13 children through Thai surrogate mothers. The 28 year old businessman was granted sole parental rights to the children by the juvenile court in Bangkok as the mothers had signed away all rights to them and DNA tests proved that he was the biological father to all the children. The court said *'for the happiness and opportunities which the 13 children will receive from their biological father, who does not have a history of bad behaviour, the court rules that all 13 born from surrogacy to be legal children of the plaintiff'*. It remains an odd case however, particularly as 9 of the babies were found in one flat in Bangkok and 4 others had been sent to Cambodia, prompting questions of human trafficking. Mr Shigetato said he simply wanted a big family.

Surrogacy in Thailand came under scrutiny in 2013 when a surrogate mother gave birth to twins, one with Down's syndrome and the Australian couple would only assume parental rights over the other child. These cases prompted the authorities to ban foreigners from paying for surrogates.

Surrogacy can, of course be a wonderful solution for parents who cannot have children naturally. They are able now through medical ingenuity to have children who are genetically connected to them and in some parts of the world, notably the USA, where such arrangements are closely regulated, surrogacy is accepted as a viable alternative to adoption and other medical processes such as artificial insemination and in vitro fertilization. However, extreme care must be taken as surrogacy is not legal in many parts of the world and surrogacy agreements which may be accepted in one jurisdiction will not be recognized in another. With the life and status of the child at stake, it is clearly crucial to get this right. Whereas the public may be well informed about the medical advances, it is often remarkably uninformed about the ramifications of surrogacy and fertility law.

In Hong Kong surrogacy agreements are unenforceable and commercial surrogacy is illegal. As a result surrogacy remains quite rare in Hong Kong as it is a grey area of the law with potential criminal ramifications and risk. Most parents prefer to go overseas to enter into a surrogacy arrangement where it can be enforced but for couples who do not meet the legal criteria in Hong Kong, there may also be criminal consequences in seeking a surrogate abroad.

One of the major risks in surrogacy is where the surrogate mother decides she does not want to transfer legal rights to the biological parents. The woman who bears the child is the legal mother of the child until a parental order which says otherwise is in place. A surrogate mother is one who carries the child pursuant to an arrangement made before she began to carry the child and made with a view to any child carried pursuant to the arrangement being handed over to, and the parental rights being exercised by, another person or persons and conceived by a reproductive technology procedure. Reproductive technology includes AI, IVF and egg and embryo donations. This is so regardless of where the mother was when the embryo or sperm and eggs were placed in her. By the same token, if that mother is married at the time of the surrogacy, the 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 legal father may be a male partner who *'attended treatment services'* with the surrogate. In the absence of a male partner, the donator of the sperm is deemed to be the legal father. The legal father therefore must be sure that any arrangements made do not land him with a liability to maintain a child he did not think would be his responsibility.

By making surrogacy arrangements unenforceable in Hong Kong, the court maintains control. It is not banned however, and arrangements are regulated by the Parent and Child Ordinance and allowed where, in view of the clinical condition of the commissioning couple, the commissioning wife is unable to carry a pregnancy to term and no other treatment option is practicable for her. Once the baby is born the commissioning parents should apply within 6 months for a parental order. Hong Kong imposes strict rules and surrogacy is only an option for married (and therefore in Hong Kong, heterosexual) couples. Parental orders will only be made if the parties are over 18 and either are domiciled, habitually resident for a year or have a substantial connection with, Hong Kong. Also, it is a condition that the gametes of either or both of the parties was 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'. In addition, the surrogate herself must be over 21 and must have been assessed by a registered

medical practitioner, who is not responsible for the reproductive technology procedure, who must consider her marital status, her history of pregnancy and her physical and mental fitness to carry the baby.

Commercial surrogacy is illegal and the court must be satisfied that no money or other benefit (other than expenses reasonably incurred) has been given or received in respect of the arrangement, unless authorised or subsequently approved by the court. What is considered '*expenses reasonably incurred*' has been the subject of litigation in England and Wales, but cases on surrogacy rarely come before the courts in Hong Kong (there has been one reported case). Under the Human Reproductive Technology Ordinance the criminal sanctions are a fine of HK\$25,000 and 6 months imprisonment increasing to HK\$50,000 and 2 years imprisonment for a second offence: this is not confined to within Hong Kong as it applies to an act done whether inside or outside Hong Kong.

In addition to criminal sanctions, the most serious consequence where the surrogacy is not enforceable 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 child abduction. It is therefore crucial to the welfare of the children and their future stability that all parties concerned: the birth mother, the husband and wife hoping for a child, the legal father if different from the husband, all fully understand the implications of surrogacy and take proper legal advice before embarking on this route to a family.

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