

FAMILY LAW

Surrogacy Laws in Hong Kong - Time for a Change

Based on a recent survey conducted by the Family Planning Association, the average number of children per woman decreased from 1.3 in 2017 to 0.9 in 2022. Like the rest of the world, Hong Kong is experiencing a declining birth rate. In response, the government recently announced a one-off bonus of HK\$20,000 to new parents as an incentive to have (more) children. Some politicians have also suggested it is an opportune time to review our surrogacy legislation to provide residents with more assisted conception options.

Given the global trend of declining fertility, it is worthwhile considering whether Hong Kong surrogacy laws and policies should be revisited.

Background

Under the Human Reproductive Technology Ordinance (Cap. 561) (HRTCO), surrogacy has been available for over two decades. However, the arrangement is rarely entered into as HRTCO prohibits commercial dealings in prescribed substances (i.e., gametes) or participation in commercial surrogacy arrangements, whether in Hong Kong or elsewhere. It is therefore only permissible in Hong Kong to enter into an altruistic surrogacy arrangement whereby the surrogate mother will carry a pregnancy without receiving monetary compensation from the intended parents.

Local media have recently reported that traditional family values have put people off the idea of “renting a womb” to have a baby but based on the number of enquiries received by intended parent(s) who are contemplating or have already subscribed to overseas surrogacy arrangements, the writer does not agree there is less interest in surrogacy. Most surrogacy arrangements appear to be undertaken in North America where commercial surrogacy is not criminal, and the rights of surrogate mothers are

readily protected by having their own legal representation thereby reducing the risk of financial exploitation.

Parental Rights

To become a surrogate baby’s legal parents (in place of the surrogate mother), the intended parents in Hong Kong can obtain a parental order under section 12 of the Parent and Child Ordinance (Cap. 429). This is, however, only available to married couples and does not apply to single or non-heterosexual couples (even if married overseas). The Court in considering such applications will need to authorise and approve surrogacy expenses in relation to the arrangement.

In the case of intended parent(s) who are not legally recognised married couples, one way is to adopt their surrogate child by seeking the Court’s permission for their child to be put up for private adoption, rather than going through the Social Welfare Department.

To enable the surrogate child to live in Hong Kong as a dependant, the intended parent with biological linkage needs to apply to the Immigration Department for either a dependant visa or verification of the child’s entitlement to permanent residency. If commercial surrogacy is detected, the Immigration Department will refer the case to the Police for investigation even though it won’t affect the application for the surrogate child to settle here.

Based on the writer’s experience, the following observations represent the

prevailing attitude of residents wanting to have children through surrogacy:

Modern societal attitudes: Chinese families have traditional values on family lineage. Surrogacy enables one to continue the family lineage no matter their marital status or sexual orientation. There has been a steady increase of enquiries on the legal process enabling a surrogate child born overseas to live with the intended parent(s) in Hong Kong. Even though the child will be carried by someone unrelated, this is not a hindrance to the intended parent(s) (likely because the child is still biologically related), and surrogacy remains sought after.

Legal recognition of parental status: There is a clear reluctance in making court applications to become legal parents of a surrogate child as it requires an applicant to provide all relevant facts including payments made for the surrogacy arrangement. Even though no case has been referred by the Court to the prosecuting authority in reported surrogacy judgments, it is still a process available to the Judiciary.

Police investigation into commercial surrogacy arrangements: The Police have been tasked with investigating commercial surrogacy arrangements but there do not appear to have been any local prosecutions (which require consent of the Director of Public Prosecution). This could well be owing to difficulties in gathering evidence by the Police as persons under investigation inevitably invoke the right to remain silent. It is



also not possible for the Police to seek mutual assistance from North American counterparts as commercial surrogacy is not a crime there.

Time for reform: It is worth considering the recommendations of the UK Law Commission, especially:

- introducing a new pathway to allow intended parents to become legal parents of their surrogate child at birth;
- clarifying the definition of “reasonable payments” that intended parents can make to surrogates; and
- if such payments are allowed by the court, whether this can constitute a reasonable excuse or lawful reason in respect of commercial surrogacy.

In the writer’s view, there are still many people who want to have children in Hong Kong but who face various difficulties. If our legislation can be reviewed to enable a smoother process for recognition of overseas surrogacy arrangements or even to relax prohibitions against commercial surrogacy, this could well be part of the solution for addressing our declining birth rate.

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家庭法

香港規管代母產子的法例 ——改變的時機

根據香港家庭計劃指導會最近進行的調查結果，每名婦女的平均子女數目由 2017 年的 1.3 名，下降至 2022 年的 0.9 名。與全球其他地方一樣，香港的出生率呈下降趨勢。有見及此，政府最近公布向新生嬰兒的父母發放港幣二萬元的一次性現金獎勵，作為鼓勵生育（更多）子女的措施。有政客更認為現在是適當時候檢討香港規管代母產子的條例，以給居民提供更多輔助受孕的選擇。

由於全球生育率呈下降趨勢，現在值得考慮是否應該重新探討香港有關代

母產子的法例和政策。

背景

根據《人類生殖科技條例》（第 561 章），代母產子已經在香港存在了二十多年。然而，因為《人類生殖科技條例》禁制訂明物質（即配子）的商業交易及禁制任何人參與屬商業性質的代母安排（不論是在香港還是其他地方），所以代母安排極為少見。因此，在香港只准安排代母無私地為擬作為父母的人生育，而代母並不可向他們收取金錢報酬。

本地媒體最近報導，傳統家庭價值觀使人放棄「租用子宮」產子的想法，但根據所收到正打算或已就海外的代母安排預付費用的擬作為父母的人的查詢數目來看，筆者不認同代母安排較少人問津。似乎大多數代母都被安排在北美產子，因為商業性質的代母產子在那裡不屬刑事，而且代母有自己的法律代表以使她們的權利隨時得到保護，因而減少了受到經濟剝削的風險。

作為父母的權利

根據《父母與子女條例》（第 429 章）第 12 條，在香港的擬作為父母的人要取代代母成為代母所生的嬰兒的合法父母，可向法庭申請獲判定為父母的命令。然而，只有已婚夫婦才可申請命令，而且這條法例並不適用於單身人士或同性伴侶（即使二人已在海外結婚）。考慮這一類申請時，法庭需要授權並批准就代母安排的相關開支。

如果擬作為父母的人不是法律承認的已婚夫婦，他們可以向法庭申請許可私下領養自己透過代母所生的孩子，而不用透過社會福利署領養。

為使代母所生的孩子能夠以受養人身份在香港居住，擬作為父母而又有血緣關係的人需要向入境事務處申請受養人簽證或證明孩子享有永久居留權的核實證明書。如果代母安排被發現屬商業性質，入境事務處會將個案轉交警方調查，但這不會影響為代母所生的孩子提出在港定居的申請。

根據筆者觀察所得，以下是希望透過代母產子的居民的普遍態度：

現代社會態度：華人家庭對家族血統抱有傳統的價值觀。不管是什麼婚姻

狀況或性取向，代母產子使人能夠延續家族血統。在海外由代母所生的孩子需要經過法律程序方可與擬作為父母的人在�香港同住，而有關這方面的法律程序的查詢一直穩定增加。雖然孩子是由一個與自己全無關係的人懷著，但這無阻擬作為父母的人選擇由代母產子（可能是因為孩子依然與自己有血緣關係），尋求代母產子的依然大有人在。

法律承認作為父母的地位：有些人不願意向法庭申請成為代母所生的孩子的合法父母，因為申請人需要提供所有相關事實，包括就代母安排支付的費用。雖然法庭從沒有把有代母安排的案例轉交檢控機關，但一直以來法庭是可以將這類型的案件轉交檢控機關的。

警方調查屬商業性質的代母安排：警方有責任調查屬商業性質的代母安排，不過香港似乎一直沒有任何檢控個案（在香港需要得到刑事檢控專員同意才可提出檢控）。很可能這是由於被調查人無可避免地引用保持緘默的權利，以致警方蒐證困難。此外，因為屬商業性質的代母產子在北美不屬刑事，警方不可能向北美警方尋求相互協助。

改革的時機：現在值得考慮英國法律委員會的建議，特別是以下三點：

- 引入新途徑，讓擬成為父母的人在代母所生的孩子出世時成為孩子的合法父母；
- 清楚界定擬成為父母的人可以就代母產子支付的「合理款項」；及
- 考慮如果法庭批准支付該合理款項，這個「批准」可會構成屬商業性質的代母產子的一個合理辯解或合法律由。

筆者認為，香港仍然有很多人想要孩子但正面對各種各樣的困難。如果本地法例能夠進行一次檢討，使承認海外代母安排的程序更為流暢，甚至放寬對屬商業性質的代母安排的禁制規定，這可以是應對出生率持續下跌的方法之一。

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