

Surrogacy

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Introduction

Surrogacy is where a woman is artificially impregnated, whether for monetary consideration or not, with the intention that the child is to be given and adopted by some other person or couple.¹ Together with in vitro fertilisation (IVF) and intracytoplasmic sperm injection, surrogacy may be considered a form of assisted reproductive treatment (ART). With couples in Singapore getting married later,² declining fertility rates³ and the success rate of IVF hovering at around 50%,⁴ surrogacy is increasingly considered as a possible solution to infertility.

Surrogacy, however, remains fraught with ethical and legal questions.⁵ The matter is further complicated by the transnational surrogacy arrangements that may result in cross-border legal tussles, exploitation and even stateless orphans. Despite the unavailability of surrogacy procedures in Singapore, there is evidence of Singaporeans going abroad to seek surrogacy services.⁶ A Singapore legal framework addressing the issue is thus due.

With the hope of shedding light on how Singapore could regulate surrogacy in future, this article examines jurisdictions with priorities similar to Singapore, namely the UK, Hong Kong (HK) and the US (specifically, California). The UK legal system forms the foundations of the Singapore legal system,⁷ hence it is fruitful to examine how the UK system has developed to address changing social concerns. HK provides an excellent comparison given its similarities to Singapore – a former British colony that became an affluent cosmopolitan city grounded in Asian values. Finally, California has positioned itself as a commercial surrogacy centre⁸ and has incentives to ensure a robust legal framework to protect

both commissioning parents (CPs) and surrogate mothers (SMs). Examining California's regulations provides a holistic perspective on balancing the different interests of all parties.

Surrogacy laws across jurisdictions

United Kingdom

The Human Fertilisation and Embryology Act (HFEA) 2008 governs the surrogacy procedure and its only prohibition involves the use of embryos with altered DNA.⁹ Hence parties may use gametes that come from the CPs, SMs or anonymous donors. There is the possibility of creating an embryo from two gametes that come from anonymous donors, although this might present a complication for legal parenthood.

The Surrogacy Arrangement Act makes commercial surrogacy arrangements illegal.¹⁰ *Commercial* is defined as involving "payment", but "does not include payment to or for the benefit of a surrogate mother."¹⁰ Hence the label "commercial", which renders an arrangement illegal, must be distinguished from permitted paid surrogacy services. Courts have generally been quite accepting of a wide range of permitted expenses which include loss earnings of the SM and her partner, pregnancy-related therapies, clothes and expenses, and even a modest recovery break for the surrogate and her family.¹¹

The arrangement however does not automatically confer legal parenthood to CPs. Instead, the SM and her husband, or civil partner, are considered legal parents, even when donated eggs are involved.⁹ For CPs to gain legal parenthood, a parental order has to be applied for with the SM's consent, and a genetic link has to exist between the

child and at least one of the CPs.⁹ The last requirement may create challenges in an application for a parental order where two donor gametes are used. Previously, only couples in marriages, civil partnerships or enduring relationships were allowed to apply for the parental order, but now singles may also apply.¹² However, surrogacy arrangements are not enforceable should parties change their minds.¹⁰

The UK Law Commission has since also highlighted the inadequacies of the current legal framework for surrogacy and has announced a review on surrogacy laws.¹³

Hong Kong

The Human Reproductive Technology Ordinance (HRTTO) prohibits the use of ART for surrogacy unless CPs are married, and donated gametes come from CPs.¹⁴ The Code of Practice on Reproductive Technology and Embryo Research further states that the surrogacy procedure may only be provided where "the wife in that marriage is unable to carry a pregnancy to term and no other treatment option is practicable for her."¹⁵

The HRTTO prohibits "commercial" surrogacy where "no person shall make or receive any payment."¹⁴ However, it excludes reimbursements for:

- the ART procedure,
- a gamete donor's expenses and loss of earnings, and
- the SM's ART- and pregnancy-related expenses.¹⁴

The commercial surrogacy arrangements prohibition extends to arrangements made outside HK.¹⁴

As in UK, legal parenthood in HK is conferred by default on the SM and her husband.¹⁶ The similarity is unsurprising since s9 and s10 of the HRTTO were taken

from the UK HFEA 1990.¹⁷ For legal parenthood, CPs must apply for a parental order with the SM's agreement.¹⁶

Similarly, "no surrogacy arrangement is enforceable" should parties change their minds.¹⁴

California

There are no restrictions on the surrogacy procedure or source of gametes used. In 1998, the Court of Appeal already had to determine legal parenthood for a baby conceived with the gametes of two anonymous donors.¹⁸

A legal arrangement is required before medical procedures for surrogacy may commence.¹⁹ The mandatory arrangement requires specific information like the identity of gamete donors and CPs, and disclosure of how medical expenses will be managed.¹⁹ Furthermore, both CPs and the SM have to be "represented by independent licensed attorneys of their choosing."¹⁹

Payment for the surrogacy is regulated by § 7961 which requires the involvement of a "licensed, independent, bonded escrow company" or an "attorney."²⁰

Unlike in UK and HK, the "intended parent" is treated in law as if he or she were the natural parent of a child thereby conceived.²¹ This parent-child relationship may also be legally established before birth.¹⁹

Surrogacy arrangements are enforceable as held in the 1993 landmark case *Johnson v Calvert* where the CPs were recognised as legal parents on the basis that they "intended to procreate the child."²² The emphasis on "parenthood by intent"²³ was also depended upon in *Buzzanca*.¹⁸

Singapore

Carrying out a surrogacy procedure in Singapore is prohibited.¹ There is however, no law regulating Singaporeans' participation in surrogacy procedures abroad.

There is also no law addressing surrogacy arrangements, partly due to the unlawfulness of carrying out such procedures,¹ and the possibility that there is presently no settled public policy on surrogacy.⁶

In the landmark case of *UKM v Attorney-General (UKM)* regarding a gay father wanting to adopt his biological

child conceived via surrogacy in the US, the High Court found that paid surrogacy fell within the ambit of unlawful payment for adoption.⁶ The payment could however be sanctioned by the court rendering it lawful.⁶ In *UKM*, the court sanctioned the payment after assessing that payment was made to adopt the child "with a sincere desire to benefit and promote [the child's] welfare."⁶ Hence there appears to be no prohibitions against paid surrogacy overseas if the adoption intent is genuine.

The law regarding legal parenthood for surrogacy also appears unsettled. While the Status of Children (Assisted Reproduction Technology) Act (SCARTA) addresses parenthood for children born through ART,²⁴ the bill was not intended to "address the larger question of surrogacy."²⁵ In *UKM*, the court however did observe that for children who were born after SCARTA, "the parentage of the child would likely fall to be determined under the SCARTA."²⁶ However, it is worth noting that between 2008 and 2018, ten out of 14 adoption applications for children born through surrogacy had been approved in Singapore⁶ and no less than 15 children born via surrogacy arrangements in the US were brought back to Singapore in 2017.²⁶ In *UKM*, the court placed emphasis on the welfare of the child, but also found that the appellant's status as biological father was favourable in "asserting his legal rights as the Child's father," which suggests that genetic relation is used to assess parenthood.⁶

Context of foreign laws

In the US, surrogacy issues are embedded within the context of changes in family structure and the role of women.²⁷ There is a long history in reproductive rights discourse,²⁸ especially concerning women's reproductive choices.²⁹ Moreover, recent narratives of LGBTQ equality³⁰ include the issue of rights to form a family.³¹ As these discourses develop, the permissive stance towards surrogacy in California has also had the practical effect of attracting CPs from other countries,³² turning surrogacy in the US into a "billion dollar industry."³³

In UK, issues of consent and rights dominate.³⁴ Although surrogacy is available in UK, many CPs still go abroad

given the unenforceability of surrogacy contracts and uncertainty surrounding payment for SMs.³⁵

In HK, traditional Confucian beliefs on social order and role expectations³⁶ remain relevant.³⁷ Hence, unlike western discourses about individual rights,³⁸ reproduction issues in HK are framed as an obligation to carry on the family line.³⁹ Surrogacy is thus restricted to situations of medically proven infertility, and confined within the traditionally recognised family structure of a married heterosexual couple.

Should surrogacy be allowed in Singapore?

Genetic affinity and profile of CPs

Reasons for procreation in Singapore are similar to HK where couples seek to carry on the family bloodline.⁴⁰ Recently, in *ACB v Thomson Medical Pte Ltd (ACB)*, a case where a wrong donor sperm was used in an IVF procedure, the Court of Appeal recognised "genetic affinity", a new head of damage for parents of children born out of medical negligence.⁴¹ Procreation in Singapore is seen less as an assertion of rights, but more as an extension of a marriage.⁴² Hence, if Singapore chooses to allow surrogacy, HK's restriction of limiting CPs to married couples whose gametes are used for the procedure could be applied to Singapore without too much controversy. Limiting surrogacy to situations where the donor embryo is exclusively constituted from the CPs' gametes will also cohere with evaluation of parenthood based on biological relation. In such situations, there will be no need to invoke the Californian concept of "parenthood by intent"²³ since the couple initiating the surrogacy arrangement will also be biologically related to the child.

Equality and surrogacy locally or abroad

Restricting surrogacy to married infertile couples may however seem unfair. In the UK and US, equality and rights to reproduction form a large part of the surrogacy discourse.⁴³ However, such expressions of self-focused concerns may not find support in Singapore where communitarian interests are valued.⁴⁴ Similar to HK, Singapore is influenced by Confucian ideas⁴⁵ that espouse the

placing of “society above self.”⁴⁶ Hence discourse about reproductive rights is generally muted.

The equality debate in Singapore is more about the socio-economic divide⁴⁷ between those who can afford surrogacy overseas, and those who cannot and have no option for surrogacy in Singapore.⁶ Singapore could equalise opportunities for surrogacy by (1) allowing surrogacy to take place within Singapore, (2) preventing those with the means from seeking surrogacy services abroad while disallowing surrogacy in Singapore, or (3) make surrogacy available in Singapore, but disallow it abroad.

It is submitted that Singapore should address surrogacy in two stages. The first stage should make surrogacy available locally to a narrow group of people where surrogacy would be fairly uncontroversial, similar to HK’s position. Singapore may also consider banning overseas surrogacy in the initial stage while it formulates its policy towards more controversial situations of surrogacy. This interim period will allow Singapore to quickly stem Singaporean involvement in transnational surrogacy while it weighs the complex issues in more controversial surrogacy arrangements involving gametes from dead donors⁴⁸ or surrogacy for non-married people.⁴⁹ The second stage can then allow a more nuanced approach towards a greater range of surrogacy arrangements, including permitting transnational surrogacy that falls within official guidelines.

Conclusion

Currently, in the absence of a holistic legal framework on surrogacy in Singapore, inconsistencies and injustice may result. Laws are urgently needed to address surrogacy locally and abroad. Without this, individuals with the means will continue to seek surrogacy overseas and courts may then be hamstrung to only react to situations where a child has already been born. While it is clear that developing a policy on surrogacy will present real and difficult questions about ethics, the value of life and the role of medical technology, these are no reasons to skirt the issue. Without a clear legal framework, there will inevitably be continued participation in surrogacy overseas that incurs greater legal risks and ethical challenges. ♦

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References

1. Ministry of Health. *Licensing Terms and Conditions on Assisted Reproduction Services* 2020. Available at: <https://bit.ly/36JceG9>. Accessed 5 August 2021.
2. Elangovan N, Choo C. *Couples in Singapore getting married later, fewer getting divorced*. Today Online [Internet]. 31 July 2019. Available at: <https://bit.ly/3wEdSmU>. Accessed 5 August 2021.
3. Statistics Singapore. *Understanding Age-Specific Fertility Rate & Total Fertility*. Available at: <https://bit.ly/3ep8Apa>. Accessed 5 August 2021.
4. SMG Women’s Health. *What You Should Know About IVF*. Available at: <https://bit.ly/3hG8NGm>. Accessed 5 August 2021.
5. Saxena P, Mishra A, Malik S. *Surrogacy: Ethical and Legal Issues*. Indian J Community Med 2012; 37(4):211-3.
6. UKM v AG [2018] SGHC 18.
7. *Application of English Law Act (Cap 7A, 1985 Rev Ed) s 3*.
8. Wells-Greco M. *Status of children arising from inter-country surrogacy arrangements*. Netherlands: Eleven International Publishing, 2016.
9. *Human Fertilisation and Embryology Act 2008 (c 22) (UK)*.
10. *Surrogacy Arrangements Act 1985 (c 49) (UK)*.
11. Department of Health & Social Care. *The Surrogacy Pathway*. Available at: <https://bit.ly/3AvXrv4>. Accessed 5 August 2021.
12. *The Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018, SI 2018/1413 (UK)*.
13. Law Commission. *Surrogacy laws set for reforms as Law Commission get Government Backing*. Available at: <https://bit.ly/3z5pb9u>. Accessed 5 August 2021.
14. *Human Reproductive Technology Ordinance 2000 (c 561) (HK)*.
15. *Council of Human Reproductive Technology. Code of Practice on Reproductive Technology and Embryo Research*. Available at: <https://bit.ly/3wF0QFD>. Accessed 5 August 2021.
16. *Parent and Child Ordinance 1993 (c 429) (HK)*.
17. *Human Fertilisation and Embryology Act 1990 (c 37) (UK)*.
18. *In Re Marriage of Buzzanca* 61 Cal. App. 4th 1410 (Court of Appeal 1998).
19. *Family Code (California) (“FCC”) § 7962*.
20. *Family Code (California) (“FCC”) § 7961*.
21. *Family Code (California) (“FCC”) § 7613*.
22. *Johnson v Calvert* 5 Cal. 4th 84 (Court of Appeal 1993).
23. *Dorfman D. Surrogate Parenthood: Between Genetics and Intent*. J Law Biosci 2016; 3(2):404-12.
24. *Status of Children (Assisted Reproduction Technology) Act (Cap 317A, 2015 Rev Ed)*.
25. *Singapore Parliamentary Debates, Official Report (12 August 2013) vol 90 (Mr K Shanmugam, Minister for Law)*. Available at: <https://bit.ly/2WN6Olr>.
26. *Tan S, Tay TF. More Singapore couples seeking surrogacy services*. The Straits Times [Internet]. 31 December 2017. Available at: <https://bit.ly/2TF4gBn>.
27. *Markens S. Surrogate Motherhood and The Politics of Reproduction*. Oakland: University of California Press, 2007.
28. *Bridgewater PD. Reproductive freedom as civil freedom: the Thirteenth Amendment’s role in the struggle for reproductive rights*. J Gender Race & Just 2000; 3(2):401-25.
29. *Berend Z. The social context for surrogates’ motivations and satisfaction*. Reprod Biomed Online 2014; 29(4):399-401.
30. *Smietana M. Affective de-commodifying, economic de-killing: Surrogates’ and gay fathers’ narratives in US surrogacy*. Sociol Res Online 2017; 22(2):163-75.
31. *Harris EA. Same-sex Parents Still Face Legal Complications*. The New York Times [Internet]. 20 June 2017. Available at: <https://nyti.ms/3hJ2SAz>.
32. *Lewin T. Coming to U.S. for Baby, and Womb to carry it*. The New York Times [Internet]. 5 July 2014. Available at: <https://nyti.ms/3kxjOLU>.
33. *Solis L. The Voiceless Citizens: Surrogacy Contracts and the Rights of the Child*. Tex A&M L Rev 3 2015;417-43.
34. *Allin MJ. Joint reproductive autonomy: does Evans v Amicus Healthcare Ltd provide for a gender-neutral approach to assisted reproductive rights?* Med Leg J 2015; 83(2):98-103.
35. *Avramova N. The UK’s restrictive surrogacy laws are hurting couples and pushing many abroad*. CNN Health [Internet]. 18 January 2019. Available at: <https://cnn.it/2UTAaUn>.
36. *Herr RS. Confucian Family for a Feminist Future*. Asian Philos 2012; 22(4):327-46.
37. *Lam CKN, Goo SH. The Intrinsic Value of Confucianism and Its Relevance to the Legal System in Hong Kong and China*. Chin J Com Law 2015; 3(1):175-89.
38. *Dillard CJ. Rethinking the Procreative Right*. Yale HR & Dev LJ 2014; 10(1):1-63.
39. *Ng EHY, Liu A, Chan CHY, et al. Regulating reproductive technology in Hong Kong*. J Assist Reprod Genet 2003; 20(7):281-6.
40. *Ramdas K. Women in waiting? Singlehood, marriage, and family in Singapore*. Environ Plan A 2012; 44(4):832-48.
41. *ACB v Thomson Medical Pte Ltd and Others* [2017] SGCA 20.
42. *Singapore Parliamentary Debates, Official Report (14 January 2019) vol 94 [19]-[21]*.
43. *Gates GJ. Marriage and Family: LGBT Individuals and Same-Sex Couples*. Future Child 2015; 25(2):67-87.
44. *Tan EKB. Law and Values in Governance: The Singapore Way*. Hong Kong Law J 2000; 30(1):91-119.
45. *Tan C. ‘Our shared values’ in Singapore: A Confucian perspective*. Educ Theory 2012; 62(4):449-63.
46. *Tan E. Shared Values*. In: National Library Board Singapore. Available at: <https://bit.ly/3hJ1C07>. Accessed 5 August 2021.
47. *Paulo DA, Low M. Class – not race nor religion – is potentially Singapore’s most divisive fault line*. CNA Insider [Internet]. 6 October 2018. Available at: <https://bit.ly/2URCSZA>.
48. *Cannold L. Who owns a dead man’s sperm?* J Med Ethics 2004; 30(4):386.
49. *Gay Couple ‘have the right’ to use surrogate mother and want law change*. BBC News [Internet]. 21 March 2018. Available at: <https://bbc.in/3jkbVM>.

Note

a. California uses the term “intended parent” where this article has chosen to use the term “commissioning parent”. Both refer to an individual who seeks a surrogate mother to carry and birth the baby.