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Hong Kongers unafraid to break law to realise dreams of parenthood

Hong Kong law carries criminal penalties for who have children through commercial surrogates. However, in practice, regulations are loosely enforced, experts say

Each year, many Hong Kong residents who are unable to conceive rely on overseas surrogate mothers to fulfil their ambition to become parents.

Unfortunately, those who get caught in the act potentially face jail time.

Commercial surrogacy, where a couple or individual enter into a contract with a surrogate mother to gestate and deliver their baby for agreed fee, is illegal in Hong Kong as per the region's Human Reproductive Technology Ordinance. Regardless if the procedure is carried out in Hong Kong or abroad, offenders risk facing a maximum penalty of a HK\$100,000 fine and two years in prison. On the contrary, non-commercial surrogacy, or surrogacy which does not involve fees paid for surrogacy services, is permissible.

Dr. John Jain, a reproductive endocrinologist at Santa Monica Fertility in southern California who regularly works with patients from Hong Kong, says the prohibition of commercial surrogacy in Hong Kong has created a growing market for surrogacy tourism.

"Commercial surrogacy, sex selection and egg donation are not available in Hong Kong and China; therefore, Chinese prospective parents often head to the US," Dr. Jain says.

US seen as safe territory for surrogacy seekers

Despite its prohibition according to local law, the business of Hong Kong residents flying abroad for commercial surrogacy, in particular to the US, seems to be thriving. From the US side, the trend appears to be confirmed by commercial surrogacy



agencies, who say business from Asia is booming.

“Since 2013, there has been a growing trend of clients coming from Hong Kong. From 2012 to date, we saw a 50 percent increase,” says Elena Dumitriu, director of marketing and international relations at Fertility Miracles, a California-based surrogacy agent.

Kathryn Kaycoff-Manos, president of Surrogacy Solutions, another Los Angeles-based surrogacy agency, also notes the surge in Hong Kongers visiting the US for commercial surrogacy. “We are now having a huge influx of [mainland] Chinese, Taiwanese and Hong Kong clients,” she says. The agency has also been contacted by an increasing number of surrogacy consultants in China who are eager to cash in on the booming business, Kaycoff-Manos says.

The recent crackdowns on surrogacy procedures in both Thailand and India, places where many Hong Kongers and Mainland Chinese used to go for such services, are indirectly making the US even more appealing, especially for homosexual prospective parents, who represent a significant portion of those asking for surrogacy, one US practitioner says.

“In Thailand and India, gay intended parents are no longer able to use a surrogate to achieve their goal of having children,” says Dr. Said Daneshmand, practice director at The Fertility Center of Las Vegas,

a clinic that has strong ties with physicians in Hong Kong in order to assist commissioning parents. California and Nevada are among those states whose legislation is friendlier towards homosexuals who have a baby through surrogacy.

Dr. Lucy Lord, a gynaecologist at Central Health medical practice in Hong Kong who frequently gives prospective parents advice on where to go for a surrogacy procedure, says she tends to recommend the US to her patients because there are more safety checks than other countries.

“We tend to recommend the US because it is the most well-regulated place,” she says. “Both the egg donors and the surrogate mothers are much better screened in the US for blood-borne diseases, such as Toxoplasmosis and cytomegalovirus, which may affect the baby.”

Difficulty of prosecution gives breathing room to surrogacy clients

The reason why many Hong Kongers are not deterred by the illegality of commercial surrogacy and why they choose the US to pursue a surrogacy arrangement may be linked, according to Jonathan Mok, solicitor advocate and partner for Mayer Brown JSM in Hong Kong, who regularly advises clients about surrogacy-related issues.



PHOTO CREDIT: SANTA MONICA FERTILITY

AN EMBRYOLOGIST AT THE IVF LAB AT SANTA MONICA FERTILITY IN SANTA MONICA, CALIFORNIA. THE CLINIC SAYS IT PLANS TO OPEN A HONG KONG BRANCH THIS YEAR



“The difficulty of prosecution stems from the fact that everybody knows his or her rights and they are not coming forward with information or documents.”

- Jonathan Mok, solicitor advocate and partner, Mayer Brown JSM, Hong Kong

In the US, Mok says, Hong Kong parents seeking surrogacy can obtain pre-birth judgment, whereby the name of the commissioning couple can be inserted as the birth parents on the baby’s birth certificate. “So basically when they come in [to Hong Kong] they can produce the birth certificate and it may not arouse suspicion,” he says.

This is in contrast with Thailand, another popular destination for surrogacy agreements, where the surrogate mother’s name appears on the document, Mok says.

According to Mok, legally speaking, a birth certificate is technically not enough for parents to obtain complete custody over the child - a court-issued parental order would be needed.



**JONATHAN MOK, SOLICITOR ADVOCATE AND PARTNER,
MAYER BROWN JSM, HONG KONG**

“The need for a parental order in Hong Kong is not as clear-cut as in countries such as England,” Mok says. “I think a lot of people can still establish parentage by relying on the birth certificate.”

Despite this alleged difficulty of tracking those who hire a surrogate abroad, even if Hong Kongers are suspected of having been involved in a surrogacy arrangement, they are usually hard to prosecute.

According to Mok, a combination of factors gives intended parents a great chance of evading the law. The only sources of evidence for prosecutors to build a case of commercial surrogacy under the Human Reproductive Technology Ordinance are the parents under investigation and US authorities. But the former are legally allowed not to provide any piece of evidence leading to self-incrimination, while the latter can offer assistance only if a crime has been committed, which is never the case since the practice of commercial surrogacy is legal in several US states.

In one 2010 case, Peter Lee Ka-Kit, the vice-chairman of

Henderson Land Development, came under media scrutiny after he allegedly had triplets through a California-based surrogate mother. Hong Kong police investigated the allegations but eventually did not charge Lee.

“The difficulty of prosecution stems from the fact that everybody knows his or her rights and they are not coming forward with information or documents,” Mok says.

To date, no one has been prosecuted for pursuing a commercial surrogacy since the Ordinance came into full effect in 2007, according to the Council on Human Reproductive Technology, the statutory body which regulates the provision of fertility treatments in Hong Kong.

However, things could change quickly. Hong Kong’s High Court will soon hear a civil case concerning a local couple requesting a parental order for their child born out of a surrogacy in the US.

The court will establish whether a birth certificate is sufficient to obtain custody of a child or a parental order is still needed.

It will also rule if the expenses paid by the parents for carrying out the procedure in the US are “reasonable,” or if such expenses are of a “commercial” nature, which would constitute commercial surrogacy. When it comes to surrogacy, the Ordinance allows only those expenses which are “reasonably incurred” or authorized by the court.

This will shed light on how the court treats surrogacy-related expenses and will potentially give parents some basis to contend these expenses are either reasonable or they can be approved by the Courts, Mok says.

“This may give rise to a possible defence to criminal prosecution even though the ruling will be made in a civil Court, which has a lower evidential proof standard than a criminal Court,” he adds.

What Hong Kong needs is new, cutting-edge, legislation on surrogacy, to regulate internationally this growing sector, says Hong Kong-based solicitor Marcus Dearle, partner and office managing director of Withersworldwide and an expert on surrogacy law.

“There is an urgent need to change the law in Hong Kong. Banning commercial surrogacy completely is not the answer: surrogacy arrangements cannot effectively be outlawed, only driven underground – and they have been driven underground in Hong Kong,” he says. [GHT](#)

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