

Legal issues surrounding surrogacy

代孕母的法律問題

張健利 (資深大律師)

Denis Chang, CBE, QC, SC, *Hon. LLD.*, JP



Baby M Case



代孕的種類

Forms of surrogacy

- 傳統代孕 vs. 借腹型代孕
Traditional vs. Gestational
- 非商業性代孕 vs. 商業性代孕
Altruistic vs. Commercial



- 傳統代孕: 代孕母與所生子女之間有基因上血緣關係
Traditional surrogacy: the surrogate provides the eggs and is genetically related to the child
- 借腹型: 代孕母僅出借子宮，與所生子女之間無基因上血緣關係
Gestational surrogacy: gestational surrogacy takes place when an embryo created by IVF technology is implanted in a surrogate (if the embryo is created using the sperms and egg from the commissioning couples → resulting child is genetically connected to them)
- 非商業性代孕: 代孕母不可收取填補原則之費用以外的報酬
Altruistic/ surrogacy: surrogacy arrangements in which the surrogate does not receive compensation for her services except reimbursement of expenses (such as the surrogacy and related medical costs), and loss of earnings.
- 商業性代孕: 代孕母可收取填補原則之費用以外的報酬
Commercial surrogacy: surrogacy arrangements in which the surrogate receives a payment, reward or other material benefit or advantage other than the reimbursement of the surrogacy costs

香港如何規管代母產子？

How is surrogacy regulated in H.K.?

- 第561章《人類生殖科技條例》
Human Reproductive Technology Ordinance (Cap. 561)
- 第429章《父母與子女條例》
Parent and Child Ordinance (Cap. 429)
- 生殖科技及胚胎研究實務守則
Code of Practice on Reproductive Technology & Embryo Research
made under Cap. 561

代母產子的法律限制

Legal restrictions on surrogacy

- 在代母產子安排中所使用的配子，只可從已婚的委託夫婦取得。 - 《人類生殖科技條例》第14條

Only the gametes of a married couple can be used in a surrogacy arrangement. (*s 14 of H.R.T.O.*)

- 委託妻子必須被證實不能持續懷孕至產期，且對她而言，並沒有其他切實可行的替代治療方案。 - 生殖科技及胚胎研究實務守則第12.2(b)章

Provided only to a commissioning wife who is unable to carry a pregnancy to term and for whom no other treatment option is practicable. (*s 12.2 (b) of Code of Practice of R.T.E.R.*)

- 禁制商業性的代母懷孕，作出商業性的代母安排或刊登代母安排的廣告屬刑事罪行 - 《人類生殖科技條例》第17條

Commercial surrogacy is prohibited under the Ordinance. Its arrangement or advertising is a criminal offence. (*s 17 of H.R.T.O.*)

誰人可以成為代母

Who can be a surrogate mother?

- 生殖科技及胚胎研究實務守則第12章
s 12 of Code of Practice of RTER

- 代母必須年滿21歲

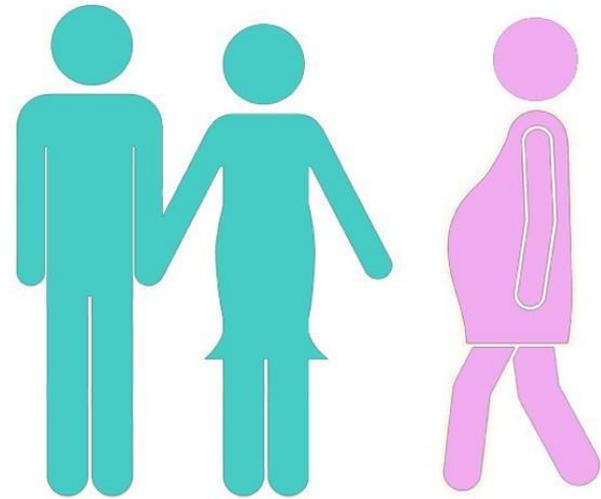
A woman at or above 21 years of age

- 某名婦女是否適合擔任代母，須由註冊醫生評定，而該名醫生不會負責進行有關代母懷孕的生殖科技程序。他考慮的因素包括該婦女的婚姻狀況；懷孕歷史；以及身心狀況是否適合懷孕。

Has been assessed by a registered medical practitioner, who is not responsible for the reproductive technology procedure, by taking into account the following considerations: marital status; history of pregnancy; and physical and mental fitness to carry a baby.

- 較易罹患妊娠併發症的婦女不得擔任代母

A woman who is at a higher risk of suffering from complications of pregnancy should not be allowed to be a surrogate mother



誰是嬰兒的法定母親？

Who is the legal mother of the child?

- 代孕協議在香港並不具法律效力 - 《人類生殖科技條例》第 18 條
Surrogacy agreements are unenforceable in Hong Kong. - s.18 of H.R.T.O.
- 法律上假定生產胎兒的女性為該嬰兒的法定母親。如果委託夫婦想成為該嬰兒的法定父母，委託夫婦必須在該嬰兒出生後六個月內向法庭申請。 - 《父母與子女條例》第9章

The woman who bears the child is the legal mother until a parental order which says otherwise is in place. – s. 9 of P.C.O.

誰是嬰兒的法定父親？

Who is the legal father of the child?

- 《父母與子女條例》第 429 章
The Parent & Child Ordinance Cap. 429.,.,
Sections 9, 12, 11
- 若在胚胎或精子和卵子被放置該女子體內時，她是婚姻的一方，該婚姻另一方須被視為該子女的父亲，除非他不同意。
If the surrogate mother is married at the time of the surrogacy, her 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: S. 9.
- 若代孕母是未婚的，**第** S. 10。
If the surrogate mother is not married, see Section 10 of the PCO..



供應配子的人獲判定為父母的命令

Parental orders in favor of gamete donors

- 生殖科技及胚胎研究實務守則
s 12 of Code of Practice of HRTO

委託夫婦必須在孩子出生的 6 個月內向法庭申請命令。在提出申請時和發出命令時，

- (1) 該孩子必須是與委託夫婦或其中一人同屬一家，
- (2) 丈夫和妻子，或其中一人必須以香港為其居籍；
- (3) 在提出申請及發出命令當日之前的 1 年內，一直慣常居於香港；或與香港有密切聯繫

The commissioning couple must apply for the order within 6 months of the birth of the child. At the time of the application and of the making of the order,

- (1) The child's home must be with the husband and wife or either of them.
- (2) The husband or wife or both of them must be domiciled in Hong Kong and either: habitually resident in Hong Kong throughout the immediately preceding period of one year;
- (3) or have a substantial connection with Hong Kong.

供應配子的人獲判定為父母的命令

Parental orders in favor of gamete donors

- 生殖科技中心轄下由多方專家所組成的小組，須向委託夫婦、代母及其丈夫(如有丈夫)提供輔導。該多專科小組最少應包括—
 - (1) 兩名建議進行代母懷孕的非主診註冊醫生，負責解釋醫學上的含意和後果；
 - (2) 一名熟悉家庭事務的法律顧問，負責向代母及委託夫婦解釋法律上的含意；
 - (3) 一名熟悉醫療事務的社會工作者，負責解釋社會和倫理方面的影響；
 - (4) 及／或一名臨牀心理學家，負責在適當時作出評估

Counseling by multi-disciplinary team :

- (1) Two non-attending medical practitioners who both recommended the arrangement to explain the medical implications and consequences
- (2) A legal advisor familiar with family matters to explain the legal implications to both the surrogate mother and the commissioning couple
- (3) A social worker familiar with medical related issues to explain the social and moral impacts
- (4) And/or a clinical psychologist when appropriate to make assessment

供應配子的人獲判定為父母的命令

Parental orders in favor of gamete donors

- 在考慮頒發命令時，法庭必須肯定委託夫婦和代母在完全明白所視事宜的情況下，均自主地和無條件地同意法院發出命令。

The court must be satisfied that both the commissioning couple and the surrogate mother have a full understanding of the matter and have unconditionally agreed to the making of such an order.



良知上認為不對

Conscientious objection

- 任何人如良知上認為參與牌照所授權進行的有關活動為不對，該人無責任參與(不論該責任是如何產生的)該等有關活動。 - 《人類生殖科技條例》 第 20 條

No person who has a conscientious objection to participating in a relevant activity authorized by a license shall be under any duty, howsoever arising, to do so - s. 20 of H.R.T.O.



我可以在外地透過代孕母產子嗎？ Can I use surrogacy service oversea?



- 任何人不得在香港或其他地方為以下事項而作出或接受付款—
 - (i) 提出或參與任何以作出代母安排為出發點的商議；
 - (ii) 要約或同意商議作出代母安排 - 《人類生殖科技條例》第 17(1) 條

No person shall- (a) whether in Hong Kong or elsewhere, make or receive any payment for-

(i) initiating or taking part in any negotiations with a view to the making of a surrogacy arrangement;

(ii) offering or agreeing to negotiate the making of a surrogacy arrangement

- s. 17(1) of H.R.T.O.

- Note that s 17(1) speaks of making or receiving **payment (whether in HK or elsewhere)**.
Apart from this does territorial principle apply ?

英國一案例: 有關本地法庭是否承認外國法庭的親權命令

An English case about enforcement of foreign parental order

- J v G [2013] EWHC 1432
- 英國允許非商業性代孕，禁止商業性代孕 - 1985代孕協議法第二條
Non-commercial surrogacy is legal; commercial surrogacy is prohibited in the U.K. – s. 2 of Surrogacy Arrangement Act 1985
- 英國法庭應否承認外國法庭的親權命令
Issue: whether to enforce foreign parental order
- 英國法庭承認外國法庭的親權命令會否違反本地之公共政策？
Test: whether the granting of a parental order would be an affront to public policy
- 法庭考慮之因素：
Relevant considerations: (1) Payments not so disproportionate to expenses reasonably incurred & not to such a level to overbear the will of the surrogate; (2) Applicants acted in good faith; (3) Applicants complied with legal parentage requirements in the relevant jurisdiction; (4) It is not a simple payment for effectively buying children overseas; (5) In line with the child's long-term welfare
- 在該案，法院最後承認外國法庭的親權命令
Foreign parental order enforced at last



German Court case : enforcement of foreign parenthood order

德國聯邦最高法院一案例: 有關本地法庭是否承認外國法庭就法定父母之裁決

- Issue: whether, despite the domestic prohibition of surrogacy, a foreign judgment granting legal parenthood to a same-sex couple of a child born by a surrogacy arrangement should be recognized? [NB: German domestic law does not permit surrogacy.]
- Reasons why the Court recognized the foreign judgment
 - (1) Application of German Law would produce the same result due to paternity of one intended parents
 - (2) Decision not violate public policy because one of the intended parents is genetically connected to the child, unlike the surrogate mother
 - (3) The ruling of successive adoption
 - (4) Preventive aim of domestic law distinguished from surrogacy that had been legally conducted overseas
 - (5) Surrogacy if consented is insufficient to ascertain an infringement of human dignity.
 - (6) It is in the best interests of the child to recognize parenthood in this case

香港案例: 有關本地法庭是否承認外國法庭的出生前宣讀法令

HK case on enforcement of foreign parenthood orders

- Re D [2015] 1 HKLRD 229
- Hong Kong's only reported case for parental order application brought by a couple who entered into commercial surrogacy arrangement.
- Before child's birth, a Pre-Birth Order given by Californian Court declared applicants to be legal parents. After child's birth, couple got married and brought child back to Hong Kong.
- Issues set out by Deputy Judge Ivan Wong:
 - Parties were unmarried at the time of child's birth, qualified to make an application for parental order in Hong Kong?
 - Whether Pre-Birth Order granted in US is an adoption order for the purpose of s.17 of Adoption Ordinance
 - S.17 of the HRTA prohibits commercial surrogacy arrangements
- Case transferred to High Court

代孕所生的孩子是否享有知情權？

Does a child born from a surrogacy agreement has a right to know about his origin?

- 《兒童權利公約》第7條：兒童於出生後應立即被登記，並自出生起即應有取得姓名及國籍之權利，並於儘可能的範圍內有知其父母並受父母照顧的權利。

Article 7 of the United Nations Convention on the Rights of the Child (UNCRC) :

The child shall ...as far as possible, the right to know and be cared for by his or her parents.

- 任何人凡滿16歲有權查閱自己是否經由涉及捐贈配子或捐贈胚胎的生殖科技程序所生，以及查閱不涉身分辨別的捐贈人資料 - 《人類生殖科技條例》第33(3)(a), 33(4), 33(5)及33(7)條

Any person who has reached the age of 16 has a right to access information about whether he or she was born in consequence of reproductive technology involving donated gametes or donated embryos and non-identifying information about the donor - s.33(3)(a), s.33(4), s.33(5) and s.33(7) of H.R.T.O.

代孕所生的孩子是否享有知情權？

Does a child born from a surrogacy agreement has a right to know about his origin?

- **Rose v Secretary of State for Health and Human Fertilization and Embryology Authority**

Scott Baker J: “Everyone should be able to establish details of his identity as a human being. That, to my mind, plainly includes the right to obtain information about a biological parent who will inevitably have contributed to the identity of his child.”

- **英國的人類生殖及胚胎研究(捐贈者資訊揭露)法**

The Human Fertilisation and Embryology Authority (Disclosure of Donor Information) Regulations 2004 : people conceived as a result of sperm, egg or embryo donation are able request non-identifying information (physical description, ethnic group, his personal and family medical history and etc. but not the donor’s actual identity) about their donors when they reach 18

同性伴侶可否透過代孕生殖？

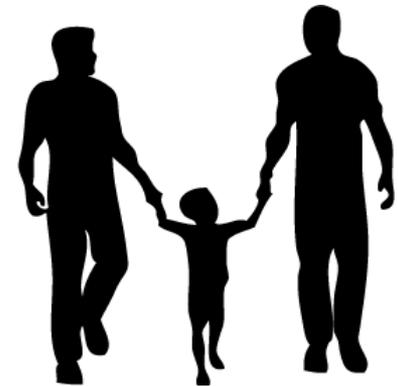
Can gay couples pursue surrogacy?

- 在香港是不可能的，通常視乎該國家是否承認同性婚姻或其他類型的同性結合

Not in Hong Kong . In other jurisdictions, laws vary.

- 在美國，同性伴侶透過代孕繁殖下一代越佔普遍，有研究者接近兩成的捐贈卵子用於同性代孕

An increasing number of gay couples in the U.S. are turning to surrogacy – 15-20% of donor eggs go to gay surrogacy in the U.S.



若代母所生的孩子患上殘疾，委託父母可以要求代母墮胎嗎？
Can the commissioning couples ask the surrogate mother to abort a disabled baby?

- Hong Kong, No, not even if the contract so provides as no surrogacy arrangement is legally enforceable. .
- In any event abortions governed by- s.47A(8) of the Offences Against the Person Ordinance.
- The general rule: abortions are illegal but “medical termination of pregnancy” permitted as exception to general rule – s 46, 47, 47(A) of the O.A.P.O.
- A person shall not be guilty of an offence when a pregnancy is terminated by a registered medical practitioner if 2 registered medical practitioners are of the opinion, formed in good faith that...
 - (1) the continuance of the pregnancy would involve risk to the life of the pregnant woman or of injury to the physical or mental health of the pregnant woman, greater than if the pregnancy were terminated
 - (2) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormality as to be seriously handicapped.

Baby Gammy Case

- In December 2013, surrogate Pattaramon Chanbua gave birth to a boy, Gammy, and a girl, Pipah, conceived with Mr Farnell's sperm and donor eggs.
- Ms. Chanbua had said the couple rejected Gammy because he had Down's syndrome. Farnells contested that "it is clear that Ms. Chanbua had fallen in love with the twins she was carrying and had decided she was going to keep the boy."
- Gammy remained in Thailand under the care of Ms.Chanbua. The Farnells returned to Australia with Pipah in February 2014 and Ms Chanbua sought a court order to have the girl returned to Thailand.
- Chief Judge Stephen Thackray of Western Australia's Family Court ruled that Pipah should stay with the Farnells and not be removed from the only family she has ever known, in order to be placed with people who would be total strangers to her.



如果代孕母拒絕放棄嬰孩和親權，委託夫婦有沒有法律保障？
Is there any legal protection for the commissioning parent if a surrogate mother refuses to give up the child and legal parenthood?

- 沒有

No

- 孕協議在香港並不具法律效力 - 《人類生殖科技條例》第 18 條

Surrogacy agreements are unenforceable in Hong Kong. - s.18 of H.R.T.O.

- 法律上假定生產胎兒的女性為該嬰兒的法定母親。

The woman who bears the child is the legal mother until a parental order which says otherwise is in place. – s. 9 of P.C.O.

- 在考慮頒發命令時，法庭必須肯定代母自主地和無條件地同意法院發出命令。
- 生殖科技及胚胎研究實務守則第 12 條

Parental order granted only when the surrogate mother unconditionally agrees to the granting of such order - s 12 of Code of Practice of HRTTO

- 世界各地有關代孕法律的發展 New Developments

加拿大安省: 「家庭平等法案」

Canada (Ontario): All Families Are Equal Act

- “Parent” instead of “mother” and “father”
- The intended parents of a child born to surrogate would be recognized without a court order if the following conditions are met:
 - (1) The surrogate and the intended parent(s) received independent legal advice and entered into a written pre-conception surrogacy agreement.
 - (2) The surrogate provided written consent to give up her parental status both before conception and seven days after the birth of the child.

- s. 10(2), 10 (3) of Bill 28, All Families Are Equal Act

- Up to 4 people would be recognized as the parents of a child, without a court order, if all parties entered into a written pre-conception agreement to be parents of the child together. The birth parent would be required to be one of the parties to the agreement.

- s. 10 (2), 10 (3) of Bill 28, All Families Are Equal Act

Australia: Pressure mounts for commercial surrogacy

澳州團體倡將商業性代孕合法化？

支持者 Supporters

- 大部份年青的澳州居民支持商業性代孕
Australians aged between 18-49 support CS
- 免卻要到發展中國家尋找代孕母的麻煩
Save people from the inconvenience of going to developing countries
- 適當的規管可避免代孕的壞影響
- Potential defects can be avoided by regulations e.g. age restrictions, mental health checks, mandatory cooling-off periods and adequate counseling
- BUT CAMBODIA, Mexico , Nepal, Thailand , India are among the jurisdictions banning or restricting commercial surrogacy

反對者 Opponents

- 女性淪為孵卵器
Reduces a woman's status to that of an incubator
- 剝削貧窮婦女
Exploitation of poor women
- 最近議會的調查證明市民反對商業性代孕
Recent parliamentary inquiry supported the ban of commercial surrogacy

The image shows a screenshot of a news article from BioEdge. The article title is "Pressure mounts for commercial surrogacy in Australia" by Michael Cook, dated 3 Dec 2016. The article features a photograph of a woman in a pink shirt holding a 100 Australian dollar bill. Below the photo, there is a caption: "As clinics offering cheap surrogacy overseas shut their doors to foreigners, pressure is mounting in Australia to permit commercial surrogacy." The article also includes social media sharing icons for Facebook, Twitter, Google+, and Email. On the right side of the screenshot, there is a search bar, a newsletter subscription form, and a "MOST READ" section with a list of five articles.

BioEdge bioethics news from around the world
Monday, December 05, 2016
pointed remarks | about BioEdge | contact us | donate | contributors

Pressure mounts for commercial surrogacy in Australia

by Michael Cook | 3 Dec 2016 | 3 comments

Facebook Twitter Google+ Email

Search BioEdge search... Go

Subscribe to BioEdge newsletter
your email
... and click here!

Subscribe to BioEdge RSS feed

MOST READ

1. Interview: Philip Nitschke on life in the Netherlands
2. Tom Price: Trump's controversial pick as Health Secretary
3. Reflections on California's assisted suicide legislation
4. Is there a last-minute hitch with 3-parent embryo trials?
5. Another abortion battle in Texas, this time over how to dispose of tissue
6. Pressure mounts for commercial surrogacy in Australia

As clinics offering cheap surrogacy overseas shut their doors to foreigners, pressure is mounting in Australia to permit commercial surrogacy.

柬埔寨公告禁止商業代理孕母行為

Cambodia: commercial surrogacy outlawed

- 由於柬埔寨醫療費用低廉、加上法律並不限制同性或單親父母，柬埔寨很快成為代孕公司的最大“產地”。

Cambodia has become a new frontier for surrogacy in recent years due to its low medical fees and domestic law which does not limit parenthood to heterosexual married couples

- 柬埔寨本月初通告國內各生育機構，代孕已經“徹底被禁止”。

Cambodia outlawed surrogacy last month.

- 澳洲女子在柬埔寨從事非法代孕業務被捕
Australian arrested in Cambodia's surrogacy crackdown

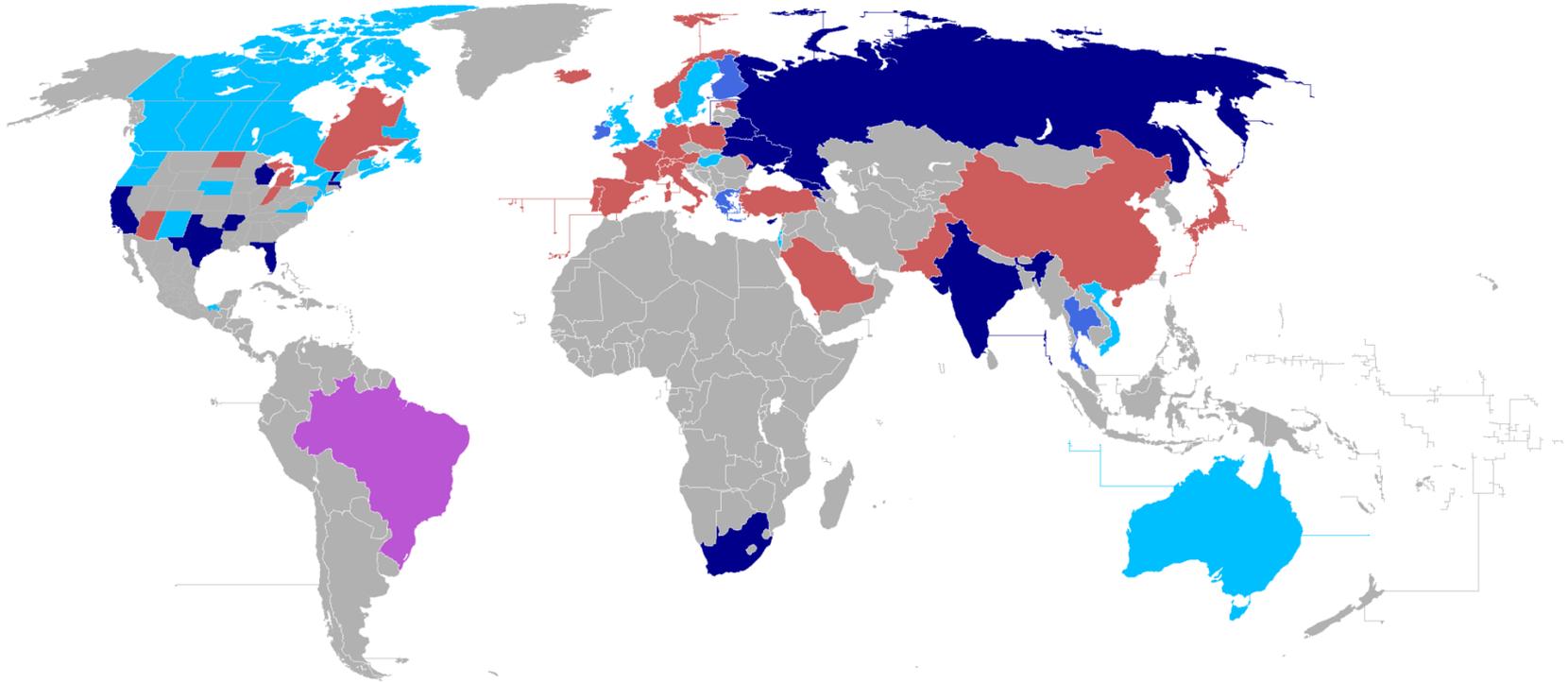


- 警方說 Tammy Davis-Charles 是一年多前從泰國到柬埔寨的，到目前為止已經讓大約23位柬埔寨女性為澳大利亞夫婦代孕。

Tammy Davis-Charles arrived from Thailand to Cambodia last year and has since then helped 23 Australian couples find a surrogate mother in Cambodia.

Legal status of surrogacy in the world

世界各地有關代孕的法律



- Both gainful and altruistic forms are legal 商業性及非商業性
- No legal regulation 沒相關法例
- Only altruistic is legal 非商業性
- Allowed between relatives up to second degree of consanguinity 二等血親
- Banned 禁止
- Unregulated/uncertain situation 不確定/沒資料

Source: *Wikipedia (the map is last updated on 27th June 2015)*