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Pro **Bono**

INFORMATION ABOUT NAMIBIA'S LAW

SURROGACY

Surrogacy is an arrangement whereby a woman agrees to bear a child for another individual or couple who intend to become the parents of the child.

There are a range of situations which can give rise to a desire for a surrogacy arrangement. For example, surrogacy might be helpful to a couple who are struggling with infertility, parents who have some hereditary health condition that they do not want to pass on to a child or women who are unable to conceive or to carry a pregnancy to term. Surrogacy arrangements are also sometimes utilised by male same-sex couples who want at least one partner to have a genetic link to the child.

Depending on the situation, the surrogate mother may be the genetic mother of the child, or she may be only the “gestational mother” of the child - meaning that the child was conceived with the ovum (egg) and sperm of the intended parents, with donor ovum and sperm, or with some combination of the two.

In a surrogacy situation, the pregnancy could be a result of *in vitro* fertilisation, which is a clinical procedure whereby a human ovum is fertilised in a medical laboratory and the fertilised embryo is implanted into the womb of the surrogate mother. Another approach is to utilise artificial insemination of the surrogate mother with the sperm of the intended father, or with donated sperm – in which case the ovum comes from the surrogate mother. Techniques vary, depending on the situation which gave rise to the need for surrogacy and the preferences of the persons involved in the arrangement.

Some people who cannot have a child together find surrogacy preferable to adoption because it can allow one or both of the intended parents to have a genetic link with the child.

The surrogate mother normally waives all parental rights and agrees to give the baby to the commissioning parent or parents immediately upon delivery.

This kind of arrangement is not illegal in Namibia, but it also has no legal protection. This creates several potential problems.

Surrogacy can give rise to a range of complicated issues. For example, what if the surrogate mother changes her mind and wants to keep the child? What if the commissioning couple change their minds and no longer want to take the child? Is it unethical to pay for the services of the surrogate mother? What if the surrogate mother engages in an activity which endangers the child (such as drinking or smoking during the pregnancy)? What if the child is born with an unexpected mental or physical problem? What if the pregnancy results in twins or triplets? What happens if the commissioning couple divorce during the pregnancy?

If some dispute arose in connection with a surrogacy arrangement, it might not be possible to enforce the agreement in court. There have been no such cases in Namibia as yet. But, in the absence of any legislative authority for such an arrangement, it is possible that the courts would find such an agreement against public policy and refuse to give effect to it. This might leave the parties to the arrangement without legal remedies.

Another problem is that the common law identifies the parents of a child as the two persons who provided the ovum and the sperm. There is a special legislative arrangement for married couples who conceive by means of “artificial insemination” or “*in vitro* fertilisation” - if they both consent to the procedure, then any child born as the result of these assisted reproductive techniques is deemed to be the biological child of the husband and wife, regardless of whether or not donor sperm and eggs were used. However, this rule does not extend to surrogacy arrangements at present.

This means that a surrogacy arrangement might require a formal adoption in order to have both commissioning parents listed on the birth certificate of the child.

Some countries have enacted laws to govern surrogacy arrangements, in order to safeguard the interests of all parties involved and to make agreements about surrogacy enforceable with clear remedies.

For example, South Africa has legislation on this topic requiring a written agreement between the parties which must be confirmed by the High Court before the surrogacy can proceed. The law also sets various conditions, such as prohibiting payments to the surrogate mother other than reimbursement of expenses such as medical costs or loss of income. The South African law also provides that a child born through a surrogacy arrangement is automatically the child of the commissioning parents, with the surrogate mother having no parental rights over the child.

There is nothing comparable in Namibia. Parties considering a surrogacy arrangement in Namibia should be warned that it can be a complicated and risky endeavour in the absence of any specific legal regulation.

ProBono is a monthly column by the Legal Assistance Centre designed to inform the public about Namibian law on various topics. You can request information on a specific legal topic by sending an SMS to 081-600-0098. Note that we will not be able to give advice on specific cases in this column, only general legal information.