

A Study on the Rules for the Recognition of Surrogate Paternity in China

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Abstract

In the context of surrogacy using artificial reproductive technology, the identity of genetic mother, birthing mother, and legal mother are separated, leading to difficulties in the determining paternity. In China, surrogacy contracts are invalid because they are against public order and morality and may not be used as the basis for paternity determination. Among the doctrines on the determination of surrogate paternity, the birth theory ignores the genetic link, the bloodline theory ignores the fact of conception, the contract theory is against China's position, and the best interest of the child theory is too open. In light of the actual situation in China, the determination of surrogate paternity should be based on the principle of biological connection and social connection, and the relevant rules should be applied flexibly in accordance with the specific circumstances of the case.

Keywords: surrogacy, surrogacy contract, parentage

1. Presentation of the Problem

Artificial reproduction technology has cut off the natural process of “fertilization-delivery”, and through artificial reproduction technology, it is possible to use other people's wombs to produce one's own offspring. In the context of artificial reproduction technology, surrogacy can be divided into two types: genetic surrogacy and gestational surrogacy. Genetic surrogacy is when the surrogate mother provides the eggs and conceives the fetus; gestational surrogacy is when the surrogate mother conceives a fetus that is not genetically linked to her, i.e., another person's embryo is transferred to the surrogate mother's womb for conception.

In natural reproduction, the mother is biologically linked to the fetus through the “fertilization-delivery” process and is, of course, the legal mother of the fetus. However, in surrogacy, due to the fragmentation of the “fertilization-delivery” process, the genetic mother and the delivery mother may not be the same woman, which makes it difficult to determine paternity. The determination of paternity is a prerequisite for the determination of a series of legal relationships such as inheritance, parenting, and support, and can have a great impact on the legal, social, and self-interest levels of the parties involved. The determination of paternity is an unavoidable issue in surrogate births.

In genetic surrogacy, the rules for determining paternity are not controversial, and the “childbirth theory” is commonly used as the basis for determining paternity. In gestational surrogacy, there is a lack of standards for the application of paternity rules, and the application of different rules is more controversial. This article focuses on the more controversial gestational surrogacy. Theoretically, the determination of paternity should first follow the provisions of the surrogacy contract, and then discuss other rules of paternity determination when the surrogacy contract is invalid. So, as a country where surrogacy is prohibited, is the surrogacy contract valid in China? How to determine the paternity under the invalid surrogacy contract?

2. Determination of the Validity of Surrogacy Contract

The author searched the Chinese Judicial Documents website with the keywords of “surrogacy” and “paternity”, and obtained 13 adjudication documents, 12 of which were related to disputes over surrogacy and paternity, and the invalid one was a debt dispute arising from surrogacy. After collating the relevant cases, we found that: in China’s judicial practice, surrogacy contracts are invalid because they violate public order and morality.

The essence of the difficulty in determining the paternity of surrogacy is the separation of the genetic link and the fact of delivery. In the case of natural childbirth, the genetic source and the fact of childbirth must be concentrated on the same woman, and the subject matter is monistic, so in the case of natural childbirth, there is no dispute that the fact of childbirth is the basis for determining paternity. In the case of gestational surrogacy, however, the subject matter is pluralistic, and the separation of the genetic subject and the fact of delivery makes it difficult to rely on the genetic link or the fact of delivery alone for the determination of paternity. If the surrogacy contract is valid, the court can directly take the agreement between the parties on the ownership of the surrogate child as the basis for the determination of paternity; if the surrogacy contract is invalid, the ownership of the surrogate child shall be determined according to other rules.

According to Article 143 of *the Civil Code of China*, a valid civil legal act requires the following three elements: first, the parties have the corresponding capacity to act; second, the intention is true; and third, it does not violate the mandatory provisions of laws, administrative regulations and public order and morals. On the premise that the first two elements of the surrogacy contract are met, the determination of its validity must focus on whether it violates the mandatory provisions of laws and administrative regulations and whether it violates public order and morality.

2.1 *The Surrogacy Contract does not Violate the Mandatory Provisions of Laws and Administrative Regulations*

The surrogacy contract does not violate the mandatory provisions of laws and administrative regulations. Article 3 of the Measures for the Administration of Assisted Human Reproductive Technology issued by the Ministry of Health in 2001 stipulates that “the sale of gametes, congeners and embryos in any form is prohibited. Medical institutions and medical personnel shall not perform any form of surrogacy technology.” In 2003, the Ministry of Health issued the “Technical Standards for Assisted Human Reproduction” and “Ethical Principles for Assisted Human Reproduction Technology and Human Sperm Bank”, which prohibit technical personnel and medical personnel from performing surrogacy procedures. The regulations on surrogacy in China are only found in the above departmental regulations, and as far as their contents are concerned, the regulations only prohibit the implementation of surrogacy technology in the medical field, and the targets of regulation do not involve surrogacy agents and surrogate parties. In China’s judicial practice, all surrogacy is underground, and the surrogacy process is handled by surrogacy agents, and the sperm and eggs are often provided by the intended parents or donated by a third party, without involving the sale of cells. There are no laws and administrative regulations prohibiting surrogacy in China, and there is also a legal gap regarding the legality of underground surrogacy and surrogacy agencies. According to the principle of “freedom without prohibition”, the surrogacy contract does not violate the mandatory provisions of laws and administrative regulations.

2.2 *Surrogacy Contract is Against Public Order and Morality*

In China’s judicial practice, surrogacy contracts are considered to be contrary to public order and morality. The vast majority of courts have ruled that surrogacy contracts are invalid on the ground that surrogacy is against public order and morality, but there is no discussion on why it is against public order and morality, which needs to be discussed seriously.

In China’s academic circles, there is a controversy about whether surrogacy is against public order and morality. Scholars who support surrogacy as contrary to public order and morality believe that the essence of the surrogacy contract is that the client uses another person’s womb to conceive a child in exchange for money, which treats another person’s body as a tool and violates the basic morality of “human being is the purpose, not a tool”. The product of surrogacy is a human being, and the production of a baby through commercial surrogacy is the same as a customized commodity, which is suspected of treating the baby as a commodity (Zhou Lihua, 2022). Scholars who oppose surrogacy as a violation of public order and morality argue that reproductive rights are a constitutional right of citizens, that the rapid development of artificial reproductive technology has facilitated the realization of reproductive rights, that infertile people can realize their reproductive rights through surrogacy in order to reproduce, and that surrogacy does not cause widespread ethical shocks (Li Yanan, 2020). Some scholars also oppose only commercial surrogacy, arguing that the behavior of surrogate mothers in unpaid surrogacy reflects the noble quality of human nature of giving freely to others, and therefore does not violate public order and morality (Ren Wei, Wang Qian, 2014).

Referring to the relevant judicial practice of other countries, Japan, which has a similar background to China, considers surrogacy to be against public order and morality. In the case of Aki Mukai, a Japanese surrogate who

was unable to have children, Aki Mukai commissioned a woman from Nevada, U.S.A., to provide her with eggs and sperm, and the American woman eventually produced twins. The Nevada court recognized Aki Mukai as the legal mother of the surrogate twins. Upon her return to Japan, Aki Mukai was denied permission to register the children for family registration on the grounds that Aki Mukai was not the mother of the children. Aki Mukai appealed and filed a lawsuit in court. The Tokyo High Court held that actual paternity must be determined uniformly by a single, clear standard, and that the *Japanese Civil Code* lacks provisions for determining surrogate paternity, and that a ruling accepting the establishment of a relationship not recognized by the *Civil Code* is contrary to public order and social custom, and therefore invalid. The surrogacy contract cannot be used as a basis to confirm paternity. However, considering that Ari Mukai was related to the children by blood, and that the Nevada court had recognized Aki Mukai as the legal mother of the surrogate twins, the court recognized the validity of the Nevada court's decision. The Supreme Court of Japan denied the validity of the judgment, holding that a foreign judgment may not be enforced in Japan in violation of Japanese law and public order. The Japanese civil law follows the principle that "the one who gives birth is the mother", which means that the mother of the child born as a surrogate should be the woman who gives birth to the child, not the woman who provides the eggs; the surrogacy contract ignored the interests of the surrogate woman, and the surrogate woman miscarried twice in the course of the surrogacy, which had a serious impact on her health. The court eventually ruled that there was no paternity between Aki Mukai and the surrogate twins.

The author believes that surrogacy is against public order and morality. In addition to treating a surrogate woman's body as a tool, surrogacy is also an exploitation of the surrogate woman and can even endanger her right to life and health. First, surrogacy is an exploitation of women. Studies have shown that the majority of women who engage in surrogacy in the United States are poor and poorly educated: 42 percent are unemployed or on Social Security benefits, and 73 percent are women who have graduated from high school or have less education (Chen Yanjing, 2006). Surrogate women are ostensibly volunteering for the surrogacy industry, but for some poor women, this volunteering is actually the result of no choice, and vulnerable women may go into surrogacy under economic and emotional pressures that they cannot control on their own. Second, legalizing surrogacy can jeopardize women's personal safety. "If there is 10% profit, it is guaranteed to be used everywhere; with 20% profit, it is active; with 50% profit, it is desperate; for 100% profit, it dares to trample on all earthly laws" (Marx, 2004). In reality, the whole process of surrogacy is usually done under the arrangement of intermediaries, and surrogacy agents. In pursuit of profits, they often trick or traffick young girls to designated locations and coerce them to engage in surrogacy activities for huge profits, which seriously threatens women's personal freedom and life and health.

The mainstream values of the social population, which to some extent reflect the general interests and general moral concepts of the society, can be used as an important factor in judging whether it is against public order and morality (Ren Wei & Wang Qian, 2014). The author used a questionnaire survey to find out the attitude of the society towards surrogacy, so as to seek the mainstream values of the society. The author published a questionnaire on the Internet with the title "whether you support surrogacy and explain the reasons". 105 questionnaires were received within a month, and 84 questionnaires were valid after screening, of which 50 were female and 34 were male, all of them were between 20 and 26 years old, and all of them did not support surrogacy. The main reasons for not supporting surrogacy are as follows: 1. The legalization of surrogacy will make women become reproductive machines, undermine women's dignity and increase gender inequality. 2. The legalization of surrogacy will commercialize women's bodies, and women's appearance and IQ will become factors that affect the price of surrogacy and degrade women's personalities. 3. After the legalization of surrogacy, a large number of women will "voluntarily" engage in surrogacy due to economic and emotional pressures. Although the author's survey is not rigorous and the scope of the survey is relatively small, it is clear that most young people are against surrogacy, believing that surrogacy is unethical and degrading to human dignity, and that legalizing surrogacy will cause serious moral panic and social crisis. From the results of the social survey, surrogacy is generally opposed by the survey respondents, the act of surrogacy is against the general moral concept of society and the mainstream values of the social masses, and the surrogacy contract is against public order and morality.

3. The Doctrine of Recognition of Surrogate Paternity

The doctrine of recognition of surrogate parentage includes the childbirth theory, the blood theory, the contract theory, and the best interest of the child theory. Each has its own rationality and limitations, and different doctrines should be applied according to the specific circumstances of the case.

3.1 Childbirth Theory

The theory of childbirth originates from the principle of "the one who gives birth is the mother" in traditional civil law, which holds that the surrogate mother is the legal mother of the surrogate child. Some scholars believe that the surrogate mother participates in the whole process of conceiving and raising the child, puts more effort

and energy than the sperm and egg provider, and establishes a closer connection with the surrogate child, and this flesh and blood connection is higher than the genetic connection (Lv Qunrong, 2010). In China's judicial practice, it is also recognized that "the establishment of the mother-child relationship lies more in the emotional ties brought about by the gestation process and the hardships of childbirth in October, and in the mother's huge investment and intangible contribution to the child in terms of energy, blood and emotion (Civil Judgment No. 56 of Shanghai No. 1 Zhong Shao Min Final, 2015).

Judicial practice in countries such as France, Germany and Japan, where surrogacy is completely prohibited, often relies on the childbirth theory to determine paternity. Article 311 of the *French Civil Code* stipulates that the legal mother of the child is determined by the birth certificate; the *German Civil Code* also considers the mother of the child to be the legal mother of the child; in the Aki Mukai case in Japan, it was ruled that no parentage exists between Aki Mukai and the surrogate baby based on the childbirth theory.

Although the childbirth theory shows respect for the fact of childbirth, it does not pay enough attention to the important role of genetic linkage in the birth system and cannot address the difficulties in gestational surrogacy. Society, in general, views the biological connection between parents and children as the basis for social and emotional ties. In gestational surrogacy, the surrogate mother may not want to be the legal mother of a child to whom she is not genetically related. The parturition theory does not apply ipso facto to the issue of surrogate parentage.

3.2 The Blood Theory

The blood theory considers the parent with whom the child is genetically related as the legal parent of the child, and the blood theory respects the genetic link more. From the perspective of biology, the formation of a fetus begins with the fertilized egg, and the sperm-egg determines the genes of the fetus and plays an irreplaceable role in the formation of the fetus. It is in line with the general concept of society to determine the biological parents of a child based on the criterion of blood relationship. In China, the concept of "blood recognition" has always existed, and the concept of succession also reflects that the child should have a genetic link with the father.

In the 1990 California case *Johnson v. Calvert*, a California court held that the intended parents were the legal parents of the surrogate child, one of the reasons being that there was no genetic link between the surrogate mother and the surrogate child (851 P.2d 776, 782 Cal., 1993). In a 2019 surrogacy paternity dispute in Shanghai, China, the first instance ruled that there was no paternity between the intended mother and the surrogate child because there was no genetic link between the intended mother and the surrogate child (Civil Judgment No. Shanghai 0107 Civil No. 8717, 2019).

The genetic theory focuses only on biological ties and ignores emotional ties between parents and children. The establishment of mother-child relationship is not solely based on biological genetic continuity, but more on the emotional connection brought about by the gestation process and the hardships of childbirth. Moreover, in the case of sperm and egg donation, the donor is difficult to find and has no desire to raise the child, so it is difficult to protect the interests of the surrogate child by identifying the legal parents based on genetic ties.

3.3 Contractual Theory

According to the contractual theory, the parties agree that the intended couple will be the parents of the child before the surrogacy contract is executed, and the law should respect the decision of the parties. The contract theory embodies the legal spirit of private law autonomy and is in the interest of the parties. The contractual doctrine is the rule for determining paternity in many countries that allow surrogacy.

Also in the 1990 California case *Johnson v. Calvert*, the surrogacy contract provided that the commissioning couple would provide the sperm and eggs, the surrogate would provide the uterus for conception, the surrogate mother would not have parental rights to the surrogate child after a successful surrogacy, and the intended parents would be the legal parents of the surrogate child. The California Supreme Court held that in the event of separation of genetic motherhood and birthing motherhood, the mother with the intent to nurture the child is the legal mother of the child; surrogacy is a voluntary act between the parties, and there is no coercion between the surrogate parties; the surrogate woman is free to dispose of the fetus in her womb, and the surrogacy contract does not violate her freedom to terminate the pregnancy; and despite the general societal perception that disadvantaged women will be financially pressured to There is no evidence that surrogacy is an exploitation of women or a trade in children as a commodity. The surrogacy contract is legal and valid and enforceable (*Johnson v. Calvert*, 851 P.2d 776, 1993). Ultimately the commissioning couple is recognized as the genetic, legal parents of the child, and the surrogate mother has no right to claim constitutional protection.

Although the contractual doctrine respects the autonomy of the parties, the law has always had strict limitations on personal relationships, and even in countries where surrogacy is legalized, special legislation is required to regulate it. Even in countries where surrogacy is legalized, special legislation is needed to regulate it.

3.4 Best Interests of the Child

The best interests of the child doctrine does not look at the genetic relationship and the fact of delivery, but rather the best interests of the child as the primary basis for determining paternity by reference to the principles adopted by both parents in child custody disputes in divorce.

In the 1985 New Jersey Baby M case, the intended father provided sperm and the surrogate mother refused to deliver the baby after delivery. The New Jersey Supreme Court held that the surrogacy contract violated New Jersey law; the content of the agreement, which agreed that the surrogate mother waived all rights to the surrogate child, violated New Jersey public policy, and the surrogacy contract was void, but the best interests of the child led to the child being raised by the intended parents (Baby M, 109N.J.396, 1998). In the 1985 English transnational surrogacy case Baby Coton, a Swedish couple commissioned an English woman to be their surrogate. The court held that the surrogacy was illegal and found the Swedish couple to be the legal parents of the child based on the best interests of the child (FLR847, 1985).

The best interests of the child doctrine is too open-ended; personal relationships cannot be determined by interests as the primary criterion; the root of personal relationships lies in the blood and social ties between each other. It is difficult to keep the parent-child relationship in a stable state if interest is used as the criterion for deciding personal relationships, and it is inconsistent with our traditional ethical concepts and lacks a social and cultural foundation. The best interest of the child is left to the discretion of the judge, which is highly subjective and requires a high level of competence, and there is a possibility that the decision will harm the interests of the child.

4. Consequential Rules for the Determination of Paternity in China

The determination of surrogate parentage should still follow the logic of the determination of biological parents under natural reproduction and focus on the biological connection between each other, while at the same time, the social connection between each other should be emphasized in order to protect the interests of the surrogate child.

4.1 The Choice of Legal Parents of Surrogate Children

China's law provides that parentage includes natural parentage and legally mooted parentage, and for the determination of legally mooted parentage, China has made detailed provisions on the formation of the adoptive parent-child relationship and step-parent-child relationship. After the natural blood relatives of the surrogate child are identified, the proposed parentage can be identified according to the legal provisions.

First, a person who is biologically linked to the surrogate child is eligible to be the legal parent of the child. The genetic connection is the primary basis for identifying the biological parents of a child, and both men and women who provide the genes are eligible to become the legal parents of a surrogate child.

Second, in order to protect the interests of the surrogate child, it is also necessary to consider the social connection between the parties concerned and the surrogate child. Intended parents who are not biologically connected to the surrogate child have the will to raise the surrogate child, which is beneficial to the growth of the surrogate child. The intended parent who is not biologically connected is eligible to be the legal parent of the surrogate child.

4.2 Rules for Determining Parentage Under Different Categories

Under the principle of giving priority to biological ties while taking into account social ties, the relevant rules are applied flexibly in light of the specific circumstances of gestational surrogacy. In China's judicial practice, gestational surrogacy is mainly in the following three situations.

Table 1.

		Source of sperm	Source of egg
Gestational surrogacy	Scenario 1	Intended father	Intended Mother
	Scenario 2	Intended Father	Third person
	Scenario 3	Third person	Intended mother

4.2.1 Scenario One Applies the Bloodline Theory

In the case of surrogacy, in which the intended parents provide the sperm and eggs, the bloodline theory should be applied to determine the intended parents as the legal parents of the surrogate child. First of all, since ancient times, China has a tradition of using blood as the bond of family ties. Due to the influence of Confucianism, the concept of "no offspring is too great if there are three unfilial children" is still imprinted in people's minds.

Intended parents are often looking for surrogacy in order to have a child related to them, otherwise adoption would be a better choice. Second, in the context of our country's particular emphasis on blood ties, genetic ties are an important factor in the unconditional nurturing of a child by parents. Although the intended parents do not fully participate in the conception process of the child, they have put in the corresponding energy and effort, and the genetic connection and willingness to nurture can make up for the lack of innate emotional connection; the surrogate mother participates in the conception of the surrogate child throughout the whole process, but her purpose is to earn money and she has no willingness to nurture the surrogate child. Even if the surrogate mother has the will to raise the surrogate child, the lack of blood relationship with the surrogate child is still a potential destabilizing factor. Finally, recognizing the intended parents who provide the sperm and eggs as the legal parents of the surrogate child can provide a complete family for the child, with the parents being the central figure in the nurturing of the child, and dual lineage nurturing is an effective form of nurturing in the existing environment for the healthy development of the child.

4.2.2 Scenario Two Applies the Best Interests of the Child Theory

In the context of our country, paternal lineage is the main concern. In the case where the intended father provides the sperm and the third person provides the eggs, the bloodline theory should be applied in preference to confirm the intended father who has a biological connection with the surrogate child as the legal father of the surrogate child, and the donor of the eggs as the legal mother of the surrogate child. The donor of the eggs does not have a desire to raise the surrogate child with whom she is genetically linked, which is detrimental to the development of the surrogate child, and the best interests of the child doctrine precludes the donor from becoming the legal mother of the surrogate child. The intended mother obviously has a stronger parenting will than the surrogate mother, and she has a marital relationship with the intended father (legal father), which can provide a good family environment for the surrogate child and is more conducive to the growth of the surrogate child.

4.2.3 Scenario Three Applies the Bloodline Theory

In the case where the third party provides the sperm and the intended mother provides the egg, the intended mother is genetically linked to the surrogate child and becomes the legal mother of the surrogate child, and the intended father becomes the legal father of the surrogate child based on the legal presumption. First, the best interests of the child doctrine precludes the donor from becoming the legal father, and our law clearly states that there is no parent-child relationship between the sperm donor and the child conceived with his sperm. Second, legal fatherhood can be acquired based on the marital relationship. According to the legal presumption, the husband is the legal father of the child born to the wife during the marriage, and this legal presumption presupposes the existence of a genetic link between the husband and the child. Since the birth of a child through surrogacy is the common intention of both spouses, it indicates that the husband is willing to become the legal father of the surrogate child, who is not genetically linked to him, and has the will to raise the surrogate child, and the spouses are naturally the legal parents of the surrogate child.

5. Conclusion

Due to the lack of legal rules for the determination of surrogate paternity in China, the existing family marriage laws are based on a natural reproduction framework, which makes it difficult to deal with the difficult issue of determining surrogate paternity. Surrogacy is illegal in China, but the interests of surrogate children still need to be protected. In the determination of surrogate paternity, the relevant rules should be flexibly applied in the light of the specific circumstances of the case, under the principle that biological ties are the main concern and social ties are taken into account. In the future, China should clearly regulate surrogacy through legislation in order to reduce the occurrence of surrogacy; at the same time, issues related to surrogacy can be explained through judicial interpretation, so as to provide a clear basis for dispute resolution and maximize the interests of surrogate children.

At the same time, the issues related to surrogacy can be clarified in the form of judicial interpretation so as to provide a clear basis for dispute resolution and maximize the interests of surrogate children.

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