

Study on the Legal Application of the Determination of Parent-Child Relationship in China's Surrogacy Involving Foreigners

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Abstract: The determination of parentage of foreign surrogacy directly involves the protection of the rights and interests of the surrogate child, the commissioning parents and the surrogate mother, and is also a prerequisite for the determination of guardianship and custody of the surrogate child. At present, China is faced with the dilemma that the criteria for determining "foreign surrogacy" are not in line with international trends, and that the current Law on the Application of Laws lacks clear and appropriate conflict rules for the determination of "foreign surrogacy parent-child relationship". Therefore, it is necessary for China to reconstruct the rules of law applicable to the determination of parent-child relationships involving foreign surrogacy in the light of the best interests of the child.

Keywords: Foreign Surrogacy; Paternity; Application of Law.

1. Introduction

The development of artificial reproduction technology and surrogacy legal system of various jurisdictions on the huge differences gave birth to the phenomenon of foreign surrogacy prevalence, but also because of the differences in the legal system of surrogacy in various jurisdictions, due to the conflict of laws caused by the emergence of legal issues, including the legal parentage of the child of the surrogate child involved in foreign affairs, i.e., surrogacy paternity of the surrogacy of the child, which directly affects the subsequent surrogate child's nationality, the determination of the place of habitual residence, as well as surrogate The child's rights and interests of adoption, guardianship, custody and protection of the rights and interests of the entrusted parents, so the determination of paternity is not only the first thing in the legal issues of foreign surrogacy, but also the prerequisite and basis for the protection of the right to identity of the child involved in foreign surrogacy.

At present, there is no uniform international convention or conflict of laws governing the legal application of the determination of paternity in cases involving foreign surrogacy. China's domestic conflict of laws and substantive laws have not made special provisions on the determination of parent-child relationships involving foreign surrogacy. The Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations does not contain any conflicting norms on foreign-related surrogacy. Article 25 of the law on the general parent-child relationship of the general provisions of the law is difficult to adjust the parent-child relationship in the foreign surrogacy. This article focuses on the conflict of laws in the determination of parent-child relationship of foreign surrogacy, analyses the difficulties faced by the application of laws in the determination of parent-child relationship of foreign surrogacy in China, and finally discusses some feasible ways to deal with the difficulties in the application of laws.

2. Conflict of Laws on the Determination of Paternity in Relation to Foreign Surrogacy

2.1. Conflict of Laws on the Determination of Paternity in Relation to Foreign Surrogacy

The phenomenon of transnational surrogacy and reproductive travel has emerged in recent years as a result of a number of factors, one of the keys of which is the negative attitude of some countries towards surrogacy, which has given rise to the idea of seeking overseas surrogacy for their own people. The problem arises when the receiving country of the surrogate child does not recognize the administrative or judicial instruments concerning the determination of paternity issued by the country of birth. Therefore, the root cause of disputes over the determination of paternity in relation to foreign surrogacy is, in essence, the conflict of laws arising from the different legal provisions on foreign surrogacy between different countries, with the conflict arising from the inconsistency between countries on the legality of surrogacy and the criteria for the determination of paternity in relation to foreign surrogacy being the most notable one.

2.1.1. Conflict Over the Legality of Surrogacy

Conflicts of law arise when countries treat surrogacy inconsistently and have different rules regarding its legality. Generally speaking, the laws of a State are generally binding only within its territorial boundaries. Whether or not a country recognises the legality of surrogacy has a direct impact on the outcome of the determination of transnational surrogacy paternity and the recognition of related judgements.

2.1.1.1 Total Prohibition Type

Some countries have adopted strict legal prohibitions against surrogacy, such as Germany, France and Italy. In Germany, for example, the Embryo Protection Act makes it illegal to artificially implant an unfertilised egg into the body of another woman. In most continental French countries, legal motherhood is recognised on the basis of the fundamental principle of "motherhood by birth", and surrogacy contracts

linked to financial gain are regarded in these countries as tantamount to human trafficking. [1]Consequently, in those countries where surrogacy is strictly prohibited, it is generally difficult to obtain recognition of judgements establishing transnational surrogacy paternity.

2.1.1.2 Limited Open

There are also some countries that have limited surrogacy, i.e., only non-commercial surrogacy and other types of surrogacy approved by state agencies are permitted, such as Thailand, Canada, Sweden and Australia. [2]Among them, Thailand is no longer the so-called "Mecca of surrogacy" since the enactment of a draft ban on commercial surrogacy in 2014. Article 24 of the Act on the Protection of Babies Produced by Assisted Reproductive Technology prohibits commercial surrogacy, which means that any surrogacy for money or other profit is illegal. Section 27 prohibits the practice of surrogacy intermediaries and the advertising of commercial surrogacy, as well as the solicitation of fees by surrogacy intermediaries or the acceptance of remuneration for the management of surrogacy.

2.1.1.3 Nearly Fully Permissive

There are very few countries or regions that fully accept surrogacy, with the exception of California in the United States, Ukraine, and India. Ukraine is the main destination for foreign nationals travelling for surrogacy, and the adoption of the Family Code in 2002 made cross-border surrogacy possible. Since then, a large number of national and foreign couples have been carrying out surrogacy in Ukraine every year, due to the relatively low cost of surrogacy. However, the local government has not issued regulations on surrogacy, making surrogacy in Ukraine a grey industry.

In addition, there are also countries that do not have laws that explicitly prohibit surrogacy, such as China and Japan. However, from the overall situation of countries around the world, the number of countries that support the complete opening of surrogacy is getting smaller and smaller, and many countries are gradually changing from the complete opening of surrogacy or the complete banning of surrogacy to the limited opening of surrogacy, and the crackdown on cross-border surrogacy is beginning to gradually increase.

2.1.2. Conflicting Doctrinal Bases for the Determination of Paternity in Relation to Foreign Surrogacy

When the doctrinal basis for the determination of transnational paternity differs between countries, there are many possibilities for the legal mother and father of the surrogate child, and there may be a conflict of laws between the domestic laws of the receiving country and the country where the surrogate child was born in terms of the criteria for the determination of paternity, which will directly lead to the phenomenon of limp paternity, and thus violate the legitimate rights and interests of the surrogate child. In order to resolve this dilemma, it is necessary to sort out the doctrinal basis for determining paternity in each country.

2.1.2.1 Genetic Theory

The genetic theory holds that the parents of a surrogate child are the persons who provide the genetic material, i.e., the legal parentage is recognised in the biological sense. In the traditional reproductive relationship, the genetic theory and the birth theory coincide, i.e., the person who gives birth is the mother who provides the genetic material, the genetic mother is the legal mother, and the genetic father is the legal father. However, in the case of surrogacy, where the gametes are donated by another person, the genetic theory cannot be

established.

2.1.2.2 Childbirth

The doctrine of nativity means that the woman who gives birth to the surrogate child is the mother of the surrogate child, in accordance with the principle that the mother is the one who gives birth to the surrogate child. The doctrine of nativity is derived from Roman law and, because of its ancient origins, was adopted by many countries in the early days for the determination of paternity. Since only the legal mother of the surrogate child can be determined on the basis of the doctrine of confinement, if the legal father is to be determined, it is generally necessary to combine it with the doctrine of the presumption of legitimacy. The German Civil Code explicitly states that "the mother is the woman who has given birth to the child"; In some European Union countries, such as Ireland and the United Kingdom, their domestic legal systems also register the mother of the birth as the mother on the birth certificate.

2.1.2.3 Contractualism

The doctrine of contract, or meaning, refers to the determination of the parent-child relationship of a surrogate child on the basis of the agreement of the parties to the surrogacy. This doctrine holds that the birth of a surrogate child is based on a surrogacy agreement between the intended parents and the surrogate mother, and that the law should respect the autonomy of the parties and directly determine the parent-child relationship between the intended parents and the surrogate child in accordance with the legal procedures. [3]The contract theory presupposes that the State recognises the validity of the surrogacy agreement, which means that it recognises the legality of the act of surrogacy, and is therefore mainly applicable in countries or regions where surrogacy is legalised.[4]

2.1.2.4 Presumption of Marriage

The presumption of legitimacy, which can be seen as complementary to the doctrine of confinement, is used to determine the legal father of a surrogate child. It considers the legal father of the surrogate child to be the husband of the surrogate mother with whom she was in a marital relationship during the period of pregnancy and confinement. The doctrine presupposes that the husband of the surrogate mother consented to the surrogacy.

2.1.2.5 Best Interests of the Child

The doctrine of the best interests of the child, which is primarily derived from the provisions of article 3 of the United Nations Convention on the Rights of the Child, essentially states that in all matters concerning the rights and interests of the child, the public authorities shall give priority to the best interests of the child. In Germany, the statement of the best interests of the child has been reflected in existing cases. For example, in the 2014 case of surrogacy by a German same-sex couple, [5] the German Supreme Court affirmed that the parent-child relationship between the commissioning parents and the surrogate child was not contrary to German public order based on the best interests of the child, and that the judgement of the Californian court should be recognised.

3. Dilemmas in the Application of the Law on the Determination of Paternity in China in Relation to Foreign Surrogacy

3.1. Conflicts between China's Judgement Criteria on the "Foreignness" of Surrogacy and International Trends

In the past judicial practice of foreign surrogacy paternity determination, Chinese judges did not carry out the choice of law, of course, there are some judges themselves to choose the weak awareness of the law, foreign trial level is insufficient and other reasons, such as Changde City, Hunan Province, surrogate child custody disputes,[6] but from a deeper comparative analysis can be seen, China's "the supreme people's court on the application of the" the People's Republic of China law on the application of law on foreign-related civil relations" a number of questions However, from a deeper comparative analysis, it can be seen that China's "The Supreme People's Court on the Application of the Law of the People's Republic of China on the Application of Laws on Foreign-related Civil Relations", Article 1 of the "Interpretation (1)", the judgement standard of "foreign-related" is actually much broader than the judgement standard of the Hague Conference on Private International Law and other countries on transnational surrogacy, so even if the judges of the civil and commercial trials on foreign-related cases are familiar with the foreign-related rules on the choice of law, this paper believes that they may also be hesitant to choose the law on the specific legal relations of the foreign-related surrogacy, which will This will also affect the judge's decision on whether or not to make a choice of law.

Of course, China as a statutory law country, in the above judicial interpretation (1) has clearly stipulated the "foreign-related" judgement standard and at present, no matter China's substantive law or the field of conflict of laws have not made special legal provisions on the foreign surrogacy, if the judge can break through the inadequacy of the existing judicial practice, legally based on judicial interpretation (1) Article 1 of the judicial interpretation (1) of the general foreign-related civil relations judgement criteria for foreign surrogacy parent-child legal relationship to make a judgement belongs to the norms of good trial state, should be praised. However, in fact, in view of the special characteristics of foreign surrogacy legal relationship and the international development trend, the above mentioned broader "foreign-related" standard in China's Judicial Interpretation and HCCH as well as the judgement standard of other countries for transnational surrogacy, the same will appear in what standard China will adopt to judge the legal relationship of surrogacy (including the foreign-related surrogacy parent-child relationship). The problem of what criteria China will adopt to judge the "foreignness" of surrogacy legal relationship (including surrogacy parent-child relationship) is more appropriate, however, China has not paid enough attention to this problem, neither in academia nor in legislation, and there are no specific measures and legal provisions to solve this problem. Therefore, this paper advocates that, in order to better solve the problems in judicial practice of China's foreign surrogacy parent-child relationship, should be proactive attention to this disagreement and give research and solution.

3.1.1. The Hague Conference on Private International Law Defines the Criterion of "Foreignness" Embodied in "Transnational Surrogacy"

There has not been a uniform definition of transnational surrogacy at home or abroad, and the HCCH, in the Appendix to its Preliminary Report on International Surrogacy Arrangements, explains transnational surrogacy as the practice of surrogacy in which the surrogate mother resides in a different country from the intended parents, and in which the surrogate mother and the intended parents live in a different country. behaviour. This definition, which emphasises 'residence' rather than 'habitual residence', is intended to cover a wider range of surrogacy types and can be seen as a broad interpretation of transnational surrogacy. For example, if a surrogate mother is temporarily sent to a third, different country where surrogacy is permitted, and then returned to her home country after the birth of the surrogate child, there is no habitual residence in the strict sense of the word. In a 2014 report, HCCH maintained its previous interpretation of transnational surrogacy. While the HCCH's approach is intended to cover a wider range of transnational surrogacy scenarios, the latter is actually broader than China's criteria for foreign surrogacy, which also includes consideration of nationality and other factors. Overall, as a more authoritative organisation in the field of private international law, the HCCH's definition of transnational surrogacy can serve as an important reference in the absence of an official definition.

3.1.2. China's Criteria for Determining the Foreignness of Surrogacy Legal Relationships

Chinese legislation does not have special judgement criteria for "transnational surrogacy", and only provides for "foreign-relatedness" in the judicial interpretation, i.e., as long as the conditions listed in Article 1 of the Judicial Interpretation (1), namely, "nationality, usual place of residence, location of the subject matter and legal facts", are met, it can be regarded as a foreign-related civil relationship, as well as other circumstances that can be regarded as foreign-related. That is to say, as long as the conditions of "nationality, habitual residence, location of subject matter and legal facts" listed in Article 1 of the Judicial Interpretation (1) are satisfied, these legal elements are associated with foreign countries, and other circumstances that can be recognised as foreign-related civil relations, then it can be recognised as foreign-related civil relations. Therefore, unlike the Hague Conference on Private International Law's emphasis on "place of residence", China's definition of foreign surrogacy is broader, and also involves the nationality of the parties and the place where the surrogacy takes place, so it may not be in line with international trends. In addition, the EU's definition of cross-border surrogacy is different from that of The Hague, as recognised by the OECD, cross-border surrogacy refers to a surrogacy agreement between a surrogate mother and intended parents who are of different nationalities or with different habitual residences in different countries and who carry out the act of surrogacy, i.e., in addition to "habitual residence", it also takes into account "nationality". [7]Nationality" is taken into account in addition to "habitual residence".

In the light of such divergent views on the definition of transnational surrogacy, it is worthwhile to consider and explore whether some special cases, such as those in which the surrogate mother and the intended parents are of different nationalities but have the same place of habitual residence,

and ultimately give birth to the child in the country of their common place of habitual residence, are considered to be transnational surrogacy.

3.2. The Current Law on the Application of Law Lacks Clear and Appropriate Conflict Rules for the Determination of "Foreign Surrogacy Paternity"

China currently has no conflict of laws that specifically address the issue of recognising the parental authority of foreign surrogates. With regard to general foreign-related parent-child relationships, the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations stipulates only in article 25 that "the laws of the place of common habitual residence shall apply to the personal and property relationships between parents and children; if there is no place of common habitual residence, the laws of the place of habitual residence of one of the parties or of the State of nationality shall apply to the laws that are conducive to the protection of the rights and interests of the weaker party." The conflict of norms for foreign surrogacy paternity disputes is difficult to apply, there are the following problems.

3.2.1. Easy to Fall into a Logical Dead End

According to the existing conflict of laws rules in China, in order to determine the applicable law in foreign surrogacy cases, it is necessary to determine the point of connection. The alternative points of connection in article 25 of the Law Applicable to Chinese Law are the common habitual residence, the habitual residence of the surrogate child or the parents, or the country of nationality. With the exception of the "habitual residence of the child" link, these links are usually related to the parents. With regard to the determination of the country of nationality, for example, most countries use the *jus sanguinis* or *jus soli* doctrine, so that the determination of nationality is preceded by the determination of who the child's parents are. As a result, the first issue to be resolved in determining the legal parentage of a surrogate child is who is the legal parent of the surrogate child, however, this is back to the original point of conflict of norms, so using these common linking points to designate the applicable law will be caught in a logical dead end circle. [8] Some practitioners have also pointed out that, for some foreign surrogacy cases that request confirmation of guardianship, Article 30 of the Law on the Application of the Law on the Conflict of Laws on Foreign Guardianship can be directly applied, however, according to the Civil Code of China, the parents generally act as the guardians of the minors, so the judgement of guardianship ultimately needs to be determined by the surrogate child's legal parents, and the practical operation is still not able to get out of the cycle.

3.2.2. Links are Not Comprehensive Enough

In addition to being easily caught in a logical loop, the above links do not effectively solve the problem of determining the paternity of a foreign surrogate in reality. The "usual place of residence of the child" in China needs to satisfy the condition of "the place where the child has resided continuously for more than one year at the time of the creation or change or termination of the foreign-related civil relationship, and which serves as the centre of the child's life". [9] That is to say, when the surrogate child was born less than a year ago, its usual place of residence is still uncertain, then "the child's usual place of residence" is difficult to serve as a

suitable link. The connecting point of "country of nationality of the surrogate child", except for a few "*jus soli*" countries, in "*jus sanguinis*" countries, usually depends on the nationality of the parents, and at this time How can the choice of appropriate law be based on the fact that the parents have not yet been identified? From a macro point of view, Article 25 of the Law on the Application of Law follows the "principle of the most favourable protection of the weak", and the surrogate child should be in a weaker position than the surrogate mother and intended parents, but with such a small number of links and no real application, the existing conflict of laws does not allow for the selection of the most favourable law for the "surrogate child". "Surrogate Child". Therefore, in view of the fact that the current linking points are not comprehensive enough, and the existing linking points are difficult to solve the problem of choice of law in practice, it is necessary to carry out special conflict of laws provisions on the recognition of foreign surrogacy parent-child relationship, and to set up additional linking points that are operable and easy to be confirmed, so as to fully safeguard the basic interests of surrogate children.

4. Analysis of the Path of Legal Application of in Response to the Determination of Parent-Child Relationships of Surrogates Involved in Foreign Countries in China

4.1. Explicitly Adopting the "Principle of the Best Interests of the Child" as an Important Principle in the Choice of Law for Foreign Surrogacy Parent-Child Relationships

The expert group of the Hague Conference on Private International Law studied the issue of public order and concluded that, with regard to the recognition of transnational surrogacy, reference should be made to other international conventions, and that recognition should only be refused if it is "manifestly contrary to public order", and that the formulation of the public order reservation should be based on the best interests of the child. It is therefore necessary for China to introduce the "best interests of the child" into judicial practice, and to impose appropriate restrictions on the use of the public order reservation system.

At present, the number of transnational surrogacy is still growing, and foreign-related cases concerning the determination of paternity and the determination of the right of custody will also come in succession. The principle of the best interests of the child as the basis for handling disputes over the determination of paternity in transnational surrogacy is not only a requirement of reality in the absence of statutory provisions, but also in line with the concept and purpose of the United Nations to care for the rights and interests of children.

At present, some countries have incorporated the principle of the best interests of the child into the conflict of laws governing transnational parent-child relationships. China should also apply conflict regulations based on the principle of the best interests of the child. The principle of the best interests of the child can be taken as a specific principle and an important criterion in Article 25 of the Law on the Application of Laws, which is "conducive to the protection of

the rights and interests of the weak", and the interests of the child should be given priority consideration in dealing with disputes relating to the determination of the paternity of the child and the right of custody and guardianship of the child. In dealing with disputes relating to the determination of parentage and custody, the interests of children should be given priority, and the principle should be refined in the specific provisions of the sub-rule, for example, in terms of the scope of the choice of linking points and the order in which they should be chosen in order to be in the best interests of the child.

4.2. Improvement of the Criteria for Determining "Foreignness" in Judicial Interpretations

According to the definition of transnational surrogacy provided by the HCCH in its preliminary report, it can be seen that the main emphasis of the HCCH is on the place of residence of the participants in the surrogacy act as well as the place where the surrogacy act is carried out, which is intended to highlight the transnational nature of the surrogacy act itself. According to China's general judgement standard on foreign-related civil legal relations, only the surrogate mother with different nationalities but the same habitual residence and the intended parents in the common habitual residence of the surrogacy will also be considered as foreign-related surrogacy, at this time there is no surrogate child's birthplace country and the receiving country. According to the judicial interpretation of the legal elements of article 1, this situation does meet the first referred to the nationality of the elements, formally foreign-related, but at this time does not reflect the cross-border surrogacy this act of trans-regional nature, from the essence of the case belongs to the domestic cases, there is no need to deal with as a foreign-related cases. Similarly, in the arbitration case involving FTZ, the parties may create "false foreign-related" situation in nationality, domicile and other elements to obtain the advantage of foreign-related arbitration, [10]but at this time in fact, there is no substantial connection with the foreign country. This shows that it is difficult to define foreign surrogacy according to the "elements of legal relationship" adopted by China for the determination of foreign-related civil relations.

Given that China currently does not have a specific definition of foreign surrogacy, and the international community has not formed a common concept, while the HCCH, as one of the more important international organisations in the field of private international law, has adopted a number of well-known international conventions, and the definitions it has made in its official documents have a high value of reference and reference. Therefore, China should take the HCCH's definition of transnational surrogacy as a benchmark, and define foreign-related surrogacy as a form of surrogacy in which the place of residence of the surrogate mother, the place of residence of the intended parents, and the place where the surrogacy is carried out involve at least two countries. As China's judgement standard for foreign-relatedness has a certain degree of discretion due to the existence of the "other circumstances that can be recognised as a foreign-related civil relationship", it is necessary for the "foreign-related surrogacy" to be interpreted restrictively, and for cases where the form of the surrogacy involves foreigners but the substance does not. The judgement standard should be interpreted in a restrictive manner, requiring that the judgement of foreign-related civil

and commercial legal relations should focus on the substantive connection of the foreign-related factors. Specifically, a provision can be added between paragraphs 4 and 5 of Article 1 of the Judicial Interpretation of the Law on the Application of the Law, so as to appropriately restrict the provisions of the first four paragraphs, i.e., "the special circumstances in paragraphs 1 to 4 where there is no substantial connection with a foreign country shall be excluded".

4.3. Adding Conflicting Norms to the Law Applicable to the Determination of Paternity in the Case of Foreign Surrogacy

In reality, many countries choose to directly apply the law of the forum or the law of the home country of the commissioning parents when dealing with transnational surrogacy paternity disputes, which undoubtedly leads to the inability to apply the law that is most favourable to the surrogate child and puts him or her in a disadvantageous position due to the inappropriate choice of law. Therefore, in order to properly resolve such disputes and safeguard the basic interests of the surrogate child, it is necessary to apply the conflicting norms of private international law with a view to choosing the law that is fairer and more just for the outcome of the case.

At present, the conflict of laws provisions on foreign parent-child relationships in China's Law on the Application of Law are not yet sufficient to resolve the dilemma of the choice of law for the determination of foreign surrogacy parent-child relationships, for example, the linking of the points is not sufficiently comprehensive, and the conflict of laws provisions are logically flawed, which makes the application of the conflict of laws provisions in practice rather restrictive. In this regard, China needs to make separate provisions in the Law on the Application of the Law on the Conflict of Laws on the Recognition of Parent-Child Relationships Involving Foreign Surrogacy, which should not be confused with ordinary parent-child relationships, and to add appropriate links based on the principle of the best interests of the child.

Firstly, in order to get out of the logical circle of conflicting norms, it is necessary to distinguish between parents and intended parents. Because of the existence of foreign surrogacy different from the traditional parents of multiple parties, the relationship is more complex, as the identification of foreign surrogacy legal parents of the provisions of the identity of the "parents" must not be assumed in advance. Secondly, in order to solve the problem that the linking points of the conflicting norms are not comprehensive enough, it is necessary to set more linking points, and these linking points should be more closely related to the surrogate child. For example, although Article 25 sets "the common habitual residence of the parents and the child" as the first point of connection, this point of connection is not operationally feasible due to the difficulty of determining the habitual residence of the surrogate child. On the contrary, the place of birth of the surrogate child is more determinable, and the laws of the country of birth are generally more lenient with regard to surrogacy, so that the intended parents can generally become the parents of the surrogate child as a matter of course. In this regard, the place of birth of the surrogate child can be considered to be included in the conflicting norms for the determination of parental rights of foreign surrogacy.

Therefore, on the basis of article 25 of the Law on the

Application of Laws, China may set up another conflict of laws regulation on the parent-child relationship involving foreign surrogacy. The specific norm can be designed as follows: the law of the common country of nationality or common residence of the intended parents shall apply to the status relationship of the surrogate child in relation to foreign affairs; if the intended parents do not have a common country of nationality or common residence, the law of the country of nationality or habitual residence of one of the intended parents, the law of the country of the surrogate child's place of birth, the law of the surrogate mother's habitual residence, or the law of the country of nationality shall apply to the extent that it is the most favourable to the interests of the surrogate child.

4.4. Distinguishing between Different Foreign Surrogacy Parentage Relationships on the Basis of Genetic Linkage and the Origin of the Eggs

4.4.1. For Genetically Linked Gestational Foreign Surrogacy Parentage - Cross-Border Recognition Approach

On the premise of restricting the public order reservation, the fact that a surrogate child is genetically linked to one of the commissioning parents and is not genetically linked to the surrogate mother is a situation that does not clearly violate public order, and the Chinese courts should not refuse to recognize judgements on the determination of surrogacy on the basis of a violation of public order made by a foreign court. This is an option where the best interests of the child prevail over the application of the public order reservation. The premise that one of the commissioning parents must be related to the surrogate child can lay the foundation for the stability of family life, and at the same time can effectively curb the chaos of surrogacy carried out at will by people with surrogacy intentions, ensuring the implementation of the purpose of the HCCH Convention on Intercountry Adoption. [11] However, at present, China's social and ethical acceptance of genetic surrogacy is not high, and there is no precedent of recognising the legal parental status of the commissioning parents of such surrogacy in domestic judicial practice, and the surrogate mother in this type of surrogacy is prone to backtracking and refusing to transfer parental rights to the commissioning parents. Therefore, on the basis of maintaining the stability and continuity of parental rights, as well as weighing the principles of domestic public order and the best interests of the child, it is more appropriate to confirm paternity by means of cross-border recognition in the case of genetically linked gestational transnational surrogacy.

4.4.2. For Other Types of Foreign Surrogate Parent-Child Relationships - Introduction of Cross-Border Adoption

Compared to genetically linked gestational surrogacy, cross-border recognition of other types of foreign surrogacy would, on the one hand, run counter to China's reproductive ethics policy and create a serious conflict with China's public order, and, on the other hand, would have an impact on China's system of foreign adoptions, leading to the proliferation of various surrogacy methods. At the same time, from the point of view of achieving the purpose of surrogacy and respecting the wishes of the commissioning parents, the introduction of cross-border adoption would be a more appropriate approach than cross-border recognition. In

Europe, some countries that have not made clear legal provisions for surrogacy, such as the Czech Republic, have also adopted adoption as a way to protect the parent-child relationship in surrogacy. Therefore, in judicial practice, if China encounters other types of foreign surrogacy parent-child relationship recognition cases, cross-border adoption can be used as the main solution for dealing with such cases.

5. Conclusion

With the advancement of science and technology and medical technology, more and more groups of people, especially infertile couples, wish to fulfil their fertility wishes through cross-border surrogacy. Due to the prevailing legal conflict between the country of birth of the surrogate child and the receiving country on the legality of surrogacy and the criteria for the determination of paternity, the legal issue of the determination of paternity arising from cross-border surrogacy is very prominent. Since there is currently no unified international convention to regulate this issue, we mainly address the difficulties in the determination of paternity of foreign surrogacy from the perspectives of legal application and cross-border recognition. Chinese legislation does not contain specific provisions on the recognition of paternity in relation to foreign surrogacy, but more and more cases of foreign surrogacy have arisen in China, and in order to facilitate the resolution of disputes over paternity in relation to foreign surrogacy, China must take into account the interests of child welfare, public order, and the protection of private rights, and make responses to the application of the law.

At the level of legal application, China should follow the principle of the best interests of the child, and add the conflicting norms of foreign surrogacy to the Law on the Application of Laws in order to choose the accurate applicable law, so that relevant cases can have a basis for legal application, and to avoid being caught in a logical dead circle. For China, although the current Chinese legislation has not responded to the legality of surrogacy, but the avoidance of parental disputes involving foreign surrogacy and the refusal to recognise the relevant judgments does not accord with the international community's increasing attention to the principle of the best interests of the child, so in the future, China should be more active in responding to the recognition of the paternity of the surrogate relationship involving foreign surrogacy to solve the relevant problems.

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