

Legal Dilemmas and Solutions in Surrogacy Parent-Child Disputes

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Abstract. With the rising infertility rate in China, the surrogacy demand has surged, triggering complex parent-child disputes involving custody rights, inheritance rights, and guardianship rights. Currently, in Chinese judicial practice, there exist divergences in the qualification of the validity of surrogacy Agreements and conflicts in the Standards for parent-child relationships. International theories and experiences, such as Germany's "the woman who gives birth is the mother" principle and the contract theory in the United States, can contribute to resolving surrogacy parent-child disputes in China. By drawing on comparative Law experiences, improvements can be made to the rules for qualifying parent-child relationships, harmonizing parent-child legal relationships, and introducing a DDR Mechanism, so as to settle disputes and Guarantee the rights and interests of all Parties.

Keywords: surrogacy, parent-child disputes, qualification of parent-child relationships

1. Introduction

According to the 2023 statistical data of the National Health Commission, the infertility rate among the eligible population in the Country has increased fivefold compared to twenty years ago, with the existing patient scale exceeding 60 million. This has led to an underground surrogacy market reaching a scale of tens of billions, resulting in a geometric growth in disputes over the Acknowledgement of parent-child relationships. Judicial big data from the Supreme People's Court shows that between 2018 and 2023, the annual growth rate of family law issues involving surrogacy reached 42.7%, with 87.3% involving CONTROVERSY over the qualification of parent-child relationships, indicating that the current Statutes are inadequate to address and regulate new reproductive technologies. Under this background, researching the Dispute over parent-child relationships in surrogacy holds significant theoretical and practical importance. From a theoretical perspective, this research will contribute to improving the legal system governing parent-child relationships in the Country, filling legal gaps, clarifying the Standards and legal consequences for qualifying parent-child relationships in surrogacy, and providing robust theoretical support for judicial practice. In terms of practical significance, properly resolving Disputes over parent-child relationships in surrogacy can effectively Guarantee the lawful rights and interests of surrogate children, ensuring their effective protection under the Law in areas such as identity Acknowledgement, Vesting of custody rights, and Payments of child support, thereby promoting their healthy development.[1]

2. Overview of parent-child dispute issues in surrogacy

2.1. Concept and classification of surrogacy

Surrogacy, medically defined as the act in which a fertile female, commissioned by a couple unable or unwilling to conceive, carries a pregnancy for others through assisted reproductive technologies such as artificial insemination, in vitro fertilization, and embryo transfer. The female performing the surrogacy is referred to as the surrogate mother, and the child born therefrom is termed the surrogate child.

2.2. Common types of parent-child disputes in surrogacy

2.2.1. Custody dispute

Custody disputes are a frequent scenario in parent-child disputes arising from surrogacy. The surrogate mother typically bases her claim on the fact of childbirth, emphasizing her close emotional bond with the child and the physical sacrifices made during pregnancy; the commissioning party, on the other hand, often counters with arguments based on genetic ties, parenting capacity, and the stability of the child's living environment. The focal point of the Dispute frequently centers on the Standards for qualifying parent-child relationships—whether custody Vesting should be determined by the fact of childbirth or genetic ties—leading to intense conflicts between differing viewpoints. Simultaneously, the principle of the best interests of the child faces practical challenges, as how to accurately assess the child's optimal interests and make scientifically sound judgments under varying family environments and parenting conditions remains an urgent issue in judicial practice.

2.2.2. Inheritance dispute

Disputes arising from surrogate children inheriting the estate of the commissioning party involve complex issues such as legal status, qualification of parent-child relationships, and the exercise of inheritance rights, with the qualification of inheritance rights being particularly contentious. PRC Laws lack unified Standards for qualifying parent-child relationships in surrogacy, as traditional parent-child qualification is based on natural childbirth, which surrogacy disrupts. The Inheritance section of the Civil Code presupposes a lawful parent-child relationship, but the prohibition of surrogacy renders the legal status of surrogate children ambiguous, leaving no clear basis for their qualification as lawful Heirs. Furthermore, surrogacy involves social issues such as marriage, family, and ethics, requiring the qualification of surrogate children's inheritance rights to balance legal, ethical, and societal public order and good morals, with public opinion also divided on the matter.

2.2.3. Dispute over guardianship.

The controversy regarding the Vesting of guardianship over surrogate children is equally complex, involving issues of Law and ethics, affecting the growth of the child and the protection of their rights and interests. At the legal level, the illegality of surrogacy results in the lack of clear basis for the qualify of guardianship, as traditional guardianship is based on legitimate parent-child or adoptive relationships, which surrogacy disrupts. Ethically, surrogacy instrumentalizes the female uterus and commodifies reproduction, violating morality, and surrogate children may face identity crises during their growth, with the Parties in the guardianship Dispute prone to neglecting the

emotional needs of the child. The Vesting of guardianship must balance Law and ethics to ensure the child grows up in a healthy and stable environment.

3. Practical dilemmas in the acknowledgement of surrogacy parentage

3.1. Practical disputes in the qualification of surrogacy parentage

3.1.1. Review of classic cases

In judicial practice, there exist numerous disputes regarding the qualification of surrogacy parentage. Taking the inheritance dispute case of Li XX, Guo XX and Tong XX as an example, the court clarified two important rules related to artificial reproduction and testamentary succession. Through arbitral proceeding, the court qualified that: first, during the Continuation of the marital relationship, where the Parties unanimously consented to artificial insemination and Li Mou insisted on giving birth, the child Guo Mouyang shall be deemed as the legitimate child of both spouses, and the unilateral denial of parentage in Guo Moushun's will shall be Invalid. Second, the Property involved constituted jointly owned Property of the spouses, and the disposition of all Property (including Li Mou's share) in Guo Moushun's will infringed upon Li Mou's Property rights, rendering that Section Invalid; meanwhile, the failure to retain the necessary inheritance share for the fetus despite knowledge of its existence at the time of making the will also constituted a Violation of the Inheritance Law, rendering that Section of the will equally Invalid. Ultimately, the court ruled that the Property involved shall belong to Li Mou, and Li Mou shall Pay the corresponding compensation to Guo Mou and Tong XX after deducting her personal share and the necessary inheritance share reserved for Guo Mouyang from the Property value.

3.1.2. Analysis of disputes

In practice, disputes regarding the qualification of surrogacy parentage primarily focus on the following two points.

First, there is divergence in the qualification of the validity of surrogacy Agreements. In the surrogacy dispute case of Tian Mou v. Wang Mou in Xiamen, the court held that the surrogacy Agreement instrumentalized the surrogate's uterus and commodified the child, severely violating public order and good morals and the provisions of Law, and thus should be deemed Invalid. However, in some similar cases, some argue that although surrogacy Agreements violate legal provisions, whether the validity of the Agreement should be entirely negated in resolving surrogacy parentage disputes remains debatable. There are still those who hold the view that the surrogacy Agreement is voluntarily reached by the Parties, reflecting to a certain extent the will and agreement of the Parties, and that the content of the Agreement may be appropriately referenced in addressing issues such as parent-child relationships, so as to balance the interests of the Parties.

Second, the Standards for qualifying parent-child relationships are also subject to Dispute. At present, there exist different viewpoints such as the bloodline theory, the childbirth theory, and the best interests of the child theory. The bloodline theory emphasizes that parent-child relationships originate from biological blood ties, and only those with blood ties constitute genuine parent-child relationships. The childbirth theory, on the other hand, takes the fact of childbirth as the key to qualifying parent-child relationships, positing that a special bond exists between the birth mother and the child. In some surrogacy disputes, the surrogate mother claims custody of the child on the grounds of having undergone childbirth.

The above has led to inconsistent Standards for qualifying parent-child relationships in surrogacy cases in judicial practice, resulting in divergent Judgments. This not only affects the lawful rights and interests of the person concerned but also challenges the authority and integrity of the Law. Therefore, clarifying the Standards and rules for qualifying parent-child relationships in surrogacy and resolving contentious issues such as the validity of surrogacy Agreements are of significant importance for the proper handling of surrogacy parent-child disputes.

3.1.3. Issues in the qualification of surrogacy parent-child relationships

First, the fragmentation of judicial adjudication Standards. Although the Supreme People's Court's Guiding Case No. 126 established the "childbirth mother as primary" principle, local practices vary. In contrast, the Pearl River Delta region emphasizes "actual caregiving priority", with actual caregiving for at least 18 months serving as the core qualifying condition. According to the 2023 judicial review report of a certain eastern province's High Court, there exists a 32.7% phenomenon of Multidistrict Litigation strategy selection in surrogacy custody cases across the province, where the Parties directly influence adjudication outcomes through the choice of jurisdictional courts. More notably, the second instance reversal rate reaches as high as 38.6%, reflecting the higher courts' disapproval of lower courts' adjudication Standards. [2]

Second, the fragmentation of legal system articulation. Firstly, identity qualification conflicts: The parent-child relationship denial system established in Article 1073 of the Civil Code forms a specification conflict with the substantive requirements for adoption in Article 11 of the Adoption Law, leaving surrogacy-born children in a legal identity limbo due to their inability to meet the adoption prerequisite of "biological parents having special difficulties." Secondly, value orientation contradictions: The administrative regulations prohibiting surrogacy by the National Health Commission conflict with the child Interest Guarantees clauses in the Law on the Protection of Minors. For instance, in a Beijing inheritance case, surrogacy-born children were deprived of inheritance rights due to lack of legal identity, violating the principle of maximizing children's Interests.[3]

4. Principal theories for qualifying parent-child relationships in surrogacy

4.1. Jus sanguinis theory

This theory regards biological genetic ties as the core basis for establishing parent-child relationships. From a biological perspective, genetic relationships determine a child's hereditary traits and physiological attributes, which have long been a critical criterion for determining parentage in traditional procreation contexts. In surrogacy cases, proponents of jus sanguinis argue that only surrogate children sharing a genetic link with the deceased are entitled to inheritance rights, as they represent the continuation of the deceased's genes and share an inherent biological bond with them. However, jus sanguinis excessively emphasizes biological connections while overlooking key elements such as emotional bonding and caregiving in parent-child relationships.[4] In surrogacy contexts, it tends to disregard the emotional attachment formed between the surrogate mother and the child during gestation. In some cases, surrogate mothers may develop profound bonds with the child despite lacking a genetic link, yet jus sanguinis fails to acknowledge the significance of such emotional ties in determining parentage.[5]

4.2. Parturition principle

The parturition principle advocates for establishing parentage based on the surrogacy agreement. This doctrine asserts that such agreements—voluntarily and equally executed between commissioning parents and the surrogate mother—embody the principle of party autonomy. Through the agreement, both parties delineate their respective rights and obligations, including parental rights over the child and child-rearing responsibilities. These contractual terms merit judicial recognition and enforcement. In jurisdictions permitting surrogacy, such as certain U.S. states, courts consider the terms of legally compliant surrogacy agreements when determining parentage, routinely enforcing such agreements to assign parental status.

4.3. Contract theory

This theory prioritizes surrogacy agreements as the foundation for determining parentage. It holds that surrogacy contracts, voluntarily and equitably executed between intended parents and surrogate mothers, reflect the parties' autonomy and should govern parental rights and obligations, including child custody. In jurisdictions where surrogacy is permitted (e.g., certain U.S. states), courts often defer to legally compliant surrogacy contracts when adjudicating parentage.

However, surrogacy contracts may contain exploitative clauses that violate the rights of surrogate mothers and children. Moreover, as surrogacy remains illegal or ethically contentious in many regions, enforcing such agreements risks transgressing legal and moral boundaries. In commercial surrogacy, surrogate mothers facing economic hardship may be coerced into accepting unfair terms, further jeopardizing their rights.

4.4. The best interests of the child principle

This principle mandates that the child's welfare supersedes all other considerations in surrogacy parentage determinations. Grounded in the UN Convention on the Rights of the Child, it treats children as independent rights-holders entitled to protection. Courts evaluate factors such as the child's living environment, educational opportunities, and emotional needs to decide custody. For example, in China's First Surrogacy Twins Guardianship Case, the court granted custody to the intended mother (Ms. Chen) based on the children's established caregiving relationship with her, exemplifying this principle's application.

There are also some bottlenecks awaiting breakthrough. Subjective interpretations of "best interests" may lead to inconsistent rulings due to undefined weighting of factors and excessive judicial discretion. Variations in judges' assessments can result in divergent outcomes for similar cases.

5. Extraterritorial legislation and practice regarding the qualification of parent-child relationships in surrogacy

5.1. Practices in countries with a complete ban on surrogacy

Germany and France adopt a comprehensive ban on surrogacy, yet the two Countries exhibit differentiated characteristics in their legal approaches and the qualification of parent-child relationships.

According to the principle of "the woman who gives birth is the mother" in the German Civil Code, the surrogate mother is directly qualified as the legal mother, with blood relations not

constituting a legal bond. If the surrogate mother is married, her husband automatically becomes the legal father; if unmarried, the intended father must obtain parental rights through court Judgments. Legislators emphasize that this measure aims to curb the ethical risks of instrumentalizing the female uterus while upholding the dominant position of women in traditional family structures.

France establishes a dual ban through civil Law and criminal Law: the 1994 Bioethics Law explicitly declares surrogacy Agreements Invalid, and the 2021 Amendment to the Criminal Code classifies surrogacy as a crime against public health. In the qualification of parentage, the Law strictly qualifies the surrogate mother as the birth mother, and even if the commissioning spouse actively applies for adoption, courts refuse recognition on the grounds of "fraudulent blood relations." This principle of "absolute biological priority" reflects France's commitment to safeguarding the sanctity of the reproductive process.

Despite differing approaches, both Countries forcibly sever the legal connection between blood relations and parent-child relationships through legislation, refusing to recognize the validity of surrogacy. The core logic of their institutional design lies in using legal means to resist the commodification of reproduction, protect women from commercial reproductive exploitation, and uphold the boundary of traditional family ethics. This legislative orientation of "ethics over technology" reflects the extreme protection of life dignity in continental Europe.

5.2. Practices in countries with limited recognition of surrogacy

Certain states in the United States adopt an attitude of limited recognition toward surrogacy legislation, and their legislative circumstances and rules for qualifying parent-child relationships in surrogacy hold certain reference value.

In terms of the rules for qualifying surrogacy parent-child relationships, some states in the United States adopt the contract theory, whereby the Parties to the surrogacy Agreement determine the parent-child relationship in the form of a contract based on the foundation of the Principle of Parties' Autonomy. This view originates from the Principle of Parties' Autonomy in civil Law, holding that the subjective intentions of the intended parents and the surrogate mother at the time of entering into the surrogacy Agreement are the key to qualifying the parent-child relationship. In general surrogacy Agreements, it is explicitly stated that the intended parents shall obtain parental rights over the surrogate child after the surrogacy occurs. When reviewing the surrogacy Agreement, the court will pay special attention to the review of the true intentions of the surrogate mother and the intended parents.

5.3. Enlightenment and reference for china

The practices of different Countries in the international community regarding the qualification of surrogacy parent-child relationships provide China with multifaceted enlightenment and reference.

In terms of clarifying the legal stance, China should firmly maintain its prohibitive position on surrogacy, which aligns with the social ethics and legal system of the country. Surrogacy commercializes the reproductive function of women, seriously violates public order and good morals, may lead to the infringement of women's rights and interests, and triggers a series of social problems. China should improve legislation to further clarify the illegal nature and legal consequences of surrogacy, strengthen the crackdown on surrogacy, and uphold the authority of the Law and the public order and good morals of society.

In improving the qualification rules, China may draw on the beneficial experiences of other Countries and formulate scientific and reasonable rules for qualifying parent-child relationships in

surrogacy based on China's national conditions. When handling surrogacy-related parent-child disputes, multiple factors may be comprehensively considered, such as the principle of the best interests of the child, blood relationship, and the fact of childbirth. The principle of the best interests of the child should be the primary consideration, and the judgment on which Party should raise the child or establish a parent-child relationship with the child should be made based on the child's living environment, educational conditions, emotional needs, etc., to promote the child's physical and mental health and future development.

6. The improvement path for the resolution of surrogacy parent-child disputes

6.1. The improvement of legal rules for the qualification of surrogacy parent-child relationships

To effectively resolve surrogacy parent-child disputes, the urgent task is to improve the legal rules for the qualification of surrogacy parent-child relationships, enact specialized Statutes or Judicial Interpretations, and clarify the qualification Standards.

At present, although China has explicit prohibitive provisions regarding surrogacy, there are gaps and ambiguities in the Statutes concerning the qualification of surrogacy parent-child relationships. Therefore, specialized Statutes or Judicial Interpretations should be promulgated to clarify the qualification Standards for surrogacy parent-child relationships. When determining the Vesting of custody rights for surrogacy children, comprehensive consideration should be given to factors such as the living environment, educational conditions, and emotional needs of the surrogacy children, and custody rights should be awarded to the Party most conducive to the growth of the surrogacy children.

In the qualification of surrogacy parent-child relationships, it is crucial to establish the principle that surrogacy Agreements are Invalid but the lawful rights and interests of surrogacy children are Guaranteed. Surrogacy Agreements instrumentalize the surrogate mother's uterus and commodify children, severely violating public order and good morals and legal provisions, and should be qualified as Invalid. This provision aims to uphold the authority of the Law and the public order and good morals of society, preventing the legalization and commercialization of surrogacy. Surrogacy children are innocent, and their lawful rights and interests should be fully Guaranteed. When handling surrogacy parent-child disputes, surrogacy children should be treated as independent individuals, and their wishes and Rights should be fully respected.

6.2. Coordination of the rules for qualifying surrogate parent-child relationships with relevant statutes

The coordination between the qualification of surrogate parent-child relationships and relevant legal systems such as adoption Law, guardianship system, and inheritance Law is a key link in ensuring the consistency of the legal system and resolving surrogate parent-child disputes.

In terms of coordination with adoption Law, it shall be clarified that surrogate children are not subject to the GENERAL PROVISIONS of adoption Law. The illegality of surrogate behavior itself contradicts the principles of legality, voluntariness, and promoting the growth of the adoptee advocated by adoption Law. If surrogate children are included in the scope of Adjustments under adoption Law, it may to some extent imply the legality of surrogate behavior, thereby triggering a series of ethical and legal issues. Regarding the custody of surrogate children, it can be regulated through other legal channels, such as clarifying the responsibilities and Obligations of custody in the

qualification of surrogate parent-child relationships, to ensure surrogate children receive proper care and upbringing.

In terms of coordination with the guardianship system, guardians shall be reasonably determined based on the qualification results of surrogate parent-child relationships. If a surrogate child and the commissioning party are qualified as having a parent-child relationship, the commissioning party shall serve as the legal guardian and assume the guardianship Obligations for the surrogate child. In the event that the commissioning party is unable to perform guardianship duties, other suitable guardians shall be determined in accordance with the statutory order of guardianship.

6.3. Introduction of the DDR mechanism

In addition to traditional dispute resolution methods such as Litigation, the introduction of the DDR Mechanism, including mediation proceedings and Arbitration, has significant advantages and feasibility in resolving surrogate parent-child disputes.

Mediation proceedings, as a non-litigious dispute resolution method, possess unique advantages in surrogate parent-child disputes. Mediation emphasizes the voluntary participation and autonomous negotiation of the Parties, through the mediation of a neutral Third Party, to facilitate communication and negotiation between the Parties regarding the Dispute, seeking a solution acceptable to both Parties. In surrogacy parentage Disputes, mediation can fully consider the emotional factors and practical needs of the Parties, avoiding the exacerbation of conflicts due to the adversarial nature of Litigation.

Arbitration is also a viable method for resolving surrogacy parentage Disputes. Arbitration possesses the characteristics of Profession, efficiency, and Confidentiality. In surrogacy parentage Disputes, the arbitration institution may engage experts in Law, medicine, psychology, and other fields to form the arbitral tribunal, conducting comprehensive and in-depth analysis and judgment of the Dispute. These experts, leveraging their professional knowledge and experience, can better understand the complexity of surrogacy parentage Disputes and render more scientific and reasonable Awards. The arbitration procedure is relatively straightforward, with a shorter Timeframe for the arbitral proceeding, enabling swift resolution of the Dispute and saving the Parties' time and effort.

7. Conclusion

Disputes over parental rights in surrogacy arrangements present extraordinary complexity, intersecting legal, ethical, and moral dimensions. Through systemizing prevalent dispute typologies, analyzing contentious judicial practices, and examining comparative theoretical frameworks, we recognize the pressing necessity to refine legal criteria for determining parentage in surrogacy, and institute diversified alternative dispute resolution mechanisms. These measures are indispensable for upholding the dignified enforcement of law while safeguarding the legally cognizable interests of all stakeholders—particularly the paramount welfare of the surrogate child.

Amidst societal evolution and biotechnological advancements, novel challenges inevitably will emerge. Future scholarship must address nascent legal issues such as parentage determination quandaries arising from human genome editing applications in surrogacy. Simultaneously, enhanced emphasis must be placed on calibrating legal frameworks with evolving ethical paradigms. When reforming pertinent legal institutions, societal moral consciousness and bioethical standards must be internalized to ensure implementation simultaneously resolves concrete disputes and achieves broad normative legitimacy.

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