

## ORIGINAL RESEARCH ARTICLE

# Legal determination of surrogate child parenthood in China

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### Abstract

Commercial surrogacy is neither prohibited nor approved in China. As the underground surrogacy market keeps expanding fast, the disputes over parenthood of surrogate child occur more and more frequently. Since there are no specific rules for surrogacy, Chinese courts have to make legal determination by applying current laws. This article firstly analyses the contradictions of existing laws and regulations on natural parenthood when apply them in the cases of surrogacy. In China, since the natural parenthood is built on reproductive connections between parents and child, this article provides a typology of surrogacy in terms of the reproductive role each party has played. By combining it with the case study, the judicial views on different issues are presented. This article further discusses the inadequacies of current legal determination of parenthood, ethical controversies in surrogacy and recommends some suggestions on regulating the surrogacy and protecting the rights and interests of women and children. (*Afr J Reprod Health* 2022; 26[8]: 134-141).

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**Keywords:** Surrogacy, reproductive role, parenthood of the surrogate child, legal determination, rights protection

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### Résumé

La maternité de substitution commerciale n'est ni interdite ni approuvée en Chine. Alors que le marché clandestin de la maternité de substitution continue de se développer rapidement, les différends concernant la parentalité de l'enfant de substitution se produisent de plus en plus fréquemment. Puisqu'il n'y a pas de règles spécifiques pour la maternité de substitution, les tribunaux chinois doivent prendre une décision juridique en appliquant les lois en vigueur. Cet article analyse d'abord les contradictions des lois et règlements existants sur la parentalité naturelle lorsqu'ils sont appliqués dans les cas de GPA. En Chine, puisque la parentalité naturelle se construit sur des liens reproductifs entre parents et enfant, cet article propose une typologie de la gestation pour autrui en fonction du rôle reproductif joué par chacun. En le combinant avec l'étude de cas, les opinions judiciaires sur différentes questions sont présentées. Cet article examine en outre les insuffisances de la détermination juridique actuelle de la parentalité, les controverses éthiques dans la maternité de substitution et recommande quelques suggestions sur la réglementation de la maternité de substitution et la protection des droits et intérêts des femmes et des enfants. (*Afr J Reprod Health* 2022; 26[8]: 134-141).

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**Mots-clés:** Maternité de substitution, rôle reproductif, parentalité de l'enfant de substitution, détermination juridique, protection des droits

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### Introduction

The development of assisted reproductive technology has not only enriched the ways for human beings to obtain offspring, but also had a great influence on the family ethics and laws, which are based on the traditional reproductive methods. In China, the application of assisted reproductive technology is limited to the eligible couples and through legal procedures at designated medical institutions, while using the same technologies in surrogacy is considered illegal according to the administrative regulations<sup>1</sup>. Surrogacy agencies are not allowed to be registered legally as well.

However, as the number of the people who desires to have child through surrogacy (intended parent or parents) continues to grow, a large underground surrogacy industry has been formed gradually<sup>2</sup>. The growing of surrogacy business causes more and more legal disputes over the issues of surrogate contract. Among all types, the disputes over parenthood of surrogate child are much more complexed than the others to solve.

Different from the disputes over parenthood in traditional ways of reproduction, the biological and gestational mothers of the surrogate child are not the same person, the reproductive role played by each party in surrogacy decides the

legitimacy of their claims for parenthood. The current legislations only prohibit the medical institutions and personnel from providing the assisted reproductive technology for surrogacy, which brings some difficulties for legal determinations of surrogate child parenthood: firstly, the validity of surrogacy contract has not been clarified in current laws, which makes its role in determining the parenthood uncertain; secondly, the current laws and regulations on natural parenthood are based on the traditional reproductive methods, which brings the contradictions of applying them in surrogacy<sup>3</sup>; thirdly, the lack of specific rules makes it more difficult for judges to protect the rights and interests of each party involved, especially those of women and children.

This article aims to analyse the current legal determination of surrogate child parenthood and put forward suggestions to strengthen the protection of rights. Part II of this article presents the current legislations and judicial interpretations on natural parenthood and analyses the contradictions when applying them in the circumstances of surrogacy. Part III provides a typology of surrogacy based on the reproductive connections each party has with the surrogate child. Part IV presents the study of sample surrogate lawsuits and the judicial views within them; Part V analyses the inadequacies of current legal determination of surrogate child parenthood and recommends some suggestions for improvement.

### ***Legislation on parenthood***

There is not a definition or terms for being a father or mother of natural parenthood in the Civil Code of China. But the administrative regulations and judicial interpretations provide rules for the registration and correction of the parenthood.

The registration of the parent's identity of newborn child is regulated by the administrative regulations. The household registration (hukou) and resident identity card are the two major legal identity documents of Chinese citizens. According to article 7 of the Regulations of the People's

Republic of China on Hukou Registration, the newborn child should be declared to the household registration within one month of birth, and the certificate of household registration is a necessary document to apply for the resident identity card after. When registering a newborn child for the household registration, the medical birth certificate is required. The information on this legal document contains the identities of the mother and father, the mother be registered is the one who gave birth to the child, and the spouse of her is registered as the father.

For the correction of the parenthood, according to the article 103 of the Civil Code and article 39 of the Judicial Interpretation(I) of the Supreme People's Court on the Application of the "Marriage and Family" book of the Civil Code, the parenthood can be corrected through a litigation by making the claim and submit the evidence. If the defendant can't prove otherwise and refuse to do the DNA parentage test either, then the court will support the plaintiff's claim.

### ***Legislative contradictions***

The existing laws, administrative regulations and judicial interpretations are all based on the traditional reproductive methods and have contradictions in application in surrogacy. In the case of traditional childbirth, the mother who gave birth to the child is also the genetic mother. The medical birth certificate does not have to clarify which mother she is. And in such circumstances, the disputes over parenthood are simply seeking for corrections of the misregistered parent identities, which only need the prove of facts and not the judgment of values.

But when it comes to the surrogacy, the contradictions arouse. According to the administrative regulations on household registration, the surrogate mother can be registered legally as the mother of the child. Meanwhile, if the intended parent(s) file a lawsuit to claim the parenthood with the prove of biological connection with the child, the court may support the plaintiff according to the judicial interpretations.

### ***Typology of surrogacy***

There are two types of parenthood according to Chinese law, natural parenthood and fiction parenthood. The former one is established by the reproductive behavior related to the event of childbirth, and the latter one is established through legal procedures, such as adoption or remarriage. Most of the disputes over parenthood in surrogacy are about the natural parenthood, which means that the reproductive behavior related to the birth of surrogate child is the prerequisite for making claims.

The purpose of surrogacy is to help fulfill the reproduction, by partly replace the intended parent(s) with assisted reproductive technology and surrogate mother in the course of reproduction. The surrogate mother gestates and delivers the child while intended parent(s) may or may not provide genetic material. Besides, the assisted reproductive technology may neither be used in certain type of surrogacy, while sexual intercourse is still the way to fertilize. The way of specific surrogacy case is performed decides whether each party is rightful to make the claim of parenthood.

From this perspective, surrogacy can be classified into several types which are based on different reproductive roles each party has played. In some types of surrogacy, besides intended parent(s) and surrogate mother, sperm or egg may be given by an anonymous donor, whose rights and obligations are exempted according to the regulations<sup>4</sup>. The typology of surrogacy is showed in Table 1.

### **Case study**

#### ***Filing parenthood lawsuits***

In China, only a small part of disputes over surrogacy have come to the litigation. In the case of commercial surrogacy, the parties may commit multiple illegal actions in order to achieve the purpose of the surrogacy. For example, while the medical birth certificate prevents the illegal way to register someone else as the parent(s) of the

newborn child other than the person who gave birth, the surrogacy agencies or intended parent(s) would bribe the hospital personnel to obtain a false certification or purchasing fake documents directly to register the surrogate child as the child of intended parent(s)<sup>5</sup>.

Therefore, if the surrogacy contract goes without dispute (the surrogate mother waives her rights after the child was born), it will be executed in its entirety and the surrogate child will be raised by the intended parents. It is only when disagreement arises and cannot be solved through negotiation, the parties may file a lawsuit to claim the rights. In most cases, the reason why plaintiff still choose to file a lawsuit while they knew the surrogacy is considered illegal, is that the defendant has the custody of the child at the moment and refuse to deliver it to the plaintiff.

#### ***Case collection***

The cases of surrogacy, especially the lawsuits of parenthood can be seen on the news report. But in the official database of the judicial cases (The China Judgement Online), there is not a sorting type for surrogacy. The cases can be collected are with the cause of action of custody and parenthood. After searching the news reports and the database of judgement documents (<http://www.court.gov.cn/zgcpwsw>), the sample cases have been collected<sup>6-10</sup>. In order to present the pattern of the judgement, the key information is listed in Table 2.

#### ***Judicial views on different issues***

1. In all sample cases, the courts have denied the validity of the surrogacy contract as it violates the public interest.
2. In the type of which surrogate mother provides the egg and give birth to the surrogate child (type 3), based on the exclusive connection (both biological and gestational connections), the surrogate mother is considered the mother in most cases. And intended father is considered the father, but without a marital

**Table 1:** Typology of surrogacy based on reproductive roles of each party played

Type	Sperm Source	Egg Source	Pregnancy	Parties of dispute
1	Intended father	Intended mother	Surrogate mother	Genetic parents v. Surrogate mother
2	Intended father	anonymous donor	Surrogate mother	Genetic father v. Surrogate mother
3	Intended father	Surrogate mother	Surrogate mother	Genetic father v. Genetic (Surrogate) mother
4	Anonymous donor	Intended mother	Surrogate mother	Genetic mother v. Surrogate mother
5	Anonymous donor	Anonymous donor	Surrogate mother	Intended parents v. Surrogate mother

**Table 2:** Pattern of judgement

Case	Cause of action	Plaintiff	Defendant	Type of surrogacy	Validity of surrogacy contract	Natural Fatherhood	Natural Motherhood	Custody
1 <sup>6</sup>	custody	Surrogate mother	Intended father	Type 3	invalid	Intended father	Surrogate mother	Surrogate mother
2 <sup>7</sup>	custody	Surrogate mother	Intended father	Type 3	invalid	Intended father	Surrogate mother	Intended father
3 <sup>8</sup>	custody	Surrogate mother	Intended father	Type 2	invalid	Intended father	None	Intended father
4 <sup>9</sup>	parenthood	Intended mother	Intended father	Type 2	invalid	Intended father	None	Intended father
5 <sup>10</sup>	custody	Intended mother	Parents of intended father	Type 2	invalid	Intended father	Surrogate mother; Intended mother as the stepmother	Intended mother

relationship between mother and father, the child may be seen as illegitimate (which has the same rights as the legitimate child, according to the article 1071 of the Civil Code).

- When both parties are entitled to claim the custody, the party which actually cares for the child after birth has a higher probability of obtaining the custody (Case 1).

When the surrogate mother did not provide the egg and claiming the parenthood only based on the fact of delivery, she may receive different determinations from the court. Such as in Case 3 where the court denied the surrogate mother's claim, but the court in case 5 mentioned in its judgement that the surrogate mother is the mother. On the other hand, in the case where the egg is from an anonymous donor (type 2), the court may deny the claim of the intended mother on the basis that she is not the gestational mother.

## Analysis and suggestions

### *Inadequacies in legal determination of parenthood*

It has been a very long time since the first Chinese test-tube baby was born, and the surrogacy followed the application of the technology not long after. The Civil Code of China has come into force since the January 1, 2021. Before that, the issues involved were govern by the 1986 General Principles of Civil Law, 2001 Marriage Law and 2001 Interpretations(I) of the Supreme People’s Court on Issues in the Application of the Marriage Law. Since the provisions have not changed from the rules before, the inadequacies in legal determination of parenthood still remain.

- Absence of laws on legitimacy of surrogacy. The current legislation on regulating the surrogacy is limited to the technology suppliers, including the

medical institutions and their personnel, but have not come to the major parties of the surrogacy transactions and their actions. The State Council and its subordinate departments launched large campaigns against surrogacy in 2015<sup>11</sup> and 2021<sup>12</sup>. Although the regulation of surrogacy is still limited to medical personnel and surrogacy agencies due to legislative limitations, the government attitudes toward surrogacy may have an implicit impact on judicial views. As a result, almost every court claims the violation of public interest and social morality of surrogacy contracts, though there is still much of controversy on this issue and some courts have claimed differently before<sup>13</sup>.

2. Lack of restrictions on the content of surrogacy contracts, especially the protection of surrogate mother and child<sup>14</sup>. Regardless of the validity of surrogacy contract, it may still restrain the choice of surrogate mother in order to get paid. For example, due to the demand of intended parent(s) of specific gender selection (many Chinese desire to have a male baby) or in case of the surrogate child is diagnosed with a congenital disease, the surrogate mother may be asked to have abortion if the agreed circumstances arise, otherwise the intended parent(s) would not raise the child. Under this situation, surrogate mother would have no choice but to abort the baby, which may cause permanent reproductive damage<sup>15</sup>. And if the child was born with a congenital disease, or for any other reasons, the intended parent(s) may refuse to accept or support the child. Since a dispute over parenthood can hardly be determined by court in a short time, consider that the intended parent(s) may avoid surrogate mother, it is difficult for her to taking care of the child on her own during this period of time.

3. The current laws fail to respond the challenge of the assisted reproductive technology has brought to the legal parenthood and traditional ethics. The change of the reproductive methods by assisted reproductive technology objectively causes the challenge to the legal relationship of the family. At present, Article 40 of the Judicial Interpretation (I) of the Marriage and Family Division of the Civil Code is the only rule on the application of assisted

reproductive technology. This is because, on the one hand, there are very strict restrictions of using it in legal ways, and the legislation only respond to the legitimate cases. But on the other hand, the disputes and litigation over parenthood of surrogate child, which are along with surrogacy, are long existing problems need to be solved.

4. Lack of consistent adjudication logics. Due to the reason mentioned above, without clear rules on such matters, the judges always have to do the interpretations of the laws and judge from inside values based on their own. The laws have been made are not based on the surrogate reproductive methods, but there are no rules of not applying them on the cases of surrogacy. However, the application of current laws may cause damage to the interests of the vulnerable ones. By applying article 39 of the Judicial Interpretation(I) of the Supreme People's Court on the Application of the "Marriage and Family" book of the Civil Code, in the types of which surrogate mother does not provide the egg, she will lose the right to claim for the parenthood from the beginning<sup>16</sup>. On the other hand, stick to the principle of "the mother is the one who gives birth" may have conflict with the protection of the surrogate child since not all surrogate mothers are capable of raising a child both financially and emotionally care for. But if the financial abilities become the priority of acquire parenthood, the dispute may turn out to be like an auction and highest bidder is the winner.

### ***Ethical controversies in surrogacy***

The challenges in determining the parenthood of surrogate child originated from the ethical controversies that surrogacy has brought, which lead to the concerns of legislators. Whether the parenthood should be determined by surrogacy contract, the court or the legislation directly? Up to now, most courts have denied the validity of surrogacy contract by announcing its violation of public interest, but there are still controversies. The views on this matter even vary from different classifications of surrogacy. Compare to the commercial surrogacy, altruistic surrogacy is

considered more meaningful and helpful to the infertile intended parents and the child<sup>17</sup>. But some believe that the genetic surrogacy (type 3 in table 1) is against the public interest without controversies for abandon child with the blood tie is definitely unacceptable, while the case of gestational surrogacy is not<sup>18</sup>. Since there is no objective damage to the general public made by surrogacy, the public interest in this context is referred to the abstract values, which points to the moral code of the society.

From the perspective of this, on one hand, the reproductive method of surrogacy has introduced a third party into the reproductive behavior and relationships. Compared to the anonymous donor of sperm or egg, surrogate mother participates into the reproduction as a specific individual, which breaks the privacy and exclusivity of it. According to article 51 of the Law on the Protection of Rights and Interests of Women and article 18 of the Population and Family Planning Law, the women have the right to procreate by following the relevant regulations, and also encouraged to procreate within a legal marriage. This implies that under traditional reproductive method, emotional or marital relationships build the ethical foundation of the reproduction, which is vacant in surrogacy. Thus, the using of other women's uterus is not only a violation of their body rights, but to be seen as unethical as well.

On the other hand, the application of assisted reproductive technology in surrogacy has put the determining of motherhood into a bioethical dilemma. In the types of which both intended mother and surrogate mother have participated the procreation (Type 1, 4), each of them has the basis to claim the motherhood according to the social and ethical conception. Under such circumstances, the using of the bioscience technologies has turned the issue from an objective judgement into a value debate. The essence of the it is the comparison between genetic and gestational value each reproductive connection represents, and which one is more eligible to the motherhood. To solve the problem, the adaptation and adjustment of

connotation of motherhood combined with bioethical thinking are needed<sup>19</sup>, and forms the response in legislation and adjudication.

## Suggestions for improvement

1. Filling the gaps of legislation on parties of surrogacy other than agencies, medical institutions and personnel. The intended parent(s) and surrogate mother are two major parties of surrogacy contract, which performed most parts of surrogacy. If the transactions are illegal, then the confirmation of law could help eliminate the violations. And if it is approved, partially or fully, the surrogacy contract can help to clarify the rights and obligations of all parties.
2. Strengthening the protection of rights in surrogacy. The surrogacy relationship involves the disposal of the rights of each party and the protection of the related interests. Whether the contract is valid or not, the surrogacy relationship should not infringe the rights of each party, especially the vulnerable ones. Since the abortion could do damage to the women's body and if it becomes an obligation of surrogacy contract, it will turn out to be compulsory and an infringement of surrogate mother's body integrity and health, such arrangements should be explicitly prohibited and legal responsibilities should be pursued if the damage is really done<sup>20</sup>. Based on the principle of "the best interest of the child", surrogate child should be taken care of ever since the birth. Considering that when dispute of parenthood occurs, especially a negative one (compare to the situation of all parties want to obtain it), in case of the custody stays unclear or the single party lacks of capabilities, both intended parent(s) and surrogate mother should be responsible for taking care of the surrogate child until the dispute is settled.
3. In order to respond to the change that assisted reproductive technology has brought to the family relationship, the legislation should provide explicit and fully applicable rules of establishment of natural parenthood. Unlike the fiction parenthood, the natural parenthood was considered by the

legislator to be "self-explanatory" due to the characteristics of the natural reproductive method. However, the intervention of assisted reproductive technology makes this issue with ethical value judgment should no longer be avoided.

4. In order to achieve a better protection of interests of all parties, there has to be a dedicated value logic to guide the legal determination in specific lawsuits. The conflict between the values each party represents cannot be solved only by the terms of the law, but also adjudications in vary cases. For example, the legislation may confirm the right of surrogate mother to claim the parenthood, but when it conflicts with the principle of best interest of the child, whether the court should judge more from the financial conditions of the parties, or the will of raising the child. The former one may provide child with more abundant materials while latter one may give the child a family with more love and care. Such situations may occur time to time since the financial conditions of intended parent(s) are better than the surrogate mother in most cases. To solve the issues, not only need the court comprehensively consider the factors involved, but also a dedicated logical and ethical analysis method to fulfill the protection of rights and guide the values<sup>21</sup>.

## Conclusion

Along with the expanding of surrogacy business in China, disputes and litigation over parenthood of surrogate child have increased rapidly. Willingly or not, China has to cope with the legal issues surrogacy has caused, including the legal determination of parenthood and interest protection within it. To fulfill the protection of women and children is also an obligation conferred by both the international and domestic laws. In April 1, 1992, China has acceded the Convention on the Rights of the Child, in which it is convinced that the family is the natural environment for the growth and well-being of children, and the point 2 of article 3 has stated that the parties shall take all appropriate legislative and administrative measures to ensure the necessary care for children's well-being. Besides, China has also acceded the Convention on the Elimination of All Forms of Discrimination

against Women in December 3, 1981, in which the protection of reproductive and parenthood rights of women have been stated. Together with the domestic laws involved, the rightfulness and necessity of legal determination of surrogacy child parenthood have been formed.

To reach the target of this, specific law and regulations are needed, but the study above shows that the work is far from finished. The existing rules on parenthood are based on the legislative considerations of traditional reproductive methods, which omit the rules of establishment of parenthood. The current registration regulations and judicial interpretations on parenthood are not the reasonable explanation and solution of the dispute in surrogacy. Without clear rules to invoke, the judges may have opposite adjudications in similar cases when facing with the disputes of such kind. Since there is no case law in China, the chaotic patterns of adjudication need to end by legislative respond.

Within the settlement of surrogate child parenthood dispute, the protection of legitimate interests is eagerly needed in practice. For the reason of this, China has to supplement a set of systematic regulations and laws on both surrogacy contract and other legal issues involved. Together with the legislation and proper logic rules of adjudication, the violations of rights in surrogacy and the value conflicts between each party can be solved more thoroughly.

## Competing interests

The author declares no competing interest.

## Author's contribution

The author wrote and approved the final manuscript.

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