The Identification of Legal Parentage in International Surrogacy

Yaoying Huang
The Law School of Sichuan University, Chengdu, China

Abstract: With the development of globalization and medically assisted reproductive technology, the transnational surrogacy trend has gradually grown. The growth in cross-border surrogacy arrangements and the diversity of legal regulations give rise to complex questions of private international law concerning the establishment, confession and recognition of children’s legal parentage. In practice, countries often determine the legal parentage of surrogacy children by the method of choice of law or recognition, which easily leads to the conflict of laws and makes the validity of surrogacy parentage unstable. To clarify the legal parentage and protect the legitimate interests of surrogacy children, a unified international treaty should be reached, and countries should pay full attention to the implementation of the principle of the best interests of the child and the principle of “intentional and functional parenthood”, coordinated with careful use of public order retention system.

Keywords: International surrogacy, Legal parentage, Public order, Principle of the best interests of the child.

1. Introduction

The development of artificial reproduction technology and constantly changing family patterns have led to an increasing number of surrogacy cases, causing traditional ethical issues like the commercialization of surrogate mothers and surrogate children[1]. In addition, in the era of globalization, the huge differences in the legal regulation of surrogacy among countries give rise to more transnational surrogacy and subsequent legal disputes. Among these, the identification of legal parentage is the basic problem, as it may lead to far-reaching legal issues, including identity, citizenship, custody, immigration status, inheritance of surrogate children born, and so forth.

International surrogacy, also called cross-border surrogacy, means the situation where the surrogate mother and intended parents are from different countries. The Hague Conference on Private International Law makes its meaning wider by defining transnational surrogacy as a concept of gestational carriers and intended parents living in different countries, without adopting the concept of habitual residence[2]. Moreover, in the context of transnational surrogacy, there is another set of concepts: receiving state and state of the child’s birth. The former refers to the country intended parents live in and to which they will return with their surrogate children; the latter refers to the country where the surrogate mother gives birth, and usually, the same as where the surrogate mother resides. Uncertainty has arisen in recent decades in these states as a result of a combination of changing family patterns and advances in medical science. Through the study of the complexity of parentage recognition in transnational surrogacy, this paper analyzes the dilemma faced by surrogate children and then puts forward suggestions from the perspective of private international law.

2. Current Problem: Different Countries’ Different Stances on Surrogacy Lead to the Unstable Legal Force of Surrogate Parentage

Nowadays, there are four kinds of regulation models of surrogacy in the world. The first is a total ban, that is, a pattern of complete prohibition on surrogacy at the legislative level, which treats surrogacy as an essentially anti-social phenomenon and prohibits surrogacy completely regardless of its category, like Germany, France, Japan, Norway, Poland, and so on. France, for example, passed in 1994, the “Bioethics Law” to deny the legitimacy of surrogacy and provide the strict penalty for it. The second is the limited (partial) open model, which liberalizes certain types of surrogacy and prohibits others. Usually, these countries make a clear distinction between the types of surrogacy, which means commercial surrogacy and surrogacy without government approval are banned while others are admitted, such as Britain, Greece, the Netherlands, Canada and Israel. The third type is non-uniform regulation. These states have not made uniform regulations on surrogacy legislation but left it to the local authorities to address the problem themselves. It is mainly some federal countries that have taken this model, and Australia and the United States are the most typical. In America, for instance, some states are already fully open to surrogacy, such as New Jersey and California, while others, such as the District of Columbia and Michigan, prohibit surrogacy strictly. The fourth is full openness, referring to those states that do not ban surrogacy of any kind but allow it to exist and even flourish as an industry, as India, Ukraine and Russia. It’s worth noting that full openness does not mean full support without any restrictions, instead, there is no clear legal prohibition of surrogacy, showing a pessimistic attitude to surrogacy. India, for instance, well-known as the global surrogacy center, has low-cost surrogacy and flexible laws[3].

So it is not difficult to find that, a simple domestic surrogacy, in which the legal parentage is regulated only by the domestic law of the country, is legally stable. In the case of international surrogacy, however, the purpose of commission parents is to carry the surrogate child back to their country as their child, so the identity of commission parents as legal parents must be decided not only by the law of the country where the surrogate child is born, but also by the domestic law of the place they live[4]. This may put the surrogate child in one of the following dilemmas: the father and mother recognized by the receiving state are different from the state.
of birth, or surrogacy is prohibited by the receiving state, so the state neither recognizes the legal parentage identified by the state of birth nor confers on either of the commission parents to be the legal father or mother, i.e., the surrogate child is left fatherless or motherless or even parentless in the receiving state, rendering the child a very disadvantageous position. Unfortunately, these questions implicate children’s fundamental human rights, for example, the right to be registered immediately after birth, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by their parents[5].

3. Research on the Recognition of Legal Parentage in Transnational Surrogacy

Today, there is neither uniform substantive law nor uniform conflict law internationally, the solution relying solely on domestic law. Throughout the judicial practice of various countries, the choice of law and recognition of judgment or certificates are two mainstream methods to determine the parentage under transnational surrogacy.

3.1 Applying the Substantive Law or the Conflict Law of the Forum

Some countries apply their substantive law of the forum to identify parentage again, while some countries and regions pay attention to foreign factors in transnational surrogacy and apply the conflict of law to determine the applicable law of parentage, such as Australia(Victoria and other states), Colombia and so on. The connecting factors in the conflict of laws are often the nationality of the surrogate at birth, as well as the nationality of the parents, the habitual residence or domicile of the parent or child.

The representative one is Germany. Most commonly, intended parents, both or one of them being German, cross borders to carry out surrogacy and evade German laws that deny the legitimacy of surrogacy, and the parentage between intended parents and surrogate child has not been established under the law of any country yet. Under this circumstance, German law defines it as the problem of application of laws relating to foreign parentage, so adopts the EGBGB that provides for the application of the law of the habitual residence of the child or the law of the state of nationality of the parents, or if the mother is married, application of the law governing the validity of her marriage at the time of the child’s birth. In addition, it is generally accepted that the habitual residence of the newborn is the habitual residence of the mother (the woman who gives birth to the child), and the law governing the validity of the marriage is governed by the law of the state of common nationality of the spouses or the law of common habitual residence or the law of the closest connection. If contradictory results are obtained from the selective application of the above-mentioned law, the law which is in the best interests of the child is applied.

Furthermore, the German courts, except for applying the above-mentioned rules of law, always use the Public Order Reservation Clause in Article 6 of EGBGB as an exclusionary rule to decide the legal application of transnational surrogacy. This approach has been used by the Expert Commission of the German registration authority and a court in Berlin. They used to come to a conclusion when directed to foreign law after applying the conflict laws rules, but then rejected the application of the foreign law based on the public order reservation clause, as it was considered against the German substantive law. However, in German judicial practice, there also exist some courts not taking the public order reservation as the obstacle, but directly applying the conflict of laws concerning foreign-related parentage. In a case in 2009, the attorney-general of Nuremberg applied foreign law (Russian law) instead of the public order reservation, and finally recognized parentage between the intended parent and the surrogate child[3].

Significantly, however, the rules governing the application of the law related to parentage generally play a role when the intended father or mother is declared the legal father or mother of the child. A key question that is more likely to arise in the context of transnational surrogacy is whether the parentage of an intended parent legally established in one country can be recognized in another. Therefore, in practice, it is more feasible to recognize the parentage established by foreign law and judicial decisions through recognition.

3.2 Recognizing Foreign Certificates and Judgments

The first way is that the receiving state admits the documents of the country of birth directly, such as a birth certificate or the registration of foreign civil status. If either of the intended parents has a genetic link with their surrogate child, and the surrogate child has a legal birth certificate issued by the country of birth, the receiving state will recognize the parentage recognized by the birth certificate. A French court ruled in 2011 that a birth certificate for a surrogate child born in India should be recognized through this procedure[6]. However, when Sweden and Canada’s Richmond are receiving countries, they do not acknowledge birth certificates showing only a genetic link between the intended mother and child. Instead, a birth certificate with a genetic link between the intended father and the child may be approved by these receiving states.

The second approach is the decision of the court in the receiving country to recognize paternity established by the judgment of a foreign court. In this case, each country has its consideration and discretion on how to recognize parentage established in a foreign country. Taking France as an example, the absolute prohibition attitude of surrogacy in France also obstinately extends to the process of parentage. French law directly provides that a surrogate mother is the natural mother of a surrogate child, whether or not she is biologically related to the surrogate child, and refuses to recognize the decision to establish maternity between the intended mother and the surrogate child. For a long time, the French courts refused to recognize parentage decisions handed down by foreign courts under international surrogacy on the basis of the public order retention system. For instance, in April 2011, the French Supreme Court rejected the enforcement of two United States surrogacy orders by using public order reservations. In 2014, in the case of Mennesson, France still maintained a negative attitude and refused to recognize parentage between a surrogate child born in the United States and his intended father. In this case, the French authorities refused to transcribe
framework is not systematic, so all these factors lead to the conflict and uncertainty in the application of the law.

4. Solution

Because of the international nature and complexity of transnational surrogacy, it is necessary to regulate it from the perspective of international law:

4.1 The Formulation of a Unified International Treaty

In terms of international legislation, there is neither a uniform substantive law nor a uniform conflict law about transnational surrogacy. International treaties help a lot when it comes to ensuring the predictability, continuity and certainty of parentage resulting from international surrogacy arrangements and effectively avoiding legal conflicts between the country of birth and the receiving country, this contributes not only to the protection of the best interests of the child and the fundamental rights of all concerned individuals, but also to the prevention of bad practices in international surrogacy arrangements. There are some new developments in current international law:

HCCH (Hague Conference on Private International Law) pointed out that, difficulties on parentage have sometimes arisen because these developments have not been globally uniform. States’ approaches to such issues such as paternity disestablishment (in light of DNA testing), assisted reproductive technologies and surrogacy arrangements have varied greatly, dependent on the State’s cultural, political and social environment. As a consequence, there is, as yet, no international consensus on how to establish and contest legal parentage in these circumstances[7]. In 2001, The Hague Conference on Private International Law began to focus on international surrogacy and began the work centered on the development of a convention to establish parentery. By March 2022, HCCH had published 10 studies focusing on the issue of international surrogate parentage. HCCH is currently studying the private international law issues being encountered concerning the legal parentage of children, as well as in relation to international surrogacy arrangements more specifically.

In 2015, the Council on General Affairs and Policy (CGAP) of the HCCH decided that an Experts’ Group should be convened to explore the feasibility of advancing work in this area. In October 2019, in the report of the 6th Expert Group Meeting of The Hague Conference, it was noted that parentage concerns all families and countries. Facing the intricate conflict of parentage in the international community, there is an urgent need for a common, internationally agreed solution to avoid limiting the legitimate parentage that leads to limping parentage, so it endorsed the continuation of the work of the Group, with a focus on proposing provisions for inclusion in (1) a general private international law (PIL) instrument on the recognition of foreign judicial decisions on legal parentage (Convention), and (2) a separate protocol on the recognition of foreign judicial decisions on legal parentage rendered as a result of an international surrogacy arrangement(Protocol). To that end, the expert group meeting discussed the drafting of two international legal instruments:

(1) The General Convention on Private International Law for California’s birth certificate, arguing that the agreement was deemed null and invalid and the recognition of foreign birth certificates would be against public policy under rule 16-7 of the France Civil Code which prohibited surrogacy. In 2015, the French Supreme Court made a point that a birth certificate cannot be denied because the child was born by a surrogate mother, as long as it was not a forgery or factually incorrect. But only when the father was also a genetic father would the government recognize the birth certificates, so in this case, parentage between the intended father and child could be recognized but the child’s mother not, rendering a limping relationship between Mrs. Mennesson and the surrogate child. In 2018, the Mennessons sued in the European Court of Human Rights, which, in its ruling on 20 April 2019, recognized parentage between the Mennessons and the surrogate child. The case has had a profound impact on the handling of cross-border surrogacy cases in EU countries. West Germany courts used to deny German homosexual couples in the United States in surrogacy cases on grounds of violation of the German public order, but finally, the best interests of the child principle helped recognize the surrogate child to obtain legal parenthood. However, some European countries, even affected by the Mennesson case, still reserve the space to not recognize surrogate parenthood on the basis of the need to maintain public order. Spain’s Civil Registration Act of 2018, for example, provides that foreign judgments and birth certificates issued by foreign states can be recognized as long as the procedural requirements are met, however, the registration authority may still refuse registration if it is manifestly incompatible with public order.

3.3 Conflict and Uncertainty in the Parentage Recognition

It can be observed in these cases that, applying the substantive law or conflict of laws to decide parentage may lead to the conflict of laws. On the one hand, countries hold different attitudes and legal provisions on surrogacy, on the other hand, there are different legal bases for the decision of parentage (gene theory, childbirth theory, contract theory, and the best interests of child theory). Therefore, the judicial practice of the countries concerned is bound to have great differences, resulting in conflicts of laws and rendering surrogacy children in a very disadvantageous position. Meanwhile, the recognition of foreign birth certificates and the foreign court decisions are also regulated by domestic law and subject to different recognition conditions and procedures. Importantly, both situations face discretion reasons of each state, such as public policy, fraud, and incompatibility with previous decisions, and among them, the public policy exception is the common reason. Especially in the practice of civil law countries, the refusal to recognize foreign parentage judgment on the grounds of public policy exception is almost the general practice. Thus, the recognition of foreign-formed parentage often faces a contradiction between the principle of the best interests of the child as advocated by the intended parents and the public order of the state, which is a huge challenge for the court to strike a balance.

In short, different countries have different ways of establishing and settling disputes over the parentage of surrogacy, and many countries still adopt the legal system based on the traditional childbirth system, which can not adapt to the new type of birth like surrogacy, and the related legal
the Recognition of Foreign Judicial Decisions Relating to Legal Parentage, that is, a comprehensive convention on the recognition of foreign judicial decisions on legal parentage in ordinary circumstances, covering all kinds of recognition of parentage; (2) Protocol on the Recognition of Foreign Judicial Decisions Concerning Legal Paternity in International Surrogacy Arrangements, which is a convention of a special character for the recognition of paternity under transnational surrogacy arrangements[8].

At its 2021 meeting, the CGAP endorsed the recommendation of the Group to extend its mandate by one year, in order to allow time to prepare the submission of its final report to CGAP at its 2023 meeting. The Group also continued its discussions on the feasibility of advancing work with respect to a possible Protocol on the recognition of legal parentage established as a result of an (international) surrogacy arrangement (Protocol). This included, in particular: the aims of a possible Protocol; the different approaches; and the different possible elements that could be included.

4.2 The Principle of the Best Interests of the Child and the Principle of “Intentional and Functional Parenthood”

The principle of the best interests of the child was first acknowledged as an international guiding principle for the protection of the rights of the child in the 1959 Declaration of the Rights of the Child, this principle has since been reaffirmed on numerous occasions in several international conventions and regional treaties, (for example, The Convention on the Elimination of All Forms of Discrimination against Women) and eventually enshrined in the United Nations Convention on the Rights of the Child as the highest legislative norm, which is widely observed in all countries’ parent-child law and considered to be the principle that all countries in the world must abide by when dealing with issues involving children. The principle calls upon states parties to do their utmost to ensure that the best interests of the minor child are served. In the 1980s, the United States proposed in Baby M case, that the principle of the best interests of the child was the primary basis for the court’s decision[9]. This principle has been used frequently in the practice of determining the parenthood of transnational surrogacy in various countries, and it has become the first principle to be followed by the court or the administrative department, especially when the absence of domestic legal provisions makes it impossible to have legal support. The principle of the best interests of the child is universally accepted, as compared to the reservation of public order with different boundaries under the provisions of national laws, it seems preferable to consider the protection of the best interests of the child as a priority principle in cases of cross-border parentage recognition of surrogacy.

In addition, the principle of the best interests of the child also necessarily requires a change in the way of identifying the parent-child relationship, from which the principle of “intentional and functional parents” is proposed. The traditional biological and gender parent principle holds that parentage is marked by biology, gender, and marital status, which ultimately establishes the child’s legal parents. It says marriage is the basis of parenthood and the husband is considered the natural father and lawful father of the child born to the wife and the mother is who gives birth to the child. With the appearance of reproductive technology, homosexuality and surrogacy, family laws in various countries have begun to reflect on the disputes between the normative definition of family relations and the establishment of the legal parent-child relationship, which focuses on the conflict between consanguinity theory and social function theory. Some scholars advocate reducing the disparities between heterosexual and same-sex marriages, biological and non-biological parents, and marital and non-marital families to create an “intentional and functional” parent-child relationship, namely social functional parentage[10]. Legal Parenthood is based not on a putative biological link with the child, but on the intention and function of forming the parent-child relationship within the marital family, and thus the understanding of the parent-child relationship shifts from the biological, dual-sex parenting to the new concept of “parental intention and function”. Parenthood is based not just on biology, gender, sexual orientation, or even marriage, but actual family relationships. The willingness to be a parent of a child and to play a role in life as a parent of a child is increasingly a decisive factor in establishing legal parenthood in the context of paternity recognition, and “intention” and “function” have become more general principles in understanding the parenthood of marital families. The core of the definition of parentage is whether a person and a child are living together in the accustomed pattern of life of the parents and children[11].

Therefore, in response to contemporary family patterns and surrogacy, the legal understanding of parenthood has changed in some countries when determining paternity, the establishment of parent-child relationships has changed from the traditional biological and gender parent principle to the intentional and functional parent principle. Predictably, the main way to solve the problem of surrogacy children’s parentage will be built on the subjective will of parents and the fact of support[12]. When establishing the parent-child relationship of surrogacy children, the principle of intentional and functional parents is more meaningful for the protection of children’s interests. In 1993, a New Jersey court ruled in Johnson v. Calvert case, establishing the principle of the willing parent, whereby any person who has a genetic link to a surrogate child and has the will to have the child born, and who intends to raise the child as his or her child, can be the legal parent of a surrogate baby[10].

4.3 Using the Public Order Reservation System with Care

In cases of cross-border parentage identification, the receiving state often refuses to recognize the child’s paternity with his or her intended parents on the ground that the surrogacy is against the social and public order of the forum state. However, before further discussion, it must be clarified that the judgment that surrogacy itself is illegal is not equal to the conclusion that the status of a surrogate child is illegal. No matter how the parentage of a surrogate child is identified, it can not prevent the illicit nature of surrogacy judged by a state, likewise the illegality of surrogacy should not prevent the paternity and identification of the surrogate child. Therefore, the choice between the use of public policy exceptions and the principle of the best interests of the child in transnational
surrogacy needs to be considered by the state at the legislative level as a relatively independent question.

For the moment, the principle of reservation of public order in cases of transnational surrogate parenthood is necessary to maintain the social order and moral concept of the country. However, as the international trend towards the use of public order has weakened, many countries, even though still consider surrogacy as a violation of public order, finally confirm the paternity, and find the best balance between the protection of the national law and the interests of the children. Therefore, the use of public order should be limited and the public interest retained by public order should be weighed against children’s private interest protected, so the reservation system of public order should be used with caution, only in “obvious violation of public policy” condition can the public order reservation system be launched. Generally, priority is given to the protection of the interests of the child when the child is born, which is actually a basic requirement of the public order in any state.

Moreover, from the perspective of private international law, public policy is intended to safeguard essential values and interests in a particular social or legal system, leading to the exclusion of the application of foreign law. Its function is not to control the application of foreign law in abstract or to deny foreign judgment, but to prevent the application of foreign law or to recognize the adverse effect of the foreign judgment on the court. The concept of public policy is not conclusive or precise, nor can it be reduced to a rigid formula, but it changes with time, place and environment. The diverse interests of each case must therefore be assessed when the public policy exception is applied. To solve the problem of establishing parentage of the transnational surrogacy children, courts should prevent the abuse of the public policy exception through the reasonable identification of the public policy.

In cross-border surrogacy cases, the principle of the best interests of the child and public order often come together, even showing the trend that the best interests of the child take precedence over the public order of a country. For example, on 10 December 2014, the Federal Supreme Court of Germany ruled in favor of the best interests of the child in recognition of a decision of a California court on the parentage of a surrogate child, that is, recognizing the parenthood identified by the United States[13]. It is the first time that Germany has recognized the country of birth on the ground that the best interests of the child take precedence over any other interests. The presiding judge in the case refused to apply the legal provisions prohibiting surrogacy. She believed that the aim of the legislator’s prohibition of surrogacy and the establishment of penal provisions was to protect surrogacy children and pregnant mothers from physical or psychological harm resulting from the birth process and subsequent “separation” of the mother from the child, rather than acting as a deterrent to a surrogate child or mother, so children themselves should not be held accountable for evasion of law done by their parents and the best interests of the child should be protected as well. Furthermore, the public order reservation did not automatically apply to all cases involving surrogacy, particularly the cases where at least one of the intended parents had a genetic link to the child. In this case, the judge weighed the interests of the mother, the intended father, the surrogate child, and the German public interest together and concluded that a United States court decision would not unacceptably violate Germany’s fundamental principles and that the best interests of the child were paramount. Hence, it can be concluded that, while the existence of surrogate children has become a fact, an innocent surrogate child should not bear the consequences of adult violations.

At last, some scholars point out that, by analyzing the strange circle of public order in the "Mennesson Case", it goes against the “International” spirit of private international law if a country refuses to recognize a foreign judgment on the grounds of public order of the court. In the era of globalization, public order has taken on an extremely convoluted appearance, especially in the case of international surrogacy, which is highly controversial in ethics, containing factors such as respect for reproductive rights, the spirit that identity rights can not be transferred, the interests of children protection and other demands. All these demands of different values have been labeled “public order”. They conflict with each other and often lead to public order disputes between countries. The core spirit and the fundamental aim of the traditional public order reservation theory are as follows: as long as the court considers that the public order of the country will be seriously undermined by the recognition of a foreign judgment, there are good reasons to activate the public order reservation system and to exclude such a foreign judgment. Under the guidance of this idea, once the court decides to start the reservation system of public order, it means that it has taken the supreme position of the fundamental value or interest of the country. In essence, this is a reflection of the rise of the modern idea of the state. This kind of compartmentalized thinking was harmless in the world of the 17th century or earlier. But in the 21st century, in the current of globalization, holding this position will not solve the fast-changing reality, as the “Mennesson case” will cause the general loss of judicial credibility and privacy deeply disturb. Of course, in the international community where the nation is still the basic legal unit and the interests of the community, the total abandonment of the public order reservation system is not possible. So the more practical way is to improve the system, that is, recognize the fundamental value and important interests of the forum and make all these values and interests live in harmony with other countries’ and international common interests. Besides, place those related public order of the forum where decisions are made and where decisions are recognized under an international evaluation mechanism, and make the universality degree of value and interests as the criterion for the realization of public order, namely, solving the problem of globalization in a global way[14].

Therefore, whether to establish a friendly international judicial environment and maintain an international civil and commercial order, or to protect the interests of the child, the reservation system of public order should not be the reason for refusing to recognize the validity of cross-border surrogate parenthood.

5. Conclusion

The identification of parentage, as the most important and basic issue arising in the context of the international surrogacy arrangement, is an urgent matter concerning the fundamental
rights of children. Therefore, every country should work together to reach a unified international treaty, and offer abundant attention to the principle of the best interests of the child and the principle of “intentional and functional parenthood”, coordinated with cautious use of public order retention system, so we can strive to solve the problem of transnational parentage identification fundamentally.

References


