



Research on the Legal Issues of Paternity Determination under Surrogacy Technology

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ABSTRACT: The Science of life law is the research field of science, technology and law. Surrogacy is a typical problem of the science of life law. There are different voices around the world about surrogacy, but there is a consensus that regardless of whether surrogacy is legal or not, we should acknowledge the fact that children born through surrogacy exist, the protection of their legal rights can not be ignored. With the increase of surrogacy cases, the issue of whether the surrogacy agreement has legal effect, how to determine the parent-child relationship, and who is responsible for the custody of the community has aroused widespread concern. The key to solve the related legal problems caused by surrogacy is to establish the theory and system of identifying parentage under surrogacy. That is to say, the identification of the surrogate parent-child relationship is the main goal of the surrogate subject, and is also the key to improve the surrogate legislation. In this paper, surrogacy as the research object, from the point of view of parent-child relationship, using the methods of literature study, comparative study, case analysis, etc. , this paper introduces and studies the concept and types of surrogacy, the necessity of identifying the surrogate parent-child relationship and the way of identifying the surrogate parent-child relationship.

KEYWORDS: Surrogacy; Parent-child relationship; Surrogacy agreement

I. INTRODUCTION

This paper can be divided into three parts from the structure. The first part is the basic issues of surrogacy, which is the legal basis of the parent-child relationship of surrogacy. The second part is the legislative attitude and identification way of parent-child relationship of surrogate pregnancy in different countries. The third part is the introduction of new legal identification system of parent-child relationship, research and analysis of it and put forward legal advice.

Status Quo:

1. Background Overview;

(1) Basic background of surrogacy;

(2) Concepts;

(3) Classification of surrogacy.

A. Local surrogacy and complete surrogacy;

B. Free surrogacy and commercial surrogacy;

C. Medical surrogacy and non-medical surrogacy.

(1) **The basic background of surrogacy:** Family relationship should be the most fundamental research object for civil law, law and even society. Surrogacy, the so-called "Giving birth through the womb", directly affects family relationships. As an extension of the in vitro fertilization, surrogacy has become the dominant form of modern human Assisted reproductive technology. This thesis involves the deep social problems such as ethics, law and psychology, which has aroused much controversy. In the field of contemporary bioethics and even life law, surrogacy has aroused intense academic controversy.

Surrogacy is not an up-to-date research topic, but news reports on surrogacy continue to attract wide attention from the society, making it always at the forefront of the storm, only a few countries have unified, systematic legal regulation. Facts have proved that the complete disregard of the law, or relying on the long-term regulation of administrative regulations, to solve a social problem, are biased, not a long-term solution.

(2) **Concept:** A woman receives the sperm of a man who is not in a marital relationship through artificial insemination, or puts another person's fertilized egg into her own uterus through medical means, surrogate pregnancy and childbirth. In the general surrogacy relationship, there are four main participants: surrogacy mother, surrogacy children, willing couple and surrogacy agency.

A surrogate mother is a woman who provides surrogacy services to others and whose main task is to conceive and give birth. A surrogate child, i. e. a



child born to a surrogate mother on the basis of a surrogate relationship. A willing couple, that is, a couple seeking a surrogate, who may in the future become the father (willing father) and mother (willing mother) of a surrogate child. Surrogacy agency, that is, between the surrogate mother and the willing couple, for the formation of their surrogacy relationship and the maintenance of the intermediary engaged in disciplinary acts or institutions.

(3) Classification of surrogacy:

- A. Local surrogacy and complete surrogacy;
- B. Free surrogacy and commercial surrogacy;
- C. Medical surrogacy and non-medical surrogacy.

A. Local surrogacy and complete surrogacy

The division of the two is according to different reasons of pregnancy. Local surrogacy, or traditional surrogacy, is when the egg comes from the surrogate mother herself and the sperm comes from the man or other donor of the intended parent, who conceives through in vitro fertilization. The risk is that the quality and moral character of the sperm donor and the mother are uncertain, and that there is a potential risk of consanguineous marriage and procreation.

Complete surrogacy is when sperm and eggs are fertilized by in vitro fertilization to form a fertilized egg, which then becomes an embryo and is implanted into the surrogate mother. This type of surrogacy can be further subdivided according to the genetic relationship:

- (a) either the embryo's genes are not from the willing parents and the fetus has no genetic relationship with them, that is to say, the embryo surrogacy;
- (b) the sperm and eggs are both from the willing couple and the fetus's genes are entirely from the willing parents, that is, the gestational surrogacy;
- (c) or the fetus inherits the genes of one of the willing couples, that is, the genetic surrogacy, if only the sperm or only the egg is from one of the willing couples and the other is the donor.

B. Free surrogacy and commercial surrogacy

The division of the two is according to whether the pregnant mother gains economic benefits from surrogacy. Free surrogacy, that is, altruistic surrogacy, is surrogacy does not need financial compensation or accept no more than the basic cost of compensation surrogacy. The basic cost of surrogacy includes the cost of prenatal care and treatment, rent, minimum living security and life insurance.

Paid surrogacy, is willing parents in addition to pay the basic cost of surrogacy, also need to pay to surrogacy women a one-time monetary compensation, that is, remuneration. Surrogacy involving surrogacy agents and charging intermediary fees is known as commercial surrogacy. It can be seen that commercial surrogacy and paid surrogacy is not entirely the same.

C. Medical surrogacy and non-medical surrogacy

They are divided into medical surrogacy and non-medical surrogacy according to the different starting points of surrogacy. Medical surrogacy refers to the surrogacy method chosen by one or both parents who are unable to conceive and bear children due to the impairment or loss of physical function of one or both parents.

Surrogacy for non-medical reasons is a kind of surrogacy which is decided by subjective factors, because the parents are normal and fit for the normal condition, but they don't want to carry on the surrogacy because of the external factors, so they choose the way of surrogacy to carry the children.

II. ANALYSIS AND THINKING

2. Discussion on the confirmation of surrogate parent-child relationship

(1) The necessity of the confirmation of surrogate parent-child relationship;

(2) The theory of identifying the surrogate parent-child relationship;

A. Birthing theory;

B. Consanguinity;

C. Protocol says;

D. Principle of the best interests of the child.

(3) The legislative attitude of each country to surrogacy and the way of identifying parentage stipulate that a is open.

A. Open;

B. laissez-faire;

C. Fully open;

D. Slient.

E. Prohibited.

(1) The necessity of the confirmation of surrogate parent-child relationship

Surrogacy technology has been forbidden repeatedly and more and more lawsuits have been involved, the traditional confirmation system of parent-child relationship can not be applied to the surrogacy technology at all, so many problems can not be solved. Therefore, it is of great theoretical and practical significance to study how to identify the parentage in surrogacy. It helps correct people's misconceptions about surrogacy.



Surrogacy is banned in many countries because it is considered to be contrary to good customs and social morality, so it is abhorrent to surrogacy and very repugnant to those who practice it. But surrogacy can actually bring hope to many infertile families and make a huge contribution to human reproduction and development. Though it may cause problems, banning it won't solve the real problem.

(2) The theory of identifying the surrogate parent-child relationship.

At present, there are four kinds of theories about the determination of parentage in the world: the theory of childbirth (the legal mother of the child who gives birth), the theory of consanguinity (the legal parents are judged according to the genetic origin of the child), the theory of agreement (the legal parents are judged according to the provisions of the surrogacy agreement), and the principle of the best interests of the child (the legal parents are judged according to the conditions most suitable for the child's growth).

A. Birthing theory. The greatest advantage of this doctrine is that a surrogate child does not have to go through the period of absence of parents in the process of paternity determination, and that the person giving birth can be identified at birth as his or her mother, but, the father is identified in other ways, with the choice between the legal spouse of the mother as the father and the genetically related man as the father, at which point the surrogate child can only identify the mother, the fact that the father had to be confirmed by another procedure did not reduce the number of legal disputes that might arise, since the mother was willing to take legal action, and another case had come before the father had been determined, this throws surrogacy into even more confusion.

B. Consanguinity. The greatest advantage of this theory is that parents can accurately identify the biological parents of a surrogate child by genetic identification, but by genetic identification of the biological parents, most likely, the men and women who provide the genes for a surrogate child may not be legally married, or even know each other at all, and they do not want to be the legitimate father or mother of a surrogate child, at this time is not conducive to the growth of children, the practice is particularly difficult.

C. Protocol says. The greatest advantage of this doctrine is that it is in the greatest degree consistent with the subjective purpose of each subject in the surrogacy relationship, but that all subjects shall ensure the normal performance of their

obligations in accordance with the surrogacy contract, and in case of breach of contract, will affect the surrogate child's paternity, which is also the theory of the drawbacks. In addition, this doctrine is based on surrogacy agreement reached, so surrogacy contract must first exist.

D. Principle of the best interests of the child. This doctrine is based on the principle of the protection of the interests of the child in international law, in line with the provisions of the Convention on the protection of the rights of the child, the most conducive to the growth of children. However, according to this doctrine, willing parents, whether or not they have a surrogacy contract, must, through litigation, have a judge determine that the conditions most suitable for the child's development are in place and conducive to the development of the child's surrogacy, before they can become legal parents.

Each of these theories is too varied to be singled out as the most scientific. Therefore, many scholars proposed that we should adopt two or even three theories to judge it comprehensively. The more mainstream view is that the principle of consanguinity and the principle of the best interests of the child as a supplement.

(3) The legislative attitude of each country to surrogacy and the way of identifying parentage stipulate that a is open.

A. Open.

International law on surrogacy without a unified legislative regulation directly led to the lack of national legislation on surrogacy issues. Only a very few countries in the world have passed legislation regulating surrogacy, which does not mean that these countries recognize the legal status of surrogacy. They may only recognize the legitimacy of unpaid surrogacy and not commercial surrogacy, as in Brazil, Greece, the Netherlands, Israel, South Africa and the United Kingdom.

B. laissez-faire.

India is known as the "International Surrogacy Center", the Indian government recognized the legitimacy of paid and unpaid surrogacy, but there is no legal regulation of surrogacy. Surrogacy, which accounts for a large part of India's tourism industry, has become the main supply market for international surrogate mothers, keeping them from being cut off.

C. Fully open.

Both Russia and Ukraine recognize traditional and full surrogacy. But there are different conditions for surrogacy, such as the requirement in



Russia to obtain the written consent of the willing couple before signing a surrogacy agreement; Ukraine provides for the rights of both parents in surrogacy agreements: the traditional surrogate mother and her spouse are the de facto parents of the child, and the willing parents are the legally presumed parents.

D. Silent.

Most countries take a silent attitude towards surrogacy, neither prohibiting nor recognizing it, such as New Zealand. An explicit ban on surrogacy can be seen as an indirect recognition of surrogacy, but surrogacy is not protected by law here either.

E. prohibited.

Many countries on surrogacy is explicitly prohibited, such as Italy, Norway, Spain, France, etc. ; Germany also adopts a completely prohibited attitude on surrogacy, does not recognize any surrogacy contract, this led to the high profile case of Jan Balaz v. Union of India.

In addition, the literature shows that the world's attitudes towards surrogacy, mainly limited open, a few adopted a completely prohibited attitude, a very few adopted a completely open policy, which is closely related to their national conditions.

III. DISCUSSION

2. Suggestions on establishing legal cognizance system of surrogate parent-child relationship

- (1) The will of the parties;**
- (2) Judicial pre-authorization;**
- (3) Administrative review and approval.**

The author proposes to adopt a new type of legal paternity recognition system, the essence of which is the mode of paternity recognition separated from the childbirth relationship, leave it to the individual to decide whether he or she wishes to become a parent, and what the law needs to do is to examine whether his or her wishes are genuine and that he or she is capable of assuming parental responsibility for the child. After all, it is difficult for the law to decide who is the legitimate and qualified parent, and the legal parent-child system solves this problem by returning the right to the parties to decide as they see fit, it is then up to the law to decide whether they can be granted the right to be parents to a surrogate child.

(1) The will of the parties, marriage law is a typical private law, should follow the idea of private law, to respect the will of the parties as the basis, in order to confirm the parent-child relationship. The difficulties arising from the new

family and the development of reproductive technology also require that the will of the parties should play a greater, even decisive, role in the acquisition of parental rights. And surrogacy contract is the most able to reflect the will of the parties, so the contract should be the most important factor in the establishment of legal parent-child relationship plays a decisive role. The new way of parent-child identification is to judge the will of the parties as a way of acquiring the qualification of parents, which is confirmed by law through the express or implied will of the couple.

(2) Judicial pre-authorization, except the will of the parties, the acquisition of parental rights needs to pass the judicial judgment of the court, which has been practiced in some American states. After entering into a formal surrogacy contract and before the birth of the child, the person concerned goes to court and files a lawsuit, requesting the court to confirm the legal parent of the child after birth on the basis of the surrogacy contract in order to obtain legal parental status. The court also has the right to review the contents of the surrogacy contract. The court has the right to order the unreasonable clauses in the contract to be corrected or revoked, otherwise the validity of the surrogacy contract will be affected.

(3) Administrative review and approval, in addition to the courts, the state authorities also have the power to approve surrogacy contracts and to exercise pre-authorization, which has been adopted by Israel. Administrative pre-authorization is similar to court pre-authorization and needs to be based on surrogacy contract. In order to obtain administrative pre-authorization, willing couples must meet the approval conditions, including:

- A. willing couples have formal hospital issued, through medical science and technology legal identification of infertility diagnosis proposal;
- B. the consenting couple has received social assistance, such as community correction and counseling;
- C. the consenting couple has thought long and hard about the contingencies that may arise from parental authority, for example, after the birth of a child suffering from illness, divorce or the death of one of the spouses;
- D. willing couples should sign a voluntary commitment that the idea of surrogacy is not subject to coercion and interference by anyone to ensure the authenticity of its expression of will.

It is suggested that the executive branch should issue a valid standard surrogacy contract and make clear regulations on the important clauses in the contract so as to reduce the contract disputes between the parties and improve the chances of the



successful approval of the surrogacy contract involving the intermediary.

The relationship of the three ways of confirmation, the above three ways of legal paternity confirmation complement each other without strict boundaries. Any kind of confirmation is based on surrogate contract, that is, the will of the parties, and the parties to the contract can choose one or more ways to increase the chances of obtaining legal parental rights.

IV. CONCLUSION AND SUGGESTIONS

Any scientific and technological innovation is a “Double-edged sword”, which brings benefits and convenience to human beings, but may bring risks and damages to some people. And the function of law is to make science and technology serve human beings through the artificial power, and develop in a healthy and correct direction.

In fact, the problem of surrogacy has been emerging, and the community for surrogacy controversy has never stopped. Whether surrogacy is open or not has profound social roots, which should be judged according to its international status, economic strength, population quality and other factors, and whether it has the ability to resist the impact of negative effects on the social environment and the construction of supporting systems, and the attitude of the legislature. We can not directly copy the experience of other countries’ legislation on surrogacy, but should establish an effective legal regulation strategy based on our own national conditions.

Through the analysis of the current legislation of surrogate parent-child relationship in

most countries and the related litigation involving surrogate pregnancy, we can find that whether the two sides shirk each other’s responsibilities for the maintenance of surrogate children, or the two sides scramble for custody and inheritance rights, can not avoid the issue of paternity in surrogacy. Once the relationship between parents and children in surrogacy is established, all the problems involved in surrogacy can be solved. Therefore, it is of great significance to establish a complete system of identifying surrogate parent-child relationship.

The author hopes that the research on the rules of identifying the parentage of surrogacy can make the law system of Surrogacy Perfect day by day, let surrogacy technology bring happiness to more families, and play the role of benefiting Mankind Truly.

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