

The Balance Between the Public Order Preservation Policy and the Protection of Children's Interests in Cross-Border Surrogate Parentage

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Abstract

The international community is widely divided on the validity of surrogacy, which has led to the phenomenon of cross-border surrogacy conflicts and triggered the application of public order reservation on the issue of cross-border surrogacy and recognition of foreign surrogacy judgments. In the process of applying public order, the judges of various countries are prone to abuse their discretionary power due to the rigidity of the connotation and theory of public order, and the unclear standard of invoking public order, which interferes with family life and is detrimental to the protection of children. This paper argues that in the parent-child relationship of cross-border surrogacy, public order reservation and protection of children's interests are equally important issues, and cross-border surrogacy judgments should strike a reasonable balance between public order reservation and the principle of the best interests of children. Not only it is necessary to enrich the theory of public order reservation and improve the rules of its application, but the principle of the best interests of the child should be implemented to the greatest extent possible to protect the interests of the surrogate child.

Keywords: cross-border surrogacy, public order preservation, child interest protection, balance

1. Introduction

With the development of globalization and people's innovative ideas, the problem of transnational surrogacy has intensified, and the reticence and inconsistency of legislation can result in the interests of surrogate children not being adequately protected. Therefore, for cross-border surrogacy judgments, how to strike a reasonable balance between the preservation of public order and the principle of the best interests of the child is a realistic issue that the international community needs to seriously consider, and it becomes necessary to study the reasonableness of invoking public order in the identification of transnational surrogate parents and to solve the problem of identifying surrogate children. (Tao, X.-Y., 2020)

Public order, sometimes referred to as "public order reservations". In private international law, it is generally accepted that the main function of this system is to defend the fundamental moral values, fundamental principles of law or vital social interests of the forum state against the application of foreign law. (Jin, P.-N., 1999) Therefore, the academic community has imaginatively called it a "safety valve". The security function of this valve is twofold: to exclude the application of foreign law and to refuse to recognize foreign judgments when the court hears civil cases involving foreign countries. The latter is the issue of refusal to recognize the domestic effect of foreign judgments in the name of public order reservation. This practice has long been generally accepted by the international community. (Xiao, Y.-P., & Long, W.-D., 2012) This article focuses on the latter manifestation, i.e., the refusal to recognize the intra-territorial effects of foreign judgments in the name of public order reservations.

The most important modern theories of public order reservations include not only the doctrine of *result*, but also the *order public international* and the doctrine of *close connection of public order*.

According to the doctrine of *result*, when the content of foreign law is in conflict with the public order of this country, it does not necessarily lead to the inapplicability of foreign law; only when the application of foreign law to the case produces results that seriously damage the public order of this country, can its application be excluded. (Han, D.-P., 2014) This theory shifts the focus of courts from the foreign provisions themselves to the actual application of foreign law in specific cases, which is more conducive to protecting the interests of justice

in individual cases and has become the mainstream view. (Tao, X.-Y., 2020)

The *order public international* was mainly put forward by European scholars. There are two broad ideas: (1) to distinguish traditional public order into different categories according to the strength or weakness of publicness. This is done as follows: First, purely domestic public order is excluded from the doctrine of public order reservations in private international jurisprudence. Such public order, which does not fall within the scope of private international law, may only be asserted by courts in purely domestic cases and not in any civil or commercial cases with foreign elements. Secondly, the public order under the doctrine of public order reservations in private international law is divided into two categories. One of them is "the fundamental ethics, values, socio-economic and cultural standards of the forum, or the notion of fairness and justice, or the basic legal constitution", that is, "the public order of the forum" in the general sense; the other one is "the public order of the forum State". The other category is "the international obligations of the forum State, or the requirements of justice generally recognized by the international community of law", which is also known as "international public order", such as the prohibition of the sale of human beings. (2) In considering whether to invoke the public order reservation system to exclude the application of foreign law, courts should differentiate according to the type of public order, i.e., to exclude purely domestic public order altogether, to limit the public order of the forum, and to actively realize international public order. (Note 1)

The doctrine of *close connection of public order*, developed by American scholars in the mid-20th century, holds that when the application of a foreign law has the potential to harm the public order of the country, the domestic state should decide whether to activate the public order reservation system based on the closeness of the connection between the case and the forum. Only when the forum has such a close connection with the case that the application of the foreign law is not precluded from causing serious and substantial harm to the public order of the forum, the court may make a public order reservation.

These doctrines have served to limit the retention of public order to a certain extent, but with the diversification of modern family structures, these three doctrines have been unable to quell the public order strife in various countries.

Many countries do not have substantive law legislation specifically for this issue, let alone legislation related to the law applicable to cross-border surrogacy. Therefore, the conflicting legislative states and attitudes of different countries and regions on the issue of surrogacy and the absence of applicable laws have led to the fact that cross-border surrogacy is facing a serious conflict of laws problem. In this article, we will try to explore the dilemma of using public order reservation with a specific case.

2. Method

In a 14-year international surrogacy case concluded by the European Court of Human Rights in 2014, *Monnesson v. France* (ECHR, 2014) (hereinafter referred to as "*Monnesson case*"), the Supreme Court of California of the United States recognized the legal parentage of the authorized parents from France. (Note 2) The reasons given by the court based on the local public order are as follows: (1) Allowing the surrogate mother to improve her own economic situation; (2) Respect the right of the parties concerned to choose their means of reproduction; (3) Protect the interests of children. In its last ruling in 2011. However, the French Supreme Court invoked the public order reservation to reject the California decision. (Burger, D. C., 1983-1984) According to the French civil Code, surrogacy agreements are invalid for the sake of public order. In addition, the French Supreme Court put forward the following two considerations: first, the transfer of "mother" identity through contract in the *Monnesson case* is bound to destroy the legal principle of identity right and cause a great impact on the French public order; second, not recognizing the validity of the surrogacy agreement also damages the interests of the children in this case, that is, not recognizing the decision of the Supreme Court of California damages the public order in France. The French couple took their case to the European Court of Human Rights, which ruled that the French Supreme Court's ruling violated the European Convention on Human Rights, also on the grounds of maintaining public order in the EU. The reasons are as follows: (1) To protect the basic human right of natural persons to enjoy family and private life; (2) Safeguarding children's rights.

3. Result

Although judges have no choice but to use public order to reserve and exclude foreign laws or reject foreign judgments, they should adopt more reasonable rules for the application of law and select the applicable law that is more favorable to children and the weak in the modern family structure; Or they can further explore more feasible alternative legal relations to protect the identity rights and family rights of all family members in the surrogate family, especially the identity rights of the surrogate children belonging to the vulnerable party.

4. Discussion

In parent-child relationship of cross-border surrogacy, public order reservation and protection of children's interests are equally important issues, and cross-border surrogacy judgments should strike a reasonable balance between public order reservation and the principle of the best interests of children. On the one hand, it is necessary to enrich the doctrine of public order reservation and improve the rules of its application. Even if judges have to use public order reservation to exclude foreign law or to deny recognition of foreign judgments, they should adopt more reasonable rules of legal application and select the applicable law that is more favorable to children and to the weaker members of modern family structure; or further explore more feasible alternative legal relationships to protect the identity rights and family rights of each family member in surrogate families, especially the identity rights of surrogate children who belong to the weaker side. On the other hand, in order to implement the principle of the best interests of the child to the greatest extent possible and protect the legitimate interests of children, it is currently feasible to strengthen international cooperation and adopt a cross-border surrogacy convention to coordinate the legal conflicts between countries on cross-border surrogacy, so as to eliminate the legal conflicts arising from cross-border surrogacy as far as possible. International cooperation between the country of birth of the surrogate child and the country of the intended parents should be strengthened to avoid or eliminate the occurrence of legal conflicts of recognition of legal parentage in cross-border surrogacy by providing a series of procedures for the determination of paternity in cross-border surrogacy. In addition, the existing CONVENTION OF INTERCOUNTRY ADOPTION, which protects the interests of surrogate children, can be used as a model to finalize the content of the convention on cross-border surrogacy. It should be noted that CONVENTION OF INTERCOUNTRY ADOPTION does not provide a complete model for reference and borrowing, can only extend the relevant provisions therein to address cross-border surrogacy. (Yuan, Q., & Luo, Y.-Y., 2019)

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Notes

Note 1. Habicht, the Application of Soviet Laws and the Exception of Public Order, 21 Am. J. Int'l L. 238(1927), pp. 243-249; David Clifford, Transnational Public Policy as a Factor in Choice of Law Analysis, 5 N. Y. L. Sch. J. *Int'l & Comp. L.* 367 (1983-1984). pp. 379-380.

Note 2. Voir Cour de cassation, civile, Chambre civile 1, 6 avril 2011, 09 - 66. 486, Publié au bulletin.

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