

Protection of Children's Rights and Interests in Transnational Surrogacy -- From the Perspective of Parent-Child Relationship

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Abstract

The development of artificial reproductive technology and the legal difference of surrogacy lead to a large number of transnational surrogacy children and many disputes about the legal parent status of transnational surrogacy children. The main reasons for the difficulty in identifying the parental relationship of the present transnational surrogacy children are the different identification of the surrogacy agreement and the parent-child relationship in different countries, the emergence of the "lame parental right" caused by the application of the principle of public order, and the reflect to recognize the transnational surrogacy parent-child relationship on the grounds of legal evasion.

Based on the analysis of the reasons for the difficulty in identifying the parent-child relationship and the experience of determining the surrogate parent-child relationship in various countries, the exploration of the path to determine the parent-child relationship of the transnational surrogacy children mainly includes establishing the parent-child relationship according to the surrogacy agreement, establishing the adoption relationship to establish the parent-child relationship, and redefining the parent-child relationship according to the conflict norms of the country where the intended parents are located.

At present, there is no basic law to regulate surrogacy in China. In practice, the legal parents of surrogacy children are established in the way of confirming the parentage of factual support. On the premise of balancing the best interests of children and social public order, we should protect the right of identity of transnational surrogacy children by perfecting laws and regulations, and maximize the function of technology to benefit mankind.

Keywords: transnational surrogacy, parent-child relationship identification, best interests of the child

1. Background

Surrogacy came into public view in the 1980s. With the global adoption market increasingly restricted, the scale of surrogacy continued to expand and the international surrogacy market developed rapidly. Deep social root causes have led to surrogacy problems. The decline in human fertility has become a major problem affecting population reproduction and social continuity, with population ageing and a declining population. The diversification of family structure in many countries and areas, especially the legitimization of same-sex marriage and life partnership in many countries and regions, has also given rise to the realistic demand of procreation through surrogacy. These realistic problems make surrogacy market develop and form industry chain quietly, and also promote the process of legalization of surrogacy in many countries and regions. In the meantime, the development of surrogacy industry has also produced many problems.

In recent years, disputes over custody of transnational surrogate children often occur, how to determine the legal custody of newborn human infant? Does it belong to the father or mother of the entrusted parent or to the surrogate? How does the current law protect the transnational surrogacy child to enjoy the normal civil status right? The resolution of these issues depends on the existence of a legal filiation between the person requesting custody and the surrogate child, and, this issue is also a prerequisite for the rights of the child to custody, guardianship and nationality in international child-surrogate disputes.

2. Analysis of Intractable Problems in Identifying Parent-Child Relationship of Surrogacy Children

Transnational surrogacy often involves many countries, and different countries have different principles for determining the parent-child relationship in handling surrogacy because of the different degree of approval for

surrogacy. In order to maintain their own social order and public interests, countries reject the judgments of other countries by applying the rule of reservation of public order or using the rule of evasion of law. The reasons for this vary from country to country, and from court or government to state the legal parents of a child who is a cross-border surrogate.

2.1 Different Definitions of Surrogacy Agreements

The validity of surrogacy agreements in different countries is basically consistent with the legitimacy of surrogacy. Depending on the degree of acceptance of surrogacy by states, the following categories can be drawn: the stand of completely forbidding surrogacy, the stand of indirectly recognizing surrogacy and the stand of permitting business surrogacy. Countries that completely ban surrogacy do not recognize surrogacy contracts and surrogate parent-child relationships arising from violating the law, mostly on the basis of religious, ethical and human rights protection considerations. Countries that indirectly recognize surrogacy, such as New Zealand, do so indirectly through adoption. The prospective parents can not establish the intended family relationship with the surrogacy children directly by the surrogacy contract, but must establish the intended family relationship with the transnational surrogacy children by adopting the surrogacy children. In countries that allow commercial surrogacy, such as Ukraine, Israel and the United States, disputes are settled on the basis of the "will to parent" principle, which recognizes the legitimacy of cross-border surrogacy agreements, and in accordance with the agreement to determine the guardian to confirm the international surrogate parent-child relationship. In the case of transnational surrogacy, it is recognized through surrogacy agreements that legal parents are in most cases acting in accordance with the true will of the participants, but that surrogate mothers and prospective parents usually come from different countries, these countries to surrogacy behavior and surrogacy agreement recognition degree is different, make surrogacy children legal parents confirmation also has the big difference. If the pre- or post-procedure established in accordance with the legal rules for the determination of parentage in the act of surrogacy in different countries, it is likely to result in the determination of parentage which is not accepted by all parties.

2.2 The Generation of "Lame Parental Power" Arises From "Public Order Reservation"

The principle of public order, also known as "Public Order Reservation", mainly refers to the maintenance of public order, basic policies, moral concepts and so on in the country, deny the foreign judgment and refuse the application of foreign law. For purpose of solving the problem of confirming the family relationship of transnational surrogacy, the state where the intended parents are located usually disavows the decision of the country where the act of surrogacy took place. This makes surrogacy children's legal parent status conflict, forming a "lame parental rights" situation. It is stiff for surrogacy children based on the family relationship to defend the legal rights and benefits. The concept of public order is not absolute, and different countries in the issue of transnational surrogacy identified public order is not consistent. Specific proposals include: people should not be the object of property transactions, policies prohibiting the exploitation of women, protection of normal family life order, parental status can not be obtained by agreement, and so on. To deal with the establishment of the hardship of the parenthood relationship of transnational surrogacy, we should make a reasonable judgment on public order, prevent the abuse of the principle of the reservation of public order, and make a judgment from the principle of the best interests of the child.

2.3 Difficulties Caused by Evasion of Law

Evasion of law, as one of the long-standing systems in the field of private international law, refers to the behavior that the parties intentionally create a connecting point to avoid the application of the law to their disadvantage in order to apply the law to their advantage. For the purpose of eluding state law, the country where the intended parents are located often does not recognize the parentage resulting from surrogacy in the process of confirming the parentage of transnational surrogacy, prospective parents may choose to use surrogacy in countries where surrogacy is permitted in the aim of achieving the purpose of surrogacy. The decision of the court of the country where the intended parent is, on the ground of evasion of law, to refuse to recognize paternity is consistent with the application of the principle of reservations to public order, except that the principle of law is different, but both lead to confusion about the parents in the legal sense of a surrogate child. The legitimate rights and interests of surrogate children have been undermined in the long process of cross-border litigation, such as being unable to apply for a visa to stay in a foreign country and living apart from prospective parents.

3. The Solution of Parental Relationship Determination in Transnational Surrogacy

3.1 Pursuant to the Surrogacy Agreement

Based on the principle of strict observance of contract and the principle of intentional and functional parents, it is

also a reasonable choice to judge the family relationship according to the business surrogacy contract. Prospective parents in international surrogacy, parents who are willing to become surrogacy children, bring up the children carefully and play the role that parents should play, are pleased to invest a lot of energy and money in surrogacy, there is even a legal risk of punishment, and prospective parents often value hard-won surrogacy as the legal parent of a surrogacy child, in the interest of fulfilling the purpose of the surrogacy contract, it also follows the rule of the best interests of the child and the rule of the intended functional parents, which is beneficial to the protection of the interests of the surrogate children, the intended parents and the surrogate mothers.

3.2 Establishing an Adoptive Relationship

Adoption and surrogacy are options available to couples who wish to become parents but are unable to have children, and the use of surrogacy usually establishes a genetic link to the surrogate child as compared to adoption, and therefore, the majority of prospective parents choose surrogacy; however, if the method of surrogacy is one of egg surrogacy, the sperm is also derived from donation, and the children born as a result of surrogacy do not have the same genetic link with the prospective parents as the children to be adopted, therefore, some scholars suggest to establish the parent-child relationship between surrogacy children and the intended parents through general adoption. In practice, New Zealand, which indirectly recognizes surrogacy, uses adoption as a way for prospective parents to establish a parent-child relationship with a surrogate child in international surrogacy, however, there is no unified international treaty to regulate the adoption in international surrogacy.

3.3 Comply With Conflicting Norms or Methods of Recognition

The determination of paternity between a surrogate child and the intended parent is often determined by conflicting norms in the country where the intended parent is located, rather than by a birth certificate determined by the country where the surrogate child was born. A birth certificate issued by the country of birth is usually not recognized by the country of the intended parent but is used only as proof of birth. The court will choose the applicable law to re-identify the legal parents of a transnational surrogacy child in accordance with the domestic conflict rules. In this regard, first of all, it is necessary to classify the case as paternity determination in order to apply the conflict norms of paternity determination. Besides, choosing the appropriate connecting point is essential. It is usually the country of nationality and habitual residence of the surrogate child or his or her intended parents, and the applicable law is designated according to the connection point. In addition, where there is no relevant conflict norm in the country where the intended parent is, or for other reasons, the method of recognition may be applied by recognizing a foreign judicial decision on the birth certificate of a surrogate child or on the determination of paternity.

4. Conclusion

The current legislation of various countries usually has detailed regulations on the legal reproduction of the status of children and the rules for the recognition of paternity, but for illegal adoption of the rules for the recognition of paternity of children born of Assisted reproductive technology, the existing path also has shortcomings. At present, our country also lacks the explicit stipulation to the surrogate child's parentage confirmation. In practice, the parent-child relationship determination rule established in the custody dispute case of Chen, Luo and Xie is of milestone significance. In order to solve the problem of establishing the parent-child relationship of transnational surrogacy children, we should prevent the abuse of the reservation of public order through reasonable identification of public order. To deal with foreign decisions on paternity determination of surrogate children, China may appropriately invoke the public policy exception when the principle of the best interests of the child takes precedence, to achieve a balance between the best interests of the child and public order. The development of law is lagging, the science and technology itself is neutral, it is not suitable to deny the technology completely because of the possible risk, the existing legal norms should be perfected to make the technology play the function of benefiting mankind.

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