

Research on the Public Order Reservation System from Surrogacy

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Abstract. Surrogacy technology provides the possibility for families who are unable to have children. Different countries have different legal regulations on surrogacy, which leads to the creation of transnational surrogacy, and at the same time, disputes over transnational surrogacy are also increasing. As we all know, surrogacy is contrary to the public moral order in China, which leads to the issue of public order retention. Private international law, as an important legal system in the field of International law, has an unshakable position and role in dealing with transnational surrogacy disputes. In transnational surrogacy disputes, public order is mainly reflected in the legal regulations of each country on surrogacy, the determination of paternity and the relevant regulations on the ethics of surrogacy, and its role is mainly reflected in the exclusion of the application of foreign laws and the refusal to recognize the judgments of foreign courts. In the application of the law, countries have tried to find a balance between the recognition of foreign judgments and the protection of the public order of the courts. This article will take a comparative and case study approach, using the issue of surrogacy as an entry point to explore the application of public order reservations in this particular area.

Keywords: Transnational Surrogacy; Reservation of Public Order; Determination of Parent-child Relationship; Extraterritorial Judgment.

1. Introduction

According to a survey by the Conference on Private International Law in The Hague (CACCH) [1], there are relatively broad regional characteristics based on differences in the level of economic development of countries. The birthplaces of surrogate children are mainly in countries such as the United States and Ukraine. The scale of transnational surrogacy has grown rapidly in recent years. According to the "Research Report on the Status of Infertility in China" published by the China Population Association and the National Family Planning Commission in 2016, one out of eight average couples in China experience fertility difficulties. The rate of growth has increased from 1 percent in the 1970s to 2 percent to 12.5-15 percent today, a tenfold increase in 30 years. Liu Changqiu, an associate researcher who studies the law of life, believes that the demand for surrogate births in China will reach millions. Cases concerning transnational surrogacy have been gradually exposed to the public eye in recent years due to the evolving media. Transnational pregnancy brings legal challenges to the international social system when it raises issues such as ethics and morality and family religious beliefs. On the other hand, transnational surrogacy has become a tool for profiteering for some people, and poor women in some countries and regions make money through low-cost "womb rentals", which can easily lead to human rights issues. On the other hand, due to different social and cultural backgrounds, the status of surrogate mothers in different countries is different, and the legal regulations are also different, the related legal conflicts also face the challenges of traditional private international law. It is against this background that this paper is conducted.

2. Literature Review

There are relatively more cases of transnational surrogacy in practice in foreign countries, and they are also more typical. On the whole, there are more research results in foreign countries, and dozens of monographs and hundreds of papers have been published to study from different perspectives. In addition, the reports of the Hague Conference on Private International Law and the relevant

judgments of foreign courts have also made profound analysis and discussions on transnational surrogacy. These studies mainly focus on the conflict between surrogacy and ethics, the human rights of surrogate women, the determination of the paternity of surrogate children and the protection of their rights and interests, and the impact of surrogacy on international and domestic laws. Surrogacy not only impacts on traditional ethics and morality but also involves the issue of safeguarding the human rights of surrogate mothers. Some scholars argue that surrogacy is a manifestation of the “Commodification” of the surrogate mother, which often exploits the surrogate woman because of the inequality between the two parties. It is mainly manifested in Marcelo De Alcantara’s paper *Surrogacy in Japan of : Legal Implications for Parentage and Citizenship* [2], *Surrogacy Arrangements in Britain: Policy and Practice Issues for Professionals* of Eric Blyth [3], *The Birth of Surrogacy in Israel* of D.Kelly Weisberg [4]. And Kenneth MckNorrie’s “Reproductive Technology-A New issue of Private International Law” [5]. In addition, surrogacy is also discussed in very new works. Ian Kerridge, Michael Lowe and Cameron Stewart’s *Ethics and Law for the Health Professions*, Martha A.Field’s *Surrogate Motherhood: The Legal and Human Issues*, etc. Kenneth Mckorrie pointed out that "the paternity determination between surrogate parents and surrogate babies is more applicable to the principle of frequent residence or closest connection."

Reproduction argues that transnational surrogacy is contrary to traditional ethics and that this kind of behavior is the exploitation of women [6].

In the article “Fair trade international surrogacy”, Humbyrd, a European scholar, believes that the reward earned by surrogate mothers is not equal to their hard work to give birth to live, so they are in the position of being exploited. In reality, the surrogate industry should be regulated, the reasonable consideration mechanism should be determined, and the exploitation of surrogate women should be reduced [7]. In addition, Professor Amrita Pande of Columbia University believes that the essence of surrogacy is the rental of a women’s uterus and the materialization of surrogate women [8]; the second is the determination of the parent-child relationship of surrogate children and the protection of their rights and interests, which is roughly the same as the views of Chinese society on surrogacy. Chinese social groups and even the government are trying their best to avoid the black and grey industrial chain that makes women's uterus become a commodity because of surrogacy. In the aspect of the identification of the parent-child relationship of surrogate children, foreign scholars focus on the conflict law rules that should be applied to the identification of surrogacy agreement and parent-child relationship, because there are obvious conflicts in the laws of various countries on the identification of legal parents of surrogacy children. The practice of unifying the substantive methods of various countries to solve the problem is difficult to achieve results in a short period of time, and the application of conflict law rules can build a communication bridge between laws and judges in various countries. In terms of the protection of the rights and interests of surrogate children, British professors Hall and Jolowicz called for international cooperation on the determination of parental rights and protection of rights and interests of surrogate children in “Surrogacy and Adoption in Two Jurisdictions”. In addition, the protection of the rights and interests of surrogate children is mainly related to the principle of the best interests of the child [9].

3. Analysis of public order reservation

The reservation of public order is a very important part of private international law and it is also known as a “saving clause”. And the definition of the concept of public order is different in many countries. “Public order reservation” is a legal name in China, in France it is customarily called "public order", in Germany it is customarily called “reservation clause”(vorbehaltsklausel), while in common law countries “public policy” is commonly used.

“Public order reservation” as a means or system for excluding the application of foreign law. When the application of a foreign law would be contrary to the public order of the forum State under domestic conflict norms, the courts of that State may directly restrict or exclude the application of the foreign law on the ground that it is contrary to the public order of that State. This phenomenon is the

public order reservation. It serves to restrict or exclude the application of foreign law on the basis of the “public order” of the country. Although the concept of public order may change with time and place, it is mainly expressed in the principles of a country’s political, economic, and legal system, moral norms, and good customs.

4. A Brief Analysis of the Current Surrogacy Problem

4.1. Surrogacy in the context of legality

The US supports cross-border surrogacy and has a regulated legal system in place. In 1973, the U.S. enacted the Uniform Parentage Act, which has been continuously revised, which provides for the protection of the rights of children born out of wedlock and proposes that regardless of the marital status of the parents, “all children shall have equal rights with all parents”, a provision that implicitly states that surrogate children have equal rights with legitimate children. The amendments include provisions on the legality of surrogacy for a fee and the identification of surrogate children, which clarify the position of supporting surrogacy and make clear provisions on the elements of parties to surrogacy, the validity of surrogacy contracts, and the identification of surrogate parentage, establishing a legal system for surrogacy. The Uniform Parentage Act (UPA) is a model law developed by the National Council of Uniform State Laws (NCUSL) and is not legally enforceable. Many states in the U.S. have enacted laws regulating surrogacy by referring to the Uniform Parentage Act, and there is no shortage of court decisions supporting surrogacy. Among the 50 states in the U.S., California has more comprehensive surrogacy legislation, and the 2014 California Family Code provides detailed provisions on surrogacy and paternity determinations, and state courts have been vocal in their support of surrogacy in judicial proceedings. California has become a world center for surrogacy, with excellent surrogacy agency services, first-rate surrogacy technology, complete surrogacy facilities, sperm banks, egg banks, fertility centers, agencies, and other services, the emergence of law firms that focus on surrogacy legal services, the establishment of a surrogacy dispute resolution department in state courts, and the industrialization of cross-border surrogacy, forming a complete industry chain [10].

Ukraine is the surrogacy capital of Europe and one of the markets for cross-border surrogacy for Chinese citizens. In 2002, the Ukrainian Parliament passed the Family Law, which legalized commercial surrogacy and allowed cross-border surrogacy. Ukraine’s cost of surrogacy is relatively low in the world, which gives the country a competitive advantage in the international surrogacy market. Ukraine lacks legal regulation of surrogacy, which forms a legal “grey area”. Poor government regulation of surrogacy has led to uncontrolled growth in the surrogacy market, and there are growing calls to regulate cross-border surrogacy in Ukraine.

In Canada, free cross-border surrogacy is allowed. Canada has enacted the Assisted Human Reproduction Act to regulate the surrogacy market, prevent the use of surrogacy to exploit surrogate mothers and protect the legitimate rights of surrogate children. The assisted Human Reproduction Act provides that cross-border surrogacy is legal in Canada (except Quebec) and applies to all types of families, including single parents, same-sex couples, and heterosexual couples. Surrogacy fees are prohibited in Canada, the surrogate mother cannot benefit financially, and all reasonable expenses incurred by the surrogate mother during pregnancy, including loss of income, are borne by the surrogate mother.

Russia is transitioning from allowing cross-border surrogacy to banning it. In 1995, the Family Code of the Russian Federation opened up surrogacy and cross-border surrogacy, and in 2012, the Law of the Russian Federation on Health Protection promoted the use of assisted medical reproductive technologies and fully liberalized the surrogacy market so that families who fully and voluntarily consent to medical intervention have the right to enjoy assisted medical reproductive technologies. The relaxed legal environment and relatively low prices have attracted many people, with about 7,000 cases of cross-border surrogacy in Russia each year. 2020 saw more than 10 deaths of cross-border surrogate children in Russia, abandonment of surrogate children by

foreign intended parents, traffic disruptions due to the global epidemic, unemployment of intended parents unable to pay for surrogacy, and other reasons that left more than 500 surrogate babies stranded in women's and infant hospitals [11]. The 2012 Russian law prohibiting foreigners from adopting children of Russian nationality has been undermined by cross-border surrogacy, which has prompted the State Duma to propose amendments to the Russian Federation Law on Health Protection in January 2021 to prohibit Russian citizens from providing surrogacy services to foreigners in Russia, to combat cross-border commercial surrogacy, and to regulate the surrogacy market.

4.2. Surrogacy in the context of illegality

At present, there is no special surrogacy law in China. The legal norms of surrogacy in China are only departmental regulations such as "measures for the Management of Human assisted Reproductive Technology", "Ethical principles of Human assisted Reproductive Technology and Human sperm Bank" and "measures for the Management of Human sperm Bank" issued by the Ministry of Health. According to Article 3, paragraph 2, of the measures for the Administration of Human assisted Reproductive Technology, China is a country that strictly prohibits surrogacy. In China, surrogacy agreements are considered to violate public order and good customs and have no legal effect. For the Chinese government, once surrogacy is legal, it means that women's uterus has become a commodity that can be traded, and the legalization of surrogacy will inevitably give rise to social problems such as the black industrial chain, which will inevitably lead to some people making use of coercion, threats and even personal injury to make some women's wombs become commodities, making these women also become commodities [12]. With China's forbidden attitude and severe crackdown on surrogacy, more and more celebrities choose cross-border surrogacy. The prohibition of surrogacy will not make surrogacy disappear, and the law should respond to emerging social problems in a timely manner.

In China's judicial practice, most courts believe that the cross-border surrogacy agreement violates the public order and good customs and the current laws and regulations of China, and has no effect on the effectiveness of surrogacy agreements.

As for the identification of the surrogacy parent-child relationship, the judicial practice in China takes the results of DNA identification as the standard [13]. In practice, Chinese courts also use the principle of the best interests of the child to determine the guardianship of surrogate children. When Chinese courts hear disputes over the determination of cross-border surrogate parent-child relationship, according to Article 5 of the Law applicable Law, the court will apply Chinese law. In addition, China's current law does not have legal norms related to cross-border surrogate children, which is bound to be not conducive to the protection of the interests of surrogate children.

The reason why surrogacy can rise quietly in China is due to the existence of the social foundation and practical needs. If the fertility barrier is not solved, surrogacy is inevitable. China forbids surrogacy, only to seek foreign surrogacy, and cross-border surrogacy has more legal problems, many problems can not be solved.

5. Analysis of classic cases

5.1. The Case of Mr. and Mrs. Montserrat

Surrogacy is expressly prohibited in France, and in 2000, in California, a French citizen, Mr. and Mrs. Montserrat, obtained twins through surrogacy (the father provided the sperm). The Montserrat wanted to raise children in France, but their paternity would not be recognized by the French government. For this reason while the children were still in the surrogate mother's womb, they appealed in the U.S. Supreme Court of California. Since California has always been more open in surrogacy, the California Supreme Court followed the surrogacy act introduced in 1982 and ruled that paternity between the Montserrat and children was established.

When the Montserrat brought their child back to France, they were directly faced with a French review of the legality of their out-of-state surrogacy. In making their decision, the French courts had

to take into account previous decisions made in other countries. The *Montserrat*, who thought they would win their case, had a meaningful ending. The case went all the way from the local court to the French Supreme Court, which ultimately denied the U.S. court's decision on the grounds that it violated local public order and morality. The crux of the matter is how should the kinship of the surrogate child be determined? The French High Court held that "the surrogacy agreement is contrary to the fundamental principle of civil law that the right of the identity of natural persons may not be alienatedParentage, as the most basic identity right of natural persons, must be established by law and can never be agreed upon or disposed of by the parties themselves."As for the protection of children's rights and interests, the non-recognition of the surrogacy agreement does not harm the rights and interests of the children in this case, and the two children can still live with Mr. and Mrs. *Montserrat* and enjoy the rights and interests of French citizens, such as education and security.

The *Montserrat*, therefore, took France to European Court of Human Rights as a defendant. After a hearing, the European Court of Human Rights found that the French Supreme Court had acted contrary to the European Convention on Human Rights on the grounds that individuals are free from unwarranted interference by public authorities in their private lives and that, in the case of the two children, such a decision by France would prevent them from acquiring French nationality by blood, which would prevent them from truly integrating into French society, as well as from inheriting their parents' property. For reasons of non-interference in private life and protection of the rights of the child, the European Court of Human Rights found that the French Supreme Court's decision was in violation of human rights conventions.

The key word at the heart of all the decisions on surrogacy is "public order". California also recognized surrogacy because of public order concerns in its own jurisdiction. In that case, the California court held that a surrogate mother has the right to choose a method of procreation that suits her and that, based on the principle of protecting the rights of the child, the court is required to establish guardianship of the child, that is, to establish the child's kinship with his or her own parents [14].

The problem is that different countries have different public orders, and it is necessary for the law to maintain the public order of their own jurisdictions. When transnational surrogacy cases like the *Montserrat* case occur, different countries play games on the issue of public order, so that the same case will result in different judgments.

5.2. Chinese Celebrity Surrogacy Cases

Due to reproductive disorders, apart from good health and unsuitable age for pregnancy, many Chinese stars do not want to change their appearance and figure as a result of preparing for pregnancy and raising children, so they usually look for surrogacy, but because these are private matters and have not been publicized by the news media, it is almost impossible for them to be discussed by the public. In 2020, a female star was exposed not only for surrogacy but even for abandoning her child, revealing the complex issues involved in the Grey area of surrogacy. It involves emotion, human nature, ethics, law, and morality. Even in some states in the United States where surrogacy is legal and tolerant, it still has many legal and ethical disputes.

Over the past decade, some states in the United States where surrogacy is legal, such as California and Nevada, have received many wealthy clients from outside the United States. Some hospitals have received far more customers outside the United States than those in the United States in the past five years.

It is worth mentioning that almost all American customers choose surrogacy because they are unable to get pregnant for their own reasons. On the other hand, some foreign customers are fertile, and the reason for surrogacy is simply to keep fit, unwilling to affect work, or unwilling to endure pregnancy and childbirth. "Surrogacy of a child is not the purchase of a commodity, but its essence is the desire and respect for life." said Jiang PeiFang. Like in the Article 14 (f) of the Programme of Action of the International Conference on population and Development states that "all couples and individuals have the fundamental right to freely and responsibly determine the number and spacing

of children and to have access to information, education and means for this purpose; in exercising this right, couples and individuals have the responsibility to take into account the needs of their present and future children and their responsibilities to society.”

The actress responded to the “surrogacy storm” with crazy words, saying that she did not break the law on Chinese soil, as well as abroad. Surrogacy and abandonment undoubtedly have an impact on Chinese traditional morality and modern law.

First of all: surrogacy is clearly prohibited in our country. No matter what kind of surrogacy, it is illegal; secondly: the birth mother is the birth mother, and China's Marriage Law does not make specific provisions for identification of the parent-child relationship [15]. In judicial practice, the identification of birth mother follows the principle of “the birth mother is the mother” according to the birth facts; the identification of the biological father is determined according to the blood relationship.

This determination is mainly related to the traditional culture and morality of our country. Some relevant court precedents believe that the establishment of the mother-child relationship is not based on biological genetic continuity, but more on the emotional connection brought about by the gestation process of pregnancy in October and the hardships of childbirth, and that the mother-child relationship is determined solely by biological genes. there will be a lack of sociological and psychological support.

Finally: abandoning a surrogate fetus may constitute a “crime of abandonment”.

Article 261 of China’s Criminal Law stipulates that the actress’s behavior is very likely to constitute the crime of abandonment, but in the eyes of the lawyer, her behavior can hardly constitute the crime of abandonment. First, it is because China’s determination of the crime of abandonment is very strict. Secondly, the actual place where the act took place at this time is in the United States, so she has the courage to think that she has abided by Chinese laws on Chinese soil.

6. Current Application of Public Order Reservation to Surrogacy

6.1. Legal regulation of surrogacy, determination of paternity, ethics and morality of surrogacy

In addition to the objective facts of “birth” and “genetics”, there are other methods such as adoption and parental authority orders. In Germany, the Adoption Agreement Act prohibits surrogacy but provides for the adoption of children born to illegal cross-border surrogates by the intended parents, who become the legal parents of the cross-border surrogate children through adoption, so as to ensure that the surrogate children will not be contested or abandoned. In the UK, the intended parents are granted relief by applying for a court parental order to adopt the child. The intended parents can apply to the court for a parental authority order within 6 months after the birth of the surrogate child, and after the court examines and approves the parental authority order, the intended parents become the legal parents of the surrogate child by going through the parental authority transfer procedure according to the Adoption Act.

In the transnational surrogacy contract, the entrusting surrogate couple can establish a parent-child relationship with the surrogate child is the embodiment of the validity of the contract. In the countries of transnational paid surrogacy, under the constraints of the surrogacy agreement, the intended parents can establish a parent-child relationship with the surrogate mother according to the agreement with the surrogate mother. Commercial surrogacy is satisfactory in the market, so commercial surrogacy is not prohibited in all countries or regions. Transnational commercial surrogacy can also bring positive economic benefits [16]. For example, if the family can be inherited, the grandparents can enjoy the happiness of the family and family harmony. In addition, banning commercial surrogacy will not make commercial surrogacy disappear, but will only make it go underground, and underground activities will become more and more prosperous. Commercial surrogacy is prohibited in our country, but more than 10,000 babies are born in the underground surrogacy market every year [17]. In order to balance the needs of all parties, the maximum extent in the legal regulation of

commercial agents, the road country commercial agents of some countries and regions are particularly open position. In these areas, as long as surrogacy does not fraudulently intimidate the surrogate mother and does not harm the public interest, then the validity of the surrogacy agreement will be recognized, and the parent-child relationship generated under the surrogacy agreement will usually be recognized.

In 2018, the Hague Conference on Private International Law talked about the identification of paternity, that is, surrogacy law in its latest report.

The confirmation of parents is the premise of many other rights of surrogate children and is extremely important to the growth of surrogate children. "The best interests of Children" will be the primary consideration and will be the possible future surrogacy in the international legal instruments of transnational surrogacy.

The baseline of consideration in the contract. There is a legal conflict between the parental rights of transnational surrogate children and the reservation of public policies of various countries, so in this case, countries usually take the realization of the "best interests of the child" as the legal guidelines and pass the comprehensive evaluation of the judge. It is estimated that as much as possible, transnational surrogate children should be provided with the spiritual and material support they should have received in the process of growing up.

6.2. Exclusion of foreign surrogacy laws, refusal to recognize foreign court decisions

In the article by Xue Qiaodan [16], the challenges posed by transnational surrogacy to the current public order issues are clearly analyzed. In the surrogacy case of the Montserrat mentioned in this article, the local court has repeatedly denied the decision of the former court on the grounds of public order reservation, and every place has its public order to be maintained, but this will inevitably lead to conflicts between courts in various places on the issue of public order, but the international jurisprudence has given a model of how to reconcile such a contradiction, that is, the partial recognition of the judgment, which means that the part of the preservation of the public order of the country has to make certain concessions, which is also in the trend of globalization. This is also a problem that countries and regions have to face under the trend of globalization. In view of this, the Hague Conference on Private International Law has held frequent meetings in recent years to discuss the issues arising from international surrogacy, and the judicial application of public order reservations and the boundaries of their effects is one of the key issues [18].

7. Conclusion

This paper discusses the famous Montserrat's case, with case of Chinese celebrity surrogacy as the object of study, after synthesizing the studies of domestic and foreign scholars, it is easy to find that the protection of the best interests of the child has become the backdrop for many courts to exclude foreign court decisions due to the different social cultures of each country citing public order reservation as a conflict of laws. The most important one is the determination of paternity, which involves not only the purpose of the surrogacy contract signed by the surrogate couple at the beginning but also the reality of the heirs, etc. In addition, the ethics and morality of surrogacy have long been a controversial issue. How to protect the legal rights of children born through surrogacy while maintaining public order in the country and region has been a challenge that countries have had to face, which has led to different court decisions in the same case. Therefore, it is necessary to explore the limits of public order preservation in the era of globalization in this new situation. In the application of laws and regulations, countries are trying to find a balance between the recognition of foreign judgments and the protection of public order in the courts. In the era of globalization, public order has taken on a highly complex appearance, and existing doctrines are sometimes stretched to their limits. The international scene offers lessons for improving this part of the law, namely the segmented recognition of partial judgments, but how to concretize it in cases is not an instant solution.

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