Journal of Law and the Biosciences, 33–55
doi:10.1093/jlb/lsu036
Essay
Advance Access Publication 8 January 2015

Surrogacy litigation in China and beyond

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ABSTRACT

Chinese law neither generally prohibits nor expressly permits surrogacy. As there has been a massive underground surrogacy market in the country, surrogacy lawsuits have occurred from time to time. Chinese courts are called to decide a number of disputed issues regarding validity of surrogacy contract, parenthood of the surrogate child, and sole care and control of the surrogate child. This article examines the judicial solutions to these disputes through a case study, and analyses whether Chinese courts have adopted appropriate approaches in applying the existing law to surrogacy lawsuits. The article further discusses the inadequacies of Chinese law in solving surrogacy disputes and regulating surrogacy, and recommends a set of suggestions for improvement so that Chinese law may better adapt to the social demand of surrogacy.

KEYWORDS: Surrogacy litigation, surrogacy contract, parenthood of the surrogate child, sole care and control of the surrogate child, law of surrogacy of China

INTRODUCTION

The concept of surrogacy is not new to Chinese society because it can be traced back to Ancient China, when a man might 'borrow a woman's belly to produce offspring' (借腹生子) for the purpose of carrying on his family line.[1] Different from surrogacy in old days, modern surrogacy does not necessarily involve sexual intercourse between

[1] Jiang Yungui, *Succession Law of Ancient China and Surrogacy Legislation* (中国古代继承制度与代孕立法), 73(3) Chuanshan Xuekan (船山学刊) 69, 70 (2009).

the surrogate mother and the intended father,[2] and the surrogate mother may become pregnant through artificial insemination or *in vitro* fertilization. There are two types of surrogacy. One is traditional or partial surrogacy, where the intended father normally fertilizes the surrogate mother's egg through sexual intercourse or artificial insemination. The other is gestational or full surrogacy, where the intended mother's or donated egg is normally fertilized with the intended father's sperm through *in vitro* fertilization in a laboratory and then the embryo is implanted in the surrogate mother' uterus.[3] The essential difference between these two types of surrogacy lies in that the surrogate mother in traditional surrogacy shares the biological connection with the surrogate child, which is not the case in gestational surrogacy. In addition, surrogacy may be divided into commercial and altruistic surrogacy, depending on whether the surrogate mother is paid a service fee for conceiving, carrying, and giving birth to the child.[4]

The first Chinese test-tube baby was born at the Third Hospital of Peking University in Beijing in 1988,[5] and the first test-tube surrogate baby was born at the same hospital in 1996.[6] Since then, surrogacy has become an increasingly popular solution to infertility in the country. With the prevalence of the internet and wireless communications, a massive underground surrogacy market has come into being in China since 2004.[7] Numerous commercial surrogacy advertisements are posted on the internet and on the streets.[8] According to the insiders in the underground surrogacy industry, there were around 400 to 500 commercial surrogacy agencies across the country in 2012, one-tenth located in Guangzhou.[9] It was roughly estimated that 25,000 surrogate

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2 The intended father may also be called the commissioning father and these two terms are exchangeable in the context of surrogacy. Similarly, the intended mother and the intended parents may also be called the commissioning mother and the commissioning parents, respectively.

3 Donated sperm is alternatively used to conceive the surrogate child in traditional and gestational surrogacy when the intended father's sperm is not available.

4 It should be noted that altruistic surrogacy does not necessarily require zero payment to the surrogate mother. If she only receives reimbursement of reasonable expenses associated with the surrogacy without further payment, it remains altruistic. For instance, Chinese law permits the reimbursement of reasonable expenses to egg donors or sperm donors; see article 6 of the 2003 Ethical Principles of Assisted Human Reproductive Technology.

5 Zong Huanping, *The First Test-Tube Baby is Ten Years Old* (第一个试管婴儿10岁了), 6 Bus. World (世界经济) 28, 28 (1998).

6 Li Xiaoning, Zhang Xiaomin & Xu Huan, *On Feasibility of Legalising Full Surrogacy* (试论完全代孕合法化的可行性) 3 Legality Vision (法制博览) 245, 245 (2013).

7 Yang Jiang & Yan Pengfei, *Surrogacy Industry Behind the Eight-Baby Story* ("八胞胎"背后的代孕产业), 2 Xinmin Wkly. (新民周刊) 60, 62 (2012); *200 Women from Qidong Went to Guangdong Province to Become the Surrogate Mother through an Agency* (200祁东妇女通过一中介赴穗代孕), S. Metropolis Daily (南方都市报), Mar. 29, 2010, http://www.hinews.cn/news/system/2010/03/29/010779670.shtml (accessed Dec. 18, 2014); *Surrogacy Agents Soliciting Clients with Prices and 250,000 Yuan for Surrogacy* (代孕机构明码标价招揽客人 出25万可借腹生子), China National Radio (中国广播网), Dec. 27, 2011, http://china.cnr.cn/yaowen/201112/t20111227˙508980110.shtml (accessed Dec. 18, 2014); *Discovering the Dirty of Surrogacy: the Surrogate Mother Need Pay the Fees for Miscarriage and Abortion of Abnormal Fetus* (揭代孕黑幕: 流产、畸形堕胎费自己出), S. Metropolis Daily (南方都市报), Aug. 27, 2012, http://www.takungpao.com/society/content/2012-08/27/content˙998672.htm (accessed Dec. 18, 2014).

8 *Surrogacy: An Absurd Deal in a Grey Area* (代孕: 一桩荒唐的灰色交易), Shanxi News (山西新闻), Jun. 23, 2009, http://wbnews.daynews.com.cn/news/sx/784319.html (accessed Dec. 18, 2014).

9 Yang & Yan, *supra* note 7, at 62.

children had been born in the country up to 2009.[10] A wealthy couple in Guangzhou had even spent one million yuan on the performance of *in vitro* fertilization and hired two surrogate mothers, who totally gave birth to five surrogate children for the couple.[11]

Chinese law neither generally prohibits nor expressly permits surrogacy. There are no specific rules governing surrogacy except four relevant provisions set forth in three sets of departmental rules[12] made by the Ministry of Health.[13] Specifically, article 3 of the 2001 Administrative Measures for Assisted Human Reproductive Technology (人类辅助生殖技术管理办法) prohibits medical institutions and medical staff from performing any form of surrogacy procedures; article 22 states that any violating medical institution shall be warned and fined no more than 30,000 yuan and the relevant responsible personnel shall be subject to administrative sanctions, and when committing a crime, shall be subject to criminal liabilities.[14] Article 3 of the 2003 Norms of Assisted Human Reproductive Technology (人类辅助生殖技术规范) and article 3(5) of the 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank (人类辅助生殖技术和人类精子库伦理原则) reiterate the prohibition on medical staff from performing surrogacy procedures.[15] It is worth noting that, though the Ministry of Health's departmental rules show the government's disfavor against surrogacy that involves assisted human reproductive technology, these departmental rules only impose administrative liabilities on the violating medical institutions and medical staff but not others, and they have not made a general prohibition on surrogacy.[16]

Although Chinese law lacks specific rules governing surrogacy, surrogacy disputes have been submitted to the courts from time to time. The courts are called to decide a number of disputed issues regarding validity of surrogacy contract, parenthood of the

[10] *An Abnormal Life of Surrogate Mother* (代孕妈妈的非常生活), S. Metropolis Weekly (南都周末), Apr. 13, 2009, http://www.nbweekly.com/news/observe/200904/9586.aspx (accessed Dec. 18, 2014). The number was estimated based on the number of surrogacy arranged by the Internet surrogacy agencies. It is likely underestimated because those private surrogacy arrangements have not been counted in.

[11] *China Couple with Eight Babies Sparks Surrogacy Debate*, BBC News, Dec. 21, 2011, http://www.bbc.co.uk/news/world-asia-china-16275624 (accessed Dec. 18, 2014).

[12] The enactments made by the departments of the State Council are called 'departmental rules'; see article 71 of the 2000 Legislation Law (立法法). They are lower and have less legal enforcement than those made by the national or provincial legislature and the State Council in the hierarchy of the sources of law in China. Departmental rules have no authority to create crimes or impose criminal liabilities according to article 8 of the 2000 Legislation Law.

[13] The Ministry of Health was re-structured and re-named as the National Health and Family Planning Commission in 2013. However, this article still uses the previous name for the sake of convenience.

[14] However, Chinese criminal law does not criminalize surrogacy and no criminal liabilities are imposed on any party taking part in surrogacy arrangements. Therefore, the final part of this provision currently does not carry much weight.

[15] The 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank are made up of two sets of ethical principles, namely the set of ethical principles on assisted human reproductive technology and the set of ethical principles on human sperm bank. Article 3(5) mentioned above is located in the first set of ethical principles.

[16] Some scholars have held an overgeneralized and inaccurate view that Chinese government banned surrogacy of both commercial and altruistic varieties, such as Katarina Trimmings & Paul Beaumont (ed.), International Surrogacy Arrangements: Legal Regulation at the International Level 93 (2013). In fact, surrogacy through sexual intercourse or self-insemination is not touched upon by the Ministry of Health's departmental rules. Even surrogacy utilizing artificial insemination or *in vitro* fertilization is arguably not prohibited by the departmental rules, although the medical institutions and medical staff performing surrogacy procedures will violate them.

surrogate child, and sole care and control[17] and visitation of the surrogate child. Judicial decisions on these issues have far-reaching implications for all parties including the surrogate mother, the intended parents, and the surrogate child. To date, there have been few studies on surrogacy litigation in China either in Chinese or English literature. Little has been known about how Chinese courts have decided surrogacy cases and whether they have adopted appropriate approaches in applying the existing law, and how Chinese law needs to better adapt to the social demand of surrogacy.[18] This article aims to answer these enquiries through a case study on surrogacy litigation in China, presenting the Chinese perspective in international debates about the regulation of surrogacy. Part II of this article presents the sample surrogate lawsuits and the findings on the judicial views on three major legal issues. They include validity of surrogacy contract, parenthood of the surrogate child, and sole care and control of the surrogate child. Part III analyses the relevant existing legal rules and assesses the appropriateness of those judicial views. And Part IV explores the inadequacies in Chinese law in solving surrogacy disputes and regulating the practice of surrogacy, and recommends a set of suggestions for improvement.

CASE STUDY ON SURROGACY LITIGATION

Case Collection

Although the Supreme People's Court has required that lower courts must upload judgments for publication to an official central website (www.court.gov.cn/zgcpwsw) from January 1, 2014,[19] there is no judgment of surrogacy case published in the website at the time of writing this article. After searching a variety of sources including the case database of PKULAW (北大法宝), the case database of LEGALDAILY (法制网), and various online and print media reports, the author collected ten published surrogacy lawsuits,[20] as listed in Table 1 below. These ten sample surrogacy lawsuits occurred

[17] It is noteworthy that the equivalent of the term 'sole care and control' is 'direct upbringing' (直接抚养) in Chinese law, and the Chinese term 'direct upbringing' is used in article 25(2) of the 2001 Marriage Law (婚姻法), article 26 of the 2001 Interpretations I of the Supreme People's Court on Issues in the Application of the Marriage Law (最高人民法院关于适用〈中华人民共和国婚姻法〉若干问题的解释 (一)), and article 63 of the 2008 Guidance for Hearing Marriage Cases involving Domestic Violence (涉及家庭暴力婚姻案件审理指南). The Chinese term 'direct upbringing' refers to a right to have the child live with a parent who has such a right and to make daily essential decisions in relation to the child, and a parent who does not have such a right is usually entitled to visit the child. There is no equivalent of the term 'joint care and control' in Chinese law. This article uses the term 'sole care and control' to facilitate the understanding of English readers.

[18] It has been estimated that 12.5–15 per cent of Chinese couples are infertile and most of them are between 25 and 30 years old; see Zhang Zheng, *Surrogacy: Unbearable Physical and Psychological Pressure* ('代孕', 身心不能承受之重), Chinese Women Daily(中国妇女报), Apr. 11, 2013, at B04. In addition, a large number of Chinese couples have only one child because of the one-child policy. When their single child prematurely dies at twenties or thirties, surrogacy may offer them a final chance to have a biological child, and an exact example is showed in the sample case 10 described below.

[19] See the 2013 Provisions of the Supreme People's Court on the Publication of Judgments on the Internet by the People's Courts (最高人民法院关于人民法院在互联网公布裁判文书的规定), which became effective on January 1, 2014.

[20] The author admits that the surrogacy lawsuits collected in the described way does not create a big sample, due to the limited resources of Chinese judicial decisions. Some typical surrogacy disputes are not covered by the sample surrogacy lawsuits, such as cases where neither the surrogate mother nor the intended parents want to take parental responsibilities for a disabled surrogate child. However, these lawsuits may still constitute a representative sample of surrogacy litigation in China.

Table 1. General information on the sample surrogacy lawsuits.

No.	*Year*	*Court*	*Type*		*Cause of action*
1	2004	Basic People's Court of Shunde District of Foshan, Guangdong Province	Commercial	Traditional	Sole care and control
2	2008	Basic People's Court of Jiangnan District of Nanning, Guangxi Zhuang Minority Autonomous Region	Commercial	Traditional	Sole care and control
3	2009	A basic people's court in Guangdong Province	Commercial	Gestational	Parenthood
4	2009	Basic People's Court of Yujiang County of Yingtan, Jiangxi Province	Altruistic	Traditional	Sole care and control maintenance
5	2010	Basic People's Court of Xingyang, Henan Province	Commercial	Traditional	Sole care and control
6	2010	Basic People's Court of Shihe District of Xinyang, Henan Province	Commercial	Traditional	Breach of surrogacy contract
7	2010	Basic People's Court of Dingcheng District of Changde, Henan Province	Commercial	Gestational	Parenthood Sole care and control
8	2011	Basic People's Court of Chengzhong District of Liuzhou, Guangxi Zhuang Minority Autonomous Region	Commercial	Traditional	Visitation
9	2012	Basic People's Court of Pingnan County of Guigang, Guangxi Zhuang Minority Autonomous Region	Commercial	Traditional	Visitation
10	2012	Basic People's Court of Siming District of Xiamen, Fujian Province	Commercial	Traditional	Sole care and control maintenance

between 2004 and 2012, eight occurring after 2009. Among them, three cases were adjudicated in Guangxi Zhuang Minority Autonomous Region, two cases each in Guangdong Province and Henan Province, and one case each in Jiangxi Province, Hunan Province, and Fujian Province. Nine of the ten sample cases involved commercial surrogacy, and one case involved altruistic surrogacy. Eight of the ten sample cases involved traditional surrogacy, and two cases involved gestational surrogacy. It is found that the common cause of action of the traditional surrogacy cases was sole care and control (and maintenance) of the surrogate child, while that in the gestational surrogacy cases was parenthood of the surrogate child.

Brief Facts of the Sample Surrogacy Lawsuits

Case 1: The defendant's wife was infertile and the couple agreed to have a child through surrogacy. A surrogacy agency introduced the plaintiff to the defendant in August 2002. The plaintiff knew that the defendant was married. They then cohabited in the premise of the defendant's factory. On December 14, 2003, the plaintiff gave birth to a male child for the defendant. On January 3, 2004, the defendant paid 70,000 yuan to the plaintiff, who returned a receipt of the surrogacy fee payment. The family of the defendant had taken care of the surrogate child since his birth. Later the plaintiff sued the defendant, claiming sole care and control of the child.[21]

Case 2: The defendant's wife was infertile and the couple agreed to have a child through surrogacy. In 2004, a third party introduced the plaintiff to the defendant. They orally made a traditional surrogacy contract and agreed on a surrogacy fee of 150,000 yuan. The defendant provided an accommodation for the plaintiff for the purpose of surrogacy. In 2005, the plaintiff gave birth to a male child for the defendant. In December 2007, the plaintiff entered into a written surrogacy contract with the defendant and his wife. The written contract stated that the plaintiff voluntarily carried a child for the couple and the defendant promised to pay a surrogacy fee of 150,000 yuan. It further prescribes that the defendant should pay 100,000 yuan at the time of making the contract and pay the outstanding balance 50,000 yuan within five months from the date of the contract, and that the plaintiff should hand the child and his medical birth certificate (出生医学证明) issued by the hospital over to the defendant and move out of the defendant's premise after receiving the payment of 100,000 yuan. However, the plaintiff brought the child back to her hometown with an excuse in April 2008 and completed the household registration[22] for the child at her hometown, which led to the defendant's suspicion in the plaintiff's attempt to keep the child. The defendant thus brought the child back to Nanning, the city where he lived, after paying off 50,000 yuan to the

[21] Deng Lizhen v. Tan Yongjian [case docket number: (2004) 佛中法民一终字第778号] (the case database of PKULAW).

[22] China's household registration/hukou system requires citizens to register their place of residence at a certain place and limits their access to state-provided goods, welfare, and entitlements within that place. Since the government sets strict limits on the change of citizens' place of residence, the household registration system tightly controls population mobility across the country; see Kam Wing Chan, *The Household Registration and Migrant Labor in China: Notes on a Debate* 36 Population Dev. Rev. 357, 357–358 (2010).

plaintiff. Later the plaintiff initiated an action against the defendant, claiming sole care and control of the child.[23]

Case 3: The plaintiff and his wife lived abroad and could not have their own child for years. The plaintiff paid over 200,000 yuan to a surrogacy agency, which arranged a gestational surrogacy by the twenty-three-year-old defendant in Guangdong Province. The embryo was created with the plaintiff's sperm and a donor's egg. In May 2009, the defendant gave birth to a male child and handed the child over to the plaintiff. The plaintiff planned to bring the child abroad; however, he had no official document to prove his parenthood of the child. Therefore, the plaintiff initiated an action, requesting the court to confirm his parenthood and sole care and control of the child, so that he could use the judgment as the child's identity evidence to support the immigration application on behalf of the child.[24]

Case 4: The plaintiff got to know the defendant in 2005. They agreed on traditional surrogacy and cohabited in a rent flat. The defendant paid all living expenses for the plaintiff. In November 2006, the plaintiff gave birth to a male child but she refused to relinquish the surrogate child to the defendant. In May 2007, the defendant took the child away from the plaintiff by force. They continuously quarreled over this matter until the plaintiff sued the defendant to claim sole care and control of the child and request the defendant to pay maintenance fees for the child.[25]

Case 5: The defendant's wife was infertile. The couple agreed to have a child through traditional surrogacy. The twenty-five-year-old plaintiff, as surrogate mother, was introduced to the defendant by a third party. According to their surrogacy contract, the plaintiff agreed to bear a child for the defendant, and in return, the defendant would pay the plaintiff a service fee of 60,000 yuan. The plaintiff gave birth to a male child one year later. The defendant and his wife surreptitiously took the child away and disappeared after successfully applying the child's medical birth certificate in their own names as biological parents, using their own birth permit.[26] Therefore, the plaintiff sued the defendant and claimed the service fee of 60,000 yuan promised by the defendant under the surrogacy contract. The court refused to accept the case. The plaintiff later changed the cause of action to a claim of sole care and control of the child.[27]

Case 6: The plaintiff's son had prematurely died years ago and his wife was no longer fertile. On September 8, 2006, the plaintiff got to know the defendant and they entered

[23] *A Twenty-year-old Woman Involved in a Lawsuit for Undertaking Surrogacy for 150,000 Yuan and the Biological Father of the Surrogate Child Awarded Sole Care and Control* (20岁姑娘15万元代孕生子惹官司 抚养权归孩子生父), Guangxi News (广西新闻网), Sept. 13, 2008, http://www.gxnews.com.cn/staticpages/20080913/newgx48cb0c3f-1664889.shtml (accessed Dec. 18, 2014).

[24] Zhou Bin, *Somebody Tried to Confirm the Surrogate Child's Identity through Litigation* (有人试图以诉讼确认婴儿身份), Legal Daily (法制日报), Mar. 30, 2010, at p005.

[25] *Battle for Sole Care and Control of an Illegitimate Child and the Mother Awarded Sole Care and Control by the Court* (非婚生子争抚养权 法院判令归母亲抚养) (the case database of PKULAW).

[26] Birth permit (also called family plan certificate) is issued by Chinese government to the couples who are eligible to have a child. It is used mainly to implement the one-child policy. Without birth permit, the pregnant women and their newborn babies will have difficulty to access to medical care, household registration, and other public services. See Liu Xin, *Legal Analysis on the First-baby Birth Permit* (第一胎"准生证"的法律分析) 12 Legal Sys. Soc'y (法制与社会) 271, 272 (2013).

[27] *Surrogacy Contract Was Not Recognised by Law and a Surrogate Mother's Claim for Sole Care and Control Was Refused* (代孕协议不受保护 荥阳一代孕女变更抚养权被拒), Dahewang (大河网), May 24, 2010, http://www.dahe.cn/xwzx/dysj/dybd/t20100524_1807374.htm (accessed Dec. 18, 2014).

into a surrogacy contract, under which the plaintiff promised to pay 40,000 yuan as consideration for the defendant's carrying a child for the plaintiff within one year. On September 29, 2006, the plaintiff paid the defendant 20,000 yuan. Because the defendant had not become pregnant within six months, the plaintiff requested her to return the paid 20,000 yuan. The defendant rejected. Later the plaintiff sued the defendant, claiming the return of 20,000 yuan.[28]

Case 7: The plaintiff and his wife had had no child for years and decided to have a child through gestational surrogacy. In May 2008, the plaintiff got to know the thirty-year-old defendant after posting a surrogacy advertisement on a Chinese website. They immediately met and signed a surrogacy contract, which prescribed that the plaintiff would assume all of the defendant's expenses associated with surrogacy and additionally pay the defendant a surrogacy fee of 100,000 yuan, and that the defendant agreed to relinquish the surrogate child to the plaintiff after birth. The plaintiff fertilized a donor's egg through *in vitro* fertilization and the embryo was placed into the uterus of the defendant in a hospital. In March 2009, the defendant gave birth to a male child but she refused to hand the child over to the plaintiff. After unsuccessful negotiation, the plaintiff sued the defendant in July 2010, claiming parenthood and sole care and control of the child.[29]

Case 8: The defendant signed a surrogacy contract with the plaintiff introduced by a surrogacy agency on January 1, 2010. They agreed that the plaintiff would undertake traditional surrogacy, and in return, the defendant would pay her a remuneration of 160,000 yuan. On May 25, 2011, the plaintiff gave birth to a male child. The defendant paid off the remuneration as well as the reimbursement of the associated expenses, which were totally 180,000 yuan as of June 3, 2011, and then took the child away on the same day. The defendant disallowed the plaintiff to visit the child. Therefore, the plaintiff sued the defendant on September 29, 2011. Although she had no dispute over the defendant's sole care and control of the child, she requested the court to allow her to visit the child for two days every month.[30]

Case 9: The plaintiff and the defendant got to know each other in 2001. They cohabited after making an oral surrogacy contract. The plaintiff gave birth to male twins for the defendant on June 5, 2004. The defendant paid the plaintiff an amount of surrogacy fee in return. The defendant had been awarded sole care and control of the twins in another separate lawsuit. However, they disputed over the plaintiff's visitation right for many times. In July 2012, the plaintiff sued the defendant, requesting the court to order the defendant to assist her visit to the twins.[31]

Case 10: The child of the defendant was seriously injured in a car accident in 2004 and died prematurely after three-year treatments. Because the defendant's wife was too old to bear a child, the defendant entered into a surrogacy contract with the plaintiff

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[28] *Surrogacy Contract Is Invalid and the Plaintiff Started an Action to Claim the Restoration of the Payment* (借腹生子协议无效 诉至法院索要财产) (the case database of PKULAW).

[29] *A Woman in Changde Undertook Surrogacy and Triggered a Fight for Child, and the Court Confirmed Validity of the Surrogacy Contract* (常德女子代孕引发夺子大战 法院判决代孕协议有效), HUNANHONGWANG (湖南红网), Aug. 18, 2010, http://unn.people.com.cn/GB/14778/21707/12468135.html (accessed Dec. 18, 2014).

[30] Chen Yumei v. Liao Dingxin [case docket number: (2012) 平民初字第1817号] (the case database of LEGALDAILY).

[31] Yao v. Tan [case docket number: (2011) 城中民一初字第838号] (the case database of PKULAW).

introduced by a surrogacy agency. The contract stated that the defendant would pay the plaintiff her living expenses 5,000 yuan per month during the course of traditional surrogacy and would additionally pay her 200,000 yuan after she handed the surrogate child over to the defendant. The defendant subsequently increased the payment of living expenses to 15,000 yuan per month and totally paid living expenses of more than 200,000 yuan. In March 2012, the plaintiff gave birth to a female child. She refused to surrender the child to the defendant and his wife. After several times of unsuccessful negotiation, the defendant stopped paying maintenance fees for the child. The plaintiff sued the defendant, claiming a lump sum maintenance fee of 640,000 yuan.[32]

JUDICIAL VIEWS PRESENTED BY THE SAMPLE SURROGACY LAWSUITS

The first legal issue addressed by the courts in the sample surrogacy lawsuits is concerned with validity of surrogacy contract. There were three different judicial views on this issue. Most courts held the first view that a surrogacy contract was invalid either because it breached social morality (eg case 10) or because it involved illegal cohabitation[33] (eg case 4), and therefore both contracting parties could not rely on the surrogacy contract to claim any right or interest arising from it (eg case 5). Although a surrogacy contract was held to be void, the courts neither ordered the surrogate mother to return the received surrogacy fee to the intended parent nor ordered a party with fault to compensate the other's losses to the extent that his fault had contributed to, except in one sample case (ie case 6). In that case, the court held that the intended father should assume a major share of accountability for the invalidity of the surrogacy contract in question, and therefore ordered the surrogate mother to return 80 per cent of the received surrogacy fee. Despite agreeing that a surrogacy contract breached social morality and should be denounced by law and social morality, some courts held the second view that a surrogacy contract was only partially invalid, and the contractual clause on sole care and control of the surrogate child remained valid and sufficiently showed that the parties had reached an agreement on the sole care and control issue (eg cases 1 and 2). Only the court in case 7 held the third view that a surrogacy contract showed the true intention of both contracting parties and it did not breach compulsory provisions of the law; therefore, it should legally bind both parties.

The second legal issue considered by the courts in the sample surrogacy lawsuits is about parenthood of the surrogate child. It seems that both the disputing parties and the courts implicitly agreed that the surrogate mother was the legal mother and the intended father was the legal father of the surrogate child in traditional surrogacy. None of the parties in the sample traditional surrogacy lawsuits had dispute over the parenthood issue, and the courts did not explicitly address the issue either, even in the case where the intended mother was also one contracting party to the surrogacy contract (eg case 2). In the sample gestational surrogacy lawsuits, one court (ie case 7) held that the surrogate mother was merely the gestational mother rather than the biological mother of the surrogate child and she had no parenthood right, let alone the right of sole care and

[32] Zheng Jinxiong & Yang Changping, *Surrogacy Triggered Tug-of-love* ('请人代孕'引发抚养权争夺战), People's Court Daily (人民法院报), Dec. 2, 2012, at p003.

[33] The term 'illegal cohabitation' generally refers to cohabitation without marriage. It is not limited to cohabitation outside of marriage because it also covers cohabitation of two unmarried persons.

control. Nevertheless, the courts hesitated to explicitly state that the intended mother was the legal mother of the child born of gestational surrogacy.

The third legal issue decided by the courts in the sample surrogacy lawsuits is concerned with sole care and control and visitation of the surrogate child. The courts were called to decide which legal parent of the surrogate child in traditional surrogacy cases was entitled to sole care and control, the surrogate mother or the intended father. Most courts regarded the surrogate child as illegitimate child. They determined the issue of sole care and control of the surrogate child by analogy to that of the child in divorce cases, referring to the 1993 Specific Opinions of the Supreme People's Court on the People's Courts' Handling the Issue of Care and Control of the Child in Hearing Divorce Cases (最高人民法院关于人民法院审理离婚案件处理子女抚养问题的若干具体意见, hereinafter 'Opinions on the Issue of Care and Control of the Child'). The sample surrogacy lawsuits present two judicial approaches in deciding sole care and control of the surrogate child. The courts adopting the first approach constructed the clause of the surrogacy contract, which stated that the surrogate mother agreed to accept a surrogacy fee and meanwhile promised to hand the surrogate child over to the intended father after birth, as an agreement reached between the surrogate mother and the intended father that the surrogate child would live under sole care and control of the intended father. According to article 2 of the Opinions on the Issue of Care and Control of the Child, when the parents agreed that their child under two years old will live under sole care and control of the father, the court will endorse the agreement if it has no detrimental effect on the child. The courts thus compared the conditions for upbringing the surrogate child offered by the surrogate mother and the intended father, including the income, the housing condition, and the length of the time period that each parent lived with the child, and then decided that it would meet the best interest of the surrogate child to award the intended father sole care and control, and the surrogate mother nevertheless did not need to pay maintenance fees for the child (eg cases 1, 2 and 8).

In contrast, the courts adopting the second approach refused to accept that the surrogate mother and the intended father had reached an agreement on the issue of sole care and control of the surrogate child in their surrogacy contract. Instead, the courts held that the case should apply article 1 of the Opinions on the Issue of Care and Control of the Child, which establishes that a child under two years old will in principle live with the mother, unless (i) the mother suffers a persistent infectious disease or other serious disease, or (ii) the mother, though being able to bring up the child, fails to discharge her duty and meanwhile the father requests the child to live with him, or (iii) the child cannot live with the mother for other reasons. By applying this provision, the courts held that the surrogate child in question should live under sole care and control of the surrogate mother and the intended father should pay maintenance fees for the child (eg cases 4 and 10).

In two of the sample surrogacy lawsuits, the surrogate mother, who did not have sole care and control of the surrogate child, claimed for regular visitation of the child. Both courts supported the surrogate mother's visitation right. For instance, the court in case 8 permitted the surrogate mother to visit the surrogate child three times per year and ordered the disputing parties to reach an agreement on the specific time and location

of the visits; the court in case 9 held that the surrogate mother could visit the surrogate child on a five-day basis at the home of the intended father every February and August.

DISCUSSION OF THE JUDICIAL VIEWS

Although Chinese law has not provided specific rules governing surrogacy, the general civil legal rules remain applicable to surrogacy litigation, which basically involves civil disputes concerning the property and personal relationships between equal civil parties, such as the surrogate mother, the intended parents, and the surrogate child. As found above, Chinese courts have inconsistently applied the existing law in surrogacy litigation. Few courts have given clear legal reasoning to uphold their views. Whether the courts have appropriately applied the law in surrogacy litigation deserves careful examination.

Validity of Surrogacy Contract

A surrogacy contract is an agreement made between the surrogate mother and the intended parent(s)[34] primarily concerning the details of a surrogacy arrangement and the issue of sole care and control of the surrogate child. It is a civil contract and also a juristic act (法律行为).[35] Article 2(2) of the 1999 Contract Law (合同法) provides that an agreement on the personal status relationship (身份关系), such as marriage, adoption and guardian, and so on, should apply other laws. Therefore, the 1999 Contract Law does not govern a surrogacy contract, as it is an agreement on the personal status of the surrogate child. Instead, a surrogacy contract should govern the 1986 General Principles of Civil Law (民法通则), which is seen as a quasi-civil code of China and generally regulates the civil relationship between equal civil parties. Articles 55 and 58 of the General Principles of Civil Law respectively set out the legal elements for a valid juristic act and the circumstances of an invalid juristic act. Both provisions incorporate the wording '(not) violating the law or public interest'. If a surrogacy contract violates the law or public interest, it will become invalid. However, whether a surrogacy contract violates the law or public interest in Chinese law is open for consideration.

Does a surrogacy contract violate any of the existing law? Article 52 of the Contract Law sets out the circumstances of an invalid contract, one of which is violation of 'compulsory provisions of laws[36] or administrative regulations'.[37] Different from the wordings in the Contract Law, articles 55 and 58 of the General Principles of Civil Law adopt the term 'the law', which refers to all sources of law, but not limited to laws made by the National People's Congress and its Standing Committee. Chinese law does not generally prohibit surrogacy, and the Ministry of Health's three sets of departmental rules[38] only prohibit medical institutions and medical staff from performing surrogacy

[34] Sometimes, the contract may be made among three parties, that is, the surrogate mother, the intended parent(s), and the surrogacy agency.

[35] The term 'a juristic act' in Chinese law refers to a human act that may create, modify, or end a civil relationship based on a freely expressed will of the relevant party or parties, such as a contract and a will; see Long Weiqiu, General Clauses of Civil Law (民法总论) 425 (2nd ed. 2002).

[36] The term 'law' in article 52 of the Contract Law narrowly means the enactments made by the National People's Congress and its Standing Committee; see article 7 of the 2000 Legislation Law.

[37] The enactments made by the State Council are called 'administrative regulations' in Chinese law; see article 56 of the 2000 Legislation Law.

[38] See the discussion in the third paragraph of Part I of this article.

procedure, rather than penalizing the surrogate mother and the intended parents. Therefore, a surrogacy contract between the surrogate mother and the intended parents in itself does not violate the relevant departmental rules, no matter whether fertility procedures have been employed in the surrogacy arrangement. Although the court in one sample surrogacy lawsuit (ie case 4) held that surrogacy involved illegal cohabitation, the surrogate mother and the intended father who cohabit for the purpose of traditional surrogacy do not violate the existing law, because their temporary cohabitation does not amount to de facto marriage,[39] and the current law no longer treats extramarital sexual intercourse as an illegal act and has actually abandoned the term 'illegal cohabitation'.[40]

Does surrogacy contract violate public interest? There is no statutory definition of the term 'public interest' in Chinese law. It is understood to broadly cover social morality.[41] To date, no consensus has been reached in Chinese society on whether a surrogacy contract violates social morality. The Ministry of Health has informally expressed that surrogacy might disturb the social morality order and cause the surrogate mother and the surrogate child to suffer psychical and psychological harm.[42] In sum, there are three major ethical arguments against surrogacy in China. First, a woman's full experiences of conception, pregnancy, birth, and raising a child reflect her inherent features as woman. Surrogacy unnaturally deprives the surrogate mother's experience of upbringing the surrogate child after she gives birth to him, as she has to relinquish the child to others. As a consequence, the surrogate mother is likely to suffer psychological harm.[43] Second, the surrogate child is likely to have confusion over his identity due to the unnatural way he was conceived and born. He may be perceived as mere property by the intended parents.[44] Third, commercial surrogacy, which is equal to the sale of the surrogate child and the rental of the surrogate mother's uterus, not only blasphemes the sanctity of the surrogate child's life but also treats the surrogate mother's body as an instrument of others' reproduction. In particular, commercial surrogacy facilitates exploitation of those financially vulnerable women.[45]

On the one hand, the first two ethical arguments are questionable in the context of Chinese law. The surrogate mother voluntarily agrees to carry a child for others by employing assisted human reproductive technology, which does not undermine her

[39] Article 258 of the 1997 Criminal Law (刑法) provides criminal liabilities for bigamy. A married person living with a third party 'like a husband and a wife' will constitute a de facto marriage and thus commit bigamy.

[40] The author searched the term 'illegal cohabitation' in the law database of PKULAW at the time of writing this article and found that the term has not been used in Chinese law for at least two decades.

[41] Ran Keping, *The Concept of Public Interest and Its Value in Civil Law* (论"公共利益"的概念及其民法上的价值) 62 Wuhan U. J. (Philosophy and Social Science) (武汉大学学报 (哲学社会科学版)) 334, 338 (2009); Zhong Ruidong, *Public Interest in Chinese Civil Law* (论我国民法上的公共利益) 49(1) J. Jiangsu Admin. Inst. (江苏行政学院学报) 126, 128 (2010).

[42] *The Ministry of Health Responded to the Issue of Surrogacy: Prohibiting Any Form of Surrogacy Procedure* (卫生部回应"借腹生子"问题：禁止任何形式代孕技术), Xinhua Wang (新华网), Mar. 13, 2013, http://politics.people.com.cn/n/2013/0313/c1001-20773632.html (accessed Dec. 18, 2014).

[43] Liu Changqiu, *On the Administrative Regulation Mode of Surrogacy* (代孕的行政规制模式研究) 4 Admin. L. Rev. (行政法学研究) 64, 68 (2013); Li Bin, *Surrogacy: Between Jurisprudence and Ethics* (代孕：在法理与伦理之间) 22(2) J. Hunan Pub. Sec. C. (湖南公安高等专科学校学报) 113, 115 (2010).

[44] Cao Xin, *Ethical Debates on Surrogacy* (代孕的伦理争议) 6 Morality Civilisation (道德与文明) 131, 133 (2012).

[45] Wang Xiaojun, *Legal and Ethical Issues of Surrogacy in China* (我国代孕的伦理及法律问题) 2 J. Nanjing U. Traditional Chinese Med. (Social Science) (南京中医药大学学报 (社会科学版)) 96, 97 (2010).

inherent features as a woman, but exactly manifests her gender identity and value. The surrogate mother's relinquishing the surrogate child to the intended parents is similar to the biological parents' transferring parenthood of the adoptive child to the adoptive parents.[46] Surrogacy is no more unnatural than adoption, and the surrogate mother does not necessarily suffer more psychological harm than the biological parents in adoption cases. For instance, one study has found that the surrogate mothers do not appear to experience psychological problems as a result of the surrogacy arrangement.[47]

The surrogate child may have confusion over his identity, but a child conceived and born through any assisted human reproductive technology[48]may encounter the same problem. Such identity confusion is not fatal to a child conceived unnaturally because the law can solve it by granting him with a right to know his identity provided that certain conditions are fulfilled.[49] In addition, the intended parents would not likely treat the surrogate child merely as their property or provide less love and care to him because he was born of surrogacy. On the contrary, the intended parents are usually more caring and concerning about him as they are unable to bear a child by themselves and are desperate to be parents.[50]

On the other hand, the existing law echoes with the third ethical argument against commercial surrogacy. Women in a vulnerable economic position generally have more incentive to make use of their body to earn money, undertaking to be a surrogate mother, which is essentially similar in the nature of sexual workers and egg sellers. The 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank explicitly establish a principle of prohibition of commercialization. Commercial dealings of sperm, egg or embryo, and other commercial arrangements in the application of assisted human reproductive technology violate the established ethical principles in China.[51] Moreover, the fee that the surrogate mother receives in traditional surrogacy is paid for her egg and service for pregnancy and birth, which may include both sale of eggs and commercial surrogacy. Therefore, commercial surrogacy no doubt violates social morality and public interest according to the 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank.

To sum up, whether a surrogacy contract violates public interest and thus becomes invalid in Chinese law depends on the type of surrogacy concerned. In altruistic

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[46] Due to this similarity between surrogacy and adoption, adoption may be used to achieve the purpose of surrogacy and the change of parenthood and care and control of the surrogate child in law and practice.

[47] In the study, 34 surrogate mothers who had given birth to a surrogate child approximately one year previously were interviewed; see Vasanti Jadva et al., *Surrogacy: The Experiences of Surrogate Mothers* 18 HUM. REPROD. 2197, 2197 (2003).

[48] Such as a child artificially conceived using a sperm and/or egg from a donor.

[49] For example, the 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank allow a child conceived and born using donor sperm to access to a pre-marriage consultation service providing relevant genetic information of the anonymous donor.

[50] Among all sample surrogacy lawsuits, the disputing parties in most cases competed for either parenthood or care and control of the surrogate child, which shows that both of them treated the surrogate child as treasure rather than mere property.

[51] The 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank are made up of these two sets of ethical principles, namely the set of ethical principles on assisted human reproductive technology and the set of ethical principles on human sperm bank. The principle of prohibition of commercialization is located in articles 1(2) and 6 of the first set of ethical principles and article 6 of the second set of ethical principles.

surrogacy, the surrogate mother voluntarily and altruistically carries a child to help the infertile intended parents fulfill their wish of having a biological child.[52] The surrogate child is expected to live in a family environment, being loved and cared by the intended parents. Altruistic surrogacy in fact promotes the intended parents' interest in reproduction, which is equally part of public interest.[53] Therefore, an altruistic surrogacy contract is valid in Chinese law; except the agreement on sole care and control of the surrogate child,[54] the surrogacy arrangements specified in the contract have enforceability.

However, a commercial surrogacy contract is invalid due to its violation of public interest; all agreements specified in the contract, including that on sole care and control of the surrogate child, are null and cannot be relied on by any contracting party as legal basis. Moreover, according to article 61(1) of the General Principles of Civil Law,[55] the surrogate mother should return the paid surrogacy fee to the intended parents, and the party with fault should compensate the other's losses to the extent that his fault had contributed to, and if both parties have fault, they should bear liability for compensation proportionately.

Turning to the judicial views on validity of surrogacy contract in the sample surrogacy lawsuits, it is inappropriate for Chinese courts to entirely ignore the nature of the surrogacy contract when addressing the issue of public interest and drawing a decision. Meanwhile, it is highly problematic for the courts to brush off the legal consequences of an invalid surrogacy contract in their judgments, leaving the surrogate mother keeping the paid service fee, which ironically has a de facto effect of judicial endorsement of an invalid surrogacy contract.

Parenthood of the Surrogate Child

There are two types of parenthood in Chinese law: natural parenthood and fictional parenthood.[56] The former is established through a natural event of childbirth[57] and the latter through a juristic act of adoption.[58] Different from fictional parenthood, natural parenthood is determined by the operation of law rather than by the will of the

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[52] The traditional Chinese notion remains rooted in current China that there are three ways to be unfilial and the worst is having no off-spring; see Ren Wei and Wang Qian, *Study on Legality of Surrogacy and Its Boundary* (我国代孕的合法化及其边界研究) 32(2) Hebei L. Sci. (河北法学) 191, 199 (2014).

[53] The question whether Chinese law recognizes reproductive right/the right to have children, and if yes, whether it is a constitutional right, remains open for debate. Despite the one-child policy established in the 1982 Constitution (宪法), social morality recognizes the citizens' interest in reproduction.

[54] Article 16 of the Opinions on the Issue of Care and Control of the Child allows one divorced parent to apply to the court for change of sole care and control of the child, which implies that the agreement on sole care and control of the child is not legally binding and may be subject to the change of mind of either parent.

[55] Article 61(1) of the General Principles of Civil Law provides that after a civil juristic act has been held to be void or withdrawn, the party who has received a property due to the juristic act shall return it to the injured party, the party with fault shall compensate the caused losses suffered by the other party, and if both parties have fault, they should bear liability for compensation proportionately.

[56] Li Xiaonong, *Assisted Reproductive Technology and Changes of Parenthood Rules* (辅助生殖技术与亲子认定规则的变化) 22(1) China Health L. (中国卫生法制) 49, 49 (2014).

[57] The term 'a natural event' in Chinese law refers to an event that does not involve a human act and has a legal effect, such as childbirth, death, earthquake, strike, etc.; see Long Weiqiu, *supra* note 35, at 154.

[58] Li Xiaonong, *supra* note 56, at 49.

parties.[59] Thus, any agreement on natural parenthood of the surrogate child in a surrogacy contract does not have any legal effect, regardless of the validity of the contract.

Although Chinese law provides legal rules on specific rights and obligations of parenthood, such as articles 21 to 25 of the 2001 Marriage Law (婚姻法), there are neither general legal rules in determining natural parenthood nor specific legal rules on how to determine parenthood of the surrogate child. To solve the issue of parenthood of the surrogate child, it is necessary to explore the implicit test used to determine parenthood in China. As parenthood includes motherhood and fatherhood, they need to be discussed separately.

The underlying basis for legal motherhood in Chinese law seems to be the biological connection between the legal mother and the child, which is implied by two legal provisions. The first is article 25(2) of the 2001 Marriage Law, which states that the biological parent who does not have sole care and control of an illegitimate child should pay the living and education expenses for the child until he becomes financially independent. This provision implies that the biological link is critical in determining parenthood and the parental responsibilities including maintenance of the child. The second provision is article 2(1) of the 2001 Ethical Principles for the Application of Assisted Human Reproductive Technology (实施人类辅助生殖技术的伦理原则), which sets out an exception that donors of sperm, egg, or embryo have no legal rights and obligations, though biologically connected, towards the consequent child. In normal cases where a woman carrying a child is also the biological mother, parturition serves as prima facie evidence of the biological connection between the gestational mother and the newborn child. In other words, the fact of parturition, evidenced by the medical birth certificate issued by the hospital, sufficiently establishes a presumption of the biological connection between the gestational mother and the newborn child. Thus in practice, the gestational mother is entitled to apply to the government for the household registration of the newborn child, and subsequently receives a household booklet documenting the gestational mother's parenthood of the child.[60]

Different from normal cases where a child's biological mother, gestational mother, and intended mother is the same person, thus being the legal mother of the child, in surrogacy cases, these three types of mother are no longer the same person. Specifically, in traditional surrogacy, the surrogate mother is both the biological mother and the gestational mother, but not the intended mother of the surrogate child. In gestational surrogacy, the surrogate mother is only the gestational mother of the surrogate child, and his biological mother may be the intended mother if the egg that conceived him comes from the intended mother or may be an anonymous donor if the egg is donated. Understandably, a dispute on legal motherhood of the surrogate child may easily occur in practice. It needs to be discussed by considering the exact type of surrogacy concerned.

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[59] For instance, article 4(2) of the 2011 Provisions of the Supreme People's Court on the Judicial Confirmation Procedure for the People's Mediation Agreement (最高人民法院关于人民调解协议司法确认程序的若干规定) provides that the courts shall not confirm a mediation agreement involving the personal status relationship. The rationale beneath the provision lies in that a personal status relationship cannot be mediated and determined by the will of the parties, and it is a matter of the operation of law.

[60] Zheng Na, *Determination of Legal Status of the Surrogate Child* (论代孕子女法律地位之认定) 9 Legal Syst. Soc'y (法制与社会) 49, 49 (2008).

In traditional surrogacy, the gestational mother is the biological mother of the surrogate child and the presumption of the biological connection evidenced by the hospital's medical birth certificate remains valid. The gestational mother is the legal mother of the surrogate child and she does not have any difficulty in making the household registration for the child. Meanwhile, the intended mother is not entitled to parenthood of the surrogate child according to the implicit biological connection test,[61] unless the surrogate mother[62] transfers parenthood to her through adoption in accordance with the 1998 Adoption Law (收养法).

In gestational surrogacy, since the gestational mother is not the biological mother of the surrogate child, the presumption of their biological connection evidenced by the hospital's medical birth certificate is no longer valid and can be rebutted. The gestational mother does not have parenthood of the child due to the lack of the biological connection. If the intended mother provides the egg to conceive the surrogate child, she will be the legal mother of the child. If the egg comes from a donor, the intended mother remains the legal mother because article 2(2) of the 2001 Ethical Principles for the Application of Assisted Human Reproductive Technology provides that the receiving couple, but not the donor, will have parenthood of the consequent child and bear the legal responsibilities to care and educate him. However, the intended mother is likely to experience practical difficulties in applying for the household registration of the surrogate child, as she is unable to submit the hospital's medical birth certificate proving that she is the gestational mother.[63] What she can do is to sue the surrogate mother, applying for judicial confirmation of parenthood of the surrogate child by relying on article 2(2) of the 2011 Interpretations III of the Supreme People's Court on Issues in the Application of the Marriage Law (最高人民法院关于适用≪中华人民共和国婚姻法≫若干问题的解释(三), hereinafter 'Interpretations III of the Marriage Law'), which provides that the party who initiates an action to apply for confirming parenthood of a child shall submit necessary supporting evidence, and the court may infer the alleged parenthood if the other party fails to submit evidence otherwise and meanwhile refuses to conduct a DNA parentage testing.

The issue of fatherhood in traditional surrogacy relates to the marital status of the surrogate mother. If she is married and bears the surrogate child during the course of the marriage, the child is a legitimate child and the surrogate mother's husband will be presumed to be the biological father and the legal father of the child.[64] When the surrogate mother's husband is unwilling to be the legal father, he may sue his wife for judicial renouncement of fatherhood of the surrogate child according to article 2(1) of the Interpretations III of the Marriage Law, which provides that one spouse sues the other

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[61] The courts in the sample surrogacy lawsuits echoed with this view because they did not treat the intended mother as an interested party in traditional surrogacy litigation due to the lack of biological connection to the surrogate child, even when the intended party also signed the surrogacy contract, such as in case 2.

[62] If the surrogate mother is married, the consent of her husband as the legal father of the surrogate child (as explained below) is also required according to article 10(1) of the 1998 Adoption Law.

[63] The medical birth certificate is one of the supporting documents for the household registration of a child; see *A Seventeen-year-old Girl Hopes to Get the Household Registration but Fails Due to the Lack of the Medical Birth Certificate* (17岁"黑户"女孩盼户口 缺张出生证明户口办不了), Cixi Daily (慈溪日报), Apr. 17, 2014, http://news.cnnb.com.cn/system/2014/04/17/008039277.shtml (accessed Dec. 18, 2014).

[64] Wang Hong, *Modifications and Limitations to the Biological Connection Test in Determining Parenthood* (论血缘主义在确定亲子关系时的修正与限制) 21(4) Mod. L. Sci. (现代法学) 85, 85 (1999).

to apply for the renouncement of parenthood of the child in question; with the necessary supporting evidence, the court may infer the alleged renouncement of parenthood if the other spouse fails to submit evidence otherwise and meanwhile refuses to conduct a DNA parentage testing. If the surrogate mother is unmarried when she bears the surrogate child, the child will not have legal father at the time of birth. When the surrogate mother's husband has denied fatherhood of the surrogate child or the surrogate mother is unmarried, because the intended father is normally the biological father of the surrogate child, both the intended father and the surrogate mother may initiate an action against each other for judicial confirmation of fatherhood of the surrogate child by relying on article 2(2) of the Interpretations III of the Marriage Law.

The issue of legal fatherhood in gestational surrogacy seems simpler than that in traditional surrogacy. Although the intended mother is the legal mother of the surrogate child, as analyzed above, her husband (ie the intended father) cannot be presumed to be the legal father of the child because the intended mother did not conceive and bear the child during the course of her marriage. However, the intended father can still rely on article 2(2) of the Interpretations III of the Marriage Law to claim fatherhood of the surrogate child on the grounds of his biological connection to the child.

Turning to the judicial views on parenthood of the surrogate child, Chinese courts have adopted the implicit biological connection test and there are three major problems in their judicial practice. First, the courts have not clearly addressed the issue of parenthood of the surrogate child, which is logically inevitable before determining the issue of sole care and control of the child. Second, the courts have been silent about the applicable legal rules in determining parenthood of the surrogate child, let alone have provided clear legal reasoning in applying them. Third, the courts have failed to acknowledge and analyze the complexity of the parenthood issue in the different situations of surrogacy.

Sole Care and Control of the Surrogate Child

The issue regarding sole care and control of the surrogate child arises in the case where the surrogate mother and the intended father are respectively the legal mother and the legal father of the surrogate child. The surrogate child in this situation may be treated as an illegitimate child because his legal parents have no martial relationship when he is conceived or born. Chinese law only provides that either biological parent of an illegitimate child equally has the right of sole care and control[65] but it has not provided any rules in determining which parent can obtain that right.

Chinese courts may apply by analogy the Opinions on the Issue of Care and Control of the Child when they determine which parent may enjoy sole care and control of the surrogate child. However, the sample surrogate lawsuits contain inconsistent judicial views, which are arguably problematic in three aspects. First of all, Chinese courts failed to clarify that the issue of sole care and control of the surrogate child should be determined in accordance with the best interest of the child principle. Despite the lack of specific legal rules on how to determine which parent can have sole care and control of an illegitimate child, the Preamble of the Opinions on the Issue of Care and Control of the Child spells out a general principle that the issue of sole care and control of a child should be properly solved based on the child's interest in physical and

[65] See article 25(2) of the 2001 Marriage Law.

psychological health and other legal rights and interests, and in the circumstances of the specific conditions for upbringing the child that each parent offers. In other words, the Preamble has established that the interest of the child is paramount in determining the issue of sole care and control of the child.

Second, some courts (eg cases 1 and 2) were in error when they treated the agreement on sole care and control in the surrogacy contract as evidence to conclude that both parents have already agreed that the surrogate child would live under sole care and control of the legal father, even though the surrogate mother as legal mother later changed her mind and sued for sole care and control of the child. Whether the intended father and the surrogate mother have agreed on the issue of sole care and control of the surrogate child should depend on their will at the time of litigation. Third, the principle established in article 1 of the Opinions on the Issue of Care and Control of the Child that a child under two years old will live with the mother should not be applied in surrogate litigation mechanically, because the fundamental difference between a divorce case and a surrogacy case lies in that, in addition to the legal/intended father, there is an intended mother who is eager to offer a mother's love to the surrogate child, which is absent in a divorce case. As the intended parents can provide a complete family environment to the child and the intended mother will take a mother's responsibilities to love and care him, the courts need to carefully consider the best interest of the surrogate child rather than mechanically applying the principle set forth in article 1 of the Opinions on the Issue of Care and Control of the Child.

To sum up, the courts should take the interest of the surrogate child as the paramount consideration and comprehensively consider all relevant factors relating to his interest, such as the age of the child, the capabilities of the surrogate mother and the intended father to meet the child's physical, emotional, and educational needs, their willingness to raise the child, their attitude to the child and to the parental responsibilities, the length of time that each parent has lived with the child, and the child's wishes in the light of his age and understanding, and so on, to determine which parent is more suitable to exercise sole care and control of the surrogate child in accordance with the best interest of the child. Meanwhile, the courts may decide whether, how much, and how the parent who does not have sole care and control of the child should pay maintenance fees and how he or she can exercise the visitation right in specified time, location, and manner.

INADEQUACIES IN CURRENT CHINESE LAW AND SUGGESTIONS

Inadequacies in Current Chinese Law

Although Chinese courts may apply, often by analogy, the relevant legal rules dispersing in different enactments[66] in order to decide the issues of validity of surrogacy contract, parenthood of the surrogate child, and sole care and control and visitation of the surrogate child arising from surrogacy litigation, these rules are far from satisfactory to properly solve surrogacy disputes and adequately regulate the practice of surrogacy. Specifically, there are three major inadequacies in current Chinese law.

[66] As explained above, they include the 1986 General Principles of Civil Law, the 2001 Marriage Law, the 2001 Ethical Principles for the Application of Assisted Human Reproductive Technology, the Interpretations III of the Marriage Law, and the Opinions on the Issue of Care and Control of the Child.

First, Chinese law has failed to address the legality of surrogacy and to clearly define the scope of permitted surrogacy in the light of social morality and public policy. The existing three sets of departmental rules made by the Ministry of Health, though prohibiting medical institutions and medical staff from performing any form of surrogacy procedure,[67] neither have impact on surrogacy that does not make use of surrogacy procedures nor regulate the parties taking part in surrogacy arrangements other than medical professionals. Despite denying the validity of commercial surrogacy contract, the 1986 General Principles of Civil Law have little deterrence to the third parties who make profit by exploiting financially vulnerable surrogate mother and child-desperate intended parents, including but not limited to surrogacy agencies and the individuals managing and controlling them.[68] As a result, there is a massive underground surrogacy market and commercial surrogacy arrangements are not uncommon in the country,[69] although the law disfavors it because of its violation of social morality. By and large, China experiences the regulatory vacuum in the practice of surrogacy.

Second, Chinese law has failed to provide specific legal rules in determining parenthood of the surrogate child. The existing implicit biological connection test is based on the presumption that a child's biological mother, gestational mother, and intended mother are the same person, where parturition is taken as prima facie evidence of the biological connection between the gestational mother and the newborn child. However, the gestational mother in surrogacy is no longer the intended mother of the surrogate child, and the intended parents face significant legal barriers to obtain parenthood in the existing law. In traditional surrogacy, the intended mother cannot become the legal mother of the surrogate child due to the lack of biological connection to the surrogate child, unless the surrogate mother transfers the parenthood to her through the legal route of adoption. As article 4(3) of the 1998 Adoption Law provides that only the parents who are unable to bring up their child due to special difficulties can place the child for adoption, without fulfilling this requirement, the intended mother remains unable to become the legal mother of the surrogate child.

The intended mother in gestational surrogacy and the intended father, no matter in traditional or gestational surrogacy, are normally the biological parents of the surrogate child. They may apply for judicial confirmation of parenthood, which is primarily based on the biological connection test.[70] However, they can hardly obtain parenthood if they have not provided egg or sperm to conceive the surrogate child and cannot pass a DNA parentage testing, or if they do not know the identity of the surrogate mother[71] and thus cannot identify her as the defendant for the purpose of initiating an action to apply for

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67 See the discussion in the third paragraph of Part I of this article.

68 Surrogacy agencies normally advertise commercial surrogacy, initiate or participate in the negotiation of commercial surrogacy arrangement, provide information of the surrogate mother and the intended parents to promote, and solicit or facilitate commercial surrogacy for the purpose of making profit therefrom.

69 See the discussion in the second paragraph of Part I of this article.

70 See article 2(2) of the Interpretations III of the Marriage Law, which has been explained in the discussion in Part III of this article.

71 In practice, the surrogate mother may be prevented by the surrogacy agency from knowing and contacting the intended parents and she often moves to another place after the surrogacy child is born and handed over to the agency. Therefore, it is possible that the intended parents may have no idea of the identity of the surrogate mother although they have the newborn surrogate child.

judicial confirmation of parenthood.[72] On the other hand, the existing implicit biological connection test allows the intended parents who have biological connection to the surrogate child to obtain parenthood, no matter whether the surrogacy arrangement in question is commercial or not. Thus, the biological connection test likely serves as the back door for commercial surrogacy arrangements.[73]

Third, Chinese law has failed to address and protect the rights of two vulnerable parties in surrogacy arrangements, that is, the surrogate child and the surrogate mother. Above all, the existing law has not provided certainty regarding parenthood and/or sole care and control for the surrogate child, which may make him unable to have a certain and stable family relationship and environment. It is also unclear whether the surrogate child is entitled to access to the medical information concerning his identity, in particular the information regarding his biological origin, when he reaches a certain age. As for the surrogate mother who has entered into an altruistic surrogacy contract, it is unknown whether she is entitled to body integrity and autonomy like other pregnant women and whether she is allowed to unilaterally terminate pregnancy under certain conditions, and if yes, what are the legal consequences of the termination. Additionally, the existing law contains no rules to particularly protect privacy of the surrogate child and the surrogate mother, such as preventing the publication of any fact that may reveal their identity.

Suggestions for Improving Regulation of Surrogacy

At the international level, the regulation of surrogacy differs from jurisdiction to jurisdiction. Some jurisdictions completely prohibit any form of surrogacy, such as Germany, France;[74] some jurisdictions outlaw commercial surrogacy but allow and closely oversee altruistic surrogacy, such as the United Kingdom, New Zealand, Virginia of the United States;[75] some jurisdictions legalize both altruistic surrogacy and commercial surrogacy, such as Ukraine, Russia, California of the United States.[76] Among those jurisdictions that disallow commercial surrogacy, they differ in terms of legal consequences of commercial surrogacy arrangements. Some jurisdictions criminalize the entry into a commercial surrogacy contract, with all parties to the contract subject to criminal penalties; some jurisdictions only criminalize the receipt of payment in excess of

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[72] According to article 119(2) of the Civil Procedure Law (民事诉讼法), to initiate an action, there must be a defendant whose identity is known and proved by the plaintiff, otherwise the courts will not accept the case. This provision covers all general civil procedures, including the application for judicial confirmation of parenthood.

[73] English courts have granted a parental order to the intended parents by treating the interests of the surrogate child as their paramount consideration, even when the amount of the payment that the intended parents made to the surrogate mother clearly exceeds the limitation of 'reasonable expenses' set by the law, such as *Re X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam)* and *Re L (A Minor) [2010] EWHC 3146 (Fam)*. It has been pointed out that this may send a message to the prospective intended parents that the courts may ratify a commercial surrogacy afterwards; see Kirsty Horsey and Sally Sheldon, *Still Hazy after All These Years: The Law Regulating Surrogacy* (20) Med. L. Rev. 67, 80 (2012). Despite in a different legal context, it shares some similarity with what happens in China, that is, Chinese courts have confirmed the intended parents' parenthood of the surrogate child according to the biological connection test in the case of commercial surrogacy, which consequently serves as the back door for commercial surrogacy arrangements.

[74] Trimmings & Beaumont, *supra* note 16, at 443.

[75] *Id.*, at 454.

[76] *Id.*, at 449 & 451.

reasonable reimbursement by the surrogate mother; some jurisdictions do not impose criminal penalties on the parties to the commercial surrogacy contract, but only declare the contract illegal and void.[77] In some jurisdictions that allow altruistic surrogacy, the law sets out various substantive and procedural limitations to provide paternalistic protection to the surrogate mother, the surrogate child, and the intended parents, and to prevent the misuse of altruistic surrogacy.[78] Because the regulation of surrogacy involves complex ethical, social, and legal concerns of the particular jurisdiction, it is understandable to have such a diverse range of regulatory models existing at the international level. By the same token, it is necessary to consider the relevant ethical, social, and legal factors regarding the practice of surrogacy in current China when presenting suggestions for improving Chinese law on surrogacy.

To remedy the inadequacies in Chinese law noted above, China needs to end the current chaotic practice of surrogacy by establishing a set of systematic regulations to closely regulate surrogacy arrangements. First of all, Chinese law needs to explicitly prohibit commercial surrogacy. As analyzed above,[79] the 2003 Ethical Principles of Assisted Human Reproductive Technology and Human Sperm Bank issued by the Ministry of Health articulate a principle of prohibition of commercialization, which represents the social morality and public interest of the country. Although the government has taken a clear decision that commercial surrogacy is in violation of the social morality and public interest and thus should be banned, it has failed to adopt effective legal rules to implement the decision. In reality, there is a massive underground surrogacy market hosted by around 400 to 500 commercial surrogacy agencies across the country.[80] The intended parents have to pay on average 500,000 to 600,000 yuan to the surrogacy agency in a commercial surrogacy arrangement. After paying the surrogate mother a service fee of 150,000 to 200,000 yuan, the surrogacy agencies will normally have a net profit of 200,000 to 300,000 yuan per transaction.[81] Surrogacy agencies thus have a very strong financial incentive to procure commercial surrogacy, taking advantage of financially voluntary surrogate mother and child-desperate intended parents. Some surrogacy agencies even induced and organized a large number of women from poor rural families to travel to big cities (such as Guangzhou) to undertake surrogacy.[82] Therefore, to deter profit-oriented surrogacy agencies and effectively ban commercial surrogacy, Chinese law needs to have teeth through imposing criminal punishments and administrative sanctions on the third parties involved in procuring, advertising, providing assistance in achieving a pregnancy in commercial surrogacy arrangements. However, Chinese law may exempt the surrogate mother and the intended parents from criminal and administrative liabilities, because the invalidation of commercial surrogacy

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77 *Id.*, at 36.

78 Such as the United Kingdom, Israel, South Africa.

79 See the discussion in the sixth paragraph of Section A of Part III of this article.

80 Yang & Yan, *supra* note 7, at 62.

81 *Uncovering the Profit Chain of Surrogacy and the Surrogate Mother Receiving a Minimum Service Fee of 200,000 Yuan If She Gives Birth to a Male Child* (揭秘代孕利益链 代孕妈妈生男孩最低酬劳20万), Nanfang Daily (南方日报), Nov. 28, 2011, http://zuche.qingdaonews.com/content/2011-11/28/content˙9025439.htm (accessed Dec. 18, 2014).

82 *200 Women from Qidong Went to Guangdong Province to Become the Surrogate Mother through an Agency* (200祁东妇女通过一中介赴穗代孕), S. Metropolis Daily (南方都市报), Mar. 29, 2010, http://www.hinews.cn/news/system/2010/03/29/010779670.shtml (accessed Dec. 18, 2014).

contracts by the 1986 General Principles of Civil Law has properly disproved their entry into commercial surrogacy contracts, and their motive for surrogacy can be more or less justified on moral and legal basis.[83]

Second, though altruistic surrogacy does not violate social morality and the 1986 General Principles of Civil Law recognize the validity of altruistic surrogacy contract, it remains necessary for Chinese law to limit altruistic surrogacy by incorporating reasonable requirements so as to strike a balance of interests of the surrogate child, the surrogate mother, and the intended parents. Specifically, statutory requirements for altruistic surrogacy may be concerned with the eligibility of the surrogate mother (eg the minimum age, the experiences of pregnancy and parturition, the physical and psychological health of the surrogate mother, receiving consultation and information about the implications of surrogacy arrangements, and the consent of her husband to surrogacy),[84] the eligibility of the intended parents (eg the medical needs for surrogacy, the marital status, and the maximum age),[85] the manner of surrogacy (eg surrogacy must adopt fertility procedures, at least one intended parent must be the biological parent of the surrogate child, and the surrogate mother and the intended parents must receive consultation and information about the implications of surrogacy arrangements),[86] the scope of reasonable expenses associated with surrogacy and recoverable by the surrogate mother, and the formality of surrogacy contract (eg in writing form).

Third, Chinese law needs to introduce a mandatory approval procedure in order to ensure that surrogacy arrangements specified in the surrogacy contract have complied with the statutory requirements for altruistic surrogacy, and have well concerned the interests of the surrogate child, such as his potential risk of physical abuse, emotional or psychological abuse, or neglect likely caused by the intended parents or the surrogate mother, and his position in the event of the death of the intended parent who is his biological parent before his birth. A local public agency[87] may be authorized to review, approve, and make records of the proposed surrogacy arrangements. The prior approval, as a procedural safeguard, will function as a pre-condition for the execution of surrogacy contract, the surrogate mother's claim for the reimbursement of the reasonable expenses, and the intended parents' obtainment of parenthood of the surrogate child at the moment of his birth.

Fourth, Chinese law needs to provide the legal rules for determining parenthood of the surrogate child. To provide the certainty regarding parenthood to the surrogate child, the intended parents may automatically be the child's legal parents upon his

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[83] For example, the surrogate mother may argue for her right to personal autonomy and the intended parents may argue for their right to procreate.

[84] These factors are mainly concerned with the interests of the surrogate mother regarding her physical and psychological health and matureness, and her interest in her own family relationship.

[85] These factors are mainly concerned with the interests of the surrogate child, who may live in a healthy and stable family environment.

[86] These factors are mainly concerned with the interests of both the surrogate child and the intended parents. For example, as Chinese people generally concern very much about the biological connection between the parents and the child, the requirement that at least one intended parent must be the biological parent of the surrogate child may guarantee love and parental responsibilities of the intended parents toward the surrogate child in most cases.

[87] Such as the health administrative bureaus at the municipal and provincial levels.

birth,[88] provided that the surrogacy arrangement has been approved in advance. If the surrogate child is born with disability, the intended parents must exercise their parental responsibilities as legal parents.[89] However, when there is any violation of the statutory requirements for altruistic surrogacy, the surrogate mother may challenge the intended parents' parenthood of the surrogate child if she wishes to be the legal mother of the child. In that case, the courts need to determine which party should obtain parenthood of the surrogate child according to the best interest of the child.

Fifth, Chinese law needs to give special concern and protection to the surrogate child and the surrogate mother. No matter whether the surrogate child is conceived and born of an approved surrogacy arrangement, he has the right to identity and the right to access to the information about his parentage and circumstance of his birth after he reaches a certain age and receives proper counseling. The law also needs to protect the surrogate mother's body integrity, and autonomy, and exempt her from contractual liabilities if she decides to legally terminate the pregnancy; although she may be required to return the payment of expenses to the intended parents if she terminates the pregnancy on non-medical grounds.

CONCLUSION

Surrogacy litigation has inevitably occurred with the increase of surrogacy arrangements in recent China. As the above case study showed, the legal issues in surrogacy litigation mainly include validity of surrogacy contract, parenthood of the surrogate child, and sole care and control and visitation of the surrogate child. As Chinese law has no specific rules governing surrogacy, the courts have applied the relevant general rules to them. However, the courts have presented different views on these issues and seldom provided clear reasoning. Some of the judicial views are arguably inconsistent with the existing law. At the moment, it is necessary for the courts to better understand the issues involved in surrogacy lawsuits, and correctly and consistently apply the existing rules to them, thus providing the certainty and consistency of law to all interested parties in surrogacy.

In the long run, Chinese law needs to establish a set of systematic regulations governing surrogacy because surrogacy is never a question of freedom of will and should not be governed merely by the rules of contract law. Therefore, Chinese law needs not only to provide certain and consistent legal solutions to the disputed issues arising from surrogacy, but also incorporate both substantive and procedural legal safeguards to protect the paramount interests of the surrogate child and better balance those of the surrogate mother and the intended parents. A satisfactory regulation of surrogacy will minimize the potential for surrogacy disputes and enhance the confidence of the public in the law of surrogacy in China.

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[88] It also likely reduces the need for court intervention on the issue of parenthood of the surrogate child; see Chelsea VanWormer, *Outdated and Ineffective: An Analysis of Michigan's Gestational Surrogacy Law and the Need for Validation of Surrogate Pregnancy Contracts* 61 DePaul L. Rev. 911, 919 (2012).

[89] This may avoid difficult cases similar to the reported story where an Australian couple abandoned the Down syndrome baby born of surrogacy; see Lindsay Murdoch, *Australian Couple Leaves Down Syndrome Baby with Thai Surrogate*, The Sydney Morning Herald, Aug. 1, 2014, http://www.smh.com.au/national/australian-couple-leaves-down-syndrome-baby-with-thai-surrogate-20140731-zz3xp.html (accessed Dec. 18, 2014).