

A REVIEW OF INTERNATIONAL
SURROGACYARRANGEMENTS FROM A PRIVATE
INTERNATIONAL LAW PERSPECTIVE AND CHINA’S POLICY
RESPONSE

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Abstract

Surrogacy has risen on a global scale due to the development of medical technology. International surrogacy is intensive as a result of forum shopping out of the variety of national policies on surrogacy and laws on legal parentage, resulting in some private international law issues. For instance, the complexity of parentage in many international surrogacy cases in recent years often leads to parentless surrogate born children. To that end, the Hague Conference on Private International Law has been working on this affair in order to protect children and women in international surrogacy from a private international law perspective.

In light of the abolition of one-child policy in China, demand for international surrogacy among Chinese citizens has increased, especially in families that only have one child and would like to bear a second one but where advanced childbearing age is worrisome. Meanwhile, highly educated women are likely to have children at an advanced age. Hence, the need for surrogacy has arisen. However, current policies and law in China prohibit surrogacy, resulting in a domestic black market and sought after international surrogacy. This Article seeks to survey the efforts of the Hague Conference on Private International Law in this regard, as well as legal and judicial practice in China by examining law and cases in detail to forecast China’s response in the future in terms of policy making and law making domestically and its position towards international agreements on legal parentage and international surrogacy arrangements.

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INTRODUCTION

Surrogacy has long been on the rise around the world.¹ On one hand, infertility becomes more common in modern societies, along with diversity of family forms, including same-sex marriage and the need to have genetically related children. On the other hand, the latest development in artificial reproduction has made medical miracles possible.² Surrogacy in this Article refers to the case where an embryo is

1. Myranda Chancey, *Who is the Mommy? Surrogacy Reform is Spreading in the Rich World*, THE ECONOMIST (Jan. 31, 2021), <https://www.economist.com/international/2021/01/31/surrogacy-reform-is-spreading-in-the-rich-world> [https://perma.cc/JL3U-92KF].

2. See Nicole F. Bromfield & Karen Smith Rotabi, *Global Surrogacy, Exploitation, Human Rights and International Private Law: A Pragmatic Stance and Policy Recommendations*, 1 GLOB. SOC. WELFARE 123–35 (2014).

implanted into the womb of a surrogate mother after in vitro fertilization using artificial reproduction technology. The fertilized egg may come from the sperm and egg of the intended parents;³ or the sperm may come from one of the intended parents, in combination with the egg from a third party or from a surrogate mother; or the egg may come from one of the intended parents and the sperm comes from a third party. Hence, the surrogate born child is genetically linked to at least one of the intended parents. Given that different nations have a variety of policies and substantive laws on surrogacy, international surrogacy has been on the rise in recent years.⁴ Hopeful parents tend to circumvent domestic prohibitions and travel overseas to states that allow commercial surrogacy.⁵ In addition, considering the technology, cost, immigration policy and other factors, it is no surprise that parents in China choose to go abroad for surrogacy.

Legal issues arising out of international surrogacy are mainly due to the fact that nations have different substantive laws regarding topics such as parentage, nationality, adoption, and same-sex marriage. The applicable laws to determine legal parentage also differ depending on the state's cultural, political, and social environment.⁶ Therefore, international surrogacy causes practical problems. First, it is difficult to determine and recognize the legal parentage of children born to surrogates, rendering the child parentless in many cases. For example, a judgment on the legal parentage or birth certificate issued by the state in which the child is born may not be recognized by the state of the intended parents, which may be denied for reasons such as jurisdiction, applicable law, or public policy exceptions. Second, children born out of surrogacy may be stateless. For example, France and Switzerland refuse to issue passports and grant nationality for their overseas surrogate born children since nationality is solely determined on the basis of legal parentage, which is difficult to determine. Third, the rights and interests of surrogate born children, surrogate mothers and intended parents are far from well protected. For example, surrogate born children may be abandoned. Among all the problems identified, it is most important to confirm the legal parentage of children born out of surrogacy to the extent that the

3. "Intended parents" refers to the couple who entrust a surrogate mother to give birth to a child. They are also referred as the "commissioning parents."

4. Hague Conf. on Priv. Int'l L. [hereinafter HCCH], *A Study of Legal Parentage and the Issues Arising from International Surrogacy Arrangements*, at 15, Prel. Doc. No. 3C (Mar. 2014), <https://assets.hcch.net/docs/bb90cfd2-a66a-4fe4-a05b-55f33b009cfc.pdf> [<https://perma.cc/P772-9P6L>].

5. *As Demand for Surrogacy Soars, More Countries are Trying to Ban it*, THE ECONOMIST (May 13, 2017), <https://www.economist.com/international/2017/05/13/as-demand-for-surrogacy-soars-more-countries-are-trying-to-ban-it> [<https://perma.cc/S45H-7QLY>].

6. HCCH, Prel. Doc. No. 3C (Mar. 2014), *supra* note 4, at 5–25.

nationality and protection of rights of relevant parties all depend on the issue of legal parentage.⁷

Keeping in mind that the issue of legal parentage of children born out of surrogacy is the primary problem needing to be solved, the international community has explored the following solutions. The first approach, the diplomatic approach, however, has encountered some difficulties in practice. In some cases, children born through surrogacy are allowed to return to the nation of the intended parents through diplomatic approaches to reach consensus that children's rights should be protected, and also to avoid publicity in coverage of international surrogacy. This is usually done by issuing visas or passports or travel certificates under the table. The case-by-case diplomatic approaches, however, do not have clear guidelines, resulting in large differences among cases. Additionally, the number of cases that could be handled through diplomatic channels is limited. Furthermore, it is not clear whether these cases are dealt with in accordance with domestic laws since no explicit laws are provided.⁸

The second approach is to make use of the other existing conventions, such as the 1993 Hague Convention on Intercountry Adoption. However, it does not work well either. Although the intended parents are able to bring the surrogate born children home through the intercountry adoption channel and legally become the parents of the child, the adoption procedure is much more complex. The intended parents may then give up on adopting the child after its birth, leaving the child abandoned and parentless. In addition, in a surrogacy scenario, the surrogate mother has to give her consent to forfeit rights and obligations over the child to the intended parents *prior* to the birth of the child, while the Hague Convention on International Adoption requires the consent of the mother to be given *after* the birth of the child.⁹ That makes intercountry adoption conventions hard to utilize.

The third way is to conclude new international legal documents, but this is far more difficult. First of all, it is largely impossible to unify substantive law among nations in determining the legal parentage, which is under the discretion of each state in the context of its social values and the like.¹⁰ Besides, it is impossible to formulate a unified substantive law to regulate surrogacy given that surrogacy is prohibited in some states

7. *Id.* at 51–54.

8. *Id.* at 49.

9. HCCH, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Arrangements*, at 22, Prel. Doc. No. 11 (Mar. 2011), <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf> [https://perma.cc/24WZ-5YJS].

10. HCCH, *The Desirability and Feasibility of Future Work on the Parentage/Surrogacy Project*, at 16–18, Prel. Doc. No. 3B (Mar. 2014), <https://assets.hcch.net/docs/6403eddb-3b47-4680-ba4a-3fe3e11c0557.pdf> [https://perma.cc/9PBE-2WMC].

while others legitimize it.¹¹ Last, it might be possible to conclude international instruments on private international law (PIL) issues in order to solve the problem of limping parentage.¹² The necessity and feasibility of concluding conventions on PIL related to the confirmation of legal parentage, an international arrangement on jurisdiction in cases of legal parentage, an international arrangement on applicable laws in cases of legal parentage, and an international arrangement on recognition in cases of legal parentage has been explored by the Parentage/Surrogacy Project in the Hague Conference on Private International Law.

I. EVOLUTION OF THE PARENTAGE PROJECT IN HCCH

A. *Initial Focus on “Recognition” Regime*

The Hague Conference on Private International Law (HCCH) authorized its Permanent Bureau to work on the Hague Parentage/Surrogacy Project in 2011. The Permanent Bureau has produced a number of reports. In 2015, the Council on General Affairs and Policy (CGAP) of the HCCH decided to establish an Experts’ Group composed of representatives from member states. The Experts’ Group has held meetings since 2016.¹³

The desirability and feasibility of three possible legal documents of private international law, an international arrangement on jurisdiction in cases of legal parentage, an international arrangement on applicable laws in cases of legal parentage, and an international arrangement on recognition in cases of legal parentage, varies. It is agreed by the Experts’ Group that a legal document of private international law limited to the “recognition regime” would be more conducive to solving the problem, which is the confirmation of legal parentage of children born out of surrogacy. Therefore, the Experts’ Group has focused on proposing two instruments, (i) a general private international law instrument on the recognition of foreign judicial decisions on legal parentage (herein referred to as the Convention), and (ii) a separate protocol on the recognition of foreign judicial decisions on legal parentage rendered as a result of international surrogacy arrangements (ISAs) (hereinafter referred to as the Protocol). Hence, the Experts’ Group agreed initially on the principle of mutual recognition.

11. *Id.*

12. See Katarina Trimmings & Paul Reid Beaumont, *International Surrogacy Arrangements: An Urgent Need for Regulation at the International Level*, 7 J. PRIV. INT’L L. 627–47 (2011).

13. See *The Parentage/Surrogacy Project*, HAGUE CONF. ON PRIV. INT’L L., <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> [https://perma.cc/TF A4-C88V].

This focus is justified because the “recognition regime” avoids the issue of making uniform private international law on jurisdiction and application of law. Moreover, in the stage of recognition where judges are presented with the issue of deciding whether or not to recognize foreign judgments, the application of public policy to refuse recognition of foreign judgments is relatively limited. For instance, judges may refuse to recognize foreign judgments on legal parentage based on the public policy of the state where the judgment is sought to be recognized. This is less likely in practice than at the stage of application of law where judges determining the issue of legal parentage may refuse to apply foreign law that legitimizes commercial surrogacy on the ground that the foreign law contravenes the public policy of the state where the judge sits because the domestic law prohibits surrogacy.¹⁴ Therefore, the Experts’ Group has been primarily working on an international arrangement on private international law relating to recognition of foreign judgments on legal parentage at the very beginning.

In terms of what is to be recognized, it is interesting to learn that the focus at the very beginning is on the problem of international surrogacy through which a child born runs the risk of being parentless. It is the legal parentage of surrogate born children that is to be recognized. However, with further research done, the Experts’ Group has shifted to the recognition of legal parentage regardless of the way the child is born. That is, the recognition of foreign judicial decisions on legal parentage in general. This legal solution goes much further. What is more interesting, an instrument on recognition of legal parentage in general is much more feasible than an instrument on recognition of legal parentage of children born out of surrogacy, which encounters intense debate. To that end, the relationship between the draft instruments (a general private international law convention on legal parentage and a separate protocol on legal parentage established as a result of international surrogacy arrangements) is important. In principle, the Group favored an approach whereby states could choose to become a party to both instruments or only one of them.¹⁵ This Article next provides a summary of issues from the least controversial to the most controversial issues.

14. HCCH, *Background Note for the Meeting of the Experts’ Group on the Parentage/Surrogacy Project*, Annex 1, (Jan. 2016), <https://assets.hcch.net/docs/8767f910-ae25-4564-a67c-7f2a002fb5c0.pdf> [<https://perma.cc/KBG6-WP7F>].

15. HCCH, *Report of the Experts’ Group on the Parentage/Surrogacy Project*, at 6, Prel. Doc. No. 2B (Feb. 2019), <https://assets.hcch.net/docs/55032fc1-bec1-476b-8933-865d6ce106c2.pdf> [<https://perma.cc/965Y-2SAL>].

1. The Least Controversial Issues: Objective and Scope of Future International Instruments

The Experts' Group broadly agreed that out of the need to avoid limping legal parentage, the main objectives of the future international instruments (the Convention and the Protocol) would be to provide predictability, certainty, and continuity of legal parentage for all individuals concerned and take into account their respective rights.¹⁶ The instruments should not be understood as supporting or opposing surrogacy. Member states are free to make policies and laws to regulate international surrogacy.¹⁷

In terms of the scope of the future instruments, the issues excluded are custody, inheritance, nationality, and other matters covered by the existing Hague conventions, such as the 1993 HCCH Intercountry Adoption Convention, which should not be undermined by any future instrument. The issues excluded are to be governed by domestic laws of states. Given the overarching aims of the instruments, most Experts agreed that it would be appropriate to include domestic adoptions within its scope. The Group agreed, however, that recognition of domestic adoptions raises many important issues and challenges, such as distinguishing between domestic adoptions and intercountry adoptions.¹⁸

2. The Moderately Controversial Issues: Recognition of Foreign Judgments and Documentation on Legal Parentage

In a normal case, a judicial decision is issued by State A confirming the legal parentage of a child born out of surrogacy in State A. State B is presented with the question of whether or not to recognize the foreign judicial decision on legal parentage when the child concerned is brought by its intended parents back to State B where the parents reside. It is the same case in the absence of a judicial decision as there is normally foreign documentation, such as a birth certificate, recording parentage of the child. The Experts' Group made significant progress in developing draft provisions for a possible future Convention dealing with the recognition of foreign judicial decisions as well as documentation on legal parentage.

16. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, at 1, Prel. Doc. No. 2 (Nov. 2019), <https://assets.hcch.net/docs/d435cffc-65ce-4047-b603-ff63ed20591c.pdf> [<https://perma.cc/VPQ7-HXBX>].

17. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, at 4, Prel. Doc. No. 2 (Feb. 2018), <https://assets.hcch.net/docs/75f52918-063d-4232-81c7-ca7cd37e5af6.pdf> [<https://perma.cc/65VK-VYAS>].

18. *Id.* at 3. See Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption art. 17, May 29, 1993, 114 Stat. 825.

a. Foreign Judgments on Legal Parentage

One of the moderately controversial issues is provision for a general PIL instrument on the recognition of foreign judicial decisions on legal parentage. The discussion primarily focuses on two issues. One is the indirect grounds of jurisdiction, and the other is the grounds for refusal.

The Experts' Group agreed that the recognition regime should occur by operation of law and be subject to the satisfaction of certain indirect grounds of jurisdiction in the state where the judgment was issued. The Experts' Group explored a number of possible connecting factors and their advantages and disadvantages respectively, and generally preferred multiple, alternative bases of indirect jurisdiction with sufficient proximity between the subject matter and the state of judgment. The Group agreed on the following alternative indirect grounds of jurisdiction that would have to be fulfilled at the time when proceedings were initiated: (a) the place of the child's habitual residence; or (b) the place of the respondent's habitual residence. The Group agreed that grounds for indirect jurisdiction relating to party autonomy (i.e., choice of court and submission to the jurisdiction of the court) should not be included in light of the subject matter of the proceedings concerning legal parentage.¹⁹

In terms of grounds for refusal, the majority of the Experts' Group agreed that recognition of foreign judicial decisions on legal parentage made without conducting substantive review should also be subject to certain conditions, the absence of which could constitute refusal of recognition. In other words, a court may refuse to recognize a foreign judgment on the grounds that (i) the procedure was unfair where the respondent did not have proper notice of the proceedings and an opportunity to be heard; (ii) where there are inconsistent judgments or parallel proceedings; or (iii) violation of public policy.²⁰ Experts also agreed that fraud should be addressed, but there was discussion as to whether such a ground for refusal should go beyond fraud in connection with a matter of procedure. As for the public policy ground, the Experts' Group agreed that the expression of public policy shall be consistent with that of the existing Hague Convention's position on public policy, which requires it be "manifestly contrary to its public policy, taking into account the best interests of the child."²¹ The public policy justification does not apply if it leaves the child parentless.²²

19. HCCH, Prel. Doc. No. 2 (Nov. 2019), *supra* note 16, at 2–3.

20. *Id.* at 3.

21. *Id.* at 1; Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, *supra* note 18, at art. 24.

22. HCCH, Prel. Doc. No. 2 (Feb. 2018), *supra* note 17, at 4.

b. Foreign Public Documentation Recording Legal Parentage

The majority of the Experts' Group considered that the recognition of foreign public documents recording legal paternity was largely different from the recognition of foreign judicial decisions on legal parentage. Here, "recognition of foreign public documents recording legal parentage" refers to recognition of the legal effect of legal parentage as recorded in foreign public documentation, rather than the matter of formal validity or authenticity of foreign public documents.

It is noted that the nature and content of birth certificates varies widely across states. First, many foreign public documents only records facts rather than the legal parentage. For instance, a birth certificate may only record the name of the mother who delivers the child, leaving the column for the name of the father blank. Second, a birth certificate may be regarded as a public document or merely a document arising from a civil relationship depending on the state's policy. Third, states' practices regarding the perception of birth certificates issued by foreign states vary significantly with some states treating foreign birth certificates as evidence of proving certain facts while other foreign birth certificates are treated as evidence of proving legal conclusions, or even as the legal conclusion itself.

The Experts' Group discussed the following three ways to recognize foreign birth certificates. The first approach is laws of uniform application. This approach would help ensure the continuity of legal parentage cross-border in the absence of a foreign judgment on legal parentage (i.e., where legal parentage is established by operation of law or following the act of an individual). However, this approach is practically difficult considering it requires unification of applicable laws across states. Even if it worked with proposed provisions like "legal parentage is to be determined by the law of the state where the court sits," divergence exists regarding rules on direct jurisdiction. The second approach treats a foreign birth certificate as rebuttable evidence of paternity. Most states have already practiced this. Some of the experts believed that uniform rules on formal validity, bi-lingual forms could be developed to enhance the circulation of birth certificates. Nevertheless, this approach does not guarantee continuity of legal parentage given that foreign birth certificates are merely regarded as rebuttable evidence of proving a fact, which is also already the practice of many states. The third approach is direct recognition of the validity of parentage recorded on foreign birth certificates through an international convention. While this approach is efficient, it would require an international authority to issue a uniform international birth certificate, which would be recognized directly by all member states. Difficulties come along with the

establishment of an international body charged with the authority to issue a uniform international birth certificate.²³

With the progress made following the discussion on applicable legal rules, two options have been put on the table for further discussion. One option is the recognition of foreign public documents recording legal parentage as long as the state of origin has jurisdiction and the applicable rules of law are complied with. This approach actually utilizes direct jurisdiction rules and applicable rules of law. The effect of recognition is that public documents presented in the requesting state shall be given the same effects or the most comparable effects that they have in the state of origin. The other option is a rule on the presumption of validity of legal parentage recorded in a public document issued by a designated competent authority. In other words, where a public document recording the legal parentage of a child has been issued by a competent authority of a contracting state, the legal parentage recorded therein shall be presumed to have been validly established until the contrary is established.

3. The Most Controversial Issues: Protocol on International Surrogacy Arrangements

Most experts agree that when it comes to parenthood, the problem lies in international surrogacy. The most controversial issues come with recognition of judgments and public documentation on legal parentage in ISAs. If a convention were to exclude international surrogacy, such a convention would not address the most pressing issues of the moment. Some experts suggested that special provisions for international surrogacy be developed as an additional protocol to the Convention.²⁴ Member states may choose to “include” or “exclude” the rules governing international surrogacy by choosing whether to accept these additional protocols through the “accession mechanism” or the “withdrawal mechanism.”²⁵

As for recognition of foreign judgments on legal parentage in ISA cases by operation of law, the Experts’ Group considered possible criteria for the recognition of judgments on legal parentage in ISA cases. In this regard, many experts re-emphasized the central importance of including minimum standards or safeguards to protect the rights and welfare of the parties involved and, in particular, the best interests of the child.²⁶ Safeguards discussed include: (i) the free and informed consent of the surrogate mother throughout the ISA; (ii) the preservation of information

23. *Id.* at 5.

24. HCCH, Prel. Doc. No. 2B (Feb. 2019), *supra* note 15, at 5.

25. See Accession, *Glossary of terms relating to Treaty actions*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/overview.aspx?path=overview/glossary/page1_en.xml [https://perma.cc/7UAQ-JK78].

26. HCCH, Prel. Doc. No. 2 (Feb. 2018), *supra* note 17, at 8.

concerning the child's origins; (iii) to what extent the Protocol should address or limit the involvement of intermediaries in ISAs; (iv) provision on the identification, authorization, and supervision of intermediaries; (v) minimum standards concerning the eligibility and suitability of the surrogate mother, and the eligibility and suitability of the intended parents; and (vi) prevention of the abduction, sale of, or traffic in women and children in the context of ISAs, taking into account the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of May 20, 2000. It should be kept in mind that the more safeguards relating to surrogacy, the international law goes to regulate surrogacy substantively, which falls primarily within national jurisdiction.

Two approaches for safeguards were discussed. One is an *a posteriori* approach, where safeguards are required to be met post-birth of the child in an ISA, and the other is an *a priori* approach, where safeguards are to be met prior to the birth of the child. The former is preferred. In the framework of an *a posteriori* approach, discussions concern whether safeguards are included in the Protocol as general obligations, or as conditions for recognition, or rather as grounds for non-recognition. A few experts were of the view that multiple conditions for recognition may undermine the overarching aims of the Protocol, in particular because failure to satisfy a condition would result in non-recognition of the child's legal parentage pursuant to the Protocol, leaving the child with limping legal parentage. It was suggested that it may be more feasible to structure some of the proposed safeguards as grounds for non-recognition and/or general obligations, rather than as conditions for recognition.²⁷

In addition to that, the Group discussed the possibility of certification (for example, by way of a model form) to verify that conditions or safeguards under the Protocol have been met. Certification should include confirmation that ISAs were permitted under the law of the state of origin at the time the ISA was entered into and executed. However, experts had differing views on who should be competent to provide such certification in the ISA state of origin.²⁸ The Group also discussed how the Protocol could also be applied to legal parentage when it is not established by a judgment. There was general support in the Group for exploring how a certification mechanism might operate in the absence of a judgment.²⁹

B. *Later Focus on PIL Issues Surrounding Legal Parentage*

The focus of the Experts' Group moved to PIL issues surrounding legal parentage in general (draft private international law convention on

27. HCCH, Prel. Doc. No. 2 (Nov. 2019), *supra* note 16, at 6.

28. *Id.* at 5.

29. *Id.* at 6.

legal parentage) at a later stage of the Hague Project on Parentage/Surrogacy.

Some experts noted that direct grounds of jurisdiction would further increase legal certainty and reduce the risk of conflicting judgments on legal parentage, and believed it would be helpful to give further consideration to such grounds in conjunction with the PIL techniques. If direct grounds of jurisdiction could be agreed upon, experts noted that it would be helpful to have an applicable rule of law stating which law authorities should apply in exercising their jurisdiction under the Convention. This also ensures that the diverse substantive rules of states on legal parentage are respected. To that end, a chapter on applicable laws in the general PIL convention on legal parentage was discussed.³⁰

The Experts' Group discussed the feasibility and necessity of the following mechanisms. First, the same conflict of laws rules (rules of applicable law) are applied to determine the legal parentage, regardless of the method and event through which the legal parent-child relationship is established. Second, the Experts' Group believed that it is certain to regard the state of birth as an objective connection point. Third, if the child's state of birth is not the parent's habitual residence, an alternative connection point, namely the law of the state of habitual residence of the person who gave birth, can be considered. Fourth—in exceptional cases—the legal parentage is established by behavior or by a court decision after the child's birth, and the law of the child's habitual residence shall apply and the child's best interest principle shall be applied.³¹

II. CHINA'S DOMESTIC LAW AND POLICIES ON SURROGACY

A. *China's Policies and Law on Domestic Surrogacy*

By reviewing law and practice in China, it is apparent that China's attitude towards surrogacy is negative. First, medical institutions and their staff are prohibited from carrying out surrogacy surgeries. According to Articles 2, 3, and 12 of the Measures on the Management of Human Assisted Reproductive Technology (hereinafter referred to as "the Measures") issued by the Ministry of Health in 2001, medical institutions and their personnel shall not carry out surrogacy, or they will be subject to administrative and criminal sanctions.³² Therefore, it is

30. *Id.* at 4.

31. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, Annex I, at 3–4, Prel. Doc. No. 2A (Oct. 2020), <https://assets.hcch.net/docs/a6aa2fd2-5aef-44fa-8088-514e93ae251d.pdf> [<https://perma.cc/3XZ6-2JVM>].

32. Renlei Fuzhu Shengzhi Jishu Guanli Banfa (人类辅助生殖技术管理办法) [Measures on the Management of Human Assisted Reproductive Technology] (promulgated by Ministry of

illegal for medical institutions and personnel with medical qualifications to carry out surrogacy. Besides this, any person or clinic without medical certificates that conduct surrogacy will be liable and punished for the illegal unauthorized practice of medicine.

The Measures are enforced rigorously against soaring surrogacy in the black market. The National Health and Family Planning Commission along with twelve other departments³³ set up a national leading group and office for the special action against surrogacy. A special campaign against surrogacy was carried out nationwide in 2015. The campaign (i) investigated medical institutions and medical staff that conduct surrogacy; (ii) investigated social intermediary agencies that carry out surrogacy; (iii) cleaned up and investigated the internet, TV broadcasting, newspapers, and magazines that advertise surrogacy promotion and services; and (iv) supervised the application of human assisted reproductive technology services and the circulation and sales of medical devices and drugs.³⁴

The nationwide campaign ended up with lots of cases, and one typical case, among them, is the illegal surrogacy in Wuhan, Hubei Province. In July 2014, the media reported the rampant underground “surrogacy” activities in Wuhan. The Hubei Provincial Health and Family Planning Commission formed a joint investigation team destroying large dens of surrogacy workshops. The investigation found that Wuhan 672 Hospital leased its departments and clinics to Wuhan Zhongtong Hesheng Medical Investment Co., Ltd. to illegally carry out surrogacy and physical examination activities for surrogate mothers. The punishment imposed was closure of the laboratories carrying out surrogacy, and seizing 771 frozen embryos and 167 frozen sperm among other items. The Hubei Provincial Health and Family Planning Commission gave the hospital an additional administrative penalty, confiscating illegal income of 380,000 RMB, revoking their medical license, and disciplining hospital leaders.

Health, Feb. 20, 2001, effective Aug. 1, 2001) ST. COUNCIL GAZ., 2002, https://www.gov.cn/gongbao/content/2002/content_61906.htm [<https://perma.cc/F2ZX-SNQB>] [hereinafter Measures].

33. The other twelve departments are the General Office of the National Health and Family Planning Commission, the General Office of the Central Propaganda Department, the Secretary Office of the Central Comprehensive Management Office, the Secretariat of the Central Cyberspace Administration of China, the General Office of the Ministry of Industry and Information Technology, the General Office of the Ministry of Public Security, the General Office of the Ministry of Civil Affairs, the General Office of the State Administration for Industry and Commerce, the General Office of the Food and Drug Administration, the Office of the State Administration of Traditional Chinese Medicine, the Army Family Planning Leading Group Office, and the Ministry of Health, Logistics Department, and Armed Police Force.

34. Notice of the General Office of the National Health and Family Planning Commission, the General Office of the Central Propaganda Department, the Secretary Office of the Central Comprehensive Management Office, et al., No. [2015]22 (Apr. 3, 2015) (on the issuance of the work plan for the special action against surrogacy).

The seven medical staff involved in the case were administratively penalized by revoking their practice certificates.³⁵

Surrogacy contracts between individual parties (i.e., between the surrogate mother and intended parents) are also not protected by law and are non-enforceable in China. Neither party of a surrogacy contract will be protected in the event a dispute arises out of the surrogacy contract. Looking at Article 2 of the Measures, which stipulates that “these Measures shall apply to all kinds of medical institutions that carry out human assisted reproductive technology,” it could be asserted that current regulations are only applicable to medical institutions. The flip side of this is that the Measures do not prohibit individuals from becoming surrogate mothers or intended parents.

Nonetheless, Article 8 of the Civil Code provides that “no person of the civil law may violate the law, or offend public order or good morals.”³⁶ In terms of the law, it refers to laws made by the legislative branch. The Measures are enacted by the Ministry of Health, and hence are governmental rules, specifically ministerial rules, rather than legislative law. Article 143 of the Civil Code provides that “[a] juridical act satisfying all of the following conditions shall be valid, the third condition is that ‘It neither violates the imperative provisions of laws and administrative regulations, nor is contrary to public order and good morals.’”³⁷ Administrative regulations refer to regulations promulgated by the State Council. The Measures are not administrative regulations.

To that end, there is concern about whether surrogacy contracts are contrary to public order and good morals. In interpreting “public order and good morals,” classification of potential violations of public order and good morals is preferred, which contains, but is not limited to: (i) endangering the national political, economic, fiscal, taxation, financial, and public security order; (ii) endangering family relations; (iii)

35. Guojia Weisheng Jiankang Weiyuanhui Gongbu Daji Feifa Xingyi Zhuanxiang Xingdong Gongbu 12 Qi Dianxing Anli Zhi Ba : Hubeisheng Wuhan Shi Feifa Daiyun An (国家卫生健康委员会公布打击非法行医专项行动公布12起典型案例之八：湖北省武汉市非法代孕案) [The National Health Commission announced a special campaign to combat illegal medical practice, announcing 12 typical cases, including the eighth: the illegal surrogacy case in Wuhan, Hubei Province], PKULAW, <https://www.pkulaw.com/pfn/a25051f3312b07f3fc86755cfd5648039519f8f0e4fc65b7bdfb.html> [https://perma.cc/RP94-EMYA]; Jinyibu Zhengdun Yiliao Zhixu Daji Feifa Xingyi Zhuanxiang Xingdong Dianxing Anli (进一步整顿医疗秩序打击非法行医专项行动典型案例) [Typical cases of the special campaign to further rectify medical order and crack down on illegal medical practice], HUBEI PROVINCIAL HEALTH DEV. SERV. CTR. (Jan. 4, 2015), https://wjw.hubei.gov.cn/hbwsjd/xwzx/szgz/202009/t20200905_2888404.shtml [https://perma.cc/JJ9R-6ADG].

36. 中华人民共和国民法典 (zhonghuarenmingongheguo minfadian) [Civil Code of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., May 28, 2020, effective Jan. 1, 2021), art. 8, 2020 Special Issue STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 2 [hereinafter PRC Civil Code].

37. *Id.* art 143.

violations of sexual ethics; (iv) violations of human rights and human dignity; (v) constraints on a free economy; (vi) violations of fair competition; (vii) violations of consumers protections; and (viii) violations of labor protections.³⁸ Surrogacy is highly relevant to the matter of marriage, family, ethics, etc. Commercial surrogacy faces opposition on ethical grounds and concerns about protecting traditional family modes and marriage. Hence, surrogacy contracts might be deemed contrary to public order and good morals in China for endangering family relations. Paragraph 2 of Article 153 of the Civil Code stipulates the consequence of contravening public order and good morals is that “[a] juridical act contrary to public order and good morals shall be void.”³⁹ Therefore, surrogacy contracts between individuals are void in a sense for being contrary to public order and good morals.

It is largely the same for surrogacy contracts between intermediate agencies and intended parents or surrogate mothers. Article 1009 of the Civil Code provides that “engaging in medical and scientific research activities related to human genes, human embryos, etc., shall abide by laws, administrative regulations and relevant state regulations, shall not endanger human health, violate ethics and morals, and shall not harm public interests.”⁴⁰ It obligates medical activities to abide by ethics and morals and not endanger public interests. The Civil Code is created by the legislative branch, and hence qualifies as the law. According to Article 8 of the Civil Code, mentioned above, “[t]he parties to civil legal relations shall not conduct civil activities in violation of *the law*,” and Article 143 of the Civil Code provides that “[a] juridical act satisfying all of the following conditions shall be valid, the third condition is that ‘It neither violates the *imperative provisions of laws*’”⁴¹ Imperative provisions of law refers to mandatory obligations that cannot be altered or escaped in a sense that the obligations must be abided by. We can tell from the provision of Article 1009 of the Civil Code that says, “engaging in medical activities shall not endanger,” where the use of “shall” indicates a mandatory obligation. In light of ethics and morals and public interests that may be involved in surrogacy contracts between intermediate agencies and intended parents, such surrogacy contracts are likely to be invalid. This is confirmed in the case of *Sun v. Sears International Consultation Co. Ltd.*, where the court of Guangdong Province held that the surrogacy contract between the parties was invalid concerning the provision of surrogacy service by Sears International

38. *Id.* art. 153.

39. *Id.*

40. *Id.* art. 1009

41. *Id.* art. 143 (emphasis added).

Consultation Co. Ltd. (which was the intermediate agency) to Ms. Sun.⁴² Nevertheless, the intermediate agency was compensated for reasonable costs and expenses occurred since both parties had fault in concluding the contract with the knowledge that the contract was against public interests and in violation of several laws and regulations.⁴³ Their compensation resulted from the application of the equitable principle that no one shall benefit from undue conduct.

Third, the legal parent-child relationship and the rights enjoyed by surrogate born children are not affected by the illegality of surrogacy in China. The separation of issues of legal parentage from that of the legality of surrogacy is not designed to encourage or legalize surrogacy but rather to protect the rights and interests of children. Given that surrogacy is prohibited in China in general by Article 1009 of the Civil Code as well as the Measures for Managing Human Assisted Reproductive Technology, which prohibits clinics and medical professionals from carrying out surrogacy, it cannot be referred to as a legal basis for the determination of legal status of children born out of surrogacy.

Last, laws and regulations in China do not have explicit provisions for the determination of legal parentage of children born out of surrogacy. In general, the provisions concerning Marriage and Family Law in the Civil Code do not have specific provisions for identifying legal parentage at all. In fact, the normal means is to identify the woman who gives birth to the child as its mother. With respect to the legal father, the man married to the woman who gives birth to the child, will be presumed as the legal father of the child.⁴⁴ The other way to identify the legal father is based on a biological connection proven by evidence.⁴⁵

In contrast, the answers regarding legal parentage are not clear cut in cases of surrogacy and can even contradict one another. There are several scenarios involving surrogacy: Scenario A is where the sperm is from the intended father, the egg is from a third party, and a surrogate mother gives birth to the child; Scenario B is where the sperm is from the intended father, the egg is from the intended mother, and a surrogate mother gives

42. Sun v. Sears International Consultation Co. Ltd., 粤03民终9212号民事判决书 (yue 03 min zhong 9212 hao minshi panjueshu) [Civil Judgment Civil Judgment Case No. Yue 03 Min Zhong 9212] (Guangdong Interm. People's Ct., 2018) (China).

43. *Id.*

44. Chen v. Luo, Stepmother Obtained Custody over Surrogate Born Children, Civil Judgment Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56 (Shanghai Interm. People's Ct., 2015) (China).

45. PRC Civil Code, *supra* note 36, art. 1073; Zuigaorenminfayuan Guanyu Shiyong 《Zhonghuarenmingongheguo Minfadian》 Hunyinjiating Bian De Jieshi (Yi) (最高人民法院关于适用《中华人民共和国民法典》婚姻家庭编的解释(一)) [Interpretation of the Supreme People's Court on the Application of the Marriage and Family Section of the Civil Code of the People's Republic of China, Judicial Interpretation No. 1] (Promulgated by the Judicial Comm. Sup. People's Ct., Dec. 29, 2020, effective Jan. 1, 2021) (China).

birth to the child; Scenario C is where the sperm is from the intended father, the egg is from the surrogate mother, and a surrogate mother gives birth to the child; and Scenario D is where the sperm is from a third party, the egg is from the intended mother, and a surrogate mother gives birth to the child.

In practice, Scenario A has been the subject of judicial decisions. In the *Stepmother Obtained Custody over Surrogate Born Children* case, the Shanghai court ruled on China's first surrogacy case in 2015,⁴⁶ which was also mentioned by the Supreme People's Court in its 2017 working report.⁴⁷ The case concerns whether the intended mother is the legal parent of children born out of surrogacy. In 2010, the infertile Ms. Chen and her husband, Mr. Luo, bought eggs and gave birth to twins through surrogacy. Her husband died of a serious illness, and the grandparents asked for custody of the children. The two parties disputed over the determination of the legal status of the children born by surrogacy, and whether Ms. Chen established a fictitious parental relationship with the two children and had custody of the children. The Shanghai No. 1 Intermediate People's Court, considering the best interests of the children and the fact that the children had lived with Ms. Chen for years, even after her husband died, held that Ms. Chen and the children had formed a stepparent-child relationship. The case aroused heated debate because the surrogacy involved in the case not only related to legal issues about parentage, but also involves ethics, morality and statutory law. To some extent, the court's reasoning reflects China's attitude towards surrogacy.

The court held that the children born by Mr. Luo and other women through surrogacy after Ms. Chen and Mr. Luo were married are children born out of wedlock of Mr. Luo. The children then lived with the couple for nearly three years after their birth. After the death of Mr. Luo, the children lived with Ms. Chen for another two years. Ms. Chen and the children formed a stepparent-child relationship because they lived together for almost five years. Considering the principle of the best interests of the child, Ms. Chen's acquisition of guardianship is also more conducive to the welfare of the children compared to the request of the grandparents for custody. However, the court did not confirm a *de facto* adoption out of the concern that if *de facto* adoption was to be recognized in this case, it would legitimize the implicit transfer of legal parentage from the surrogate mother to the intended mother, thus acquiescing to surrogacy, which is prohibited by law and policies in China.⁴⁸

In a nutshell, the judicial decision is guided by policies against surrogacy in the absence of explicit provisions in law. The principle of protecting children's rights and interests is operative throughout judicial

46. *Chen v. Luo*, Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56.

47. Zhou Qiang, WORK REPORT OF SUPREME PEOPLE'S COURT (2017).

48. *Chen*, Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56.

decisions in determining legal parentage of children born out of surrogacy. The judge handling the case stated that no matter how the illegal surrogacy is denied or condemned, the children born out of the surrogacy should be treated the same as normal children, and their legitimate rights and interests should be protected by law.⁴⁹ Therefore, regardless of whether it is a child born in wedlock or out of wedlock, whether to biological parents or through artificial reproduction, including surrogacy, the same protections should be afforded.

However, the other case concerning Scenario A was decided quite differently by the Guangdong Court. In the case of *Ms. Zhang v. Mr. Li Claiming for Custody*, Ms. Zhang brought the case in Beijing Court for seeking custody over a baby against Mr. Li.⁵⁰ Mr. Li claimed that Ms. Zhang was the surrogate mother and had no biological connection with the child since the child was born out of surrogacy in Thailand with sperm from Mr. Li and an egg from a third party. This case thus concerned whether biological connection as a basis for legal parentage or the birthing relationship would prevail. In the end, the court held that Mr. Li is the biological father of the child while Ms. Zhang is not the biological mother of the child. Based on the fact that the child was raised by Mr. Li for several months after its birth. The court, therefore, dismissed Ms. Zhang's claim for custody over the child. As for the surrogacy, the court held that no evidence showed there was surrogacy.⁵¹ It can be inferred that a biological connection is preferred over the fact of giving birth although this case denied the existence of the surrogacy arrangement based on insufficient evidence. In addition, the United Nations Convention on the Rights of the Child was mentioned in the case of *Ms. Zhang v. Mr. Li Claiming for Custody* in that Article 3 of that Convention confirmed the legal principle of best interests of the child, and China, as a negotiating party and contracting party, is obligated to apply the principle in its legislation and judicial practice, including in the determination of legal parentage by courts which are obligated to protect the best interest of the child.⁵²

The two cases contradict one another to the extent that the Shanghai Court recognized the woman who gives birth to the child as the mother while the Guangdong Court focused on biological connection and held that the alleged surrogate mother is not biologically connected to the child. Nevertheless, the two cases share commonalities in that the principle of protecting children's best interests is emphasized and

49. *Id.*

50. Zhang v. Li, Civil Judgment (Guangdong Interm. People's Ct., 2019) (China).

51. *Id.* See also Min Liu, 代孕妈妈起诉争夺抚养权, 法院这么判! [The Surrogate Mother Sued for Custody, and the Court Ruled Like This!], Baidu (Mar. 19, 2022), <https://baijiahao.baidu.com/s?id=1727735756108045651> [<https://perma.cc/FQJ6-XJN3>].

52. *Id.*; see also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

extensively applied in determining custody. Additionally, both courts tried working around the issue of surrogacy—the Shanghai Court fell short of talking about confirmation of legal parentage in cases of surrogacy and the Guangdong Court denied the existence of any surrogacy.

While no judicial decisions have been made in Scenarios of B, C, or D, the key points from judicial decisions related to Scenario A may be applicable to the other Scenarios by analogy. In Scenarios B, C, and D, courts are likely to identify the surrogate mother as the legal mother on the basis of the doctrine in China that the woman who gives birth to the child is regarded as the legal mother unless there is contrary evidence showing that no biological connection exists between this woman and the child.⁵³ Then, the legal father is the sperm provider. The intended mother, whether or not providing eggs, may be identified as a stepmother based on the fact of upbringing. However, at the time when the child is born, and during the period prior to the birth of the child, the intended mother cannot claim any legal right over the child given that she did not carry the child. To that end, intended parents are not likely to be legal parents of surrogate born children as they expect. In practice, the absence of provisions of law relating to legal parentage of children born out of surrogacy creates uncertainty for identification of legal parentage.

B. *China's Policies and Law on International Surrogacy*

There are many more Chinese couples seeking surrogacy overseas as intended parents where commercial surrogacy is permitted. In one case, for instance, a Chinese couple who stored their embryos in a hospital died. The parents of the deceased couple asked the Intermediate People's Court of Wuxi to grant them the right to dispose of their deceased children's embryos. The request was granted. However, the hospital where the embryos were stored only allowed the transfer of the embryos to a medical institution. As no Chinese institution would accept the transfer of the embryos to its facilities, the four parents requested that the embryos be transferred to a clinic in Laos. They then hired a commercial surrogacy agency to have the embryos implanted into a surrogate mother in Laos. The surrogate mother gave birth to the child in December, 2017 in China. It is not clear how the child is registered in China, or who his legal parents are.⁵⁴

In such international surrogacy, various legal issues arise. Could the child born out of international surrogacy obtain a birth certificate issued

53. Chunyan Ding, *Surrogacy Litigation in China and Beyond*, 2 J.L. & BIOSCIENCES 33, 47 (2015).

54. Jiangsu Wuxi Yixing Lengdong Peitai Jiufen An (江苏无锡宜兴冷冻胚胎纠纷案) [Shen Xinnan and Shao Yumei v. Liu Jinfa and Hu Xinxiang], Case No. Xi Min Zhong Zi No. 01235 (Wuxi Interm. People's Court of Jiangsu Province, Sept. 17, 2014) (China).

by a competent Chinese authority? Could the child concerned be household-registered in China in terms of “Hukou,” which is similar to a social security card in the United States? Could the child concerned get Chinese nationality? What about the legal parentage of the child concerned? Will a judicial decision by foreign courts in states where a child is born out of surrogacy be recognized by Chinese authorities? Will the birth certificate or documentation recording legal parentage issued by overseas authorities where the child is born out of surrogacy be recognized by Chinese authorities? The answers are not clear cut from analyzing current Chinese law and policies.

1. Birth Certificate, Household Register, Nationality and Legal Parentage

With respect to the issue of whether the child born out of surrogacy overseas could obtain a birth certificate issued by a competent Chinese authority, Article 23 of the Law of the People’s Republic of China on Maternal and Infant Health Care provides that “medical and health institutions and professionals engaged in traditional birth attendance shall, in accordance with the directives issued by the administrative department of public health under the State Council, issue uniform medical birth certificates for newborn babies.”⁵⁵ However, the abovementioned provision applies within the borders of China. In other words, children born overseas rather than in the territory of China cannot obtain a medical birth certificate issued by a competent Chinese authority.

With respect to the issue of whether the child born out of surrogacy overseas could be household-registered in China, it is important to explain what household registration is. Household registration is a little bit like obtaining a social security card in the United States. However, there are many more differences. A household registration, normally referred to as Hukou, officially identifies a person as a permanent resident of an area and contains identification information such as their name, parents, spouse, and date of birth. Hukou is related to education, medical service, and housing in a sense. For instance, in Beijing, you cannot be enrolled in public schools or even buy a house in Beijing if you are not household registered in Beijing.⁵⁶ Although Chinese household registration authorities have the power to register babies born out of

55. Zhonghuarenmingongheguo Muying Baojianfa (2017 Xiuzheng) (中华人民共和国母婴保健法(2017修正)) [Maternal and Infant Healthcare Law of the People’s Republic of China (2017 amendment)] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 27, 1994, amended Aug. 27, 2009, amended Nov. 4, 2017, effective Nov. 5, 2017), art. 23, CLI.1.304342 (PKULaw).

56. Kam Wing Chan, *The Household Registration System and Migrant Labor in China: Notes on a Debate*, 36 POPULATION DEV. REV. 357, 358–59 (2016).

surrogacy overseas, one prerequisite for registration is that legal parentage is already clear since registration of Hukou is based on the family unit and the household registration is issued per family—including all births, deaths, marriages, divorces, and moves of all members in the family. The child born out of surrogacy overseas could not be household registered if it is not clear who its legal parents are.

With respect to the issue of whether the child born out of surrogacy overseas could obtain Chinese nationality, according to Article 5 of Nationality Law of the People's Republic of China, "[a] person, born in a foreign nation, whose parents are both Chinese citizens are able to have Chinese nationality. However, a person whose parents are both Chinese citizens and have settled abroad and who has acquired foreign nationality at birth shall not have Chinese nationality."⁵⁷ However, this provision applies only if legal parentage is already clear. In other words, legal parentage of the child born out of surrogacy is a prerequisite issue for acquiring nationality.

It turns out the confirmation of legal parentage of the child born out of international surrogacy is a prerequisite for many issues, such as nationality. To the extent cases involving international surrogacy in relation to legal parentage are brought before courts in China, there are two matters that need to be addressed.

The first thing that judges face with the abovementioned cases present with is the issue of jurisdiction. In cases where Chinese intended parents bring lawsuits against the surrogate mother who is a resident of a foreign state, Article 23 of the Civil Procedure Law of the People's Republic of China is applicable given the international factors in these cases. Article 23 provides,

civil lawsuits described below shall be under the jurisdiction of the people's court of the place where the plaintiff has his domicile; if the place of the plaintiff's domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people's court of the place of the plaintiff's habitual residence:

(1) those concerning personal status brought against persons not residing within the territory of the People's Republic of China; . . .⁵⁸

57. Zhonghuarenmingongheguo Guojifa (中华人民共和国国籍法) [Nationality Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, effective Sept. 10, 1980), art. 5, CLI.1.796 (PKULaw).

58. Zhong Hua Ren Min Gong He Guo Min Shi Su Song Fa (2021 xiuzheng) (中华人民共和国民事诉讼法(2021修正)) [Civil Procedure Law of the People's Republic of China (2021 Amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 9, 1991, amended

To that end, it is the Chinese court where Chinese intended parents reside that has jurisdiction over cases in which Chinese intended parents bring a lawsuit against the foreign surrogate mother. In cases where the foreign surrogate mother brings a lawsuit against Chinese intended parents, Article 22 of the Civil Procedure Law applies. Article 22 stipulates,

[a] civil lawsuit brought against a citizen shall be under the jurisdiction of the people's court of the place where the defendant has his domicile; if the place of the defendant's domicile is different from that of his habitual residence, the lawsuit shall be under the jurisdiction of the people's court of the place of his habitual residence.⁵⁹

It can be concluded that in cases where the foreign surrogate mother brings a lawsuit against Chinese intended parents, it is the Chinese court of the place where the Chinese intended parents reside that has jurisdiction. Thus, courts in China have jurisdiction over actions brought against Chinese intended parents by the foreign surrogate mother challenging the legal parentage of the child born out of surrogacy. What if the foreign surrogate mother brings a lawsuit in a foreign state against Chinese intended parents? In that case, the issue of recognition of foreign judicial decisions regarding legal parentage of children born out of surrogacy arises. It concerns the competition of jurisdiction as well.⁶⁰

The second matter is the court's choice of law. Given that the confirmation of legal parentage of the child born out of surrogacy involves international factors, Chinese conflict of laws rules are applicable in order to figure out which state's law is applicable and then the legal parentage would be determined according to the law of that state. According to Articles 2, 5, and 25 of the Law of the People's Republic of China on the Application of Laws on Foreign-Related Civil Relations, there are two possible outcomes after the Chinese court applies Chinese conflict of laws rules.⁶¹ One outcome is that the Chinese court will apply the foreign law (the law of the state where the child concerned is born or the law of the state where the foreign surrogate mother resides). The other outcome is that the Chinese court will apply Chinese law instead of foreign law on the ground that the application of foreign law will impair the social value and public interests of China if the state where the child concerned is born out of surrogacy, as well as the state where

Dec. 24, 2021, effective Jan. 1, 2022), art. 23, 2022 *STANDING COMM. NAT'L PEOPLE'S CONG. GAZ.* 355 (China).

59. *Id.*, art. 22

60. See analysis in Section II(B)(2) below for further discussion of this issue.

61. Zhonghuanrenmingongheguo Shewai Minshi Guanxi Falü Shiyong Fa (中华人民共和国涉外民事关系法律适用法) [Law of the People's Republic of China on the Application of Laws on Foreign-Related Civil Relations] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2010, effective April 1, 2011), arts. 2, 5, 25, CLI .1.139684 (PKULaw).

the foreign surrogate mother resides, legitimizes commercial surrogacy. In cases where substantive Chinese law is applied, the analysis is similar to in section A above.

2. Does China Recognize Foreign Judgments on Legal Parentage?

When it comes to the issue of whether Chinese courts will recognize foreign judicial decisions on legal parentage, we may refer to Articles 281 and 268 of the Civil Procedure Law of the People's Republic of China which provides that a foreign judicial decision may be recognized provided it "does not contradict the basic principles of the law of the People's Republic of China nor violates State sovereignty, security and social and public interest of the country."⁶² Such a foreign judgment may confirm the legal parentage as follows: (a) the surrogate mother and her husband are legal parents of the child born out of surrogacy; (b) the intended parents are the legal parents of the child born out of surrogacy, and it may be the case that the intended parents are a same sex couple; or (c) the surrogate mother and the genetically related intended father (sperm provider) are the legal parents of the child concerned.

In the above mentioned scenarios, after review by Chinese courts in accordance with international treaties concluded or acceded to by China or in accordance with the principle of reciprocity, foreign judgments falling within category (c) are likely to be recognized by Chinese courts since it is much more in line with current judicial practice in China. In the case of foreign judgments falling within category (b), Chinese courts may not recognize such foreign judgments on legal parentage based on public interests, particularly considering that confirmation of intended parents as legal parents of children born out of surrogacy is an indirect way to legitimize surrogacy and same-sex marriage. As for foreign judgments under category (a), whether Chinese courts will recognize it has not been decided yet. However, according to the principle that the woman who gives birth to the child is regarded as the legal mother of the child, and her husband is presumed to be the legal father of the child, it is believed that Chinese courts may recognize a foreign judgment in category (a) unless there is evidence to the contrary.

3. Does China Recognize Foreign Documentation on Legal Parentage?

The question of whether China recognizes foreign documentation of legal parentage is in fact a question of whether China directly recognizes the legal parentage as recorded in the document. Foreign documentation is normally issued by administrative staff of a state. The typical example of foreign documentation on legal parentage is a birth certificate. What is recorded on the birth certificate or other document issued by a foreign

62. Civil Procedure Law of the People's Republic of China, *supra* note 58, arts. 281–82.

state could be: (a) the surrogate mother is recorded as the legal mother and her husband is presumed as the legal father; (b) the intended parents are recorded as legal parents of the child, and the intended parents may be a same-sex couple; (c) or the surrogate mother is recorded as the legal mother and the intended father is recorded as the legal father.

It is not clear whether a birth certificate is regarded as evidence to prove the fact of legal parentage or as a legal conclusion since there is no explicit law in this regard in China. If a birth certificate was to be regarded as evidence for the purpose of proving the fact, there is no need for China to formally recognize the birth certificate issued by a foreign state. Chinese courts may come to a different legal conclusion on legal parentage based on evidence contrary to what is recorded in the birth certificate issued by the foreign state. If a birth certificate was to be regarded as a legal conclusion on legal parentage, there are normally two kinds of treatment accorded to the birth certificate. One is the recognition approach and the other is the conflict of laws approach. The former approach refers to the legal parentage recorded in the birth certificate being directly recognized by a foreign state while the latter approach applies the foreign state's conflict of laws rules to determine legal parentage. Given that there are no explicit laws specifying which approach is to be adopted, the practice in China is less likely to adopt the recognition approach.

In addition, if surrogacy is carried out in China and the surrogate mother is the legal mother of the child concerned, the intended parents risk committing smuggling for taking the child across the border of China according to China's Criminal Law.⁶³

III. IMPLICATIONS FOR CHINA AND PREDICTION OF ITS POLICY RESPONSE

A. *How Will China Deal with Surrogacy Legislatively and Judicially?*

In terms of domestic legislation on surrogacy, current laws and regulations in this regard are actually two operative pieces of law. One is the Measures on the Management of Human Assisted Reproductive Technology, which is government rules on regulating medical practice that prohibit medical staff and institutions from carrying out surrogacy. The Measures were adopted in 2001.⁶⁴ The other piece is in the Civil Code of the People's Republic of China, which came into effect in 2020. It is a codification of civil law including contracts, family law, marriage

63. Zhonghuarenmingongheguo Xingfa (2020 xiuzheng) (中华人民共和国刑法(2020修正)) [Criminal Law of the People's Republic of China (2020 amendment)] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amended Dec. 26, 2020, effective Mar. 1, 2021), arts. 262, 322, 2021 Special Issue STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 1 (China).

64. See Measures, *supra* note 32.

law, inherent law, torts, etc. Nothing in the Civil Code addresses surrogacy except for one provision, which is Article 1009 of the Civil Code providing that “medical and scientific research activity related to human genes, embryos, or the like shall be done in accordance with the relevant provisions of laws, administrative regulations, and the regulations of the State, and may not endanger human health, offend ethics and morals, or harm public interests.”⁶⁵ However, the provision doesn’t explicitly prohibit surrogacy. This provision only regulates medical activities to the extent of abiding by existing rules, or alternatively not endangering ethics, morals, or public interests. In application of Article 1009 of the Civil Code, the relevant rules to abide by include the Measures enacted in 2001 since no new rules regarding surrogacy have been promulgated since.

A question may be raised as to why surrogacy was not addressed in the Civil Code of 2020 since it was a good opportunity to enact new provisions and rules in times of codification. In addition to that, no new rules regarding surrogacy have come from the State Council or ministries. The absence of new rules in laws, regulations, and government rules is more obscured in contrast to the campaign against surrogacy starting in 2015 in response to the surge of surrogacy in the black market. The underlying reason may also aid in predicting China’s domestic legislation regarding surrogacy in the coming years. In other words, China is unlikely to enact laws to explicitly prohibit surrogacy in the coming years due to four factors.

The first factor is the controversy around surrogacy. Surrogacy concerns the value of people, the morals of society, the needs of families, and the advance of medical technology. Too much controversy will arise in the debate of justification and legalization of surrogacy. Obstacles will also arise if there is a clear-cut prohibition of surrogacy in law in China. The second factor is the large need for surrogacy in China currently and in the future. In particular, China has abolished the one-child policy, allowing a family to have two children, and encouraging two or more children for one family, taking into account the aging society. The problem of an aging population is a large concern for China in the coming decades. However, couples are reluctant to have children nowadays due to reasons such as the cost of raising a child, limited time for childcare activities, etc. Among these reasons, the age of parents also makes it much more difficult for families to have second or third children. In addition to that, many women find that bearing a child by conception adversely affects their career advancement, and hence would like to look for surrogates.

65. PRC Civil Code, *supra* note 36, art. 1009.

The third factor is the international trends. Globally, many states allow commercial surrogacy, and international instruments will be negotiated in relation to surrogacy. Relatedly, the last factor is that leaving room for discretion is preferred in terms of policy cost. Although the legislation and judicial practice in other states are not authoritative in China, and international instruments on surrogacy are never meant to encourage or oppose surrogacy, it is a good idea to leave domestic legislation open and blank in this regard, leaving room for future policy developments. On one hand, the enforcement of relevant rules combating surrogacy is rigorously underway currently. Enforcing current government rules is a good approach to combat surrogacy and even going beyond that. The black market for surrogacy is always there. It is easy to find advertisements for surrogacy posted on the walls of toilets in hospitals. The cleaning staff are required to wash off these advertisements. However, the advertisements are too many to be cleaned up altogether. The black market of surrogacy is rampant, but it fluctuates depending on the rigor of enforcement. The demand for surrogacy will hesitate if confronted with a rigorous campaign against surrogacy. On the other hand, if law enforcement is not strict, the black market will prevail, and the phenomenon of surrogacy will be widespread. To that end, the bid demand for surrogacy will be met to a certain extent and hence alleviate the social anxiety of low birth rates. It makes sense that China prefers discretion embedded in government in combating surrogacy.

In terms of judicial practice, it is predicable that more and more cases relating to surrogacy will come out of China in the coming years. First, judges are likely to declare surrogacy contracts between surrogate mothers and intended parents as well as surrogacy contracts between intermediate agencies and intended parents/surrogate mothers to be void and non-enforceable. Second, judges are likely to solve the legal problem, such as legal parentage and custody, by working around the issue of surrogacy. Instead, relying on other legal techniques, such as a stepmother and child relationship. For instance, in the case of *Stepmother Obtained Custody over Surrogate Born Children*, the Shanghai Court recognized Ms. Chen as a stepmother based on the fact of living with the children together for years rather than explicitly recognizing her as the intended mother for the surrogate born children.⁶⁶ Third, judges are likely to grant custody to the intended parent who has a biological connection with the surrogate born child, rather than the surrogate mother who has no biological connection with the surrogate born child. In the case of *Ms. Zhang v. Mr. Li*, the Guangdong Court implicitly denied the legal parentage of a surrogate mother by only focusing on biological

66. *Chen v. Luo, Stepmother Obtained Custody over Surrogate Born Children*, Civil Judgment Case No. Hu Yi Zhong Shao Min Zhong Zi No. 56 (Shanghai Interm. People's Ct., 2015) (China).

connection and denying the sufficiency of evidence proving the existence of surrogacy.⁶⁷ Combing the two cases, it could be determined that the outcome of the cases actually confirms legal parentage of the intended parents and denies legal parentage of the surrogate mother. Fourth, judges tend to utilize the principle of best interests of the children. That is another way judges affirm intended parents as legal parents without directly recognizing the legality of surrogacy. Judges in the two cases above both talked about this principle and refer to the United Nations Convention on the Rights of the Child.⁶⁸ It is clear that this principle works as the most important thing in determining custody and legal parentage. It could be predicted that this principle will always work in this way throughout surrogacy cases in the future. The principle of the best interests of the children is a general principle without specific rules and guidelines in its application. To that end, judges have significant discretion in the application of this principle. It is also one reason that judges are in favor of this principle.

B. *Will China Join Relevant International Agreements?*

Will China join the future International Agreement on Legal Parentage and International Surrogacy Arrangement and if so, how? In light of discussion by the Experts' Group of the Hague Conference on Private International Law, there is no problem achieving consensus for the objective and scope for future international agreements. China, in the meantime, agrees that any future instruments which include coverage of ISAs should not be understood as an endorsement of the practice of surrogacy but rather as a mechanism for practically addressing limping parentage resulting from ISAs, as well as enabling states to better protect the human rights of all those involved in the cross-border arrangement. The adoption of any instrument would not be intended to encourage states to introduce surrogacy as a permitted practice. However, the scope of future instruments including domestic adoptions may raise difficulty for China as well. Domestic adoption is a quite independent sector in China.⁶⁹

With respect to mutual recognition of foreign judicial decisions relating to legal parentage. The future international agreement considers the following indirect grounds of jurisdiction: (a) the child's habitual residence; and (b) the respondent's habitual residence.⁷⁰ The consideration of the "child's habitual residence" is in accordance with the

67. Zhang v. Li, Civil Judgment (Guangdong Interm. People's Ct., 2019) (China).

68. *Id.* See also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

69. See generally Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 L. & Soc'y REV. 379 (2002) (discussing Chinese conception of adoption and the applicable laws in China).

70. See *supra* note 19 and accompanying text.

principle of the best interests of the child, and the consideration of the “respondent’s habitual residence” is a common practice of all states, including China, with respect to a lawsuit. Given that the civil procedural law in China stipulates the domicile or habitual residence of the respondent is the domain, or that of the plaintiff in situations where the respondent is neither domiciled nor habitually residing in China,⁷¹ China is less likely to oppose to the factor of the respondent’s habitual residence as an indirect ground of jurisdiction. The omission of domicile is not of significance since the practice in China tends to put emphasis on habitual residence rather than domicile.⁷² Furthermore, multiple jurisdictional bases rather than a single one is more likely to be accepted in China. In terms of grounds for refusal, such as the ground of procedural defects is of no concern. As for the ground of public policy, China is in favor of it. It leaves discretion and room for Chinese courts to refuse to recognize foreign judgments on legal parentage on the ground of public policy in situations where, for instance, intended parents determined as legal parents of the surrogate born child are of the same sex, given that China is far from being open to same-sex marriage.

With respect to mutual recognition of foreign documents recording legal parentage, there is possibility for China to accept the option of a combined approach—that is, a rule on the presumption of validity of legal parentage recorded in a foreign public document issued by a designated competent authority. In other words, a public document regarded as a legal conclusion with presumptive effect. Although current laws in China do not explicitly stipulate whether a foreign official document or a birth certificate is regarded as evidence to prove a fact, or to prove a legal conclusion, or as a legal conclusion by itself, it is practical to designate a domestic competent authority to issue birth certificates or international birth certificates in accordance with requirements provided in the future international agreement. In addition, China has the discretion of refusing to recognize the public documentation based on public policy grounds. This option doesn’t concern unifying direct jurisdiction and applicable law rules, making it easy for China to accept.

Concerning the ISAs Protocol with regard to safeguards in ISAs, it should be kept in mind that the more safeguards relating to surrogacy, the further it goes to regulate surrogacy substantively, which falls primarily within national jurisdiction. In light of China’s current position against surrogacy, safeguards in ISAs in international instruments are disguised unification of substantive law rules on surrogacy, and in other words, legalization of surrogacy. For instance, the true consent of the surrogate

71. Civil Procedure Law of the People’s Republic of China, *supra* note 58, arts. 281–82. Civil Procedure Law of the People’s Republic of China, *supra* note 58, arts. 22–23.

72. Qisheng He, *Reconstruction of “Lex Personalis” in China*, 62 INT’L & COMP. L.Q. 137, 138 (2013).

mother, the rights of all parties to be informed, the health standards required to become a surrogate mother, the rights and interests of the child concerned, the prevention of child abuse by the intended parents, the qualifications and conduct code of the intermediary, etc. These safeguards actually touch the area of regulation of surrogacy. Moreover, given that the primary objective of the Hague project is to ensure the predictability of legal paternity of children across borders, safeguards are of lesser priority. To that end, China is more likely to hesitate in accepting the ISAs Protocol in light of these safeguard provisions with the concern that current domestic substantive rules on surrogacy will not be respected.

In terms of direct jurisdiction and applicable rules of law in the draft conventions, to the extent that the state the child was born in or the state of habitual residence of the person who gives birth is likely to be the connecting factor for direct jurisdiction, China will provide thoughts on these provisions. In light of the Hague Convention on Choice of Court Agreements, which is about allowing individuals to choose the court they prefer, permitting forum selection clauses in international commercial transactions, and signed by China in 2017, there are no obstacles preventing China from ratifying the Convention.⁷³ China, nowadays, tends to be open to jurisdictional issues, including choice of courts. Hence, there is room for China to accept jurisdictional rules. To the extent that the state of the child born or the state of habitual residence of the person who gives birth is likely to be the connecting factor for the applicable rule of law, China may make reservations in this regard. This is due to the fact that the application of conflict of laws rules, such as applying the law of the state of the child born or the state of habitual residence of the person who gives birth, will substantively affect the outcome of legal parentage. In addition, China has not signed any international agreements concerning unification of applicable law rules. Making reservations is a reasonable and acceptable choice for China.

In addition to the above legal analysis of specific rules in future international instruments, there are factors that will be taken into account by China in determining whether or not to join a future international instrument on legal parentage and an ISAs Protocol. One is the economic factor. In light of the surge in surrogacy as well as international surrogacy arrangements, and we have analyzed why China is less likely to enact laws to explicitly prohibit surrogacy in the coming years, China has two options domestically. One is to strictly combat surrogacy and enforce current policies, and the other is to legalize surrogacy and make regulations for surrogacy. The latter is less likely. However, signing

73. Wei Cai & Jonathan Kolieb, *Between National Interests and Global Business: China's Possible Reservations to the Hague Convention on Choice of Court Agreements*, 11 J. OF INT'L DISP. SETTLEMENT, 295, 295 (2020).

international instruments concerning legal parentage except for ISAs, is not much of an obstacle for China since China may choose to accede to the international agreement on legal parentage in general, without accepting an ISAs Protocol immediately. The other factor is a political factor given that China is a party to the Convention on the Rights of the Child and China is determined to protect children's rights and interests. Joining an international agreement on legal parentage in general so as to avoid limp parentage, contributes to compliance with the Convention on the Rights of the Child. China has the willingness to make contributions in this regard.

CONCLUSION

Advances in science and technology and different policies in different countries have given rise to modern transnational surrogacy. However, it has led to many legal problems, especially the uncertainty of legal parentage for surrogate born children. The international community is trying various solutions, including diplomatic approaches, the use of existing conventions, the unification of the substantive law on the confirmation of legal parent-child relationship and the substantive law on surrogacy, etc., but they all encounter difficulties. The Hague Conference on Private International Law invited experts from around the world to study the issue and work towards draft conventions. In the present, it is considered feasible to formulate international agreements on general legal parentage and a protocol on ISAs with mutual recognition of foreign judicial decisions on legal parentage and foreign public documentation recording legal parentage as well as rules on jurisdiction and applicable law.⁷⁴ Based on China's anti-surrogacy policy, relevant legislation and judicial practice analyzed in detail, as well as prediction of its domestic legislation, and judicial practice in favor of surrogacy in the coming years, China is more likely to accept the international agreement on general legal parentage with reservations on applicable law rules, and maintain hesitance regarding a protocol on ISAs.

74. HCCH, *Report of the Experts' Group on the Parentage/Surrogacy Project*, at 1, Prel. Doc. No. 2 (Nov. 2019), <https://assets.hcch.net/docs/d435cffc-65ce-4047-b603-ff63ed20591c.pdf> [<https://perma.cc/5TWA-6CU9>].