

Dilemmas and Breakthroughs of the Guardianship System for Surrogacy Children in China: Construction of the "Biological-Pregnancy-Social" Triple-Consideration Model

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Keywords: In Surrogacy children; Guardianship; Legal dilemma; Triple-consideration model; Rights relief

Abstract: This paper comprehensively reviews the current situation of the guardianship of surrogacy children in China. The legal regulations on surrogacy and the guardianship of surrogacy children in China are evidently lagging, lacking in specialized legislation and clear norms. This leads to multiple dilemmas, such as in determining the legal status and guardians of surrogacy children, and the absence of effective protection for their legitimate rights. In judicial practice, due to the lack of legal basis, judges often face difficulties and the "different judgments for the same case" problem is prominent. To address these issues, the paper proposes a triple-consideration model of "biological connection + pregnancy fact + social rearing situation". It also suggests specifying the implementation guarantee of guardianship determination standards, including establishing a dynamic guardianship assessment mechanism, an emergency protection mechanism for negative conflicts in guardianship, and an integrated surrogacy-guardianship information platform.

1. A comprehensive review of current situation of guardianship of surrogacy children in China

In China, regarding the issues of surrogacy and the guardianship of surrogacy children, the legal regulations show obvious lag. This topic has neither been incorporated into the scope of specialized legislation nor included in the legislative plan, thus causing multiple dilemmas in aspects such as the determination of the legal status of surrogacy children and the identification of their guardians. In the current legal system, there are no clear provisions on matters related to surrogacy children. In practical operations, due to the lack of corresponding legal norms, it is difficult to obtain definite answers to many questions, which in turn leads to the fact that the legitimate rights and interests of surrogacy children in such cases are difficult to be effectively protected.

Although the Civil Code of the People's Republic of China has established the principle of the best interests of the ward, and also clearly defined that parents have the rights and obligations of raising and educating minor children, in the special context of surrogacy, the guardianship system has exposed many conflicts and contradictions, leaving the "commissioning parents" in a state of unclear understanding of their rights and obligations. On the one hand, the current law has not clearly defined

the type of contract concluded between the surrogate mother and the client and its validity.^[1] On the other hand, within the current legal system framework, there are no effective paths or means provided for the "commissioning parents" to solve problems such as identity recognition and the performance of rights and obligations.

In the field of judicial practice, although there have been disputes cases involving the guardianship of surrogacy, due to the lack of legal basis, when dealing with cases of the guardianship of surrogacy children, judges can only adopt the method of analogical application, refer to the relevant legal provisions of "illegitimate children", and determine the guardianship of surrogacy children according to the principle of "the best interests of the child". On the one hand, due to the particularity of surrogacy behavior and the resulting parent-child relationship, there are significant differences in the determination of the guardianship of surrogacy among different subjects in judicial practice. On the other hand, it should be noted that the legal application method of analogical application is extremely vulnerable to the interference of subjective factors such as the personal experience and value orientation of judges, which may easily lead to the judicial problem of "different judgments for the same case" when judges handle cases related to the determination of the guardianship of surrogacy children.

2. Dilemmas in the Determination of the Guardianship of Surrogacy Children in China

2.1. The Absence of Guardianship Determination Standards Leads to Difficulties in Legal Application

In China's current legal system, the definition of the subject status of surrogacy children is still lacking. This legislative gap often plunges the courts into an awkward situation of lacking legal basis when dealing with surrogacy-related cases. On the one hand, in terms of legal application for surrogacy children, it remains undetermined whether they should refer to the relevant rules for naturally-born children or be regulated as a unique category. On the other hand, this unclear legislative situation makes it difficult for judges to accurately select the legal provisions applicable to adjudication when hearing such cases. Some judges, considering the blood relationship, attribute the guardianship of surrogacy children to sperm and egg donors to resolve guardianship disputes. In other cases, however, judges tend to make judgments by comprehensively considering the objective reality during the surrogacy process and the actual living conditions of the children.^[2] This difference in consideration factors directly leads to significant differences in the judgment results of different surrogacy guardianship cases.

Such a situation has triggered a series of thorny problems. For parents with the same identity, just because their children are determined to be born through surrogacy, they may face completely different custody arrangements, which undoubtedly seriously infringes upon the legitimate rights and interests of surrogacy children. At the same time, this phenomenon of "different judgments for the same case" has also greatly weakened the public's trust in judicial fairness and shaken the society's confidence in the rule of law order. For example, in the "first surrogacy guardianship case in China" in Shanghai, the court determined that the entrusting party had guardianship based on the principle of "the best interests of minor children". However, in a similar case in Beijing in 2020, the court determined that the pregnant woman was the eligible guardian. This sharp contrast vividly demonstrates the judicial chaos caused by the imperfect legal norms.

2.2. The Lack of Effectiveness of Rights Remedy Channels

There are significant oversights in the domestic legislation regarding the regulation of surrogacy, which is prominently manifested in the failure to make a substantive distinction between physiological surrogacy and non-physiological surrogacy. Physiological surrogacy refers to the situation where the surrogate mother uses her own eggs to combine with the sperm provided by the entrusting party for fertilization and give birth to children. Non-physiological surrogacy, on the other hand, means that with the gametes provided by the donor couple, through techniques such as artificial insemination and in-vitro fertilization and embryo transfer, the surrogate mother conceives and gives birth to offspring. Given the obvious differences in the ethical connotations and social impacts of different types of surrogacy, they should be treated differently in legal regulations. However, the current laws do not make a substantive consideration of this, resulting in an embarrassing situation where there is no legal basis to rely on when facing different liability-bearing scenarios in practice.

Specifically, although the Technical Specifications for Human Assisted Reproductive Technology explicitly prohibits all forms of surrogacy, including the pregnancy stage, this specification is only a departmental regulation and does not have the mandatory binding force at the legal level. Article 1009 of the Civil Code only makes a general provision, requiring that medical and scientific research activities related to human genes, human embryos, etc. must comply with laws, administrative regulations, and relevant national regulations, but it does not clarify the specific legal consequences and liability-bearing methods corresponding to specific behaviors. Particularly importantly, the existing legal system has not established a special protection mechanism for the special circumstances of surrogacy children, making it difficult for this group to receive the respect and rights protection that the law should provide.

3. Feasible Routes to Improve the Guardianship System for Surrogacy Children in China

3.1. Ascertaining the Standards for the Attribution of Guardianship of Surrogacy Children

Before embarking on the improvement of the guardianship system for surrogacy children, it is crucial to clarify two key aspects: the legal standing of surrogacy children and the criteria for determining the entitlement of their guardianship. The essence of resolving the issues related to the legal status of surrogacy children and the standards for the attribution of guardianship lies in reconciling the discrepancy between their de-facto parents and legal parents. From the vantage point of practical rationality, the fundamental measure to address this quantitative disparity between the de-facto and legal parents of surrogacy children is to clarify the standards for the attribution of guardianship. However, constructing such standards without first clarifying the legal status of surrogacy children is tantamount to putting the cart before the horse, rendering the attribution standards ineffective in meeting societal needs, much like a structure lacking a proper foundation.^[3]

In this context, this paper contends that, in light of the principles of safeguarding human rights and maximizing the interests of children, it is necessary to clarify the legal status of surrogacy children as either "illegitimate children" or "adopted children" by means of improving relevant specific laws and regulations. When the time for specialized legislation specifically targeting surrogacy behavior and the guardianship of surrogacy children is not yet ripe or seems unnecessary, an alternative approach could be to amend the relevant concepts of "illegitimate children" and "adopted children" in the Marriage and Family Section of the Civil Code. This would involve explicitly enumerating "surrogacy children" within the purview of "illegitimate children" or "adopted children" in this section. Considering China's cautious legislative philosophy and the pressure-based legislative model, judicial

interpretation can also be an option. For example, the Supreme People's Court could incorporate "surrogacy children" under the provisions related to "illegitimate children" or "adopted children" through its judicial interpretations.

Given that the traditional dichotomy of relying solely on blood relationship or parturition is insufficient to meet the requirements for determining the guardianship of surrogacy children, it is urgent to create a more equitable and rational multi-dimensional examination approach. This entails constructing a comprehensive evaluation system that takes into account the interests of multiple parties, specifically the "biological connection + pregnancy fact + social nurturing situation" triple-consideration model. This model aims to achieve a multi-dimensional dynamic equilibrium, respecting natural laws, safeguarding children's rights and interests, and at the same time responding to social realities.^[4] Currently, the conspicuous absence of legal provisions regarding the guardianship of surrogacy children has led to the frequent occurrence of "different judgments for the same case" in judicial practice. For instance, in some cases, excessive reliance on blood relationship results in the neglect of the actual nurturing situation, while in others, one-sided emphasis on the parturition fact leads to the disregard of children's rights. The triple-model, by integrating biological, physiological, and sociological factors, can more comprehensively balance the interests of all parties, reduce the subjective arbitrariness of judicial judgments, and ensure that the determination of guardianship is both ethical and in line with real-world circumstances.

3.2. Guarantee of Rights Relief for Specifying the Standards of Guardianship Determination

Legal regulation of surrogacy is crucial for ensuring that the birth mother can smoothly obtain guardianship in this context. Currently, the regulatory norms regarding surrogacy in China are extremely sketchy and, in some aspects, nearly non-existent. In specific cases involving disputes over the guardianship of surrogacy children, the actual situations are extremely complex. There are even negative conflicts in guardianship, such as the situation where a party that has been recognized as the subject of guardianship for surrogacy children is unwilling to exercise guardianship, and then abandons or abuses the surrogacy children, or has their guardianship revoked in accordance with the law. Therefore, how to resolve these negative conflicts in guardianship has become a practical issue that urgently needs to be considered. Resolving negative conflicts in guardianship can not only effectively safeguard the fundamental interests of surrogacy children, but also protect the guardianship of other relevant parties in surrogacy, and further contribute to the improvement of the design of the guardianship system for surrogacy children.^[5] To address the above-mentioned issues, this paper proposes that, centering around the determination standard of the "biological connection + pregnancy fact + social rearing situation" triple-consideration model, the implementation guarantee of the guardianship determination standard should be specified.

First, in view of the unique nature of the guardianship of surrogacy children, a dynamic guardianship assessment mechanism should be established. Community workers, such as social workers and community doctors, should conduct quarterly assessments of the rearing environment, parent-child interaction, and children's mental health in surrogacy families. Once it is found that there is a lack of guardianship ability (for example, long-term neglect of children's care), the community can issue a written document in the name of the community, suggesting that the court initiate a guardianship adjustment procedure. For example, if a surrogate mother is unable to raise a child due to economic difficulties, after assessment, her guardianship can be transferred to the entrusting parents who have the ability to raise the child. For the situation where the established subject of guardianship refuses to fulfill their responsibilities, a "mandatory order for the performance of

guardianship responsibilities" can be introduced. For instance, if the entrusting parents refuse to receive the surrogacy child, the court has the right to compel them to fulfill their support obligations and freeze part of their assets to ensure the child's living needs until they take the initiative to assume guardianship responsibilities or transfer guardianship through legal procedures.

Second, considering the realistic possibility of negative conflicts in guardianship, an emergency protection mechanism for negative conflicts in guardianship needs to be established. When all relevant parties in surrogacy behavior refuse and are not suitable to raise surrogacy children, resulting in negative conflicts in the guardianship of surrogacy children, from the perspective of effectively safeguarding the interests of children, social welfare institutions should receive the children and provide temporary accommodation. At the same time, psychologists should be arranged to intervene to alleviate the psychological trauma of children caused by abandonment. In addition, the "Children's Fund" established by the state should provide long-term living security to ensure that the basic rights and interests of children are not violated. For example, in a cross-border surrogacy case, if the surrogate mother and the entrusting parents abandon their guardianship, the child can be temporarily cared for by a welfare home until the court re-adjudicates the custody.^[6]

Finally, in order to achieve the institutional guarantee of the guardianship of relevant parties of surrogacy children, an "integrated surrogacy-guardianship information platform" should also be built. Blockchain technology should be used to store key data such as genetic test reports and rearing records. This platform and the data it records are more conducive to efficiently safeguarding the guardianship of relevant parties. Specifically, this platform requires medical institutions to file key information such as surrogacy agreements, gene sources, and pregnancy medical records. These data can provide objective evidence for the "biological connection" (genetic testing) and "pregnancy fact" (pregnancy test report) in the determination of guardianship, avoiding the situation where the adjudication is in trouble due to lack of evidence when disputes occur. For example, when an entrusting parent claims guardianship, the platform can automatically retrieve data such as paternity test results and embryo implantation records stored on the chain, quickly confirm the biological connection between the entrusting parent and the surrogacy child, and can effectively avoid the risk of evidence forgery.

4. Conclusion

At present, the surrogacy guardianship system in China is deeply mired in multiple dilemmas. To effectively resolve these problems, this paper innovatively proposes the construction of a triple-consideration model of "biological connection + pregnancy fact + social rearing situation". This model is by no means a simple aggregation of traditional rules. Instead, it is committed to dynamically weighing different key factors and placing the interests of children at the core.

In terms of biological connection, it emphasizes the objectivity of blood relationships. Specifically, technical means such as genetic testing can be used to accurately clarify the parent-child relationship, laying a solid genetic foundation for the determination of guardianship. Regarding the pregnancy fact, full recognition is given to the physical and emotional investment made by the surrogate mother during pregnancy and childbirth. Especially in the case of physiological surrogacy, due to her crucial role in the pregnancy process, she should be given the priority to obtain guardianship, but reasonable exceptions should be set to protect the rights and interests of children. As for the social rearing situation, the focus is placed on the actual living needs of children after birth. If the entrusting parents have long-term and effectively fulfilled their parenting responsibilities, providing children with a stable living environment, emotional care, educational support, etc., even if there is no direct blood connection between them and the children, they should be entitled to claim guardianship based on the

social rearing situation.

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