

# Value Conflicts and Choices: How to Solve the Dilemma of Surrogate Parenthood Identification

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**ABSTRACT.** *Although surrogacy is currently banned in China, some people still violate the rules, and there are conflicts in judicial decisions regarding the surrogate parenthood identification. In the theoretical and judicial circles, there has been a tendency to confuse surrogate parenthood identification with the legitimacy of surrogacy and apply the natural childbirth parenthood identification rules. Based on the diversity of surrogate subjects and the complexity of behavioral structures, traditional parenthood identification rules have been unable to cope. Legislation should be specified. The value evolution of parenthood identification can be summarized as: natural selection-patriarchal center-equal rights of men and women-children's interests are given priority. There are value conflicts of multiple subjects in the identification of surrogate parent-child identity. Based on the principles of value rank and balance of interests, the following conclusions are drawn: Based on the priority protection of children's right to survival, the principle of giving priority to children's interests should be implemented. At the same time, based on the three factors of parental willingness, genetic connection and double-line parenting, the parenthood identification principle of parental subjective and limited consanguinity were established.*

**KEYWORDS:** *Conflict of values; Choice; Surrogacy; Parenthood identification*

## 1. Introduction

The identification of surrogate parent-child identity is a complex and practical issue. Surrogacy can be divided into partial surrogacy with genetic relationship and complete surrogacy without genetic relationship according to whether there is a genetic relationship between the surrogate child and the surrogate mother. In the former case, the surrogate mother not only gives birth, but also provides egg, which are genetically related to the surrogate child. Sperm usually comes from the entrusting man. In the latter case, the surrogate mother only gives birth, the egg usually comes from the entrusting woman or the donor, and the sperm usually comes from the entrusting man or the donor. In reality, the controversy caused by the identification of surrogate parent-child identity is mainly manifested in the situation

that the surrogate mother is not willing to give the surrogate child to the entrusting party. It may also be the case that the surrogate child is born with physical defects and the client and the surrogate mother are unwilling to assume parent responsibility.

There are three aspects concerning the complexity of this problem. Firstly, the legality of surrogacy is controversial and China's legislative attitude is not clear. This leads to the theoretical and practical exploration of the solution to the problem often tied to the discussion of the legality of surrogacy, and failed to treat it as an independent issue. This in turn may lead to adverse situations that may harm the interests of minor children when the law is applied. Secondly, the complexity of the subjects involved. The issue concerns clients, surrogate mothers, sperm and egg providers and surrogate children. In the most complicated cases, the surrogate child may face eight "parents", namely sperm and egg providers and their spouses, surrogate mother and her spouse, entrusting man and woman. What rules are used to confirm the legal parents of the child, they will inevitably face conflicts of values and choices. Thirdly, the complexity of the conflict of rights involved. In the process of confirming the identity right, when the client's fertility right, surrogate mother's body right, surrogate child's survival right, development right are conflicting, which right should be protected first. Moreover, the conflict of basic rights such as personal dignity, freedom, survival and development makes it difficult to choose between values.

The practical significance of this problem lies in the fact that although domestic legislation in China does not provide rules for the identification of surrogate parent-child identity, surrogacy behaviors and disputes occur in real life. The occurrence of some typical cases of surrogacy in recent years has also attracted the attention of society and academia. The author searched the keyword "surrogacy" from the judicial case database of China legal resource base of laws big data analysis platform (<http://bigdata.lawyee.net>). The search results show that from 2011 to 2019, there were 141 civil cases, 81 criminal cases, and 5 administrative cases. In the judicial practice, the parenthood identification rules for natural childbirth are generally applicable to the identification of surrogate parent-child identity. However, the subjects and behavioral characteristics of natural childbirth and artificial assisted surrogacy are significantly different. The application of the same rules may lead to contradictions and injustices in the judiciary, and is particularly not conducive to the protection of the interests of minor children. This violates the Value standard of modern identity division, and it is necessary to establish special rules on this issue.

It should be noted that "surrogacy" in real life has broad and narrow meanings. Surrogacy in the broad sense includes natural childbirth through sexual relations and surrogacy through human assisted reproductive technology. The latter refers to the behavior of females with childbearing ability who accept the commission of the client to conceive and give birth for another person using modern medical technology (artificial insemination or in vitro fertilization and its derivative technology) [1]. Based on the complexity and practical dilemma of parenthood identification of surrogacy under human assisted reproductive technology, this article only discusses within the scope of human assisted reproductive technology. The parent-child identity of the natural born "surrogacy" is more suitable to be

determined by the parent-child identity confirmation rules of children born out of wedlock, so it is beyond the scope of this article.

## **2. Dilemma and Evaluation**

### ***2.1 Realistic Dilemma of Legislation and Justice***

#### **(1) Surrogacy Cannot Be Prohibited**

At present, in China, medical institutions and medical personnel are prohibited from implementing surrogate technology at the level of health department regulations, and the legislative attitude on whether to prohibit surrogacy at the level of laws and administrative regulations is unclear.

In the 2011 to 2019 judicial cases inquired by the author from the legal case database of Peking University, the “surrogacy” involved in related civil disputes includes: (1) Both the husband and wife of the entrusting parties agreed that the husband would provide sperm and the wife would supply egg, and the surrogate mother would be entrusted to give birth through assisted reproductive technology; (2) Both the husband and wife of the entrusting parties agreed that the husband would provide sperm and the third person would provide egg, and the surrogate mother would be entrusted to give birth through assisted reproductive technology; (3) Both the husband and wife of the entrusting party agreed that the husband would provide sperm and the surrogate mother would supply egg, and the entrusted surrogate mother would give birth through assisted reproductive technology; (4) The entrusting man and woman were not spouse but agreed that the man would supply the sperm, and the woman would supply the egg, and the surrogate mother would be entrusted to give birth through assisted reproductive technology; (5) The entrusting man and woman were not spouse but agreed that the man would supply the sperm, the third person would supply the egg, and the entrusted surrogate mother would give birth through assisted reproductive technology; (6) In the name of “surrogacy”, the man has a natural sexual relationship with another person and has children. Except for the 6th item that does not meet the characteristics of assisted reproductive technology, the rest belong to the scope of surrogacy discussed in this article.

The disputes included: request for identification of parent-child identity, guardianship, inheritance right, child custody and maintenance payments, visitation right, performance of surrogacy contracts, divorce, and division of common property of husband and wife. The guardianship, inheritance, visitation, custody and maintenance payments usually are based on the identification of parent-child identity.

The court's decisions mostly affirmed that surrogacy was a invalid act on the grounds that surrogacy violated public order, good customs, laws, and legal principles. Due to the lack of direct rules, the current judiciary mainly confirms the surrogate parent-child identity in accordance with the rules of natural blood relatives or artificial blood relatives.

It can be seen from the above that although the current domestic legislation and judicial system in China have basically taken a negative attitude towards the legality of surrogacy, surrogacy facts and controversies based on surrogacy often occur. Although the current legislation in many countries has a negative attitude toward surrogacy based on money transactions, the relevant cases in China basically adopt this type of surrogacy. The purpose of surrogacy is to solve the problem of infertility. The author believes that surrogacy is an endless phenomenon, which is closely related to the high infertility rate, the desire of people to continue their bloodlines, and the maturity of assisted reproductive technology. Merely denying the legality of surrogacy or the regulatory measures of the health sector to combat surrogacy are no longer sufficient to solve the real problem. The absence of legislation regarding the identification of surrogate parent-child identity is even more detrimental to the protection of the interests of minor children.

## (2) Conflicts in Judicial Decisions

Regarding the identification of fatherhood, in the current cases, the men who entrusted surrogacy generally provided sperms, and the court's decision generally adopted the rule of blood relationship to determine the fatherhood of the male client. Decision conflicts occurred mainly in the identification of motherhood.

The first is the conflict of admissibility of the claim for parenthood identification. In justice, most cases requesting confirmation of parent-child relationship were accepted and judged by the court; However, there are also courts that have ruled against the acceptance of civil proceedings on the grounds that the parent-child relationship is not within the scope of the people's court to accept civil lawsuits.

The second is the conflict of motherhood identification rules between the childbirth doctrine and the blood relationship doctrine. Regarding the identification of motherhood, some judgments adopted the consanguinity doctrine. For example, the same situation of surrogacy with the consent of both spouses, when the wife is the egg provider, the wife's motherhood is identified;<sup>[4]</sup> When the third person provided eggs, it was determined that there was no parent-child relationship between the wife and the child on the grounds that surrogacy was illegal and there was no blood relationship with the wife.<sup>[5]</sup> However, some rulings adopt childbirth doctrine and believe that the legal biological mother should be determined according to the principle of "women who give birth are mothers".

The third is the conflict whether the entrusting woman who has relation of raising with the surrogate child could establish a step parent-child relationship or not. Some decisions denied the establishment of a parent-child relationship on the grounds that there was no blood relationship or that the surrogacy is illegal. Some Others, on the grounds that conforming to the legal relationship established condition and the protection of the interests of minor children, have established a step-parent relationship with a raising relationship.

The above conflicts of judgments is directly related to the absence of legislation to confirm the parent-child identity of surrogacy. The lack of a basis for adjudication leads to inconsistency in justice and damages the judicial authority and the legal

rights and interests of the parties.

## ***2.2 Evaluation and Analysis of Status Quo and Problems***

### **(1) The Legality of Surrogacy Should Not Be Confused with the Identification of Parenthood**

On the question of the identification of the surrogate parent-child identity, especially the identification of the motherhood identity of the entrusting woman, the court's decisions were mostly based on the prohibitive regulations of the Ministry of Health. On the grounds that surrogacy is illegal, the motherhood of the entrusting woman should not be confirmed. For example, "Employing a surrogate mother is against ethics and is prohibited by law". "The surrogacy itself is not legal, and it is difficult to determine that after such an act has been given a chance to raise a child, the two parties can form a fictional blood kinship.

In the theoretical discussions in the academic world, there are also opinions that the recognition of the motherhood of the entrusting woman actually helped her "get legal status from the illegal act and realize the desire to raise children" [2], leading to the "default effect on surrogacy". [3]

The controversy over the legitimacy of surrogacy lies in the surrogacy itself, the core of which is the value balance between personal freedom and public order and good customs. That is to say, whether the client has the right to choose a surrogacy method, whether the surrogate mother has the right to use her own body organs to give birth to others, whether the prohibition of surrogacy violates the client's fertility rights, and whether the surrogacy violates Personal dignity of surrogate mothers, whether surrogacy is suspected of buying and selling babies, and whether surrogacy destroys marriage and family relationships. [4] The confirmation of the parent-child identity of surrogacy is based on the fact that surrogacy has occurred and the child has been born. The end point is to determine the rules of parent-child identity, and then determine the kinship rights between parents and children and the scope of other kinship rights. The core of the problem is the value standard of parent-child identification, that is, when children's rights of protection, freedom of contract, true blood relationship, physical dignity and other values conflict, the ranking of their value ranks.

The division of identities in the sense of modern law has evolved from ancient times in order to strengthen the status of the strong among members of society to the protection of vulnerable groups. The nature of parental rights has also shifted from maintaining parental autocracy to emphasizing parental duties and responsibilities. Based on "natural rights", minors are considered first as "people" and secondly as "children" of parents. They have the same rights as adults and are protected by the state. [5] Even if surrogacy is illegal, children born as a result of surrogacy are still independent rights subjects with independent and equal personality. The children of surrogacy should be treated equally as the children of natural childbearing and artificial assisted reproductive technology concerning confirmation of parent-child identity, and there should be rules for confirming rights in accordance with its

characteristics and the principle of protecting the interests of children. The possibility of the entrusting party to become a parent of a surrogate child directly cannot be denied for the reason that the surrogacy is illegal. Otherwise, it may lead to the situation that the surrogate child has no parents, or that the parents determined by law have no willingness to assume parent responsibility, which is not conducive to the survival and development of the child. It can be said that it is an inevitable requirement for the protection of children's human rights to separate the identification of surrogate parenthood from its cause and act as an independent legal issue.

#### (2) Parenthood Identification of Surrogacy Should Not Adopt the Rules of Natural Childbirth Parenthood Identification

Most current judicial decisions use parenthood identification rules of natural childbirth.

Regarding the confirmation of the father's identity, in the existing cases, the entrusting man was generally sperm provider, so the judgment was based on the blood relationship to determine the father's identity of the entrusting man. However, the applicable rule of the law ignores the characteristics of assisted reproduction of surrogacy, and it cannot solve the problem how to determine the father's identity when the entrusting man is separated from the donor. This is indeed possible when the man does not have fertility. If consanguinity standard is still used in this case, the fatherhood can only be the donor. However, in this case, the sperm donor generally donates for the purpose of helping infertiles with childbirth, and has no intention to raise children born with his sperm through artificial assisted reproduction. Regarding the legal sperm donation, the law shall respect the intention of the parties and shall not impose their legal fatherhood identity. If the fatherhood identity of the sperm donor is determined, it is obviously not conducive to the protection of the rights of the minor child if he has no will to raise or does not know where he is.

Regarding the identification of motherhood, there are two standards for the existing judgments, one is the consanguinity, and the other is the majority of childbirth. In the case of natural childbirth, consanguinity and childbirth are essentially the same, that is, the mother of childbirth must be the mother of consanguinity, and childbirth is only an external form of judging consanguinity. Only in the case of artificially assisted reproduction, will the separation of the blood mother from the mother of childbirth occur. In the case of surrogacy, there will be a complicated situation where the blood mother, the mother of childbirth, and the client who wishes to be a mother are separated. In the case of surrogacy, if the consanguinity standard is simply adopted, when the egg donor is not the client or the surrogate mother, there will also be the problem that the legal act of donation will be imposed as the legal consequence of mother's identity. If the standard of childbirth is completely adopted, when the childbirth party only wants to help others give birth but does not have the willingness to become a mother, and the entrusting woman has a strong will to support, it is obviously not in the best interests of children's survival and development to compel the surrogate mother to bear the responsibilities of raising, educating and protecting.

Surrogacy has different characteristics from natural childbirth. The first is the pluralism of the subject. In the case of natural reproduction, sexual behavior, genetic origin, and childbirth occur in situations where both sexes are unique. Therefore, biological parents can be judged based on the facts of blood source and childbirth. In the case of surrogacy, at least four subjects are involved (the client's man and woman, surrogate mother, and surrogate child), and theoretically up to nine subjects (the client's man and woman, sperm and egg providers and their spouses, surrogate mother and her spouse, and surrogate child). The second is the complexity of the behavior structure. Compared with natural childbirth, in the case of surrogacy, with the help of artificial assistive technology, the birth originates from the commission contract between the client and the surrogate. It does not require sex and is separated from the genetic source. As a result, the traditional parent-child identification rules for natural reproduction have been unable to cope with the complex characteristics of surrogacy. In reality, scramble for or shirk child custody may occur, leading to uncertainty in parent-child status. This is not conducive to the protection of kinship rights, especially children's rights and stability of family and social. It is necessary to legislate clear rules to determine the parent-child identification criteria, such as the commission agreement, the facts of childbirth, the blood gene, or the interests of children. In view of the conflicts of interests of multiple parties, legislators will inevitably face complex value conflicts and choices.

### **3. Value Evolution of Parenthood Identification**

Regarding the definition of value, Marx pointed out that “value, this universal concept is derived from the relationship between people's treatment of external matter that meets their needs.” [6] The value is “the attributes of things that people take advantage of and that express a relationship to their needs”. [7] Value is the meaning of the object to the subject and the satisfaction of human needs. The value of law is the satisfaction of the law as an object to human needs and the orientation of the person about law. [8] “The value of law is not fixed. It shows differentiation, diversity, and pluralism with different times, societies, classes, and groups.” [9] The identification of parenthood identity is an ancient system that has continued to this day and has experienced the value evolution from natural selection to patriarchal dictatorship to equal rights between men and women and the protection of minor children's rights.

#### ***3.1 Natural Selection Stage: Birth Dominance Dominated by Identification of Mother and Child***

The identification of parent-child identity originates from the natural selection of human evolution in ancient times. Bloodline families in the prehistoric obscurity group divided the marriage group by generations, and only rejected direct marriage (between ancestors and offspring, between parents and children). The Punalua family further excludes intermarriages between sisters and brothers. In the dualistic family at the turn of the obscurant and the barbaric, due to the growing range of relatives

who are prohibited from marriage, there has been a spouse system of one man and one woman in a short or long period. Human intentions to spontaneously prevent the marriage of close relatives have repeatedly manifested. In these family forms, the father of the child cannot be completely determined, but the mother of the child can be determined through childbirth. [10] Therefore, the earliest confirmation of parent-child status is based on the confirmation of mother-child status, which is confirmed by the fact that the mother gave birth. Its important purpose is to identify the range of blood relatives and avoid the harm of close marriage to racial reproduction.

### ***3.2 Patriarchy: Paternalism-Led Consanguinity Doctrine***

In the prehistoric barbaric era, from middle to advance to recent times, the content of the parent-child identification system is centered on patriarchy. With the improvement of human productivity and the emergence of private property, husbands have more wealth due to their physical and division of labor characteristics. "On the one hand, wealth makes the husband occupy a more important position in the family than the wife, and on the other hand, it generates a motive force to use this enhanced position to abolish the traditional inheritance system to benefit children. However, this is not possible when the lineage is determined according to the matriarchy ".So "abolished the method of calculating the lineage by the female line and the right of inheritance of the maternal line, and established the method of calculating the lineage by the male line and the right of inheritance of the father line". A patriarchal society is founded on male domination, and its obvious purpose is to have children with a definite biological father, so that children will inherit their father's property in the future as biological heirs. [10]

But the identification of the father is not as obvious as the identification of the mother through the facts of childbirth. Even in order to maintain the dominance of the husband, women should practice single spouse system. But "though adultery, despite its prohibition and severe punishment, cannot be eradicated, it has become an unavoidable social system that goes hand in hand with individual marriage and licentious marriage. Whether the child is definitely from the father, as before, can only be based on moral convictions." [10] Therefore, a series of paternity identification rules were established for patriarchy, including presumption and denial of children born in wedlock, and the identification and correction of children born out of wedlock. The patriarchal core is manifested in the following aspects: 1. The unequal status of children born in and out of wedlock. In the early days, only children born in wedlock were legal children. Children born out of wedlock were not recognized or discriminated against unless they were claimed by their natural father or granted the status of legitimate children. 2. The dominance of father's will. On the one hand, in the identification of children born in wedlock, even if it could make a presumption that children born within wedlock according to the child's conception or birth time, the father must still express his intention to recognize the status of the child, otherwise the child does not have legal status. On the other hand, the claim and correction of minors born out of wedlock need only the unilateral expression of



the intention of the father, without the consent of the mother or child. 3. Take the true blood relationship between father and child as the objective criterion for judging parent-child relationship. This is manifested in the fact that, after the presumption of children born in wedlock, the father can initiate the denial of children born in wedlock on the grounds of no blood relationship.

In summary, in the patriarchal stage, in order to protect the family interests with patriarchy as the core, the blood truth is taken as the objective standard, and the father's subjective approval is the form element. Even if the blood is true, children without the father's approval cannot obtain the legal status of a child. At this stage, the parent-child identity is confirmed to follow the consanguinity standards dominated by father's will.

### ***3.3 Equal Rights of Men and Women, and the Priority of Children's Interests: Consanguinity is the Focus and Subjectivism Are Adopted***

Since the 20th century, the amendments of marriage and family laws in various countries have been centered on equality between men and women and the protection of children's rights. In the traditional family relationship, the relationship of unequal between husband and wife, parents and children has been replaced in modern times by the principle of equality between men and women and respect for the protection of children's rights.[11] Especially since the United Nations Convention on the Rights of the Child established the principle of the best interests of the child, modern parent-child law has evolved from the general principle of protecting children's rights to the principle of children's best interests. It manifests itself in the past focusing on legislation to safeguard the rights of parents to their children, while currently emphasizing the obligations and responsibilities of parents to their children." Parental rights in law" is in a secondary position compared to "Children's best interests". [12]

In the field of parent-child identification, on the one hand, through the establishment of additional rules for the identification of mothers (usually the mother and child are confirmed by the fact of childbirth).The scope of the right to deny children born in wedlock has been extended from the exclusive enjoyment of fathers to the mothers and children. The father claim system has developed from the father's unilateral will to the mother's and child's will should be respected. Children born out of wedlock have the same rights and obligations as children born in wedlock. It embodies the principle of equality between men and women and the protection of children's rights and interests.

On the other hand, a series of rules reflecting the principle of the child's best interests have been added, which are mainly reflected in:

The first is the compulsory nature of consanguinity doctrine, which provides for the mandatory confirmation of the identity of parents. That is, in order to avoid the absence of legal parents after the birth of a minor child, most European countries' legislations provide for a mandatory registration of mothers' names in birth registration. After the child is born out of wedlock, if the father is unwilling to claim,

the mother or the state authority can confirm the father identity through compulsory claim and proof by all means.

The second is that when consanguinity doctrine conflicts with the protection of children's interests, it also adopts subjectivism, respects the intention of the parties, and protects the stability of identity. For example, multinational legislations provide for restrictions on the scope and duration of denial right of children born in wedlock. Even if the legal father is not the biological father, in order to protect the interests of children and the stability of marriage, family, and social order, not everyone can sue for denial. And the right of denial was extinguished due to the expiration of the exercise period of the denial right and the explicit waiver of the denial right. In the case of voluntary claim by the father, the mother and child can refuse if the claim is not in the interest of the child. Another example is the identification of the parenthood identity of the artificially born children. In many countries, the children born by the heterogeneous artificial insemination and the heterogeneous in vitro fertilization of the wife's eggs agreed by both husband and wife shall be regarded as the legitimate child of the husband and wife and shall not exercise the right of denial. At this time, even if one of the couple undergoing surgery had no blood relationship with the child, he or she still presumed to be the parent of the child because of the consent. Even without consent, in order to prevent the child from having no parents, the parent-child identity is still presumed to be established, but the party who does not consent can exercise the right of denial.

The modern parent-child identification system places more emphasis on protecting the interests of minor children than the will of parents. Even if parents do not want to acknowledge, in order to protect the rights and interests of minor children, the law authorizes the mandatory recognition of parent-child identity based on blood relationship. At the same time, bloodline doctrine can be restricted according to the interests of children, reflecting the value orientation of giving priority to children's interests.

#### **4. Value Conflicts and Choices in Surrogate Parenthood Identification**

The core question of surrogate parenthood identification is what standards are used: whether to determine the parent identity of the entrusting couple based on the entrustment contract (willing doctrine), or to confirm the motherhood of the surrogate mother based on the facts of childbirth and the fatherhood of the spouse of the surrogate mother (childbirth doctrine), or to confirm the parent-child identity based on genetic gene(consanguinity doctrine) or the children's best interests (children's best interests principle), or adopt some mixed standard. Due to the challenges to traditional ethics and the conflict of multiple values, the academic views are controversial, and the legislations of different countries also have different standards.

At present, there are mainly the following models in the legal practice of various countries: first, surrogacy is completely prohibited, all the surrogacy participants are guilty, and the client is not allowed to become a parent, only the surrogate mother

can become a legal mother, such as France. Second, it is stipulated that surrogacy is illegal, and the surrogate mother is a legal mother, but when the best interests of the child are necessary, the client is allowed to adopt the surrogate child, such as Germany. The third is to recognize the non-profit surrogacy, and the surrogacy agreement does not have the force of enforcement. The entrusting party can obtain the identity of parents through the court's determination, but the surrogate mother has the right to choose the identity of mother within a certain period of time when the child is born, such as in the UK. The fourth is to determine the identity of parents of the entrusting couple when the genes come from both sides of the entrusting couple, such as Ukraine. Fifth, the implementation of surrogacy agreement is recognized, and the entrusting couple have the right to obtain the status of parents, such as Illinois, USA. [1] China's domestic legislation has not specifically stipulated this.

Choosing between conflicting interests that are not guided by existing norms and principles requires value judgment. The value of law is the ideological guide of legislation. [16] "Any specific legal system is based on a value order that is confirmed and consolidated through norms by legislators." [23] How to decide in the formulation and application of laws necessarily involves the issues of value recognition, value evaluation and value selection.

#### ***4.1 Performance of Value Conflict: Multilevel and Diverse Value Conflict Structure***

There are multilevel and diverse legal value conflicts in the identification of surrogate parenthood. According to the value needs of different subjects, there are value conflicts between different individuals, value conflicts between individuals and groups, and value conflicts between the same individual. And there are conflicts of multiple value elements in the value conflict structure.

Concerning the value conflicts among different individuals, it is mainly manifested in the value demands conflicts among the entrusting party, the surrogate mother and the surrogate children. As far as the entrusting parties are concerned, they may claim parenthood identity based on reproductive rights and freedom of reproduction, that is, "the infertile persons have the right to choose to obtain their own child through surrogacy technology".<sup>[24]</sup> As far as the surrogate mother is concerned, she may claim the identity of mother based on physical dignity, that is, "human is the purpose, not means". As for the children born by surrogacy, based on their survival needs, the parent-child identity should be confirmed in the best interests of the children. That is, because surrogate children do not have the ability to survive independently, parents are the primary responsible persons for the upbringing, care, education, and protection of minor children.<sup>[25]</sup> The division of parent-child identity is of fundamental significance to the survival and development of surrogate children. Parenthood identity should be confirmed according to the child's best interests.

Concerning the value conflict between individuals and groups, it is mainly

manifested as the conflict between individual freedom of reproduction and human ethical order and evolutionary needs. The original value of the division of parent-child relationship was for the needs of the human group to survive and evolve, in order to ensure the quality of reproduction and avoid consanguineous intermarriage. This value demand still exists today. However, in order to solve the problem of infertility of the individual, in the case of partial surrogacy or a complete surrogacy provided the genes by other persons, at least one of the clients has no blood relationship with the surrogate child. If the parent identity of the unrelated party is confirmed, it means that persons who were not confirmed the legal parent-child identity but provided the genes or their close relatives may intermarry with the surrogate children, which has a negative impact on human marriage order and evolutionary needs. On the other hand, there is also a conflict between the consanguinity doctrine and the autonomy of the legal sperm donors and egg donors.

The value conflict of the same individual is mainly manifested in the conflict between the physical dignity and the physical freedom of the surrogate mother, which is the focus of controversy on whether the client's parent identity can be recognized. The viewpoint that the value of physical dignity of a surrogate mother is given priority is that surrogacy is the instrumentalization of the womb of a surrogate mother and violates the dignity of female personality. Therefore, even if the surrogacy contract is signed independently by the surrogate mother, it is still invalid, and the parent identity of the clients cannot be recognized. The viewpoint of maintaining the physical freedom of surrogate mother is that in the case of non-commercial surrogacy, and on the premise that it does not violate public policies and the interests of others, surrogate mothers have the right to exercise physical autonomy and conclude surrogacy contracts. Surrogacy not only doesn't damage the personal dignity of women but also improves their personal dignity. [26] Therefore, the validity of the surrogacy contract concluded by the surrogate mother based on her body's autonomy should be recognized in this case, and the parent identity of the clients should be recognized.

#### ***4.2 Value Choice: the Principle of Parental Subjectivism and Limited Consanguinity Dominated by the Priority of Children's Interests***

Concerning the identification of surrogate parenthood, there are conflicts of multiple value elements, including: the client's freedom of reproduction, the physical dignity and physical freedom of surrogate mothers, the survival and development of surrogate children, the ethical order and evolution of human society. In order to seek the best legal benefits, it is necessary to comprehensively use conflict resolution principles such as the value ranking principle and the case balance principle for value selection.

(1) Priority of Children's Interests: the Principle of Giving Priority to the Right to Survival

The basic value of law is the criterion that every link of law must comply with, and the value that other values of law must comply with. [18] In the measurement of

benefits, we must first consider “whether one type of legal interest involved here has obvious value superiority over other legal interests”. [29] The right to survival is the most basic part of the right to life and the basis of all rights. All human rights need to be based on the right to survival. Without the right to survival, any right becomes meaningless. The priority of the right to survival is reflected in the priority protection of the law. Any behavior that hinders people's survival is opposed by law. Among all civil rights, the right to survival has the most basic nature. The enjoyment of other rights requires concessions to the right to survival when necessary. [8]

The identification of parenthood is directly related to the guarantee of the right to survival of surrogate children. Although surrogate children have the status of independent subject of rights, they do not have the independent ability to survive and must depend on the protection of their guardians. Parents are the legal guardians of minor children. The primary obligation of raising, educating and protecting minor children is a key element in realizing their right to survival. Therefore, in the formulation of rules for the identification of surrogate parenthood, the protection of the survival right of minor children should be taken as the basic value proposition, and the value choice of children's interests should be implemented.

On the other hand, the old parenthood identification rule of the true consanguinity for avoiding intermarriage between close relatives is still applicable in modern society, which is related to the ethical order and survival and evolution of human groups. According to this value requirement, the ideal state is that the legal parents and the genetic parents are consistent. However, the emergence of surrogate technology is accompanied by the physiological regret of the client's infertility. Except for the case where the genetic genes come from the entrusting spouse of the complete surrogacy, the sperm and egg providers are not from the same family in other cases. If the parents are only identified through genetic gene, the person who has no intention of raising may be identified as the legal parents, and single-line parenting is undoubtedly not conducive to the growth of children. In addition, if the sperm and egg providers for donation purposes are forced as a parent because of blood relationship, will undermine their autonomy and will even not be conducive to the growth of the children. At this time, the survival and evolutionary needs of the human group conflict with the survival and development needs of surrogate children. When conflicts occur between values at the same level, the specific situations, needs, and interests between the subjects should be considered comprehensively.[28] On this issue, if the consanguinity doctrine is enforced, it will obviously undermine the survival and development interests of minor children and the freedom of will of genetic material donors. However, if limited consanguinity is adopted, that is, when one of legal parents is allowed to have no genetic relationship with the children, it is still possible to avoid the intermarriage of the close relatives in advance through technical testing and other means, and the damage to the whole human being is relatively small. From the perspective of balance of interests, the right to survival of the surrogate children should be prior protected.

## (2) Parental Subjective and Limited Consanguinity Principles

After all, the priority of children's interests only determines the principle

direction of problem solving. As far as the actual solution of the problem is concerned, the priority of children's interests is subjective. In order to realize the standardization and consistency of the application of the law, it is still necessary to evaluate and select the specific rules and schemes.

At present, various theoretical discussions about the confirmation rules of surrogate parenthood are related to the protection of children's interests. For example, (1) The viewpoint of confirming the parent identity of the entrusting party holds that the personal dignity and civil status of surrogate children should be protected equally. In order to protect the surrogate children, when there is currently no legal provisions on the identity of relatives of children born from surrogacy, the surrogate children should be confirmed as the legitimate children of the entrusting couples according to the most similar source of law. This is the legal position that best protects surrogate children. [20] (2) The viewpoint of confirming the motherhood of surrogate mothers believes that since the uterus provider participates in the pregnancy process of life, it is easier to establish a close relationship with the surrogate children. In general, surrogate mothers are the best caregivers for the interests of surrogate children. [21] (3) The viewpoint of confirming the parent identity based on the source of genetic genes is that the blood standard is more in line with the nature of human reproduction and moral sentiment. The blood relationship is conducive to maintaining parents' love for their children and is conducive to their growth. [22] (4) The viewpoint that the identification of parent-child identity in the best interests of the children holds that for the protection of the best interests of the minor children, it is only a "decision" in legislation to determine which of the sperm, egg and uterus providers is the legal parent, and there may be defects in establishing the legal priority of either party. Therefore, it is more important to determine the optimal scheme to protect the best interests of minors according to the rules of benefit measurement in individual cases. [23]

Since it is in the interests of children to confirm the parent-child identity with any party, it's necessary to study which is more in the interests of children. This needs to be analyzed from the nature of human fertility. Mr. Fei Xiaotong believes that fertility is for the purpose of racial extension, and the fertility system is an activity system that occurs from the needs of racial extension. Fertility is an activity that benefits others and harms one's own interests, and raising children is sacrifice for parents. Human upbringing is dual line, that is, parents are responsible for the upbringing of their children, and parents are equally important at home. The basic structure of the fertility system is the triangle of father, mother and child. [24] In other words, since parenthood means the commitment of long-term obligations, from the perspective of benefiting children's growth, this requires parents to have enough parenting will. Race continuation is the purpose of fertility and the fundamental motivation for parents' willing to sacrifice. Parental dual-line parenting is more in line with children's interests than single-line parenting. Therefore, three factors of the parenthood identification rules that give priority to children's interests are deduced, that is, parents' parenting willingness, genetic connection, and dual parenting.

Children from birth to adulthood require a lot of emotional, time, and material

input from parents. Taking the long-term obligation of parenting into consideration, parents' long self-sacrifice needs the support of willingness to bear the responsibility of parents. If there is no such willingness from the beginning, it is not appropriate to confirm their parent identity. Therefore, parents' willingness to nurture is the necessary condition to confirm the identity of surrogate parenthood. Secondly, based on the subjectivity of nurturing will, its long-term maintenance needs to be based on objective factors. The purpose of fertility is the continuation of race bloodlines, and the gene connection is the objective motivation to maintain the long-term care intention. Therefore, there should generally be a gene connection between surrogate children and their legal parents. But as mentioned before, based on the characteristics of artificial assistive technology of surrogacy, complete consanguinity doctrine may harm the interests of children and the free will of gene donors. The author believes that the adoption of limited consanguinity doctrine with genetic relationship between at least one parent and the surrogate children is more in line with the characteristics of surrogate parent-child relationship. It can also take into account the needs of children, parents and human reproductive order. Thirdly, from the perspective of benefiting children's growth, parental dual parenting means at least two meanings. One is that in the process of parenthood identification, both parents should be identified, not only one party; the other is that both parents should bear the responsibility of parenting.

Therefore, the principle of parent subjectivism and limited consanguinity should be adopted in the identification of surrogate parenthood, that is, both parents confirmed by law should have the parenting willingness and bear the parent responsibility to the surrogate children, and at least one party has genetic connection with the surrogate children. Specifically:

(1) In the case of complete surrogacy where the genetic genes come from both entrusting parties: both entrusting parties have the three elements of parenting willingness, gene connection and dual-line parenting. The surrogate mothers have no parenting willingness at first. Even if the surrogate mothers have affection and parenting intention for the children during pregnancy, their spouses have no genetic connection with the children, nor have the parenting intention, and are not suitable as the father of the children. or it is possible that the surrogate mother is a single woman and it is difficult to achieve dual-line parenting. In this case, it is more in the interests of children to confirm the identity of parent of both entrusting parties.

(2) In the case of complete surrogacy agreed by the entrusting parties that one side of the genetic genes comes from the entrusting parties and one side from the donor: both entrusting parties have the willingness to raise and the element of dual-line parenting, and the single gene line is available. In contrast, for the absence of willingness and genetic connection elements of the surrogate mothers' spouses, or absence of dual-line parenting element, while the genetic gene donors do not have the willingness to raise. In this case, it is more in the interest of the children to confirm the identity of parent of both entrusting parties.

(3) It is more complicated in the case of the partial surrogacy that the entrusting parties have agreed on surrogacy, and the genetic genes come from the entrusting

man and the surrogate mother. If the surrogate mother does not have the willingness to raise, it is not disputed to confirm that the parent identity of the entrusting parties who meet the aforementioned three elements. If the surrogate mother has affection and parenting willingness to the child due to pregnancy and childbirth, both the surrogate mother and the entrusted man have the parenting willingness and genetic connection. However, the spouse of the surrogate mother does not have the willingness to raise or the surrogate mother is single and does not meet the condition of dual-line parenting. In addition, surrogacy mothers do not have the willingness to raise from the beginning, but both entrusting parties have the aforementioned three elements. Therefore, it is more in the interest of the children to confirm the identity of parent of both entrusting parties.

(4) In addition, in the case that the entrusting party entrusts the surrogacy unilaterally without the consent of the spouse, one side of the genetic gene comes from the entrusting party and one comes from the donor or the surrogate mother: from the perspective of protecting the interests of the children and avoiding the absence of legal parents, the parent identity of the entrusting party and the spouse should be confirmed. The party that does not agree may voluntarily exercise the right of denial to decide whether to assume parent responsibility for the surrogate children.

## References

- [1] Liu Changqiu (2016). *Research on Legal Issues of Surrogacy Regulation*. Shanghai: Shanghai Academy of Social Sciences Press.
- [2] Li Fan, Fan Jizeng (2019). Hidden Constitutional Review: The Jurisprudential Path and Judicial Impact of the 'Custody of Surrogacy Child' Case. *Journal of Sichuan Normal University (Social Science Edition)*, no.3, pp.45-46.
- [3] Zhang Mindan, Hu Jinbing (2017). Legal status and child custody confirmation of surrogacy children. *The People's Judicature*, no.2, pp.12-13.
- [4] Xu Wen (2019). Screening and classification: On the way to resolve the basic disputes in surrogacy cases. *Hebei Law Science*, no.11, pp.41-42.
- [5] Sun Ruojun (2013). *Research on the Legal Issues of the Conflict of Identity Right and Personality Right: From the Perspective of Marital Relationships [M]*. Beijing: China Renmin University Press.
- [6] Marx, Engels (1963). *Complete Works of Marx and Engels*. Beijing: People's Publishing House.
- [7] Marx, Engels (1975). *Complete Works of Marx and Engels*. Beijing: People's Publishing House.
- [8] Zhuo Zeyuan (2009). *Jurisprudence*. Beijing: Law Press, China.
- [9] Zhang Wenxian (1997). *Jurisprudence*. Beijing: Law Press, China.
- [10] Engels (1999). *The Origin of Family, Private Ownership and State*. Beijing: People's Publishing House.
- [11] Wang Hong (2009). *From status to contract*. Beijing: Law Press·China.
- [12] Douglas G, Sebba L (1998). *Children's rights and traditional value*. England: Dartmouth Publishing Company.



- [13] Bodenheimer (1999). *Jurisprudence: Legal Philosophy and Legal Method*, Deng Zhenglai, Translated, Beijing: China University of Political Science and Law Press.
- [14] Bourne Weidz (2003). *Jurisprudence*. Ding Xiaochun, Wu Yue, Translated, Beijing: Law Press.
- [15] Ren Wei, Wang Qian (2014). Legalization of China's surrogacy and its boundary research. *Hebei Law Science*, no.2, pp.45-46.
- [16] Xia Yinlan (2018). Reflections on the Minor Guardianship Legislation in Civil Code. *Jurists Review*, no.4, pp.34-35.
- [17] Kong Demeng, Chang Chun, Zuo Jinlei (2018). Study on Surrogacy and Fertility in Foreign Countries from the Perspective of Uterine Instrumentation. *Journal of Dialectics of Nature*, no.7, pp.18-19.
- [18] Zhuo Zeyuan (2006). *The value theory of law*. Beijing: Law Press.
- [19] Liu Xinjie (2011). *Introduction to Jurisprudence*. Sichuan University Press.
- [20] Yang Lixin (2017). *Six Lectures on Civil Law*. Beijing: China Renmin University Press.
- [21] Zhu Xiaofeng (2017). Illegal surrogacy and the realization of the principle of the best interests of minors: Comment on the country's first illegal surrogacy dispute over custody. *Tsinghua University Law Journal*, no.1, pp.28-29
- [22] Li Zhiqiang (2011). Civil Law Adjustment of Surrogacy. *Journal of Shanxi Normal University (Social Science Edition)*, no.3, pp.18-19.
- [23] Zhu Xiaofeng (2014). On the principle of the best interest of the adoption of minors in Germany and its defining standards. *Juvenile Delinquency Prevention Research*, no.2, pp.12-13.
- [24] Fei Xiaotong (2007). *Earthbound China* [M]. Shanghai: Shanghai Renmin Publishing House.