

# *Study on the Issue of Parentage Determination in Cross-Border Surrogacy*

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**Keywords:** Cross-Border Surrogacy; Parentage Determination; Limping Parentage; Public Policy; Best Interests of the Child

**Abstract:** The determination of parentage in cross-border surrogacy is plagued by the dilemma of "limping parentage," where children face legal uncertainty and rights deprivation due to conflicting laws between the state of birth and the receiving state. This study identifies the dual roots of the problem: fundamental conflicts and ineffective application of domestic laws (regarding surrogacy legality, jurisdiction, and conflict rules), and the widespread non-recognition of foreign birth certificates and judgments, primarily due to the sweeping invocation of the public policy (*ordre public*) exception. To resolve this, the paper proposes a two-pronged approach. At the transnational level, it advocates for stricter limits on the public policy exception, the structured application of the "best interests of the child" principle, and a shift towards a unilateral liberalization mechanism for judgment recognition. At the domestic level, particularly for China, it recommends establishing conflict rules using the child's place of birth as the connecting factor and creating a substantive rule system for parentage determination centered on genetic ties, supplemented by the "willingness to parent." Complementary legal reforms are also suggested. This combined approach offers a viable pathway to overcome the current legal impasse and systematically protect the rights of children born via surrogacy.

## **1. The Dilemma of Parentage Determination in Cross-Border Surrogacy**

### **1.1. Conflict of Parentage Determination Standards in Domestic Laws**

In cross-border surrogacy, intended parents often travel from countries that prohibit or restrict surrogacy (e.g., France, Germany, China) to states where it is permitted (e.g., the US, Ukraine, Georgia). The legal recognition of the established parentage by the receiving state (the intended parents' home country) is therefore critical for the child's ethnic group and rights. This creates a core legal conflict. Receiving states that prohibit surrogacy frequently invoke public policy to deny recognition of foreign judgments, viewing surrogacy as violating fundamental principles. Legally, a direct clash arises: birth states often apply a contractual approach, recognizing the intended parents. In contrast, many receiving states adhere to the traditional "mother is the woman who gives birth" principle, legally recognizing the surrogate. This conflict results in a "limping parentage" where the

child has two different sets of legal parents, creating profound legal uncertainty.

The determination of jurisdiction is a prerequisite for selecting the applicable substantive law. Given the significant disparities in parentage determination laws across countries, identifying the competent court often predetermines the legal standard used to decide the child's legal parents, thus directly shaping the case's outcome. Currently, there is no unified global convention on civil jurisdiction. While regional coordination, such as the EU's Brussels Regulations, has made progress, and the Hague Conference is now focusing on a global jurisdiction convention following the 2019 Judgments Convention, the current landscape remains fragmented. In the absence of international rules, domestic laws prevail. Jurisdictional claims in parentage cases generally follow three patterns: Based on the intended parents' nationality or habitual residence (e.g., Japan, Brazil). Based on the child's birthplace (e.g., Czech Republic, Mexico). Exclusive jurisdiction based on the nationality of the involved child or citizen (e.g., Hungary, New Zealand), often not recognizing foreign judgments on the matter. <sup>[1]</sup>These differing standards create a fragmented jurisdictional landscape. Conflicts arise when a child's case falls under the jurisdiction of multiple states, leading to legal uncertainty, parallel proceedings, and significant obstacles to the cross-border recognition and enforcement of judgments.

In cross-border surrogacy cases, domestic courts apply national conflict-of-laws rules to determine applicable law, typically categorizing the case as a parentage matter. States generally follow one of two approaches: Application of the Lex Fori (Law of the Forum): Jurisdictions like the UK apply their own law, often leading to the denial of foreign-established parentage based on the "mother-by-birth" rule in prohibiting states, resulting in "limping" parentage. Application of Personal Law: Many civil law states apply the personal law (nationality/habitual residence) of the parent(s) or child. This creates a circular dilemma, as determining the personal law of intended parents presupposes the very parentage in question. Applying the child's personal law is also problematic due to nationality issues and the undefined nature of a child's habitual residence. <sup>[2]</sup>In summary, neither approach effectively resolves the dilemma. While incorporating the "best interests of the child" principle into choice-of-law rules reflects a protective trend<sup>[3]</sup>—exemplified by Chinese law favoring the weaker party's rights—it has not overcome the core limitations of traditional principles. <sup>[4]</sup>Its practical efficacy requires further judicial testing.

## 1.2. Non-Recognition of Foreign Parentage Determinations

Birth registration is a key international mechanism for safeguarding children's rights. However, recognizing birth certificates from cross-border surrogacy faces significant hurdles, involving verification of both authenticity and legal effect. While authenticity is addressed via procedures like consular legalization or the Hague Apostille, receiving states still scrutinize the certificate's substantive legal effect. Most states view it as evidence of registered facts, not as automatically establishing parentage domestically. Recognition depends on the receiving state's own conflict rules and public policy assessment, leading to two problematic approaches: Recognition as Mere Evidence: States like Israel and Ireland treat it as factual evidence only, refusing it constitutive legal effect for establishing parentage.

Substantive Review via Applicable Law/Public Policy: States like Belgium and the Netherlands assess if the parentage establishment complies with the law designated by their conflict rules and if recognition violates public policy<sup>[5]</sup>. This often leads to denial, either because the applicable law prohibits surrogacy or on direct public policy grounds. Both paths frequently result in non-recognition, leaving the child in legal limbo. Current rules are thus insufficient for protecting the child's best interests. Future developments require clearer conflict rules and a restrictive use of the public policy exception to better balance state sovereignty with the child's fundamental rights.

In cross-border surrogacy, court judgments from the child's country of birth are key documents for confirming parentage. However, no unified international convention governs the recognition of such status determinations. The 2019 Hague Judgments Convention explicitly excludes family matters. States therefore rely on general domestic rules, which typically require that the foreign court had proper indirect international jurisdiction, the judgment is final, proceedings were fair, and recognition does not violate public policy, conflict with a local judgment, or, in some cases, lacks reciprocity. The public policy exception is the primary barrier. Many states view the act of recognizing a foreign judgment that establishes parentage via surrogacy as an endorsement of a practice their legal order prohibits,<sup>[6]</sup> constituting a fundamental violation of core principles (e.g., "mater semper certa est"). Consequently, recognition is often denied without examining the specific outcome, a position upheld by courts in multiple jurisdictions. The "best interests of the child" principle is invoked as a counter-argument but with limited effect. Some courts contend that if the child maintains a de facto family life with the intended parents, their core well-being is not fundamentally harmed. They suggest domestic adoption or testamentary provisions can substitute for legal status. This reasoning—substituting factual arrangements for legal status—is critically flawed. The absence of legal parentage creates lasting uncertainty and poses direct obstacles in healthcare, travel, and daily life. Domestic adoption is a separate, uncertain process, not a direct confirmation of an existing bond. Testamentary provisions are delayed and revocable, failing to provide the immediate, comprehensive protection inherent in legal parentage. Severing legal status from a child's interests effectively transfers the burden of legal conflict onto the child, forcing them to navigate protracted uncertainty—a outcome fundamentally at odds with the principle's aim of ensuring a stable and secure environment for the child. A truly child-centered approach must remove recognition barriers, not leave the child in legal limbo.

## **2. Exploring Pathways to Resolve Parentage Determination in Cross-Border Surrogacy**

### **2.1. Improving the Recognition of Foreign Court Judgments Confirming Parentage**

To prevent the public policy doctrine from being used as a blanket tool to reject foreign judgments in cross-border surrogacy, its application must be strictly constrained to balance fundamental state interests with the rights of the parties involved.<sup>[7]</sup> First, courts should adopt a restrictive, "human rights-based" interpretation. The assessment of public policy should be tied to concrete, operable standards centered on protecting core values like the fundamental rights of the child.<sup>[8]</sup> The reservation should be invoked only when recognizing the foreign judgment would cause substantive harm to these specific rights.<sup>[9]</sup> Second, a distinction should be made between domestic public policy and international public policy. Norms safeguarding universal values (e.g., human dignity, fundamental human rights) should be accorded higher hierarchical status than those reflecting a state's specific internal policies. This helps courts look beyond parochial concerns and incorporate broader consensus. Finally, application should adhere to the "objective" or "effects" theory, requiring a case-by-case assessment of consequences. The focus should be on whether recognition would cause "substantive harm" to the forum state's core legal interests, not merely on formal legal differences. In parentage cases, if recognition primarily serves to secure the child's rights to life, support, and nationality without undermining the state's prohibitive stance on surrogacy itself, it should not lightly be deemed a violation of public policy. These three layers of constraint enhance predictability, safeguard judicial sovereignty, and provide greater scope for securing the child's stable legal status.

In cross-border surrogacy cases, the "best interests of the child" must evolve from an abstract concept into a decisive, operational standard. First, its status as the primary consideration must be affirmed. Its application cannot be automatically overridden by public policy. Courts must actively

balance competing interests, recognizing that stable legal parentage is foundational and cannot be replaced by alternatives like *de facto* care.

This requires a structured, case-specific assessment. Courts must concretely evaluate the impact of non-recognition on the child, including psychological harm from legal uncertainty, immediate obstacles to rights (nationality, healthcare, travel), and risks to family stability. A mandatory proportionality test is crucial when public policy is invoked: Suitability: Does non-recognition truly serve the stated public policy goal? Necessity: Is it the least harmful measure, or are milder options (e.g., partial/conditional recognition) available? Balancing: Does the public policy benefit significantly outweigh the concrete, long-term harm to the child? As a transitional measure, courts can adopt functional alternatives, such as recognizing specific legal effects from the foreign judgment (e.g., support obligations, guardianship) even if full parentage is not yet recognized. In essence, this demands a shift in judicial role—from guardian of sovereign legal purity to active protector of children's rights. A structured application of this principle is key to resolving the current impasse and fostering a more just system.

The recognition of foreign judgments generally relies on either international treaties or, in their absence, the principle of reciprocity. In cross-border surrogacy, where treaties are lacking, reciprocity becomes decisive. Historically, Chinese courts have applied a strict *de facto* reciprocity standard, requiring proof that the foreign state has previously recognized a Chinese judgment. This creates a "first-move dilemma," where states wait for the other to act first, leaving children in legal limbo. This caution stems from sovereignty concerns and the risk of unilateral reciprocity—offering recognition without receiving it in return, potentially undermining judicial authority. The international trend, however, is shifting from *de facto* to *de jure* or presumed reciprocity. *De jure* reciprocity focuses on whether the foreign state's laws permit recognition of foreign judgments, not on prior cases. This lowers the burden of proof. Chinese courts have moved in this direction, as seen in a case involving a UK judgment. Presumed reciprocity assumes reciprocity exists unless proven otherwise, placing the burden of disproof on the party opposing recognition. China's Nanning Statement endorses this approach, aiming to break the "first-move" deadlock. Building on this, scholars propose a unilateral liberalization mechanism, advocating for a reduced or eliminated reciprocity requirement in certain cases. For cross-border surrogacy parentage judgments, this could involve: Creating Exceptions Based on the Child's Interests: Courts could recognize urgent foreign judgments concerning child support, custody, or healthcare based on the "best interests of the child" principle, without waiting for reciprocal action. Signaling a Liberal Stance Domestically: Supreme courts can issue judicial interpretations, guiding cases, or policy documents explicitly adopting the most liberal interpretation of reciprocity in surrogacy-related cases to encourage applications.<sup>[10]</sup>

Such unilateral steps can reduce judicial barriers, promote the free flow of judgments, and ultimately encourage convergent state practice, laying the groundwork for future international harmonization.

## 2.2. Enhancing National Legislation on Parentage Determination

The current jurisdictional dilemma in cross-border surrogacy parentage cases stems from rules based on the *lex fori* or the parties' personal law, which often create "limping parentage." A more effective approach would use the child's place of birth as the primary connecting factor, guided by the principle of the child's best interests. This is justified for four key reasons: Objective and Stable Link: The birthplace is a fixed, factual connection, unlike variable factors like nationality or habitual residence. Respect for Primary Jurisdiction: It acknowledges the birth state's sovereign right to regulate events, including births, within its territory and its role in making the initial parentage determination. Avoids Logical Circularity: It prevents the paradox of needing established

parentage to determine the applicable law for establishing it. Best Serves the Child's Interests: It directs application to the law of a state (typically one permitting surrogacy) that can provide immediate, coherent legal status from birth, ensuring stability and protecting the child's fundamental rights.

Current Chinese law lacks positive rules for establishing parentage, relying instead on a mechanism for denying it (*ex post*). This creates legal uncertainty in surrogacy cases. A systematic framework with the genetic link as the core criterion should be established, drawing from China's historical legal traditions and modern judicial trends favoring a "genetic theory." Rationale: Aligns with Intent and Stability: It respects the primary intent of surrogacy (having a genetically related child) and fosters stable parent-child bonds, avoiding identity crises. Objective and Verifiable: DNA testing provides an objective, standardized standard, reducing litigation and uncertainty in transnational cases, aiding judgment recognition. Adapts to Surrogacy Realities: The traditional "mother-by-birth" principle, based on natural reproduction, is unsuitable for gestational surrogacy where the birth mother may lack a genetic link. Applying it mechanically contradicts the arrangement's purpose. Therefore, the genetic theory should be the primary basis, functionally modifying the birth mother principle.

While the genetic link is the primary standard, surrogacy presents complexities. A strict genetic rule could yield unintended results. Therefore, a clear, genuine, and sustained willingness to parent should serve as a key supplementary, and sometimes decisive, factor, especially when the genetic link is absent or its application harms the child's best interests. The system complements the core genetic rule, guided by the child's welfare and respect for stable *de facto* family life. Operational Standards for "Willingness to Parent": A judicial review framework is essential: Clear Expression: Through agreements, official acts. Genuine Intent: Assessed contextually, free from fraud or duress. Substantive Parental Conduct: The critical factor—long-term cohabitation, financial support, daily care, and public acknowledgment of the parental role. Overall parental capability is also evaluated.<sup>[11]</sup> Integration with Domestic Law: This rule aligns with China's framework for establishing a "fictitious blood relationship". When a genetic link is absent but a stable *de facto* parent-child relationship exists with a non-genetic intended parent, the willingness and act of parenting can establish legal parentage, as seen in Chinese judicial precedent. Necessary Supporting Legal Reforms: Gamete Donor Status: Legislation should presume that donors for assisted reproduction relinquish all parental rights/obligations. Restricting Denial Actions: In consensual surrogacy, intending parents should be barred from denying parentage solely due to a lack of genetic link, especially after a stable relationship forms, to prevent abuse and protect the child. A dual-rule system balances legal certainty with flexibility. It requires a functional, child-centered judicial approach that protects stable *de facto* families. For China, this offers a pragmatic solution for existing cases and a path towards more refined, child-centric parentage laws.

### 3. Conclusion

In conclusion, overcoming the challenge of "limping parentage" demands a concerted effort that balances the legitimate regulatory interests of sovereign states with the paramount and immediate need to protect the fundamental rights of the child. By implementing stricter constraints on public policy exceptions, genuinely centering the child's best interests in recognition processes, and establishing clear, child-focused domestic rules for parentage establishment, states can systematically resolve the current legal limbo. This approach provides a viable and just pathway to ensure that every child born of cross-border surrogacy secures a stable legal identity and enjoys the full protection of the law from the moment of birth.

## Acknowledgements

Innovation Project of GUET Graduate Education, 2025YCXS157

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