



Recognition of Family Status & Same-Sex Couples in China

Yin Liu

Research Institute of Global Chinese & Area Studies
Huaqiao University

May 12th 2022

Outline

- ▶ I. Introduction
 - ▶ No legislative rules & Inconsistent judicial practice
- ▶ II. Recognition of Foreign Same Sex Unions
- ▶ III. Property Agreement
 - ▶ Enforceable vs. Unenforceable
- ▶ IV. Surrogacy Agreement & Filiation
 - ▶ 1. Surrogacy agreement
 - ▶ Enforceable vs Unenforceable
 - ▶ 2. Filiation
 - ▶ Surrogate/birth mother's claim vs. Genetic/biological mother's claim

I. Introduction

- ▶ Neither Chinese domestic law nor its private international law deals with same sex unions. And in the near future, China would keep it open (art. 1041, the *Civil Code 2020*).
- ▶ However, Chinese courts usually refuse to recognize same sex unions either domestic or foreign.
- ▶ The property agreement between a same sex couple is usually ruled unenforceable if the court finds it unfair or unconscionable.
- ▶ A surrogacy agreement was usually held unenforceable before 2015 on the ground that Chinese administrative rules prohibit surrogacy surgery.
- ▶ Nowadays, more and more Chinese professors assert that surrogacy agreement be enforceable for Chinese legislative rules never prohibit surrogacy.
- ▶ I would argue that the property agreement between a same sex couple should be enforceable while a surrogacy agreement shouldn't.

II. Recognition of Same Sex Unions

- ▶ Same sex unions, both domestic and foreign, are absolutely denied recognition.
- ▶ Chinese marriage registration authority understands that the marriage under Chinese law (art. 1041, the *Civil Code* 2020) shall be only opposite sex marriage, and this understanding is supported by Chinese courts.
- ▶ Article 1041
 - ▶ Marriage and family are protected by the national government.
 - ▶ Marriage shall be voluntarily concluded in accordance with gender equality and monogamy (husband and wife).
 - ▶ Rights and legitimate interests of women, children, senior people and the disabled are protected.

II. Recognition of Same Sex Unions

- ▶ Foreign same sex unions are denied recognition usually in name of violation of Chinese public policy.
- ▶ However, as we will see later, Chinese courts seldom rule that such relationship or its recognition would violate China's public policy.
- ▶ Chinese legislation, at least according to its administration, does not protect a same sex couple as family members of each other while they may protect themselves by agreements.

III. Property Agreement

Case 1: Jiang, Shan vs. Zhao, Han

- ▶ Chinese citizens and habitual residents Ms. Jiang (plaintiff) and Ms. Zhao (defendant) cohabitated from 2013 till Nov 2017.
- ▶ They co-owned a school and bought a flat registered under Zhao's name.
- ▶ In 2016, Jiang and Zhao went to US where Zhao's ovum was fertilized and implanted into Jiang's womb (Zhao signed as Jiang's spouse).
- ▶ In 2017, they contracted into a domestic partnership in California and their baby girl ALEXANDRAH ZHAO was born .
- ▶ According to her birth certificate issued by US Public Health Service, the girl's father was Zhao (genetic mother) and mother was Jiang (birth mother).
- ▶ Nov 7, 2017, Jiang and Zhao signed the Agreement of Dissolution of Domestic Partnership at US Consulate General Shanghai.

III. Property Agreement

Case 1: Jiang, Shan vs. Zhao, Han (cont.)

- ▶ Jiang (plaintiff) claimed for her half ownership of the flat alleging that she co-paid it.
- ▶ Zhao (defendant) denied her domestic partnership with Jiang.
- ▶ Nanjing Qinhuai District Court (2018) Su 0104 Min Chu No. 1011 (trial)
 - ▶ Jiang had legitimate interests arising from her **relationship** (*de facto marriage*) with Zhao which should be protected; otherwise, Chinese public policy would be violated;
 - ▶ The *Marriage Act* (default community) was applied; and
 - ▶ Jiang's claim was sustained.
- ▶ Nanjing Intermediary Court (2018) Su 01 Min Zhong No. 10499 (appeal)
 - ▶ **Modified.**
 - ▶ Jiang had no marriage with Zhao so the *Marriage Act* shouldn't have been applied; however,
 - ▶ **The principle of equity under the General Principles of Civil Law applied; for**
 - ▶ While cohabitating, the parties mixed their properties, and since Zhao failed to show she did cover living expenses, except for the payment for the disputed flat, Jiang shared the ownership of the disputed flat by 50% (probably as a fair compensation) .

III. Property Agreement

Case 1: Jiang, Shan vs. Zhao, Han (cont.)

❖ Comments

- ▶ 1. The given dispute was a foreign one in the context of Chinese PIL while both courts directly applied Chinese law as if it had been a domestic case.
- ▶ 2. Validity and effect of the Californian domestic relationship (the incidental question) was governed by Chinese law because China had the closest connection with it (para. 2, art. 2 of the *Law of Application of Laws to Foreign-related Civil Relations* 2011).
- ▶ 3. Recognition of that relationship was not considered to be violating Chinese domestic public policy. Otherwise, either community property regime or equity principle couldn't have been applied to sustain the plaintiff's claim.

III. Property agreement (cont.)

Case 2: Shen, Jun vs. Liu, Songtao

- ▶ Mr. Shen (plaintiff) and Mr. Liu (defendant), had cohabitated for 10 years before they broke up in 2014.
- ▶ They then signed an agreement to divide their real property, deposits, cash, etc..
- ▶ According to their agreement, the real property registered under their names, would be exclusively owned by Liu while Shen was obliged to pay off the mortgage and to help alter its owner's name.
- ▶ Shen failed to perform his obligations but initiated a lawsuit alleging that the agreement to pay off the mortgage was a grant (not property division), which violated China's public policy because such agreement resulted from their same sex relationship.
- ▶ Shen claimed to revoke his alleged "grant" and to keep 85%, though he paid 90% of its full price, of the ownership for the sake of his relationship with Liu.

III. Property agreement (cont.)

Case 2: Shen, Jun vs. Liu, Songtao

- ▶ Shanghai Pudong District Court (2016) Hu 0115 Min Chu No. 26844 (trial)
 - ▶ The agreement dealt with property division and was enforceable : the property would be exclusively owned by Liu and Shen had to pay off the mortgage payment.
- ▶ Shanghai Intermediary Court I (2016) Hu 01 Min Zhong No. 8441 (appeal)
 - ▶ **Affirmed.**

III. Property Agreement (cont.)

Case 2: Shen, Jun vs. Liu, Songtao

❖ Comments

- ▶ 1. Property agreement between a same sex couple is enforceable.
- ▶ 2. The courts rejected the argument that either such relationship or property agreement arising from it, though not legalized under Chinese law, would violate Chinese public policy.

III. Property Agreement (cont.)

Case 3: Gao, Yuling vs. Han, Fengqin

- ▶ Ms. Gao (plaintiff) cohabitated with Ms. Han (defendant) for 8 years.
- ▶ They had filed their application for immigration to the Canadian Immigration Service and were going to marry in Canada.
- ▶ 2006 Gao purchased a real property in Shenzhen and voluntarily shared its ownership with Han by half and half (registered under both names as strangers).
- ▶ Gao made the down payment and mortgage payments up to the filing date of the lawsuit while both were debtors under the given mortgage agreement with a HK bank.
- ▶ Having broken up with Han in 2013, Gao claimed for half of the down payment and mortgage payments she had made (as compensation for the value of property registered under both names).

III. Property Agreement (cont.)

Case 3: Gao, Yuling vs. Han, Fengqin

- ▶ Shenzhen Luohu District Court (2013) Shen Luo Fa Min San Chu Zi No. 178 (trial)
 - ▶ Their immigration application was sufficient to show that they **were a couple**, and Gao promised to make the down payment alone; thus, her first claim for half of the down payment was rejected.
 - ▶ The majority of mortgage payments happened after their relationship broke up, so Gao's second claim for half of mortgage payments she had made was sustained (under co-ownership by share)
- ▶ Shenzhen Intermediary Court (2013) Shen Zhong Fa Fang Zhong Zi No. 2588 (appeal)
 - ▶ **Modified.**
 - ▶ Gao and Han were not a couple.
 - ▶ The co-ownership by share instead of community of (marital) property applied so Gao's claims were supported. Since Gao owned half of the property, she needn't have paid all the mortgage as well as the down payment, and was entitled to recover what she had paid in excess of her share.

III. Property Agreement (cont.)

Case 4: Li vs. Chen

- ▶ June 2011 Chen (defendant) purchased a real property (1,700,000 RMB) where she cohabitated with Li (plaintiff).
- ▶ Dec 2011 Chen and Li agreed that Li would have a share of 10% of the ownership of the real property by paying 100,000 RMB, and altered its owner names at the registry office.
- ▶ Half a year later, Chen and Li's relationship broke up.
- ▶ Li claimed against Chen for the real property division.

III. Property Agreement (cont.)

Case 4: Li Vs. Chen

- ▶ Beijing Dongcheng District Court (2012) Dong Min Chu Zi No. 09018 (trial)
 - ▶ Li's claim was **sustained**.
- ▶ Beijing Intermediary Court II (2012) Er Zhong Min Zhong Zi No. 16263 (appeal)
 - ▶ **Reversed**.
 - ▶ The parties lived together only for their own respective interests, not as a couple having a common interests.
 - ▶ The sale price of 100,000 RMB was so remarkably lower than the market price that the contract between the parties was contrary to good conscious and thus unenforceable.
 - ▶ Both the sale contract and the agreement of co-ownership of the real property were revoked. Li's claim over the property was **rejected**.

Conclusion on Recognition of Same Sex Unions and Property Relationship Concerned in China

16

- ▶ 1. The legislation concerned is unclear while the judicial practice is inconsistent.
- ▶ 2. Some courts (usually trial courts) appear more friendly to such relationship, treat the parties concerned as *de facto* married couples, and rule their property agreement enforceable.
- ▶ 3. Even for the part of those courts which rule such agreements unenforceable, it is not because they violate China's public policy but the principle of conscionability or equity.
- ▶ 4. Consequently, the argument that same sex relationship violate China's public policy doesn't stand.

IV. Surrogacy Agreement & Filiation

1. Surrogacy Agreement: Enforceable or Not

Prior to 2015, Chinese courts usually invoked article 3 of the *Administrative Rules Governing Application of Assisted Reproductive Technology* (2001), and ruled that surrogacy agreements violated Chinese public policy so they were unenforceable.

Only one case in which such an agreement was ruled enforceable, and it was a foreign dispute between a Chinese surrogate mother and an Australian (opposite sex) couple.

Article 3 Assisted Reproductive Technology shall be applied in medical institutions for a medical purpose corresponding with the national family plan, ethnical principles and legislative rules concerned. Sale of gametes, zygotes, embryos in any form or any type is forbidden. Medical institutions and medical staff shall not perform any form of surrogacy surgery.

IV-1. Surrogacy Agreement: Enforceable or Not

Case 1: Dingcheng Case

(source: an article posted on the Dingcheng District Court's website)

- ▶ The Chinese Australian couple (claimant) came to China signing a surrogate agreement with the defendant (the surrogate mother), a Chinese citizen domiciled in Changde City, Hunan Province.
- ▶ Having delivered the surrogate baby whose biological/genetic father was the Chinese Australian husband while whose biological/genetic mother was unknown, the defendant wanted to keep the child and tried to stop the father from taking him away. Thus, the father sued in Dingcheng District Court, Changde City.
- ▶ The Court invoked article 8 of the *Contract Act*, held the surrogacy agreement enforceable and ruled for the claimant. The surrogate mother accepted the ruling, and the couple took the child back to Australia.

Art. 8 A contract concluded lawfully binds the parties. Either party shall perform his obligations under the contract and be kept from unilaterally altering or revoking it. A contract concluded lawfully is enforceable.

IV-1. Surrogacy Agreement

Case 1: Dingcheng Case

❖ Comments

- ▶ 1. This is the only case (2010) we know in which a (foreign) surrogacy agreement was held enforceable prior to 2015 whereas the full text of its judgment was not available in public.
- ▶ 2. It was a foreign dispute in the context of the Chinese PIL since the claimant was an Australian citizen and habitually lived in Australia but again, Chinese law was directly applied.
- ▶ 3. Indeed, Chinese law was the governing law (art. 2, the *Law of Application of Laws to Foreign-Related Civil Relations* 2011). However, the court erred in its application of the *Contract Act* which was not applicable to legal status (art. 2, the *Contract Act*).
- ▶ 4. Also, the court erred again in its ruling that surrogacy agreement did not violate Chinese public policy (art. 3 the *Administrative Rules*).

Art. 2: This present Act does not apply to status agreement dealing with marriage, adoption, guardianship, etc.

Art. 3: Sale of gametes, zygotes, embryos in any form or any type is forbidden. Medical institutions and medical staff shall not perform any form of surrogacy surgery.

IV-1. Surrogacy Agreement (cont.)

20

- ▶ Nowadays, more and more Chinese scholars advocate that surrogacy agreements be enforceable because, according to them, not a single Chinese legislative rule prohibits surrogacy.
- ▶ The *Act of Population and Planned Parenthood (2021)*, made by the National People's Congress (NPC) does not expressly prohibit surrogacy although its draft did so.
- ▶ According to those scholars, article 3 of the *Administrative Rules* applies only to medical institutions and medical staff; so other organizations and individuals may perform surrogate surgery and surrogate agreements would be enforceable.
- ▶ However, since qualified medical staff are kept from performing surrogate surgery, how might, could, would or should others unqualified be able to do so regardless of any dangers and threats to surrogate mothers' safety and security?
- ▶ I argue that China prohibits surrogacy, and surrogacy agreements are **unenforceable** because they violate article 3 and therefore Chinese public policy.

Art. 3 Sale of gametes, zygotes, embryos in any form or any type is forbidden. Medical institutions and medical staff shall not perform any form of surrogacy surgery.

IV-2. Filiation

Case 2: Lin vs. Zhang (unknown)

- ▶ Chinese citizens, living in China, Lin (plaintiff) and Zhang (defendant) married in California.
- ▶ Each had an In Vitro Fertilization-Embryo Transfer (IVF-ET) surgery in California and bore a baby there (a boy and a girl).
- ▶ Lin is the birth mother of the baby girl, while Zhang is the genetic/biological mother of the baby girl and the birth and genetic mother of the baby boy.
- ▶ The Californian certificate states that Lin is the girl's mother.
- ▶ Having been driven out of home, Lin claims for guardianship of both babies, as the mother of the girl and as a parent (in the capacity of Zhang's spouse?) of the boy.
- ▶ Zhang argues that Lin is no more than a surrogate mother of the baby girl, not a parent and not even her spouse so she should not have the guardianship of the children.

(Source: a nationwide PIL seminar Dec 2020 & Lin's counsel's interview, first initiated in a Zhejiang local court and then transferred to Beijing Fengtai District Court)

IV-2. Filiation

Case 2: Lin vs. Zhang (cont.)

- ▶ Quite a few Chinese law professors believe that (1) the principle of the children's best interests (arts 3 and 18-para 1, *Convention on the Rights of the Child 1989*) should apply; and thus (2) Californian law (for the children have US citizenship) should apply. I object.
- ▶ First, it is not clear that the *Convention* would directly apply in China. In particular, arts 3 and 18 (para. 1) are not incorporated into China's *Child Protection Act* (a source of its constitutional law).
- ▶ Second, according to China's *Nationality Act*, the children are Chinese citizens foremost and not treated as US citizens.
- ▶ Thus, Chinese law, as the law of the either common habitual residence or common nationality, would govern all disputes, principal and incidental, of this case.

Article 3 China does not recognize Chinese citizens' foreign nationality.

Article 5 Anyone who was born in a foreign country to a Chinese parent is a Chinese citizen; however, if his Chinese parent(s) settled down abroad and he acquired a foreign nationality upon his birth, he is not a Chinese citizen.

The Law of Application of Laws to Foreign Related Civil Relations 2010

- **Marriage (art. 21)**
 - Chinese law applies as the law of their common habitual residence.
- **Surrogacy and filiation (art. 25)**
 - Chinese law applies as the law of of their common habitual residence.
- **Guardianship (art. 30)**
 - Chinese law applies as the law of either's party habitual residence or nationality.

Article 21 Conditions of marriage is governed by the law of the couple's common habitual residence, or that of their common nationality if they have no common habitual residence, or *lex loci celebratiois* if they married at the place where either party habitually resides or belongs to in the case that they have no common nationality either.

Article 25 Relations either concerning status or property between parent and child is governed by the law of their common habitual residence, or that of either party's habitual residence or nationality which better help protect the weaker party if they have no habitual residence.

Article 30 Guardianship is governed by the law of either party's habitual residence or nationality which is better for the ward's rights and legitimate interests.

IV-2. Filiation

Case 3: Ti vs. Mei

- ▶ Mei (defendant) bore a baby girl whose genetic/biological mother was Ti (plaintiff).
- ▶ Mei had the baby registered as her daughter and denied Ti's access to the baby.
- ▶ Ti alleged that Mei was a surrogate mother and claimed for her filiation with the baby.
- ▶ Mei acknowledged that she had no genetic/biological connection with baby but asserted that Ti and she were a same sex couple.
- ▶ Xiamen Huli District Court (trial)
 - ▶ Ti's claim was rejected.
- ▶ Xiamen Intermediate Court (appeal)
 - ▶ Unknown.

(Source: the Court's Wechat subscription account)

Conclusion on Surrogacy under Chinese Law

- ▶ Chinese law does not expressly outlaw **surrogacy agreements** while judicial practice is inconsistent.
- ▶ In the specific case of a **same sex couple**, I argue :
 - ▶ **1. Only through legislative rules** (excluding contracts) should **filiation** with both parents be dealt with.
 - ▶ **2. Surrogate/birth mother's claim** should prevail.
 - ▶ **3. Genetic/biological mother's claim** would depend upon her relationship with the surrogate/birth mother.
 - ▶ i If those two women are **married** or in any other form of **civil union** legally recognized as a family, **genetic/biological mother's claim could be supported**. But I would suggest that the latter (in the capacity of surrogate/birth mother's spouse) had better adopt the child, if possible.
 - ▶ ii If they are **not married** or registered as a **civil union while living together *de facto***, the **same** solution as above would apply too.
 - ▶ iii **Otherwise**, even in the case of an opposite sex couple (married or not), the **surrogate/birth mother's claim** should prevail over **the genetic/biological** mother's claim.

Concluding Remarks on Same Sex Relationship and Surrogacy Under Chinese Law

- ▶ 1. Chinese law should seriously deal with same sex relationship so as to help the judicial practice get consistent.
- ▶ 2. Surrogacy agreements violate Chinese public policy so they are unenforceable.
- ▶ 3. Chinese law should expressly prohibit surrogacy (in principle) because it violates women's rights to health and life (arts.7-b, 10, 12-1, *the International Covenant on Economic, Social and Cultural Rights*, and life as well as child's right to know and be cared for by his parents (art. 7, *the Convention on the Rights of the Child*).
- ▶ 4. Birth/surrogate mother's claim prevails over that of genetic/biological mother.
- ▶ 5. Where the two women concerned are registered or *de facto* same sex couple, both would be the child's parents. Yet the genetic/biological mother is advised to adopt the child if possible.

-THE END-
THANKS FOR
YOUR ATTENTION!

