

LEGAL ISSUES WITH SECTION 56 OF THE PROTECTION OF
A CHILD BORN BY MEDICALLY ASSISTED REPRODUCTIVE
TECHNOLOGY ACT B.E. 2558 (2015)^{*}

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Abstract

Parental recognition of surrogate children born of unqualified intended parents or non-compliant surrogacy falls right in the gap of both public and private laws. Section 56 of the Protection of a Child Born by Medically Assisted Reproductive Technology Act was incorporated to protect the rights of surrogate children born prior to the enactment of the law. Due to its rigid wordings, it limits the rights of some intended parents to file for the child legitimation and jeopardizes the rights of the child to have proper parentage.

By viewing the child's right as paramount, true and honest intent of the intended parents together with the principle of the best interests of the child should be jointly applied when determining parentage of surrogate children. To prevent the children from exploitation, intended parents must prove their parental capability and inspection by government authorities should take place after the court has issued the order.

Keywords: Surrogacy, Parentage, Parental Power, Citizenship, Parental Recognition, Birth Registration, Statelessness, Children Rights, Human Rights

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1. Introduction

The Protection of a Child Born by Medically Assisted Reproductive Technology Act (ART Act) was published in the Royal Thai Gazette on 1 May 2015 and has been in effect since 30 July 2015. Prior to the enactment, Thailand was considered as one of the most popular destinations for surrogacy, as some called ‘the womb of Asia’.¹ Surrogacy is one of the commonly sought methods by intended parents from all over the world. Associate Professor Dr. Kamthorn Pruksananonda, a former chairman of the Royal Thai College of Obstetricians and Gynecologists said that in 2014 there were approximately 7,000 couples who received ART services in Thailand and the success rate was 35%.²

Due to the fact that Thailand did not have any legislation governing surrogacy, previous arrangements had involved paid, commercial surrogacy. In order to prevent exploitations and keep up with the ART advancement, the ART Act was enacted to regulate surrogacy practice in Thailand. Section 56 has been incorporated as a transitory provision to the ART Act to resolve issues of legal parentage of the surrogate children who were born prior to the ART Act, but it seems that this provision has raised many doubts in terms of its practicality and implementation.

Firstly, the terms used in referring to the persons who are eligible to file a petition to the Juvenile and Family Court to issue parentage order for surrogate children are limited to four persons, which are (i) the person born through surrogacy arrangement, (ii) a husband undertaking surrogacy, (iii) a

¹ Henk Ten Have, *Global Bioethics* (Taylor and Francis 2016)

² เอมผกา เตชะอภัยคุณ บุญมี, การเรียกค่าเสียหายจากการใช้วิธีผสมเทียมที่ผิดพลาดในประเทศสิงคโปร์ คดี ACB V Thomson Medical Pte Ltd And Others, รพี, พิมพ์ครั้งที่ 1, คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2560. (Aimpaga Techa-apikun Boonmee, Karn Riek Khasiahai Chak Karn Chai Withi Pasomthiam Tii Pidplad Nai Prathet Singapore Khadi ACB V Thomson Medical Pte Ltd and Others [Claiming for Damages from Error in IVF in Singapore, ACB v Thomson Medical Pte Ltd and Others] (1st edn, Faculty of Law, Thammasat University 2017))

wife undertaking surrogacy, and (iv) a public prosecutor. This right does not extend to intended parents who are not a husband or a wife under the law.

Secondly, the factors in determining legal parentage of the surrogate children are not defined as to whether it should rest upon genetic relationship, the intention of the intended parents, or the best interests of the child.

Thirdly, it is a concern whether the parental power would have automatically been established to the intended parents as soon as the legal parentage has been granted, whether the court has the right to terminate the parental power of the intended parents if they are not suitable for the best interests of the child while their legal status remains as lawful parents, and whether the surrogate mother still has any legal right over the child. This would further reflect on how to register the birth and recognize citizenship of the surrogate child.

2. Legal Parentage

The term ‘parent’ is not expressly defined under the Civil and Commercial Code (CCC), but its intrinsic meaning has been embedded and implied that ‘parent’ is someone who has naturally conceived a child through sexual relationship as husband and wife and it is understood by nature that the child is the biological child who has the genetic materials of the parent.

2.1 Parentage under Thai Laws

The CCC stipulates several presumptions on parentage of a child. A child born to an unmarried woman is presumed to be her legitimate child.³ A child born to a woman during wedlock is presumed to be the legitimate child of the woman and her husband.⁴ A child born to a woman within 310

³ Civil and Commercial Code, s 1546

⁴ Ibid., s 1536

days after the dissolution of the marriage is presumed to be the legitimate child of the ex-husband.⁵ A child born to a woman who re-marries within 310 days from the date of the dissolution of marriage is presumed to be the legitimate child of the new husband.⁶ A child born to a woman in an extramarital affair during her marriage is presumed to be the legitimate child of the latest husband who registered marriage to the said woman.⁷

Such presumptions are rebuttable unless it has been proven otherwise. However, some presumptions are irrefutable by statute or by statutory period or by court order. For instance, the husband or the ex-husband who presumed to be the father of the child is not permitted take action for repudiation after 10 years from the child's date of birth.⁸ The husband or the ex-husband cannot take any action for child's repudiation if he registered himself as the father in the child's birth register.⁹ A presumed father would become a lawful father of a child by section 1547 of the CCC. Section 1547 provides that a presumed father can become a lawful father of a child once (i) he registers marriage to the woman who gives birth, or (ii) he submits a child legitimation application and the application is granted by the local registrar, or (iii) he obtains the court order. In case that the father does not wish to register marriage to the birth mother, the second alternative is a simpler way to legitimize the child; however, the process of child legitimation by application requires consent from the birth mother and the child. If the child is too young or the birth mother dies, this alternative would not be possible and the father would need to seek the court order for child legitimation.

Legal parentage of surrogate children does not fall under the presumptions under the CCC as the ART Act specifies that the surrogate children would become legitimate children of the intended parents. In case

⁵ Ibid.

⁶ Ibid., s 1537

⁷ Ibid., s 1538

⁸ Ibid., s 1542

⁹ Ibid., s 1541

that the ART process uses gametes from donors, the child would be the legitimate child of the intended parents whilst the donors would have no rights or responsibilities over the child.¹⁰ It may be presumed that the intent of the intended parents is a factor used to determine parentage of surrogate children under the ART Act.

2.2 Parentage under Foreign Jurisdictions

Under the United States Uniform Parentage Act 2017 (UPA), there are several presumptions set out in relation to parent and child relationship. For example, an individual who gives birth to a child is presumed to be the child's parent.¹¹ An individual is presumed to be a parent of a child if the said individual and the woman who gave birth to a child are married and the child is born during the marriage, regardless of the validity of the marriage¹² or the child is born no later than 300 days after the marriage is terminated.¹³ An individual who marries the woman who then gives birth to a child and agrees to be named as a parent of the child is presumed to be the child's parent¹⁴ or the said individual has lived in the same residence with the child for two years after the child is born.¹⁵ These presumptions are based on the idea of natural conception, which varies from the child born through surrogacy process. Article 8 of the UPA stipulates how the parentage over surrogate children can be determined. The principle to determine parentage for both gestational surrogacy and genetic surrogacy is that each of the intended parents is the parent of the child where the law

¹⁰ The Protection of a Child Born by Medically Assisted Reproductive Technology Act, s 29

¹¹ Uniform Parentage Act, s 201

¹² *Ibid.*, s 204(a)(1)(A)

¹³ *Ibid.*, s 204(a)(1)(B)

¹⁴ *Ibid.*, s 204(a)(1)(C)(ii)

¹⁵ *Ibid.*, s 204(a)(2)

made it clear that neither the surrogate nor her spouse is the child's parent.¹⁶

In Australia, the surrogacy laws presume that the surrogate and her husband (or partner) are lawful parents of the surrogate child.¹⁷ The intended parents who may have the same genetic relationship with the child are presumed not to be the legal parents of the child unless such intended parent registers in a birth register or acknowledges parental status.¹⁸ The intended parent(s) and the surrogacy arrangement itself must satisfy the conditions set out under the legislation of their applicable jurisdiction in order to request the court to grant the transfer of parentage from the surrogate parents to them. Otherwise the parental status would be determined by the general law.¹⁹

3. Parental Power

The definition of parental power, as described by Thierry Garé,²⁰ is 'the center of rights and duties legally granted to the parents to protect the child'. The parents and the child both have the rights to demand the other party to act or refrain from certain action. Generally, parental power is attached to the parents of the child based on biological relationship that extends from the parents to the child. Parental power is established by the government as a tool to ensure that the person who has not attained the age of maturity is protected; therefore, parental power is related to good

¹⁶ Ibid., s 809

¹⁷ Mary Keyes, 'Australia', *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart Publishing 2013)

¹⁸ Ibid.

¹⁹ Ibid.

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morals and public order and it cannot be surrendered, limited, transferred, terminated or otherwise agreed beyond the law.

3.1 Parental Power under Thai Laws

Under the CCC, parental power is jointly exercised by the parents and the parents can make decisions on the child's place of residence, discipline the child, require the child to work to suit his ability and condition, and demand the child to be returned from a person who unlawfully detains him.²¹ In terms of parental power over surrogate children, the ART Act itself does not provide any provisions on the establishment of parental power; therefore, the provisions relating to parental power as stipulated in the CCC on Family would apply to the extent that it is not contrary to the ART Act.²² However, the procedure to obtain parental power for children born through pre-commencement surrogacy or non-compliant surrogacy should be treated in a more cautious manner. After the court has considered parentage of the surrogate child based on the true and honest intent and best interests of the child, it is essential to set out factors to review the readiness of the intended parent before granting a sole parental power as well as conducting post-monitoring procedures as a trial period (in consistent with the procedures required for child adoption) to ensure that the intended parents have the ability to raise them and the child is not at risk of being exploited.

3.2 Parental Power under Foreign Jurisdictions

In the United States, parental power is often times referred to as custody, visitation right or guardianship and is attached to the parents of the child to give appropriate education²³ and to have custody, care and nurture

²¹ Civil and Commercial Code, s 1567

²² The Protection of a Child Born by Medically Assisted Reproductive Technology Act, s 34

²³ *Meyer v State of Nebraska*, 262 US 390 [1923] The United States Supreme Court (The United States Supreme Court)

the child.²⁴ At present, the Court relies on the principle of the ‘best interests of the child’ but the application of such principle may be quite challenging as one factor may favor one party while another factor favors the other.²⁵ Several factors have been addressed for the court to decide on parental power including gender and primary caretaker, economic superiority, employment stability, sexual conduct, religion, sexual orientation, physical and mental health, child’s preference, unwed father, child abuse history, substance abuse and smoking, relationship quality, etc.

In Australia, the Family Law Act 1975 (as amended) governs matters relating to child custody. In all court proceedings, it is emphasized that the principle of the best interests of the child is of the utmost importance.²⁶ The best interests of the child are determined by the child’s right to enjoy a meaningful relationship with both parents, child’s safety, the child’s point of view, quality of relationship, parental involvement in the child’s future, effect of the change towards the child, difficulty in engaging in communication, ability to provide for child’s needs, parent’s attitude, records of family violence and other factors.²⁷

4. Recommendations and Conclusion

For the best interests of the child, Section 56 of the ART Act should be amended to incorporate non-compliant surrogacy. The right to file petition for child legitimation should be drafted in a broader perspective, which allows anyone involved in the surrogacy process to file a petition for child legitimation to the court. It should incorporate an exit strategy for surrogacy that is not conformed with the requirements under the ART Act

²⁴ *Prince v Massachusetts*, 321 US 158 [1944] The United States Supreme Court (The United States Supreme Court)

²⁵ Scott E Friedman, *The Law of Parent-Child Relationships* (Section of Family Law, American Bar Association 1992)

²⁶ Family Law Act 1975, s 60CA

²⁷ *Ibid.*, s 60CC

so that the right of the child born through non-compliant surrogacy will be recognized.

Parentage Order To determine legal parentage of children born through pre-commencement surrogacy or non-compliant surrogacy, the intended parent must demonstrate their true and honest intent and each of the intended parents must provide appropriate reasons to the court as well as their situations and circumstances. The proposed factors include their motives during the time of surrogacy arrangement, details of the ART process, proof of genetic materials and reasons for not using their own genetic materials in the process, criminal records of the intended parents, marital status, employment history, annual income, sexual orientation, physical and mental health evaluation by licensed physician, two witnesses or references, any other reasons as the intended parents view appropriate to prove their true and honest intent. However, intent should not override the right of the surrogate who has the same genetic relationship with the child. The surrogate should have the right to give consent whether or not to keep or waive her right over the child.

In addition to the intent of the intended parent, the best interests of the child must be considered and the court may weigh the following factors to decide whether the parentage order would benefit or endanger the child including the child's age, length of time the child stays with any party, quality of relationship, possible physical and emotional impact towards the child, and any other reasons that would be for the best interests of the child.

Parental Power The court may request the intended parents to submit a plan to raise the children, which comprises the information on the intended residence of the child, number of total family members, neighborhood, surrounding environment, education plan, and information about the main caretaker of the child. In case of doubt, the court may by himself visit or request the officer of the Ministry of Social Development and Human Security (MSDHS) to visit the potential residence of the child at the expenses of the intended parents.

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