

## The Relationship between Mother and Child Born Subject to a Gestational Agreement in IPL — with Proposals for New Legislation (summary)

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More than twenty years have passed since the weird words “Surrogate Motherhood” were first used. “Surrogate Mother” has two meanings; partial surrogacy and full surrogacy. Partial surrogacy is where the egg of the birth mother is fertilized by the sperm of the intended father, whereas in full surrogacy the egg is that of the intended mother or a third party donor.

The former can be dealt with under the traditional family law, but the latter has caused a serious problem — the separation of “mother” into egg-donor and gestational woman, which we had never faced before in history.

This separation is now shaking the very basis of family law, which has never doubted that “mother” could be identified through the fact of birth. Therefore many countries are compelled to legally define “mother” or “motherhood”. We can now find three definitions in the world: 1. Birth mother; 2. Egg-donor; and 3. Intended mother.

The difference among these definitions in substantive family laws, also gives rise to significantly difficult problems in International Private Law (IPL). In Japan, under the present law (articles 17 and 18 of Horei), it is possible that a child born under a gestational agreement would legally have no “mother” in the world. This is because the conflict of substantive laws remains after the application of the conflict-rules. Besides this problem, we have to address two other problems; the relevance of applicable law chosen by Horei, and the risk of overusing *ordre-public*.

In this thesis, the author claims that it should be necessary to amend the Horei to deal with these problems. For this purpose, the following points should be taken into consideration;

1. Consider the child’s best interests — that is, not cause a situation in which the child has no mother.
2. Restrain the use of *ordre-public*.

3. Maintain consistency with the applicable law of adoption.
4. Decide the applicable law independently for each parent-child relation, that is, so as not to relate the paternal relationship to the maternal relationship, and not to regulate legitimate and illegitimate children separately.

In order to address only 1, it might be enough, for example, to use the child's habitual residence as a connecting factor, or to use an alternative connection or a cascading connection. However, in order to meet all the points mentioned above, the author proposes as follows;

① The establishment of the parent-child relationship is governed by the national law of each parent at the time of the birth of a child. If a parent is deceased at the time of the birth of the child, it is governed by his /her national law at his/her death.

② Where no maternal relationship is established according to paragraph ①, it is governed by Japanese law.

③ Where plural paternal/maternal relationships are established according to paragraph ①, the court shall determine who has the responsibility as a father/mother (Shinken in Japanese) by considering the best interests of the child, provided that this should not apply where a parent-child relationship is established by Japanese law.