

Gestational Surrogacy in Japan

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Abstract

In order to help sterile couple, assisted reproductive technologies have been remarkably developed in Japan. This article introduces ‘gestational surrogacy’ as one of assisted reproductive technologies and examines its ethical and legal issues in Japan. It deals with doctor’s opinions, government policy, case law and public opinion toward gestation surrogacy in Japan. The conflict among different groups toward gestational surrogacy in Japan should be solved in order to protect the right of intending parents, security of gestational mother and the welfare of the child.

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Recently, as sterile couples are increasing in Japan, they hope to have their baby by gestational mother. There is no law about gestational surrogacy in Japan. We just depend on the rules of the academic society of obstetricians prohibits gestational surrogacy. The bill the Ministry of Health, Labor and Welfare made also forbid gestational surrogacy, because the intending parents may treat her body as a tool to obtain pregnancy. Additionally Supreme Court decided that gestational surrogacy is opposed to public order and moral as well as the Ministry of Health, Labor and Welfare stated. In regards to legal parenthood, the Ministry of Justice and Supreme Court determined that the birth mother is the baby's legal mother. That is to say, they followed the judgment of the Supreme Court in 1962 strictly and did not recognize any exception.

However gestational surrogacy is the last way for some sterile couples. That is because in the case wife removes her womb for some reasons, there is no way to have their baby without gestational mother. And even if the government prohibits gestational surrogacy, they can arrange a gestational mother in foreign country.

In this situation, the government started to re-examine the bill that recognizes gestational surrogacy with some requirements.

1. Doctors' opinions.

i. The academic society of obstetricians.

These days in Japan, the academic society of obstetricians prohibits

gestational surrogacy¹. This society has strong authority over maternity hospitals and constitutes an important ethical committee.

The first reason for this prohibition is that the resulting baby's welfare should be thought of as the first priority, which is based on the Convention on the Rights of the Child². For example, the academic society of obstetricians supposes that the gestational mother gives the baby to the intending parents, because giving the baby to them ignores the relationship between the birth mother and the resulting child. In addition, there is no assurance that the parties can fulfill the gestational surrogacy contract. For instance, the gestational mother may refuse to hand the child over to the intending parents, or the intending parents might not accept the child for whatever reasons. Consequently, the child's position becomes uncertain.

The second reason for this prohibition is that gestational surrogacy may create the risk of physical danger to the gestational mother's body or create a mental burden on her or the child. According to doctors' opinions, even natural pregnancy and childbirth may involve unexpected dangers. Even if they explain to the gestational mother the full dangers that pregnancy and childbirth may cause, and obtain her consent, an unexpected physical or psychological disease, such as suffering mental conflict or feeling of frustration, may still occur. Therefore it is also

¹ We can see "Opinion on the Gestational Surrogacy", reported at the Academic Society of Obstetricians (2003) in the HP of the Academic Society of Obstetricians. The HP is in URL. [http://www.jsog.or.jp/kaiin/html/H15_4.html]

² Article 35 of this Convention reads as follows: "Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of, or traffic in children for any purpose or in any form."

dangerous for the third-party birth mother to become pregnant and deliver the child to the intending parents. Considering these points, gestational surrogacy is not an area of fertility treatment recognized by the academic society of obstetricians.

The third reason for this prohibition is that gestational surrogacy makes the relationships among families more complicated, as based on a Supreme Court judgment in 1962³, where the Chief Justice of the Supreme Court gave a ruling that the birth mother is truly the resulting baby's legal mother. This rule has been maintained since then. However, with the development of assisted reproductive technologies, this rule has led to confusion as to whether the gestational mother is the baby's legal mother or the woman who receives the baby. That is why the academic society of obstetricians feels that gestational surrogacy complicates the relationship between the baby and its parents.

The fourth reason for this prohibition is that gestational surrogacy is not admitted ethically in Japanese society, as based on opinions by some scholars of the Civil Code⁴. According to their opinions, the gestational mother is treated as a tool even if the intending parents decide to pay her expenses.

³ Judgments of the Supreme Court, a Civil Affair Law Reports, vol.16.tom.7(1962).1247.

⁴ Indeed, the scholars of the Civil Law look on with suspicion whether or not the gestational surrogacy is against the public order and moral. However, they do not state definitely that gestational surrogacy is opposed to the public order and moral. See, Ninomiya, Syuuhei & Kushiara, Hujiko, **21 Seiki Oyako Hō e* [For the family Law in 21centry], Tokyo, 1996, 20, Kinjō Kiyoko, **Seimei Tanjō wo meguru Baioeshikusu –Seimei Rinri to Hō* [Bioethics on the Birth of Life –the Relation of Bioethics and Law], Tokyo, 1998, 166, Ōmura, Atsushi, **Kazoku Hō* [Family Law], Tokyo, 2004, 214.

The academic society of obstetricians therefore concludes that this conduct is against public order and moral.

ii. Dr.Netsu's view.

Contrary to the above opinions, Dr. Yahiro Netsu, at the Suwa Maternity Clinic in Nagano Japan, arranged for the use of host mother in Japan.

Dr. Netsu insists the following:

Indeed it is natural that we should not deal with a gestational mother as a tool of reproduction. However, whether the intending parents treat her as a tool of reproduction or not depends on the way they build their relationships. Some husbands, losing conjugal affection, treat their wives as tools of reproduction. Why do they think only surrogacy causes such a problem? I think, in my experience, there are good relationships between host mothers and the intending parents. Is this relationship good? The academic society of obstetricians and the government regard all arrangements involving host mother as bad and prohibit them. If they understood the situation of a sterile couple, they would not conclude that all gestational surrogacy should be prohibited⁵.

On the basis of his opinions, he proposed six rules about host mother.⁶ He states them as follows:

1. The intending mother has no ability to become pregnant without

⁵ Suwa maternity Clinic HP is in URL. [<http://www.smc.or.jp/smc/smc05.html>].

⁶ Suwa maternity Clinic HP is in URL. [<http://www.smc.or.jp/smc/smc05.html>]

borrowing another woman's womb.

2. The intending parents should be a married couple and use the eggs of the intending mother and the sperm of the intending father.
3. The host mother should have experienced giving birth to her own baby, should be married, and should have a volunteer spirit.
4. She should not demand any reward.
5. The intending parents should not pay any fee to her other than her actual expenses.
6. The doctor should explain to the host mother, her husband, and the intending parents, the full dangers of pregnancy and child birth, and also obtain their consent, before the arrangements begin.

According to these rules, he has tried to make some arrangements involving host mothers. On the basis of his arrangements, in 2001 a wife's sister became the host mother⁷, and in 2003 a husband's sister-in-law gave birth to his baby⁸, and in 2006 a woman's mother gave birth to her daughter's baby⁹.

iii. Summary.

As doctors' opinions, there are two conflicting opinions such as the academic society of obstetricians and Dr.Netsu. The academic society of obstetricians prohibits gestational surrogacy. That is because gestational surrogacy ignores the resulting baby's welfare, may create the risk of

⁷ 19th May 2001 in **Asahi Shinbun*[The Asahi News Paper].

⁸ 6th March 2003 in **Asahi Shinbun*[The Asahi News Paper].

⁹ 16th October 2006 in **Asahi Shinbun*[The Asahi News Paper], **Nishinihon Shinbun*[The Nishinihon News Paper], **Yomiuri Shinbun*[The Yomiuri News Paper].

physical gestational mother's body or create a mental burden on her or the child, makes the relationships among families more complicated, and it is not admitted ethically in Japanese society. On the contrary to this prohibition, Dr.Netsu insists that, with some requirements, gestational surrogacy, specifically host mother is not illegal.

2. Government opinions.

In October 1998, the Ministry of Health and Welfare¹⁰ formed a committee, Special Committee in the Welfare and Science Counsel on Medical Technology for Reproductive Treatment (S.C.W.S.), to examine thoroughly the problems concerning assisted reproductive technologies from professional viewpoints and had S.C.W.S. make a survey about such problems in 2000¹¹. Furthermore, in June 2001, the Ministry of Health, Labor and Welfare constituted a second committee, Sectional Meeting in the Welfare and Science Counsel on the assisted Reproduction Technologies (S.M.W.S.), to make a bill regulating assisted reproductive technologies on the basis of the first committee's survey.

¹⁰ The name of the Ministry of Health and Welfare was changed to the Ministry of Health, Labor and Welfare in 2001.

¹¹ * *Kosei Kagaku Shingikai Sentan Iryō Gijutsu Hyōka Bukai Seishoku Hojo Iryō Gijutsu ni kansuru Senmon Inkai* [Special Committee in the Welfare and Science Counsel on Medical Technology for Reproductive Treatment =S.C.W.S.], * *Seishi Ranshi Hai no Teikyō tō ni yoru Seishoku Hojo Iryō no Arikata ni tsuite no Hōkokusho* [Report on the way the assisted Reproduction Technologies by the Donation of the Sperm, the Ovum, the Embryo et alii should be run], Jurist, vol.1204 ,Tokyo,2001,113.

According to the bill of 2003, gestational surrogacy was banned¹². The need to discuss this bill thoroughly caused the Ministry of Health, Labor and Welfare not to introduce the bill to the Diet¹³. This bill was suspended and was never made into a law.

After the failure of the bill of 2003, the Ministry of Justice formed a committee, Sectional Meeting in the Legislative Council on Parent and Child Law relative to the assisted Reproduction Technologies (S.M.L.C.), to make a new bill of legal parenthood resulting from assisted reproductive technologies¹⁴.

i. The Ministry of Health, Labor and Welfare.

S.C.W.S. has determined six ethical concepts concerning assisted reproductive technologies viz¹⁵:-

1. We should give priority to the resulting child's welfare.

¹² * *Kosei Kagaku Shingikai Seishoku Hijo Iryo Bukai* [Sectional Meeting in the Welfare and Science Counsel on the assisted Reproduction Technologies =S.M.W.S.], * *Seishi Ranshi Hai no Teikyo nado ni yoru Seishoku Hojo Iryo no Seibi ni kansuru Hokokusho ni tsuite* [About the Report on the improvement of the system of the assisted Reproduction Technologies by the Donation of the Sperm, the Ovum, the Embryo et alii should be run], in Home Page of the Ministry of Health, Labor and Welfare [<http://www.mhlw.go.jp>].

¹³ 16th December 2006 in * *Asahi Shinbun* [The Asahi News Paper].

¹⁴ * *Hosei Shingikai Seishoku Hojo Iryo Kanren Oyako Ho Bukai* [Sectional Meeting in the Legislative Council on Parent and Child Law relative to the assisted Reproduction Technologies =S.M.L.C.], * *Seishi, Ranshi, Hai no Teikyo nado ni yoru Seishoku Hojo Iryo ni yori Shusseji shita Ko no Oyako Kankei ni kansuru Minpo no Tokurei ni kansuru Yoko Chukan Shian* [A draft on the exception to the Civil Law on Parent and Children Relationship: The case in which the Children are born by the Donation of the Sperm, the Ovum the Embryo et alii, id est the assisted Reproduction Technologies], in Home Page of the Ministry of Justice. [<http://www.moj.go.jp>]

¹⁵ S.C.W.S., *op. cit.*, 113.

2. We should not treat others as just a means of delivering a baby.
3. We should consider the gestational mother's safety.
4. We should reject the concept of eugenics.
5. We should reject commercialism.
6. We should respect the dignity of human beings.

The prohibition of gestational surrogacy is based on these six concepts.

One reason for prohibition is that

if we allow people to enter into a gestational arrangement, the intending parents will treat the gestational mother's body as a tool to provide pregnancy and birth. This is opposed to concept No.2 in that we should not treat others as a merely means of delivering a baby.¹⁶

Another reason is that,

it is possible that pregnancy and birth can endanger the gestational mother's life. Gestational surrogacy exposes the mother to such dangers like this for nine months. This is contrary to concept No.3 that we should consider the gestational mother's safety, we can not allow it.¹⁷

Thirdly,

it is possible that the gestational mother may refuse to hand over the child when it is born. That is because, unlike people who donate their sperm, eggs or embryo, the gestational mother develops another couple's child in her womb for nine months, so it is natural that she wants to rear the

¹⁶ S.M.W.S., *op.cit.* in Home Page of the Ministry of Health, Labor and Welfare [http://www.mhlw.go.jp]

¹⁷ S.M.W.S., *op.cit.* in Home Page of the Ministry of Health, Labor and Welfare [http://www.mhlw.go.jp]

resulting child by herself. This may result in conflict between the birth mother and the intending parents, such as in some cases in the United States. This situation is opposed to concept No.1 that we should give priority to the resulting child's welfare.¹⁸

ii. The Ministry of Justice.

In response to the bill, the Ministry of Justice considered an exception to the bill of legal parenthood resulting from gestational surrogacy. The ministry of justice said,

: as state in the bill of 2003 made by S.M.W.S., if we allow gestational surrogacy, it is possible that the intending parents may treat her as a tool to have their child, which may place her in unexpected danger for nine months, and gestational surrogacy may cause conflict between the birth mother and the intending parents, just as, some cases in the United States. That is why in Japan, gestational surrogacy will be officially banned in the future. So gestational surrogacy is opposed to public order and moral in the Civil Code, and should naturally be avoided.¹⁹

In addition to this, they said,

: if children are born of a gestational mother, we can not recognize legal parenthood. Since the Ministry of Health, Labor and Welfare prohibit gestational surrogacy, we can not allow any exception.²⁰

Therefore, as for legal parenthood resulting from gestational surrogacy,

¹⁸ S.M.W.S., *op.cit.* in Home Page of the Ministry of Health, Labor and Welfare [http://www.mhlw.go.jp]

¹⁹ S.M.L.C., *op.cit.* in Home Page of the Ministry of Justice. [http://www.moj.go.jp]

²⁰ S.M.L.C., *op.cit.* in Home Page of the Ministry of Justice. [http://www.moj.go.jp]

they said, “we will not change the rule that the birth mother is the baby’s legal mother.”²¹

There are two reasons the baby’s legal mother is considered the birth mother. Firstly, it is an objective and definite standard that the woman who gives birth to a baby is its mother, so we can decide the resulting baby’s legal mother. Secondly, during the process of pregnancy and the birth of a baby, a woman experiences motherhood in relation to the baby inside her. Therefore, the rule that the birth mother is the baby’s legal mother complies with the child’s welfare and is rational.

iii. Summary.

In short, the government prohibits gestational surrogacy. They do so because the characteristics of gestational surrogacy are opposed to public order and moral, since it is possible that the intending parents may treat her as a tool to provide them with a child, place her in unexpected danger for nine months and gestational surrogacy may cause conflict between the birth mother and the intending parents. Also, in regards to legal parenthood, the government did not modify the rule that the birth mother is the resulting baby’s legal mother.

3. Case law.

Since it is difficult for sterile couples to have children in Japan, some of them go to foreign countries where gestational surrogacy is legal to

²¹S.M.L.C., *op.cit.* in Home Page of the Ministry of Justice. [<http://www.moj.go.jp>]

have their babies, and come back to Japan with birth certificates filled with the intending parents' names. Moreover, when they register the child's birth in Japan, they do not tell the municipal office about gestational surrogacy to acquire legal parenthood. Most couples acquire legal parenthood, but in two cases couples could not.

i. A case in which a Japanese sterile couple received donated eggs and sperm to a gestational mother to give birth to their baby (gestational surrogacy No.3 in the material No.1).

The first case; a Japanese sterile couple received infertility treatment but failed to conceive. So, they decided to arrange a gestational mother with their sperm and donated eggs from a Chinese American woman in California, that is to say this gestational surrogacy is No. 3 in the material No.1. She eventually had the baby in 2002. The couple came back to Japan and tried to register the child as their child in a municipal office but the officer noticed the birth mother was a gestational mother. The officer refused to register the child's birth and ordered them to correct the parents' names. In Japan, the child's legal mother decides the child's legal father. In this case, as per the judgment of the Supreme Court in 1962²², the child's legal mother is the gestational mother that means her husband is the child's legal father, even though they did not hope to be the legal parents. Moreover, if they are the resulting child's legal parents, the resulting child cannot acquire Japanese nationality,

²² Judgments of the Supreme Court, a Civil Affair Law Reports, vol.16.tom.7(1962).1247.

because, to have Japanese nationality, the child's mother or father must be Japanese. In this case, these problems inflict more legal troubles on the resulting child. That is why the intending couple refused to correct the parents' names and the government office received strong criticism that, they should have consideration to the child's welfare²³.

Therefore, from the point of view of the children's welfare, the Ministry of Justice recognized that the intending father acknowledged the unborn baby as his child when he enters a contract with the gestational mother²⁴. So the resulting child's legal father was the intending father. However, they did not change the rule that the birth mother is the resulting child's legal mother, hence upholding the judgment of the Supreme Court in 1962²⁵. As a result, if the intending father registers a child's birth as that of his with the concern of the gestational mother, the resulting child can have Japanese nationality and also be entered on the family register.

However, the intending parents insisted that there was a birth certificate filled with the intending parent's name issued lawfully in California, and the gestational mother did not wish to be the resulting child's legal mother. They resubmitted some documents filled out with the intending parent's name but the municipal office did not accept them. Thus the intending parents accused the municipal office of not registering the child's birth as that of their own child.

²³ 24th November 2003 in **Asahi Shinbun*[The Asahi News Paper].

²⁴ 11th November 2003 in **Asahi Shinbun*[The Asahi News Paper].

²⁵ Judgments of the Supreme Court, a Civil Affair Law Reports, vol.16.tom.7 (1962). 1247.

The judgment

The Kobe family court dismissed their petition. The Judge gave a ruling that

: the intending mother is not the resulting child's legal mother. That is because the intending mother did not donate her eggs and also give birth to the resulting child. On the contrary, the gestational mother gave birth to the baby. It is an objective and definite standard that the woman who gives birth to a baby is its legal mother. Thus the gestational mother should be the resulting child's legal mother.²⁶

The intending parents objected to this decision and appealed to a high court in Osaka. The judge upheld the Kobe family court judgment and rejected their appeal. On legal parenthood, the Judge ruled that,

: the intending mother is not the resulting child's legal mother. Indeed assisted reproductive technologies are developing remarkably. However it is an objective and definite standard that a woman who gives birth to a baby is its legal mother and we should not change this rule. This rule allows no exception.²⁷

In addition, regarding gestational surrogacy, the judge observed that,

: the intending parents treat the gestational mother's body itself as a tool for

²⁶ 14th August 2004 in **Asahi Shinbun* [The Asahi News Paper].

The judgment is not officially published considering the privacy of the parties. Hereupon I asked to the Kobe Family Court. However this court rejected to read the judgment document because of considering the privacy of the parties. So the content of my text depends on the article of the newspaper, which was written on the ground of the interview of the press to the parties and the conference.

²⁷ The Judgment of the Osaka High Court, **Hanreijiho* [Journal of Judgments], vol.1919,2005,pp107.Cf.,Hayashi,Takami,**Hanrei Hyohyaku* [An interpretation of the Judgments],in *Hanrei Times* ,Tokyo,2006,vol.1219.58-63.

pregnancy and birth and gestational surrogacy places her body in unexpected danger. That is why gestational surrogacy creates ethical problems and is contrary to public order and moral.²⁸

The intending parents could not accept this decision and appealed to the Supreme Court. The Chief Justice of the Supreme Court gave a ruling that “we uphold the Osaka high court, ”²⁹ and rejected their appeal. The Judge did not mention the reason for his judgment, but upheld the rule that, “the birth mother is truly the born baby’s legal mother³⁰” and decided gestational surrogacy was contrary to public order and moral.

ii. A case in which a Japanese sterile couple donated their embryo and got a gestational mother to give birth to their baby (gestational surrogacy No.2 in the material No.1).

In the second case, the sterile couple also could not register the baby as their own. The wife’s name is Aki Mukai, a very famous radio announcer and newscaster. Her husband’s name is Nobuhiko Takada, a pro wrestler. They tried to have children by assisted reproductive technologies and published three books about the process of their treatment, because they wanted many people to know the correct information about gestational mothers and the feelings of sterile couples³¹. Feelings of a sterile couple include, for example the bitterness

²⁸ *Op.cit.*

²⁹ The date of the judgment is 24th November 2005, 25th November 2005 in **Asahi Shinbun*[The Asahi News Paper].

³⁰ *Op.cit.*

³¹ Mukai,Aki, **Puropōzu Wātashitachi no Ko wo undekudasa*[Propose -please give birth

of removing her womb and losing their baby, the hopelessness of their future, and the hope of getting their own baby by means of a gestational mother.

Hysterectomy:

When Ms. Mukai became pregnant, her doctor told her he had found that she had uterine cancer. The late discovery meant, it was difficult for them to remove a part of her womb. For her health, she was compelled to give up her baby and have an operation to remove her womb. In despair over losing her baby and the ability ever to give birth to a child, she thought of getting a divorce. Instead of a divorce she agreed with her husband's support, that a gestational mother would give birth to their baby.

As Ms. Mukai gathered information about gestational mothers, she found the Nevada Center for Reproductive Medicine Japan Office. And met Ms. Yuki Sumi, a delegate in this office. As it is difficult for a sterile couple to arrange surrogacy in Japan, sterile couples who hope to obtain gestational surrogacy in a foreign country are increasing thorough the Nevada Center for Reproductive Medicine Japan Office. In this center, before 2002 they had introduced 42 sterile couples to gestational mothers who gave birth to 51 babies³².

to our baby],Tokyo,2002,Mukai,Aki, **Aitakata Dairibo Shussan toiu Sentaku*[We wanted to see our Child. – Our Decision of Host Mother],Tokyo,2004,Mukai,Aki, **I6shu Anata to ita Shiawase na Jikan*[The six weeks - Happy period when we lived with you],Tokyo,2001.

³² Idem.,Mukai,Aki, **Aitakata Dairibo Shussan toiu Sentaku*[We wanted to see our Child. – Our Decision of Host Mother],Tokyo,2004,17.

According to the center, they consider certain requirements when handling case of sterile couples³³. The First requirement is that the intending couple should have hope for their baby sincerely. Secondly, the most important, the intending couple should appreciate the gestational mother and take care of her. On the other hand they demand all gestational mothers should feel “if I can do something for sterile couples, I want to do what I can for them,” and deliver their baby voluntarily. For that, some specialists meet and check them immediately by asking some questions not to speak of a medical checkup. After hearing these policies, Ms. Mukai and her husband had no hesitation in gestational arrangement because the humanitarian and deliberate policies of the center swept away anxiety for some unpleasant rumors that about gestational mother and made them determine to arrange their gestational surrogacy.

The three times attempts:

Immediately, the center found a gestational mother, whose name is Sandra Johnson. She was 35 years old, and had three children. Her husband, James, worked for a building-related company and was a Christian. Before the first attempt, Ms. Mukai and Mr. Takada had lunch and checked whether their affinity and thinking of surrogacy matched. They were convinced that they would succeed with Sandra and James

³³ We can know the requirements of gestational surrogacy in the HP of the Nevada Center for reproductive Medicine. The information of The Nevada Center for Reproductive Medicine is in URL. [<http://www.sumiyuki.co.jp/index.htm>]. Or see Nagita, Makiko, **Dairibo Shussan* [Gestational surrogacy], Tokyo, 1995, 133.

and decided to take care of them sincerely.

The first attempt occurred in August 2002, at which time one egg was retrieved from the left ovary. This cycle, unfortunately, was canceled due to non-fertilization.

The next attempt occurred in December 2002, at which time three eggs were retrieved from the left ovary, resulting in two embryos. They were transferred into a gestational mother but, unfortunately, implantation did not occur and a pregnancy did not result. After this failure, Ms. Mukai and Mr. Takada considered adopting a child. However they really wanted a child of their own genes. They decided to make a third attempt. It would be their last try.

In consideration of Ms. Mukai and Sandra's mental burden, Ms. Yuki Sumi made Ms. Mukai change her gestational mother. The new gestational mother was Cindy, who had given birth to three of her own children. Her husband, James, worked for Gibbons Enterprises. Cindy's job was to do ordering and paperwork at a local furniture store, baby-sit a six-month old girl, and clean their house. For Ms. Mukai and Mr. Takada, Cindy and her family were very good too.

Her third cycle occurred in April 2003. With modification of her stimulation protocol, she produced three eggs from the left ovary and, for the first time, an egg was seen on the right ovary, which was also retrieved, resulting in four oocytes. The sperm injection of the four eggs resulted in three becoming fertilized, of which two were good quality embryos. These were transferred into a gestational mother. As a result, the gestational mother conceived with a twin gestation, confirmed by

two ultrasounds in June. Ms.Mukai and Mr.Takada's babies were growing smoothly, and they were delivered in November. When Cindy gave birth to them, Ms.Mukai and Mr.Takada were in the same delivery room to share the time with her.

The Judgment:

They came back to Japan, tried to register the twins' birth as their own children in the municipal office but the officer refused to register the twins' birth. That is because it was clear that the birth mother was not Ms.Mukai. Ms.Mukai and Mr.Takada accused the municipal office of not registering the twins' birth in their names. However the family court dismissed their petition³⁴.

They objected to this decision and appealed to a higher court in Tokyo. The high court judge recognized that

: the judgment in the Nevada family court said that twins' legal parents were Ms.Mukai and Mr.Takada is the final decision and basically enforceable. However the effect of the foreign judgment is not always enforceable in Japan. Thus in this case the issue of whether this foreign judgment is contrary to public order and moral in Japan or not, that is to say this case of gestational surrogacy is opposed to public order and moral or not.³⁵

For that, the judge reflected specifically on whether this case was

³⁴ The judgment was not officially published. However we can know from the newspaper that the Tokyo family court dismissed their appeal on November 2005, 30th September 2006 in **Asahi Shinbun*[The Asahi News Paper].

³⁵ The judgment was decided 29th September 2006. We can see it in the HP of the High Court. The HP of the High Court is in URL.[<http://www.courts.go.jp/hanrei/pdf/20061012132020.pdf>]

contained in the Ministry of Health, Labor and Welfare reason for prohibiting gestational surrogacy. In this consideration, the judge certified mainly four points as follows. First, the intending parents are related to the resulting children. Second, they had no way to have a child without gestational surrogacy. Third, they paid only the actual expenses to the gestational mother. These expenses were not in consideration of delivering their children to the intending parents. In other words, the gestational mother gave birth to their children voluntarily. Fourth, in the contract they stipulated that a gestational mother's body was the first priority. As a consequence they decided, "this case is not contrary to public order and moral in Japan. Therefore the intending parents are the resulting children legal parents."³⁶

However this judgment was reversed at Supreme Court. They decided, : the rule of deciding legal parenthood should be definite and allows no exception. That is because recognizing legal parenthood is considerably concerned with essential principles and basic philosophy that form the basis of the Family Law. In other words, we should recognize the only legal parenthood provided by the Civil Code (Family Law) and should not recognize any exception. Therefore, we can not but saying that the recognition twins' legal parents are Ms.Mukai and Mr.Takada is opposed to public order and moral, because the Civil Code did not assume the case that birth mother, the egg donor, and the intending mother are different and there is no rule about gestational surrogacy.³⁷

³⁶ *Op.cit.*,

³⁷ The judgment was decided 23rd March 2007. We can see it in the HP of the Supreme

As the consequence, the Supreme Court did not recognize that twins' legal parents were Ms.Mukai and Mr.Takada.

iii. Summary.

Comparing two cases, there are five similarities: They arranged to have a gestational mother in a foreign country to legalize gestational surrogacy; they had the birth certificate filled with the intending parents' name; based on this, they tried to register the children's birth in their names in the municipal office Japan; the officer discovered that the birth mother was not the intending mother and refused to register the children's birth; so the family court and Supreme Court dismissed their petition. However each high court delivered opposite decision. Why were the judgments different?

There is an important difference concerning the egg donor. In the first case, the egg donor was not the intending mother or the gestational mother but a Chinese American woman. In the second case, the egg donor was the intending mother. That is to say, in the second case, the intending mother is biologically related to the resulting children.

Also, there is the judge's different attitude toward gestational surrogacy and legal parenthood. In the first case, concerning the gestational mother, the judge observed that

: the intending parents treated her body as a tool to obtain pregnancy and birth and gestational surrogacy placed her body in unexpected danger as a

Court. The HP of the Supreme Court is in
URL.[<http://www.courts.go.jp/hanrei/pdf/20070323165157.pdf>]

result of pregnancy. That is why gestational surrogacy poses a great ethical problem is contrary to public order and moral.³⁸

In other words, the judge did not consider this particular case but gestational surrogacy in general. On legal parenthood the judge decided, “it is an objective and definite standard that a woman who gives birth to a baby is her or his legal mother and we should not change this rule. This rule allows no exception.”³⁹ They strictly followed a Supreme Court judgment in 1962⁴⁰. On the contrary, the other judge treated second case as an issue of approval of the foreign judgment, reflected concretely on whether this case upheld the Ministry of Health, Labor and Welfare prohibition reasons of gestational surrogacy and decided that this case was not opposed to public order and moral in Japan. That is why in this case it is not a problem to allow an exception to making the intending mother the birth mother.

However, Supreme Court gave ruling that gestational surrogacy is opposed to public order and moral. That is because we should recognize the only legal parenthood provided by the Civil Code and should not recognize any exception.

³⁸ The Judgment of the Osaka High Court, **Hanreijiho* [Journal of Judgments], vol.1919,2005,pp107.Cf.,Hayashi,Takami,**Hanrei Hyohyaku* [An interpretation of the Judgments],in *Hanrei Times* ,Tokyo,2006,vol.1219.58-63.

³⁹ *Op.cit.*,

⁴⁰ Judgments of the Supreme Court, a Civil Affair Law Reports, vol.16.tom.7(1962). 1247.

4. Social recognition for gestational surrogacy in Japan.

In Japan, the Civil Code provides public order and moral. As time and society continue to change, public order and moral also needs to change. Today's society is structured by us. So people should not constitute the regulation of births as gestational surrogacy without the nation's consensus.

What does the nation think about gestational surrogacy? In 1999 and 2003, the Ministry of Health, Labor and Welfare surveyed the opinions of the nation. In it, the word a "surrogate mother" means gestational surrogacy No.1 and a "host mother" means gestational surrogacy No.2 in the material No.1.

i. The data in 1999.

In 1999, the Ministry of Health, Labor and Welfare chose 4000 people at random. The results are as follows⁴¹:

a. Question 1.

"If you or your wife does not have a womb because of a disease, do you want to try gestational surrogacy?"

According to the research, the first question they asked people was "If you or your wife does not have a womb because of disease, do you want to try gestational surrogacy?" Regarding surrogate mother, 82.4 percent of the people answered, "even if my partner wanted to do it, I would

⁴¹ **Seishoku Hogyo Iryō nitsuiteno Isiki Chōsa* [The Public Opinion Survey of Assisted Reproductive Technology in 1999 by S.C.W.S.],in Home Page of the Ministry of Health, Labor and Welfare [http://www1.mhlw.go.jp/houdou/1105/h05061_18.html]

refuse surrogate mother,” 15.4 percent of the people answered “if my partner agrees with surrogate mother, I would do it.” 2.3 percent of the people answered “whether my partner agrees with it or not, I would like to do it.” In other words, the people that want to do surrogate mother are 17.7 percent in total.

As for host mother, 68.8 percent of the people answered, “even if my partner wanted to do, I would refuse a host mother.” 26.1 percent of the people answered, “if my partner agrees with host mother, I would like to do it.” 5.1 percent of the people answered “whether my partner agrees with it or not, I would like to do it.” In brief, the people that want to do host mother are 31.2 percent in total.

It is easier for them to approve of a host mother than a surrogate mother.

There are some reasons people cannot accept a surrogate mother or a host mother. First, “these make the relationships between the parents and child complicated, so it is best to get pregnant naturally,” about 60 percent of the people answered like this. Around 30 percent of the people answered, “The surrogate mother and host mother may have some troubles such as parental rights and succession of property.”

b. Question 2.

“Do you think we should allow gestational surrogacy for married couples?”

The second question was, “Do you think we should allow gestational surrogacy for married couples?” Concerning this question, 36 percent of

the people answered, “we should not agree with a surrogate mother,” 36.7 percent of the people answered, “with some requirements, we should agree with it.” And 7 percent answered, “without any requirements we should agree with it,” In other words, a total of 43.7 percent of the people agreed with surrogate mother.

Regarding a host mother, 29.7 percent of the people answered, “we should not agree with host mother.” 43.6 percent of the people answered, “with some requirements, we should agree with it,” and 9.2 percent answered “without any requirements we should agree with it,” In other words, more than half of the people, 52.8 percent actually agreed with host mother.

Comparing the two questions, as to why people are not willing to enter surrogate mother or host mother, they approved of other people doing it.

ii. The data in 2003.

In 2003, the Ministry of Health, Labor and Welfare chose 8000 people at random and gave them information and a leaflet about surrogate and host mothers. The results are as follows⁴²:

a. Question 1.

“If you or your wife does not have a womb because of disease, do you want to try gestational surrogacy?”

According to the research, they asked people the question “If you or

⁴² **Seishoku Hogen Iryō nitsuiteno Isiki Chōsa* [The Public Opinion Survey of Assisted Reproductive Technology in 2003 by S.M.W.S.], in Home Page of the Ministry of Health, Labor and Welfare
[<http://www.mhlw.go.jp/wp/kenkyu/db/tokubetu02/index.html>]

your wife does not have a womb because of disease, do you want to try gestational surrogacy?” On the topic of surrogate mother, 75.2 percent of the people answered, “even if my partner wanted to do it, I would refuse a surrogate mother.” 21.5 percent of the people answered, “if my partner agrees with a surrogate mother, I would do it.” 3.3 percent of the people answered “whether my partner agrees with it or not, I would like to do it,” In other words, the people that want to do a surrogate mother are 24.8 percent in total. Comparing with the data in 1999, the people that want to do a surrogate mother have increased by around 7 percent.

About host mother, 56.7 percent of the people answered, “we should not agree with a host mother,” 34.7 percent of the people answered “if my partner agrees with a host mother, I want to do it” and 8.6 percent answered “whether my partner agrees with it or not, I would like to do it.” In other words, a total of 43.3 percent of the people agreed with a host mother.

Comparing with the data in 1999, the people that want to do a host mother have increased by around 10 percent.

b. Question 2.

“Do you think we should allow gestational surrogacy for married couples?”

The second question was, “Do you think we should allow gestational surrogacy for married couples?” Concerning this question, 32.1 percent of the people answered, “we should not agree with a surrogate mother.” 31.3 percent of the people “with some requirements, we should

agree with it.” In 2003, the survey did not include the answer “without any requirements we should agree with it.” Therefore the respondents could not choose this answer. However comparing with the data in 1999, the answer that people should not recognize a surrogate mother had decreased by around 4 percent.

About host mother, 22 percent of the people answered, “we should not agree with a host mother,” 46 percent of the people answered, “with some requirements, we should agree with it.” Again, in 2003, they could not choose the answer “without any requirements we should agree with it.” Comparing with the data in 1999, the answer that people should not recognize a host mother had decreased. Also in 2003, it was easier for them to recognize a host mother than a surrogate mother.

There are three main reasons people can accept the host mother. First, over 85 percent of the people answered, “if the wife lost her womb to a disease, a host mother can carry the couple’s baby.” Second, more than 80 percent of the people said, “For a serious illness in which the wife cannot deliver a baby, it is possible for another couple to have their baby.” At last, over 40 percent of the people said “we cannot object to what a sterile couple and host mother decide. That is why the contract is for them.” Meanwhile, over 50 percent of the people who refuse host mother, said, “sterile couples should have a baby naturally.” Around 40 percent of the people said “a host mother carries an unnatural relationship with the parents and child,” or “Commercial host mothers will come in the future,” or “sterile couples use the host mother like a tool for their baby.”

iii. Summary.

Thus, comparing these two questions, in 1999 and 2003, it is not difficult for people to understand that a host mother better than a surrogate mother. Also, people are not willing to enter the surrogate mother or host mother but can agree that other people may enter into it.

Comparing 1999 and 2003, for surrogate mother and host mother, the people who said “if my partner agrees with a surrogate mother, I want to do it,” and “whether my partner agrees with it or not, I want to do it” are increasing.

I think these days some cases of a host mother are causing people to think more about surrogate mother and host mother and gradually to except the idea of using a host mother.

5. Conclusion.

Some doctors, the government and the Supreme Court prohibit gestational surrogacy. That is because there are possibilities that gestational surrogacy puts the gestational mother in unexpected danger for nine months, conflicts may occur between the birth mother and the intending parents as in some cases in the United States, and the intending parents may treat the gestational mother as a tool to have their child. From a medical standpoint, some risks from pregnancy will be relieved in the future. Also conflicts between the gestational mother and the intending parents do not occur every time. There are cases of gestational

mothers handing over the resulting child to the intending parents smoothly, such as in Japan. The most important issue is whether the intending parents treat the gestational mother as a tool to have their child. On this point, Ms. Mukai said, "I have never treated a gestational mother as a tool to have my child and never even had that idea." This case and others suggest that it is possible through the law, to insure that the intending parents do not treat a gestational mother as a tool to have their child.

In a series of changes, starting to re-examine the bill that recognizes a gestational mother with requirements⁴³ in November 2006, the government sought the Science Council of Japan⁴⁴ for professional opinions⁴⁵. Also, according to the public opinion which the Ministry of Health, Labor and Welfare surveyed in 2007, around 54.0 percent of the people answered "with some requirements, we should agree with gestational surrogacy."⁴⁶ In addition, the academic society of obstetricians declared as follows, "in the future if the nation recognizes gestational surrogacy,

⁴³ 19th December 2006, in **Nshinbon Shinbun* [The Nishinbon News Paper].

⁴³ The Nevada Center for reproductive Medicine is in URL. [<http://www.sumiyuki.co.jp/index.htm>].

⁴⁴ "The Science Council of Japan was established in January 1949 as a "special organization" under the jurisdiction of the Prime Minister for the purpose of promoting and enhancing the field of science, and having science reflected in and permeated into administration, industries and people's lives." The Science Council of Japan HP is in URL. [<http://www.scj.go.jp/en/index.html>]

⁴⁵ [<http://www.scj.go.jp/ja/info/iinkai/seishoku/irai.pdf>]

⁴⁶ The Ministry of Health, Labor and Welfare do not publish detailed data. However, you can see 22th June 2007 in **Asahi Shinbun* [The Asahi News Paper], 25th June 2007, in **Nshinbon Shinbun* [The Nishinbon News Paper].

we will re-examine gestational surrogacy as well.”⁴⁷ At last, as a supplementary opinion in the judgment of Supreme Court in 2007, some judges said, “considering the fact assisted reproductive technologies are developing remarkably and some sterile couples hope to have their baby by gestational surrogacy in foreign country, we need new rules of deciding the legal parents resulted from gestational surrogacy.”⁴⁸

These movements mean that, in the near future doctors, courts, the government and the nation will recognize gestational surrogacy in Japan.

⁴⁷ The Academic Society of Obstetricians HP is in URL. [http://www.jsog.or.jp/kaiin/html/H15_4.html]

⁴⁸ The judgment was decided 23rd March 2007. You can see a supplementary opinion in the HP of the Supreme Court. The HP of the Supreme Court is in URL. [<http://www.courts.go.jp/hanrei/pdf/20070323165157.pdf>]

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<Material No. 1>

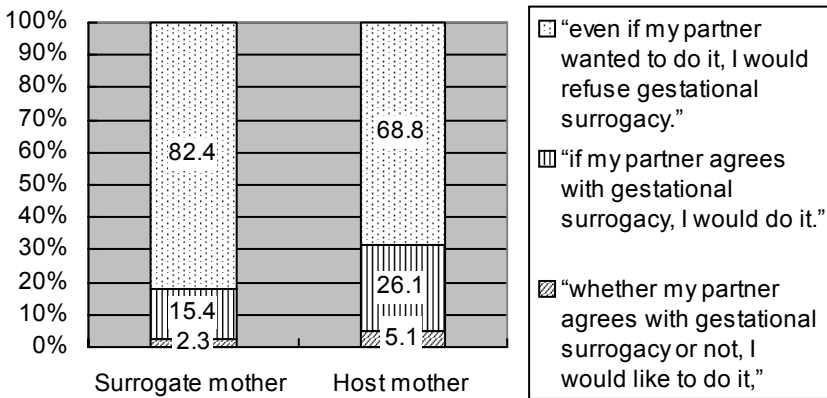
Kind if surrogacy

		egg donor		sperm donor		
		wife	another women	husband	another men	
artificial insemination	①		○	○		An egg donor and a birth mother are the same.
in vitro fertilization	②	○		○		
	③		○	○		An egg donor and a birth mother are different.
	④	○			○	
	⑤		○		○	This style is possible from a medical standpoint. However, there is no discussion on this in Japan, because this is not different from adoption, so I do not consider this style.

<Material No. 2>

Question 1

“If you or your wife does not have a womb because of a disease, do you want to try gestational surrogacy?”

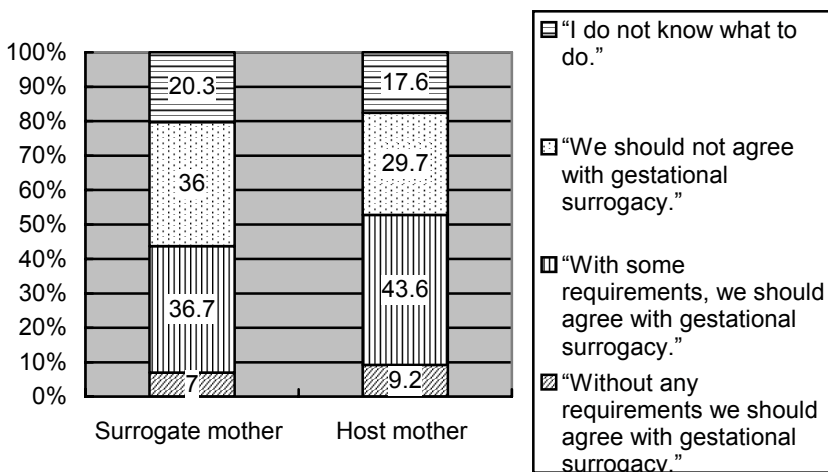


The Public Opinion Survey of Assisted Reproductive Technology in 1999 by S.C.W.S. in Home Page of the Ministry of Health, Labor and Welfare [http://www1.mhlw.go.jp/houdou/1105/h05061_18.html]

<Material No. 3>

Question 2

“Do you think we should allow gestational surrogacy for married couples?”

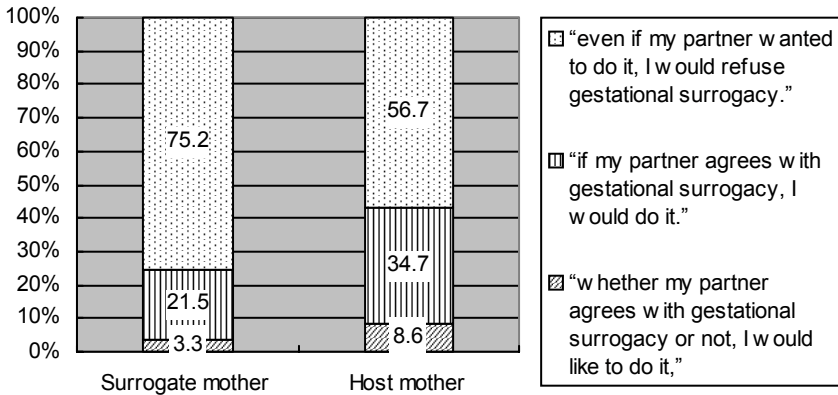


The Public Opinion Survey of Assisted Reproductive Technology in 1999 by S.C.W.S. in Home Page of the Ministry of Health, Labor and Welfare [http://www1.mhlw.go.jp/houdou/1105/h05061_18.html]

<Material No. 4>

Question 1

“If you or your wife does not have a womb because of a disease, do you want to try gestational surrogacy?”

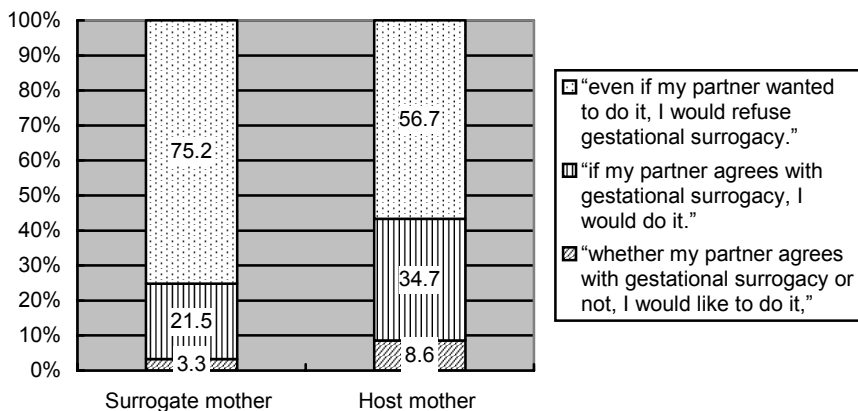


The Public Opinion Survey of Assisted Reproductive Technology in 2003 by S.M.W.S. in Home Page of the Ministry of Health, Labor and Welfare [<http://www.mhlw.go.jp/wp/kenkyu/db/tokubetu02/index.html>]

<Material No. 5>

Question 2

“Do you think we should allow gestational surrogacy for married couples?”



The Public Opinion Survey of Assisted Reproductive Technology in 2003 by S.M.W.S. in Home Page of the Ministry of Health, Labor and Welfare [<http://www.mhlw.go.jp/wp/kenkyu/db/tokubetu02/index.html>]