

Chinese legal response to the shared motherhood model in lesbians' family-making

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ABSTRACT

Despite the non-recognition of same-sex relationships or marriage by the law, lesbian motherhood has become an emerging socio-legal issue in China. To fulfil their desires to reproduce and make a family, some Chinese lesbian couples adopt a 'shared motherhood model' where one lesbian contributes an egg while her partner becomes pregnant through embryo transfer following artificial insemination with a donor's sperm. Because the shared motherhood model intentionally divides the roles of biological mother and gestational mother between lesbian couples, this has allowed legal controversies to emerge associated with the parenthood of the conceived child as well as custody, support of, and visitation of the child. There are two pending judicial cases involving a shared motherhood arrangement reported in the country. The courts have appeared reluctant to rule on them because Chinese law has not provided clear legal solutions to these controversial issues. They are highly cautious about delivering a decision not in line with the current legal position of non-recognition of same-sex marriage. Given little literature discussing Chinese legal responses to the shared motherhood model, this article aims to fill the gap by investigating the basis of parenthood under Chinese law and analysing the parentage issue concerning the different types of relationships between lesbians and children born of a shared motherhood arrangement.

KEYWORDS: shared motherhood model, lesbians' family-making, basis of parenthood, custody, support and visitation, China

I. INTRODUCTION

Despite the non-recognition of same-sex relationships or marriage by the law,¹ lesbian motherhood has become an emerging socio-legal issue in China. Chinese lesbian couples have adopted a number of different ways to fulfill their desires to reproduce and make a family. One way is having children born from a previous heterosexual marriage or relationship. Another is having a ‘contract marriage’ and conceiving children with their gay husbands.² More recently, advances in and availability of assisted reproductive technologies (ARTs) have empowered lesbians to gain more agency in their family-making and child-conceiving. Some lesbian couples choose to have biological children through a surrogacy service.³ Others follow a ‘shared motherhood model’ where one lesbian contributes an egg while her partner becomes pregnant through embryo transfer following artificial insemination with a donor’s sperm. As such, they share the motherhood of the conceived child—one as the biological mother⁴ and the other as the gestational mother.⁵ Some lesbian couples even exchange their eggs, conceive, and give birth to their partner’s biological child with the aid of ARTs so that they can both be the gestational and biological mother at the same time.⁶

The shared motherhood model has its advantages in enabling lesbian couples to have a joint connection with the conceived child either by a genetic link or the experience of childbearing and birth. This may help them achieve a more cohesive and supportive family structure. However, because the shared motherhood model intentionally divides the roles of the biological mother and the gestational mother between lesbian couples, this has allowed legal challenges to emerge associated with the parenthood of the conceived child. Such a model affects the interests of lesbian

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- 1 Although the number of lesbians and gays, respectively, reached 35 million and 30 million in China in 2014, the current marriage and family law has not legalized same-sex relationships or marriage, see Cai Huiqiong, ‘Investigation on the Recognition of Same-sex Relationships and Marriage under the Marriage and Family Law’ (同性恋及同性恋婚姻的婚姻家庭法律认可探究) (2018) 4 *Legal System and Society* (法制与社会) 242–244, 242.
 - 2 Chen Yaya, ‘Challenges towards the Traditional Marriage System Brought about by Lesbians’ Marriage and Family’ (女同性恋者的婚姻和家庭给传统婚姻制度带来的挑战) (2009) 4 *Society* (社会) 107–226, 108; Jiang Meng, Liu Yong and Chen Jianzhi, ‘Investigation on the Counter Measures of Post-1985 Lesbians Encountering the Heterosexual Marriage Pressure’ (“85后”女同性恋者异性婚姻压力应对策略探究) (2013) *Social Studies* (社会研究) 119–120, 120; Iris Lo, ‘Dialectical Family Imaginaries: Navigating Relational Selfhood and Becoming a Parent through Assisted Reproduction in China’ (2022) *Sociology* 1–17, 3, <https://journals.sagepub.com/doi/abs/10.1177/00380385221113480> (accessed Feb. 10, 2023).
 - 3 Wei Wei, ‘Reproduction of the Same-sex Partners’ Family: Achieving Path, Family Life, and Social Adaption’ (同性伴侣家庭的生育: 实现途径家庭生活和社会适应) (2016) 12 *Shandong Social Science* (山东社会科学) 75–82, 77; I. Lo, *ibid.*, 8.
 - 4 The term ‘the biological mother’ is used in this article in a narrow sense. It refers to a woman who contributes her egg to conceive a child and is genetically connected to the child. In other words, ‘the biological mother’ is interchangeable with ‘the genetic mother’ in the article.
 - 5 Hao Zheng, ‘Shared Motherhood or Free Surrogacy?: Risks and Vulnerabilities in a Chinese Lesbian’s Family-making’ (2021) 69 (11) *Journal of Homosexuality*, 1881–1907, 1887–1888. Some described the medical procedure used in a shared motherhood arrangement as ‘intra-partner egg donation’ and ‘co-maternity’, see D. Bodri et al., ‘Shared Motherhood IVF: High Delivery Rates in a Large Study of Treatments for Lesbian Couples Using Partner-Donated Eggs’ (2018) 36(2) *Reproductive BioMedicine Online*, 130–136, 131. Regardless of the labels, a shared mother arrangement is motivated by a strong wish of lesbian couples to achieve shared motherhood and have a genetic or gestational joint connection between them and the conceived child.
 - 6 H. Zheng, *Ibid.*

couples and their children, no matter whether their relationship continues or ends. Specifically, the following three legal issues require a clear answer. First, what is the nature of the shared motherhood agreement in law? Second, how to determine the legal parenthood of a child born of a shared motherhood model? Third, if lesbian couples separate after the child is born, how to determine the issues of custody and support of the child and parental visitation rights?

Although lesbian motherhood has not been a prominent topic in Chinese society, and the general public knows little about sexual minorities,⁷ a few such disputes have been filed in court in recent years. Because Chinese law has not provided clear legal solutions to these controversial issues, the courts have appeared reluctant to make a ruling on such cases. Hence, Chinese lesbians' family-making practice through the shared motherhood model has been subject to legal uncertainty, thus affecting their desires and choices of approach to achieve motherhood and family-making. Little literature has discussed Chinese legal responses to the shared motherhood model. This article aims to fill the gap by investigating the basis of parenthood under Chinese law and analyzing the parentage issue concerning the different types of relationships between lesbians and children born of a shared motherhood arrangement.

This article is in six parts. The second part introduces two Chinese judicial cases of shared motherhood and the legal issues emerging from them. The following three parts, respectively, analyze the legal nature of the shared motherhood agreement, the legal parenthood of the child born through a shared motherhood arrangement, and upon separation, the lesbian mothers' rights to custody and visitation and their duty to support the child under Chinese law. The final part concludes the article.

II. TWO SHARED MOTHERHOOD CASES

II.A. Xiamen Case

The plaintiff (P) and the defendant (D) were a lesbian couple. They agreed on a shared motherhood model to have a child in which P would be the biological mother and D the gestational mother. In April 2019, P went through an oocyte retrieval procedure to provide an egg fertilized with sperm purchased from an anonymous party through *in vitro* fertilization. Five days later, the embryo was transferred to D, who gave birth to a healthy baby girl in December 2019. The birth certificate issued by a hospital in the city of Xiamen where D gave birth documented D as the gestational and biological mother and stated no information about the child's father. The child's household (*hukou*)⁸ was

7 Li Yinhe and Zheng Hongxia, 'The Public's Attitude toward Gays and Lesbians and Influential Factors' (公众对同性恋的态度及影响因素) (2013) 6 *Journal of South China Normal University (Social Science Edition)* (华南师范大学学报(社会科学版)) 31–36, 36.

8 China's household (*hukou*) registration system works as an official recognition of residency of a Chinese citizen, and all the educational, health, housing benefits and employment of citizens are associated with it, see Fenglong Wang & Yungang Liu, 'Interpreting Chinese Hukou System from a Foucauldian Perspective' (2018) 36(2) *Urban Policy and Research* 153–167, 153. Many children who were born in violation of the one-child policy could not have a *hukou* registration until the central government changed the family planning policy to the two-child policy in 2016. The current three-child policy has implemented since 2021 removed the difficulty of registering the third child of a family. Their *hukou* registration is normally with their single parent for children not born into a marriage. In a shared motherhood case, most children are registered with the gestational/birth mother if born domestically. However, children born overseas may be strategically registered with one of the lesbian couples to maximize the interests of the child. For example, a child is

registered with D. P and D lived together and jointly took care of the child until Feb. 26, 2020, when D, without notifying P, left their residence and took the child. P did not know where D and the child were living and filed an action in the Basic Court of Huli District of Xiamen of Fujian Province, claiming her motherhood and custody of the child.

During the first-instance trial, P applied to the court for DNA parentage testing on her and the child. D argued that the testing was unnecessary because she admitted that P had provided her egg to conceive the child with the aid of ARTs. In September 2020, the court made its decision. It confirmed that the parties conceived the child through an unlawful purchase of sperm and the use of ARTs. The court held that, despite the parties' shared motherhood agreement and D's acknowledgment of a genetic link between P and the child, there was no legal basis to support P's legal parenthood of the child. Moreover, it ruled that D had custody of the child according to the principle of the best interests of the child because the child's birth certificate documented D as the gestational and biological mother, she had taken care of the child since childbirth, and the child was younger than one year old and needed breastfeeding.⁹ Therefore, the court turned down P's claim.

P appealed to the appellate court, the Intermediate People's Court of Xiamen. Although the law requires the court to decide an appeal case within three months of its acceptance,¹⁰ this case has been pending with the appellate court for almost two years.

II.B. Beijing Case

The plaintiff (P) and the defendant (D) were a lesbian couple and had a long and stable relationship. In 2016, they travelled to the United States to get married and, at the same time, to conceive two children (one boy and one girl) with the aid of ARTs according to their shared motherhood agreement. Both eggs were contributed by D. P bore and gave birth to the girl, and D bore and gave birth to the boy in 2017. Later, they brought the children back to China. P did most of the childcare at home until their relationship broke down in November 2019. Without P's consent, D took the children to Beijing, where they have been cared for by D's parents ever since. P was prevented from living with and visiting the children. As D argued, both children were genetically linked to her, and she paid all expenses related to the use of ARTs overseas; therefore, the children should be hers. P disagreed. As D's *hukou* registration was in the City of Zhoushan, P sued D in the Basic Court of Dinghai District of Zhoushan of Zhejiang Province in March 2020, requesting her custody right and guardianship of the children.¹¹

D disputed the jurisdiction of the case and argued that it should be filed in Beijing because she had been working and living there for more than one year, and Beijing had

registered with the lesbian whose *hukou* is in a big city, while her partner's *hukou* is in a rural area so that the child can get a better education, medical benefits, and other social welfare.

9 Li Seyang, 'Legal Issues on the Right to Custody of the Same-sex Partner's Child Born through Surrogacy' (同性伴侣代孕子女抚养权法律问题探析) (2021) 6 *Legal System and Society* (法制与社会) 129–131, 131.

10 Art.183 of the *Civil Procedure Law* (民事诉讼法), which was promulgated by the National People's Congress on Apr. 9, 1991, effective on the same day. It was amended in 2007, 2012, 2017, and 2021.

11 Qin Wenlu, 'Studies on the Issue of Guardianship of the Child of the Same-sex Partner' (同性伴侣子女的监护问题研究) (2021) 13(6) *Medicine and Law* (医学与法学) 124–128, 124.

become her habitual residence. In May 2020, the court agreed that the case should be moved to the Basic Court of Fengtai District of Beijing, which had its first hearing in November 2020.¹² However, the latter court has not yet delivered its decision even though the law requires a first-instance case to be decided and closed within six months of its acceptance.¹³

II.C. Legal Challenges Emerging from the Two Cases

The above two judicial cases are both concerned with a child born through a shared motherhood arrangement between lesbians in a relationship. The courts need to deal with the following three legal challenges emerging therefrom. First, what is the nature of the shared motherhood agreement in law? Second, how to determine the legal parenthood of a child born of the shared motherhood model? Third, if the lesbian couple separates after the child is born, how to determine the issues of custody and support of the child and parental visitation rights?¹⁴

The fact that the Xiamen and Beijing cases have been pending for an unusually long time shows that the courts perceive the issues to be controversial and are having difficulties reaching an acceptable decision. The underlying reasons are three-fold. First, the lawmakers of the *Marriage Law*¹⁵ and the *Civil Code*¹⁶ did not contemplate the scenario of a child being born through a shared motherhood arrangement. They only considered that a child would be born in a traditional and common family structure based on a heterosexual marriage when drafting the statutory provisions regarding legal parenthood, custody and support of the child, and parental visitation rights. Second, as same-sex marriage has not been legalized in China, the judicial approach to determining these issues will inevitably have implications for the country's legal position on same-sex relationships or marriage. The courts are highly cautious about delivering a decision that is not in line with the current legal position of non-recognition of same-sex marriage. Third, because no statutory provisions specifically address the legal issues emerging from shared motherhood cases, the courts must find an appropriate legal basis and provide robust and complicated reasoning to tackle the legal loophole involved in such cases. To do that, the courts must explore a fundamental issue about the basis of parenthood. Specifically, the courts need to answer the question—what is the basis of parenthood under Chinese law: a biological connection with the child, a gestational contribution, or an intent to be a parent and social contributions to parenting? For example, the defendant in the Xiamen case intended to be a parent and made gestational

12 Zhang Xiaolian, 'Dialogue with the Plaintiff's Lawyer of the First Custody Case Involving the Children Born to Same-sex Partners' (对话首例同性恋伴侣子女抚养权案律师), June 6, 2022, *The Paper* (澎湃), https://www.thepaper.cn/newsDetail_forward_7768782 (accessed Feb. 10, 2023).

13 Art.152 of the *Civil Procedure Law*.

14 Although these three questions are discussed in the context of disputes between the lesbian partners when their relationship ends, the first two questions remain valid even though their relationship maintains. Therefore, the discussion and solutions made in this article are of importance beyond the circumstances of the disputes.

15 The *Marriage Law* (婚姻法) was promulgated by the National People's Congress on Sep. 10, 1980, effective on Jan. 1, 1981. It was amended in 2001 and annulled on Jan. 1, 2021 when the *Civil Code* took effect on the same day.

16 The *Civil Code* (民法典) was promulgated by the National People's Congress on May 28, 2020, effective on Jan. 1, 2021.

contributions and social contributions to parenting. However, she was not genetically linked to the child. The plaintiff in the Beijing case was in the same situation with respect to the girl. However, as to the boy, she only demonstrated an intent to be a mother and made social contributions to parenting him. The artificial separation of the mother's roles of conception and gestation through the use of ARTs and additional factors (such as intent and social contributions to parenting) have legally complicated the understanding of the basis of parenthood.

The following three parts of this article will discuss the three related legal issues emerging from shared motherhood cases in order to provide insights into how Chinese law can respond to the shared motherhood model in lesbian family-making.

III. LEGAL NATURE OF THE SHARED MOTHERHOOD AGREEMENT

Should a shared motherhood agreement made by a lesbian couple be considered a legally enforceable contract under Chinese law? Article 464(1) of the *Civil Code* defines a contract as 'an agreement on the establishment, modification, or termination of a civil juristic relationship between civil subjects'. Article 464(2) of the *Civil Code* further provides that an agreement on establishing a marriage, adoption, guardianship, or the like personal relationships should be governed by the provisions of laws providing for such personal relationships; in the absence of such provisions, the provisions of the Book on Contracts may be applied *mutatis mutandis* according to the nature of such agreements. Similar to a marriage or adoption agreement, a shared motherhood agreement is an agreement concerning a personal relationship in which lesbian couples agree on the manner in which a child will be conceived and, more importantly, the motherhood to be shared between them. There are no statutory provisions providing for shared motherhood under Chinese law. Accordingly, the court may apply the relevant provisions of the Book on Contracts *mutatis mutandis*.

Although a shared motherhood agreement can be seen as a contract under the *Civil Code*, whether it is valid and enforceable is another question. Article 143 of the *Civil Code* sets out three legal elements for a valid contract: (1) the parties have the civil capacity to conduct juristic acts; (2) it is a true expression of intent; and (3) there is no violation of any mandatory provisions of laws or administrative regulations and no offence to public order and morality.¹⁷ If a lesbian couple is composed of adults without mental disability who have voluntarily expressed their true intent, the first two legal elements are met. However, controversy may arise regarding the third legal element: does a shared motherhood agreement violate any mandatory provisions of laws or administrative regulations or offend any public order or morality?

Although lesbian couples are socially different from single women, they are still seen as single women because Chinese law does not allow same-sex marriage. Article 3(13) of the *Norms of Assisted Human Reproductive Technology*¹⁸ provides that ARTs should

17 The term 'public order and morality' is '公序良俗' in Chinese. It has a fluid meaning and gives the courts great discretion to interpret the specific content of the relevant public order and morality in individual cases.

18 The *Norms of Assisted Human Reproductive Technology* (人类辅助生殖技术规范) was promulgated by the Ministry of Health on June 27, 2003, effective on Oct. 1, 2003.

not be applied to a single woman.¹⁹ According to Article 8 of the *Legislation Law*,²⁰ such a restriction of citizens' fundamental civil rights and reproductive autonomy must be stipulated by a law made by the National People's Congress or its Standing Committee. Because the *Norms of Assisted Human Reproductive Technology* was enacted by the Ministry of Health,²¹ it cannot set out such a restriction. In other words, Article 3(13) of the *Norms of Assisted Human Reproductive Technology* arguably lacks legality due to Article 8 of the *Legislation Law*.²² Moreover, Article 143 of the *Civil Code* sets out the legal requirement of no violation of laws (ie those made by the National People's Congress or its Standing Committee) or administrative regulations (ie those made by the State Council). Therefore, a violation of an administrative rule made by a department of the State Council, such as the *Norms of Assisted Human Reproductive Technology*, cannot deprive a shared motherhood agreement of enforceability.

However, Chinese courts may infer from Article 3(13) of the *Norms of Assisted Human Reproductive Technology* that it is against public order and morality to allow a single woman to access ARTs, which includes oocyte retrieval, *in vitro* fertilization, and embryo transfer.²³ As the same rule that ARTs should not be applied to a single woman was provided in Article 4 (titled 'The Principle of Public Interest') of the *Ethical Principles of Assisted Human Reproductive Technology*,²⁴ it may be argued that this restriction is a matter of public interest and concerns public order and morality. Therefore, it is likely that a shared motherhood agreement by lesbian couples will be

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- 19 Due to the legal restriction, it is difficult for lesbians to access ARTs in China. Only lesbians who have economic privileges may access ART services abroad when they can afford such services. I. Lo, see n 2 above, 3; Iris Lo, Emma Liu, and Sam Yu, 'Family and Work Lives of Lesbians in China: Implications for the Adult Worker Model' (2022) 19(11) *International Journal of Environmental Research and Public Health*, 11, <https://doi.org/10.3390/ijerph19116390> (accessed Feb. 10, 2023).
- 20 The *Legislation Law* (立法法) was promulgated by the National People's Congress on 15 March 2000, effective on July 1, 2000. It was amended in 2015.
- 21 The Ministry of Health (卫生部) was transformed into the National Health and Family Planning Commission (国家卫生与计划生育委员会) in 2013. The latter was changed to the National Health Commission (国家卫生健康委员会) in 2018.
- 22 It has been proposed to allow single women to access ARTs in recent years, see Hou Runfang, 'The Member of the National Committee of the Chinese People's Political Consultative Conference Mr Jin Li: Proposing to Remove the Restriction on Single Women's Access to the Service of Frozen Oocyte and Accept Illegitimate Children of Single Women' (全国政协委员金李:建议放开单身女性冻卵限制认可非婚生育孩子), Mar. 2, 2022, *Beijing News* (新京报), <https://m.bjnews.com.cn/detail/164618615814448.html> (accessed Feb. 10, 2023).
- 23 It is worth noting that the Chinese government has greatly concerned about a dip in its population in 2022 and a shortage of labor force in the future; see 'China's Population Is Shrinking – and Graying', *Time*, Jan. 17, 2023, <https://time.com/6248728/china-population-decline-aging/> (accessed Feb. 10, 2023). Against this backdrop, the local government of Sichuan Province issued the new *Measures of Sichuan Province on Administration of the Birth Registration Services* (四川省生育登记服务管理办法) on Feb. 2, 2023. It took effect on Feb. 15, 2023. The new local law features two new rules. First, the birth registration will no longer be limited to married applicants; second, it cancels a maximum number of children regarding an application for birth registration. The new local law intends to encourage unmarried people to be parents; see 'Chinese Province Drops Restrictions on Unmarried People Having Children in Bid to Halt Plummeting Birth Rate', *CNN*, Feb. 1, 2023, <https://edition.cnn.com/2023/01/31/china/china-sichuan-birth-registration-unmarried-intl-hnk/index.html> (accessed Feb. 10, 2023). However, it is a local enactment and does not change the national legal position of no access to ARTs by single mothers although there could be a possibility of change in the future.
- 24 The *Ethical Principles of Assisted Human Reproductive Technology* (人类辅助生殖技术伦理原则) was promulgated by the Ministry of Health on Dec. 17, 2001, effective on the same day. It was replaced by the *Norms of Assisted Human Reproductive Technology* in 2003.

declared invalid and unenforceable by the courts. Nevertheless, the agreement can be evidence of the parties' intent to be parents of the child born through a shared motherhood arrangement.

Moreover, the issue of whether the shared motherhood agreement violates any mandatory provisions of laws or administrative regulations also touches upon a fundamental legal question—does Chinese law allow parenthood to be determined and shared between the parties merely based on their mutual agreement? The answer to this question is negative. The next part of this article provides a more detailed discussion of the types of parenthood and the basis of parenthood under Chinese law.

IV. PARENTHOOD OF A CHILD BORN THROUGH A SHARED MOTHERHOOD ARRANGEMENT

IV.A. Types of Parenthood Recognized by Chinese Law

Legal parenthood is determined by the operation of the law (but not by contract) under Chinese law, which recognizes two types of parenthood: natural parenthood and constructive parenthood. Natural motherhood is normally established by the fact of childbirth regardless of the existence of a marriage between the biological parents. When a child is born to a married woman, it is presumed that the child is a legitimate child and the woman's husband has the natural fatherhood of the child according to the marital presumption of paternity. When a child is born into a marriage declared void or annulled by the court after his or her birth, the parentage of the parties to the void or annulled marriage remains valid according to Article 1054 of the *Civil Code*. When a child is born out of wedlock, despite being an illegitimate child, he or she is entitled to the rights of a legitimate child and should not be harmed or discriminated against by any party according to Article 1071(1) of the *Civil Code*.

Chinese law recognizes two types of constructive parenthood. The first and most common one is adoptive parenthood. Adoption must be established upon registration at the local civil affairs bureau according to Article 1105 of the *Civil Code*. In other words, Chinese law does not recognize a *de facto* adoption. Moreover, once an adoptive relationship is established, parentage between the adoptive child and the adoptive parents replaces that between the child and his or her natural parents according to Article 1111 of the *Civil Code*.

The second type of constructive parenthood, unique to Chinese law, is constructive parenthood based on a stepparent-stepchild relationship. As provided by Article 1072(2) of the *Civil Code*, the relevant provisions regarding the parent-child relationship shall be applied to the relationship between a stepparent and a stepchild raised and educated by the former. Such constructive parenthood is established on the fact that a stepparent has reared and educated a stepchild for a certain period of time. When the stepparent is divorced from the biological parent of the stepchild, he or she may freely decide whether to continue such constructive parenthood if the stepchild remains a minor or incompetent adult at the time of divorce according to Article 54 of the *Interpretation I of the Supreme People's Court on the Application of Book of Marriage and Family of the Civil Code* ('Interpretation I on Book of Marriage and Family').²⁵

25 The *Interpretation I of the Supreme People's Court on the Application of Book of Marriage and Family of the Civil Code* (最高人民法院关于适用《中华人民共和国民法典》婚姻家庭编的解释(一)) was promulgated by the Supreme People's Court on Dec. 29, 2020, effective on Jan. 1, 2021.

It is important to note that, different from adoption, the stepparent-stepchild constructive parenthood neither requires registration at the local bureau of civil affairs nor causes the natural parenthood between the stepchild and his or her other natural parent to be terminated. As such, the stepparent-stepchild constructive parenthood gives rise to a three-legal-parent model.²⁶ Specifically, a child may have three legal parents at the same time: his or her two natural parents and one stepparent who has been rearing and educating him or her. This is seen as an exception to the ordinary two-legal-parent model under Chinese law.

IV.B. The Basis of Parenthood Under Chinese Law

In relation to a shared motherhood model, four factors may be considered as the basis of legal parenthood: a biological connection with the child, the gestational contribution, an intent to be a parent and social contributions to parenting. Although some scholars argue that the parentage issue should be decided in accordance with the principle of the best interests of the child because the *Civil Code* endorses this principle in relation to the issues of custody and guardianship of the child,²⁷ I disagree because they have confused the parentage issue with the issues of custody and guardianship and overgeneralized that the principle of the best interests of the child should be applied to all legal issues involving a child. Unlike the custody issue that centers on the best interests of the child concerned, the parentage issue is generally guided by parental interests.²⁸ Unlike the guardian disqualification issue primarily based on the principle of the best interests of the child,²⁹ the legal parenthood cannot be deprived of or changed because the parent has not acted in the best interests of the child. Furthermore, Chinese courts have clarified that the child's best interests are not a determinant when deciding the parentage issue.³⁰ Although there is no statutory provision that clearly explains the basis of parenthood in Chinese law, it is possible to search for an answer by examining the legal test of parenthood embodied in a number of statutory principles concerning parenthood.

1. *The Biological Ground of Parenthood*

A biological connection with the child concerned is the primary basis of natural parenthood under Chinese law. As noted above, natural motherhood is established

26 By contrast, although Canadian law recognizes the child support obligation of stepparents who meets the criteria of standing in the place of a parent, it does not produce the effects of parental status. However, the Ontario case *A.A.* (2007) recognized three (or more) legal parents of same-sex partners, especially in cases where the genetic contributors are known and intend to be a parent of the conceived child, see L. Harder and M. Thomarat, 'Parentage Law in Canada: The Numbers Game of Standing and Status', (2012) 26(1) *International Journal of Law, Policy and the Family* 62–87, 74, 77–78.

27 E.g., Yang Lixin, 'Determination of the Parentage of Same-sex Partners with Their Children' (同性同居者与其所生子女的亲子关系认定) (2021) 39(9) *Hebei Law Science* (河北法学) 27–43, 32.

28 D. Nejaime, 'The Nature of Parenthood' (2017) 126(8) *Yale Law Journal* 2260–2381, 2269.

29 Articles 35 and 36 of the *Civil Code*.

30 See *Chen v Luo* (2015) 沪一中少民终字第 56号. This is same in the United States, see L. Harris, 'The Basis for Legal Parentage and the Clash between Custody and Child Support' (2009) 42(3) *Indiana Law Review* 611–638, 629. However, courts in some countries (such as the United Kingdom), in deciding whether to issue a parental order, may consider the child's best interests in addition to the requirement of a genetic link between the intending parent and a surrogate child despite born through an offshore commercial surrogacy arrangement, see E. Jackson, 'UK law and International Commercial Surrogacy: The Very Antithesis of Sensible' (2016) 4(3) *Journal of Medical Law and Ethics* 197–214, 200–201.

by proof of childbirth evidenced by a birth certificate issued by the hospital where the child was born. This is because the law adopts a presumption of a genetic link between the gestational mother and the newborn child. However, such a presumption is rebuttable. According to Article 2(2) of the *Notice of the Ministry of Health regarding Further Improving the Management of the Birth Certificate*,³¹ the relevant parties may, with the supporting proof of DNA parentage testing conducted by a qualified forensic authentication institution, request the issuing hospital to change the information about the parent that appears on the birth certificate. This not only shows that a biological connection is the basis of natural parenthood but also reveals that the fact of childbirth is merely used to infer a biological connection with the child.

Moreover, Article 1073 of the *Civil Code* authorizes the parties who have justification for questioning the legal parenthood of a child to apply to the court for confirmation or renouncement of parenthood. Specifically, Article 39(1) of the *Interpretation I on Book of Marriage and Family* is concerned with ‘judicial renouncement of parenthood’ as it provides that when a mother or a father files an action in court with the necessary supporting evidence requesting judicial renouncement of parenthood in relation to a named child, the court may deem that the plaintiff’s request stands if the other party to the dispute has failed to provide opposing evidence and refuses to undergo DNA parentage testing. Moreover, Article 39(2) is concerned with ‘judicial confirmation of parenthood’, which provides that when a father, a mother, or an adult child files an action in court with the necessary supporting evidence requesting judicial confirmation of parenthood in relation to the named child, the court may deem that the plaintiff’s request stands if the other party to the dispute has failed to provide opposing evidence and refuses to undergo DNA parentage testing. In practice, the DNA parentage testing result is seen as the most compelling evidence to determine natural parenthood. The father’s argument that he should not be the legal father because the child’s mother lied to him that she was using birth control has never been accepted by the courts, which implies that his intention not to be the father is insufficient to deny legal fatherhood.

A caveat is that a gamete or embryo donor will not be treated as the legal parent of a child conceived using the donated gamete under the donor anonymity principle,³² despite their genetic connection with the child. In other words, the donor’s intention not to be a parent overrules the biological connection between the donor and the child for the purpose of maintaining a supply of donated gametes or embryos.

2. The Intent and Social Grounds of Parenthood

Legal parenthood may also be established on the grounds of intent and social factors— a person not only has the intent to be a parent but also makes social contributions to parenting the child. Chinese law sees intent and social grounds as the basis of parenthood in two exceptional situations.

The first situation is concerned with legal parenthood in the case of donor insemination. The *Reply of the SPC regarding the Post-divorce Legal Status of the Child Born*

31 The *Notice of the Ministry of Health regarding Further Improving the Management of the Birth Certificate* (卫生部关于进一步加强出生医学证明管理的通知) was promulgated by the Ministry of Health on Sep. 29, 2009, effective on the same day.

32 Article 5 of the *Ethical Principles of Assisted Human Reproductive Technology*.

from *Artificial Insemination*³³ states that when a husband and wife have agreed to have a child through (donor) artificial insemination during their marriage, the conceived child is deemed to be their legitimate child even though the husband is not genetically connected to the child; the rights and obligations of the parents and child should be governed by the relevant provisions of the *Marriage Law*. This rule is incorporated in Article 40 of the *Interpretation I on Book of Marriage and Family*. Therefore, Chinese law recognizes legal parenthood based on the receiving party's intent to be the parent and his or her social contributions to parenting the child born of donor insemination.

The second situation relates to the stepparent-stepchild relationship. Article 1072(2) of the *Civil Code* recognizes the stepparent's legal parenthood of the stepchild when the former has reared and educated the latter for a certain period of time. Although the provision does not explicitly mention the basis of such constructive parenthood, the appellate court in *Luo v Chen*³⁴ clearly addressed this issue and, more importantly, expanded the application of Article 1072(2) of the *Civil Code* to the establishment of parenthood of the non-biological intending parent in surrogacy cases. In this case, the defendant was Chen, the intending mother, who married the intending father and son of Luo, the plaintiff. Due to Chen's infertility, the couple agreed on a gestational surrogacy arrangement, resulting in surrogate twins being born from the intending father's sperm and the donated eggs. The birth certificates documented the couple as their parents. The twins lived with the couple from birth, and the intending mother, Chen, continuously raised and educated them after her husband died in February 2014. The plaintiff Luo, the father-in-law of Chen, filed an action to challenge Chen's motherhood and guardianship of his surrogate grandchildren in December 2014. When interpreting Article 27(2) of the *Marriage Law* (the equivalent of Article 1072(2) of the *Civil Code*), the appellate court highlighted two requirements for establishing legal parenthood based on the stepparent-stepchild relationship: one is objective, and the other is subjective. The objective factor originates from the language of the provision, that is, the fact of a stepparent raising and educating a stepchild. The subjective factor, as the court interpreted, is that the stepparent must intend to treat the stepchild as his or her own child. In other words, the subjective and objective requirements, respectively, show the 'intent' and 'social' grounds of this type of constructive parenthood. Such interpretations of Article 1072(2) of the *Civil Code* have subsequently been accepted by other courts.³⁵ Although *Luo v Chen* involves a non-biological intending mother in an egg-donor gestational surrogacy arrangement, the court's interpretations of Article 27(2) of the *Marriage Law* may also apply to a non-biological intending mother in a traditional surrogacy arrangement and a non-biological intending father in a gestational surrogacy arrangement.³⁶

However, where Chinese law recognizes the intent and social grounds of legal parenthood, it sets out a restriction that a person who gains legal parenthood on

33 The Reply of the SPC regarding the Post-divorce Legal Status of the Child Born from Artificial Insemination (最高人民法院关于夫妻离婚后人工授精所生子女的法律地位如何确定的复函) was promulgated by the Supreme People's Court on July 7, 1991, effective on the same day. It became invalid on Jan. 1 2021.

34 (2015)沪一中少民终字第 56号.

35 Ding Chunyan, 'Who Are My Parents? Determining Parenthood of Surrogate Children under Chinese Law' (2022) 30(1) *Asia Pacific Law Review* 123–144, 135.

36 *Ibid.*, at 135, 137.

such grounds must have a marital relationship with the biological parent of the child concerned.³⁷ For example, in the case of donor insemination, the husband becomes the legal father based on his intent to be the father and social contributions to parenting the child whose biological and gestational mother is the wife. Also, the stepparent-stepchild relationship indicates the existence of the above restriction. In this sense, Chinese law has not established a general principle that legal parenthood can be recognized merely on intent and social grounds.³⁸ Indeed, a marital relationship between a non-biological intending parent and a biological parent of the child concerned is an additional legal requirement.

Although the Chinese government is likely to relax the restrictions on unmarried people to have children through ARTs due to a falling birth rate for years and a decrease in population in 2022,³⁹ the possibility that the same reasons will make the Chinese law shift to parenthood recognition merely based on the intent and social grounds seems remote (though not closed), as the current law insists on non-recognition of a *de facto* adoption,⁴⁰ which can be seen as another example where a social parent claims legal parenthood merely based on the intent and social grounds.

IV.C. The Parenthood Issue in the Shared Motherhood Model

Although the issue of whether a shared motherhood arrangement is lawful in China remains open for discussion, a child born through such an arrangement should not be denied a legal identity and legal parents. Otherwise, the child would become parentless or even stateless. Hence, Chinese courts should not avoid determining the parentage issue for a child born through a shared motherhood arrangement.

The Xiamen and Beijing cases illustrate the four potential types of relationships between a lesbian and a child born through a shared motherhood arrangement. Table 1 below lists them from the strongest to the weakest bond between them. The parentage issue of each type needs to be discussed separately.

1. Type 1 Relationship

The parentage issue in a Type 1 relationship is the least controversial. Because the lesbian has full motherhood of the child born through the shared motherhood arrangement (eg the defendant in the Beijing case regarding the boy), she has natural motherhood of the child on the biological ground under Chinese law. Although such a child is not born into a marriage, Chinese law treats legitimate and illegitimate children equally.

37 The requirement of a marital relationship between the intending parent and the biological parent of the child concerned may partially be justified by the following legislative purpose for recognizing these two types of constructive parenthood: the Chinese lawmakers intended to grant legal parenthood to the intending father in the case of donor insemination and the stepparent raising and educating a stepchild to improve and strengthen the marital relationship between the two adults in question.

38 Some foreign scholars argue that marriage should not be a requirement in parentage determinations and that the intent to parent and socially function as a parent are sufficient to establish parentage in law, see L. Adler, 'Inconceivable: Status, Contract, and the Search for Legal Basis for Gay & Lesbian Parenthood' (2018) 123(1) *Penn State Law Review* 1–40, 19.

39 'China's Population Falls for First Time Since 1961', *BBC*, Jan. 17, 2023, <https://www.bbc.com/news/world-asia-china-64300190> (access Feb. 10, 2023); also see n 23 above.

40 Article 1105 of the *Civil Code*.

Table 1. Four types of the relationship between a lesbian and a child involved in shared motherhood cases

Types	Characteristics of the relationship	Examples	Legal motherhood
1. Full motherhood (biological, gestational and intending mother)	The woman is both the biological and gestational mother of the child conceived from the woman's egg and the donated sperm. She not only intends to be the mother but also contributes to parenting the child.	The defendant and the boy in the Beijing case	Yes
2. Biological intending mother	The woman is only the biological mother of the child whom her partner bears and gives birth to. She not only intends to be the mother but also contributes to parenting the child.	The plaintiff and the child in the Xiamen case; the defendant and the girl in the Beijing case	Yes
3. Non-biological but gestational intending mother	The woman does not contribute her egg to conceive the child but bears and gives birth to the child conceived from her partner's egg and the donated sperm. She not only intends to be the mother but also contributes to parenting the child.	The defendant and the child in the Xiamen case; the plaintiff and the girl in the Beijing case	Yes
4. Non-biological intending mother	The woman intends to be the mother and contributes to parenting the child, whose biological and gestational mother is her partner.	The plaintiff and the boy in the Beijing case	No

Legally, the lesbian mother in a Type 1 relationship has the same legal status as a single mother, whose motherhood is little disputed under Chinese law.

2. *Type 2 Relationship*

Following the shared motherhood agreement, the lesbian in a Type 2 relationship only plays the role of the biological mother, not the role of the gestational mother of the child (eg the plaintiff in the Xiamen case; the defendant in the Beijing case regarding the girl). Although she shares a similarity with an egg donor in this sense,⁴¹ she should be distinguished from the latter because she intends to be the mother of the consequent child and makes social contributions to rearing and educating the child. Hence, the donor anonymity principle does not apply to the lesbian in a Type 2 relationship. Instead, because Chinese law in principle recognizes the biological ground for establishing legal parenthood, the lesbian in a Type 2 relationship should be granted legal motherhood of the child born through the shared motherhood arrangement. Therefore, it was wrong for the first-instance court in the Xiamen case to reject the plaintiff's claim because the plaintiff, as the biological intending mother, was entitled to have legal motherhood of the child concerned.

3. *Type 3 Relationship*

The lesbian in a Type 3 relationship only plays the role of gestational mother although she intends to be the mother and also contributes to parenting the consequent child from childbirth (eg the defendant in the Xiamen case; the plaintiff in the Beijing case regarding the girl). Because she does not provide her egg to conceive the child but bears and gives birth to the child, her role is similar to that of a gestational surrogate mother.⁴² However, an obvious difference between the lesbian in a Type 3 relationship and a surrogate mother lies in that the former has the intent to be the mother of the child throughout the shared motherhood arrangement and, moreover, she takes care of the child after childbirth together with her partner who is the biological mother of the child, while these are absent in a gestational surrogacy arrangement.

Chinese law has no clear rule that specifically deals with the parenthood issue in a Type 3 relationship because it is unlikely that the lawmakers of the *Marriage Law* or the *Civil Code* contemplated this situation. In other words, the answer to the parenthood issue in a Type 3 relationship must be drawn from the existing principles of parenthood through statutory interpretation or by analogy. In my opinion, a possible legal solution to the parenthood issue in relation to a Type 3 relationship may derive from the rule of constructive parenthood based on the stepparent–stepchild relationship set out in Article 1072(2) of the *Civil Code*. This provision states that ‘the relevant provisions regarding the parent–child relationship shall be applied to the relationship between a stepparent and a stepchild raised and educated by the former’. As analyzed in Section B of this part, the appellate court in *Luo v Chen* interpreted that Article 1072(2) of the *Civil Code* provides two requirements for establishing constructive parenthood based on the stepparent–stepchild relationship: (1) the objective requirement is concerned with the social ground of parenthood, that is, the fact of a stepparent raising and

41 This was the argument made by the defendant in the Xiamen case but rejected by the first-instance court.

42 This was the argument made by the defendant in the Beijing case regarding the girl in question.

educating a stepchild; and (2) the subjective requirement is about the intent ground of parenthood, that is, the stepparent's intention to treat the stepchild as his or her own child.

However, such interpretations are subject to the stepparent–stepchild relationship. Literally, a stepchild refers to a child of the spouse born out of a past marriage or relationship, which implies that the intending parent must have a marital relationship with the biological parent of the child born out of the latter's past marriage or relationship. Turning to a Type 3 relationship, the child born through a shared motherhood arrangement is not the stepchild of the intending mother. Moreover, despite a genetic link between the child and her partner, a marital relationship is lacking between the intending mother and her partner because Chinese law does not recognize same-sex relationships or marriage. Therefore, it is difficult to directly apply Article 1072(2) of the *Civil Code* to solve the parenthood issue in a Type 3 relationship through statutory interpretation.

I suggest that an appropriate legal solution to solve the parenthood issue in a Type 3 relationship is to apply Article 1072(2) of the *Civil Code* 'by analogy'. Specifically, in the case of constructive parenthood based on the stepparent–stepchild relationship, the law recognizes the stepparent's legal parenthood of the stepchild based on two fundamental grounds: the intent and social grounds of parenthood in relation to the biological child of his or her spouse. These two grounds also exist in a Type 3 relationship because the lesbian (who is a non-biological but gestational intending mother) not only intends to be the mother (as the shared motherhood agreement evidences) but also makes social contributions to parenting the child who has a biological link with her partner. The only difference is an absence of a marital relationship between the intending mother and the biological parent of the child, which seems to be a major concern of Chinese judges (such as the appellate court in the Xiamen case and the first-instance court in the Beijing case) when they are dealing with the parenthood issue in a Type 3 relationship.

However, it is essential to note that the lesbian in a Type 3 relationship demonstrates an even stronger bond with the child, which is absent in the stepparent-stepchild relationship – she bears and gives birth to the child (ie a gestational link). Therefore, she has a strong emotional attachment and affinity with the child because of the gestational link, as well as through post-birth breastfeeding, day-to-day caring, and the intimacy experienced through daily association with the infant. Such a strong and *direct* connection between the intending mother and the child can arguably mitigate or set off the absence of a marital relationship between the intending mother and the biological parent of the child (which is only an *indirect* connection between the intending mother and the child). Therefore, I suggest that Chinese courts should consider the solution of applying Article 1072(2) of the *Civil Code* by analogy to establish legal identity and parenthood to the child born in a Type 3 relationship and avoid leaving cases like the Xiamen and Beijing ones pending for such a long period of time.

The two lesbians in Type 2 and Type 3 relationships are a pair of intending mothers of the child born through the shared motherhood arrangement. As I have analyzed, Chinese law can recognize the legal motherhood of both of them, which nevertheless gives rise to a related question: does Chinese law accept a child with two legal mothers at the same time? On the one hand, Chinese law accepts the traditional two-legal-parent model (ie a legal father and a legal mother), and there is no clear answer to this

question from the *Civil Code*. On the other hand, the law does recognize a three-legal-parent model in certain special circumstances. For example, in the case of stepparent–stepchild constructive parenthood, the stepchild may have three legal parents at the same time: his or her two natural parents and one stepparent who has been raising and educating him or her. In other words, Chinese law accepts that a stepchild may have two legal fathers or two legal mothers at the same time when constructive parenthood is established based on the stepparent–stepchild relationship. This leaves the door open for recognition in Chinese law of two legal mothers for a child born through a shared motherhood arrangement.

4. Type 4 Relationship

Compared to a Type 3 relationship, a Type 4 relationship does not involve a strong emotional and relational connection and attachment between the intending lesbian mother and the child due to a lack of pregnancy and childbirth (eg the relationship between the plaintiff and the boy in the Beijing case). However, the intent and social grounds of parenthood equally exist in a Type 4 relationship, the same as the stepparent–stepchild relationship that gives rise to constructive parenthood based on intent and social grounds. The legal barrier is a lack of a marital relationship between the intending parent and the biological parent of the child in a Type 4 relationship.⁴³ Whether Chinese courts are willing to apply Article 1072(2) of the *Civil Code* by analogy to confirm constructive parenthood in a Type 4 relationship is essentially a matter of legal policy toward same-sex relationships or marriage in China.

The legal position towards same-sex relationships has experienced substantial changes in the country: it was de-criminalized by the *1997 Amendments to the Criminal Law*,⁴⁴ and was removed from the scope of ‘sexual perversion’ in 2001.⁴⁵ However, this is still far off legalizing same-sexual relationships or marriage. For example, in April 2016, the Basic Court of Furong District of the City of Changsha of Hunan Province heard a judicial review case where the applicants, a gay couple, sued the Bureau of Civil Affairs of Furong District because the latter refused to issue a marriage registration to them. The court ruled that the term ‘marriage’ under Chinese law refers to a voluntary union of one man and one woman for life, and same-sex marriage is disallowed by the law. Therefore, it rejected the applicants’ claim for marriage registration. The court clarified that Chinese law provides anti-discrimination protection to gays and lesbians, but this should not be confused with the recognition of same-sex marriage, which is concerned with the public’s ethical views toward marriage and has significant implications for other legal issues such as succession and maintenance duties.⁴⁶ The

43 Chinese gay couples also encounter the same legal barrier when seeking the legal fatherhood of a child who has a genetic link only with one of them.

44 The *1997 Amendments to the Criminal Law* (刑法 (1997年修订)) was made by the National People’s Congress on Mar. 14, 1997, effective on Oct. 1, 1997.

45 Society of Psychiatry of Chinese Medical Association, *Chinese Classification of Mental Disorders* (中国精神障碍分类与诊断标准), 3rd edition, (Shandong Science and Technology Press, 2001); also see, Xiao Muye, ‘A Chinese Judicial Decision Announced for the First Time: Advocating “Treatment of Homosexuality” Constituted Misrepresentation’ (中国首例判决:治疗同性恋“属于虚假宣传”), Dec. 19, 2014, *Tencent News* (腾讯新闻), <https://news.qq.com/a/20141219/062863.htm> (accessed Feb. 10, 2023).

46 In other words, Chinese courts admitted that equality-based sexual orientation has not included the rights to marriage and family-making under Chinese law.

court indicated that Chinese law might take a long time to accept same-sex marriage.⁴⁷ Moreover, although the national legislature received a strong proposal for legalizing same-sex marriage when it was carrying out a public consultation of the *Civil Code* (draft), the proposal was not included in the *Civil Code*, and the national legislature reiterated that marriage should remain a union of one man and one woman.⁴⁸

Given the national legislature's reservation about the recognition of same-sex marriage, Chinese judges will, in hesitating to apply Article 1072(2) of the *Civil Code* by analogy, hold that the intending mother in a Type 4 relationship is not a legal mother of a child born through a shared motherhood arrangement because of a lack of a marital relationship between her and the child's biological parent. It seems that legal motherhood in a Type 4 relationship will not be recognized until Chinese law legalizes same-sex marriage⁴⁹ or recognizes legal parenthood merely based on the intent and social grounds.⁵⁰

V. CUSTODY, SUPPORT, AND VISITATION RIGHTS FOR A CHILD BORN THROUGH A SHARED MOTHERHOOD ARRANGEMENT

This part of the article turns to a separate issue of judicial determination of the custody, support, and lesbian couple visitation rights of the child born of a shared motherhood model when a lesbian couple ends their relationship after childbirth, as happened in the Xiamen and Beijing cases. The *Civil Code* has not provided legal rules to specifically deal with these issues in the context of a shared motherhood arrangement. The relevant statutory provisions are Articles 1084–1086 of the *Civil Code*, in Chapter Four, titled 'Divorce', of Book Five on Marriage and Family. In other words, the possible legal solutions to these needs to be explored by referencing the rules on custody, support, and visitation rights in the context of divorce.

V.A. Custody of the Child

Article 1084 of the *Civil Code* concerns physical custody of the child upon divorce. Its first two subsections articulate that the parent-child relationship should not be affected by the divorce of the parents, and neither should parental rights and responsibilities in relation to the child. Moreover, its third subsection states that 'as a matter of principle, a mother shall, upon divorce, have physical custody of her child under the age of two. When parents fail to reach an agreement on the physical custody of their child over the age of two, the People's Court shall decide it according to the principle of the best interests of the child and in light of the actual situations of both parents. The child's true will shall be respected if he or she has reached the age of eight.'

47 Zeng Yan, 'Changsha Gay Couple Whose Application for Marriage Registration Was Rejected Sued the Bureau of Civil Affairs' (长沙“男同”申请结婚登记被拒状告民政局), Apr. 14, 2016, *People's Court Daily* (人民法院报), http://rmfyb.chinacourt.org/paper/html/2016-04/14/content_110754.htm?div=-1 (accessed Feb. 10, 2023).

48 'The Legislative Affairs Commission of the Standing Committee of the National People's Congress Replied to the Issue of Legalizing Same-sex Marriage' (全国人大常委会法工委就有关同性婚姻合法化作出回应), Aug. 21, 2019, *Fazhi Daily* (法治日报), https://www.toutiao.com/article/6727504759005118980/?channel=&source=search_tab (accessed Feb. 10, 2023).

49 Similarly, the national legislature holds the same attitude to gays' claim about legal fatherhood of a child who only has a genetic link with his partner in China.

50 See Section 2 of Part IV.B of this article.

Despite dealing with the issue of custody of the child upon divorce, Article 1084 of the *Civil Code* has the following three implications. First, the legal parenthood of a child should not be affected by any change to the relationship between the parents of the child, such as divorce, separation, or death. Second, when the parents cannot reach an agreement on the custody of the child, the principle of the best interests of the child is the governing legal doctrine and the predominant legal policy for judicial determination of the child's custody issue upon dissolution of the parents' relationship. The best interests of the child in question should be determined on a case-by-case basis and by considering various relevant factors, such as the health and financial situations of both parents, the relationship between each parent and the child, and the will of the child if he or she is eight years old or above. Third, in principle, the mother has physical custody of the child under the age of two because it is important for a little baby to be breastfed and be given basic and intimate care by the mother.

By and large, the above three implications are relevant for the courts to decide a custody dispute concerning a child born through a shared motherhood model between two legal mothers—one the biological intending mother and the other the non-biological but gestational intending mother. The separation of a lesbian couple does not affect their parent-child relationship with the child. When they cannot agree on the custody issue, the court will decide which party should be granted physical custody of the child according to the principle of the best interests of the child. Although both parents in a shared motherhood case are the mother of the child, their roles in caring for the child remain different. Generally, the non-biological but gestational intending mother plays the same caretaking role of 'the mother' in a heterosexual family, which Article 1084(3) of the *Civil Code* implicitly refers to. For example, in the Xiamen case, the child was under one year old at the time of litigation. It is suggested that the appellate court should rule that the plaintiff, the non-biological but gestational intending mother, has physical custody of the child because she is the birth mother and the infant needs her breast-feeding and basic care, and she has been taking care of the child at home since the child was born.

Turning to the Beijing case, the two lesbians are the legal motherhood of the girl only. Because the girl was between two and eight at the time of the litigation, the presumption that the non-biological but gestational intending mother has physical custody of the child under the age of two does not apply to this case. The court should carefully consider, among other factors, the fact that the two children born through a shared motherhood arrangement had been raised and educated together since they were born, and separating them would not be in the best interests of the girl because the plaintiff was not the legal mother of the boy, who must live with the defendant who had full motherhood of the boy. Moreover, the fact that the defendant had a strong financial ability to provide a stable and good living and education environment to the children under the care of the defendant's parents might also tip the scale in favor of the defendant in terms of physical custody of the girl.⁵¹

51 Zheng sharply observed the persistence of patriarchy in a lesbian family in China, see n 5 above 1893. The phenomenon of 'veiled patriarchy' in Chinese lesbians' family-making not only prevents the weak lesbian under patrilocal oppression from achieving independence in socioeconomic matters but also renders her in a disadvantageous legal position in their dispute over the custody of child issue. The Beijing case can be seen as a good example in this regard.

V.B. Support of the Child and Visitation Rights

Article 1085 of the *Civil Code* concerns the issue of support of the child upon divorce of the parents. It provides that the parent not granted physical custody of the child shall pay part or all of the child support. If they disagree on the matter, the court shall decide. Neither the agreement nor the judgment shall preclude the child from making a reasonable request, where necessary, to either parent for an amount exceeding what is decided in the said agreement or judgment.

Article 1086 of the *Civil Code* stipulates the rule on visitation of the child upon the divorce of the parents. It states that after divorce, the parent not granted physical custody of the child shall have the right to visit the child, while the other parent shall have the duty to assist with this. The court shall decide if the parents cannot agree on how and when to exercise the visitation right. Where visiting the child may harm the child's physical or mental health, the court shall suspend the visit according to the law. After the cause of suspension disappears, the visit shall be resumed.

Despite addressing the issues of support and visitation rights upon divorce, these two statutory provisions equally apply to the child born through a shared motherhood arrangement upon separation of the lesbian couple, who are both the legal mother of the child.

Chinese law does not accept the concept of 'psychological parent' or 'de facto parent' regarding custodial and visitation rights over a child.⁵² As for a lesbian in a Type 4 relationship (eg the plaintiff in relation to the boy in the Beijing case), she has no rights to custody and visitation of the child because she is not the child's legal mother.

VI. CONCLUSION

Chinese lesbians have adopted the shared motherhood model in their efforts at family-making and has inevitably created legal challenges regarding the issues of parenthood, custody, support, and visitation rights in relation to the child born through this model. Because the extant law has not provided clear legal answers to these issues and the national legislature has so far refused to legalize same-sex marriage, Chinese courts have shown great reluctance to deliver a decision in cases where two lesbians dispute the legal motherhood of the child. As a result, the child concerned has been left in legal limbo in terms of parenthood (ie a child of no one) and prevented from enjoying rights that should flow from his or her legal parent. At the same time, the plaintiff intending mother who loses physical control of the child has no legal basis for accessing the child.

Against this backdrop, this article has shown that the basis of parenthood recognized by Chinese law is two-fold: one is the biological ground, and the other is the intent and social grounds, provided that there is a marital relationship between the intending parent and the biological parent of the child. Furthermore, it proposes appropriate solutions to granting legal motherhood concerning different scenarios, including full motherhood, biological intending mother and non-biological but gestational mother, as illustrated by the two judicial cases involving a shared motherhood arrangement. Once the parenthood issue is solved, other related issues of custody, support, and visitation rights can be dealt with by reference to the existing rules on these issues in the context of divorce under Chinese law. Although the proposed legal solutions

52 L. Harris, see n 30 above, 624.

are of a transitional nature and unable to support legal motherhood in a Type 4 relationship due to the lack of a marital relationship between the intending mother and the biological parent of the child, they are useful and important for providing legal identity and parenthood to the child born through a shared motherhood model before Chinese law accepts same-sex marriage. Practically, they also play a significant role in facilitating Chinese lesbians' family-making and achieving their reproductive equality and self-identification.

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