

REVIEW ARTICLE

LEGAL CONSIDERATIONS SURROUNDING SURROGACY IN UKRAINE

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ABSTRACT

The aim of the study is to analyze the legal framework regulating surrogacy relations in Ukraine, its main loopholes and collisions, and provide suggestions to improve the Ukrainian legislation on surrogacy.

Materials and methods: The methodological framework of the research consists of general methods of analysis and synthesis, formal logical method and formal legal method.

Conclusions: The procedure for the implementation of surrogacy in Ukraine is enshrined in several regulatory acts. Ukrainian legislation has some loopholes and collisions, representing the challenges that have to be addressed in the nearest future. It is necessary to reconsider the existing legal acts to strengthen state control and supervision in this area for proper protection of the rights and responsibilities of subjects entering surrogate agreements.

KEY WORDS: surrogacy, assisted reproductive technology, infertility, legal regulation

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INTRODUCTION

Being able to create a new life is undeniably one of the most important aspects of quality of life for many people. However, many couples face the problem of infertility. The WHO defines infertility as a disease characterized by the failure to establish a clinical pregnancy after 12 months of regular, unprotected sexual intercourse or due to an impairment of a person's capacity to reproduce either as an individual or with his or her partner [1]. The prevalence of infertility has increased significantly in recent years; its global prevalence is reported to be 10%-15% [2].

Before the invention of assisted reproductive technologies (ART), infertile couples had only two options: either to adopt a child or to remain childless. Advancements in reproductive medicine provided such individuals with various options to have a genetically related child. Surrogacy is one of the most controversial ART methods. It raises many ethical and legal issues, which often remain unresolved. Arguments against it are the commodification of women and concerns about the rights and interests of the child born through surrogacy.

Based on the genetic link between a surrogate mother and a child, surrogacy is classified into traditional and gestational. Traditional (genetic/partial/straight) surrogacy is the result of artificial insemination of the surrogate mother with the intended father's sperm, making her a genetic parent along with the intended father. Gestational surrogacy (host/full surrogacy) is defined as arrangement in which an embryo from the intended parents or from a donated oocyte or sperm is transferred to the surrogate's uterus. In gestational surrogacy, the woman who carries the child has no genetic connection to the child [3].

Peter R. Brinsden notes that until the introduction of modern ART, "traditional or partial surrogacy" was the only means of

helping women without uterus or with major abnormalities of the uterus to have children. However, in this case, an intended mother did not have a genetic link to the child, and surrogate mother was the child's genetic mother [4]. The invention of in vitro fertilization has led to development the gestational surrogacy, which is a more socially acceptable option.

Surrogacy may be commercial or altruistic, depending on whether the surrogate mother receives financial reward for her services. If surrogate receives money for surrogacy arrangement, it is considered commercial, and if she receives only the reimbursement of her pregnancy-related expenses, it is an altruistic surrogacy.

As for the experience of countries in the legal regulation of surrogacy, according to O. Onishchenko, there are three main regimes: altruistic regime (Australia, Canada, United Kingdom, etc.), legal regime (Georgia, India, Ukraine, etc.), and banning regime (France, Sweden, Hungary, Germany, etc.). Altruistic surrogacy is intended to prevent the commodification of both a surrogate mother and a child. Legal regime has variations in different countries. The countries that decided to adopt such a banning regime are guided by moral and ethical principles, in particular, trying to avoid the conversion of children into goods and the exploitation of surrogate mothers [5].

The first successful gestational surrogate pregnancy was carried out in the USA in 1985 [3]. The first surrogacy program in Ukraine (and at the same time in the CIS) was implemented in 1995 in Kharkiv, where a surrogate mother was a woman who gave birth to her daughter's child because her daughter had a congenital uterine deficiency [6].

About 35 years have passed since the birth of the first child through gestational surrogacy, but this ART method remains the most controversial and insufficiently regulated.

THE AIM

The aim of the research is to analyze the legal framework regulating surrogacy relations in Ukraine, its main gaps and collisions, as well as to provide suggestions to improve the Ukrainian legislation on surrogacy.

MATERIALS AND METHODS

The authors used the methods of analysis and synthesis to clarify the content and provide the definition of the concept “surrogacy”; the formal logical method was used to identify contradictions and loopholes in the current legislation of Ukraine governing relations in the field of surrogacy; formal legal method allowed studying legal facts and legal rules related to the regulation of surrogacy in Ukraine. The theoretical framework of the research includes the works of domestic and foreign scientists. The legal framework for the study involves the current laws and bylaws governing surrogacy arrangements in Ukraine.

REVIEW AND DISCUSSION

Surrogacy has become increasingly popular in Ukraine, and the country is turning into one of the main world centers of surrogacy business. According to the official data in the Information and Statistical Reference Book on Assisted Reproductive Technologies in Ukraine that is issued by the Center for Medical Statistics of the Ministry of Healthcare of Ukraine, there were 40 ART clinics in the country in 2018 [7] but there is no official statistics on surrogacy cycles. Ukrainian legal scientists O.L. Kuchma and L.M. Siniova state that Ukraine is the most liberal platform for surrogacy because it allows for paid childbearing services that are permitted by law [8].

The main regulatory acts governing surrogacy arrangements in Ukraine are the Civil Code of Ukraine, the Family Code of Ukraine, the Law of Ukraine On Fundamentals of Health Care in Ukraine dated November 19, 1992, Order of the Ministry of Health No. 787 On the Approval of the Application of Assisted Reproductive Technologies in Ukraine dated September 9, 2013, the Decree of the Ministry of Justice of Ukraine No. 140/5 dated November 18, 2003 On Amendments to Civil Registration Rules in Ukraine.

According to Article 48 of the Law of Ukraine On Fundamentals of Health Care in Ukraine, the application of artificial insemination and implantation of the embryo shall be carried out in accordance with the conditions and procedure established by the central executive body that ensures the formation of the state health policy, according to the medical indications of the adult woman with regard to whom such action is carried out, subject to the written consent of the spouse, ensuring donor anonymity and keeping medical confidentiality [9].

The main legal act regulating the procedure for the use of ART is Order of the Ministry of Health of Ukraine No. 787 dated September 09, 2013 On Approval of the Procedure for the Application of Assisted Reproductive Technologies in Ukraine. Section 6 thereof is entirely dedicated to the

issue of surrogacy. The prerequisite for the implementation of surrogacy practice under this Order is the genetic relation between the intended parents or one of them and the fetus. However, the legislator does not forbid close relatives of intended parents (sister, mother, cousin, etc.) to carry pregnancy. This Order specifies that surrogate motherhood should be used only upon medical indications. A married couple has the right to participate in surrogacy program only in case of confirmed infertility [10]. Thus, the law unambiguously prohibits fertile and healthy women to outsource procreation to surrogate mothers because of professional, political or aesthetic reasons.

Order No. 787 specifies that a surrogate mother may be a woman who has no medical contraindications to carry and deliver a healthy baby. The main requirements for a person who wants to participate in surrogacy process are to be of legal age (i.e. from the age of 18) and full legal capacity and to have at least one healthy genetically related child [10]. The age criterion for a surrogate mother is a debatable issue. The WHO statistics and guidelines have found that the most favorable reproductive age for women is between 20 and 35 years. Considering this fact, one of the draft laws feasibly suggested setting the age limits for surrogate mothers between 21 and 35 years old [11].

The Family Code of Ukraine specifies the issue of legal parenthood. In particular, Part 2 of Article 123 and Part 2 of Article 139 of the Family Code of Ukraine state that the parents of the child are donors of genetic material. Part 2 of Article 123 establishes that in the case of transfer of a human embryo conceived by the intended parents (man and woman) to the body of another woman as a result of the use of assisted reproductive technologies, the parents of the child are the intended parents, and Part 2 of Article 139 prohibits challenging maternity in this case. [12]. Thus, according to the specified articles of the Family Code of Ukraine, a surrogate mother cannot claim recognition of her motherhood, even in court.

The procedure of child registration is regulated by the Decree of the Ministry of Justice of Ukraine No. 140/5 dated November 18, 2003 On Amendments to Civil Registration Rules in Ukraine. Clause 2.2 thereof states that if a child is born by a woman who was implanted with an embryo conceived by the intended parents, birth registration is done at the request of the intended parents who gave their consent to implantation. In this case, simultaneously with a document confirming the fact of the birth of the child by this woman, her written notary-certified consent is given for the intended parents to be recorded as the legal parents [13].

Direct instructions for regulating this type of infertility treatment in international law have not been developed yet. It should be noted that Ukraine has signed the Convention on Human Rights in Biomedicine (the Oviedo Convention), adopted on 19 November 1996 by the Committee of Ministers of the Council of Europe, but has not yet ratified it or the protocols thereto. Therefore, the issue of ratification of the Oviedo Convention remains open to Ukraine. It is important for the international legal confirmation of the readiness to protect human rights and dignity, and establishing liability for their violation.

Thus, the procedure for the implementation of ART through surrogacy is enshrined in several regulatory legal acts of Ukraine. Although it may seem that the legal regulation of surrogate motherhood in Ukraine does not require any changes or improvements, Ukrainian legislation has some loopholes and collisions, representing the challenges that have to be addressed in the nearest future to protect the rights of all parties to surrogate agreement.

1) *The concepts “surrogate motherhood”, “surrogate mother” are not consolidated in legislative acts of Ukraine.*

The first thing that should be paid attention to when familiarizing with surrogate motherhood as the ART method is its concept. However, such a definition is not provided in any regulatory act of Ukraine.

The term surrogate motherhood first appeared in Order of the Ministry of Health of Ukraine On Approval of the Instruction on the Procedure for the Application of Assisted Reproductive Technologies No. 771 dated December 23, 2008 [14]. Chapter 7 thereof was dedicated to this type of infertility treatment but did not provide the definition of this term.

Many Ukrainian researchers paid their attention to this issue. Thus, I. Chekhovska notes that Ukraine does not have a legal act that would define the concepts of “surrogate motherhood”, “surrogate mother”, “surrogacy agreement”, etc., and would regulate all aspects of surrogate motherhood arrangements [15]. N. Abliatipova rightly points out that these concepts exist only in public relations related to modern ART [16].

For the first time in the world, the term “surrogate mother” was used in a report by the Council of Europe [17], where a surrogate mother means a woman who carries a child for another person and has agreed before pregnancy that the child should be handed over after birth to that person. The World Health Organization uses the term “gestational carrier” instead of the term “surrogate mother” [18]. It is significant that the word “mother” is not even used in this definition, which indicates that WHO regards the relationship between donors and a surrogate mother as primarily contractual.

Considering the term “surrogate motherhood”, we support the viewpoint of A. Holovashchuk who proposes to use the etymology of the term “surrogate motherhood” as the basis for defining this concept in legal acts as follows: “surrogate motherhood is a method of assisted reproductive technologies when another woman (surrogate mother) carries a human embryo conceived by intended parents or one of them and a donor for the purpose of giving birth to a child with the subsequent transfer to intended parents” [19].

2) *Restrictions of access to surrogacy arrangements for not married couples.*

Rule 123 of the Family Code of Ukraine provides that only a married couple can use assisted reproductive technologies. [12]. Marriage is legal if it is registered by the state body for the registration of civil status acts. The legislation of Ukraine does not specify the possibility of using surrogacy as the ART for a single woman or a man. Thus, it means

that persons who are in de facto relationship and have the procreation right are restricted the access to surrogacy.

Therefore, the rule on granting the right to use surrogacy only to married couples (a man and a woman) does not comply with the rules of Article 281 of the Civil Code of Ukraine, which entitles an adult woman or man to treatment programs of assisted reproductive technologies for medical indications, in accordance with the procedure and conditions established by law [20].

3) *Surrogacy agreement is not defined in the legislation of Ukraine.*

Surrogacy arrangements raise numerous questions, such as: what to do if the couple refuses to take a child born by a surrogate mother for some reason; what are the actions of the parties in the event of the death of a child before the birth or birth of a mentally or physically ill child; what is the liability of the surrogate mother for the failure or improper fulfillment of the terms of the contract, what if the surrogate mother or intended parents decide to terminate the pregnancy, etc. [21]. These issues can be solved through a proper surrogacy agreement.

Relations arising under a surrogacy contract must be placed within the legal framework. The contract must determine the rights, obligations and responsibilities of the parties to ensure that the obligations are properly fulfilled and to prevent abuse in this area.

At the legislative level, there are no requirements for the form of the agreement, and therefore, it is advisable to specify that surrogacy agreement should be concluded in writing, notary-certified and registered by the state. The notary will certify that the parties signing the agreement acted voluntarily, understanding their actions and the provisions of the agreement. Therefore, it would be advisable to develop a model of a surrogacy agreement and to further consolidate it in legislative acts. Such steps are necessary to protect the rights and legitimate interests of the parties to the contract and a child born to a surrogate mother.

4) *Access of foreign citizens to surrogacy services in Ukraine*
Clause 1 of Article 7 of the Convention on the Rights of the Child, which was ratified by Ukraine on February 27, 1991, states that the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents [22]. However, there are examples when these rights were violated. A vivid example is the case of a girl named Bridget who was born very ill and was abandoned by her biological parents who paid the surrogate mother from Ukraine for her birth. The child became stateless as she was not considered a Ukrainian citizen and no application had been made for her to become an American citizen [23]. Thus, surrogacy services to foreign nationals may in some cases result in the fact that children born through surrogacy will be outside the legal field of both Ukraine and their parents' countries. Moreover, M. Gryshchenko and A. Pravdyuk note that the citizens of those countries where surrogacy is prohibited may encounter difficulty when bringing a child born through surrogacy in Ukraine

to their country, registering the child, and establishing the child's citizenship [24].

Thus, considering the absence of the international regulatory framework for surrogacy, it would be appropriate to specify in law that surrogacy may be used only by citizens of Ukraine and foreign nationals of countries that do not prohibit such ART method, and if foreigners reside outside the country of their nationality – the law of the country of residence.

5) Collisions of the registration of a child born through surrogacy.

According to clause 11 of Section 3 of the Rules for the State Registration of Civil Status Acts of Ukraine, if the child is born by a woman who was implanted with a human embryo conceived by intended parents as a result of the use of ART, state registration of the child born is carried out at the request of the intended parents who have applied for such services. The surrogate mother submits an application about her consent to record the intended parents as the legal parents of the child (the authenticity of her signature must be notary-certified) [25]. Having analyzed these provisions, we can conclude that, unlike in the Family Code of Ukraine, these Rules provide an additional requirement for the consent of the surrogate mother for registration of intended parents as legal parents of the child born through surrogacy and the possibility of refusing to provide such consent. I. Veres underlines that the requirement for the consent of the surrogate mother to register the intended parents as the legal parents of the child born is unjustified since it does not correspond to the interests of the intended parents [26].

In view of the above, it is advisable to harmonize clause 11 of Section 3 of the Rules of the State Registration of Civil Status Acts with the requirements of Article 123 the Family Code of Ukraine, namely: to provide for the right of the intended parents to register a child born to a surrogate mother based on the document confirming the fact of the birth of the child by the surrogate mother, surrogacy agreement, the certificate of genetic relation.

CONCLUSIONS

Surrogacy is an ART tool aimed at fighting infertility that raises problems when used improperly. To prevent abuse in the area of surrogate motherhood, it is necessary to strengthen state control and supervision in this area. Proper protection of the rights of subjects entering surrogate agreements is the task of the state. One of the key issues is the protection of the child's rights, which are often being neglected in surrogacy cases. There is a need for greater control on the part of the state concerning the issue of surrogate motherhood for foreign parents.

There is a number of issues that are not resolved at the legislative level but which arise when the method of surrogate motherhood is used. They include, but not limited to, the absence of concepts "surrogate motherhood", "surrogate mother" in legislative acts of Ukraine; restriction of access to surrogacy arrangements for not married couples; surro-

gacy agreement is not defined in the legislation of Ukraine; access of foreign citizens to surrogacy services in Ukraine. Thus, it is feasible to develop a draft law on ART or surrogate motherhood separately that would define all aspects of surrogate motherhood, provide the definition of concepts "surrogate motherhood", "surrogate mother", enshrine the form and content of surrogacy agreement, specify the issue of the remuneration for surrogacy services depending on its altruistic or commercial type, define the grounds for access of foreign citizens to surrogacy services in Ukraine.

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