

Artículo de investigación

Surrogacy as a method of supporting reproductive technologies in Ukraine and a foreign method of its legal regulation**СУРОГАТНЕ МАТЕРИНСТВО ЯК МЕТОД ДОПОМІЖНИХ РЕПРОДУКТИВНИХ ТЕХНОЛОГІЙ В УКРАЇНІ ТА ЗАРУБІЖНИЙ МЕТОД ЙОГО ПРАВОВОГО РЕГУЛЮВАННЯ**

La surrogacia como método de apoyo a las tecnologías reproductivas en Ucrania y un método extranjero de su regulación legal

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The relevance of the article is the need to regulate the issue of surrogacy in Ukraine. The object of the study of this article is the relations arising in the field of surrogacy. The following research methods were used in the study design: analysis, synthesis, induction, deduction, etc. The purpose of this paper is to determine the legal regulation of surrogacy in Ukraine and other foreign countries. To achieve this goal, the following research tasks were set: to analyze the concepts and features of surrogate motherhood as one of the methods of assisted reproductive technologies; explore the foreign experience of legal regulation of this method.

The authors conclude that some legal provisions may be useful for the development of Ukrainian legislation in this field, in particular, regarding

Анотація

Актуальність статті полягає у необхідності регулювання питання сурогатного материнства в Україні. Об'єктом дослідження даної статті стали правовідносини, що виникають в сфері сурогатного материнства. При написанні дослідження були використані наступні методи дослідження: аналіз, синтез, індукція, дедукція тощо. Метою даної роботи є визначення правового регулювання відносин сурогатного материнства в Україні та інших зарубіжних країнах. Для досягнення зазначеної мети були поставлені наступні завдання дослідження: проаналізувати поняття та ознаки сурогатного материнства як одного із методів допоміжних репродуктивних технологій; дослідити

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the possibility of being a surrogate mother not only to a spouse but also to a single person.

Keywords: Legal regulation, surrogacy, reproductive technologies.

зарубіжний досвід правового регулювання цього методу.

Авторами був зроблений висновок про те, що деякі правові положення можуть бути корисними для розвитку українського законодавства у даній сфері, зокрема, стосовно можливості бути замовником сурогатного материнства не тільки подружжю, але і самотній людині.

Ключові слова: Правове регулювання, сурогатне материнство, репродуктивні технології.

Resumen

La relevancia del artículo es la necesidad de regular el tema de la subrogación en Ucrania. El objeto del estudio de este artículo son las relaciones que surgen en el campo de la subrogación. Los siguientes métodos de investigación se utilizaron en el diseño del estudio: análisis, síntesis, inducción, deducción, etc. El propósito de este trabajo es determinar la regulación legal de la subrogación en Ucrania y otros países extranjeros. Para lograr este objetivo, se establecieron las siguientes tareas de investigación: analizar los conceptos y características de la maternidad subrogada como uno de los métodos de las tecnologías de reproducción asistida; Explore la experiencia extranjera de la regulación legal de este método. Los autores concluyen que algunas disposiciones legales pueden ser útiles para el desarrollo de la legislación ucraniana en este campo, en particular, con respecto a la posibilidad de ser una madre sustituta no solo para un cónyuge sino también para una sola persona.

Palabras clave: Regulación legal, subrogación, tecnologías reproductivas.

Introduction

Ukraine is considered one of the most attractive countries for surrogate motherhood, where such a procedure is legally commercially available, whereas, in most countries of the world, such a technique is either prohibited on legal or ethical grounds or altruistic. This requires appropriate legal regulation of the implementation of this procedure in order to protect its participants. In modern conditions, given the tendency to fall in the authority of the family institution, the increase in the number of divorces, it is safe to assert that the spouses always have a choice: they can build their property relations both on a legal and on a contractual basis (Safonchuk, Sirko, & Andronova, 2019).

Despite the fact that surrogate motherhood is defined by national law as a legal fact from which the relevant legal relation arises, there is currently no full legal regulation of this sphere. Agencies and clinics providing services under the surrogate motherhood program, in their activities, rely on certain provisions of the Family Code of Ukraine (hereinafter referred to

as the FC of Ukraine), the Civil Code of Ukraine (hereinafter - the CC of Ukraine), and the Law of Ukraine "Fundamentals of the legislation of Ukraine on health care" and the Law of Ukraine "On transplantation of organs and other anatomical materials to a person", Procedure for the use of assisted reproductive technologies in Ukraine, approved by the Procedure of the Ministry of Health of Ukraine No. 787 of 09.09.2013 (hereinafter - the Procedure) that containing only some aspects of legal regulation of surrogacy tend in general.

In addition, the surrogacy implies relations that arise between spouses and surrogate mothers, which have a complex contractual nature, so they have inherent elements of family and civil relations that require proper legal formulation. Surrogacy issues are directly related to fundamental human rights, including the protection of the rights of the child; therefore, relations arising on the basis of a surrogate motherhood contract require separate, specific

legal regulation. All this determines the relevance of the topic under study.

Methodology

In the article general scientific methods, as analysis, synthesis, induction, deduction, etc were used. Regarding the special scientific methods used in the course of the work, one should name the method of system research, the method of comparative law, the method of complex analysis and the method of legal modeling. It should be noted that with the help of the method of systematic research, the special legal nature of the institute of surrogacy in foreign countries was discovered. In addition to this, the method of comparative law allowed to reveal similar and distinctive features of the institute of surrogacy in Ukraine and foreign countries.

Analysis of recent research

Some aspects of the use of assisted reproductive technologies, the essence and problematic issues of surrogate motherhood, the grounds for the emergence of surrogate motherhood relations, the concept, legal nature and essential conditions of the surrogacy motherhood contract have become the subject of scientific research of such legal scholars as N. Ablyatipova, T. Borysova, V. Vstras, I. Veres, A. Golovashhuk, T. Zaverza, Yu. Korenga, R. Majdanyk, K. Mytryakova, O. Punda, K. Suxareva, Yu. Talanov, O. Yavor, and others.

Presentation of key research findings

The purpose of this paper is to determine the legal regulation of surrogacy in Ukraine and other foreign countries. To achieve this goal, the following research tasks were set: to analyze the concepts and features of surrogate motherhood as one of the methods of assisted reproductive technologies; explore the foreign experience of legal regulation of this method.

Assisted reproductive technologies (hereinafter referred to as "ART"), according to national legislation, recognize the methods of infertility treatment, in which the manipulation of reproductive cells, some or all stages of preparation of reproductive cells, the processes of fertilization and development of embryos before transfer to the uterus in vitro" (Para. 1.2 p. 1 of the Procedure) (On approval of the Procedure for the application of assisted reproductive technologies in Ukraine, 2013).

In part 7 of Art. 281 of the CC of Ukraine provides that adult women or men are entitled to medical indications for carrying out treatment programs of assisted reproductive technologies under the procedure and conditions established by law (Civil Code of Ukraine, 2004). That is, an important aspect of this right is the ability of a woman or a man who has appropriate medical evidence to seek treatment programs for assisted reproductive technologies under the procedure and conditions established by the legislation of Ukraine. In turn, the provisions of Art. 123 FC of Ukraine, determines the origin of a child born as a result of the use of assisted reproductive technologies (Family Code of Ukraine, 2003).

The Law of Ukraine "Fundamentals of the legislation of Ukraine on health care" specifies the conditions for the lawfulness of the use of ART. Article 48 stipulates that the use of artificial insemination and implantation of an embryo shall be carried out in accordance with the conditions and procedure established by the central executive authority providing for the formulation of public health policy, according to the medical indications of the adult woman with whom such action is carried out, by the conditions for the written consent of the spouse, ensuring the anonymity of the donor and maintaining medical secrecy. It is imperative that a woman to whom such technologies are applied must be of legal age and must have legal capacity. It is also mandatory that the spouse must give their written consent for the use of ART (Fundamentals of Healthcare Legislation..., n.d.).

There are currently a large number of ART methods used in the treatment of infertility. All treatments are aimed at partially eliminating infertility or completely replacing the stages of conception and early embryonic development outside the woman's body. Analyzing the content of the Procedure, we can conclude that the following varieties of assisted reproductive technologies are used in Ukraine: in vitro fertilization (in vitro fertilization, artificial insemination); intrauterine insemination; donation of gametes or embryos; surrogate motherhood.

In the documents of the World Health Organization, the concept of surrogacy is defined as a contractual relationship between a woman (gestational courier) who has become pregnant as a result of fertilization by oocytes belonging to a third party, spermatozoon, belonging to a third party, and the parents of a child born by a surrogate mother, provided that the gametes of

both or at least one of the two parents mentioned were used to fertilize the surrogate mother (WHO recommendations: ART terminology, 2006). This definition covers a wide range of legal relationships related to surrogate motherhood and envisages cases where a surrogate mother may also be a genetic mother under the surrogate motherhood contract of the child.

The current national legislation does not contain a single, specific definition of surrogacy. Yes, Part 2 of Art. 123 of the FC of Ukraine only determines the origin of the child in case of using assisted reproductive technologies, and the Order formulates medical indications for the use of surrogacy method and treatment algorithm. There is no common understanding of the notion of surrogacy in domestic legal science.

V.V. Samojlova defines surrogate motherhood as a method of assisted reproductive technology whereby a woman undergoes implantation of an embryo created as a result of the conception of an IVF, and carries the baby for birth and transfer to those persons, based on a mutual agreement with the persons seeking her services. At the same time, the concept of "surrogate motherhood" should also include cases when reaching the goal of giving birth and handing over the child to persons who have applied for such a service is not possible (Samojlova, V. (2014).

Yu.V. Tereshko in her research defines surrogate motherhood as artificial insemination, implantation of the embryo, as well as childbearing for a married couple, to whom the child will be genetically native and for the woman who bears it - "biologically alien" (Tereshko, n.d.). But in our view, such a definition is not entirely correct, since a born child may be genetically alien to both the surrogate mother and the spouse who requested the services, or, conversely, the child may have a genetic affinity with the surrogate mother, and with spouses, or only with a surrogate mother, or only with spouses.

According to E.A. Yvaeva, the concept of surrogate motherhood should be formulated as a process of conception through IVF (outside the body of a woman), delivery and birth of a child to pass it on to other persons (Yvaeva, 2009). This definition does not specify to whom it is in the future the birth of the child will be given, which makes such a formulation of surrogate motherhood unclear.

Scientist Yu.Yu. Talanov defines surrogate motherhood as the fertilization of a genetically

alien woman (without the use of her biological material) by implanting or transplanting an embryo using the genetic material of a married man and woman for the purpose of conceiving and giving birth to an infant spouses, on the basis of the relevant agreement between the spouses and the surrogate mother (Talanov, 2012).

T.E. Borisova defines surrogatemotherhood as a method of assisted reproductive technology in which a woman undergoes an implantation procedure based on in-vitro fertilization based on a contract with the persons who seek her services, bears the child to give birth and pass it above. The concept of "surrogate motherhood", according to the scientist, should include cases when it is impossible to achieve the stated goal (Borysova, 2012).

According to N.M. Bassai, surrogate motherhood can be considered as realized on the mutual agreement of persons entitled to use this method of ART, implantation of an embryo owned by a spouse and created as a result of extracorporeal fertilization, intending to carry and its birth, with subsequent transfer (Basaj, 2014).

T.V. Sorokina's definition is noteworthy: "Surrogate motherhood should be understood as the process of implantation, delivery and birth of a child by a performer (surrogate mother) who is conceived using the genetic material of the customer (s), the donor or the surrogate mother, on the basis of a surrogate maternity agreement surrogate mother and possible parents on a paid or free basis (Sorokyna, 2010). In this case, the scientist considers surrogate motherhood through the concept of a contract.

Therefore, based on the above, we can distinguish the following signs of surrogacy:

- 1) The existence of a mutual agreement of persons participating in the surrogacy program. The defining feature of surrogate motherhood, as noted by M.V. Antokolsky, is the conclusion, before the conception of the child, of a contract for the delivery of the child to the surrogate mother, in order to further establish the parental relationship between that child and the persons who have entered into this contract with the surrogate mother. It is essential that the contract should be concluded just at the time of conception of the child, because, of course, the contract for the assignment of already conceived or born child should be declared void, as

such, contrary to the moral principles of society (Family Code of Ukraine: science- practical. Koment, 2008);

- 2) The fact of conceiving a child through IVF and implantation of the embryo. According to item 1.2. Section 1 of the Procedure for assisted reproductive technology is carried out in vitro. In vitro is the technique of performing an experiment or other manipulation in special laboratory glassware or a controlled environment, outside the living organism. In this definition, "transfer" means the implantation of an embryo from a test tube into the uterine cavity of a surrogate mother;
- 3) The obligatory use of genetic material of customers. Section 6.1, paragraph 6 of the Procedure states that a spouse (or one of the expectant parents) in the interests of whom surrogate motherhood is exercised must (must) have a genetic connection with the child. Therefore, the use of the genetic material of the couple (or one of the expectant parents) is one of the main conditions for surrogate motherhood. Because of this, there are three possible options for surrogate motherhood: 1) the use of the egg of the wife and sperm of the husband; 2) the use of the egg of the wife and the sperm of the donor; 3) use of the donor egg and the sperm of the man (Talanov, 2012);
- 4) The specific purpose of the method is to bear and to give birth to the baby for further transmission to its genetic parents. As noted above, from a medical point of view, surrogate motherhood is one of the most effective ways of overcoming the inability to procreate. At the same time, this is the most controversial method of ART, both in legal and ethical terms, so there are many opponents to this method of assisted reproductive technology, which call it immoral and inhumane, but the ultimate goal of this program is quite humane - the birth of a new life. This is the only goal that should be implemented by the participants in the method of surrogate motherhood. In Part 2 of Art. 123 FC of Ukraine states that in case of transfer to the body of another woman embryo of a person conceived by spouses as a result of the

use of assisted reproductive technologies, the parents of the child are the spouses.

Thus, national legislation in the field of legal regulation of this method of assisted reproductive technology as surrogate motherhood requires improvements that would eliminate existing gaps and improve the use of reproductive technologies. It is necessary to consolidate the notion of surrogate motherhood at the regulatory level, which is proposed to be considered as mutually agreed upon by persons entitled to use this method of assisted reproductive technology, implantation of the embryo that belongs to the spouses and created as a result of in vitro fertilization, for the purpose of childbearing and birth, and then passing it on to the appropriate persons.

Surrogate Parenting Associates Inc. program in Louisville, 1980, after which a surrogate mother in a local court relinquished her birthrights in favor of a biological father, is considered the most successful first surrogate maternity procedure in the world (Basaj, N. (2014). And the first successful surrogacy motherhood program in Ukraine was implemented in 1995 in Kharkiv (Surrogate motherhood - a church sin or the key to happiness? n.d.).

Successful use of surrogate motherhood has, from the outset, caused quite a controversial attitude towards this society, representatives of medical, legal and religious organizations in most countries of the world. Due to this, the national legislation of many countries does not yet have clear rules on the application of the investigated ART method. Therefore, the legal and moral issues of applying this procedure have repeatedly been put on the agenda of many international events. For example, the program of action of the International Conference on Population and Development, held in 1994 in Cairo, states that reproductive health is not simply evidence of the absence of diseases of the reproductive system or impaired function, but of a state of complete physical, mental and social well-being, which provides for a satisfactory and safe sex life, the ability to reproduce, the right of men and women to information and access to safe, effective, cost-effective family planning methods and other non-statutory birth control and the right to access appropriate health care services that allow a woman to carry pregnancy safely and childbirth and for parents to create the best conditions for having a healthy child (Report of the International Conference on Population and Development, n.d.).

To improve the legal regulation of the use of surrogacy in Ukraine, it would be appropriate to explore the foreign practice of legislative regulation of this issue.

Existing foreign legislation on the use of surrogate motherhood can be divided into three main regimes governing these issues.

The first mode is altruistic, by which surrogate motherhood is allowed by the state, and the surrogate mother is reimbursed only for medical care and other expenses related to pregnancy. That is, future parents who contract with a surrogate mother are not eligible to pay for the childbirth and birth service. This mode allows avoiding the transformation into a product of both a surrogate mother and a baby. The altruistic regime has been adopted in Australia, Canada, the United Kingdom, the Netherlands, and Belgium.

The second regime is an authorization regime, which allows the use of surrogate motherhood at the legislative level, but with some regulation in only a few aspects. The permit regime is used in Georgia, India, Israel, South Africa, and the Russian Federation.

There is also a prohibition regime under which surrogacy is not permitted. Countries that have adopted such a regime are guided by moral and ethical principles and believe that using this procedure turns children into a commodity and exploits surrogate mothers. Examples of such countries are Austria, France, Sweden, Hungary, Germany, Iceland, Italy, Japan, Switzerland, Pakistan, Saudi Arabia, Serbia (International experience in regulating the use of reproductive technologies (including surrogacy), 2013).

An analysis of the provisions of surrogacy legislation in the laws and practices of different countries shows that there are no general concepts regarding this procedure. For example, in the US, surrogate motherhood is legally enforced by entering into an appropriate contract for the childbearing and birth of a child by a surrogate mother who establishes the rights and obligations of the parties, as well as the terms of such relationships between them. All parental rights go to the persons who have signed such an agreement to become parents of the child. However, the contract must be approved by the court. Without such a condition, the contract will be void and the parental rights will remain surrogate to the mother and her husband if he is also a party to the contract. The essential conditions, besides the subject, are also the price,

place, and term of the contract, the institution where fertilization will be carried out, and the conditions and terms of payment of the surrogate mother's services will be accepted, the parties' liability for non-performance or improper performance of the contract, other conditions (Borysova, 2012).

But the legal provisions for surrogate motherhood in some states have some peculiarities. For example, in New York, surrogate motherhood is a contract (oral or written) between a woman who agreed to inseminate and bear a child conceived using genetic material from a man who is not her husband and a woman who has agreed to adopt a child who was born this way, and a surrogate mother is considered to be a woman who bears a baby for other parents (Woltman, n.d.). Virginia law allows only non-commercial contracts that are subject to prior court approval. In California, considered the world center of surrogacy, since 1993, the principle that all rights to a child born with the help of a surrogate mother belong to the genetic parents (Sopel, 2008).

In the Republic of Belarus, the issue under study is governed by the Law "On additional Reproductive Technologies" of January 7, 2012, No. 341-C, which defines assisted reproductive technologies as a method of providing medical care in which some or all stages of conception of the baby and (or) early development of the embryo (embryos) prior to transfer to the uterus are performed in a laboratory setting (On additional reproductive technologies: Law of the Republic of Belarus, 2012). In this country, surrogate motherhood is regulated at the legislative level, defining certain mandatory conditions, which include: the obligation of the surrogate mother to transfer the genetic mother of the child after its birth within the period during which such transfer should take place; the obligation of the genetic mother to accept the child from the surrogate mother after birth at the time during which such transfer was to take place; the price of the contract, which must include the cost of the service provided by the surrogate mother under the surrogate motherhood contract (except when the service is provided free of charge), as well as the costs spent on medical care, food, surrogate mother's stay during pregnancy and postpartum period (Bajborosha, 2010). Also, following Art. 53 of the Code of the Republic of Belarus "On marriage and family" the contract of surrogate motherhood is concluded between the surrogate mother and the genetic mother in writing form and is subject to a notarial certificate (On

marriage and family: Code of the Republic of Belarus, n.d.). But at the same time, there are gaps in the legislation on the subjective component of the legal relationship of surrogate motherhood and the types of surrogate motherhood, since not always the female customer is a genetic mother, in some cases, donor female material may be used (Bajborosha, 2010).

parate law on reproductive technologies, and the order of their use, contraindications, and restrictions on their application are determined by the relevant order, as in the Ukrainian legislation to which it is similar. Positive in Russian law is that surrogate motherhood can be used in case of infertility, it is an opportunity to use reproductive technologies for both married and unmarried couples if they give informed consent to appropriate medical intervention. The Russian legislation does not regulate the definition of a surrogate mother, a surrogacy agreement and other related concepts. There is also no obligation for the surrogate mother to pass the baby on to the expectant parents after birth. Therefore, there is a risk that the surrogate mother will change her mind about keeping the pregnancy until birth or about passing the baby to the parents (On the basics of public health in the Russian Federation, 2011).

In the Netherlands, the legislation sets out certain conditions for concluding an agreement between expectant parents and a surrogate mother. Thus, according to the rules prepared by the Dutch Association of Obstetricians and Gynecologists, there should be evidence that the expectant mother has a serious medical illness that causes this method, and the surrogate mother must be familiar with the expectant parents and must have a complete own family. An additional requirement is that the genetic material must come from both expectant parents. The Dutch system has a complicated procedure for determining paternity. For example, the transfer of all parental rights in a surrogate motherhood will not happen against the will of either party. This means that the surrogate mother has no legal obligation to give the child, and the expectant parents to accept it. If the child is under six months of age, the prospective parents may take her home only with the consent of the Child Care and Protection Board (Maternity for others: Holland's dual approach, n.d.).

Under Indian law, the surrogacy procedure is commercially available. The cost and medical support of the procedure are much lower than in other countries, so such services are more often

provided to foreigners. When a surrogate mother gives birth to a baby, the baby is immediately transferred to his or her genetic parents, even if such parents are not Indian nationals. In healthcare institutions, the parties conclude a surrogacy agreement that reflects all legal and medical aspects, resolved financial issues, and enshrined legal rights and responsibilities of the surrogate mother and genetic parents (Surrogate motherhood in India is gaining popularity, 2012). In Israel, the surrogacy procedure was legally enshrined in 1996 by the adoption of the Surrogacy Maternity Act and is currently considered an advanced development in the country. The requirements for surrogate mothers in Israel are as follows: ages 22 to 38; the maximum number of births should not exceed three; having your own healthy baby; the interval between the last births should not exceed one year; at the time of the decision to conclude a contract on surrogate motherhood, a woman cannot be in difficult situations (divorce, difficult financial situation, loss or serious illness of one of the family members) (Gytlyna, 2015).

Conclusions

Thus, the analysis of foreign legislation in the field of surrogate motherhood provides an opportunity to argue for the existence of different approaches to the legal regulation of this method of reproductive medicine. Some legal provisions may be useful for the development of Ukrainian legislation in this area, in particular, regarding the possibility of being a surrogate mother not only to a spouse but also to a single person.

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