Med Law (2019) 38:2:211-224

Medicine and Law
World Association for Medical Law

Reproductive Medicine

ANALYSIS OF UKRAINIAN LEGISLATION ON SURROGATE MOTHERHOOD IN COMPARISON WITH US AND EU LEGISLATIVE NORMS

Valentina A. Vasilieva* Natalia M. Stefanyshyn* Tetiana Ya. Skhab-Buchynska*

Abstract: The objective of this article is to analyze the essence of the institute of surrogate motherhood, evaluate Ukraine's current relevant legislation and comparative analysis with other states and outline recommendations and prospects for further development of domestic legal regulation. The author defines the concept of "*contract of surrogate motherhood*" and proposes the adoption of a scientifically and legally substantiated Concept of Legal Acknowledgement of the Institute of Surrogate Motherhood, within which there should be a single normative legal act – the Law of Ukraine "On Surrogate Motherhood" with simultaneous amendments to the current legislation of our country.

Keywords: Surrogate Motherhood; Contract of Surrogate Motherhood; Auxiliary Reproductive Technologies; Reproductive Medicine; National Legislation; Genetic Parents.

Introduction

The use of methods of additional reproductive technologies is becoming increasingly relevant and requires proper regulation of relevant legal relationships. A detailed study of diverse national approaches, to solve the problem of surrogate motherhood, shows the ambiguity of the position of legislators. Some states completely prohibit surrogate motherhood, others prohibit related commercial agreements, and third world countries restrict the use of auxiliary reproductive technologies.

* **Department of Civil Law, Vasyl Stefanyk Precarpathian National University, 76000, 44-a Shevchenko Str., Ivano-Frankivsk, Ukraine**
Corresponding authors: Valentina A. Vasilieva, Vasyl Stefanyk Precarpathian National University
e-mail: lawdept@pu.if.ua

According to the statistics of the World Health Organization (WHO), infertility in the world directly affects up to 15% of the total number of marital couples of reproductive age [1]. International practices reflect the variability of views on surrogate motherhood, indicating the presence of both supporters and opponents of this method and correcting the legal regulation of the outlined scope [2]. The prohibition on the implementation of innovative reproductive technology, as a method of implementing reproductive rights, can take place only in the absence of relevant constitutional grounds. There are examples of prohibition of surrogate maternity at the level of sectoral legislation, despite the existence of constitutional foundations for its implementation (Italy) [3-4]. Comparative analysis of the positive experience of legal regulation of relations in the area of surrogate motherhood is considered relevant and expedient to further approbate international practices in the national legislation of Ukraine.

Methodology

The methodological basis of this article consists of such methods as: dialectical, comparative legal, historical and legal, analysis and synthesis formal-logical, assertive, analogy, legal modeling and others.

The leading method, in the research, was the dialectical method of research of phenomena and processes which allowed determination the state, trends and prospects of scientific and legislative developments in the field of legal regulation of the Institute of Surrogate Maternity. A comparative legal method is necessary, used for comparative analysis between legal norms of states, to identify the appropriate legislative practices for Ukraine while accounting for peculiarities of domestic law.

The historical-legal method has become useful when studying the genesis of the development of legislation which regulates the use of auxiliary reproductive technologies in Ukraine and other countries; methods of analysis and synthesis were used to establish the form and content of the institute of surrogate motherhood. These methods have allowed delineation of the variability of the legal definitions of the concept of “surrogate motherhood”, both on the conceptual and on the legislative level. The formal-logical method permitted identification of gaps in the current national legislation of Ukraine in the investigated area. The conceptual conclusions were formulated in accordance with the purpose of the investigation. This method of analogy accounted for the experience of other countries, to conclude that the adoption of new legal acts was necessary. During the formulation of legislative proposals, the

normative-semantic method, logical methods of cognition and the method of legal modeling were used.

Results

Within the scientific literature, the definition of "surrogate motherhood" either mention only one or several of its types or formulate the concept too broadly, losing inherent characteristics of surrogate motherhood.

Rozgon proposes to consider fertilization of a woman, by implantation of the embryo using the genetic material of the spouse, for the further bearing and birth of a child. Postpartum, the neonate will be recognized as originating from the marriage: such relationships are commercial in nature and take place on the basis of agreement between spouses and a surrogate mother [5].

L. Khurtsilava and others define "surrogate motherhood" as a conception that: use the methods of auxiliary reproductive technologies; carries the fertilized embryo during gestation; and formulates agreement of birth and transfer between surrogate mother and potential parents. [6-11]. Jackson expresses the view that "surrogate motherhood" is a practice whereby one woman (surrogate mother) agrees to take a child whom, after birth, should be passed to potential parents (father or mother) [12-16].

The direct mention of this institution originates from USSR legislation, in particular the Law of the USSR dated May 22, 1990 "On Amendments and Additions to Certain Legislative Acts of the USSR on Matters relating to Women, Family and Childhood" [17]. Amendments to Fundamentals of the USSR and Republics of the Union on Marriage and the Family, were approved by the Law of the USSR of June 27, 1968. Article 17 was supplemented and the issue of paternity was revealed as a result of artificial insemination. The 1992 changes to the Marriage and Family Law of Ukraine, from 1969, [18] detail the procedure for donating in Article 56 and regulate the procedure for recording a mother's child and legal registration of paternity [19-24].

The first program of traditional surrogate motherhood, planned and managed through the medico-legal perspectives of Surrogate Parenting Associates, Inc. in Louisville (USA), ended in 1980 with the successful birth of a child and the subsequent court's refusal of a surrogate mother and favor of the biological mother, in accordance with the current legislation of the country. The same method was tested in the UK in 1985 but, only after a 4 year delay, to obtain permission from the British Medical Association for surrogate motherhood

[25-30]. Throughout the post-Soviet space, for the first time the innovative method was tested in 1995 in Kharkiv [31].

The second and most widespread kind is an unconventional surrogate motherhood (or gestation) where there is no genetic link between the surrogate mother and the child . Unlike surrogate maternity sui generis, there is no radical surrogate motherhood permitted in all countries that have legalized this institution in marriage and family relationships. This method permits the following genetic links between the child and parents: communication with the parent alone; connection with the mother only; communication with both parents; and the child has no genetic links with his parents [32-34].

The most complete classification was proposed by N. Antsuh:

I. Genetic connection between a surrogate mother and the child:

- sui generis surrogate motherhood – implies the existence of a genetic link between a surrogate mother and her baby;
- non-traditional (gestational) surrogate motherhood, based on the absence of a genetic link between a surrogate mother and the child.

II. The genetic link between a child born by a surrogate mother and both parents or one of the actual parents of this child:

- complete surrogate motherhood means the presence of a genetic link between the two actual parents of a child born by a surrogate mother;
- partial (truncated) surrogate motherhood – implies the existence of a genetic link between one of the actual parents of a child born by a surrogate mother and this child [35].

The first is the “altruistic regime” in which surrogate motherhood is permitted by the state but the surrogate mother receives compensation for out-of-pocket expenses, for medical care and other expenses related to pregnancy. Future parents concluding a contract with a surrogate mother are not entitled to pay for a child bearing and birth service. This approach is intended to avoid the commercialization/transformation of the process into a product as a surrogate mother and a child (often considered a sale of children). It was adopted in Australia, Canada and Belgium.

The "*permission based*" model envisages the legalization of the method of surrogate motherhood at the legislative level. It was adopted in Georgia, India, the Russian Federation and Ukraine. This legislative regime may have certain variations: in Israel, surrogate motherhood is controlled by the state through a licensing system at all stages of the process; in South Africa, a contract with a surrogate mother should be certified by a court.

The third type is "*prohibitive*", according to which the conclusion of contracts on surrogacy is not allowed by law. The main reason for selecting such a regime were the moral and ethical principles, including but not limited to transformation of children into goods and the abuse of surrogate mothers. It was adopted in France, Sweden, Germany, Italy, Japan, Switzerland and Pakistan [36-38].

Valid international agreements, the regulations of which would direct the application of the studied method, are still absent. The World Medical Association Assembly, in 1987, adopted the Declaration of the World Medical Association on in vitro fertilization and embryo transplantation [39-42], which contained provisions on surrogacy but was abolished in 2006.

The Convention on Human Rights and Biomedicine [43] proclaimed that the interests and benefits of individuals must prevail over the interests of society and science. Recommendations of the Inter-Parliamentary Assembly of the member-states of the Commonwealth of Independent States "*On ethical and legal norms, safety of genetic medical technologies in the CIS member states*" [44-45] are designed to harmonize the state policies of the Commonwealth countries in the field of ethical-legal regulation of genetic medical technologies and extend to all types of medical activities, involving the application of genetic technologies to humans. Surrogate motherhood is an agreement between people (genetic parents and a surrogate mother) entitled to use this method of auxiliary reproductive technologies[46].

The agreement of surrogate motherhood establishes two types of relations: property (payment for services related to surrogate motherhood, current expenses of a surrogate mother during pregnancy and childbirth) included in the scope of civil law, and non-property (the process of implantation of the embryo, carrying and birth of a child by a surrogate mother, establishment of motherhood and fatherhood) [47-48].

The spouses serve the contractors for the service and the surrogate mother becomes the executor. Scientists offer a certain list of criteria to be met by

the other party, in particular: 1) age – adulthood, the maximum age is not stipulated by law but the recommended age is 35-36; 2) the medical – surrogate mother should be completely mentally and somatically healthy and have no contraindications that would complicate or make it impossible for her to bear the child and give birth; 3) social – a person must, prior to the conclusion of the contract, give birth to a healthy child; 4) legal – granting a legally agreed consent by signing the corresponding application for implantation of the embryo, which is attached to the contract and is an integral part of it [26; 49-50].

The content of the contract, in accordance with the law and practice of business, must constitute essential conditions, among which: the entity stated for the provision of services; the price determined by agreement of the parties; and the term of the contract. The latter condition requires the precise determination of the chronological framework of the contractual relationship between the entry into force of the contract and its termination or dissolution. In the United States, the law provides a wider range of essential conditions, in addition to the mentioned legislation of Ukraine: the place of the contract; the terms and procedure for payment for the services rendered; the institution where the fertilization will take place; a medical institution where the child is taken; and the responsibility of the parties of the agreement and others.

It is often the case that during conclusion of an agreement, the precise regulation of the provisions for legal liability, in cases of non-fulfillment or improper fulfillment of the terms of the agreement is undervalued. A signed agreement requires additional legal support. Thus the embryo transfer procedure also requires the registration of a contractual relationship between a surrogate mother, a genetic parent and a medical institution. The cases where divorce automatically terminates the agreement of surrogate motherhood are becoming more frequent but such a situation and its consequences remain unregulated.

Discussion

The economic objectification of the unborn child disregards the child's psychological and biological subjectivity. Such an embryo is considered an object without any basic civil, medical and legal rights. The same applies to permission for abortion without medical indications. When carrying out medical manipulations to stop the life of the embryo, through an external decision, the embryo is considered as an object and not a subject. In the case of gestational mothers, the rights of the child-embryo are ignored similarly to abortive cases for which there is no legal liability in Ukraine. There is a

commercialization of this area and surrogate mothers gradually will turn into "agencies" for providing such services and receiving earnings. Motherhood will become contractual work, jeopardizing the moral basis and unity of mother and child.

Buhtiyarova made proposals for optimization of administrative legislation on maternity and childhood protection in Ukraine [51]. Golovashchuk and others, considering the lack of legal regulation of the different types of surrogate motherhood, justify their legal consolidation on the basis of the establishing policies and guidelines for surrogate mother and child and proposed amendments to article 48 of the Law of Ukraine "Fundamentals of the Ukrainian legislation on health care" [6; 16; 52-53].

Conclusion

The current global humanitarian climate indicates that a nation's degree of democratic development is determined by its level of observance of rights and freedoms, including the right to procreation and parenthood. In practice, the recourse of future parents to the methods of additional reproductive technologies is increasing, calling for the need of proper legal regulation of such relationships.

Studying different national approaches, to the problems of surrogate motherhood, displays ambituity in current legislation. In some states, surrogate motherhood is completely prohibited, in others – only commercial agreements are subject to prohibition, and in the third countries – the use of auxiliary reproductive technologies in general is restricted. For the most part, surrogate motherhood is legalized by countries, including the CIS countries and the USA. The possibility of one-to-four types of surrogate motherhood, in different countries, raises the probability of their non-recognition in certain states and unrecognition of the legal relationship itself. The expert opinion, on the legal nature of the surrogate motherhood agreements, also diverges and remains uncompromising. Ukraine's lack of proper regulation within its legislation and unanimity of lawyers in contract assignment may result in a surrogate motherhood agreement unable to fully ensure and protect the rights of individuals involved.

It is proposed to develop a scientifically and legally substantiated Concept of Legalization of the Institute of Surrogate Maternity, a single normative legal act, the Law of Ukraine "*On Surrogate Maternity*", with simultaneous introduction of changes to the current legislation.

There is still a wide range of relations in need of legal support in Ukraine. Apart from the area that attracts the attention of scientists, there remains a certain range of issues, related to the definition of the legal content of reproductive rights, the mechanisms and limits of the implementation of these rights and the establishment of their place in the system of private law. The realities require a well-balanced reform of the domain of surrogate motherhood and the field of reproductive medicine in general.

References

1. Women and health: today's evidence tomorrow's agenda. *World Health Organization*. http://apps.who.int/iris/bitstream/handle/10665/44168/9789241563857_eng.pdf?sequence=1 (Accessed: 28.10.2018).

2. Samoylova V. V. *Surrogacy as a legal institution*. http://teoria-practica.ru/rus/files/arhiv_zhurnala/2014/4/yurisprudentsiya/samoylova.pdf (Accessed: 28.10.2018).

3. Federal Constitution of the Swiss Confederation of 18 April 1999. https://www.admin.ch/opc/en/classified-compilation/19995395/index.html (Accessed: 28.10.2018).

4. *Constitution of the Italian Republic* https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (Accessed: 28.10.2018).

5. Rozhnon O. 2010. Surrogate Motherhood: Problems of Legal and Contractual Regulation. *Small Encyclopedia of the Notary,* 3(51). Pp. 120–140.

6. Golovaschuk A. P. 2017. *Civil regulation of relations related to the use of auxiliary reproductive technologies*. Kiev. 258 p.

7. Hurtsilava L. A. 2007. On the issue of surrogacy agreement. *Actual Problems of Russian Law,* 2. Pp. 155–161.

8. Rusanovova N. E. 2008. *Reproductive Opportunities for Demographic Development*. Moscow. Kompaniya Sputnik. 333 p.

9. Chernysheva Yu. A. 2012. Legal status of a child born during the implementation of a surrogate motherhood program. *Family and Housing Law,* 6. Pp. 34–36.

10. Talanov Yu.Yu. 2012. Surrogate Maternity: Moral and Legal Aspects. *Collection of scientific works of Kharkiv National Pedagogical University named after Gregory Skovoroda. " Law",* 19. Pp. 42–47.

11. Lezhenin V. N. 2002. Contractual problems associated with surrogacy. *Actual problems of civil law, civil and arbitration process:* materials of scientific conf. (Voronezh, March 15–16, 2002). Voronezh. Pp. 384–398.

12. Jackson E. 2010. *Medical law: text, cases and materials*. New York. Oxford Univ. Press. 972 p.

13. MacCallum F. 2003. Surrogacy: the experience of commissioning couples. *Human Reproduction,* 18(6). Pp. 1334–1342.

14. Glossary of terms of ART. 2009. Revised ICMART and WHO Glossary of VTR terms (İKMART – ICMART – International Committee Monitoring Assisted Reproductive Technologies). *Fertility and Sterility,* 92(5). http://www.who.int/reproductivehealth/publications/infertility/art_terminology2/ru/index.html (Accessed: 28.10.2018).

15. *Encyclopedic dictionary of medical terms*. http://encdic. com/medicine/Gestacionnyj-6738.html (Accessed: 28.10.2018).

16. Ablyatípova N. A. 2009. Problems of surrogate motherhood in Ukraine. *Actual problems of state and law: Sb. sciences works,* 51. Odesa. Odessa National lawyer academy. Pp. 167–173.

17. On Amendments and Additions to Certain Legislative Acts of the USSR on Matters Related to Women, Family and Childhood: Law of the USSR dated 22.05.1990, No. 1501-I. http://zakon.rada.gov.ua/laws/show/ru/v1501400-90 (Accessed: 28.10.2018).

18. Code of Marriage and Family of Ukraine: Law of the USSR dated 20.06.1969, No. 2006-VII. http://zakon.rada.gov.ua/laws/show/2006-07 (Accessed: 28.10.2018).

19. Family Code of Ukraine: Law of Ukraine dated January 10, 2002, No. 2947-III. http://zakon3.rada.gov.ua/laws/show/2947-14 (Accessed: 28.10.2018).

20. Fundamentals of Ukrainian Health Care Legislation: Law of Ukraine dated 19.11.1992, No. 2801-XII. http://zakon2.rada.gov.ua/laws/show/2801-12 (Accessed: 28.10.2018).

21. On Approval of the Rules for State Registration of Civil Status Acts in Ukraine: Order of the Ministry of Justice of Ukraine dated October 18, 2000, No. 52/5. http://zakon.rada.gov.ua/laws/show/z0719-00 (Accessed: 28.10.2018).

22. On Approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine: Order of the Ministry of Health of Ukraine dated 09.09.2013, No. 787. http://zakon0.rada.gov.ua/laws/show/z1697-13 (Accessed: 28.10.2018).

23. The Civil Code of Ukraine: Law of Ukraine of 16.01.2003, No 435-IV. http://zakon5.rada.gov.ua/laws/show/435-15 (Accessed: 28.10.2018).

24. Bayborosha N. S. 2009. Harmonization of the legislation of CIS member states in the field of surrogate motherhood: theoretical aspects. *Legal journal,* 2009, 4. Pp. 101–108.

25. IVF surrogacy. 2007. *Fertility a. Sterility,* 8(4). Pp. 50–51.

26. A comparative study on the regime of surrogacy in EU member states. The European Parliament. http://www.europarl.europa.eu/RegData/etudes/STUD/2013/474403/IPOL-JURI_ET(2013)474403_EN.pdf (Accessed: 28.10.2018).

27. Surrogate Motherhood Treaty: UK Law of 16.07.1985. Surrogacy Arrangements Act 1985. http://www.legislation.gov.uk/ukpga/1985/49 (Accessed: 28.10.2018).

28. On Mediation at Adoption: The German Law of 02.07.1976. Gesetz über die Vermittlung der Annahme als Kind und über das Verbot der Vermittlung von Ersatzmüttern (Adoptionsvermittlungsgesetz – AdVermiG). Bundesgesetzblatt Nr. 78 vom 07.07.1976. http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl176s1762.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl176s1762.pdf%27%5D__1446215628622 (Accessed: 28.10.2018).

29. On the health of the people and the health care system: the Code of the Republic of Kazakhstan of 19.09.2009 № 193-IV. http://adilet.zan.kz/rus/docs/K090000193_#z1952 (Accessed: 28.10.2018).

30. Svitnev K. N. 2006. Surrogate motherhood: history and modernity. *Medical Newspaper.* P. 7.

31. Sutrimery is history. https://surogatnoematerinstvo.com.ua/ua/surogatne-materinstvo/tse-tsikavo/473-surmaterinstvo-istoriya (Accessed: 28.10.2018).

32. Dronova Yu. A. 2007. *What you need to know about surrogacy.* Moscow. Gorodets. 112 p.

33. Peresada O. A., Lebedko A. V. 2005. Assisted Reproductive Technologies: Ethical and Legal Issues. *Medical news,* 6. Pp. 9–10.

34. Fabre C. 2006. *Whose body is it anyway?* London. Oxford Univ. Press. 232 p.

35. Antsuh N. S. 2015. *Cross-border problems of legal regulation of surrogate motherhood*. Minsk. Chetyre chetverti. 156 p.

36. Brinsden P. R. 1999. Surrogacy. A textbook of in vitro fertilization and assisted reproduction. The Bourn Hall guide to clinical and laboratory practice. The Parthenon Publishing Group. Pp. 361–368.

37. Kohler, K. 2017. Certain aspects of surrogacy in the judicial practice of European courts. *Justice of Belarus,* 4. Pp. 69–74.

38. Act for Protection of Embryos (The Embryo Protection Act) = Gesetz zum Schutz von Embryonen (Embryonenschutzgesetz — ESchG) of 13 December 1990. Bundesministerium der Justiz. 2015. https://www.rki.de/SharedDocs/Gesetzestexte/Embryonenschutzgesetz_englisch.pdf?__blob=publicationFile (Accessed: 28.10.2018).

39. Déclaration de l'AMM sur la Fécondation In Vitro et le Transfert d'Embryon: [adoptée par la 39e Assemblée Médicale Mondiale Madrid (Espagne), oct. 1987 et supprimée à l'Assemblée générale de l'AMM, Pilanesberg, Afrique du Sud, Oct. 2006]. https://www.wma.net/fr/policies-post/declaration-de-lamm-sur-la-fecondation-in-vitro-et-le-transfert-dembryon/ (Accessed: 28.10.2018).

40. UN Convention on the Rights of the Child of 20.11.1989. http://zakon2.rada.gov.ua/laws/show/995_021 (Accessed: 28.10.2018).

41. International Covenant on Economic, Social and Cultural Rights (ICESCR) of 16.12.1966. http://zakon5.rada.gov.ua/laws/show/995_042 (Accessed: 28.10.2018).

42. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 18.12.1979. http://zakon5.rada.gov.ua/laws/show/995_207 (Accessed: 28.10.2018).

43. Convention on the Protection of Human Rights and Dignity in Connection with the Advancement of Biology and Medicine (the Convention on Human Rights and Biomedicine). http://aau.edu.ua/static/lll/texts/medlaw/Konvenc%D1%96ya-pro-prava-lyudyny-ta-b%D1%96omedycynu.pdf (Accessed: 28.10.2018).

44. Recommendations of the Inter-Parliamentary Assembly of the States Parties to the Commonwealth of Independent States "On the ethical and legal regulation and safety of genetic medical technologies in the CIS countries". http://iacis.ru/activities/documents/rekomendatsii/?sort_by=name (Accessed: 28.10.2018).

45. The Convention on the Protection of Children and Cooperation in the Field of Interstate Adoption (1993 Convention on International Adoption) of 29 May 1993. http://zakon2.rada.gov.ua/laws/show/995_365 (Accessed: 28.10.2018).

46. Korenga Yu. V. 2012. Surrogate Motherhood Treaty. *Bulletin of the Ministry of Justice of Ukraine*, 5. Pp. 133–137.

47. Kvit N. M. 2016. Institute of Surrogate Motherhood: Problems of Collision Regulation. *Almanac of International Law,* 14, Pp. 38–48.

48. Pestrikova A. A. 2007. *Surrogate motherhood obligations*. Samara. 202 p.

49. Veres I. Ya. 2013. Problems of legal regulation of surrogate motherhood. Lawyer, 3. Pp. 27–31.

50. Korbut, Yu. N. 2011. Determination of the origin of children at birth by a surrogate mother. *Actual problems of science of the XXI century: Sat. Art. uch. scientific-practical seminar of young scientists (Minsk, February 17, 2011)*. Minsk. Pp. 55–59.

51. Buhtiyarova I. R. 2018. *Administrative and legal principles of protection of childhood and motherhood in Ukraine*. Kiev. 22 p.

52. Basay N. M. 2014. Concept of surrogate motherhood. *Civil law and civil process, family law, international private law. Precarpathian Legal Bulletin,* 3(6). Pp. 58–64

53. Yavor O. A. 2012. Legal aspects of surrogate motherhood. *University scientific notes*, 4(44). Pp. 127–133.