

Surrogate Motherhood Legal Regulation Problems in Russian and European Law

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ABSTRACT: The article is devoted to the legal problems of surrogate motherhood procedure implementation, and the determination of this phenomenon legal nature in the Russian Federation and individual European countries. The article makes a comparative analysis of Russian and European legislation governing the relations associated with surrogate motherhood.

Key words: surrogate motherhood, contract, surrogate mother, genetics, genetic fund, biological parents.

INTRODUCTION

Such a procedure as surrogate motherhood becomes more and more popular in the world. Russian and European legislation does not contain a single document that would regulate this issue, but the provisions on surrogate motherhood are enshrined in such laws as the Family Code of the Russian Federation, the Federal Law "On the Basics of Citizens' Health Protection in the Russian Federation", the Federal Law "On Civil Acts state" and others. The problem of this phenomenon is very relevant nowadays and is expressed in the contradiction of laws and moral standards (Saurykova et al, 2018; Martínez-Alcalá, et al, 2018). The methodological basis of the article was represented by

general scientific and special methods. The following general scientific methods were used: dialectic, logical, analysis and synthesis, induction and deduction, etc. The following private scientific methods of cognition were used: formal legal, comparative legal, and systemic-structural (Alkhateeb, 2019).

RESULTS

Today, Russia is included in the list of countries, along with such countries as Italy, Georgia, Ukraine, Kazakhstan, Great Britain, Canada, where surrogacy is permitted officially. The relationship to surrogate motherhood as a form of reproductive motherhood is ambiguous. Although reproductive motherhood is allowed in the UK and Canada, strict restrictions are applied at the legislative level: no commercial gain is allowed for a surrogate mother, except for a compensation related to medical expenses and the period of pregnancy in which she was temporarily disabled. In a number of European countries, such as France, Norway, Sweden, Germany, Austria, the prohibition of surrogate motherhood is established at the legislative level. Moreover, in France, according to the Article 16-7 of the French Civil Code (FCC) (Civil code (France) Mise a jour legifrance 21 February 2004), the reproductive technologies involving surrogate mothers are prohibited and all contracts for bearing a child for other people are considered invalid, and a guilty person faces a criminal sentence of up to three years of imprisonment. Germany has its own special law "On the Protection of Embryos" (Georges ROUHETTE), which protects the rights of embryos and. If this law is violated, a violator faces up to three years in prison or a very large fine (Deutsches Embryonenschutzgesetz). This law contains the prohibition of IVF for women who are going to transfer the child to other parents after childbirth, surrogacy contracts, any advertising of these services, and mediation in this field are prohibited. Such prohibitions are related to the fact that German lawmakers consider such programs as the violation of moral principles. Surrogacy contracts are also illegal in Spain. Italian legislation has a "softer" position on the issue of surrogate motherhood: only heterosexual couples who are official spouses with a document and a medical report on infertility can participate in reproductive programs (Gunther et al., 2010; Mollaei, et al, 2014). The legislation provides liability for those who sell sex cells and is engaged in the implementation of surrogacy programs. Those who break the law can go to jail for a period of several months to two years. Besides, large fines are provided - from 600 thousand euros to 1 million.

In the Russian Federation, this phenomenon dates back to 1995 and there are no prohibitions at the legislative level at present, including the absence of prohibitions on obtaining a commercial benefit by a surrogate mother from this service, in connection with which various points of view have emerged regarding surrogate motherhood and its legal regulation among scientists and society in general. Before giving a legal assessment of this phenomenon, it is necessary to answer the following question: what is surrogate motherhood, as a type of reproductive motherhood? Its essence lies in the fact that married couples, the persons who are actually married, as well as individual citizens who, for personal reasons, cannot give birth to their child, apply for help to a woman who is able to bear the fetus. At the same time, the latter is forbidden to use her egg cell, that is, all the material is donated, which means that it is just a kind of "incubator" in which a genetically alien body develops. A surrogate mother cannot be called a woman who used her egg cell for this procedure, since then she will already be considered the biological

mother of the child. Naturally, this significantly affects the psyche of such a woman, therefore, very often, before giving consent to such an operation, she undergoes special training with a psychologist. It is important to have thorough legal knowledge for such a procedure, both on the part of the surrogate mother and on the part of biological parents, because by law the woman who gave birth to the child must write a voluntary refusal so that customers officially become parents according to the birth certificate (Italian Constitutional Court removes the prohibition on gamete donation in Italy). But practice shows cases where biological parents have to wait court decisions for several years in order to deprive such a mother of rights and to acquire parental rights. The decision of the biological mother to keep the baby to herself, violating all the conditions of the contract, is determined by strong attachment during the fetus bearing, which is ceased to be controlled at the legal level. In this case, a legal problem arises: on the one hand - there is an agreement between the customer and the surrogate mother, on the other - according to the Art. 35 of the Convention on the Rights of the Child, there is the prohibition on a child sale for any purpose and in any form (RF Family Code, №223-FL issued on 29.12.1995). In other words, this is a certain contract of sale, the subject of which is a child.

Such a procedure requires an individual approach and careful study, therefore, there is a number of criteria under which a surrogate mother should fall. First of all, in Russia there are special official agencies that are engaged in the selection of surrogate mothers. The main criteria are the existence of their own children and age limits from 20 to 35 years. A girl is required to undergo a full medical examination and give her written consent to the procedure (<https://www.unicef.org>). If she is married, then her husband must also give consent. A woman should not have genetic diseases and have at least one child. She concludes a tripartite agreement, the parties to which are surrogate, biological parents and employees of a medical institution who conduct the procedure.

The law provides certain cases when it is possible to use the services of a surrogate mother: 1. If a woman is not able to bear the baby and the pregnancy breaks, that is, there are certain pathologies that do not allow the fetus to be normal; 2. If a woman has no uterus due to congenital reasons or due to illness; 3. If more than 4 unsuccessful attempts at artificial insemination were carried out. I.V. Ponkin (The Federal Law No. 323-FL "On the Basics of Protecting the Health of Citizens in the Russian Federation", 2011) believes that surrogate motherhood turns people into a commodity, and from an ethical point of view, the woman's role is that she becomes an incubator, which significantly violates the honor and dignity of a person and contradicts international treaties (Ponkin, 2014; Nurgaliyeva, et al, 2018). The author also refers to the fact that many European countries outlawed this procedure at the level of civil law (<https://treaties.un.org>), and in France, for example, there is criminal liability for mediation, initiation, complicity and preparation in this field (CIVIL CODE, 2004). The author also believes that such services cannot be commercial, a prohibition on advertising is needed and it is unacceptable to use the procedure for the people who are not married. Therefore, no self-respecting state can allow the creation of a business based on the female body, which is comparable to sale of persons and prostitution.

It is impossible to unequivocally agree with this point of view, because, firstly, we believe that there are no contradictions with international treaties here, and moreover there is no violence against women, humiliation of their dignity, because surrogacy is a voluntary procedure. Every woman has the right not to sign a contract and no one can

force her to do this. Secondly, such phenomena as surrogacy and prostitution are incomparable. Surrogate motherhood will not be considered an immoral act, if we take a fairly real life situation when a couple, for example, can't bear a child, and wants to preserve the genetic fund, continue its genus, to have their own genes. Some scientists call this phenomenon the entrepreneurial activity of a surrogate mother, but this statement is not justified, since entrepreneurial activity is aimed at systematic profit making, and in this case we can only talk about a one-time fee in accordance with the contract. Besides, surrogate motherhood is also an opportunity to help childless couples find happiness and give the right to life for an unborn child. On the other hand, as critics rightly note, the development of surrogate motherhood will lead to a problem associated with overcrowding of orphanages, where every child, knowing that he is not guilty of having been abandoned by his parents, dreams of having a family, thereby significantly reducing the adoption chances for such children. A bill was introduced in the State Duma of the Russian Federation on the prohibition of this kind of procedure due to the immorality of the phenomenon, referring to the legislation of European countries, however, it was rejected.

At present, in Russia, it is necessary to draw up a contract indicating all the nuances and conditions that are important for both the surrogate mother and parents to make the surrogate motherhood procedure proceed legally correctly. The parties enter into a contract for the provision of services, which is consensual, which means the achievement of all conditions and agreements by the time the transaction is concluded. First of all, it is necessary to determine the price for the general procedure (currently the price is from one to two million rubles in Russia), that is, the amount of remuneration for a woman who bears a child. The contract should consist of conditions in the event of violation of which by one of the parties, the second party undertakes to pay a fine. The surrogate mother has the right to demand compensation and, in general, financial support for the period of bearing the child, which includes food, accommodation, medical examinations, etc., which relates directly to this procedure. It is also necessary to indicate the condition that biological parents have the right to take part in the life of a surrogate mother for the period of gestation, to monitor compliance with all procedures and a woman's lifestyle. It is also important to indicate the condition of what to do in a situation where biological parents unexpectedly die during the pregnancy of a surrogate mother; if, for example, the cost of the mother increases significantly due to unforeseen circumstances, such as illness or complications. Another problem of the surrogacy procedure is the unilateral refusal to fulfill the contract for the provision of services concerning compensation provided in Article 782 of the RF Civil Code (Georges ROUHETTE). It is advisable to allow such a refusal before the onset of pregnancy, as well as when the termination of pregnancy is necessary according to medical indications, since the voluntary refusal during pregnancy entails the non-fulfillment of the contract.

CONCLUSION

It is undeniable that the progress in the field of surrogacy is significantly ahead of the established legislation, since there is a number of gaps in this activity. In our opinion, surrogate motherhood does not entail immorality, since both future parents and a surrogate mother consciously come to this decision, which gives rise to the principle of voluntariness. It would be inappropriate to say that the mother who gave birth to a child

is engaged in entrepreneurial activity, given the complexity of the process and selection itself. It is necessary to give greater importance to a contract drafting and to take into account all cases when a born child may be left without care, as well as the regulation of relations regarding the refusal of a surrogate mother to fulfill the terms of the contract should be important and most important, since a surrogate mother may not want to make customers parents.

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