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METHODS OF LEGAL REGULATION FOR SURROGACY IN UKRAINE AND ABROAD

ABSTRACT. Almost at the onset of surrogacy as a method of ART, it has been attracting the attention of society as the way to fulfill the issue of high priority – procreation and family. Surrogacy has become one of the main research objects of bioethics that studies the ethical and moral aspects of the use of new biological and medical technologies.

The main issue of this article is the identification and comparative analysis of the features of the legal regulation of the method of surrogacy in Ukraine and other countries. The particular importance lies in specifying those prohibitions and restrictions, who they are applied to, and how they relate to the human right to procreation. The comparison to the laws of other countries that have a better legal surrogacy regulation will take place.

The theoretical and practical significance of the work is reflected in the fact that the results can be used in the further theoretical development of the legal issues related to surrogacy as one of the methods of human assisted reproduction. The research made it possible to find out the basic terms that are used in the legal regulation of surrogacy.

In the course of the research, it was found out that legal regulation of the use of the ART methods in the world, including surrogacy, varies depending on the jurisdiction. Each country has their laws. Nowadays it is possible to divide legal regulation of the use of the surrogacy method into four basic legal regimes:

- regime of permission;
- regime of restriction;
- regime of complete prohibition (in any form);
- regime of uncertainty.

Ukrainian legislation is considered to be very liberal in relation to surrogacy. Major types of surrogacy, including commercial surrogacy, are permitted and widely used. Moreover, in Ukraine, legislation does not allow traditional surrogacy, and also does not allow couples who do not have a registered marriage, single people, and same-sex couples, to use this method. It should also be borne in mind that the method of surrogacy can only be used for medical reasons.

In Ukraine, taking into account the peculiarities of notarization, agreements (contracts) on commercial surrogacy should be preferably signed by a notary. However, in the legislative norms there is no direct reference to the notarized form of such an agreement.

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The obtained research results indicate that Ukrainian surrogacy legal regulation is lacking a special law and thus remains fragmented. According to the author, only through the adoption of a special law in Ukraine, it will be possible to make proper legal regulation of basic reproductive human rights, including the application of the method of surrogacy, the peculiarities of concluding surrogacy agreements, post-mortem human reproduction and delayed parenthood.

KEYWORDS: surrogacy, ART, IVF, human right to procreation, human reproduction rights, surrogate mother, post-mortem human reproduction, delayed parenthood.

Almost at the onset of surrogacy as a method of ART, it has been attracting the attention of society as the way to fulfill the issue of high priority – procreation and family. Surrogacy has become one of the main research objects of bioethics that studies the ethical and moral aspects of the use of new biological and medical technologies.

The main issue of this research is the identification and comparative analysis of legislative provisions in Ukraine and other countries that establish prohibitions and restrictions on surrogacy. The particular importance lies in specifying those prohibitions and restrictions, who they are applied to, and how they relate to the human right to procreation.

The theoretical and practical significance of the work is reflected in the fact that the results can be used in the further theoretical development of the legal issues related to surrogacy as one of the methods of human assisted reproduction.

The legal regulation of the use of the ART methods in the world, including surrogacy, varies depending on the jurisdiction. Each country has their laws. Nowadays it is possible to divide legal regulation of the use of the surrogacy method into four basic legal regimes:

- regime of permission;
- regime of restriction;
- regime of complete prohibition (in any form);
- regime of uncertainty.

In Ukraine, surrogacy, including commercial, is permitted and widely used. However, legal regulation without a special law remains fragmented.

The relations in the field of assisted reproductive technology (ART) with the method of commercial surrogacy are complex and have different legal regulations in Ukraine and other countries.

For couples and single people who can have no children naturally or through in vitro fertilization (IVF), surrogacy is the feasible way to parenthood. Desperate couples that want to have children genetically related to both of them try to find any method to exercise their right to produce new generation. They are ready to accept the help of women who agree to give birth to a child for them after the IVF program. But in many countries of the world, the laws

of each state set out prohibitions and restrictions on the use of this method. The major obstacle concerns the payment of money compensation to surrogate mothers for carrying and giving birth to a child.

The aim

The choice of the research topic is determined by the necessity of establishing an effective legal basis that provides adequate regulation, drawing on such key factors as the positive experience of foreign countries, the sufficient experience of the researcher in the legal support of transnational reproductive programs with the method of commercial surrogacy, and the registration and legal protection of human rights in this area.

The main aim of this research is the identification and comparative analysis of legislative provisions of countries that set out prohibitions and restrictions on surrogacy or full legalize of this method. The particular importance lies in specifying those prohibitions and restrictions, who they are applied to, and how they relate to the human right to procreation. The comparison to the laws of other countries that have a better legal surrogacy regulation will take place.

The theoretical and practical significance of the work is reflected in the fact that the results can be used in the further theoretical development of the legal and ethical issues related to surrogacy as one of the methods of human assisted reproduction.

Importantly, numerous authors pay attention to this topic in their research and publications. These authors are H. W. Jones, K. Anderson, E. A. O'Hara, I. Senyuta, S. Danylenko, O. Rozgon, K. Svitnev, J. G. Raymond, R. Landau, F. MacCalum, M. Smith, M. Keyes, S. Markens, H. Ragoné, D. Danna, C. Shalev, M. A. Field, T. M. Pinkerton, R. F. Storrow, A. R. Charo, E. Blyth, D. Bogecho, S. Golombok, V. Jadva, E. Jackson, R. Kempers, J. Cohen, E. Lycett, B. Hale, D. A. Murphy, Y. Okuda, and others.

The methodology of the research includes the following general research methods: historical, logical, dialectical method, the method of theoretical analysis, technical, and general scientific methods.

Results

Prior to the research of legal regulation of 'surrogacy' and its peculiarities, such facets of the concept as the origin, meaning, and the attitude of society and church towards surrogacy require special attention.

Dictionaries and scientific literature provide various definitions of the term 'surrogacy' as well as explanations of its origin. The definitions reflect both medical and legal aspects of this concept¹. The following definition

¹ See for ex. *The Oxford English Dictionary* (2008); *The Macquarie Dictionary* (2001).

from *Osborn's Concise Law Dictionary* gives the main characteristics and a comprehensive description of the concept of 'surrogacy':

Surrogacy A process under which a woman, the surrogate mother (q. v.), carries a child under an arrangement made before the birth of the child with a view to handing over that child after birth so that other persons assume parental responsibility for that child, usually an infertile couple who have made the arrangement with the surrogate mother².

Surrogate derives from Latin '*surrogates*' (put in place of another). The surrogate is a substitute of a natural product that has only a few properties. It is that that substitutes something³.

The issue of overcoming infertility has worried mankind since ancient times. At different epochs, it was solved in different ways and was reflected in laws and customs. That is why the legal relations regarding surrogacy have deep historical roots. Certainly, in the ancient world, reproductive technology was far from today's complex and high-tech form. In those times, infertile couples looked for an opportunity to continue their family entering into a legal relationship with a third party, namely, the other woman who carried and gave birth to a child for them⁴.

The first legal relations that resemble surrogacy by their nature are found in the times of ancient Babylon when the childless spouses resorted to the help of another woman, often a slave, for procreation. At that time, because of numerous wars and a large number of closely-related relations, especially among the members of the nobility, the demographic situation in the Sumerian Kingdom was catastrophic. To solve the problems of infertile couples, a special provision allowing replacing the infertile woman by the slave was included into the Code of King Hammurabi in 1781 BC. The infertile wife, wanting to have children, had to give her husband a slave for procreation, and the children born by a slave, a surrogate mother, were considered legitimate children of an infertile couple⁵.

As mentioned before, surrogacy is one of Assisted Reproductive Technologies (ART) methods used for the treatment of infertility. It means that a woman (*a Surrogate*) by her free will and on the terms, fixed by the agreement, gives her consent to undergo implantation of the embryo conceived by means of IVF, and subsequently to carrying and delivering the child genetically unrelated to her in order to relinquish this child to other people (*Intended*

² See: *The Osborn's Concise Law Dictionary* (Sweet & Maxwell 2013) 414.

³ See: *The Merriam-Webster's Dictionary of Law* (Merriam-Webster Inc 1996) 634.

⁴ See: M Field, *Surrogate Motherhood: The Legal and Human Issues* (Harvard University Press 1988) 17.

⁵ Ibid 21.

Parents)⁶. According to legal realization of the surrogacy program, the participants in the process are the intended parents, a surrogate mother, and in some cases the donor of gametes (oocytes or sperm). In addition, they can include a medical facility, and a surrogacy agency (if such broker is involved)⁷.

By analysing the definition above, the surrogate is a substitute only in certain properties. In the case of surrogacy, surrogate mother substitutes a potential mother during the pregnancy period and childbirth because the organism of a surrogate mother is healthy and capable of giving birth due to its reproductive properties⁸. Therefore, when using the term “surrogacy”, it means the substitution of a potential surrogate by surrogate mother during both pregnancy and childbirth only in reproductive properties of her body. In addition, the international practice of assisted reproductive technology and legislation of many countries widely use the terms “surrogacy”, “surrogate mother”, “contract of surrogacy”⁹.

In Glossary on ART Terminology of World Health Organization and the International Committee for Monitoring Assisted Reproductive Technologies (ICMART) surrogacy is defined as a method of assisted reproductive technology¹⁰.

The term “surrogacy” is used in the legislation of many countries, including the Australia, UK, Canada, and some US states¹¹.

Having taken certain features into account, surrogacy includes the following features:

- financial component;
- affinity of a surrogate mother and a child¹²;

In addition, in recent years, so-called “*postmortem surrogacy*” became a separate type. These programs are carried out with the use of reproductive material or embryos of dead people. Many parents, whose children have died and left no grandchildren, often look for an opportunity to continue the generation in this way. The reproductive material can be taken during the life as well as sometimes after a person’s death (limited time and due to certain conditions)¹³.

⁶ K Rothenberg, ‘Surrogacy and the Health Care Professional: Baby M and Beyond’ in *Surrogate Motherhood: Politics and Privacy* (Lawrence Gostin ed, Indiana University Press 1990) 201.

⁷ Field (n 4) 10.

⁸ Ibid 202.

⁹ K Trimmings and P Beaumont, ‘General Report on Surrogacy’ in *International Surrogacy Arrangements: Legal Regulation at the International Level* (Trimmings K and Beaumont P ed, Hart Publishing 2013) 455.

¹⁰ The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology, 2009 <http://www.who.int/reproductivehealth/publications/infertility/art_terminology2/en> (accessed: 20.01.2020).

¹¹ See for example, Parentage Act 2004 (ACT), Surrogacy Act 2008 (WA), Surrogacy Act 2010 (NSW), Surrogacy Act 2010 (Qld), Surrogacy Act 2012 (Tas), the Surrogacy Arrangements Act 1985 (UK), the Uniform Parentage Act of 2000 (Texas, the USA) and others.

¹² See for ex. Field (n 4) 18.

¹³ In many countries, such as Israel, taking and cryopreservation of reproductive material are widely used. Moreover, there is compensation of related to them financial costs by the state. These programs are for the military men and representatives of the professions related to risk to life and reproductive health (policemen,

According to financial component, surrogacy is divided into *commercial* and *non-commercial* surrogacy¹⁴.

Due to conditions of the commercial surrogacy, a certain sum of money is paid to a woman, a surrogate mother, as a compensation for the difficulties and inconvenience she experiences because of pregnancy and childbirth. The compensation is payment the amount of which is determined in accordance with the terms of the surrogacy agreement¹⁵.

In the non-commercial surrogacy, also known as the “*altruistic*” one, the compensation is not paid to surrogate mother. However, even in non-commercial surrogacy, Intended Parents compensate potential surrogate mother all costs related to the ART, pregnancy, and childbirth¹⁶.

On the basis of the affinity of a surrogate mother and a child, surrogacy is divided into two kinds: *traditional* and *gestational*¹⁷.

In the case of traditional surrogacy, also known as “*total*” or “*genetic*,” surrogate mother bears and gives birth to a child that is genetically native. This means that woman’s egg with the help of artificial reproductive technologies is fertilized with the genetic material of a potential father. Consequently, the surrogate mother will have a genetic link with the child¹⁸.

In the case of gestational (or “*partial*”) surrogacy, the surrogate mother has no genetic connection with the child. Such type of surrogacy offers several possible variants:

- child will be genetically native only for intended father when his reproductive material and an egg donor are used;
- child will be genetically native for both Intended Parents when their reproductive cells are used;
- child will be genetically native only for intended mother when her egg and donor’s reproductive material are used¹⁹.

The surrogate mother cannot be both an egg donor and then bear a child conceived with her reproductive cell, as in the future it will cause problems in determining the origin of the child. From the moral and ethical point of view, this type of surrogacy is unacceptable because, in fact, the surrogate mother will be forced to refuse from her own child. Having a genetic connection with the child, the surrogate mother may blackmail parents by telling how the child

firefighters, nuclear physicists, and others). See: D Weisberg, *The Birth of Surrogacy in Israel* (University Press of Florida 2005) 37.

¹⁴ Field (n 4) 19.

¹⁵ Ibid.

¹⁶ Ibid 20.

¹⁷ J Zukerman, ‘Extreme Makeover – Surrogacy Edition: Reassessing the Marriage Requirement in Gestational Surrogacy Contracts and the Right to Revoke Consent in Traditional Surrogacy Agreements’ (2007–2008) 32 Nova Law Review 663.

¹⁸ Field (n 4) 20.

¹⁹ Ibid 22.

was born and demand money from them or even apply to court for recognizing her as the child's mother²⁰. Also, during the pregnancy with the use of genetic surrogacy, a woman can have a psychological and emotional attachment to the child after the birth. Given that, she could be reluctant to give her child to Intended Parents considering it to be hers because of her genetic link. In general, this form of surrogacy raises more questions and makes difficulties for both Intended Parents and surrogate mother, but primarily the interests of the child will suffer²¹.

According to the type of agreements between intended parents and a surrogate mother, surrogacy is divided into *Informal* and *Formal Surrogacy Arrangements*²².

Informal Arrangements are typical for cases when a surrogate mother and intended parents are relatives or very close friends. Such arrangements are not made in the form of written agreements²³. Voluntary mutual obligations of the parties are previously agreed as in an altruistic type of surrogacy²⁴. For example, parents can take over the financial expenses for medical services, the purchase of food, medicines, and clothes or they can simply care (visit a surrogate mother during pregnancy and delivery, help about the house, look after a child, etc.). A surrogate mother not only agrees to carry and give birth to a child, but she could also give breast milk or other services. Moreover, the actions of the parties are specified in advance in case of unforeseen circumstances: complications during pregnancy or delivery, a multiple pregnancy, birth of a child with physical or mental problems, divorce, disability, or death of the intended parents. It is important to negotiate the order of formal abandonment of parental rights by a surrogate mother. The main legal characteristic of such agreements is the absence of a formalized control over the implementation and legal liability of the parties²⁵.

Formal Arrangements are made in the form of a written agreement as a document of legal validity that draws up a so-called 'contractual' surrogacy. This form of fixing the obligations is considered as a required attribute of work of surrogacy agencies in the USA (in the states, where such activities and agreements are permitted)²⁶. Such agreements must include specific obligations and rights of the parties as well as their legal liability. One of the most important points is the obligations of a surrogate mother after the birth of the child.

²⁰ D Dana, *Contract Children: Questioning Surrogacy* (Ibidem-Verlag 2015) 26.

²¹ Ibid 26.

²² See: Field (n 4) 23.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid 24.

²⁶ Rothenberg (n 6) 236.

In Ukraine and some jurisdictions, for example, Kazakhstan, the signing of documents on the agreement registers the intended parents as the legal parents of a child. Another crucial point is accepting the obligations to pay for medical services by intended parents as there may be similar situations already described in informal arrangements. In case the agreement is of commercial nature (the one that involves payment of a specific amount of remuneration as a substantial financial compensation), then it is a commercial surrogacy²⁷.

In Ukraine the agreements (contracts) of commercial surrogacy must be signed by a notary²⁸. Such agreements must be clearly kept and they often involve fine sanctions for violations. If agreements are signed without violating the jurisdiction of legal relations, they are accepted by the court (some US states, Ukraine, Kazakhstan, and others)²⁹. The legislation of several Australian states also describes similar written agreements, but they are invalid. They are not accepted by the courts, and consequently are not enforceable³⁰.

Instead, proponents of the commercial surrogacy claim that a woman who bears and gives birth to a child for Intended Parents has the right to compensation. The financial reward is reasonable as during pregnancy she will have some difficulties and inconveniences. Moreover, she will not be able to work during pregnancy and some time after childbirth because she will need time to recovery³¹.

Surrogacy has recently become transnational in nature. In the USA, Ukraine, Georgia, and some other countries, surrogacy has developed into a lucrative business industry that provides services in organizing the surrogacy programs for people globally³². The characteristic features of the world market of surrogacy are rapid development, easy access, and poor regulation. Exploitation, difficult situations, and serious legal problems for all participants may arise. Therefore, it is important to look for the ways of optimal legal regulation of surrogacy at both national and international levels.

Given the great social significance, the ambiguity, and complexity of control, each country has the right to choose its own model of legal regulation of relations, in particular those that are connected with the use of the method of surrogacy. Therefore, the legal regulation has major differences in various jurisdictions.

The significance of the opportunity to have an access to the use of this method with a guaranty of the law has simple explanation. The main motive

²⁷ A Sanders, *Global Surrogacy: Legal Regulation and Support* (VERDYS Publishing 2016) 27.

²⁸ Ibid.

²⁹ Ibid 45–7.

³⁰ Trimmings and Beaumont (n 9) 35.

³¹ Ibid 48.

³² Sanders (n 27) 67.

of people (infertile couples and single people) who want to use the method of surrogacy is the desire to use their right to procreation. It is natural for every living creature, and a human is one of the biological species³³.

The right to procreate is identified as “one of the basic civil rights of man”³⁴. In literature and acts of international and national legislation various formulations of this concept can be found. The definition that was given by Corell, E can be regarded well enough. It is the following:

Reproductive rights can be defined as a set of universal rights and freedoms ensuring the enforcement of fundamental and inalienable human right to procreation – regardless of gender, nationality, marital and health status, including the right to reproductive health and the use of assisted reproductive technologies, including donor and surrogate programs, as well as the right to an independent family planning, including the freedom to determine the number and sex of children, as well as the time intervals between their birth and freedom from any form of discrimination in the exercise of these rights³⁵.

This definition expresses briefly the main point of a fuller formulation of reproductive rights, given at the International Conference on Population and Development (Cairo, 1994)³⁶.

It should be noted that the human right to procreation in many countries of the world has no support of the state and often is not even enshrined in national legislation. There are specific problems with the enforcement of this right with the help of the surrogacy method.

The common law recognizes the right of every woman to bear a child and will not contravene this right if there are no compelling reasons for doing so. In other words, every person has a right to realize the right to procreation³⁷. However, realization of this right by means of reproductive medicine, including the method of “surrogacy”, is regulated clearly by the legislation of states and territories of Australia and other countries of this legal system³⁸.

Nowadays it is possible to divide legal regulation of the use of the surrogacy method into four basic legal regimes:

– regime of permission (all types are permitted, there are no restrictions for those who want to participate in such programs);

³³ Robert G. Lee and Derek Morgan, *Human Fertilisation and Embryology* (Oxford University Press Inc. 2001) 3.

³⁴ Ibid 6.

³⁵ M Betsill and E Corell, *Gender Violence and Reproductive Rights* (WRTO Inc 2002) 241.

³⁶ *The Politics of Population: The International Conference on Population and Development*, Cairo 1994 (Johnson S ed, Earthscan 1995) 7.

³⁷ Trimmings and Beaumont (n 9) 427.

³⁸ In Australia, the right to procreation is not directly incorporated into the law either at the federal level or in its states and territories. See full comm. in *International Surrogacy Arrangements: Legal Regulation at the International Level* (Trimmings K and Beaumont P ed, Hart Publishing 2013) 429.

- regime of restriction (certain types are prohibited, there are restrictions according to marital status, sex, and age of parents);
- regime of complete prohibition (in any form);
- regime of uncertainty (there are no legal provisions prohibiting or permitting the use).

On the basis of the liberal national legislation to surrogacy (primarily, to commercial) Katarina Trimmings proposed to divide the country into three groups:

- 1) ‘surrogacy–friendly’ jurisdictions;
- 2) ‘anti-surrogacy’ jurisdictions and
- 3) jurisdictions with a relatively neutral approach to surrogacy³⁹.

‘Surrogacy-friendly’ countries have become ‘hubs’ of the international commercial surrogacy market, attracting intended parents both from the anti-surrogacy jurisdictions and jurisdictions with a relatively neutral approach to surrogacy⁴⁰.

According to this author, the term ‘surrogacy-friendly’ jurisdictions refers to the countries where commercial surrogacy is legal and, as a result, these jurisdictions attract a substantial number of intended parents from abroad. Countries that fall into this category are characterized by the following features:

- commercial surrogacy is legal;
- commercial surrogacy is performed on a relatively large scale;
- there are legal measures which allow the intended parents (or at least one of them) to obtain legal parentage;
- there is no nationality, domicile, or habitual residence prerequisite for the intended parents⁴¹.

The strictest prohibitions and restrictions on surrogacy (first of all, commercial) are typical for the legislation of the countries with a strong position of the Catholic and Protestant churches such as Italy, Germany, France, Switzerland, and others⁴².

Ukraine, Georgia, the US states of Alabama, Arkansas, California, Connecticut, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Nevada, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, West Virginia and Wisconsin, Uganda, and Russia are ‘surrogacy-friendly’ countries⁴³.

Ukraine is one of a few countries in the world where appliance of majority of ART, especially commercial surrogacy, is absolutely legal. The formation of

³⁹ Trimmings and Beaumont (n 9) 443

⁴⁰ Ibid.

⁴¹ Ibid 447.

⁴² Ibid 454.

⁴³ Ibid.

such a liberal to surrogacy legislation did not affected by the great authority of the Orthodox Church in Ukraine.

There is still no special law (such laws exist in Canada, the United Kingdom, India, individual US states, and also in most states of Australia) in Ukraine that governs the use of ART methods, including surrogacy. The rules that govern various aspects of the application of ART methods can be found in several regulations of varying legal force. Such fragmented legal regulation leaves many blank spots and unresolved problems.

Article 123 of The Family code of Ukraine (as amended from December 22, 2006 No. 524-V) regulates affiliation of the child, born in case of assisted reproductive technologies (ART).

The Article 281 of Civil Code of Ukraine regulates who has the right to participate in assisted reproductive programme. In Ukraine, only traditional couples (man and woman) who are in a registered marriage can take surrogacy. Moreover, a woman should have problems with bearing or the ability to give birth to a child.

Order of the Ministry of Healthcare of Ukraine from September 09, 2013 No. 787 “Order Manual of Appliance of Assisted Reproductive Technologies” establishes order of ART appliance. It is this act that contains the basic rules that govern the medical and organizational issues of surrogacy in Ukraine. There are several features of the use of surrogacy in Ukraine:

- no limits on surrogacy related payments;
- no additional legal procedures to obtain court order;
- no adoption of your own child is required;
- Ukrainian law allows issuing birth certificate to Intended Parents’ names regardless of their genetic links to the child;
- gamete donor or a surrogate mother has no parental rights over the child, who is legally the child of the prospective parents from the moment of conception.

It should be noted, that the only country with a full permission regime is the USA (some states)⁴⁴.

The regime of restriction is connected in particular with the possibility of payment of a financial fee (compensation), the admissibility of a genetic connection of a surrogate mother with a child (traditional surrogacy), marital status (officially registered marriage), family traditionalism (man and woman), and the age of spouses. This regime is in force in such countries as: Belarus⁴⁵. This group also includes Australia⁴⁶, the prohibitions and restrictions fixed by

⁴⁴ Trimmings and Beaumont (n 9) 390.

⁴⁵ Ibid 37.

⁴⁶ It should be noted in advance that in the states and territories of Australia gestational surrogacy is not prohibited. See: M Keyes, ‘Australia’ in *International Surrogacy Arrangements: Legal Regulation at the International Level* (Trimmings K and Beaumont P ed, Hart Publishing 2013) 26.

the legislation of its states and territories will be described in details in the next part of this research.

Such a restriction exists in the legislation of most countries, for example, in Illinois, the USA, there is a law “On Gestational surrogacy”. This law defines that gestational surrogacy means the process when a woman gives birth and bears a child conceived with gamete or gametes of at least one of the Intended Parents and the gestational surrogate mother does not give her genetic material for conception⁴⁷.

As an example, the USA practices the most liberal variant of legal regulation of surrogacy, which is typical of the category of “surrogacy-friendly” jurisdictions. Despite the fact that the USA is considered one of the most conservative and puritanical countries in the world, there the legislators have provided most of all opportunities for the use of almost all methods of assisted reproductive technologies, in particular surrogacy⁴⁸.

Due to the legally allowed possibility to make agreements on commercial surrogacy, Arkansas became just “the land of promise” for thousands of childless couples from around the world. The contract for the provision of surrogacy services there is binding. Potential parents (or one parent), in other words, clients in the contract, are recorded on the birth certificate of the child carried by surrogate mother without any legal complications. The main point in deciding the issue about the parents of a surrogate child according to law is intention expressed by parents-clients in the contract, because of which “surrogate” child is born. Thus, the possibility of any disputes and court battles for a child is non-existent. If in a few years after the birth of the baby parents are divorced, the court deciding who the child will stay with does not come from a biological link, which cannot exist, but from that with which parent it will be better for a child to stay⁴⁹.

The legislation of this state also provides great opportunities for single parents. Both single men and women can hire surrogate mothers for their procreation. Even if there is no biological link between a parent and a child, the parent-client is recorded in the birth certificate as the only parent⁵⁰.

Legislation of California and Florida can also be considered progressive in the matter of surrogacy. The courts of California rendered several important decisions that radically changed the legal situation in this and many other states. The court’s decision in the case *Johnson v. Calvert* in 1993 became historical⁵¹. For the first time in the world legal practice, the court supported

⁴⁷ Gestational Surrogacy Act № 750 ILCS 47, Illinois, the USA.

⁴⁸ It should be noted that in the USA there are several states where surrogacy (surrogate contracts or agency in the field of surrogacy) is prohibited. See: Trimmings and Beaumont (n 9) 390.

⁴⁹ Ibid 392.

⁵⁰ Ibid 390.

⁵¹ Ibid 393.

the intention of a woman-client to become a mother and bring up the child, carried by surrogate mother, as her own one. The Calverts hired a nurse Johnson for carrying their embryo. Shortly before the birth of the child, the Calverts refused from the child and filed a claim for recognition the surrogate mother as the true mother of their child. According to the court decision, Johnson who carried a child played the role of “the nurse who was given a child by parents for some time.” The court emphasized that the use of oocyte donor is not an obstacle for the recognition of maternity of a woman-client⁵².

Of particular note the legal regulation of the use of the ART methods in Australia, including surrogacy, varies depending on the jurisdiction. Each state and territory has their laws⁵³. There are strict regulations and requirements in all of the jurisdictions; the only exception is the Northern Territory because there are no laws regarding surrogacy⁵⁴. It also should be noted without giving an extensive comment that in the three jurisdictions (NSW, Queensland, and the ACT), there is a ban on commercial surrogacy for the residents abroad⁵⁵.

Discussion

Almost at the onset of surrogacy as a method of ART, it has been attracting the attention of society as the way to fulfil the issue of high priority – procreation and family⁵⁶. Surrogacy has become one of the main research objects of bioethics that studies the ethical and moral aspects of the use of new biological and medical technologies⁵⁷.

This research allowed us to classify the types of surrogacy, to determine the main methods of its legal regulation in different countries, as well as to assess the regulation in Ukraine and some countries of the world where it is most common.

The ideas expressed and the research results obtained are original and may be useful for the creation of relevant regulatory acts, in particular the special law on Assisted Reproduction and Reproductive Human Rights.

Conclusion

For a few decades of successful use of IVF methods, the attitude of society to them, in particular surrogacy, remains controversial. The nowadays debate

⁵² Trimmings and Beaumont (n 9) 390.

⁵³ The laws of the states and territories that regulate issues of surrogacy: Parentage Act 2004 (ACT), Surrogacy Act 2010 (NSW), Surrogacy Act 2010 (Qld), Surrogacy Act 2012 (Tas), Surrogacy Act 2008 (WA), Assisted Reproductive Treatment.

⁵⁴ See comm. in Trimmings and Beaumont (n 9) 27.

⁵⁵ See Parentage Act 2004 (ACT), s 45 (1), Surrogacy Act 2010 (NSW), s 11 (2), Surrogacy Act 2010 (Qld), s 54 (b), and see also full comm. in Trimmings and Beaumont (n 9) 27.

⁵⁶ Rothenberg (n 6) 37.

⁵⁷ Ibid.

on some of its moral, ethical, and legal aspects continues. The solution of legal surrogacy issues is made at the level of national and international legislation.

Despite the various methods of legal restriction on the use of surrogacy, it is necessary to continue looking for a balance between interests of society and people who want to become parents of children genetically related to them. In our opinion, they should not be denied because of the increase of demographic problems in the developed countries, international recognition of the absolute human rights, including the rights to reproductive health, procreation, and family as well as the inability to establish and maintain a total state control over fertility and family issues.

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МЕТОДИ ПРАВОВОГО РЕГУЛЮВАННЯ СУРОГАТНОГО МАТЕРИНСТВА В УКРАЇНІ ТА ЗА КОРДОНОМ

Анотація. Майже з початку застосування сурогатного материнства, як методу ДРТ, воно привертає увагу суспільства як спосіб вирішити питання, які мають високий пріоритет для продовження роду та сім'ї людини. Тому сурогатне материнство стало одним із головних об'єктів дослідження біоетики, яка вивчає етичні та моральні аспекти використання нових біологічних та медичних технологій.

Основні завдання цієї статті – виявити та зробити порівняльний аналіз особливостей правового регулювання методу сурогатного материнства в Україні та інших країнах. Особливе значення полягає у визначенні заборон та обмежень щодо застосування методу, до кого вони застосовуються та як вони стосуються права людини на продовження роду. Зроблено порівняння із законодавством інших країн, які мають більш досконалу правову регламентацію застосування методу сурогатного материнства.

Теоретична та практична значущість статті відображається у тому, що її результати можуть бути використані у подальшій теоретичній розробці спеціальних правових норм, пов'язаних із сурогатним материнством, як одним із методів людського відтворення. Дослідження дозволило з'ясувати основні терміни, які використовуються в правовому регулюванні сурогатного материнства.

У ході дослідження було встановлено, що правове регулювання використання методів ДРТ, зокрема сурогатного материнства, змінюється залежно від юрисдикції. Кожна країна має свої закони. На сьогоднішній день правове регулювання використання методу сурогатного материнства можна розділити на чотири основні правові режими:

- режим дозволу;
- режим обмеження;
- режим повної заборони (у будь-якій формі);
- режим невизначеності.

Українське законодавство вважається доволі ліберальним щодо сурогатного материнства. Основні види та типи сурогатного материнства, включаючи комерційне, дозволені та широко використовуються. Однак, в Україні законодавство теж має певні обмеження: не дозволено традиційне сурогатне материнство, встановлено заборону використання методу для пар, які не мають зареєстрованого шлюбу, а також не дозволено для одиноких осіб та одностатевих пар. Слід також враховувати, що метод сурогатного материнства в Україні можна застосовувати лише за медичними показами.

В Україні, враховуючи особливості нотаріального посвідчення, договори (угоди) про комерційне сурогатне материнство, бажано, оформлювати у нотаріальній формі. Однак у законодавчих нормах країни немає прямого посилання на нотаріальну форму посвідчення таких угод (договорів).

Отримані результати дослідження свідчать про те, що в українському законодавчому регулюванні сурогатного материнства відсутній спеціальний закон і тому правове регулювання залишається фрагментарним. На думку автора, лише завдяки прийняттю спеціального закону в Україні можна буде здійснити належне правове регулювання основних репродуктивних прав людини, у тому числі застосування методу сурогатного материнства, визначити зміст та особливості укладення договорів сурогатного материнства, проведення постмортальних програм, а також “відкладеного батьківства”.

Ключові слова: сурогатне материнство; ДРТ; ЕКЗ; право людини на продовження роду; репродуктивні права людини; сурогатна мати; відкладене батьківство; постмортальна репродукція людини.