

LEGAL AND INDIVIDUAL REGULATION OF SURROGACY: INTERDISCIPLINARY COMPARATIVE RESEARCH OF THE PHENOMENON

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Abstract: The paper reveals regulatory boundaries of surrogacy relations. The object of the research deals with the analysis of Russian and overseas legislation ruling issues of contractual and consequential aspects. Current Russian legislation is of some gaps in establishing terms of surrogacy agreements. This results in parties' ambiguous assessment of the terms of obligations. In the Russian Federation legislation some definite issues concerning the procedure for surrogacy have remained unresolved. Foreign experience in legislation to surrogacy is particularly valuable in dealing with the issues within judicial and contractual practice. The authors compared several legal systems to justify some definitive findings of the research.

Keywords: surrogacy, assisted reproductive technologies, family law, parental rights, contract, individual regulation.

1 Introduction

For a long time, Russian legislation did not contain any legal provisions on surrogacy, except for the possibility of using an assisted reproductive technology. The issue of the grounds for surrogacy relationship, including rights of parties to make their own claims remained unresolved. In fact, the parties to the surrogacy contract themselves determined all specifics of fulfilling their obligations. However, even the use of contractual structures did not have an unambiguous legal basis, since the legal acts which were in force in the Russian Federation before 2011 did not oblige prospective parents to enter into any agreement. Often one had to use oral forms and rely on the good will of all parties involved.

Therefore, this state of affairs arising out of surrogacy led to legal issues needed to be fixed. The only source of regulation was the court, which, against the background of a vast gap in legislation, could not settle cases in favour of all the parties concerned. Contract was therefore of fundamental importance in regulating these obligations. The parties to the contract stipulated the terms of payment, the surrogacy programme, the obligations to inform each other mutually, as well as the woman's observance of medical recommendations and ensuring her life support until the birth of the child.

The Federal Law of 2011 "On the fundamentals of healthcare in the Russian Federation" introduced the definition of surrogacy¹ for the first time. Its central feature is the contract whereby a surrogate mother conceives and gives birth to a child. Although Article 55 of the Act does not set out the basic substantive requirements for a surrogacy contract, it outlined certain legal restrictions.

For example, this Federal Law only allows such a contract to be concluded with potential parents who are not able to bear and give birth to a child for medical reasons (Article 55, Paragraph 9). A surrogate mother is to meet a much wider range of requirements: from the age to the state of health. Specifically, in the Russian Federation a woman may conclude the surrogate contract as a surrogate mother if she is from 20 to 35 years old.

At the same time, the woman should have at least one child of her own. Moreover, the legislation emphasizes that her child should be healthy. A potential surrogate mother also has to meet certain health characteristics. Therefore, she has to get a special medical certificate. The Act specifies the conditions for a married woman to participate in surrogacy.

Within linguistics aspects the term *surrogacy* is classified as being a non-equivalent lexical unit, it was borrowed directly, not forming a calque for it is a loan-word and a culture-specific element. The lexical item "surrogacy" is not included in general defining dictionaries (by S.I. Ozhegov, V.I. Dal, A.P. Evgenyeva) in its meaning as "surrogate motherhood", but presented in thesaurus dictionaries of legal terms². In legal texts in the Russian language the term is used as *surrogatnoje materinstvo* (surrogate motherhood). Borrowing is a natural process of language development. A lexical borrowing enriches language and as a rule does not harm its identity, this preserves basic vocabulary and grammatical structure of language remains unchanged. For example, Czech word *robot* have become literally international, it can be found in English, Russian, Spanish, Swedish, Norwegian, Estonian, it also transformed into German *Roboter*, Finnish *robotti* enriching vocabularies of these languages. A separate word *surrogacy* is also not a problem for identity of the Russian vocabulary. The reason for borrowing this word is its being a new term and having no Russian equivalent. The latter is for its belonging to foreign linguistic reality. As the phenomena of surrogacy is not of the Russian origin, the loan-word *surrogacy* is used and not a new one has been invented. The legal term *surrogacy* is termed in Russian as *surrogatnoje materinstvo* where the first term element is a loan-word formed according to rules of derivation but with borrowed word root – *surrogat-* (with stem ending –*t* from Latin) + *-n* Russian verbal adjective suffix of result of some action that is named by the source word + *-oje* neuter ending in the Russian nominative case. Thus, the derivational analysis has revealed that in the Russian language the term is formed as hybrids: it is formed by joining to the foreign root the Russian suffix and the ending form.

2 Methods

The main methods developed within legal science were used to carry out the research. The authors analysed laws and implementing regulations using a systemic-functional approach. It resulted in specifying the limits of legal regulation of surrogacy. The hermeneutic method was applied in defining the terms used in the regulation of relations of parties. This method allowed to define the meaning of legal norms aimed at establishing features of individual regulation of surrogacy. Both historical method and the method of comparative law were applied to trace the development trends of the Russian and foreign surrogacy concepts. Using the formal-legal method the authors compared the current legislation with judicial practice and revealed the general approach towards assessing the legal relations under study. The method of complex analysis was also applied in order to summarise theoretical conclusions and formulate the authors' proposals for solving legal problems. Linguistic comparative analysis was also used to reveal the peculiarity of the term formation based on a lexical borrowing.

3 Results and discussion

In contrast to Russian legislation, a number of other states have different approaches to the surrogacy concept. Even among European countries there is no unambiguous position on this issue.

¹ Federal law dated 21.11.2011 N323-FZ (changes 13.01.2020) "On fundamental healthcare principles in the Russian Federation". Legislation Bulletin of the Russian Federation, 2011. N48, article 6724; 2020. N3, article 275.

² Ardasheva N.A. Dictionary of terms and notions on medical law. SPb., 2007. Pp. 474-475.

The foregoing can be proved with the exercise of complete ban on the use of surrogacy as assisted reproductive technology contained in the legislation of Germany, France, Norway, Austria, and Sweden. A similar model of legal regulation has been established in some North American states (Michigan, Arizona).

Non-commercial nature of surrogacy relationships is highlighted in current legislation of the United Kingdom. The prohibition of any remunerated use of this method is contained in the legislation of such states as Israel, Canada, and Australia. No legal provisions on surrogacy are in legislations of Finland, Belgium, Greece and Spain. In these countries, this method of childbirth is actually practised, but without state intervention in the regulation aspects of surrogacy relations. Nevertheless, these relations are based on a certain contractual framework within which the parties determine how to fulfil their obligations³.

Thus, the Russian Federation is one of the countries where any type of surrogacy (commercial and non-commercial) is allowed. A similar mechanism of legal regulation has developed in most states of the United States of America as well as in the post-Soviet countries (Kazakhstan, Belarus, Ukraine, etc.).

In contrast to Belarusian law, the Russian surrogacy institution implies a wider freedom of contract. The parties are only obliged to adhere to certain requirements specified in the Federal Law of 2011. In addition to terms that must be met by the parties on this obligation, legal restriction is the inadmissibility of the coincidence of the surrogate mother and the donor of oocyte (Article 55, Paragraph 10). Thereby the principle basis for this assisted reproductive technology is provided: the child born by a surrogate mother is genetically the child of the potential parents who have made the relevant contract with the woman (surrogate mother)⁴.

United Kingdom legislation requires the potential parents to adopt the child born by a surrogate mother. In Belarus, the approach is different: not a surrogate mother but genetic mother of such a child is recognized to be his or her mother. Therefore, the fact of birth is considered as a legal fact of establishing maternity and paternity with respect to such children. At the same time, the Belarusian legislation requires that the contractual consent must be given by the maximum number of persons having a legal interest in surrogacy: potential parents-customers, a surrogate mother and her spouse. The same rule is a subject to terms of the Russian legislation, provided that the woman is married.

Researchers have ambiguously defined the limits of legal and individual regulation of surrogacy relationships. Thus, some scientists note that the parties are free to choose the conditions aimed at the maximum regulation of fundamental issues affecting the procedure of pregnancy carrying, birth and transfer of the child to the potential parents⁵. Other authors believe that loopholes in the law become a factor of abuse of the rights by the parties to a surrogacy contract⁶.

Thus, two key positions have emerged in the legal doctrine:

- 1) the need for legal regulation of relations arising from surrogacy;
- 2) the preservation of individual freedoms in establishing the conditions of surrogacy through individual regulation (by means of a contract or verbal agreements).

A moderate combination of legal and individual contractual regulation is noted by some researchers on surrogacy issues

based on a generalization of judicial practice⁷. In the Russian Federation, judicial practice has become determinative when disputes arise over the performance of a surrogacy contract.

In particular, the most common cases are disputes over assignment of a child born by a surrogate mother to parents-customers. Since the Family Code of the Russian Federation⁸ stipulates that the persons on the same side in the contract as spouses may be recorded as the parents of the child born only with the consent of the surrogate mother, it is she who has the right to decide on the main contractual obligation.

In 2017 the Supreme Court of the Russian Federation determined for such cases the fundamental significance of terms of a contract concluded by the parties on surrogacy⁹. However, only those contractual provisions that regulate consequences of a surrogate mother's refusal to resign a child to parents-customers are taken into account. Since these issues have not been resolved by law in Russia, it is up to the parties to the contract to initially establish the procedure for both the terminating their obligations and the consequences of such a decision.

Simultaneously with the above mentioned principles, the fact of genetic kinship between parents-customers and a child born by a surrogate mother becomes important. The Supreme Court of the Russian Federation is of a just opinion that the refusal of a woman who has given birth to a child conceived by means of assisted reproductive technology using the germ cells of other persons may be challenged by potential parents in court. In this regard, the Constitutional Court of the Russian Federation ruled that a surrogate mother's groundless use of the right to refuse to register such persons as parents of the child can be regarded as an abuse of right¹⁰.

A dispute over a child born by a surrogate mother is to be resolved based on a combination of circumstances. In addition to those mentioned above, official judicial practice emphasises the need to consider interests of a child in the universally recognised perception of Article 3 of the Convention on the Rights of the Child. The Russian Federation is a party to this international instrument, so its highest courts adhere to the position of compliance with international norms.

Still the above mentioned issue does not clear up the question of who has to prove that the surrogate mother's refusal to consent to the registration of the child's parents is groundless. Furthermore, it is questionable whether the woman can justifiably refuse to hand over the child to the parents-customers. Current case law on this issue has not developed criteria that are admissible in such situations. Therefore, this gap can only be filled by individual-contractual regulation i.e. by the parties themselves in the surrogacy relationship. If the relevant contract specifies the grounds for refusing a surrogate mother's consent to register the parents-customers as the parents of the child born by her, the will of the parties to such a relationship will be subordinated to the contract conditions.

4 Summary

The lack of sufficient legal regulation of surrogacy in the Russian Federation opens up a wide margin of appreciation for

⁷ Igareda González N. Regulating surrogacy in Europe: Common problems, diverse national laws. *European Journal of Women's Studies*, 2019. V. 26. №. 4. Pp. 435-446; Walker R., van Zyl L. *Three Models of Surrogacy. Towards a Professional Model of Surrogate Motherhood*. Palgrave Macmillan, London, 2017. Pp. 1-27.

⁸ Family code of the Russian Federation dated 29.12.1995 N223-FZ (edition of 06.02.2020). *Legislation Bulletin of the Russian Federation*, 1996. N1, article 16; 2020. N6, article 589.

⁹ Resolution of Plenum of the Supreme Court of the Russian Federation dated 16.05.2017 N16 "On application by courts legislative execution during hearing on the merits of parentage of children", paragraph 31. *Supreme Court of the Russian Federation Bulletin*, 2017. N7.

¹⁰ Constitutional Court of the Russian Federation ruling under 27.09.2018 N2318-O "On dismissal of a request for a hearing the complaint of citizens S. D. and S. T. on violation of their constitutional rights by sub-section 4 of article 51, sub-section 3 of article 52 of the Family code of the Russian Federation, sub-section 5 of article 16 of the Federal law "On vital records", part 9 of article 55 of the Federal law "On fundamental healthcare principles in the Russian Federation".

³ Picchi M. *Surrogate Motherhood: Protecting the Best Interests of the Child in Light of Recent Case Law*. *Peace Human Rights Governance*, 2019. V. 3. N3. Pp. 307-331.

⁴ Shigonina K.A., Kovalenko K.I. Aspects of legal regulation of surrogacy within the current Russian legislation. *Sinerhiya nauk*, 2019. N31. Pp. 1320-1332.

⁵ Ragoné H. *Surrogate motherhood: Conception in the heart*. Routledge, 2019. 215 p.

⁶ Van den Akker O. B. A. *Ethical, Moral and Human Rights Considerations in Surrogate Motherhood*. *Surrogate Motherhood Families*. Palgrave Macmillan, Cham, 2017. Pp. 231-267.

parties in such relationships. The agreement between the parties is intended to define the scope of this discretion and prevent possible abuse for all concerned parties. Current Russian legislation should contain more detailed provisions obliging the potential parents and the surrogate mother to include in the agreement the detailed conditions of fulfilment of mutual obligations. In addition to the need to enter into a surrogacy agreement, the parties should be required to provide for grounds for involuntary termination of their relationship as well as to prevent negative consequences associated with each party's withdrawal from obligations.

If the surrogacy contract contains the most specific terms for the construction of relationship between a woman carrying a child and potential parents, the Russian courts will be obliged to take into account the specifics of individual regulation of the case. We believe that generalizing surrogacy practice and elevating it into legal norms cannot serve as an effective tool for problems to be solved. This is primarily due to various socio-economic and personal characteristics as well as the ethics of surrogacy.

Due to the above mentioned circumstances, the legal regulation of surrogacy relationships should determine the essential terms of the contract, which the parties are obliged to provide for when concluding the deal. However, the law cannot interfere in the personal sphere of people's lives, leaving them free to detail the content of their own surrogacy contractual obligations.

5 Conclusions

The results of this report show that the approaches to legal regulation of surrogacy have evolved in legal doctrine along with the increased contractual practice. State interference in surrogacy relationships infringes on individual freedoms. The moderate proportion of public law and individual contractual regulation can be traced back to the generalisation of judicial practice, which becomes under the necessity to fill many of the gaps in legislation upon surrogacy. Thus, the obligation for parties in these legal relationships to enter into a surrogacy contract entails a certain contractual freedom to be followed. If a surrogate mother refuses to comply with the terms of the agreement, including those regarding the transfer of a child to genetic parents, her decision is a case of wrongdoing but cannot be declared illegal. The central conclusion of the research stands for the next: since a number of related issues are not regulated by law (paternity of a child not handed over to his or her genetic parents; fate of a child when surrogate mother dies after having left the child to herself; sanctions for parties, etc.), parties of surrogacy relationship are to determine relevant terms in a special contract.

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