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## LEGAL ASPECTS OF SURROGATE MOTHERHOOD IN THE REPUBLIC OF MOLDOVA

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### *ASPECTE JURIDICE ALE MATERNITAȚII SUROGAT ÎN REPUBLICA MOLDOVA*

*Dorința de a avea copii este una dintre nevoile esențiale ale majorității oamenilor. Această nevoie este una dintre proprietățile sociale și psihologice ale unei persoane, care întâmpină anumite dificultăți în realizarea de sine fără prezența copiilor. Ca orice sferă a vieții publice, maternitatea surogat trebuie reglementată prin lege. Acest lucru se datorează faptului că relațiile de familie capătă întotdeauna caracterul de relații semnificative din punct de vedere social. În plus, problema demografiei în Republica*

*Moldova este o problemă de stat. Inseminarea artificială, și anume maternitatea de substituție gestațională, a devenit una dintre modalitățile de rezolvare a problemelor demografice în prezent. Cu toate acestea, actualmente practica de implementare a legislației privind mama surogat indică existența numeroaselor lacune. La nivel legislativ, interesele unui copil născut ale mamei surogat și cele ale părinților biologici, nu sunt protejate.*

The birth of a child is an important event in the life of every family. But, unfortunately, not everyone is given the opportunity to experience the joy of fatherhood and motherhood, which is sometimes associated with a deterioration in reproductive health. In such cases, sometimes they resort to reproductive technologies [1].

Surrogate motherhood has been known since ancient times. For example, in ancient Rome, men gave their wives to foreign couples, in which the wife was barren, for the birth of a child. A child born to a hired mother was considered the legitimate child of an infertile couple [7]. Consequently, already in ancient times, people partially solved the issues of infertility.

Thanks to the rapid progress of medical science and the use of scientific achievements in medical practice around the world, research and experience in the field of medicine and medical law has greatly expanded the possibilities of overcoming infertility. The solution to the problem of having children for women and men diagnosed with infertility is possible at the legislative level.

Now in the Republic of Moldova, the use of the “surrogate motherhood” program is in demand. However, this method of the birth of a child causes a significant number of different conflicting opinions. At present, the attitude towards surrogate motherhood, both from a legal and moral point of view, is completely ambiguous. Some believe that this is a chance for those families who are unable to give birth to their own child, to become parents. Others, on the contrary, believe that surrogacy turns children into a commodity, and motherhood into a paid job.

The attitude in different countries to this type of contract is also ambiguous. In France, surrogacy is prohibited because it is contrary to the legal provision “On the inalienability of the human body” and the legislation on adoption. And in Israel, on the contrary, surrogate motherhood is widely developed and applied [3].

In the Republic of Moldova, there are no special normative legal acts

regulating the legal relations arising between the participants of “surrogate motherhood”.

The Republic of Moldova has the Law “On Reproductive Health” No. 138 dated June 15, 2012[6] In paragraph h) part (9) of Art. 9 of this law, the use of such assisted reproductive technologies as “donation of sperm, eggs, embryos” is allowed. However, at the moment, surrogate motherhood is prohibited in the Republic of Moldova. Moreover, in December 2013, Article 165 “Trafficking in Human Beings” was amended in the Criminal Code [14]. Now there is a paragraph that reads as follows “and also the use of a woman as a surrogate mother, committed by: b) deception; c) abuse of position of vulnerability or abuse of power, giving or accepting payments or benefits in order to obtain the consent of a person who controls another person.” Again, a legal conflict, this point can be considered in two ways. That is, if someone manages to prove that surrogate motherhood was not used to extract financial benefits by the surrogate mother, then perhaps there will be no punishment. According to the law, it is precisely the receipt of benefits from surrogate motherhood that is prohibited, and if one sister bears a child for another sister, if a mother bears a child for her daughter or for her son, then it turns out that this is permissible.

Surrogacy is prohibited by law in Austria, Germany, Norway, Sweden, France, and some states of America. In countries such as Australia, Great Britain, Denmark, Iceland, Canada, the Netherlands, surrogacy is allowed only on a gratuitous basis. Surrogate mothers receive health insurance, maternity benefits, but do not receive financial compensation from biological parents, at least not officially. Surrogate motherhood is allowed in most states of America, in South Africa, in India, in Russia, in Georgia, in Ukraine, in Israel. For example, in Israel, a woman applicant for a surrogate mother, in addition to being chosen by her parents, is chosen by psychologists. Social workers work with her, she is being prepared for this unusual motherhood. When there is confirmation that a woman has become pregnant through IVF, she is gradually prepared for the fact that she will give this child away. From the moment of conception to the moment of birth, the child does not belong to either the biological parents or the surrogate mother, it belongs to certain social services. If we are talking about monetary compensation, then the parents initially put the money into a certain account, only a social worker has access to this account, and only he will be able to transfer the amount to the account of the mother who

carried it out in the future. If this woman has her own children, then the biological parents are warned that they will pay not only the fee, but also money for the maintenance of children, for food, etc.

Despite the fact that surrogate motherhood is developing and in demand in our country, neither the Civil Code of the Republic of Moldova [4], nor the Family Code of the Republic of Moldova [11] has an exact definition of this method of assisted reproductive technologies. There is also no definition of a surrogate mother in our legislation, which, in our opinion, is unacceptable. At this stage of the development of the regulatory framework, there is no legally fixed definition of surrogate motherhood.

For example, in contrast to the Republic of Moldova, the term “surrogate motherhood” has received legislative consolidation in paragraph 9 of Art. 55 of the Federal Law of November 21, 2011 No. 323-FZ “On the Fundamentals of Protecting the Health of Citizens in the Russian Federation”<sup>5</sup>, where it is defined as the bearing and birth of a child (including premature birth) under an agreement concluded between a surrogate mother (a woman carrying fetus after transfer of a donor embryo) and potential parents whose germ cells were used for fertilization, or a single woman for whom the bearing and birth of a child is impossible for medical reasons [15].

Basically, there are two types of surrogate motherhood:

- “*traditional*” - kinship at the biological level between a woman carrying a child for another couple, and this child. It involves conception using the genetic material of the father and the egg of a surrogate mother. It is important to note here that in this case, the woman who carries the child is his biological mother.

- “*gestational*” - there is no connection at the genetic level between the surrogate mother and the child. She simply carries the embryo of the biological parents of the customers. The fertilized egg of the parents is injected into the uterus of the surrogate mother. This method is preferred among couples, because it allows you to have a 100% genetic connection with the child.

The shortcomings in the field of legal regulation of surrogate motherhood include the problem that arises in connection with the status and influence of the nasciturus, which is the child carried by the surrogate mother, on the hereditary rights of the surrogate mother and her relatives, as well as third parties. Being genetically not her child, and also given that

the surrogate mother wants to transfer him to potential parents after the birth, it will not be possible to proceed with the division of property before his birth [10]. Also, the issue of the possibility of inheritance by an unborn child after his potential parents, who, for one reason or another, may die before his birth, has not been resolved. This gap negatively affects the rights and legitimate interests of the child.

The absence of legal norms that would regulate these issues can be explained to some extent by the fact that the legislator recognizes a legally surrogate mother as the mother of a child, because it is on her decision that it depends who will raise and educate the born child - she or potential parents. It is worth noting that the term "potential parents" itself indicates the status of these persons, they will not become parents if the surrogate mother does not give her consent to register the child in the registry office. In many countries where surrogate motherhood is allowed, the legislator initially recognizes potential parents as parents, and the surrogate mother has no legal grounds to keep the child, which is possible in the realities of Moldovan law. The existence of such an opportunity is justified by the fact that during pregnancy a certain psychological connection may arise between the surrogate mother and the child, forcing the surrogate mother to transfer the child will become a serious trauma, both for her and for the newborn [8].

Nevertheless, it is important to note that the goal of surrogate motherhood is the treatment of infertility, and by establishing the right of a surrogate mother to keep the child, this goal may not be achieved, then this ART method can be considered meaningless.

Many other issues that people who wish to participate in the surrogacy program have not been resolved. The concept, subject and content of the surrogacy contract are not disclosed by law, its legal nature is not defined, and the consequences of its non-fulfillment are not fixed.

A number of researchers refer the surrogacy contract to civil contracts, others to family contracts, and still others to a special type of contract at the intersection of family and civil law. There is an opinion according to which this contract should be considered null and void. Supporters of this position argue that in fact the subject of the contract is the child, which contradicts not only the current legislation, but also the norms of morality and ethics.

Some scientists, such as E.S. Mitryakova [9], T.E. Borisova [2], O.V. Fetisova [16], suggest paying attention to the similarity of the surrogacy

contract with the contract for the provision of services for compensation. And E.V. Stebleva [12] adheres to the point of view on the family-legal nature of the surrogacy contract.

Representatives of another group do not attribute the surrogacy contract to either civil law or family law contracts, recognizing a special status for it, designating it as an unnamed, mixed contract. These scientists include S.Yu. Chashkova [17], S.P. Zhuravleva [5].

However, at the moment, the surrogate motherhood contract is in practice considered as a civil contract, the norms of the current civil legislation, as a rule, applied to contracts for the provision of services, are applied to it.

The subject of a surrogate motherhood agreement is the bearing and birth of a child. The current legislation does not establish the form of the contract, most of the authors consider it necessary to fix a notarized form. There are no rules that allow us to conclude what will be the essential terms of the contract, therefore, and also based on judicial practice, we can say that the parties themselves stipulate these conditions. The contract can be both paid and free of charge. The provisions concerning the rights and obligations, the parties establish by agreement. The law does not impose special requirements, with the exception of the nullity of the obligation of a surrogate mother to give consent to the recording by potential parents of a child in the registry office, the inclusion of which is proposed in some samples of a surrogacy contract.

Today, even a legally correct contract cannot guarantee biological parents that the child will be handed over to them after birth; unfavorable scenarios, such as blackmail, threats, deceit, cannot be ruled out. The legislator believes that the fact of gestation and birth is more significant than genetic origin [13].

Problems also arise in the sphere of responsibility of the parties in case of non-performance of the contract. The contract, as a rule, provides for the property liability of the parties in such situations as non-payment or payment with delay of amounts due to the surrogate mother as maintenance in addition to remuneration, and also if the surrogate mother spends these amounts of money for other than the purpose specified in the contract, leads lifestyle that can negatively affect the intrauterine development of the child. Due to the specifics of relations, a situation may arise in which purely civil liability may not be enough. For example, if potential parents abandon the child for one reason or another, the contract proposes to pro-

vide for the obligation to pay a certain amount of money to the surrogate mother in such a situation. Nevertheless, it is difficult to argue that this amount of money, in whatever amount it is provided, will be a fair measure of responsibility, because, in this situation, the child may suffer in the first place, his right to be raised in the family by his parents will be violated. A surrogate mother, concluding an agreement with potential parents, does not initially aim to keep the child, and therefore, if potential parents refuse him, she can also refuse him without taking him from the medical institution where he was born. As a result, she will be judicially deprived of parental rights in relation to this child with the obligation to pay alimony for his maintenance, while the child will grow up in a specialized institution (children's home). Therefore, a number of authors propose to establish in the legislation the maintenance obligations of potential parents if the surrogate mother is ready to consent to the registration of the child in the registry office, and they refuse for any reason from the child.

Another problem that exists in the legislation on surrogate motherhood is the legal uncertainty of establishing a family-legal relationship of a child with parents and adoptive parents.

Today, the question of who are the parents of a child born by a surrogate mother is finally decided only after the birth of the child. In this case, the child may be left with a surrogate mother, which deprives the genetic parents of the child of the opportunity to subsequently challenge this circumstance. In fact, a surrogate mother has the opportunity to destroy the terms of the contract, referring to the presence of blood relationship with the child. In practice, there are other problems in the field of legal regulation of the institution of surrogate motherhood that require legislative resolution, including the uncertainty as to whether only one of the spouses or a citizen can act as a customer under a contract for the provision of services in the field of surrogacy in a marital relationship.

It seems that for a clearer understanding of the legal status of a newborn child born under the contract for the provision of surrogacy services concluded between the genetic parents and the surrogate mother, one should also consider the issue of the civil law nature of such an agreement.

Independent legal regulation of the contract for the provision of surrogate motherhood services and its legal consolidation in the norms of civil legislation will largely remove the existing conflicts and legal uncertainties caused by not quite clear legislative formulations in the area under study.

This problem is closely related to the issue of the legal status of the customer under the surrogacy contract. E. S. Mitryakova believes that this issue should receive an unambiguous resolution at the legislative level in order to exclude the formation of conflicting judicial practice [8].

As priority tasks for improving the regulatory framework, it is advisable to develop fundamentally new approaches and proper legislative regulation, since the current legal norms in the field of surrogate motherhood today are only fragmentary

Thus, it seems possible to conclude that the existing array of regulations in the field of legal regulation of the institution of surrogate motherhood needs to be further improved. The main problems in this area today are:

1) The ability to refuse the full performance of the surrogacy contract by the executor (surrogate mother), which is currently solved only by going to court with a claim to establish the origin of the child. The way out of this situation is the introduction into the text of the civil code of an independent norm regulating the civil law contract for the services of surrogate motherhood;

2) Uncertainty in the question of who can act as the subject of a contract for the provision of services in the field of surrogate motherhood. To date, the law names only single women and married couples as parties to the contract, however, judicial practice shows that single men can also be subjects of the contract, which is not provided for by any normative act in force in the field of surrogate motherhood. As a solution to this problem, it is possible to recognize single men as parties to the agreement under consideration, subject to certain requirements and criteria, which, at a minimum, must fully coincide with the restrictions provided for by the rules on the adoption of children.

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