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Research Article

REGULATION OF SURROGATE MOTHERHOOD: NATIONAL AND FOREIGN EXPERIENCE

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ABSTRACT

The article analyzes the concept of surrogate motherhood, its types and national and foreign norms regulating this relationship. It also analyzes the US experience and the current importance of surrogate motherhood, as well as the requirements for future surrogate parents.

KEYWORDS

Surrogate motherhood, traditional and gestational surrogacy, surrogate parenting agreement, adoption, institution of surrogate motherhood, reproductive rights, discrimination, social function.

INTRODUCTION

Surrogate motherhood is a controversial but widely used reproductive technology. This is the practice whereby a woman, by prior agreement with the intended parent(s), intentionally becomes pregnant, carries and gives birth to a child of whom she does not

claim to be the parent. In “traditional surrogacy”, the surrogate mother contributes her own egg. In turn, with “gestational surrogacy”, a fertilized egg is implanted in a surrogate mother. In addition, surrogacy can be altruistic



or commercial, depending on whether the surrogate mother receives payment for her work [1].

Surrogate motherhood requires changes in the legal regulation of paternity and challenges traditional views on motherhood, fatherhood, pregnancy and family. Traditionally, the law recognized natural fatherhood and adoption as two models of the legal relationship between parents and children.

The legal recognition of surrogate motherhood suggests that the model of parenting by intent is a possible basis for legal relations between parents and children [2]. Thus, parenthood should no longer be just a biological fact, but a socially constructed status resulting from consent and intention to become a parent.

The practice of surrogate motherhood is gradually becoming more acceptable and welcomed both theoretically and practically in various countries of the world, and the economic aspects of this only emphasize the lack of legal regulation on this issue in the vast majority of jurisdictions. Today, this silence is a source of uncertainty and many of the ethical and legal difficulties that block the path for those for whom this practice represents one of their last chances to become parents.

We are seeing this phenomenon more and more often. This institution is well developed as a legal phenomenon in foreign countries due to progress in the field of medicine. However, in the Republic of Uzbekistan, surrogate motherhood is not yet so widespread that one could speak of any major problems that could affect the moral character of our society. But still, the legislation does not give a specific answer to the question: is surrogate motherhood allowed in our country? Although part six of Article 207 of the Family Code of the Republic of Uzbekistan

provides that persons who are married to each other and who have given their consent in writing to the implantation of an embryo in another woman for the purpose of carrying it, can be recorded as the parents of a child only with the consent of the woman who gave birth to the child (surrogate mother). That is, in fact, we regulate only the issue of registering persons as parents, but nothing more.

Moreover, this gap also causes ambiguity and additional pitfalls in relation to international surrogacy agreements concluded with third parties located outside the specific country. This legal uncertainty about the legality of such surrogacy contracts or the recognition of the legal paternity of future parents harms the parties to these contracts, and even more so the child [3]. Consequently, such children may suffer years of struggle with ambiguity and uncertainty about such a basic question as who their legal parents are, especially in the early years when confidence and stability are so important for their development. The surrogacy laws of the various countries that exist vary, and the range of opinions is very wide, from complete prohibition with criminal sanctions to moderate regulation, freedom of contract, and recognition of the legal paternity of future parents. This wide range of laws has already received the concept of “jurisdictional chaos” [4].

At the same time, the problem of the relationship between surrogate motherhood and the institution of adoption is raised. Back in the 70s of the twentieth century, the phenomenon of surrogate motherhood began to spread in the United States, which gave rise to many problems, among which the Baby M case was striking. Agrees for a certain fee, by artificial insemination to carry a child to term, give birth to a newborn, and after birth, transfer all parental rights to

the biological father. And then it is assumed that the wife of the biological father will adopt the child.

Surrogate parenting is an attempt to create a new form of independent adoption and such arrangements should not be honored to the extent that they are inconsistent with legitimate and well thought out social principles. Adoption is a method by which the state attempts to provide a suitable home for children whose biological parents are unable or unwilling to care for them. Since this results in permanent severing of the legal ties between the child and its biological parents, adoption is strictly regulated by each state.

In the Republic of Uzbekistan, general theoretical problems in the field of family law were studied by such legal scholars as F.M. Otakhuzhaev, N.F. Imomov, D.M. Karakhodjaeva, H.R. Rahmonkulova, N. Ashurova, Z.N. Esanova, U.Sh. Sharakhmetov. However, these authors did not specifically study the issues of adoption in relation to surrogate motherhood, which confirms the need for scientific research in this direction.

A surrogacy parenting agreement is not, in and of itself, an adoption agreement. This is an agreement in accordance with which the biological mother agrees for a fee to deprive her of parental rights after the birth of the child and transfer the child to the biological father [5]. A threshold question may be why surrogacy parenting agreements need to comply with existing adoption laws. A threshold question may be why surrogacy parenting agreements need to comply with existing adoption laws.

The parties to the surrogate parenting agreement assume that the biological father's wife, the stepmother, will adopt the child. Surrogacy parenting agreements are, in essence, a form of independent adoption. Their ultimate goal is to make the

contracting couple legal parents of the child through adoption.

Because surrogate parenting agreements are an attempt to create a new form of independent adoption, their compatibility with adoption laws is critical. The public policy interests protected by the adoption process are reflected in three aspects of state adoption laws: the requirement for consent, the prohibition of the sale of babies, and the requirement for an investigation [6].

The most developed institution of surrogate motherhood is in the United States, so we focus on the study of this experience. Every state in the US requires the biological parents to consent to the adoption of their child before the adoption is approved [7]. There are several reasons why the consent of the biological parents is required.

As a general rule, one of the reasons is the interest of the state in maintaining the relationship between the child and his biological parents. It is generally considered preferable that parents and their biological offspring stay together. The second, related reason for requiring consent is that involuntary deprivation of the rights of biological parents can only occur under certain circumstances. The adoption process is designed primarily as a mechanism for the voluntary termination of parental rights. The third reason why the consent of the biological parents is required for adoption is to protect the adopters from the instability that could arise if the biological parents were free to change their mind and return their child [8]. Finally, consent is required to prevent abuse that might otherwise occur if consent were not required. Thus, without the consent of the biological parents, no state permits the removal of a child from them, unless the child has been abandoned, left unattended, or abused. A similar procedure exists in the Republic of



Uzbekistan. Thus, Article 159 of the Family Code of the Republic of Uzbekistan requires the consent of the parents being adopted for adoption.

Based on the fact that Article 63 of the Constitution of the Republic of Uzbekistan provides that the family is the basic unit of society and has the right to the protection of society and the state, our government prefers to leave children with their biological parents. However, this policy is not always implemented. Then one of the options for ensuring the upbringing of children in the family comes to the rescue - adoption. Adoption is a government response to the needs of children whose parents are unable or unwilling to care for them. This is a procedure by which the state tries to find a permanent home for those children who do not have one. In general, adoption permanently breaks the legal ties between the child and his biological parents.

In the family legislation of the Republic of Uzbekistan, the administrative procedure for adoption (adoption) was recently abolished. In the administrative order, adoption was carried out by the decision of the khokim.

The development of family law also influenced the institution of adoption, and a judicial procedure for adoption was introduced. Adoption at the request of citizens of the Republic of Uzbekistan falls under the jurisdiction of inter-district, regional (city) courts for civil cases at the place of residence of the adopted child.

The list of participants participating in the consideration of cases related to adoption is also established by law. Thus, prospective adoptive parents, guardianship and guardianship authorities, as well as the prosecutor must participate in the trial.

If necessary, a parent (father or mother), his/her relatives and other interested persons of the adopted child, as well as a child over the age of ten years may participate in the court. After the trial, the court may decide on the adoption of the child by the applicants (adoptive parents).

For the consent of the biological parents to be valid, it must be given voluntarily. Consent can be forced for a number of reasons. For example, consent given by biological parents under coercion is not considered voluntary and is not voluntary if given under any influence, fraud or error. Consent is also not considered voluntary when buying it. For example, in the United States, a quarter of the states prohibit biological parents from receiving remuneration in exchange for their consent to place a child up for adoption. Prohibition of such charges together prohibitions on consent before the birth of a child needs to be explored further to understand how they contribute to state policy to ensure that consent is voluntary and informed.

In theory, the issue of prohibiting biological parents to give consent to adoption before the birth of a child is often discussed. The doctrine with such a prohibition recognizes the impossibility of giving consent to an informed and reasonable basis before the birth of the child [9]. Accordingly, in jurisdictions, parents may withdraw consent given before the birth of the child. Moreover, in accordance with article 159 of the Family Code of the Republic of Uzbekistan, even if the biological parents give consent after the birth of the child, this consent can be relatively easily withdrawn before the court decides on adoption.

One reason to ban prenatal consent is to protect biological parents from hasty, ill-considered adoption decisions. The prohibitions are also based on the recognition that pregnancy and childbirth can be the



most personal and emotional experience for a woman. The bond between mother and child can take place during pregnancy and at birth. Attachment begins with the sensations created by the movement of the fetus, which confirm the mother's awareness of the other - an awareness that continues throughout pregnancy. Thus, a woman who is attached to a child during pregnancy or childbirth is in a tragic situation if she is forced to give up her child for adoption on the basis of consent given before the birth of the child. Allowing the state to give consent before the birth of the child will leave the biological mother with no choice but to complete the adoption [10]. Based on the experience of developed countries, it can be stated that the ban on giving consent to adoption before the birth of a child is directly and indirectly based on the connection between the biological mother and her child, which occurs to varying degrees both during pregnancy and at birth.

Many countries also seek to ensure voluntary consent by prohibiting the payment of fees to biological parents in order to obtain their consent. However, for example, in most states of the United States, a foster couple is allowed to reimburse biological parents for medical expenses incurred in connection with pregnancy and childbirth [11]. Some states also allow foster parents to pay legal fees incurred by biological parents, and some go so far as to allow biological parents to reimburse living expenses incurred during pregnancy. However, no state permits a fee to be paid to biological parents in exchange for their consent to transfer the child. The prohibition of such fees is a recognition that a financial incentive may encourage a biological parent to consent to the adoption of a child they would otherwise keep.

It often happens that persons wishing to adopt a child, before the birth of the child, provide for his mother and

pay for hospital and medical expenses related to the care of the mother and child. There is nothing contrary to state policy in this practice. Indeed, it is conducive to the well-being of the child that both the child and the mother receive adequate medical care that might otherwise not be provided.

Surrogacy agreements can be enforced under certain circumstances. First, to comply with consent provisions in adoption laws, they must not provide for the biological mother to receive remuneration in excess of the reimbursement to which she would be entitled under with adoption legislation [12]. While this proposal may reduce or virtually eliminate the desire of women who agree to act as surrogates, it is necessary to protect the best interests of the child. Second, surrogacy parenting agreements should be restructured to give the birth mother a period of time to change her mind after the baby is born. In addition, after the birth of the child, a surrogate mother.

Finally, the state must determine the suitability of adoptive parents.

The investigation must be carried out before the fertilization of the surrogate mother. Once an investigation has been conducted and the adoptive couple has been found eligible, the surrogate parenting process may operate within the limitations outlined above.

Reproductive rights are relatively new in legal theory. The basic concept first appeared in the outcome document approved by the Tehran Conference on Human Rights in 1968, which recognized “the rights freely and responsibly to decide on the number and spacing of children, and to have access to information, education and the means to ensure the possibility of exercising these rights” [13].



Only at the World Population Conference in 1994 (Cairo Conference) were reproductive rights clearly formulated [14]. Although the Cairo Conference was convened to address population issues, the Cairo Conference participants recognized that:

- 1) Family planning programs should not include any form of coercion;
- 2) State-sponsored economic incentives and disincentives were only marginally effective;
- 3) Government targets should be defined in terms of unmet needs for information and services” and not in terms of quotas or targets.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) guarantees the rights of pregnant women. Article 11.2, for example, lays down measures to be taken by states to “prevent discrimination”. These measures include prohibition of maternity or maternity leave, paid maternity leave or “comparable social benefits”, and necessary supportive social services to enable parents to combine family responsibilities with work and social participation.

Article 16 requires states to “take all appropriate measures to eliminate discrimination” against women in all matters relating to marriage and family relations.” In addition to these specific safeguards, Article 5 more broadly requires maternity to be recognized as a «social function» and not a commercial function. To the extent that CEDAW focuses on the health of the pregnant woman, it does not prohibit gestational surrogacy. Rather, it affirms safeguards that, while protecting the health of the surrogate mother, reduce objections to the practice. However, to the extent that CEDAW focuses on motherhood as a «social function», it is difficult to reconcile with commercial surrogacy, or at least with those forms of commercial surrogacy in

which the intended parents and surrogate remain strangers.

Surrogacy implies several rights of the child in accordance with the Convention on the Rights of the Child. First, the rights of the child must be “respected and secured” without discrimination of any kind, including birth or other status. While this provision was originally intended to protect children born out of wedlock, its inclusiveness suggests wide application, including children born through surrogacy.

Article 7 is the most problematic here. Article 7.1 provides that “the child is registered immediately after birth and from the moment of birth has the right to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his parents”. There are two difficulties with this position. If this law provides that a child born as a result of surrogacy cannot acquire the citizenship of persons intending to adopt the child, the child may be in a dangerous situation.

In conclusion, surrogate motherhood acts as one of the subspecies of the institution of adoption, since in the first case, the surrogate mother bears the fetus of a man and is genetically related to him. That is, there is a connection of the fetus with a surrogate mother, therefore the world community grants the right to a surrogate mother to refuse the agreement on surrogate motherhood. As a general rule, in surrogate motherhood, we assume that in the future the surrogate mother is obliged to transfer all parental rights after the birth of the child to the “stepmother”.

Because surrogacy agreements deal with elementary human rights of great personal and social significance, any strict adherence to such agreements or complete rejection of them may be detrimental to the parties. Likewise, any other thoughtful decision, such as a

monetary refund or compensation, that may be appropriate in a commercial context is irrelevant in the intimate context of a surrogacy contract, since the sole purpose of the agreement is to have a child and establish legal paternity of the child. In the same way, one should not forget that the object of such an agreement is a child, whose interests and rights can be severely violated if the parties fail to reach a fair compromise. Finally, since there is often a close relationship between the parties, it is the parties, and not the courts, who are in the best position to determine what is the best compromise for them.

Thus, the institution of surrogate motherhood is a complex legal phenomenon that combines various institutions of family law. However, when considering the essence of surrogate motherhood and comparing it with adoption, we come to the conclusion that the first follows from the second, while each of them has its own characteristics, some of which are provided for in family law.

The difficulties of the contractual order increase when it comes to a long-term contract, because there are good reasons for not implementing the agreement in its original form. The essence of this dispute is that in the case of a long-term agreement, the parties are often interested in leaving open or flexible the order of their contractual risks, obligations and rights for the next stages. Recognizing their inability to foresee all future scenarios, the parties believe that if any circumstances change after the execution of the agreement, they will cooperate further and work together to find the right solution.

Paid surrogacy is incompatible with the ban on the sale of children and should be prohibited. However, there may be agreements on surrogate parenting, unless the surrogate mother is paid a fee in excess of those fees currently permitted under with adoption laws.

In addition, some mechanism needs to be put in place to investigate the suitability of the adoptive couple as parents. Finally, in surrogate parenting agreements, the biological mother must allow time after the birth of the child for her to decide whether she wishes to transfer the child. Otherwise, the surrogate parenting agreement will be terminated at her discretion. If the surrogate mother decides not to give up the child, the decision on the further upbringing of the child must be made based on the best interests of the child, without regard to the surrogate agreement.

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