



SURROGACY: PROBLEMS OF DEFINITION AND CONTRACTUAL REGULATION

Babajanova Dinara Islamovna

Doctor of Philosophy in Law (PhD) at Civil Law

Department of Tashkent state university of Law

<https://www.doi.org/10.37547/ejar-v03-i02-p3-99>

ARTICLE INFO

Received: 09th February 2023

Accepted: 16th February 2023

Online: 17th February 2023

KEY WORDS

Surrogacy, reproductive health, contract, surrogate mother, customer, donor.

ABSTRACT

For a more effective understanding of the legal relations of surrogacy, it is necessary to determine the structure of such legal relations. The article examines the basis for the emergence of legal relations of surrogate motherhood, gives an idea of the object of legal relations and the contract of surrogate motherhood, as well as the subject composition of such legal relations. The problems of the conceptual apparatus in this area are also considered and the need to reflect in the legislation of the Republic of Uzbekistan the relevant provisions on the regulation of legal relations of surrogate motherhood is justified.

The use of surrogate motherhood was not provided for by the Marriage and Family Code of the Uzbek SSR and is a novel of the Family Code of the Republic of Uzbekistan. There are different opinions about surrogacy. The reason, in our opinion, lies in the fact that this topic has not been sufficiently developed in the scientific field, although in fact there is not a little experience in this matter in our country. An analysis of the results of scientific research conducted in the field of legal regulation of surrogacy allows us to conclude that this problem has not been studied enough today, and many more issues need appropriate resolution. We have already published some scientific developments in this direction [1-5].

Surrogate (Latin *surrogatus* – delivered in place) means a product or object designed to replace similar ones, but not having the appropriate quality; a substitute that has only some properties of the replaced object, product, object [6]. Currently, scientists have different approaches to the definition of surrogacy.

For example, E.S. Mitryakova writes that surrogate motherhood is a legal relationship between a surrogate (carrying) mother and spouses (customers) arising from the implantation of an embryo genetically alien to her into the body of a surrogate mother for its gestation, the birth of a child and its subsequent transfer to customers [7].

E.A. Ivaeva concludes that the definition of surrogate motherhood should contain at least two signs: the presence of a genetic connection (including in a truncated form) between persons expecting a child and a child (embryo), as well as the fact that a woman is carrying a child precisely for the purpose of transferring it to persons expecting it [8].



S.P. Zhuravleva suggests understanding surrogacy as a type of assisted reproductive technologies based on in vitro fertilization, which is associated with the transfer of a fertilized egg into a woman's uterus for carrying and giving birth to a child [9].

A.A. Pestrikova defines surrogate motherhood somewhat differently as the process of artificial insemination, gestation and birth of a child by a woman (surrogate mother) in order to transfer the child to the intended parents [10]. E.V.Stebleva believes that “surrogate motherhood is a legal relationship between a surrogate mother and genetic parents (spouses, a woman and a man who are not married in accordance with the procedure established by law, an unmarried woman) arising in connection with the implantation into her body of an embryo obtained during the procedure of in vitro fertilization using the germ cells of genetic parents, in order to bear and give birth to a child for them” [11].

According to F.Lusher, surrogate motherhood is the bearing of a fertilized egg by a woman who returns the child to the genetic parents after childbirth [12]. V.V.Samoilova systematizes the types and also identifies subspecies of surrogate motherhood that affect the emergence of family relations with the child. She distinguishes:

1) full surrogacy, in which the egg of another woman who is not a surrogate mother is used. There is no genetic link between a surrogate mother and a child.

In relation to full surrogate motherhood, two subspecies are distinguished:

a) surrogate motherhood, in which the egg of the customer's spouse is used, which will subsequently be recorded as the legal mother of the child, if the surrogate mother agrees to record the customer's spouses as the child's parents. In this case, there will be a genetic link between the mother and the child;

b) motherhood, in which the egg of another woman (a female donor) is used, who will not act as a mother, but with whom the child will have a genetic connection;

2) partial surrogacy, when a surrogate mother's egg is used. In this case, a medical procedure is possible only by using the egg of a surrogate mother with an artificial method of in vitro fertilization (IVF) [13].

Quite often in their works, the authors also highlight the problems of the surrogacy contract, defining its legal nature in different ways. So, according to E.S.Mitryakova, the surrogacy contract has a nature similar to such civil law contracts as a lease agreement, a service agreement, a purchase and sale agreement [14]. S.P.Zhuravleva believes that when studying the place of the surrogacy contract in the system of civil law contracts, there is a specificity of the surrogacy contract, which does not relate to any of the contracts known to the legislator, since it is a true unnamed contract that is not enshrined in legislation [15].

E.V. Stebleva believes that the surrogacy contract has a family-legal nature. On the basis of the contract concluded by the parties, the surrogate mother agrees to bear and give birth to a child genetically alien to her for the genetic parents (parent), provided that the conception of the child takes place through in vitro fertilization and implantation of an embryo obtained using the germ cells of the genetic parents, and the genetic parents (parent) undertake to provide the surrogate mother with the necessary conditions for carrying and giving birth to a child [16].

The authors also make various proposals to improve the legislation on surrogacy. In particular, E.S. Mitryakova says that it is necessary to expand the grounds for the emergence



of legal relations on surrogacy, allowing not only married couples to resort to this method of having children for medical reasons, but also those married couples in which a woman simply does not want to bear a child on her own. However, in this case, we believe, we should be afraid that the number of unscrupulous customers for carrying a child will increase. After all, if a woman does not want to give birth to a child on her own, but at the same time her health allows it, she can easily refuse to accept a child in the future [7].

According to S.P. Zhuravleva, it is necessary to develop a unified attitude to the surrogacy program at the international level to protect the subjects of the surrogacy agreement and the child born using assisted reproductive technologies [9]. In addition, it justifies the need to improve the legislation of some neighboring countries, in particular, Belarus, Kazakhstan, Ukraine, etc., to refine the conceptual apparatus, develop requirements for surrogate mothers and genetic parents, etc. [9].

In our opinion, surrogacy exists within a certain legal relationship. A legal relationship is a type or form in which a social relationship regulated by law is clothed [15], a form of interaction of legal subjects [16], an individualized social connection between persons arising on the basis of the norms of law, characterized by the presence of subjective legal rights and obligations, supported (guaranteed) by the coercive force of the state [17]. A legal relationship arises on the basis of the norms of law, that is, a legal relationship is not any actual relationship, but only one that is regulated by the norms of law.

According to Yu. K. Tolstoy, the legal relationship acts as an appropriate legal means of influencing social relations, "it is an intermediary link between the rule of law and those social relations that constitute the subject of legal regulation" [18].

A legal relationship is, first of all, a type of social (legal) connection of subjects of social communication. This means that the participants in the legal relationship are "connected", i.e. Such a characteristic of a legal relationship is fully consistent with the philosophical understanding of the relationship, according to which "the very fact that it is a relationship means that there are two sides in it that relate to each other".

According to the reasoning of Y.S. Reshetov, each party in a legal relationship occupies a certain place and plays a well-defined role both in the structure of the relationship and in the structure in which it (the relationship) enters as a constituent or complementary element; at the same time, one side is, at least, capable – endowed with the ability to understand, report, control and anticipate the possible consequences of their behavior – because a person relates, that is, shows in one way or another, for example, by action or inaction, their essence in the process of interaction not only with another person or social group (this rule), but, in principle, with any subject; the presence of this kind of relationship (one side is a capable subject, the other is a non-subject) is determined, in particular, by the complication of mental processes and an increase in the possibilities of their implementation [19].

From the point of view of the content, the legal relationship is understood by specialists as a set of subjective civil rights and subjective civil duties. What has been said about the legal relationship seems to be fully applicable to surrogacy, to the relations arising from the relevant contract.

There is, of course, a legal connection between the subjects of surrogate motherhood relations from the moment an agreement is reached between the surrogate mother and the



customer spouses until the surrogate motherhood contract is fully executed. Surrogacy is regulated by the norms of various branches of law: family, civil, etc., which leads to the conclusion about the diversified nature of surrogacy. The subjects of surrogacy – genetic parents or a single mother, on the one hand, and a surrogate mother, on the other, have mutual rights and obligations that should be properly prescribed in the surrogacy contract, for the improper performance of which there are appropriate legal consequences.

The legal connection between the subjects of surrogate motherhood is formed by the expression of will (desire, consent to surrogate motherhood) and reaching an agreement. According to M.I. Braginsky and V.V. Vitryansky, “the basis of transactions is really will. It is she who creates the transaction, and that is why the transaction is considered an act of will” [20].

The legal relationship of surrogate motherhood arises on the basis of a special agreement – the surrogate motherhood agreement, which is usually understood as an agreement between the persons (person) who have the right to use this method of assisted reproductive technologies and the surrogate mother.

Based on the above, it is possible to define: surrogate motherhood as a legal relationship between a woman (surrogate mother) and a married couple or a single woman (genetic parents) whose genetic material is used, arising on the basis of a law and a contract, regarding the bearing and birth of a child for subsequent transfer to its genetic parents.

If we turn to the legislative definition of surrogacy, then, in accordance with the Model Law on Combating Human Trafficking, a surrogate mother is a woman who gave birth to a child as a result of using the method of artificial insemination with donor sperm or the method of in vitro fertilization or embryo implantation in order to carry it for other persons.

The Russian Federation has a sufficient legal basis for concluding and executing a surrogacy agreement, which is not available in the Republic of Uzbekistan. Thus, according to Article 55 of the Federal Law “On the Basics of protecting the health of citizens in the Russian Federation” [21], surrogacy is the bearing and birth of a child (including premature birth) under a contract concluded between a surrogate mother (a woman carrying a fetus after the transfer of a donor embryo) and potential parents whose germ cells they were used for fertilization, or by a single woman, for whom carrying and giving birth to a child is impossible for medical reasons.

Article 51 of the Family Code of the Russian Federation stipulates that “persons who are married to each other and have given their written consent to the implantation of an embryo to another woman for the purpose of carrying it, can be recorded by the child's parents only with the consent of the woman who gave birth to the child (surrogate mother)”, and in Article 52 of the Family Code of the Russian Federation, that “spouses who have consented to the implantation of an embryo to another woman, as well as a surrogate mother, have no right to refer to these circumstances when challenging motherhood and paternity after the parents have made an entry in the birth record book”.

By means of this article, the legislator stipulates that customers in surrogacy relationships can only be spouses, that is, persons who have married in the civil registry offices.



Attributing a surrogacy contract to any existing category of civil law contracts will not take into account the specifics of the legal relationship under consideration, which consists in a special object of the contract, namely, that the final result of the contract and legal relations as a whole is aimed at the birth of a child by one person (surrogate mother) for another person (potential parents). Thus, the object of the contract can be defined as the process of bearing and giving birth to a child by a surrogate mother for potential parents.

It is necessary to remember about the purpose of surrogate motherhood, namely, that surrogate motherhood is a method of assisted reproductive technologies aimed at the treatment of infertility, therefore, this goal should be traced in the contractual relations of the parties.

Since the surrogacy contract is regulated by both civil and family law (in terms of bearing and transferring a child to parents-customers), it is quite appropriate to talk about intersectoral regulation of such legal relations.

When referring to the issue of the subjects of the surrogacy contract, there is no doubt that the surrogate mother and potential parents are parties to such a contract, since one party initiates it (potential parents), and the other party directly carries the child (surrogate mother). That is, potential parents are a kind of customers, and the surrogate mother is the performer. At the same time, the specifics of the object of the surrogacy contract presupposes the commission of a certain set of special medical manipulations (selection of the necessary genetic material, embryo cultivation, transfer of the embryo into the body of the surrogate mother). It is obvious that neither the surrogate mother nor potential parents can perform the necessary medical manipulations on their own. Therefore, their implementation requires the participation of a third party who is able to perform the necessary actions, i.e. a medical organization.

In this regard, the surrogacy agreement should be considered as a tripartite agreement between: a surrogate mother, potential parents and a medical organization. Another approach, in which a surrogacy contract is considered as a bilateral contract between a surrogate mother and potential parents, seems incorrect due to the fact that in fact the parties to such a contract are not able to perform the necessary medical manipulations. Consequently, without the intervention of a third party, the surrogate mother and the genetic parents cannot achieve the goal of surrogacy. In this case, the "contract" between the surrogate mother and the genetic parents should be considered not as a surrogate motherhood contract, but as a form of a preliminary contract or a contract of intent.

Thus, under the contract of surrogate motherhood, which is the basis for the emergence of legal relations of surrogate motherhood, it is necessary to understand an intersectoral, multilateral agreement under which, in order to treat infertility of potential parents, one party (surrogate mother) undertakes to carry and give birth to a child genetically alien to her for subsequent transfer to another party (potential parents), who, in turn, the queue, pay for the surrogacy program and other expenses agreed by the parties, and a third party (medical organization) undertakes to provide the full range of necessary medical services.

Considering the legal relations of surrogate motherhood, it is necessary to separate two concepts: the legal relations of surrogate motherhood and the contract of surrogate motherhood. These concepts relate to each other as general and particular. The surrogate



motherhood contract generates surrogate motherhood legal relations, but at the same time the surrogate motherhood legal relations are not identified and are not limited only to the surrogate motherhood contract. Therefore, when defining the object of legal relations of surrogate motherhood, it is necessary to understand that it is not identical to the object of the surrogate motherhood contract.

The object of the contract is the bearing and birth of a child by a surrogate mother for potential parents. However, it seems incorrect to consider the same object as an object of legal relations of surrogate motherhood.

Some legal systems recognize surrogacy as one of the methods of assisted reproductive technologies. In turn, assisted reproductive technologies are methods of infertility treatment, in which some or all stages of conception and early development of embryos are carried out outside the maternal body. Therefore, if surrogate motherhood is a method of infertility treatment, then the object of surrogate motherhood legal relations should be considered infertility treatment of potential parents, and the object of the surrogate motherhood contract is the bearing and birth of a child by a surrogate mother for potential parents.

If it is based on the statement that the legal relations of surrogate motherhood are not identified with the surrogate motherhood contract, but are correlated as general with private, then the subject composition of these legal phenomena will also be different.

The subjects of the surrogacy contract are: the surrogate mother, potential parents and a medical organization. These subjects of the surrogacy contract are, of course, also subjects of legal relations of surrogate motherhood. However, the subject composition of legal relations of surrogate motherhood seems to be broader than the subject composition of the surrogate motherhood contract.

Thus, the legal regulation of legal relations on surrogacy in the world practice has a lot of experience, which cannot be said about the Republic of Uzbekistan. The domestic legislator did not directly allow the use of surrogate motherhood, but also did not prohibit it, as a result of which a certain legal vacuum arose in this regard, which requires improvement of legislation in this direction.

References:

1. Babajanova D. Issues Of Improving The Institution Of Placing Children Deprived Of Parental Care In Uzbekistan.
2. Бабажанова Д. И. СРАВНИТЕЛЬНО-ПРАВОВОЙ АНАЛИЗ СУРРОГАТНОГО МАТЕРИНСТВА В НЕКОТОРЫХ ЗАРУБЕЖНЫХ СТРАНАХ ЕВРОПЕЙСКОГО КОНТИНЕНТА //ИННОВАЦИОННЫЕ ТЕХНОЛОГИИ СОВРЕМЕННОЙ НАУЧНОЙ ДЕЯТЕЛЬНОСТИ. – 2022. – С. 114.
3. Бабажанова Д. Суррогатное материнство и международные права человека //Научные исследования и инновации в индустрии 4.0. – 2022. – Т. 1. – №. 1. – С. 252-257.
4. Бабажанова Д. Деликтное право и суррогатное материнство: ответственность будущих родителей за отказ от соглашения о суррогатном материнстве //Общество и инновации. – 2022. – Т. 3. – №. 7/S. – С. 274-284.



5. Бабажанова Д. И. Суррогатное материнство: договорно-правовое регулирование и защита интересов сторон // Государство и правовая система в условиях информационного общества. – 2022. – Т. 9.ф
6. Райзберг Б.А., Лозовский Л.Ш., Стародубцева Е.Б. Современный экономический словарь. – М., 2006 // Портал малого и среднего предпринимательства Волгоградской области. – URL: http://rpmr.volganet.ru/glossary/c_ye
7. Митрякова Е.С. Правовое регулирование суррогатного материнства в России: автореф. дис. ... канд. юрид. наук. – Тюмень, 2006. – 23 с.
8. Иваева Э.А. Проблемы реализации конституционных прав человека в Российской Федерации на примере суррогатного материнства: автореф. дис. ... канд. юрид. наук. – М., 2004. – 22 с.
9. Журавлева С.П. Правовое регулирование договора о суррогатном материнстве в Российской Федерации: автореф. дис. ... канд. юрид. наук. – М., 2011. – 27 с.
10. Пестрикова А.А. Обязательства суррогатного материнства: автореф. дис. ... канд. юрид. наук. – Самара, 2007. – 19 с.
11. Стеблева Е.В. Проблемы реализации прав участников отношений суррогатного материнства: автореф. дис. ... канд. юрид. наук. – М., 2012. – 18 с.
12. Люшер Ф. Конституционная защита прав и свобод личности / пер. с фр. – М.: Прогресс, 2003. – 382 с.
13. Самойлова В.В. Семейно-правовые аспекты реализации репродуктивных прав при применении вспомогательных репродуктивных технологий: автореф. дис. ... канд. юрид. наук. – М., 2011. – 28 с.
14. Митрякова Е.С. Правовое регулирование суррогатного материнства в России: дис. ... канд. юрид. наук. – Тюмень, 2006. – 175 с.
15. Иоффе О.С. Избранные труды по гражданскому праву: Правоотношение по советскому гражданскому праву. Спорные вопросы учения о правоотношении – М.: Статут, 2000. – 665 с.
16. Явич Л.С. Право и общественные отношения. – М.: Юридическая литература, 1971. – 152 с.
17. Алексеев С.С. Общая теория права. Курс в 2-х т. Т. 2. – М.: Юридическая литература, 1982. – 359 с.
18. Толстой Ю.К. К теории правоотношения. – Л.: Изд-во Ленинградского ун-та, 1959. – 88 с.
19. Решетов Ю.С. Правоотношения и их роль в реализации права: учебное пособие. – Казань: Издво Казанского ун-та, 1993. – 104 с.
20. Брагинский М.И., Витрянский В.В. Договорное право. Книга первая: Общие положения. – Изд. 4-е, стереотип. – М.: Статут, 2001. – 848 с.
21. Федеральный закон от 21 ноября 2011 г. № 323-ФЗ «Об основах охраны здоровья граждан в Российской Федерации» // Российская газета. – 2012. – 23 ноября. – № 5639.