Surrogacy in Ukraine: legal regulation and judicial practice

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Thousands of couples who are unable to have children rely on surrogacy, and the possibility of using services of a surrogate mother is very important for such couples. Many celebrities became parents participating in surrogacy programs, namely Kim Kardashian and Kanye West, Nicole Kidman, Sarah Jessica Parker, Tyra Banks, Lycu Liu and others.

Surrogacy is an alternative to fertility treatment and a type of assisted reproductive technology (ART) where a woman (surrogate mother) voluntarily agrees to get pregnant in order to bear and give birth to a biologically alien child, who will be given into care of other people (genetic parents), and with whom the surrogate mother will be bound neither by rights nor obligations.

History and worldwide practice

A vast majority of states around the world prohibit ART in the form of surrogacy. In Spain, Italy, France and many other European countries surrogacy is completely prohibited, while in the Netherlands, Portugal, Greece, Canada, and Australia non-commercial ("altruistic") surrogate motherhood is allowed. In recent years, countries such as Thailand and India that used to offer surrogacy services have also banned commercial surrogacy.

Commercial surrogacy has been officially allowed in Ukraine since 1997. As of today, commercial surrogacy is also allowed in Israel, Russia, Belarus, and some US states. As for the USA, today there is a total ban on surrogacy in 4 states, including New York. However, from 2021 surrogacy will be greenlighted for New Yorkers.

As for the history of this type of ART, the first legal surrogacy agreement was signed in 1976. Traditional surrogate motherhood was applied, i.e. the mother who bore and gave birth to the child was its biological mother. The surrogate mother did not receive compensation for pregnancy and childbirth.

In 1980, surrogate mother Elizabeth Kane from Illinois received USD 10,000 for her surrogacy services, making it the first case of commercial surrogacy.

In a so-called "Baby M" case of the 1980s in the United States, the surrogate mother who was genetically related to the child refused to give the newborn to the spouses. This precedent marked the beginning of gestational surrogacy where the surrogate mother does not have any genetic ties to the child. At birth, the child does not even inherit the surrogate mother's blood type and is a biological child of the spouses or at least one of them.

A predominant number of countries, including Ukraine, currently use only gestational surrogacy and adhere to the rule of donor confidentiality. Such approach allows to protect the rights of all participants of the surrogacy arrangement and minimize the risk of the child's non-return by the surrogate mother.

Legal regulation
Surrogacy is recognized and allowed in Ukraine at the legislative level, namely by the Family Code. The procedure for application of surrogacy and other types of ART is regulated by special acts (by-laws).

Ukraine has legislatively determined that the spouses are recognized as the parents of a child born by the surrogate mother. This provision protects the rights of the spouses and the child and minimize the risks of possible abuse by the surrogate mother.

As a comparison, in Russia the surrogate mother is considered to be a legal mother and has priority rights to register the child's birth. Until the surrogate mother gives away the child, the spouses will be unable to legitimize their family relationship with the child. There is no such problem in Ukraine as the legislation provides greater support to the couples seeking surrogacy services.

At present, the issue of legal reform in ART sector and, first of all, surrogacy field is relevant for Ukraine. A few legislative proposals concerning the adoption of a comprehensive law on ART were introduced in the Ukrainian Parliament. Unfortunately, as of today, there is no separate law on ART that would ensure proper state regulation of surrogacy and other types of ART in Ukraine.

Thus, the Ukrainian legislation currently does not define surrogacy, nor does it establish a list of rights and obligations of the surrogacy program participants or provide liability for violations, etc. We hope that in the near future an adequate and detailed law will be adopted and all the mentioned gaps will be filled in.

With the existing legislative shortcomings, in order to protect themselves from possible violations, surrogacy program participants should take a balanced approach to drafting and concluding agreements with the clinic and the surrogate mother. It is also essential to select legal counsels carefully as their task is to prevent possible violations of the spouses' rights, draft and review the agreements, and provide legal support to couples during the program.

**Judicial protection**

In a number of European countries, in particular, Germany, Spain, and Great Britain, there are legal requirements to obtain a court decision in the country of the child's birth confirming family relationship between the child and the spouses. Without such decision, biological parents cannot legalize their family relationship with the child and register their child in the country of their citizenship.

The Ukrainian procedural legislation allows foreign parents to obtain such court decision. Over the recent few years, the judicial practice of Ukraine has had many cases on determination of family relations between foreign parents and children born by surrogate mothers in Ukraine.

The Unified State Register of Court Decisions features enough examples of positive court decisions in which family relationships have been determined. At the same time, there are examples of incorrect application and/or interpretation of legislative norms by the judges leading to violation of the rights of both the child and the parents. In such cases, it is necessary to apply to a court of higher instance, which will eliminate the mistakes made by the lower court and reverse the unjustified court decision.
Notably, the issue of legalization of the legal status of a child born by a surrogate mother has already been raised at the level of judgments of the European Court of Human Rights (whose legal conclusions are binding for the Ukrainian courts). According to judicial practice of the European Court of Human Rights, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms requires that domestic law provide a possibility of recognition of the legal relationship between a child born through a surrogacy arrangement concluded abroad and the intended father or mother where they are biological parents. Failure to do so entails a violation of the child's right to respect for her or his private life, as guaranteed by Article 8 of the Convention.

When an application for determination of family relationship is prepared properly and necessary evidence is presented, Ukrainian courts have all legal grounds to satisfy the applicants' claims. Our practice shows that a court can issue a positive decision in a single court session, so that the parents and their child can return to the country of their citizenship and legalize their status in a short time frame.

**Conclusion**

For many families around the world surrogacy is the last hope for the birth of a child and the happiness of parenthood. The fact that today Ukraine allows surrogacy programs, offers quality medical services at a reasonable price, and has favorable legislation for biological parents, should become a driving force for further development of this area in our country. An important condition for such development is the adoption of a dedicated law on ART, which will resolve a number of controversial issues that currently create space for possible abuse. If adopted, the law will have a positive impact benefiting the economic development of Ukraine and will provide greater credibility to Ukraine in the global market of reproductive services.