

PECULIARITIES OF DETERMINING THE ORIGIN OF CHILDREN BORN AS A RESULT OF THE USE OF ASSISTED REPRODUCTIVE TECHNOLOGIES IN UKRAINE, THE EUROPEAN UNION AND THE UNITED STATES

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Annotation. *The article considers the legal basis for determining the origin of children born as a result of the use of assisted reproductive technologies, and in particular through surrogate motherhood, analyzes domestic and foreign legislation regulating the procedure for determining the origin of the child. It is emphasized that the recognition of each person's rights such as the right to create a family, the right to respect for private and family life, the right to procreation, poses the task for the State and the international community to create optimal mechanisms for regulating new rights that have arisen with the development of modern medicine.*

The article is aimed at a comprehensive analysis, disclosure of the essence and features of legal regulation of determining the origin of a child born through the use of assisted reproductive technologies under the legislation of Ukraine, the European Union and the United States.

The author stresses that among the problems inherent in the institution of surrogate motherhood in countries of the world, it is necessary to highlight the following: lack of proper monitoring of surrogacy cases, inadequate control by state authorities, which ultimately can lead to violation of the rights of biological parents, surrogate mother, as well as the child himself; risk of genetic parents abandoning a child born with physical or mental disabilities. The author proved that the use of assisted reproductive technologies by the method of substitute (surrogate) motherhood can be carried out only in relation to citizens of Ukraine and foreigners-citizens of countries in which such a method of assisted reproductive technologies is not prohibited by law, and in cases where foreigners do not live in the country of citizenship, – also by law of the country of residence. In this case, the conditions for the use of substitute (surrogate) motherhood should be the genetic connection of the child with at least one of the future parents and the absence of a direct genetic connection of the child with the substitute (surrogate) mother, except in cases when the substitute (surrogate) mother is a relative of the future parents.

Key words: *reproductive health, reproductive rights, determination of the child's origin, assisted reproductive technologies, surrogate (substitute) motherhood, biological paternity.*

1. Introduction.

Recently, the issue of reproductive health of citizens, and hence their reproductive rights, has been increasingly raised both in Ukraine and abroad.

Demographic birth rates, unfortunately, are not encouraging for most countries of the world, and this problem is not always associated with the low financial situation of the modern family. To a greater extent this is due to the state of reproductive health of the population.

In the legal literature, reproductive rights are recognized as personal non-property rights of an individual to exercise and protect reproductive health, free decision-making regarding the birth or refusal to give birth



to children, as well as medical, social, informational and consulting assistance in this sphere if necessary [1, p. 106]. A wider interpretation of the reproductive rights of an individual is provided by A.O. Dutko and M.R. Zabolotna, who define them as guaranteed, state-encouraged opportunities for persons to protect their reproductive health, free adoption and implementation by individuals of decisions on conception of a child, on the birth or refusal to give birth to children in marriage or outside it, methods of conception and birth of children, including with the help of assisted reproductive technologies, the number of children, time and place of birth, intervals between their births necessary to preserve the health of mother and child, as well as medical and social, informational and advisory assistance in this sphere [2, p. 86]. In general, the doctrine defines reproductive rights as a complex concept, and they are completely dependent on the state of reproductive health of the individual.

In turn, reproductive health is understood not just as evidence of the absence of diseases of the reproductive system or impairment of its functions, but as a state of complete physical, mental and social well-being, which implies the possibility of a satisfactory and safe sexual life, the ability to reproduce, the right of men and women to information and access to safe, effective, affordable family planning methods and other methods of birth control chosen by them, which does not contradict the law, as well as the right to access appropriate health care services that allow a woman to safely endure pregnancy and childbirth, and parents – to create the best conditions for the birth of a healthy child [3, p. 5].

In the sense of the above said, I'm convinced of the fairness and validity of the statement, according to which — recognition of each person's having the rights such as the right to create a family, the right to respect for private and family life, the right to procreation, sets before the state and the international community the task of creating optimal mechanisms for regulating new rights that have arisen with the development of biomedicine [4, p. 248].

Right is the position of O. Telnik, who points out that realization of one of the fundamental human rights – the right to procreation – occurs through motherhood and fatherhood, but due to infertility, a significant part of humanity is deprived of the capability of realizing this right [5, p. 104]. According to statistics from the World Health Organization, the problem of infertility in the world affects up to 15 % of the total number of married couples of reproductive age. The percentage of female and male infertility is approximately equal and is 30 %, another 30 % of couples have impaired reproductive function in both partners [6]. Investigating the right to surrogacy, Ya. R. Marko points out that there are about 48.5 million infertile couples in the world. Of these, 19.2 million have difficulty with the birth of their first child. 10.50 % of all couples have difficulty with the birth of their second child. In Ukraine, statistics are on average the same as in the world as a whole. Today, 10–15 % of Ukrainian families suffer from infertility, which can be attributed to direct reproductive losses. The number of infertile couples reaches about one million [4, p. 248]. S. H. Lesovska, investigating the state of introduction of reproductive technologies, points out that in Ukraine every fifth married couple has difficulties with the birth of a child in a natural way, and that 20 % of them turn to medical institutions to conceive a child [7, p. 12–16].

For this category of people, writes R. A. Maidanyk, reproductive technologies can become a lifeline that will make them feel the joy of parenthood [3, p. 5]. Similar is the point of view of V. P. Dumanska, who believes that today, assisted reproductive technologies are an important tool for the treatment of infertility, one of the important factors in preserving the reproductive potential of the nation. Against the background of postponing childbearing and shifting priorities from parenthood towards other social sub-institutions, assisted reproductive technologies make it possible to ensure the birth of children in families that have a conscious need for motherhood and fatherhood, but for one reason or another cannot realize it [8, p. 84].

Thus, thanks to modern achievements of world and national medicine, to realize the right to motherhood, fatherhood has become possible through the use of reproductive technologies, and in particular surrogacy. Ukrainian lawyers emphasize that surrogacy is an institution of great social importance, as it helps to resolve the problem of those people who cannot have children. The increase in the number of childless families entails an active demand for reproductive medicine services in general and surrogacy in particular [9, p. 19]. I share the point of view of those specialists who insist that reproductive medicine is possible only for medical reasons, in no case for social reasons. Thus, a surrogacy contract cannot be concluded because the wife is afraid to bear a child, or that she will have to leave work for a while. In other words, it is only a matter of health, the actual physical ability of persons to conceive and give birth to a child [10, p. 105]. I cannot help agreeing with the conclusions of N. M. Basai, who believes that the

ultimate, only and humane goal of the surrogacy program is the birth of a new life, which categorically excludes the pursuit of any other goals [11, p. 63].

According to the international non-governmental organization International Social Service (ISS), at least 20,000 children are born each year through surrogacy, and this figure is constantly increasing. The Ministry of Justice of Ukraine states that from 2015 to April 2020, 6599 children were born to surrogate mothers in Ukraine, including 6126 children with foreign parents.

2. The objective of the article is a comprehensive analysis, disclosure of the essence and features of legal regulation of determining the origin of a child born through the use of assisted reproductive technologies under the legislation of Ukraine, the European Union and the United States.

3. The state of the study.

In the doctrine of Ukrainian civil and family law, the problems of using reproductive technologies, and in particular, surrogate motherhood, as well as determining the origin of a child born through the use of reproductive technologies, are presented by a galaxy of scientists. Among those it is necessary to highlight: S. V. Antonov, O.I. Antoniuk, N.M. Basai, N.V. Bilianska, A.Yu. Bondar, M.Z. Vovk, Kh.I. Vonsovykh, A.P. Holovashchuk, N.V. Kaminska, N.M. Kvit, Yu.V. Korenha, L.V. Krasnytska, R.A. Maidanyk, Ya.R. Marko, O.V. Onishchenko, O.V. Rozhgon, Z.V. Romovska,, Yu.Yu. Talanov, I.V. Chekhovska, M.P. Yunina and others.

4. Presentation of the main material.

Currently, the legal regulation of surrogate motherhood in Ukraine is carried out in accordance with the Civil Code of Ukraine, the Family Code of Ukraine, the Procedure for the use of assisted reproductive technologies in Ukraine, approved by the order of the Ministry of Health Care of Ukraine dated September 9, 2013 No. 787, the Fundamentals of the Legislation of Ukraine on Health Care of November 19, 1992 No. 2801-XII, the Rules of State Registration of Acts of Civil Status (as amended by the order of the Ministry of Justice of Ukraine dated December 24, 2010 No. 3307/5).

In the countries of the European Union, the legal regulation of the sphere of surrogacy is carried out on the basis of the provisions enshrined in the The Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 8 of which establishes the right to respect for private and family life, Art. 14 — prohibition of discrimination on any grounds; Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: (An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it (Article 5); Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo (Article 18). Besides these acts, an important act regulating contractual relations in the European Union, there are the Principles of European Contract Law, Article 1:102 of which establishes that “Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles” [12, p. 74].

As already emphasized, Ukrainian legal science, pays great attention to the issue of using assisted reproductive technologies and related issues of determining the origin of a child born through the use of assisted reproductive technologies. One of the directions of scientific research is the definition of legal, legislative principles that regulate these processes. This issue becomes more relevant due to the fact that in the countries of the European Union, the USA and other foreign countries there is a different attitude to the use of reproductive technologies, and in particular surrogate motherhood, which differs significantly from Ukrainian practice.

Analysis of the foreign doctrine and certain legislative provisions on the use of assisted reproductive technologies and determining the origin of a child born in this way allows us to talk about the existence of certain surrogacy regimes and agree with the classification proposed by Ukrainian researchers. Thus, altruistic, permissive and prohibitive regimes of surrogacy are distinguished.

Under the altruistic regime, surrogacy is allowed by the state, but at the same time, the surrogate mother receives compensation only for medical care and other expenses associated with pregnancy. Future parents who conclude an agreement with a surrogate mother are not entitled to pay for the service of carrying and giving birth to a child. This approach aims to avoid becoming a commodity for both surrogate mother and child. The altruistic regime is adopted in the following countries: Australia, Canada, the United Kingdom, the Netherlands, Belgium, Denmark, Hungary, Ireland, Latvia, Sweden, Portugal.

The permissive regime allows surrogacy at the legislative level, with certain regulation of some aspects. These countries include: Georgia, India, Ukraine, Israel, the South Africa. For example, in Israel, surrogacy is fully controlled by the state through various permits, and in the South Africa, a contract with a surrogate mother must be confirmed by a court.

Under the prohibitive regime, the conclusion of surrogacy contracts is not allowed. Examples of such countries are France, Sweden, Hungary, Germany, Iceland, Italy, Japan, Switzerland, Pakistan, Saudi Arabia, Serbia. The countries of the European Union where surrogacy is prohibited include, in particular, Bulgaria, France, Germany, Italy, Malta, Portugal, Sweden.

Surrogacy for commercial purposes is allowed in Cyprus, the Czech Republic, Estonia, Greece, Lithuania, Luxembourg, Slovenia, Slovakia [13, p. 61–62; 14, p. 7–8].

For a fuller understanding of the problem of using assisted reproductive technologies, in particular through surrogate motherhood and further determination of the origin of the child, let us dwell on some aspects of the legal regulation of this sphere in some countries of the European Union and the United States.

For example, surrogacy is prohibited in France. Since 1994, any surrogacy agreement that is commercial or altruistic (non-commercial) is illegal and prosecuted (Article 16-7 of the French Civil Code). Surrogacy (“acting as an intermediary between a person or a couple desiring to receive a child and a woman agreeing to bear this child with the intent to give it up to them”) qualifies as abandoning a child, which under Article 227-13 of the French Penal Code is punished by three years’ imprisonment and a fine of 45 thousand euro. In addition, in accordance with Article 227-12 of the French Penal Code, the incitement of the parents or one of them to abandon a born or unborn child, is punished by six months’ imprisonment and a fine of 7 thousand euro [15]. However, citizens of that country can apply to artificial insemination methods outside France, but children born as a result of the use of assisted reproductive technologies will be able to obtain citizenship only with the consent of the government.

For the use of assisted reproductive technologies in Italy, in accordance with the norms of the current Law “On Medically Assisted Reproduction”, it is necessary to confirm with medical documents the infertility of any spouse who wants to have children. However, Italian law prohibits surrogacy and provides for criminal liability in the form of imprisonment for a term of three months to two years and a fine, which can reach from 600 thousand to one million euro, for organizing and assisting in the birth of a child by a surrogate mother [16, p. 190]. However, Italian citizens are not prohibited from using such services abroad.

In Germany, in turn, all surrogacy arrangements (both commercial and altruistic) are illegal. According to the German Civil Code, the legal mother is always the woman who gave birth to a child. In this country, the procedure for legalizing children born from a surrogate mother abroad is quite complicated and costly. Such children can be legalized solely through the judicial authorities [17].

In Spain, there is a Law “On Assisted Human Reproduction Techniques”, according to which in the country are allowed: donation of reproductive cells and provision of monetary remuneration to such donors, the use of assisted reproductive technologies for single women and genetic diagnosis of the embryo before its transfer to the uterine cavity. But there are certain prohibitions, which primarily include the prohibition of surrogate motherhood, which, although not a criminal offense, entails legal responsibility.

It should also be emphasized that under Belgian law, surrogacy is also considered a crime for which criminal liability is provided [18, p. 77].

It is also worth mentioning the experience of legal regulation of surrogacy in the Czech Republic, where surrogacy is allowed as a way of treating infertility for women who are not able to bear and give birth to

a child on their own. A child born by a surrogate mother is passed on to genetic parents with subsequent adoption. Also, the Czech Civil Code stipulates that if a surrogate mother does not want to give the child to the for an infertile couple, the law is more inclined to her legal rights, since she has the right to keep the child for herself [18, p. 79].

As for the United States, surrogacy is officially allowed in California, Oregon, Illinois, Florida, Nevada; non-commercial surrogacy takes place in New Hampshire, Virginia, New York (since 2020). In Michigan, Arizona, New Jersey, surrogacy is prohibited in any form. In other states, decisions are made depending on the circumstances. There are also a number of difficulties there, because the surrogate mother is subject to requirements regarding her age, marital status, existence of earlier born children and her state of health. The future surrogate mother should undergo a thorough medical examination, the results of which will be possible to judge her ability to become such a mother [19, p. 88].

An example of heterogeneity of legal regulation of surrogacy in the United States is California and Virginia, which hold opposite views. California is the state that most supports genetic parents. The opposite is the position of Virginia, where all legal rights are granted to a surrogate mother. The US experience in legislative regulation of all aspects of the surrogacy program implementation is positive. Three states – California, Illinois and Nevada – have adopted new surrogacy laws that contain comprehensive provisions on surrogacy contracts, the rights of surrogate mothers, children and fathers, as well as rules for transferring children to future parents. This legislation can be a positive example for countries considering the possibility of adopting a comprehensive law on reproductive technologies, in particular surrogacy [20, p. 27].

Until 2018, the whole world recognized India as a center of surrogacy, where this reproductive technology was very common. This is due to the fact that surrogate mother services here are quite cheap compared to European countries. Also, Indian legislation allowed foreigners to turn to the use of this method of artificial insemination under a more simplified procedure than in other countries of the world. According to some reports, in 2017 alone, the commercial surrogacy industry in India has been estimated in 500 million – 2 billion dollars [21, p. 1]. According to international experts, Ukraine is considered one of the world leaders in the sphere of “reproductive tourism”, the second country of international surrogacy after the United States [22]. Modern Ukrainian researchers point out that in Ukraine commercial surrogacy is legal and relatively cheap (about 50 thousand dollars compared to 150 thousand dollars in the United States) [23, p. 74–75].

5. Conclusions.

Having considered in general terms the legislative provisions of Ukraine, some countries of the European Union and the United States on determining the origin of a child born through the use of assisted reproductive technologies, namely, surrogacy, I can say that this issue requires further optimization and development. Despite the fact that the use of assisted reproductive technologies, a rather promising means for individuals to exercise their right to be parents, still has a number of problems. Moreover, these problems are equally characteristic of both Ukraine and other countries. These problems are as follows: the lack of proper monitoring of cases of surrogacy, inadequate control by state authorities, which ultimately can lead to violation of the rights of biological parents, surrogate mother, as well as the child himself; risk of genetic parents abandoning a child born with physical or mental disabilities.

For Ukraine, the greatest problem is the imperfection of legislation regulating relations in the field of surrogate motherhood, which “attracts” foreign citizens not always legally to use the services of a surrogate mother.

Currently, Article 48 of the Fundamentals of the Legislation of Ukraine on Health Care stipulates that the use of artificial insemination and embryo implantation is carried out in accordance with the conditions and procedure established by the central executive body that ensures the formation of state policy in the sphere of health care, according to medical indications of an adult woman with whom such an action is carried out, subject to the written consent of the married couple. The law should stipulate that the use of assisted reproductive technologies by the method of substitute (surrogate) motherhood can be carried out only in relation to citizens of Ukraine and foreigners-citizens of countries in which such a method of

assisted reproductive technologies is not prohibited by law, and in cases where foreigners do not live in the country of citizenship — also by the law of the country of residence. In this case, the conditions for the use of substitute (surrogate) motherhood should be the genetic connection of the child with at least one of the future parents and the absence of a direct genetic connection of the child with the substitute (surrogate) mother, except in cases when the substitute (surrogate) mother is a relative of the future parents.

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