
АЗАМАТТЫҚ ҚҰҚЫҚ ЖӘНЕ АЗАМАТТЫҚ ПРОЦЕСС ГРАЖДАНСКОЕ ПРАВО И ГРАЖДАНСКИЙ ПРОЦЕСС

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The issues of legal regulation of surrogacy in the Republic of Kazakhstan

This article is dedicated to the problem of legal regulation of surrogacy. The issue of surrogate motherhood has not yet found a clear-cut solution not only in Kazakhstan but also in foreign countries. «Is surrogacy the answer to infertility?», «what is the legal status of a surrogate mother or embryos?», these are the issues, in addition to many more, that are becoming more urgent with the rapid medical technology innovation. This paper attempts to examine existing relevant research conducted by scientists of different disciplines, as well as to analyze religious views on surrogate motherhood in the modern context.

Key words: Code «On Marriage (Matrimony) and Family», family — marriage legislation, reproductive health, human reproduction, basic human function, surrogate motherhood, ART (assisted reproductive technology), surrogate mother, Surrogacy contract, methods of artificial insemination.

The problem of infertility of married couples has existed at all times. Humanity has tried to solve this problem rather ingeniously. Indeed, expedient ways were used only when it was impossible conceive in the traditional way. It was assumed that the alternative methods could not become the norm. Use of these techniques is justified by the importance of human reproduction, basic human function. In ancient Rome they used the concept of «renting a womb» when «men provided their wives» for rent to «couples where the wife was barren». Like in the modern period it is a woman who is mostly blamed for infertility, in traditional societies, it was assumed that the blood is transmitted through male sperm. «Women, according to medieval legalists, were considered as «reservoirs», «vase».

In traditional societies, terms such as «pot», «bag», «bundle», «boat» were also used to describe women. In traditional societies, people did resort to non-biological methods that are so popular in modern period. Traditional societies also solved the problem of infertility using «fiction, relying on the abstract for lack of ability to change the specific. Artificial paths are different, but they all lead to eternity, because they open something that is able to conquer death — namely, the possibility of owning offspring» [1].

In many traditional societies, if a couple could not conceive it was possible for a wife to leave her husband and enter into a relationship with another man and then to return to her husband when she would become the mother of one or more children. All these children were considered the children of her legal husband.

Thus, the history and customs of various peoples confirm that human reproductive health has always been of great importance to the institutions of family and marriage, and problems associated with it have been solved in different ways. Existing family — marriage legislation offers citizens using forms of contractual relationship in different areas of family life. Indeed, for the «parents — children» relationship, particularly, there are such contracts as parenting agreements and residence agreements, a contract that sets the place of residence of children when parents separate, as well as a surrogacy contract. Development of Western civilization, scientific and technological progress and the process of women emancipation have all contributed to the search for new ways to overcome infertility. That includes the possibility of obtaining genetic material from the genetic parents and inserting it into a natural biological incubator, i.e. the body of a surrogate mother.

The founding fathers of in vitro fertilization (IVF) and surrogate motherhood in its modern sense are the two British researchers — a biological scientist, Robert Edwards, and a gynecologist, Patrick Steptoe [2]. Due to the numerous moral, ethical and religious disputes arising over the issue, the national legislation of most of the developed countries restrict surrogacy. In most countries it is entirely or partially forbidden by law. Indeed, in France surrogacy was totally forbidden due to the belief that surrogacy is in conflict with the law of adoption and violates the regulation on alienability human body».

According to German law, a health worker, who performed transfer of a fertilized egg, must incur criminal penalties, while prospective parents and a surrogate mother are only confined to an official warning from the authorities and the state. Many states ban only commercial surrogacy agreements. Therefore, consideration of lawsuits on such agreements are not allowed. In general terms, modern reproductive technology is an equation with several unknowns. On the one hand, reproductive technologies allow us to overcome the problem of infertility and to ignore them would be absurd. On the other hand, modern biomedical technology is developing so fast, that society does not have time to think of what spiritual, moral and social consequences can such developments cause. Therefore, today surrogacy, in public opinion, is a tangle of legal, religious, moral, and ethical concerns [2]. Indeed, the practice of surrogate motherhood entails difficult moral and legal issues.

Decisive importance in the provisions of the legislation on issues that relate to health and human ethics, is the state's attitude to new scientific technologies, in particular, the issues of artificial insemination, embryo transfer, surrogacy and other methods and reproductive technologies. Surrogacy — one of the ways to solve the existing problem of infertility of individual families whose members do not want to separate due to barrenness and have a goal to raise and educate their child.

According to the experts, the statistics show that up to 15 % of married couples are childless in the Republic of Kazakhstan, about 30 % of such pairs, which is about 7,000 pairs a year, require the use of assisted reproductive technology (ART). Probably, in this regard, people of Kazakhstan are tolerant in their attitudes towards surrogate motherhood. Despite the high latency of this social phenomenon, there is a need to improve the civil-legal regulation of social relations resulting from surrogacy agreements. If the medical aspect has been resolved technologically and can be easily performed now, the legal, moral and ethical issues are still insurmountable. Same as cloning, surrogacy provokes controversy, scandals and unprecedented lawsuits and trials. Apart from a purely scientific thirst of knowledge, experimentation and creation, that at all times have inevitably led to social and religious condemnation and disbelief, there is also an issue of big money, since the procedure is very expensive. Adding to it confidentiality, complexity, and a host of other legal and just human nuances.

The development of ART (assisted reproductive technology) and the first attempts to use embryonic stem cells for the treatment of several diseases began to raise certain bioethical issues in recent years. An article by professor N.A. Kayupova «New technology in Obstetrics, Gynecology and Perinatology: Realities and Opportunities (humanistic, moral and legal aspects)» published in the journal titled «Obstetrics, Gynecology and Perinatology» was one of the first major publications on bioethical issues in the modern medicine, including reproduction. The author of this article notes that today artificial insemination is associated with a profitable activity. Principles of morality often come into conflict with business interests and commercial benefits [2]. Societal attitudes towards surrogacy differ dramatically. One can accept it or deny, and even declare surrogacy as manifestation of «reproductive business». But is there anything more important than the attitude of infertile couples (customers), who have an opportunity to have their genetical child? Indeed, imagine a father and a mother (prospective parents) who now have the chance to experience the previously infeasible joy of motherhood and fatherhood. And finally, a surrogate mother who generally comes from a large family with own children but devoid of material wealth, has an opportunity to receive a good financial reward, which will help to improve the financial state of her family. If we examine the religious views on surrogacy, the world's two major religions, Islam and Christianity, have distinctive attitude towards the possibility of using assisted reproductive technologies to treat infertility.

In accordance with the Islamic theological and legal inferences childlessness or infertility is a test from God. God-fearing people and people with persistent faith tend to accept this test with meekness and humility, trusting in the grace and favor of the Almighty who is in charge of all that is far beyond from human understanding. But childlessness is a sign, which is followed by consolation, wherefore the grace Gracious Creator is promised to those who can withstand the test without despondency and despair. An example of this can be Abraham and the parents of the Virgin Mary who were blessed to have the offsprings.

But Allah desires ease for you and does not desire hardship for you. Fundamental principles of Sharia is to provide for diverse human interests, satisfaction of human needs and facilitation of human life. Based on this, Islamic law is intended to ensure the conservation of fundamental human values: religion, life, mind, honor and dignity as well as procreation and property. These guidelines define the Islamic approach to the problem of infertility.

If a thorough medical examination identifies recoverable/treatable causes of infertility, according to Islamic scholars, the use of various forms of infertility treatment, which do not violate the pristine nature of humans, is necessary and should be permitted. Prophet Muhammad said: «Be healed, slaves of Allah! God created illnesses and medicines for them. Only aging is incurable» [3].

However, if traditional infertility treatments are ineffective, considering the individual characteristics of the age of the spouses, as well as the availability of authoritative medical evidence of the impossibility of use of any other methods, it is permissible to use assisted reproductive technologies, including in vitro fertilization (IVF).

It is likely that legislative recognition is quite objective and justified, since only individuals experiencing this problem can credibly explain their true feelings, motives, rationale for these procedures. Securing the rules regulating the legal consequences of artificial insemination, means that family law somewhat interferes with the natural functions - creation of a new life. But the family law can not remain indifferent to the problems of the birth of children whose birth was made possible due to advances in various branches of medicine (biology, physiology, genetics, etc.) Optionality of the family and marriage laws, based on the presence of a consensual and emotional ties, allows citizens to select the most appropriate model of behavior. Surrogacy in modern reality is one of the most feasible ways to realize a simple natural desire of women and men who are not capable of natural reproduction, to have their own child. A huge number of childless couples with a natural desire to have a child determine demand for services of a surrogate mother. The purpose of such method as surrogacy, is only partial resolution of the problem of infertility, caused by social disasters, environmental degradation and other adverse factors.

The Code «On Marriage (Matrimony) and Family» dated December 26, 2011, like the former normative act has foreseen the possibility to sign surrogacy agreements. Surrogacy is an assisted reproductive technology, the implementation of which implies that a woman voluntarily agrees to become pregnant in order to carry and give birth to a biologically alien to her child, who will then be given to other individuals, the genetic parents, for upbringing. They will be considered as child's legal parents, despite the fact that a surrogate mother carried and gave birth to it. Article 54 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» dated December 26, 2011, states:

«1. Surrogacy contract shall be in writing in compliance with the civil legislation of the Republic of Kazakhstan and is subject to mandatory notarization.

2. Signing a surrogacy contract knowingly assumes parental rights and responsibilities of spouses (child ordering party) for a child born as a result of assisted reproductive techniques and technologies.

3. Simultaneously with the surrogacy contract spouses (ordering party) enter into a contract with a medical organization that will provide the appropriate services applying assisted reproductive techniques and technologies».

Conditions of care for surrogate mothers are directly regulated by Article 100 of the Code «On people's health and the health care system» of the Republic of Kazakhstan dated September 18, 2009. According to the abovenamed article, «by agreement between the surrogate mother (a woman who carries a fetus after the introduction of the donor embryo) and prospective parents, surrogated motherhood implies child bearing and childbirth, including premature births».

Surrogate mother may be women aged twenty to thirty-five, who have a certified medical report on the satisfactory state of mental, physical and reproductive health, including the results of the medical and genetic testing.

The content of surrogacy agreements is regulated by Article 55 of the Code of the Republic of Kazakhstan dated «On Marriage (Matrimony) and Family» dated December 26, 2011. Indeed, under Article 55 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» dated December 26, 2011, a surrogacy contract should include:

- 1) information about spouses (customers) and a surrogate mother;
- 2) procedure of and conditions for payment of operating expenses to a surrogate mother;
- 3) the rights, duties and responsibilities of the parties in default of the contract;
- 4) the amount and procedure for compensation;
- 5) other conditions, including circumstances of insuperable force, i.e. force majeure [4].

There are various methods of artificial insemination, each of which has specific medical, psychological, as well as moral and ethical perspectives. In some cases, people use a method that maintains relationship with both parents, in other cases, only one of them, or close relation is totally excluded. In addition, in vitro fertilization can be implemented through the sperm of the husband the child's mother or the embryo with parents data is implanted to a surrogate mother. In the last case, genetic and biological relationship of the child with his parents is unconditional. It is also possible that an embryo is fertilized by a donor sperm or an embryo is in communication only with one of the parents. In this way the biological relationship with one parent or both parents is absent. A surrogate mother is genetically completely extraneous to the child inside her.

Since the domestic legislation does not include family contracts, surrogacy, should probably have the civil nature. Accordingly, the subject of the contract services are child bearing and childbirth. In foreign practice, the term «mother-incubator» is used quite often. This agreement is consensual, the rights and obligations of the parties arise from the moment of reaching an agreement. Parties to a contract have rights and obligations, which correspond to the nature of mutual agreement. According to the contract of surrogacy reward payments are optional, although the legislator indicates that the contract shall provide the order and payment terms of material cost of the surrogate mother [5].

Under the surrogacy agreement the payment of remuneration and provision of consideration can also be provided, therefore, the contract can have a gratuitous and non-gratuitous character. However, it is quite difficult to assign this agreement to a certain type of contracts. The surrogacy agreement is orientated towards provision of services and assistance, i.e. «causa» of the contract is the service of nurturing and childbirth. Let us agree that this is an unusual service, conditioned by the peculiarities of human physiology, the reproductive health or lack of it, his/her social, moral and ethical requirements. If ancient Rome this agreement used to have the character of a temporary agreement «on renting a womb», i.e. the lease agreement, today with a great deal of doubt, it can be attributed to service provision contracts.

Paid services agreement are intended to provide services for a fee. The subject of such type of contract will be the service itself.

Under the civil legislation of the Republic of Kazakhstan service provision contracts are exclusively non-gratuitous in nature. This agreement is not intended to provide services for compulsory compensation or for profit. The purpose (causa) of potential parents is clear — get a service of childbearing and childbirth. Then how one can explain the consent of a surrogate mother to childbearing, this service can cause both positive and negative consequences for. Generally speaking, the specifics of this contract involves its conclusion only when there are extreme medical conditions. Commercial use of the institute of surrogacy is prohibited by the Council of Europe, any payments can be purely objective and allow for the necessary expenses. In this regard, one of the requirements of the foreign legislator is that the role of a surrogate mother must be performed by a sister, or a close relative, or friend of a barren woman.

In our opinion, the contract may also be fiduciary in nature as personal trust and confidence can be definitive for this type of agreement. Moreover, this contract can be seen as aleatory, since the risk of improper performance or non-performance is already present at the time the contract entrance. Performance of the contract is associated with human physiology, with human psyche, which may not always be under full control and does not always depend on the will and consciousness. Thus, this agreement is civil in nature, but can not be attributed to any kind of civil contracts, as it has a specific object of the contract. The subjects of this agreement can only be individuals, while potential parents, according to the legislator, are the persons wishing to have children. In our view, it is worth to clarify wording, whether potential parents imply any persons wishing to have children or just a married couple, or also cohabitees. If the contract is signed by cohabitees it is not clear, whether they have the intention of further cohabitation. Then, it is logical that the agreement with a surrogate mother should be signed by the person wishing to have a child the most.

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- A woman wishing to become a surrogate mother must be aged between twenty and thirty-five.
- Have a satisfactory physical, mental and reproductive health, certified by a respective medical institution.
- Have her own healthy child.
- In case where a surrogate mother is officially married (marriage), during the conclusion of the surrogacy contract she must submit a written consent of her husband certified by a notary. Under the contract a surrogate mother must be regularly monitored by a doctor and strictly follow medical recommendations; inform the second parties of the course of pregnancy. Undoubtedly, such contract is characterized by specific subject composition. Besides, the role of medical institutions or the individuals engaged in private practice which will provide the medical services, is not precisely defined. There must be an agreement between prospective parents and the medical institution on the implementation of all the necessary measures for artificial insemination. It is likely that this will be a separate contract that foresees the provision of gratuitous medical services. There should probably be two separate agreements: one as the main and the second, as an accessory. The latter will regulate the service provision for embryo implantation as well as for the evaluation of health of a surrogate mother. In our opinion, an essential condition can be a medical testimony about the inability to have children of certain applicants for surrogacy, and about physical, mental and reproductive health of women, who gave consent to the implantation of an embryo. In addition to these essential conditions there can be other conditions determined by the agreeing parties.

The content of the contract include terms and conditions, rights and obligations of the parties. Indeed, according to Art. 55 of the Code of RK «On marriage and family», a surrogacy agreement must contain:

- 1) information about spouses (customers) and a surrogate mother;
- 2) the procedure and conditions for the payment of expenses to a surrogate mother;
- 3) the rights, duties and responsibilities of the parties in default of the contract;
- 4) the amount and procedure of compensation as provided for in Article 57 of the Code of RK «On marriage and family»;
- 5) Other terms and conditions, including force majeure conditions.

Agreement shall be in writing, shall be subject to compulsory certification in the notary office. Termination of the contract possible in the case of intentional violation of recommendations on pregnancy of the surrogate mother.

Surrogate mother is obliged to give the child to parents (the customers) after its birth and may not give the child to other individuals. This provision, in our opinion, is controversial. It is true that potential parents of a child have genetic relation to the child. But it is also true that the surrogate mother has a biological, psychological, emotional connection to the child. Russian legislators, for example, gave preference to the interests of a surrogate mother. Indeed a surrogate mother must give her consent not only at the moment of the surrogacy contract conclusion, but must also confirm her consent to record the prospective parents (the customers) as legal parents after the child's birth. Upon cancellation of this confirmation, the surrogate mother has the right

to put herself as the legal guardian of the child. According to M.V. Antokolsky, «this provision should be recognized as an achievement of the new Family Code. It formulates a good solution to one of the most complex moral issues. There is always a conflict of interests arising between the individuals entering into a surrogacy contract. Since individuals who have concluded an agreement on child bearing and childbirth are the genetic parents, they can place their hopes and feelings of parenting with the appearance of their child to this world. Renunciation of a surrogate mother to confirm her consent to record the second party as legal parents of the child may cause a serious trauma. A surrogate mother, in turn, not being the genetic mother, nevertheless has a biological relationship with the child. During pregnancy and childbirth, manifest her maternal feelings that can completely change her attitude to the child and to the agreements concluded with the second party. If by law she was required to give the baby to the individuals with who she has signed a contract, giving the baby to the legal parents might be as traumatic as the loss of her own child. Therefore, in order to resolve this conflict of interest, preference was given to the interests of surrogate mothers. The fact of child bearing or childbirth was recognized socially and emotionally more important than genetic origin. In this case there can be other arguments to support this position. This problem is very delicate and, in the first place, requires consideration of what is best for the child. Perhaps the position of the legislator can be explained by the lack of such practice, but in this agreement no one would want a woman be treated simply as an incubator. Family law should conform to the most morality and ethics. Certain traditions of Kazakh people (giving the eldest grandson to grandparents), proverbs («the mother is not who gave birth but the one who brought you up») confirm the thesis that social bond is more important. The question of surrogacy lies here [6].

If this institution was enshrined in domestic legislation, it means that medical, social, demographic, and psychological need for this is overdue. These are the first steps in the regulation of such contract, they can not be infallible. The difficulty is that these relations are deeply personal, intimate, spiritual and emotional. Infertility is the problem that accompanies humanity throughout its existence. In traditional societies there is saying for a reason, «when a man, who has children dies, they say «he left», when a childless man dies, they say «he ended» [6].

Legislators have created the legal basis for those with problems of reproduction, but who want to continue themselves in their children. Surrogacy is one of the solutions to this problem.

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Қазақстан Республикасында суррогаттық ана болуды құқықтық реттеу мәселелері

Мақала суррогатты аналықтың құқықтық реттеу мәселелеріне арналған. Суррогатты аналық мәселесі тек Қазақстан Республикасының заңнамасында ғана емес, сонымен қатар шетел заңнамаларында да нақты шешімін таппағандығы көрсетілген. Медицина саласындағы жоғары технологиялардың дамуына байланысты, суррогатты аналық бедеулік мәселесінің шешімі болып табыла ма, суррогатты ана мен ұрықтың мәртебесі және басқа да сұрақтар бүгінгі таңда өзекті сұрақтардың қатарына қосылып отыр. Авторлар әр түрлі білім салаларындағы ғалымдардың ғылыми ізденістеріне, діни догмалар беретін суррогатты аналықтың бүгінгі таңдағы алатын орны мен маңызының анықтамаларына, суррогатты аналық заңнамасын дамытудағы мүмкіндіктері мен болашағына зерттеу жүргізуге талпыныс жасады.

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Проблемы правового регулирования суррогатного материнства в Республике Казахстан

Данная статья посвящена проблемам правового регулирования суррогатного материнства. Отмечено, что вопрос о суррогатном материнстве законодательно не нашел однозначного разрешения не только в Республике Казахстан, но и в зарубежных государствах. Определена актуальность вопросов: является ли суррогатное материнство решением проблемы бесплодия; каким образом регулировать проблемы, связанные со статусом суррогатной мамы и эмбрионов; и других, которые становятся все более актуальными по мере развития высоких технологий в области медицины. Авторами предпринята попытка исследовать существующие научные изыскания ученых различных отраслей знаний, взгляды религиозных догм по определению места и значения суррогатного материнства в современный период.

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Development of alternative ways of civil disputes adjustment

This article is devoted to the problems of application of alternative ways of civil disputes adjustment as an effective remedy of settlement of the legal conflicts. The question about concept and types of alternative ways of settlement of civil disputes legislatively didn't find univocal resolving in the Republic of Kazakhstan. The maximum realization of the rights of participants of civil legal proceedings, timely protection and restoration of the violated rights and personal freedoms, it is possible to reach by development of institutes of amicable dispute resolution therefore the legal nature of alternative ways of legal conflicts settlement during the modern period is studied in article.

Key words: civil legal proceedings, settlement arrangements, simplification of the legal proceedings, alternative ways of settlement of disputes, mediation.

The constitution of the Republic of Kazakhstan guarantees to each citizen the right for judicial protection of the rights and freedoms. The judicial recourse for protection of the violated subjective right and legitimate interest — wide, originally democratic, constitutional law in which availability of justice is taken shape. Equality of all before the law and court is fixed in the Constitution of the Republic of Kazakhstan (Art. 14), and also the right to the qualified legal aid (Art. 13) [1]. The protection of the rights of citizens is realized in civil and criminal legal proceedings.

In the Republic of Kazakhstan justice functions independent from the legislative and executive authorities and has strictly competence defined in the Constitution of the Republic of Kazakhstan and laws. The special role in modern conditions belongs to justice on civil cases. From total of the cases considered by courts, the prevailing number is made by civil cases. Therefore justice implementation on civil cases as specific state function consists in providing appropriate application of laws by a way of restoration both