

PRACA POGLĄDOWA  
REVIEW ARTICLE

## ASSISTED REPRODUCTIVE TECHNOLOGIES: THE PROBLEMS OF LEGAL ENFORCEMENT

### TECHNIKI WSPOMAGANEGO ROZRODU: TRUDNOŚCI PRAWNE Z WDROŻENIEM W ŻYCIE

**Vitalii Pashkov, Anna Lyfar**

POLTAVA LAW INSTITUTE OF YAROSLAV MUDRIY NATIONAL LAW UNIVERSITY, POLTAVA, UKRAINE

#### ABSTRACT

**Introduction:** Today, the use of assisted reproductive technologies (including surrogacy) is an effective method of guaranteeing realization of person's right on maternity or paternity. Through therapeutic efficiency reproductive means have become incredibly popular among population. However, the lack of certain legal relations in the sphere of surrogacy (both at the international level and the national one) leads to the confusion in the theory and practice.

**The aim:** In this article, the author has set himself the following aims: a) to determine the state of legal regulation of surrogate maternity at national and international levels; b) to focus on problematic moments in legal regulation of surrogacy, which cause such phenomena as medical tourism and human trafficking; c) to investigate the regimes of legal regulation of surrogacy in the countries of the world.

**Materials and methods:** The methodological framework of the research consists of general scientific and special methods. The dialectical method is used to identify the term surrogacy and its meaning; the method of summarization is applied to the case laws (judgements of European Court of Human Rights and other high legislative bodies of foreign countries). The statistical method is applied to statistical data; the formal method is used for analysing the experience of such foreign countries as the USA (state Illinois, Nevada, California), Sweden, the Netherlands, India, Great Britain. Lastly, the method of comparison is applied to determine the similarities or differences between domestic and foreign legislation.

**Review:** There are three regimes of surrogacy in the world which contradict one another (altruistic, permitting and prohibiting). The difference between legal regulations of surrogacy contributes expansion of such a phenomenon as medical tourism.

**Conclusions:** Owing to absence of unified principles and standards on international level in the sphere of surrogacy, subjects of such legal relations are absolutely unprotected. Such phenomena as medical tourism, human trafficking and commercial exploitation of surrogate mothers are extending.

**KEY WORDS:** surrogacy, medical tourism, reproductive technologies

Wiad Lek 2018, 71, 5, 1066-1070

#### INTRODUCTION

Today's using of assisted reproductive technologies is an effective method of guaranteeing of person's right realization on maternity or paternity. That is why since 1978 (the year when such technologies were put into practice for the first time) they have become an ordinary medical services for population. The therapeutic efficiency of such technologies has predetermined the rate of popularization and development in society. This includes relations of surrogacy. Besides, public relations in the sphere of reproductive technologies (especially surrogacy) are not regulated properly on international and national legislative levels so far.

In the absence of necessary level of legal regulation of the relations of surrogacy, numerous problems, connected with human trafficking, medical tourism, right defense of genetic fathers as well as biological mothers appear. All in all, exact statistic data concerning number of using surrogacy do not exist because of two reasons. Firstly, the lack of systematic monitoring (including such countries

as the USA, Canada, Great Britain, where surrogacy was used for the first time) and secondly, the illegality of such relations in a great majority of countries (the existence of illegal and unofficial arrangements).

Thus, in the report of Hague Conference on Private International Law in 2011 the mark was given towards India reproductive industry. According to such estimation, 400 million USD per year till 2012 was occurred to Indian market of medical tourism, as reproductive segment of this industry. India is a country where the use of assisted reproductive technologies in the form of surrogate maternity has obviously increased in recent years due to the lack of relevant legislation, the low cost of infertility treatment and surrogate motherhood services, a weak administrative system.

The statistics establish the fact that surrogacy is profitable and necessary medical service in the world, which is actually behind legal regulation in a great majority of developed countries. As a result, such situation contributes to the development of medical tourism.

## THE AIM

Authors have set themselves following aims:

- a) to determine the state of legal regulation of surrogacy at national and international levels;
- b) to emphasize the problem points in surrogacy regulation, which stipulate such phenomena as medical medical tourism and human trafficking;
- c) to investigate legal regulation regimes of surrogacy in the countries of the world.

## MATERIALS AND METHODS

The certain types of medical services have been investigated by such scientists as Pashkov V. [2, 3] Hrekov Y., Hrekova M. [4], Olefir A. [5,6], Harkusha A. [7, 8], Hutorova N. [9, 10, 11].

However, in spite of the relevance of analysis, some aspects of surrogacy legal regulation have not been the subject of separate thorough theoretical research. Regarding international regulation it is necessary to note the absence of the international treaties which are supposed to regulate the issues of reproductive technologies (including surrogacy). Albeit, surrogacy is closely connected with human rights, it is believed that international standards in the sphere of human rights are also applied to the analyzed sphere. In particular, the UN Convention on the Rights of the Child sets out the most significant standards of protection, for instance: the right not to be an object of discrimination on the basis of birth or the status of parents (art. 2); child right for immediate taking into account his/her interests in all actions (art. 3); child right to obtain name and nationality [12].

The methodological framework of the research consists of general scientific and special methods. The dialectical method is used to identify the term surrogacy and its meaning; the method of summarization is applied to the case laws (judgements of European Court of Human Rights and other high legislative bodies of foreign countries). The statistical method is applied to statistical data; the formal method is used for analysing the experience of such foreign countries as the USA (state Illinois, Nevada, California), Sweden, the Netherlands, India, Great Britain. Lastly, the method of comparison is applied to determine the similarities or differences between domestic and foreign legislation.

The International Covenant on Economic, Social and Cultural Rights provides for the right to health (art. 12) and right to maintenance (art. 10). In practice such rights can acquire forms of free prenatal care and treatment for surrogate mother [13].

The Convention on the Elimination of All Forms of Discrimination against Women requires using the legal measures by States in order to eliminate discrimination against women on the basis of marriage or maternity and to ensure their labour rights (art. 11.2); requires ensuring access to health care services (art. 12.1); including services related to pregnancy, birth, postnatal period, with giving free services, when it is necessary and also providing

adequate nutrition during pregnancy and lactation (art. 12.2) [14].

On the subject of international treaties on surrogacy, the Hague Conference on Private International Law [1] refers to the Convention on the Protection of Children and Cooperation in respect of Intercountry Adoption, which may be used by States in resolving issues concerning international surrogate maternity treaties [15]. However, some of the main requirements of the 1993 Convention in cases of international surrogacy can not be realized in practice due to the fact that surrogacy is significantly different from adoption.

Moreover, the EU addressed the issue of facilitating the circulation of civil status documents within the Union and the recognition of parental rights by law in other EU member states. The lack of attempts to harmonize EU legislation on assisted reproductive technologies and surrogacy, despite the urgency of the issue, is due to the limited jurisdiction of EU institutions in the field of family law. This is stated in the decision of the ECHR "Menesson and Lyabasse v. France" (case of 2014) [17].

In the field of surrogacy, this case is fundamental and single. In this case ECHR admitted that the prohibition of surrogacy should not restrict the rights of children legally born abroad through surrogacy. The court has given a judgement against France only on this basis. Nowadays European countries even those ones, where surrogacy is forbidden, must admit ties of relationship between genetic father, on the one hand, and a child, born abroad by surrogate mother on the another hand officially. Otherwise, the child's right for name would be infringed [17].

In the context of research, it is necessary to pay attention on the experience of foreign countries. The countries where medical tourism, towards using surrogacy prosper are: India, the USA ( such states as: California, Illinois, Nevada) the Russian Federation, Taiwan. For decades, the number of surrogacy cases in India has increased. In particular, couples from other countries take decision to undergo surrogacy in India, because of low price services and lack of legislative limits or prohibitions.

In 2006, India adopted National Recommendations on the Accreditation, Supervision and Regulation of the Use of Assisted Reproductive Technologies. However, the recommendations do not contain propositions concerning surrogate mothers', children's and future parents' rights [18, p. 5]. In 2010 India drafted a Law in order to regulate assisted reproductive technologies in response to increase of number of problems, connected with surrogacy, such as: the lack of relevant provisions of the law in this domain and dissemination of exploitation of surrogate (human trafficking). Although, taking into consideration profits from illegal (and therefore unprotected) surrogacy, adoption of the Law is constantly deferring [19]. Albeit, the positive provisions of analyzed draft law are:

- a) mandatory medical insurance of surrogates;
- b) establishing a separate government regulatory body that would focus on licensing and controlling of the quality of the reproductive technologies services in clinics;

- c) regulation of contractual arrangements between biological and genetic parents;
- d) affirmation of requirements to surrogate mother (age of 21-35, Indian citizenship, must have no more than 5 children, the absence of blood relationships with genetic parents);
- e) determination of the order of crossing the border by a child born as a result of the use of auxiliary reproductive technologies for a foreign couple, etc.

The Netherlands apply an altruistic mode of surrogacy, so that law establishes certain conditions for an agreement between future parents and surrogate mother. Thus, according to the rules, prepared by Dutch Department of Obstetrics and Gynaecology, there must be evidence of the fact that future mother has got a serious medical disease and surrogate mother must know future parents of a child and must have her own family. As an additional requirement is that genetic material must be taken from both future parents.

The Dutch system has got a complicated procedure of child's paternity determination. For example, transmission of all parental rights in the process of surrogacy will not take place against the will of any of the parties. It derives from the fact that surrogates have no legal obligations to give a child back to the genetic, as well as future parents are under no obligation to take their genetic child back. If a child is under 6 months of age, future parents are allowed to take him/her home only by consent of the tutorship and guardianship agencies ( Art. 24/3 DCC; Art. 1 of the Guardianship of Children Act) [20, p. 2].

In France surrogacy was forbidden in 1991 by the decision of Cour de cassation (the highest court body in France). This prohibition was established by the Law on Bioethics of 1994 and codified in the article 16-7 of Civil Code of France. According to this provision, any agreement with the third party concerning reproduction or bearing a child is void [21].

In Germany, surrogacy agreements are also considered to be unethical and as a result legally invalid. The Germany Law on Embryo Protection as well as the Adoption Law stipulate punishments for individuals and doctors involved in a surrogacy organizing procedure. According to the German law surrogate mother is concerned to be a legal mother of a baby instead of genetic mother of a child [22].

In the USA where surrogacy is allowed in 16 States, the cost of such services is estimated at between \$59. 000 and \$80. 000 [24]. In 2005 state Illinois (and Nevada later) passed the Law of Surrogate Motherhood, which includes requirements, procedures and detail the consequences of surrogacy contracts [25]. This Law is considered to be one of the most progressive among American legislation since it regulates all important issues of surrogacy in a great detail.

In September 2012 the Law which changed to Family Code, regarding surrogacy was passed. The need for this emerged after the appearance of several lawsuits, in which the court had to answer some questions that arose as a result of surrogacy contracts. Moreover, people encountered many difficulties due to the fact that negotiators services

costed about \$40. 000 to \$100. 000 for future parents, while surrogate's payment was still sparse. The changes were supposed to codify and clarify existing precedents as well as to decide the current problems which derive from surrogacy contracts by clarifying and establishing procedural safeguards for all parties of the treaty [26].

One of most important cases of surrogacy, was the case decided by the California Supreme Court on May 20, 1993 (Johnson v. Kalvert), where a court had to decide who would be considered as the biological parents of the child.

In this case a couple has entered into a contract with surrogate mother about bearing and giving birth to a child from their genetic material. During pregnancy period numerous conflict situations occurred between sides and surrogate mother decides to infringe the terms of contract and to keep a child. The California Supreme Court has determined, that both mothers are «natural», one is genetic mother and the second is birth mother. All in all, Supreme Court decided, that a person who was going to give birth to a child and to bring it up as her own, according to the California law is legal mother. Another remarkable case was the Buzanka`s case decided by the California Appeal Court on March 10, 1998. In this case future parents decided to undergo a course of artificial insemination by fertilization of the embryo with donor genetic material (ovule and sperm were given by different anonymous donors) and its transfer to surrogate mother`s uterus. Over the period of bearing a child a couple started divorce proceedings, when a husband stated, that they do not have common offsprings of marriage, and his wife stated, that the child she is bearing is their common child. A husband rejected the fact of being genetic father. In this, Court of Appeal decided that for husband to be a legal child's father according to law because of intension to become a father independently of genetic relationship [27].

## REVIEW AND DISCUSSION

Existing approaches for regulation of social relations in the field of surrogacy can be divided into 3 main groups (regimes) [28, p.10]. Altruistic regime, where surrogacy is allowed by state, but surrogate mother gets compensation only for medical services and other expenditures, connected with pregnancy. Future parents are not allowed to pay for surrogacy services, including bearing and delivering a child. This approach intends to avoid commoditizing both surrogate mother and a child (which in fact has external features of human trafficking). Altruistic regime is applied in such countries as Australia, Canada, Great Britain, the Netherlands, Belgium.

The permitting regime means that surrogacy is legal in the country with certain regulations. It is allowed in such countries as: Georgia, India, Russian Federation, Ukraine. However, there are some variations of legal regime. For example, in Israel surrogate motherhood is controlled by State, therefore, the permission is required on each stage of the procedure. In South Africa contracts with surrogate mother must be confirmed by a court [28, p.10].

Prohibiting regime does not allow enter into the contract. The countries, which have adopted such regime were being leg by moral and ethical principles, such as avoiding of treatment children and surrogates as a commodities. This mode is being used in such countries as: France, Sweden, Hungary, Germany, Italy, Japan, Switzerland, Pakistan, Saudi Arabia, Serbia. Prohibiting regime faces such problems as how to act with imported children, who were born by a surrogate mother abroad. According to the international law, a child who was born as a result of applying reproductive technologies has the same set of rights and freedoms as a child who was born naturally, any forms of discrimination should be excluded [28, p.10].

In a great majority of countries with permitting or altruistic regimes many aspects of the use of auxiliary reproductive technologies and surrogacy services are left unregulated, consequently, participants of the social relations are unprotected. Besides, the countries with prohibiting regime collide the necessity to recognize the children, born by a surrogate as a result of medical tourism. It is considered to be the most complicated issues in this domain the problems of ensuring rights of surrogate mother, future parents and child born by a surrogate mother. The analysis of surrogate motherhood, as well as analysis of legislation of foreign countries concerning auxiliary reproductive technologies proved the fact that there are no unified principles and standards in this field.

In general, there is now an increased need for sufficient standards and provisions to protect the rights of participants of surrogacy contracts, such as an informed consent of future parents and surrogate mother; standards and procedures that ensure the welfare of the surrogate mother during the procedure of bearing and delivering a child, including medical expenses compensation, providing psychological support and legal assistance to all parties of the surrogate motherhood treaty, rules for verifying the authenticity of an agreement between future parents and surrogate mother, rules for termination of the contract, licensing conditions for clinics providing assisted reproductive services, certification and quality control, child delivering procedure, the consequences if future parents come from countries, where surrogate motherhood is prohibited by law. The analysis of the Indian law, Illinois law, allowed us to conclude that the law of any country should regulate all above-mentioned aspects of surrogacy. Otherwise, the cases of "medical tourism" will occur more often. For example, in the case ( X v. Y) the British couple went to Ukraine in order to sign a surrogacy contract using father's sperm and donor's egg, as a result they had faced problems after returning to the UK due to the process of legal registration of paternity. According to the United Kingdom law, the surrogate mother and her partner or husband remain the legal parents of the child until delivering on to future parents in accordance with the procedure established by British law. Analysing the amount of money for surrogate maternity services, it is important to state that UK law

allows to cover only medical expenses, while the surrogate mother was remunerated for the birth and delivery of a child (the altruistic model). The court had to decide if it can be allowed to recognize the legality of the payment of remuneration (for the services of bearing and delivering of a child), towards Ukrainian surrogate mother. Then, the court faced the constraint of comparisons of paid amount to the reasonable prices. All in all, the court decided that the payment was not excessive, taking into account the comparison of the cost of living in Ukraine and in UK. [29].

## CONCLUSIONS

Sum all above-mentioned points up, it is necessary to conclude that:

- 1) The lack of unified principles and standards in the field of on international level causes that subjects of such legal relationships are absolutely unprotected.
- 2) Such phenomena as medical tourism, human trafficking and commercial exploitation of surrogacy are expanding.
- 3) There are three regimes of surrogacy, which contradict each other. The process of globalization and internationalization requires the unification legal regulation of the consequences of applying of auxiliary reproductive technologies (paternity recognition, border crossing etc).
- 4) The legislation of certain American States are sufficiently progressive in the context of legal regulation of surrogacy and its consequences. Taking this fact into consideration it can be used as a sample for legislation of other countries.

## REFERENCES

1. Report of the Hague Conference on Private International Law "Issues of Private International Law on the Status of Children, including issues related to international agreements on surrogacy.
2. Pashkov V., Golovanova I., Noha P.: Principle of serviceability and gratuitousness in transplantation? *Wiad Lek.* 2016, 3, 565-569.
3. Pashkov V., Kotvitska A., Noha P. Protecting the rights of producers original medicines. *Wiad Lek.* 2017, 4, 834-838.
4. Pashkov V., Hrekov Y., Hrekova M.: European experience of regulating distance selling of medicines for Ukraine. *Wiad Lek.* 2017, 1, 96-101.
5. Olefir A.A., Pashkov V.M., Bytyak O.Y.: Legal features of the drug advertising. *Wiad Lek.* 2017, 1, 133-139.
6. Olefir A.A., Pashkov V.M. Problems of Rehabilitation of Mentally Ill Person: the International Legal Aspect (Ukrainian Experience). *Acta Balneologica.* 2017, 4, 341-354.
7. Harkusha A., Pashkov V.: Certain aspects on medical devices software law regulation. *Wiad Lek.* 2016, 6, 765-768.
8. Pashkov V., Hutorova N., Harkusha A. Vatrates on medical devices: foreign experience and Ukrainian practice. *Wiad Lek.* 2017,2, 345-348.
9. Gutorova N., Harkusha A., Pashkov V.: Medical devices software: defining key terms. *Wiad Lek.* 2016, 6, 813-818.
10. Tatsiy V., Gutorova N., Pashkov V.: Legal aspects of cancer diseases prophylactics: patients rights context. *Wiad Lek.* 2017, 6, 1108-1114.
11. Pashkov V., Kotvitska A., Harkusha A.: Legal regulation of the production and trade of medical devices and medical equipment in the EU and US: experience for Ukraine. *Wiad Lek.* 2017, 3, 614-619.

12. Convention on the Rights of the Child 44/25 of 20 November 1989. URL: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>.
13. International Covenant on Economic, Social and Cultural Rights General Assembly resolution 2200A (XXI) of 16 December 1966. URL: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>
14. The Convention on the Elimination of All Forms of Discrimination against Women. URL: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.
15. Protection of Children and Co-operation in respect of Intercountry Adoption of 29 May 1993. URL: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=69>.
16. Council of Europe Draft recommendation on the rights and legal status of children and parental responsibilities and Draft explanatory memorandum. URL: <https://7676076fde29cb34e26d759f611b127203e9f2a0021aa1b7da05.ssl.cf2.rackcdn.com/eclj/Draft-recommendation-rights-legal-status-childrenCDCJ-2011-15.pdf>.
17. Case of the European Court of Human Rights "Menesson and Lyabasse v. France" on June 26, 2014, № 65941/11. URL: <https://hudoc.echr.coe.int/app/conversion/pdf/%3Flibrary%3DECHR%3D003-4804617-5854908%26filename%3D003-4804617-5854908.pdf&prev=search>.
18. Center for Social Studies in India "Surrogate Motherhood — Ethical or Commercial. Centre for Social Research. 2008.88.
19. The draft law "On reproductive technologies" in 2010. URL: <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.
20. Vonk M. Maternity for Another: A Double Dutch Approach. *Electronic Journal of Comparative Law*. 2010. 14.3. 1-12.
21. Civil Code of France URL: <http://www.legifrance.gouv>.
22. Information provided by the Federal Ministry of Foreign Affairs of Germany. URL: <http://www.auswaertiges-amt.de/EN/infoservice/Forums/NanFamilyLaw/Leihmutterchaft.html?Nn=479790>
23. Swedish National Council on Medical Ethics, review of the report "Assistive Reproduction — Ethical aspects. URL: <http://www.smer.se/wp-content/uploads/2013/03/Slutversion-sammanfattning-eng-Assisted-reproduction.pdf>.
24. Nelson E. International Trade and Assisted Reproductive Technologies, Regulatory Issues in Surrogate Motherhood. *Journal of Legislation, Medicine and Ethics*. 2013. URL: <http://onlinelibrary.wiley.com/doi/10.1111/jlme.12016>.
25. Illinois Law on Surrogate Maternity. URL: <http://www.ilga.gov/law/ilcs>.
26. Senate Senate Analysis of Proposed Amendments, June 11, 2012. URL: <http://leginfo.legislature.ca.gov/faces/bilAnalysisClient.xhtml>.
27. California Supreme Court case "Johnson v. Calvert". URL: <http://faculty.law.miami.edu/zfenton/documents/Johnsonv.Calvert.pdf>.
28. Brashovyanu A. International experience in legislative regulation of the use of reproductive technologies (including surrogate motherhood) [Mizhnarodnyi dosvid akonodavchoho rehuliuвання pytannia vykorystannia reproduktyvnykh tekhnolohii (vkliuchaiuchy surohatne materynstvo)]. 2013. 60.
29. Richardson W., Wirii L. Legislation on Surrogate Maternity and Medical Ethics. *International Journal of Scientific and Engineering Research*. 2012. 3. URL: <http://www.ijser.org/researchpaper%5CSURROGACY-LAWS-ANMEDICAL-ETHICS.Pdf>

**Authors' contributions:**

*According to the order of the Authorship.*

**Conflict of interest:**

*The Authors declare no conflict of interest.*

---

**CORRESPONDING AUTHOR**

**Vitalii Pashkov**

Department of Civil, Commercial and Environmental Law,  
Poltava Law Institute, Poltava, Ukraine  
tel: +380532560148  
e-mail: [poltava\\_inst@nula.edu.ua](mailto:poltava_inst@nula.edu.ua)

**Received:** 26.03.2018

**Accepted:** 01.06.2018