**SURROGACY AGREEMENT**

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***Abstract.*** *In the article the authors research the content of surrogacy and its types. The legal nature of surrogacy agreement and the definite list of its obligatory terms are considered there.*

**Key words:** surrogacy, surrogacy agreement, parents, surrogate mother, child.

**Statement of the problem and its topicality.** The problem of surrogacy is a subject of discussion in scientific community and society. In despite of the fact that they consider the infertility treatment methods, there are still many controversial problems as legal regulation of surrogacy and ethical aspects of such procedure.

The majority of foreign countries ban or limit using the surrogacy. Thus, such countries as France, Germany, Austria, Norway and Sweden totally prohibit its using[[1]](#footnote-2).

Some countries allow only non-commercial surrogacy, for example, Australia, Great Britain, Canada and Israel. Thus, Great Britain allows only non-commercial surrogacy where the genetic parents pay all current expenses to surrogate mother.

Use of surrogate mothers including commercial surrogacy is allowed by the laws of the majority of states of America (surrogacy was allowed there in 1991 already, although in such states as Arizona, Michigan, and New Jersey it is banned till now[[2]](#footnote-3)), Republic of South Africa, Kazakhstan and some other countries. The laws of Belgium, Greece, Ireland and Finland do not regulate the attraction of surrogate mothers to the infertility treatment, but practically it takes place there[[3]](#footnote-4).

Ukraine is one of the countries which are loyal to the surrogacy. However, it is necessary to point out on imperfection of legal regulation of using such infertility treatment methods that creates a set of legal problems to be researched.

**The statement of the main material.**At present legal regulation of surrogacy in Ukraine is based on the following regulatory legal acts: the Civil Code of Ukraine[[4]](#footnote-5), the Family Code of Ukraine[[5]](#footnote-6), the Procedure of Application of the Accessory Reproductive Technologies in Ukraine approved by the Decree of the Ministry of Health Protection of Ukraine on September 9, 2013 N787[[6]](#footnote-7), the Principles of Legislation of Ukraine on Health Protection of November 19, 1992 N2801-XII.[[7]](#footnote-8)

In medical opinion, they distinguish two types of surrogacy: absolute and partial. Absolute surrogacy means that a woman who bears a child and a child are not genetically related and such type is called as gestation surrogacy. And partial surrogacy means that the woman ovule is only used and such type is called as gender surrogacy[[8]](#footnote-9).

The Ukrainian legislation permits only gestation surrogacy that foresees using the biological materials of solely genetic parents. In our country the surrogate mothers can provide paid serviced or free of charge.

Surrogacy foresees a sequential execution of some legally significant actions: 1) biological parents have to give their consent to implant an embryo to the body of another woman using their genetic material (such consent should be in the form of spouses’ application under which they have equal rights and obligations regarding the upbringing and maintenance of a child); 2) biological parents have to conclude the agreement of carrying a child with surrogate mother; 3) the application of the relevant procedures to the surrogate mother, insemination and carrying a child; 4) the transfer of a child to his/her biological parents, the surrogate mother’s written consent while registration of a child, written registration of birth by application of the spouses who gave their consent to surrogacy[[9]](#footnote-10).

While realization of surrogacy program the main positions are mutual relations between genetic parents and surrogate mother. In Ukraine such relations are based on the agreement concluded between spouses and surrogate mother regulating their rights and obligations. But, today there is no clear understanding of the content of such agreement.

Some scientists deem that the surrogacy agreement has civil law nature[[10]](#footnote-11). Thus, in T. Palkina’s opinion, the agreement between married persons and surrogate mother has a nature of civil law agreement creating the obligations between its parties[[11]](#footnote-12).

Other scientists think that surrogacy agreement can not be regarded as a civil law agreement, so it is inadmissible to use there the civil legislation on agreements accordingly[[12]](#footnote-13). There is also a position that agreements on application of reproductive technologies including surrogacy belong to the proprietary agreements in family law[[13]](#footnote-14). The surrogacy agreement is also included to the mixed agreements consisting of civil and family legal elements[[14]](#footnote-15).

Considering the problem of legal nature of the surrogacy agreement, firstly, it should be noted that surrogacy is inextricably linked with family relations as it is aimed at creation of family and blood relations called as “parents – children”[[15]](#footnote-16). The statement that family legislation regulates personal non-proprietary and proprietary relations not only between family members allows to avoid the consideration of relations arising from the surrogacy agreement as a family legal relations, but only within the limits established by the family legislation.

As the Ukrainian legislation does not contain any directions on the ultimate contractual regulation of surrogacy relations, the surrogacy agreement is in practice subordinate to the requirements applied to the civil law agreements.

In legal literature the surrogacy agreement is defined as an agreement under which one party (the surrogate mother) agrees to undergo the procedure of implantation of the human embryo conceived by the second party (the genetic parents), carry, give birth and relinquish a child to his/her genetic parents, and genetic parents agree to pay the costs necessary for execution of the agreement and pay a certain sum of money, unless otherwise is determined by the agreement.[[16]](#footnote-17) Some authors propose to consider a medical institution, accredited by the Ministry of Health Protection of Ukraine to carry out such procedures, as one of the surrogacy agreement parties. In such case the surrogacy agreement should be deemed as tripartite.

As rightly pointed out in the literature, the surrogacy agreement should be concluded before the moment of conception of a child, because the agreement of relinquish already conceived or unborn child should be absolutely recognized as worthless one contradicting the moral principles of society[[17]](#footnote-18).

The main purpose of such agreement is realization of wife’s and husband’s right to maternity and paternity determined by the articles 49 and 50 of the Family Code of Ukraine, in case when the wife is unable independently to carry and bear a child for some physiological reasons.

According to the point 6.4 of section 6 of the Procedure of Application of the Accessory Reproductive Technologies in Ukraine, the surrogate mother could be legally capable woman of the full legal age, if she has her own healthy child, under her written consent and in the case of absence of medical contraindications.

According to the section 2 of article 123 of the Family Code of Ukraine, the genetic parents of a child as the second part of the surrogacy agreement could be only married couples (man and woman).

The surrogacy agreement subject should be actions of the surrogate mother on the procedure of implantation of the human embryo conceived by the second party (the genetic parents), carry, give birth and relinquish a child to his/her genetic parents. So, the problem is the issue of implementation of the surrogate mother’s right to abortion. Taking into consideration that I. Veres proposed to amend the wording of paragraph 1 section 6 of article 281 of the Civil Code of Ukraine, i.e. to provide that “artificial interruption of pregnancy, but if it does not exceed twelve weeks, can be made at the request of the woman, except when she acts as a surrogate mother under the surrogacy agreement”.[[18]](#footnote-19)

As a rule, the surrogacy agreement is considered as paid one, but it could be gratuitous too. Material component of such agreement usually determines the following: the costs connected with childbearing and childbirth (including medical examination, drug, feeding of the surrogate mother), compensation for lost earnings as well as remuneration for “services rendered”. All costs are of course borne by the genetic parents.

The surrogacy agreement should also fix the place of residence of the surrogate mother during her pregnancy, medical institution where the surrogacy program will be carried out and childbirth will take place, consequences of having a child with physical and mental disabilities, consequences of the birth of two and more children, legal consequences of inobservance of medical requirements by the surrogate mother that creates a threat to the life or health of a child[[19]](#footnote-20).

Also it is useful to specify in the surrogacy agreement the time of its entry into force and its termination, periods of execution of certain obligations (for example, the frequency of making necessary medical examinations, period of relinquish a child to his/her genetic parents, period during which the genetic parents are obliged to pay for improvement of health of the surrogate mother after birth, etc.).

The surrogacy agreement has risky nature and it is aimed at possible achievement of result of medical intervention caused, firstly, by objective factors and, secondly, by probabilistic nature of biological parameters of functioning of the surrogate mother’s body, embryo and a child.[[20]](#footnote-21)

Therefore, the surrogacy agreement should also include specific terms, from which no one is immune. In particular, they proposed to determine the following situations in the surrogacy agreement: the birth of several children by the surrogate mother, having a baby with defects that are not connected with the surrogate mother’s behaviour during her pregnancy, stillbirth or miscarriage offensive, inability pregnancy as a result of the full cycle of procedures on surrogate mother, the need for artificial interruption of pregnancy according to the medical opinion of the doctors, divorce of the genetic parents, death of one or both genetic parents.[[21]](#footnote-22)

One more problem which is also insufficiently regulated by the legislation is unilateral refusal of the surrogacy agreement. Thus, such refusal is only possible just before the implantation of the embryo to the surrogate mother’s body. And a refusal of surrogate mother to relinquish a child to his/her genetic parents is definitely deemed by the legislator as illegally. The Family Code of Ukraine determines the following: the parents of a child born by the surrogate mother are considered the (genetic) parents (part 2 of article 123); parents have the right to demand taking away the juvenile child from any person who held it not on the basis of law or a court decision (part 2 of article 163). The legislation of Ukraine does not foresee the genetic parents’ ability to cancel the surrogacy agreement.

So, it is reasonable to determine in the surrogacy agreement the terms of its change and termination unilaterally and by the consent of the parties.

**Conclusions.** The surrogacy agreement, of course, has common features with other types of agreements, but it requires separate regulation. Therefore, one of the ways to solve the controversial problems related to the surrogacy agreement should be its legislative consolidation as a separate agreement by amending the Civil Code of Ukraine. The definite list of obligatory terms of surrogacy agreement should be consolidated, and in the absence of at least one of which the agreement should be recognized as invalid. Thus, such obligatory terms should be: subject, periods, price, liability, and force-majeure (for example, need for artificial interruption of pregnancy for medical reasons, birth of more than one child, birth of a child with disabilities, etc.).

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