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Scientific article

Surrogacy agreement: problems of legal regulation

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Abstract: The purpose of the study is to examine issues arising in the legislation of Kazakhstan and law enforcement practice governing legal relations between the parties to the surrogacy agreement. The theoretical and practical significance of the study lies in the fact that its results can be taken into account by legislators when amending and supplementing legislative acts on healthcare issues, by practitioners when drafting surrogacy agreements, theorists when preparing teaching materials on medical and reproductive law, and citizens when exercising their constitutional right to health protection through the use of surrogacy. The study concludes that the existing difficulties in the application of surrogacy arise, first, from the fact that surrogacy remains outside the scope of comprehensive state legal regulation. Second, to the legal conflicts, gaps, and other defects in the legislation of Kazakhstan regulating the application of assisted reproductive methods and technologies legal conflicts, gaps, and other defects that prevent citizens from exercising their constitutional right to reproductive health, motherhood, and fatherhood, as well as the regulation of legal relations between persons involved in the use of surrogacy. Third, uncertainty or misunderstanding of the procedure itself for fertilizing male and female sex cells outside the human body, the procedure for transferring and implanting a human embryo into a gestational carrier – a third party providing services for carrying a pregnancy and giving birth to children who are genetically unrelated to them – as well as the legal nature and all essential terms of a surrogacy agreement, such as: the main subject and object, the scope of rights and obligations of the parties, and the limits and measures of responsibility of the participants in the process. The reliability of the obtained results is ensured by the chosen methodological basis of the research, which includes a set of general scientific theoretical and special private practical methods of cognition.

Keywords: surrogate motherhood, aleatory contract, risky contract, embryo carrying services, female infertility, marital and family legal relations, reproductive medicine, assisted human reproduction, customers, contractor.

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Introduction

Legal relations between the intended parents and the potential surrogate mother are governed by civil and family law, as well as by the regulatory legal acts of the Republic of Kazakhstan in the field of healthcare and reproductive medicine. Defining surrogacy as "the carrying and birth of a child (children), including cases of premature birth, under a contract between the surrogate mother and the spouses with payment of remuneration" [1], the Code of the Republic of Kazakhstan "On Marriage (Matrimony) and Family" (CoMF) emphasizes its remunerative nature and indicates the commercial type of surrogacy permitted in Kazakhstan. Chapter 9 of the Code establishes general requirements for the form and content of a surrogacy agreement, defines its parties, and requires compliance with civil law when it is concluded [1]. Thus, Kazakhstani lawmakers make it clear that, in legal terms, a surrogacy agreement is a type of civil law agreement under which the surrogate mother (the Performer), acting on behalf of the commissioning couple (the Customers), provides paid services to carry a pregnancy and give birth to a child (children).

At the same time, civil law contracts for the provision of paid services are in many ways similar to employment contracts governing the hired paid labor of an employee, as well as to marriage agreements governing property and non-property relations between family members. Accordingly, the use of the uniform terms "Spouses" and "Commissioning parties" in matrimonial, family, and civil law is not accidental. In turn, the use of such terminology leads to ambiguous and erroneous interpretations of the norms of the legislation of Kazakhstan when applying surrogacy as one of the modern methods and technologies (ART) for treating or overcoming female infertility. As a result, difficulties arise in the legal regulation of legal relations between the commissioning couple (the Customers) and surrogate mother (the Performer), caused by a dispute over who can actually be a party to a surrogacy agreement, what its subject matter is, what its essential conditions are, what the scope of rights and obligations of persons participating in the surrogacy program should be, what the limits of legal liability are, and what measures apply to them.

In the course of studying the practice of surrogacy in Kazakhstan, frequent cases were identified where medical institutions with all types of modern ART for the treatment or overcoming of female infertility, through their internal legal acts, relieve themselves of legal responsibility for the consequences resulting from their use of these methods and technologies. At the same time, when drafting and certifying surrogacy agreements, notaries effectively imbue them with the characteristics of employment contracts, which may be explained by their misunderstanding and misapplication of laws on healthcare and reproductive medicine, as well as of civil and matrimonial law. As a result, surrogacy agreements are concluded on onerous terms for the commissioning spouses, who, due to their vulnerability, are forced to agree to them, assuming obligations not provided for by legislation in the field of healthcare and reproductive medicine, as well as civil or matrimonial and family law.

The choice of research topic is dictated by the need to address the above issues. In particular, this study will raise some rather acute questions that often arise between a married couple and a surrogate mother at any stage of the surrogacy process, which have not previously been the subject of scientific research by other authors. A review of the scientific literature shows that, although there are individual works devoted to surrogacy, the civil law nature of the contract, the relationship between the norms of various branches of law, and the practice of their application

as a whole have not yet been comprehensively and systematically covered. This indicates a gap in legal science and justifies the scientific relevance of the chosen topic.

To achieve the objectives of the study, tasks were set aimed at identifying legal conflicts, gaps, and other defects that prevent citizens from realizing their constitutional right to the protection of reproductive health using surrogacy, as well as the correct legal regulation of legal relations between persons participating in surrogacy. The object of the study is the social relations that arise in the process of using surrogacy. The subject of the study is the concepts developed by the theory of medical law, regulatory legal acts in the field of reproductive medicine and data from the law enforcement practice of surrogacy.

Literature review

The scholarly examination of surrogacy within legal doctrine has developed along several key lines, encompassing historical and legal, civil law, criminal law, and bioethical perspectives. This study draws upon both foundational and contemporary works by Kazakhstani and foreign scholars addressing these dimensions of surrogacy.

A significant contribution to understanding the genesis of surrogacy as a legal institution is made by M.A. Seidinova, who examines its formation within a socio-legal context and traces its development in connection with transformations in family and reproductive relations. The author substantiates that surrogacy has emerged not merely as a medical technology but as a complex legal phenomenon requiring systematic regulatory approaches. This perspective provides a conceptual framework for identifying the origins of current legal challenges in the field of surrogacy.

Contemporary foreign scholarship, particularly the work of K. Horsey, focuses on global trends and national regulatory models of surrogacy. The academic value of this research lies in its comprehensive review of diverse legal landscapes, the identification of differences between permissive and restrictive regulatory approaches, and the assessment of future directions in the legal regulation of surrogacy in the context of the globalization of reproductive services.

Another strand of research addresses the criminal law aspects of surrogacy. In particular, N.R. Aikumbekov analyzes surrogacy through the lens of criminal law, drawing attention to the risks of abuse, potential criminal offenses, and the need for criminal law safeguards to protect participants in surrogacy arrangements. These findings complement civil law analyses and underscore the interdisciplinary nature of legal regulation in this area.

A substantial body of legal scholarship is devoted to the civil law nature of surrogacy agreements. Works by V.R. Borisova, E.S. Mitryakova, L.A. Khurtsilava, M.A. Volkova and E.V. Pitko, M.Yu. Kremenets examine issues of legal qualification of the surrogacy contract, its subject matter and essential terms, as well as the determination of the rights and obligations of the parties. Particular attention is paid to the risk-bearing nature of surrogacy agreements, as emphasized in the study by A.S. Shabanova, who highlights the heightened legal and factual risks inherent for all participants in such legal relations.

Bioethical considerations related to surrogacy are reflected in foreign studies, including the work of M. Shayestefar and H. Abedi, which addresses the protection of women's health, the permissibility of commercialization of reproductive functions, and the necessity of respecting human dignity in the application of assisted reproductive technologies. These studies provide an essential ethical framework for assessing the balance between private interests and public values in the regulation of surrogacy.

At the same time, the analysis of the existing body of literature demonstrates that, despite the extensive examination of individual aspects of surrogacy, a comprehensive approach to the assessment of eligibility criteria for surrogacy and their impact on law enforcement practice remains underdeveloped. In particular, Kazakhstan legal scholarship lacks a systematic study integrating legal and bioethical analysis of such criteria within the context of both national and foreign legislation. This gap determines the relevance and scientific novelty of the present research.

Materials and methods

Civil, matrimonial, and family legislation of the Republic of Kazakhstan, as well as legislation in the fields of notarial activity, healthcare, and human reproduction, including local legal acts of clinics that use ART, were used as normative material. Along with these, the practical materials included notarized surrogacy agreements concluded between 2019 and 2025, as well as contracts for the provision of paid medical services to ART spouses and ART surrogate mothers, the content of which constitutes confidential information protected by law about family secrets, the secrets of the origin of children, and personal data about all persons involved in surrogacy procedures, which cannot be disclosed in this work. The theoretical materials are scientific works by Kazakhstani and foreign authors. A study of current regulatory legal acts and law enforcement cases has revealed that, due to the lack of uniform and correct interpretation and application of legislation in the field of assisted reproductive medicine by legal entities, the legal rights and interests of the parties to a surrogacy agreement are violated. As a result, one party finds itself in a dominant position, while the other is in a subordinate position, which is characteristic of agreements concluded on extremely disadvantageous, exploitative terms.

The methodological basis of the study is a systems approach, which made it possible to consider the right of citizens of the Republic of Kazakhstan to use surrogacy as part of a single, integrated system of constitutional and legal guarantees of the individual, family, motherhood, fatherhood, and childhood. General logical, philosophical, and special legal methods were used in conducting the scientific research. In particular, the structural method was used to study the relationship between the norms of constitutional, labor, social and family law. The comparative legal method allowed us to identify differences and similarities in the legal regulation of surrogacy agreements in Belarus, Canada, India, Kazakhstan, Kyrgyzstan, and Russia. The study used a method of analysing regulatory legal acts governing surrogacy agreements as a type of civil law agreement. This method was used to examine the provisions of legislation defining the procedure for concluding, the content and performance of surrogacy agreements, their essential terms, as well as the requirements for their form and subject composition. The use of this method made it possible to identify the specifics of civil law regulation of surrogacy agreements, establish a special contractual structure, and identify existing gaps, conflicts and ambiguous provisions that affect the effectiveness of protecting the rights and legitimate interests of participants in the relevant legal relations.

Results and discussion

According to general rules, a surrogacy agreement is concluded in accordance with the requirements of the Civil Code of the Republic of Kazakhstan (CC) applicable to contracts for the

provision of paid services, in writing and certified by a notary. According to Article 55 of the CoMF, its content includes: "1) the details of the spouses (clients) and the surrogate mother; 2) the procedure and conditions for payment of material expenses for the maintenance of the surrogate mother; 3) the rights, obligations, and responsibilities of the parties in case of non-fulfillment of the terms of the agreement; 4) the amount and procedure for compensation provided for in paragraph 1 of Article 57; 5) other conditions, including force majeure circumstances" [1].

First, we need to establish the subject matter of the surrogacy agreement, determine the conditions that serve as the basis for the payment of material expenses for the maintenance of the surrogate mother by the clients, and the procedure for their implementation. To this end, we studied ten notarized surrogacy agreements concluded in the Republic of Kazakhstan. An analysis of the agreements' content showed that, in most of them, the subject matter was either undefined or incorrectly defined. Only in three of the ten agreements was the subject matter of the agreement clearly formulated and reflected in the content of the agreement. According to them, the carrying of a pregnancy and the birth of a viable child (children), including premature births, conceived through artificial insemination, under the terms of a notarized agreement concluded between the surrogate mother and the spouses whose gametes were used for this purpose due to medical indications for surrogacy, constitute the subject matter of the surrogacy agreement.

Consequently, gestation and childbirth are the specific end result of contracts for the provision of services for remuneration. Accordingly, the obligation of the parties to a surrogacy agreement is that, on behalf of the spouses, the surrogate mother carries the pregnancy, following the transfer and implantation of the embryo (embryos), creating the most favorable conditions for its (their) intrauterine development, gives birth and transfers the child (children) to them, and they, in turn, pay her maintenance, remuneration, and compensation for the services she has rendered.

In surrogacy agreements, maintenance includes monetary or material support that the spouses are obliged to provide to the surrogate mother who is entitled to receive it, i.e., food, accommodation, travel, utilities, means of communication, maternity clothing, medicines, etc. The surrogate mother's right to support and, accordingly, the spouses' obligation to provide it arise only from the moment of pregnancy, confirmed by a medical opinion, and last until the day of delivery.

However, as follows from the content of the surrogacy agreements we have examined, they often stipulate mandatory conditions for the spouses to provide financial support to the surrogate mother from the date of her examination, or preparation for embryo transfer, or conclusion of the agreement, up to 56-70 days after childbirth. It is quite surprising and somewhat strange that it has now become customary in surrogacy agreements to stipulate the spouses' obligation to pay compensation to the surrogate mother in the event of unsuccessful embryo transfer and implantation, i.e., if pregnancy does not occur. Many contracts also stipulate that the surrogate mother shall be paid compensation for the transfer of the embryo into her uterus, which raises serious concerns, since pregnancy has not actually occurred and, by its nature, cannot last more than nine months [2], [3], [4]. In essence, compensation implies the payment of a sum of money or another form of remuneration to compensate for damage or loss, whereas maintenance is payable only to a surrogate mother who has become pregnant.

Additionally, embryo transfer into the uterine cavity is one of the ART procedures directly performed by reproductive medicine clinics for a fee ranging from 200,000 to 300,000 tenge, paid by clients. Furthermore, we have found that some contracts include provisions for paying monetary compensation to the surrogate mother if a child is born dead or non-viable, which

conflicts with the purpose of the surrogacy contract—namely, the gestation and birth of a viable child(ren), including premature births, conceived through artificial insemination [2], [3], [4].

The resulting practice of concluding surrogacy agreements demonstrates a violation of the principles of reasonableness and proportionality in civil transactions when determining the scope of obligations and limits of liability of clients, leads to abuse and unreasonable imposition of financial obligations on clients, as well as to a distortion of the legal nature of the surrogacy contract itself, which, in essence, should be aimed at achieving a specific end result—the birth of a child. Let us clarify exactly what is subject to compensation in practice and in what cases it is carried out.

So, Kazakhstan's lawmakers have specified that the contract must include terms and conditions regarding the amount and procedure for payment of compensation provided for in paragraph 1 of Article 57 of the CoMF, which refers to the costs of medical examination and care for the surrogate mother during pregnancy and childbirth, as well as during the postpartum period for 56 or 70 days [1]. Other cases of compensation payments to the surrogate mother are not provided for by law. Therefore, if a surrogacy agreement contains a requirement to pay additional compensation not provided for by law, then the transaction is concluded on oppressive terms, which may subsequently become the subject of legal proceedings regarding the validity or invalidity of the agreement in this part.

It is noteworthy that the repealed law of the Republic of Kazakhstan “On the reproductive rights of citizens and guarantees for their implementation” differed from the provisions of the current legislation in that it recognized the following as conditions of a surrogacy agreement: “the procedure and conditions for payment of material expenses for the maintenance of the surrogate mother” [5]. In addition, the law provided for the obligation of persons wishing to have a child to pay the material expenses for the “health improvement” of the surrogate mother during pregnancy and childbirth, as well as in the postpartum period. In addition, according to Part 2 of Article 17 of the aforementioned law, the surrogate mother was obliged to provide the persons who had concluded the agreement with her with full information about her state of health “before concluding the agreement” [5], and not “upon concluding the agreement,” as provided for in Part 2 of Article 57 of the CoMF [1]. It is particularly noteworthy that the law in question does not use the terms “spouses” and “commissioning parties.” Instead, it uses the terms "persons wishing to have a child; persons who have entered into a contract; persons who have decided to use surrogacy," which expands the list of subjects acting as one of the parties to the contract and also allows for the conclusion of a contract in the absence of a registered marriage, i.e., the mere desire to have children is sufficient for the use of surrogacy.

On this issue, the opinion of researchers focusing on the potential problems in the legal regulation of the parties' legal relations under a surrogacy agreement and the emergence of a shadow market for surrogacy seems fair. These problems are related to the fact that the legislative framework lacks legal acts in the field of reproductive health protection, establishing the principles of state policy in the sphere of the exercise of reproductive rights by citizens, including the right of married couples, unmarried men and women, and single women to use surrogacy [6].

British lawyer Kirsty Horsy, who specializes in bioethics and family law, has researched all possible options for the legal regulation of surrogacy in the UK, which is known for its liberal legislation in reproductive medicine, and notes the need for a unified international system to regulate surrogacy. The author proposes that each country independently establish legal mechanisms to ensure the safe, ethical, and fair use of surrogacy, taking into account the

interests of the child, the surrogate mother, the prospective parents, and the family as a whole, as well as eliminating the possibility of a shadow market in another country with the risk of child trafficking and exploitation of women [7].

Some authors believe that in order to prevent and combat crime in this area, as in Azerbaijan, Lithuania, and Moldova, Kazakhstan should establish criminal liability for the illegal performance of artificial insemination, embryo implantation, surgical sterilization, trade in human organs or tissues, coercion to remove them for transplantation, and conducting prohibited biomedical research on humans or human embryos [8].

As we can see, the author cited above is only interested in strengthening the legal liability of persons involved in surrogacy, combating the illegal market for surrogacy services that remain outside state legal regulation, and protecting the institution of marriage and family. However, the author overlooks the fact that in the countries he cites, surrogacy is prohibited and its use is punishable by criminal law, while in Kazakhstan, surrogacy is permitted and in demand.

Conducting a sociological survey among Iranian surrogate mothers to identify the factors that motivate them to provide pregnancy and childbirth services, Mina Shayestefar and Heydarali Abedi found that they are exploited, their rights are violated, and their human dignity is humiliated. To prevent this, the authors consider it necessary to develop ethical standards and fair legal mechanisms for regulating surrogacy, which, together, help reduce the social risks and negative consequences of surrogacy [9].

From our point of view, the uncertainty of the very moment and procedure for concluding a contract is very problematic today. Thus, if Part 1 of Article 56 and Clause 1 of Part 2 of Article 57 of the CoMF require that a surrogate mother be in satisfactory health, confirmed by a medical opinion, then it is quite logical to conclude a contract only if this is the case [1]. However, as practice and the personal experience of the authors of this work show, no surrogate mother candidate undergoes a medical examination or provides the commissioning parties with a medical report on her health status because they do not have the financial means to do so, are not insured under the compulsory health insurance system, and do not have the relevant indications for undergoing a medical examination at a medical facility within the scope of guaranteed free medical care. The established practice of concluding surrogacy agreements places the burden of responsibility on the Clients to pay for the medical examination and care of the Surrogate Mother, with whom they have no legally formalized contractual relationship. In this regard, extremely undesirable situations cannot be ruled out, such as the surrogate mother's refusal to undergo ART or her unsuitability due to her state of health, and it will be impossible to recover the money spent on her in such cases.

Here, we would like to draw readers' attention to the gross errors made by reproductive medicine clinics and notaries in the practice of surrogacy, completely ignoring the Rules and Conditions for the Use of ART, which the authorized body, represented by the Ministry of Health of the Republic of Kazakhstan, clearly stipulated in paragraph 48 that the procedure “Surrogacy” is carried out after the conclusion of a contract and has defined a step-by-step algorithm for all actions to be taken [10].

It is also important to mention other material expenses incurred by spouses for notarial actions, including payment for legal and technical services in the amount of 7 MCI, state fees of 10 MCI, as well as certificates of consent from the spouse of the surrogate mother or the surrogate mother herself, who is not in a registered marriage, which also entails expenses for legal and technical services in the amount of 0.5 MCI and state fees of 1 MCI. It seems extremely unusual,

and even somewhat frightening, that the tariffs for notarial services do not specify the amounts for services and state fees separately charged for the notarization of surrogacy agreements. Notaries often prefer to charge fees for their notarial services based on state fees and on the provision of additional legal and technical services established for the certification of contracts for the alienation of movable or immovable property. However, the tariffs for notarial services provide for rates for performing "other notarial acts" in the amount of 0.2 MCI of state duty and 7 MCI for the provision of additional technical and legal services, which are fully applicable to surrogacy agreements [11].

At the same time, when concluding a surrogacy agreement, the notary will request from the surrogate mother a medical certificate on the health status of her genetic children, who have no relation to the service of carrying embryos that are genetically foreign to her. It is not even clarified whether the surrogate mother's spouse or cohabitant is registered for dynamic observation at a mental health clinic, drug treatment clinic, or tuberculosis clinic. The notary's actions are limited to obtaining notarized consent from the surrogate mother's spouse, who is in a registered marriage with her.

The omission of the authorized body is seen in the fact that the "Rules for the performance of notarial acts by notaries" approved by it, including the procedure for notarizing surrogacy agreements, do not establish the notary's obligation to check the health status of the spouse or cohabitant of the surrogate mother [12]. In reality, when requesting information from the surrogate mother about the absence of dynamic observation of mental, narcological, tuberculosis, the notary categorically refuses to accept certificates issued by the electronic government in the form of electronic documents, identical to those issued directly by mental health clinics, drug treatment clinics, and tuberculosis clinics only on a paid basis, which artificially increases the cost of medical expenses covered by the spouses.

One pressing issue in performing obligations under a surrogacy agreement is the need to address force majeure events. Thus, in accordance with Part 3 of Article 685 of the CC, "in the event that the impossibility of performance arose due to circumstances for which neither party is responsible, the customer shall reimburse the contractor for the expenses actually incurred by him, unless otherwise provided by legislative acts or the contract" [13]. As a rule, in the event of force majeure, neither party is liable for failure to perform its obligations, provided that 1) they were not the result of the wishes and actions of the parties, 2) the parties could not prevent them, and 3) they took all necessary measures to prevent them. The question arises: can the following cases be classified as force majeure: the death of a woman in childbirth, serious harm to health resulting in the loss of an organ or loss of organ function, surgical delivery by means of an incision in the abdominal cavity, stillbirth, or the death of a newborn? Obviously, if they are recognized as such, the parties are not liable, and their inclusion in the contract as a condition means that the parties assumed the possibility or inevitability of their occurrence, but at their own risk, and expressed their desire to conclude the contract, assuming obligations. A force majeure event directly affects the performance of contractual obligations, and when it occurs, a party to a surrogacy contract is liable for non-performance of its obligations only if they occurred through no fault of its own.

In practice, these issues are resolved in somewhat different ways. Reproductive medicine clinics enter into a contract with the surrogate mother for the provision of paid medical services (ART-Surrogate Mother), paid for by the Commissioning Parties, with written notification that the pregnancy resulting from artificial insemination may be ectopic, multiple, terminated, or

cause complications for which they are not liable to her [14]. Similarly, reproductive medicine clinics enter into an agreement with the Commissioning Spouses to provide paid medical services (ART-spouses) [15]. In the notarized surrogacy agreements we studied, the responsibility for paying monetary compensation to the surrogate mother in the event of such dire consequences is, for some reason, placed on the clients [2], [3], [4] despite the fact that medical intervention in the surrogate mother's body is carried out by the clinic with her voluntary consent, and not by the clients. From this point of view, it seems questionable for the legislator to recognize a surrogacy agreement as a bilateral agreement between the clients and the surrogate mother, since the clinic is also involved, in addition to them.

The legislation of the Republic of Kazakhstan does not contain provisions regulating cases of death of a surrogate mother, but in practice, notarized surrogacy agreements often stipulate the obligation of the spouses to pay compensation to persons specified by the surrogate mother in the event of her death during pregnancy or childbirth. We believe that in such cases, it is necessary to be guided by Part 5 of Article 57 of the CoMF, according to which "a surrogate mother is responsible for the pregnancy provided for in the surrogacy agreement after the use of assisted reproductive methods and technologies and is obliged to exclude the possibility of natural pregnancy" [1], whereby the legislator has placed the responsibility for the course of the pregnancy and its outcome squarely on the surrogate mother.

In the cases under consideration, it should be assumed that pregnancy and childbirth themselves always entail certain risks and consequences for the mothers and clients, for which they are not responsible. Even if the surrogate mother fulfills her obligations properly, she cannot guarantee the birth of a viable, healthy, and full-term child due to circumstances beyond her control. For example, she should not be held responsible for a pregnancy that did not occur through her fault, its termination, anembryonia, miscarriage, premature birth, including stillbirth, premature birth, or a non-viable child. Reproductive medicine clinics, women's clinics, and maternity hospitals also cannot guarantee pregnancy and a favorable outcome. In cases of adverse events affecting the performance of obligations and the achievement of the desired result that have led to serious consequences, the Commissioning Parties shall bear only the costs associated with the medical care of the Surrogate Mother and pay her compensation for her recovery and restoration of health.

Of course, the situation will be different if the events listed and their serious consequences are the result of medical error or negligence, hereditary diseases transmitted by genetic parents, as well as the Surrogate Mother's failure to fulfill or improper fulfillment of her obligations to create the most favorable conditions for carrying the pregnancy, fetal development, and childbirth, which in each case must be confirmed by the results of a forensic medical examination. Of course, there are some signs of employment contracts here, especially the employer's guarantees and compensation payments to the employee. However, despite the similarities between temporary employment contracts and civil law contracts for the provision of paid services, there are significant differences in their regulatory frameworks, subject matter, parties, terms and conditions, procedures, and amounts of guarantees and compensation payments.

In this regard, one issue under discussion remains the legal nature of surrogacy agreements. Thus, according to V.R. Borisova, surrogacy agreements cannot be recognized as purely civil law or family law agreements, since a surrogate mother is not recognized as a subject of family law and her services can be provided on a paid or unpaid basis, which gives the author grounds for recognizing them as separate types of civil law agreements [16]. On the contrary, E.S.

Mitryakova came to the conclusion that a contract for carrying a child is similar to a contract for the provision of services for remuneration, and the commercial or non-commercial nature of the service provided does not prevent it from being recognized as a type of contract, since the rules governing contracts for the provision of services for remuneration also apply to contracts for the provision of medical services [17].

Unlike Russia, in Kazakhstan, there are no reasoned grounds for denying the civil-law nature of surrogacy, since the legislator has established only the commercial form of surrogacy. Judging by the fact that the clinic provides the service of embryo transfer and implantation, and the surrogate mother provides the service of carrying the embryo, the surrogacy contract, in the opinion of L.A. Khurtsilava, is of a "service" nature [18]. The dual legal nature of surrogacy agreements allows some authors to classify them as unnamed types of civil law agreements, similar in nature and content to agreements for the provision of paid services [19]. Agreeing with this opinion, M.Yu. Kremenets proposes supplementing Part 2 of the Civil Code of the Russian Federation with Chapter 39.1, "Surrogacy Agreement," thereby recognizing it as a separate type of civil law contract, distinct from contracts for the provision of paid services [20]. Given the uncertainty of the possibility of proper performance of a surrogacy agreement due to circumstances beyond the control and actions of the parties, the birth of a viable child, the occurrence of adverse consequences of pregnancy and childbirth, which are unknown to the parties, the acquisition of benefits or losses when applying ART or concluding an agreement, A.S. Shabanova classifies surrogacy agreements as aleatory (risky) [21].

The practical application of modern ART for the treatment or overcoming of any form of infertility is complicated by the fact that there are no guarantees of artificial insemination, implantation of the transferred embryo, safe pregnancy, and childbirth, even with strict compliance with all standards in the field of reproductive medicine and the terms of the contract. Without a doubt, ART carries with it the risks of loss and the possibility of gain. Of particular importance in the context of the issues raised is the need to clearly define in the surrogacy contract the rights and obligations of all persons involved in the use of ART, the scope of rights, limits, and measures of liability for non-performance or improper performance of their obligations, and potential risks with the distribution of their consequences between the parties.

A comparative legal analysis of legislation regarding the use of assisted reproductive methods and technologies and the protection of the reproductive rights of citizens in some countries of the Eurasian Union and individual European states reveals the following. Belarusian, Kyrgyz, and Russian legislation does not require payment to the surrogate mother for pregnancy and childbirth. Pregnancy and childbirth are natural physiological processes associated with risks to the health and life of the mother and the unborn child. Therefore, Kyrgyz law requires a notarized agreement between the surrogate mother and the reproductive clinic for the provision of medical services by the reproductive clinic to the surrogate mother during pregnancy, childbirth, and the postpartum period, the cost of which is subject to mandatory reimbursement by the genetic parents (parent) [22].

We consider the legislation of Belarus to be indicative, which provides for mandatory essential conditions of a surrogacy agreement, which are as follows:

1) provision by one woman (surrogate mother) to another woman (genetic mother or woman who has used a donor egg) of the service of bearing and giving birth to a child (children) conceived with the participation of an egg (eggs) removed from the body of the genetic mother, or a donor egg (eggs);

2) the number of embryos that will be transferred into the surrogate mother's uterus;

3) indication of the healthcare organization(s) in which the union of the sperm(s) and the egg(s) removed from the body of the genetic mother, or the donor egg(s), will take place, the transfer of this embryo(s) into the uterus of the surrogate mother, monitoring of the course of her pregnancy and childbirth;

4) the obligation of the surrogate mother to comply with all instructions of the attending physician and to provide the genetic mother or the woman who used the donor egg and her spouse with information about her health status and the health status of the child (children) being carried;

5) place of residence of the surrogate mother during the period of bearing the child (children);

6) the obligation of the surrogate mother to transfer the child (children) to the genetic mother or the woman who used the donor egg after his (their) birth and the period within which the said transfer must be made;

7) the obligation of the genetic mother or the woman who has used the donor egg to accept the child (children) from the surrogate mother after his (their) birth and the period within which the child (children) must be accepted;

8) the cost of the service provided by the surrogate mother under the surrogacy agreement (except in cases where the surrogacy agreement is concluded free of charge);

9) the procedure for reimbursement of expenses for medical care, food, and accommodation of the surrogate mother during pregnancy, childbirth, and the postpartum period [23].

In Canada, a detailed mechanism for reimbursing the surrogate mother's expenses is established at the legislative level, including a precise list of these expenses and the mandatory reimbursement by the genetic parents:

(a) travel expenditures, including expenditures for transportation, parking, meals and accommodation;

(b) expenditures for the care of dependants or pets;

(c) expenditures for counselling services;

(d) expenditures for legal services and disbursements;

(e) expenditures for obtaining any drug or device as defined in section 2 of the Food and Drugs Act;

(f) expenditures for obtaining products or services that are provided or recommended in writing by a person authorized under the laws of a province to assess, monitor and provide health care to a woman during her pregnancy, delivery or the postpartum period;

(g) expenditures for obtaining a written recommendation referred to in paragraph (f);

(h) expenditures for the services of a midwife or doula;

(i) expenditures for groceries, excluding non-food items;

(j) expenditures for maternity clothes;

(k) expenditures for telecommunications;

(l) expenditures for prenatal exercise classes;

(m) expenditures related to the delivery;

(n) expenditures for health, disability, travel or life insurance coverage;

(o) expenditures for obtaining or confirming medical or other records [24].

Indian law obliges the genetic parents (parent) to reimburse all material costs associated with the medical examination and care of the surrogate mother during pregnancy, childbirth and the postpartum period, as well as with insurance coverage for the risks of complications during pregnancy and childbirth [25].

We understand that before the surrogate mother undergoes a medical examination, it is necessary to conclude a tripartite agreement between the clinic, the spouses, and the surrogate mother on the provision of paid medical services, or a preliminary agreement between the spouses and the surrogate mother. In the practice of surrogacy, none of these types of agreements are concluded. This is due to the fact that, firstly, in accordance with local clinic regulations, separate types of agreements are concluded with the surrogate mother or spouses for the provision of paid medical services, and secondly, when certifying surrogacy agreements, notaries, relying on Part 2 of Article 57 of the CoMF [1] and Clause 215 of the "Rules for the Performance of Notarial Actions by Notaries," request a certificate of the health status of the surrogate mother and her children, provided by the clinic using ART [12]; thirdly, according to the rules of Article 390 of the CC, a preliminary contract is concluded in the form established for the main type of contract [13], i.e., in notarial form on a paid basis.

Conclusion

When resolving issues related to determining the legal nature of surrogacy agreements and regulating the legal relations arising between the parties, it is necessary to be guided by Part 3 of Article 1, Part 1 of Article 5, Article 7 of the CC, and Article 5 of the CoMF. According to these provisions, first, civil legislation regulating similar relationships applies to marital and family relationships if they are not regulated by family law, are not provided for in a marital and family agreement, or there are no legal customs applicable to them in civil circulation. Secondly, one of the grounds for the emergence, change, and termination of civil rights and obligations is contracts and other transactions provided for by law, or not, if they do not contradict it. Thirdly, the application of civil law provisions to property and personal non-property relations between family members is permitted.

Given that surrogacy services in Kazakhstan are provided only on a commercial basis, when determining the legal nature of a surrogacy agreement, preference should be given to an agreement for the provision of services for remuneration as a type of civil law agreement governed by the rules of civil law, which are fully applicable to family and marital relations. On the one hand, the contract affects property relations relating to the payment of monthly maintenance to the surrogate mother, the final remuneration for carrying and giving birth, postnatal compensation for her recovery and restoration of health, reimbursement of expenses incurred for her medical examination and care before pregnancy, during pregnancy, and after childbirth, artificial insemination programs, embryo transfer and implantation. On the other hand, the contract affects personal non-property relations, including the transfer of the child to the commissioning parties, their recognition as its genetic parents, the child's cohabitation with the parents, its upbringing in the family, etc. This leads to a very important conclusion, which is that civil legal relations may arise between the commissioning spouses and the surrogate mother, and family and marital relations between the genetic parents and the child.

We believe it is advisable to conclude a tripartite agreement between the clinic, on the one hand, the commissioning parties, on the other hand, and the surrogate mother, on the third hand, providing for all the essential conditions contained in bilateral agreements concluded between the clinic and the spouses, as well as between the clinic and the surrogate mother. It is assumed that a notarized tripartite agreement will serve as an additional guarantee of the protection of the rights and interests of all parties protected by law, since the notary verifies its

content for compliance with the requirements of the law, the validity of the parties' intentions, the absence of circumstances preventing its certification, etc.

However, violations of the rights and legitimate interests of spouses, uncertainty in the subject matter and terms of the surrogacy agreement, confusion with employment contracts and other agreements, and non-compliance of its content with the requirements of civil law indicate that the conclusion of a surrogacy agreement in notarized form did not contribute to the formation of correct law enforcement practices in surrogacy. Taking this into account, our legislators need only require the conclusion of a tripartite surrogacy agreement in simple written form with specialized human reproduction clinics, freeing customers from the costs of notarial actions, including the payment of notarial certification of the surrogacy agreement, the consent of the surrogate mother's spouse or the surrogate mother herself, if she is not in a registered marriage, legal and technical services, as well as state fees.

It seems necessary to enshrine the principles of fairness, proportionality, and reasonableness in the determination of the conditions and procedure for compensation payments at the legislative level, as well as to establish legal guarantees for the protection of the interests of both surrogate mothers and parents, which together will make it possible to eliminate cases of abuse, increase the legal responsibility of the parties to the contract, and ensure proper observance of the constitutional right of citizens to reproductive health protection through the use of surrogacy.

The problems in this area of legal relations could also be solved by the development of standard surrogacy agreements by medical lawyers specializing in the application of ART, in accordance with the requirements of civil and matrimonial and family law, as well as in the field of healthcare and human reproduction, which would define the scope of rights, limits and measures of liability of the parties, and evenly distribute between them the risks of adverse consequences of surrogacy.

In addition, consideration should be given to social insurance for surrogate mothers' lives and health, which will, to a certain extent, minimize risks and protect the interests of the parties to the surrogacy agreement.

Furthermore, there is an urgent need to develop and adopt independent laws regulating the use of assisted reproductive methods and technologies, as well as enshrining citizens' reproductive rights and legal guarantees for their implementation. Currently, in the Republic of Kazakhstan, these legal relationships are governed primarily by bylaws, including orders of the authorized healthcare body, as well as certain provisions of the Code on Public Health and the Healthcare System. This does not provide sufficient legal certainty, stability, or protection for the rights of citizens who have resorted to assisted reproductive methods and technologies. Adopting specialized laws would systematically regulate key issues related to the use of ART, define the legal status of all participants, delineate the powers of government agencies, and create effective legal mechanisms to protect citizens' reproductive rights.

There is no conflict of interest

The contribution of the authors in writing this article is equivalent. The scientific research was conducted by a team of authors. All authors participated in writing the article, providing their data in three languages and working together on the section "Results and discussion."

In particular, **E.B. Ablaeva** formulated the research topic, defined its goals and set tasks for their achievement, selected a thematic set of scientific publications from domestic and international scientometric databases, and interpreted the results. In the "Introduction," she

justified the choice of the topic, demonstrated its relevance and theoretical and practical significance, and in the "Author's Contribution" section, she provided an objective assessment of each author's participation. As the corresponding author, she corresponded with the editorial board by mail.

M.V. Voronin conducted a "Literature Review" and reviewed the regulatory legal acts on the research topic, based on which she identified problems in legal relations under consideration, which all authors participated in solving. She also edited the text, bringing it into line with editorial requirements. In the "Conclusion" section, she summarized the research results. She made corrections and additions to the manuscript, taking into account the reviewers' and the editorial board's comments.

E.O. Toilybekova prepared the sections "Materials and Methods" and "Abstract" in three languages, selected keywords on the research topic, and formatted the bibliography with transliteration.

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Құрсақ аналық мәмілесі: құқықтық реттеу мәселелері

Аңдатпа: Зерттеудің мақсаты құрсақ аналық келісім-шарт тараптары арасындағы құқықтық қатынастарды реттейтін қазақстандық заңнама мен құқық қолдану практикасында кездесетін мәселелерді анықтау және шешу. Зерттеудің теориялық және практикалық маңыздылығы зерттеу нәтижелерін заң шығарушылар денсаулық сақтау жүйесі мәселелеріне

қатысты заңнамалық актілерге өзгертулер мен толықтырулар енгізу, мамандар құрсақ аналық келісім-шарттарды әзірлеу, теоретиктер медициналық және репродуктивтік құқық бойынша оқу-әдістемелік кешендер дайындау, сондай-ақ азаматтар құрсақ ананы қолдана отырып, денсаулықты қорғауға конституциялық құқығын жүзеге асыру барысында ескере алатындығында. Зерттеу нәтижесінде құрсақ ананы қолданудағы қиындықтар, біріншіден, оның мемлекеттік құқықтық реттеу аясынан тыс қалуымен байланысты екені анықталды. Екіншіден, Қазақстан заңнамасында кездесетін құқықтық қайшылықтар, олқылықтар мен басқа да ақаулар азаматтардың конституциялық құқығын – репродуктивтік денсаулықты қорғау, ана мен әке болу құқықтарын жүзеге асыруына кедергі келтіретіні анықталды. Сонымен қатар, бұл қиындықтар құрсақ аналық үрдісіне қатысатын тұлғалардың құқықтық қатынастарын реттеуде де өзінің кері әсерін тигізеді. Үшіншіден, адам ағзасынан тыс аталық және аналық жыныс жасушалардың ұрықтандыру, адам эмбрионын гестациялық тасымалдаушыға – өзіне генетикалық тұрғыдан жат жүктілікті көтеру және балаларды туу қызметін көрсететін үшінші тұлғаға тасымалдау және қоныстандыру рәсімінің белгісіздігі немесе оны дұрыс түсінбеу анықталды. Сондай-ақ құрсақ аналық мәмілелердің құқықтық табиғаты мен маңызды шарттары, соның ішінде негізгі пәні мен объектісі, тараптардың құқықтары мен міндеттері, жауаптылық шегі мен шаралары туралы да өзекті мәселелерді қамтиды. Алынған нәтижелердің сенімділігі зерттеудің таңдалған әдіснамалық негізімен қамтамасыз етіледі, ол жалпы ғылыми теориялық және арнайы жекелеген тәжірибелік таным әдістерінің жиынтығын қамтиды.

Түйінді сөздер: құрсақ аналық, алеаторлық мәміле, тәуекел мәмілесі, эмбрионды көтеру қызметтері, әйел бедеулігі, неке-отбасы қатынастары, репродуктивті медицина, медициналық құқық, тапсырыс берушілер, орындаушы.

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Договор о суррогатном материнстве: проблемы правовой регламентации

Аннотация: Целью исследования является изучение и решение проблем, встречающихся в казахстанском законодательстве и правоприменительной практики, регламентирующих правоотношения сторон договора суррогатного материнства. Теоретическая и практическая значимость исследования состоит в том, что результаты исследования могут быть учтены законодателем при внесении изменений и дополнений в законодательные акты по вопросам системы здравоохранения, практиками при составлении проектов договоров суррогатного материнства, теоретиками при подготовке учебно-методических комплексов по медицинскому и репродуктивному праву, а также гражданами при реализации своего конституционного права на охрану здоровья с применением суррогатного материнства. В результате исследования установлено, что существующие сложности в сфере применения суррогатного материнства, связаны, во-первых, с тем, что суррогатное материнство по-прежнему остается вне сферы государственного правового регулирования. Во-вторых, с имеющимися в казахстанском законодательстве, регламентирующих порядок применения вспомогательных репродуктивных

методов и технологий, правовых коллизий, пробелов и иных дефектов, которые препятствуют гражданам реализовать свое конституционное право на охрану репродуктивного здоровья, материнства, отцовства, а также упорядочению правоотношений лиц, участвующих в применении суррогатного материнства. В-третьих, с неопределенностью или неправильным пониманием самой процедуры оплодотворения мужских и женских половых клеток вне тела человека, процедуры трансфера и имплантации человеческого эмбриона гестационному курьеру – третьему лицу, предоставляющему услугу по вынашиванию беременности и рождению генетически чужих для него детей, а также юридической природы и всех существенных условий договора о суррогатном материнстве, как: основной предмет и объект, объем прав и обязанностей сторон, пределы и меры ответственности участников процесса. Достоверность полученных результатов обеспечивается выбранной методологической основой исследования, включающей совокупность общенаучных теоретических и специальных частно-практических методов познания.

Ключевые слова: суррогатное материнство, алеаторный договор, рисковый договор, услуги вынашивания эмбриона, женское бесплодие, брачно-семейные правоотношения, репродуктивная медицина, вспомогательная репродукция человека, заказчики, исполнитель.

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