

## Legal Problems of a Contract for Surrogate Motherhood in the Republic of Tajikistan

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**Abstract:** The study analyzes a legal nature of a contract for surrogate motherhood and also parties' contractual liability, it considers the features of legal regulation of a child's origin establishment who was born as a result of conclusion of a contract for surrogate motherhood. The programs of surrogate motherhood are rather successfully realized abroad for several decades. In turn, in the Republic of Tajikistan the application of auxiliary reproductive technologies has started being applied rather recently that, however, does not at all belittle the results of the conducted research. The scientific novelty of the research is that this study is the first complex research of a legal nature of surrogate motherhood and legal (the material and the legal and the conflict) regulations of this institute and also the responsibility for the realization of this form of auxiliary reproductive technologies. Researchers prove expediency of the use of the principle of free will for regulation of a contract for surrogate motherhood and also suggest using legislation of that country where a contract is executed. The development of medicine in the Republic of Tajikistan has allowed making different interventions into the reproductive system of a person for the purpose of the reproductive function restoration. Having conducted a comparative research of legislations of various states, Researchers come to a conclusion about expediency of the use of the principle of free will for the regulation of a contract for surrogate motherhood and also suggest using legislation of that country where a contract is executed and that family and legal responsibility for the non-execution or inadequate performance of a contract for surrogate motherhood is determined not only by free will of the parties but also in a place of performance of a contract. In this case, the cumulation of conflict principles cannot be avoided. According to such state of affairs, we have offered the use of legislation of that state where a contract for surrogate motherhood is executed.

**Key words:** Surrogate motherhood, collision, free will, closest connection, establishment

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### INTRODUCTION

The development of medicine in the Republic of Tajikistan has allowed making different interventions into the reproductive system of a person for the purpose of the reproductive function restoration. It is necessary to establish that fact that every year a number of persons asking for medical care in the centers of reproductive health for carrying out the artificial insemination increases that is connected, first of all, with the increasing childlessness in the country under the influence of various factors.

The problems of reproductive activity of a person cause not only psychological injuries, inferiority complex but also have an essential impact on a demographic situation in each separately taken country and in the world in general.

The heightened state interest to questions concerning a family is confirmed not only by an adoption of a number of acts in recent years but also the

declaration by the President of the Republic of Tajikistan E. Rahmon in 2015 as "A year of a family". For today as the Ministry of Health of the Republic of Tajikistan about 15% of married couples have problems with impregnation and a child's birth.

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It should be noted that despite that fact that plans of the application of such kind of auxiliary reproductive technologies as surrogate motherhood in Tajikistan only are in development, some women, citizens of the RT participate abroad in the program of surrogate motherhood. Our research not only of national but also foreign legislation in a specified area was caused by that. Today in use, there is such term as reproductive tourism which is a practice connected with a temporary departure

to other country for reproductive treatment for the purpose of a child's conception/incubation/birth. It can be considered as a special case of so-called "medical tourism".

The aim of the research is the identification and the analysis of the main problems arising at the realization of the rights of participants of surrogate motherhood relations, the development of offers for their permission and improvement of the current legislation in a considered area of public relations. Public relations arising at the realization of the rights of participants of surrogate motherhood relations are the object of the research.

The object of the research are the standards of family, civil legislation, domestic and Foreign judicial and law-enforcement practice developing in the sphere of surrogate motherhood relations, works of the scientists and experts lawyers (Surrogate motherhood in Russia, 2008). Now the heightened in law interest to legal regulation of surrogate motherhood relations testify to the completeness of scientific researches on problematics chosen by the author of dissertation Vrege and Evdokimov.

Mitryakova in 2007 dissertation works reveal surrogate motherhood relations in the context of Civil Law. The research of legal bases of the application of a surrogate motherhood method in the system of methods of artificial insemination and implantation of an embryo, responsibility for illegal carrying out of the operations on artificial insemination and implantation of an embryo was carried out by E.V. Grigorovich in his theses "Artificial insemination and implantation of an embryo of a person (family and legal aspect)".

The separate aspects of the posthumous reproductive programs based on the application of a surrogate motherhood method occur in scientific papers of experts lawyers, for example, of K.N. Svitnev. In the Republic of Tajikistan, a contract for surrogate motherhood was not paid much attention, the lighting in legal literature was received by separate aspects of the legal analysis of a contract for surrogate motherhood. It is possible to refer works of such scientists as Babadzhonov, A.R. Purge, H.S. Mirsaiev, N.Sh. Bakhmani to them. The urgency and diversity of the considered problem and also its insufficient readiness in the Republic of Tajikistan have caused a choice of the subject of this study.

## **MATERIALS AND METHODS**

Dialectic, formal and logical, analytical, statistical, comparative and legal methods of knowledge make the methodological basis of the present research (Islamic Fiqh

Academy, 2000; Babkina and Baiborosha, 2010; Kobersy *et al.*, 2015). Scientific researches of such scientists as Afanaseva and Parokannaya (2012), Bogdanov (1999), Lebedev (2012) Mitryako (2007) Ogorodov and Chelyshev (2015) and Horoshevsky (2012) form the theoretical basis of the theses.

The need for experience reflection of the Foreign countries concerning the realization of the participants' rights of surrogate motherhood relations and its comparative analysis with provisions of Tajikistan legislation has caused an appeal to works of the Foreign researchers Welty (1963) and Connor (1993).

The standards of both intra national legislation and international legal acts formed the standard basis of the research. Scientific novelty of the research is that this study is the first complex research of a legal nature of surrogate motherhood and legal (material and legal and conflict) regulations of this institute and also responsibility for the realization of this form of auxiliary reproductive technologies (Babkina and Baiborosha, 2010).

Authors prove expediency of the use of the principle of free will for regulation of a contract for surrogate motherhood and also suggest using legislation of that country where a contract is executed.

## **RESULTS**

The methods and means of auxiliary reproductive (Shkurkin *et al.*, 2016) technologies have received the detailed legal regulation in legislation of separate states of the USA though in such states as Arizona, Michigan, New Jersey the use of surrogate motherhood is forbidden. In the territory of the European Union, there is the Convention "On Human Rights and Biomedicine" of 1997 which contains a norm forbidding the use of medical technologies directed on reproduction (Art. 14) works. But despite this provision of an international treaty, certain European states allow the use of auxiliary reproductive technologies, in particular, surrogate motherhood. In Great Britain, the use of a surrogate mother for birth of a child is admissible only in case of gratuitousness of rendered services. But, at the same time, a mother is a woman who gave birth to him. In case of a surrogate mother's attachment to a child she can keep him because she has a privilege to the statement of parental rights before blood parents.

The code about marriage (matrimony) and a family of Kazakhstan from 2011 under a contract for a surrogate mother provides as one of duties to bring a child whom she gave birth to persons who signed a contract with her (Art. 57). Besides, parents of a child who was born by

means of auxiliary reproductive technologies are spouses (customers) (Art. 59). It turns out that if a child will be born by means of reproductive technologies in great Britain, then a mother will be a surrogate mother if in Kazakhstan a person who signed a contract for surrogate motherhood will be recognized as a mother.

Hazova believes that a contract for surrogate motherhood is invalid because it is deprived of claim protection and, therefore, has no right for the existence in view of what she offers to impose a direct ban on its conclusion. Bogdanova considers opposite that relations between the parties in this case have to be mediated by a contract regulated by the standards of family legislation. The use of methods of surrogate motherhood has no common approach neither from scientists-jurists nor from legislators of different countries.

Kyrgyzstan is that country where this method of the fight against infertility is legal and commercial surrogate motherhood is also not forbidden. In India commercial surrogate motherhood is widespread. In such countries as Belgium, Greece, Spain, Finland the relations resulting from the use of surrogate motherhood are not settled by the law despite the fact that they take place actually.

As the above given examples show a position of legislation of different countries is not common Filippov. But, as a rule, the prohibition of a specified method of reproduction is not an obstacle in its use for married couples which spend significant forces and financial means when carrying out implantation of an embryo of a surrogate mother in other country.

In our opinion, the best permission of such situation would be creation of effective legislation in this sphere following realities of modern life. Ensuring claim protection according to legislative norms is one of the main functions of a legislator. At the same time, we will dare to disagree with Bogdanova considering that a contract for surrogate motherhood has to be regulated only by norms of the family law Bogdanova. The insufficiency of legal regulation in this case can be the reason for a substitute mother's blackmail.

## DISCUSSION

The statements according to which a child's birth by a surrogate can be used are:

- The congenital or acquired lack of a uterus
- Deformation of cavity of uterus or its neck in case of congenital development troubles or as a result of diseases
- Somatic diseases because of which child-bearing is contraindicated

- Numerous unsuccessful attempts to make extracorporal fertilization when receiving quality embryos not once which transfer to cavity of uterus did not cause pregnancy

Now jurists could not come to a consensus of opinion concerning a legal nature of a contract for surrogate motherhood. It is thought that for the reference of a specified contract to this or that sphere it is necessary to define its essence and context. Fertilization, child-bearing, and also birth of a child are only separate part of the subject of a contract. In this case, certainly, transfer of a child to genetic parents has to be the purpose.

The first category of scientists refers this contract to a kind of family legal instruments. For example, V.P. Horoshevsky specifying that an agreement for surrogate motherhood provides the transition of personal non-property rights of the parent from a woman who gave birth to a child to a married couple which is a party of a contract Lebedeva in 2012, Horoshevsky. In this connection, in his opinion, a specified agreement cannot be referred to a kind of civil contracts on rendering services, considering only a possibility of the presence of a specified agreement paid character.

E.V. Stebleva in turn, holding an opinion on a family and legal nature of a contract for surrogate motherhood, points to a special character of specified relations the purpose of which is completion of a woman's reproductive function who is not capable to be pregnant and give birth to her own child because of physiological problems but non-compliance of any material participants' needs and the commodity-money exchange Stebleva.

Other scientists consider that the regulation of a contract for surrogate motherhood has to happen by means of the application of civil norms. And most of the scientists adhering to this point of view refer an agreement for surrogate motherhood to a kind of services agreement. So, Mitryakova looking through the similarity between these contracts, suggests to refer a contract for surrogate motherhood in a section of the civil code to the list of contracts relating to paid rendering services Mitryakova A.A. Pestrikova considers that, in this case, the regulation of a contract for surrogate motherhood has to be carried out by means of the application as norms of family and the standards of civil legislation (Islamic Fiqh Academy, 2000). Thus, she points the need for reference of a contract for surrogate motherhood to mixed contracts. On the basis of all above facts, it is possible to make a conclusion that in the doctrine concerning this matter there is no common ready position.

It is thought that actually a contract for surrogate motherhood is a specific contract which is not similar to one another and demands special attention of a legislator. In our opinion, a specified contract cannot be regulated also as well as services agreement that is connected with the distinction of their legal nature.

### CONCLUSION

On the basis of the research and the analysis of civil legislation of the Republic of Tajikistan touching upon questions concerning responsibility, there was revealed a provision according to which ways and procedures of the execution and also measures undertaken in case of the inadequate execution are determined also by the right of the country, where there is the execution. There was made a conclusion that family and legal responsibility for the non-execution or inadequate performance of a contract for surrogate motherhood is determined not only by free will of the parties but also in a place of performance of a contract. In this case, the cumulation of conflict principles cannot be avoided. According to such state of affairs, we have offered the use of legislation of that state where a contract for surrogate motherhood is executed.

### ACKNOWLEDGEMENTS

Researchers group of the present scientific study expresses the professor N.N. Salikhov who is the Head of the Russian-Tajik (Slavonc) University, gratitude for his support and help in this paper publication. Researchers also express colleagues of the university, in particular, the

Doctor of Legal Sciences, the professor M.A. Abdulaev, the professor Kh. Shambezod Dzh gratitude for their help and support in the study preparation.

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