

Section: Law

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ESSENTIAL FEATURES OF A SURROGACY CONTRACT IN UKRAINE

Surrogacy is characterized as a fairly safe and effective alternative to human procreation. Being one of the assisted procreation methods, surrogacy is being used increasingly often, giving rise to new ethical and legal challenges. Therefore, there is an urgent need for its proper legal regulation.

Failure of the law to develop in tandem with social norms may lead to new interpretations of existing laws. The most effective way to solve this problem within the framework of legal regulation is using a contract. Since family relationships have become even more unique due to the wide possibilities of assisted reproductive technologies (ART), they often do not fit into the limitations of regulatory legal acts. They can be more functionally regulated using a contract.

A surrogacy contract is not enshrined in regulatory enactments in the legislation of Ukraine. However, the Civil Code of Ukraine determines that the parties have the right to conclude a contract that is not provided for by acts of civil law but meets the general principles of civil law (part 1 of Article 6) [1].

The provisions of Article 627 of the Civil Code of Ukraine provide for the freedom of contract. Thus, the parties are free to conclude a contract, choose a counterparty and determine the terms of the contract, taking into account the requirements of the Civil Code of Ukraine, other acts of civil legislation, business customs, requirements of rationality and fairness [2, p. 74].

The contract regulates relations between potential parents and the surrogate mother and defines each of the parties' rights, obligations, and responsibilities. The parties can determine the solution to various problematic issues that may arise during the implementation of surrogacy arrangements. The contract must be concluded on the terms and following the procedure defined in the second section of the Civil Code of Ukraine.

The parties to the surrogacy contract are a surrogate mother and potential parents. The medical institution where the surrogacy program is implemented provides appropriate medical services, i.e., operates within the scope of the contract for the provision of medical services. The surrogacy contract regulates the relationship between potential parents and the surrogate mother. The surrogate mother's husband is not a party to the contract. However, his written consent regarding the participation of the legal spouse is mandatory, which is stipulated in the Order of the Ministry of Health No. 787 [3].

The features of the surrogacy contract are as follows:

- a surrogacy contract has certain features of a service contract, which is regulated by the provisions of the Civil Code of Ukraine. Therefore, within the framework of a surrogacy contract, services can be considered as the obligation of a surrogate mother to carry pregnancy and give birth to a child for potential parents who pay her compensation;
- the parties are exclusively individuals (potential parents and a surrogate mother);
- the contractor must provide the service personally under Part 1 of Article 902 of the Civil Code of Ukraine (a surrogate mother personally carries

the pregnancy and gives birth to a child for potential parents). It is not possible to assign the obligation to perform the contract to another person.

According to Article 638 of the Civil Code of Ukraine, a contract is concluded if the parties agree on all the essential terms of the contract in due form. The essentials of the contract are the subject matter of the contract, conditions defined by law as essential or necessary for this type of contract, and those conditions on which an agreement must be reached upon the application of at least one of the parties [1]. The essential conditions of the surrogacy contract include the following:

1) Subject of the contract. Considering the subject of the surrogacy contract, scientists point out an ambiguous solution to the issue of the subject of such a contract. Some of them indicate its similarity with the service contract. Other scientists point out that the subject of the surrogacy contract is the actions of a surrogate mother who undertakes to carry the pregnancy and give birth to a child and provide her consent for genetic parents to register the child.

2) The next essential condition of the surrogacy agreement is the term. The moment of embryo implantation is proposed to be considered the beginning of the contract, and the transfer of the child to potential parents and payment of compensation to the surrogate mother – as the moment of termination of such a contract [4, p. 364].

3) A compensation for surrogate mother services should also be considered an essential condition of the surrogacy contract. In the case of a non-commercial (altruistic) surrogacy, compensation under the contract includes expenses such as payment for all medical procedures and consultations and other expenses that may arise during the implementation of the surrogacy program. If commercial surrogacy is implemented, the surrogate mother, in addition to the expenses listed above, receives monetary compensation, the amount of which is determined by the parties to the contract and fixed therein.

4) An essential condition is the form of the contract. According to Part 1 of Article 639 of the Civil Code of Ukraine, a contract can be concluded in any form if the requirements for the form of the contract are not established by law [1]. In addition, the Order of the Ministry of Health of Ukraine No. 787 as of September 09, 2013 On Approval of the Procedure for the Use of Assisted Reproductive Technologies in Ukraine provides for the presence of a notarized copy of the written contract (clause 6.11 of Section VI Surrogate Motherhood) [3].

Thus, the surrogacy contract plays an important role in regulating all relations that arise within the framework of the surrogacy program. Due to the lack of a legally enshrined form of a surrogacy contract in the current legislation of Ukraine, discussions are underway about its legal affiliation to legally defined contracts. The essential conditions of this contract are the subject matter, term, form, and price. It is important to specify in the contract all the rights and obligations of all parties, possible force majeure, etc. It is necessary to enshrine the form of a surrogacy contract in legislation, indicating that it must be notarized and registered by the state. Such measures are necessary to protect the rights and legitimate interests of both the parties to the contract and the child born by a surrogate mother.

References

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