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CONFLICTING ISSUES OF LEGAL REGULATION OF SURROGACY IN PRIVATE INTERNATIONAL LAW

The proposed article is devoted to the issue of Conflicting issues of legal regulation of surrogacy in Private International Law. The complexity and multidimensionality of issues, the emergence of which is due to the birth of children because of agreements on surrogacy, have been investigated.

The article draws a number of conclusions. First, compliance with the recommendations of the Special Rapporteur requires the adoption of urgent measures to prevent violations of the rights of all participants in a surrogacy relationship due to their vulnerability. Also, regarding the lack of regulation of these legal relations at the level of law within the jurisdiction of Ukraine, the author expresses his opinion about the certain justification of such a situation until a unified normative act is adopted based on the results of the work of the Hague Conference on Private International Law.

Key words: surrogacy, conflict issues of legal regulation of cross-border surrogacy, protection of the rights of the child, international unification of legal regulation of surrogacy.

Problem setting. Addressing the chosen topic, it should be noted that scientific progress in reproductive technologies has led to a wide range of problematic issues. Talking about the field of human rights law, which is directly affected by the phenomenon of surrogacy, we identify the issues of child trafficking, non-discrimination and the right to health of children born through surrogacy, and citizenship and identity, and access to information on origin and the rights for family life, etc. These categories of rights are characterized by the impossibility of providing them with a comprehensive definition, as well as the complexity of international legal unification. The very delicacy of relations in the field of surrogacy is related to the protection of the rights of both surrogate mothers and people wishing to become parents. At the same time, in the light of the outlined issues, guarantees of protection of the rights of children born as a result of surrogacy agreements have a special place.

Analysis of recent researches and publications. In recent years, these issues have become the subject of research as some international organizations, especially within the UN, much attention has been paid to the reports of the Special Rapporteur on the sale of children and sexual exploitation of children, including child prostitution, child pornography and other sexual abuse of children. With regard to the direction of international legal unification, the relevant work is being carried out by the Hague Conference on Private International Law. Also, numerous scientists have devoted their scientific works at the international and domestic levels to the problematic issues of surrogacy, including Y. Babenko, Y. Pechegina, O. Tragnyuk and others.

Article's main body. Nowadays, the world sees it as possible to identify three main approaches to the problem of surrogacy and, above all, child trafficking, as clarifying the boundaries of this relationship allows for further resolution of problematic aspects. The first approach is a number of states and organizations that categorically deny the very possibility of trade in the context of surrogacy, noting that for the child it is not about any transaction. The second approach is the idea that a significant number of interested parties are concerned about the potential for merging surrogacy and child trafficking, which could lead to criminalization of surrogate mothers and expectant parents, as well as possible violations of sexual and reproductive health. The last group is a number of states and organizations that have spoken out in favor of a complete ban on surrogacy without any restrictions. This identification is based on an analysis of the response following the Special Rapporteur's report on surrogacy and child trafficking in 2018 in dialogue with the Human Rights Council [5]. Such ambiguity in approach leads to a situation in which residents of states with prohibitory jurisdictions circumvent their law and take the opportunity to enter into a surrogacy agreement in jurisdictions where these actions are not illegal. States that prohibit surrogacy face the foreign surrogacy agreements, which lead to problems related primarily to the realization of the child's rights to a family environment, access to information on origin, identity, and so on. The most serious problems arise in the countries, where sur-

rogacy agreements are not recognized as valid, are not enforceable and may even lead to criminal prosecution, which primarily entails serious consequences for a child born as a result of an international surrogacy agreement. As an example of the real risk of separation with the family of a surrogate child from the future parents after the decision of the national court, we can cite the case of Paradiso and Campanelli v. Italy (2017) [3]. In this case, the Italian authorities found out that there was no genetic link between the surrogate child and the future parents, denied the possibility of a family relationship between the parents and the child and placed the child in an alternative care facility. During the appeal lodged with the Court of Appeal of the European Court of Human Rights, the court ruled that the family had no de facto family ties, refused to recognize the legitimacy of the "parent-child" relationship abroad, and rejected it. However, the Chamber's initial decision recognizing the existence of de facto family ties, as well as the dissenting opinion of the six judges in the annex to the Grand Chamber's decision, who also acknowledged the existence of de facto family ties, indicate that the decision was linked to significant difficulties.

In its turn, the national courts of a number of countries have concluded that in order to ensure the best interests of the child, they must recognize the legitimacy of the "parent-child" relationship abroad, even if it is contrary to domestic law (Re X and Y (Foreign Surrogacy) (2008) [4].

The difficult issue of surrogacy can involve even more conflicts. In the case of international agreements on surrogacy, which affect states with different legal systems, a situation becomes probable in which the child may not obtain either the citizenship of the country of birth or the citizenship of his parents. As a confirmation that the threat of such a situation may be real, we give the case of Baby Manji Yamada v. Union (2008) [1]. During the trial, it was found that after the divorce of the parents planning to adopt, the surrogate child was left without documents in India, as neither Japan (recognizing only a surrogate mother) nor India (where single parents are not allowed to adopt) wanted to recognize the legitimate origin of the child from the future father. In the final decision, the Supreme Court of India ruled that it was necessary to issue an identity card to a surrogate child so that she could travel to Japan with her father.

Along with the issue of citizenship, name and family ties, within the framework of the respect for the child's right to preserve his or her identity, the question of the state's participation in providing the necessary assistance and protection of these rights arises. The specificity of the relationship associated with surrogacy changes the relationship between genetic, gestational and social functions of parents, which, among others, are part of the concept of identity, it should not change the basic rights of the child. Nowadays, the case law of the European Court of Human Rights is based on such principles. This is evidenced by the decisions in the cases of Mennesson v. France and Labassee v. France [2], in which petitioners challenged the denial of legal recognition in France of the relationship between parents and children legally established in the United States between children born as a result of surrogacy agreements and their future parents. Only the father had a genetic connection with the child. The court concluded that the authorities' failure to recognize the family relationship between the future parents and the child born as a result of the gestational surrogacy agreement in California violated one of the essential aspects of a person's identity, namely the legal relationship between parents and children, which is a violation of the child's right to respect for private life, guaranteed by Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The court once again stressed that ensuring the best interests of the child is more important than the government's desire to prevent its citizens from violating national surrogacy law.

In general, the Court's position reflects a global trend. Nowadays, more and more examples demonstrate the failure of prohibitive jurisdictions regarding surrogacy. Due to the fact that citizens are forced to circumvent national laws, which can have disproportionately worse consequences for children born as a result of a surrogate agreement. We are also of the opinion that in the case of surrogacy there can be no question of child trafficking, even when it comes to its commercial form. Because theoretically in the case of altruistic surrogacy, the issue of child trafficking is absolutely excluded. It is generally accepted that altruistic surrogacy is a gratuitous act that is often performed between family members or friends with an existing relationship, usually without the involvement of intermediaries. There are jurisdictions in which this connection is enshrined in law as a necessary condition. However, this deprives people who do not have such relatives or friends of the opportunity to resort to this type of assisted reproductive technology, which in practice can lead to dishonesty. The development of organized surrogacy systems, called "altruistic", often involving large sums of reimbursement to surrogate mothers, as well as significant payments to intermediaries, can blur the line between commercial and altruistic surrogacy. Under such conditions, regulated commercial surrogacy looks more appropriate than unregulated altruistic one.

It is believed to be possible to consider the relationship of surrogacy in the perspective of trade, for example,

gestational services. In this case, disputes can be resolved by signing an agreement. For example, in California, commercial surrogacy agreements signed during pregnancy qualify as child trafficking, while commercial surrogacy agreements signed prior to embryo transfer do not qualify in that way [6].

If we start moving from the idea that future parents cannot buy "their own" children, another question arises. With what degree of genetic relatedness will children be considered "their own"? After all, based on the findings of the Hague Conference on Private International Law, there may be no genetic link between a child born as a result of a surrogate agreement and its "legal parents". People (person) who ask another one to take a child for themselves with the intention to take custody of the child after birth and raise the child as their own. Such people may or may not be genetically related to the child born as a result of the agreement.

Speaking of the existence of surrogacy in the case when none of the spouse who plans to become the parent of a child, born as a result of such an arrangement, has a genetic connection with the child, it should be noted that in our opinion, the use of this assisted reproductive technology is justified. Because the same goal can be achieved by using the institution of adoption.

In light of this, it should be noted that Ukraine belongs to such jurisdictions in which the use of such assisted reproductive technology is allowed only if the spouse or one of the future parents, in whose interests the surrogacy is performed, must have a genetic connection with the child.

At the same time, despite the legality of surrogacy in Ukraine, the legal provision of this phenomenon is one of difficult and unresolved issues in the field of family law. As well as, at the cross-border level, the domestic urgency of the problem of surrogacy for Ukraine is due to the lack of sufficient regulations for the implementation of the procedure itself and the solution of problems that arise in practice during the implementation of the surrogacy program. In Ukraine today there is no definition of surrogacy at the legislative level. In the legal sense, surrogacy is the fertilization of a woman by implanting an embryo using the genetic material of the spouses for the purpose of carrying and giving birth to a child, which is then recognized as descended from the spouses, usually on a commercial basis under a contract between the spouses and the surrogate mother. Art. 123 of the Family Code of Ukraine establishes the procedure for establishing the origin of the child, who was born as a result of three types of reproductive technologies: artificial insemination, surrogacy and embryo implantation. This type of medical care is governed by Art. 48 of the Fundamentals of the Legislation of Ukraine on Health Care, according to which every able-bodied woman has the right to use artificial insemination and embryo implantation. The information about the use of artificial insemination and embryo implantation is a medical secret. According to the Procedure for the use of assisted reproductive technologies in Ukraine, approved by the order of the Ministry of Health of Ukraine dated form 09.09.2013 N787, a surrogate mother can be an adult woman with the condition that she has her own healthy child, her voluntary written consent, and in the absence of medical contraindications. This Procedure regulates in detail the range of people for whom medical programs are assisted by reproductive technologies, their examinations, methods of treatment of ART, donations of gametes and embryos and, in particular, the issue of surrogacy.

Ukraine is one of the few countries where surrogacy is permitted by law. Attitudes towards the legalization of surrogacy in other countries of the world still remain different. The Family Code of Ukraine on artificial insemination with the help of modern reproductive technologies does not protect the interests of the biological mother, but puts in the first place the terms of the agreement concluded between the surrogate mother and the spouses. The moment of concluding the agreement is essential in this legal relations. With regard to the determination of the legal father and mother of a child born to a surrogate mother as a result of in vitro fertilization, the provisions of the Family Code of Ukraine should be followed. In accordance with the provisions of Part 2 of Art. 123 of the FC of Ukraine "in case of transfer to another woman's body of a human embryo conceived by a spouse as a result of the use of assisted reproductive technologies, the child's parents are the spouses".

Thus according to Part 2 Art. 139 of the Family Code of Ukraine, contesting maternity is not allowed in the case of transfer to another woman's embryo of a person conceived by a couple as a result of the use of assisted reproductive technologies. The mentioned above provisions of the current legislation of Ukraine are aimed at ensuring the protection of the rights of the child and the rights of spouses who are the biological parents of the child. In particular, a child conceived as a result of the use of assisted reproductive technologies is guaranteed the right to a family, the presence of a mother and father who are the biological parents. The parents and children have rights, responsibilities and guarantees in accordance with the Family Code of Ukraine. Thus, the biological parents of a child born to a surrogate mother with the help of in vitro fertilization are the legal parents of such a child.

The provisions of Section III of the Family Code of Ukraine establish the rights and responsibilities of a mother, father and child. In particular, Art. 139 of the FC

of Ukraine provides for the possibility of the contestation of motherhood by a woman who is registered as the mother of the child, or the woman who considers herself the mother of the child, but is not registered by her. However, it is not allowed to contest the motherhood of a biological mother by a surrogate mother. It is believed that this provision is regulated by law, based on the moral opinion. There is a possibility of a woman who gave birth to a child (a surrogate mother), maternal feelings for the child, who is biologically alien to her. In this case, the rights of the biological mother are protected by law; and above all, the rights and interests of the child are protected, taking into account the genetic and biological affinity with the mother.

As in many other jurisdictions, Ukraine requires to improve the legal regulation of assisted reproductive technology such as surrogacy. The lack of a special legal act that would regulate in detail all aspects of surrogacy, with a fairly common practice, indicates that nowadays there has not been a full legal adaptation of Ukrainian society to the development of medicine in the field of reproductive technologies. It should also be noted that the essential terms of the contract concluded between the surrogate mother and the biological parents (spouses) are insufficiently regulated.

As mentioned above, the lack of proper legal regulation of the relations between the surrogate mother and the spouse can lead to violations of the rights of all participants in these relations, both biological parents and the surrogate mother and the child born as a result of surrogacy agreements. And the situation can become much more complicated if there is a foreign element in these relations.

The existence of the considered risks has led to the formation of a certain public opinion about the need to ban in Ukraine such reproductive technology as surrogacy in order to avoid the negative consequences of such a procedure and prevent circumvention of the law in the case of cross-border surrogacy.

In our humble opinion, such points of view are at odds with current trends. The world practice shows that prohibitory jurisdictions cannot avoid the risks of negative consequences of surrogacy, and in some cases for children born with this type of assisted reproductive technology, there is an insecurity of their rights and interests. We are of the opinion that the existing relations of surrogacy should not be prohibited, but carefully regulated both at the domestic and international levels through the development and adoption of relevant regulations. The literature has repeatedly expressed the need to protect the property and non-property rights and legitimate interests of the people participating in the surrogacy program, through the use of individual legal means and mechanisms, in particular, the adoption in Ukraine of the law "On Assisted Reproductive Technologies", but not the first version of which still remains at the project stage.

In addition, a particularly "acute problem" has emerged in recent years: it is well known now that surrogacy is a global business. This has created a number of problems, especially when surrogacy arrangements involve parties in different countries. In particular, international surrogacy agreements (ISAs) can often lead to the difficulties described above in establishing or recognizing the legal paternity of a child (children) born as a result of this agreement, sometimes leaving the child without parents. This can have far-reaching legal consequences for all people involved: for example, it may affect the child's nationality, immigration status, and attribution of parental responsibility for the child or the people (a person) who are obliged to support the child financially, and so on. Difficulties may also arise because the parties involved in such an arrangement are vulnerable and at risk.

On behalf of its members, the Permanent Bureau of the Hague Conference on Private International Law (HCCH) is currently examining the issues of private international law faced in connection with the legal origin of children, as well as in connection with international agreements on surrogacy more specifically.

The HCCH Expert Group, convened in 2015 by the General Affairs and Policy Council (CGAP) to study the feasibility of advancing work in this area, is geographically representative and consulted with the members.

Currently, the Expert Group meetings took place in February 2016, January / February 2017, February 2018, September 2018, January / February 2019, October / November 2019, October 2020 and February 2021 [7].

In March 2021, the CGAP extended the mandate of the Expert Group for one year to allow the submission of the final CGAP report at the 2023 meeting. This will allow the group to hold at least one face-to-face meeting before submitting the final report, as well as to continue intersessional work and convene several short online meetings. The current work of the Group of Experts focuses on the development of potential provisions for the inclusion in the general document of private international law on legal paternity and a separate record on legal paternity, created as a result of international agreements on surrogacy [7].

Conclusions and prospects for the development. Summarizing the above mentioned issues, we would like to point out that the compliance with these recommendations requires urgent measures to prevent violations of the rights of all participants in the relationship related to surrogacy, due to their vulnerability. Regard-

ing the lack of regulation of these legal relations within the jurisdiction of Ukraine at the level of law, we would like to express the opinion that such a situation is justified until a unified normative act is adopted based on the results of the Hague Conference on Private International Law. Harmonization of legal norms at the national and international levels will allow in the future to avoid conflicts in relations of cross-border surrogacy, taking into account the issues of child trafficking, non-discrimination and the right to health of children born through surrogacy, within the framework of respecting the child's right to preserve his or her identity, as well as access to information on origins and rights to family life, etc.

RESOURCES

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КОЛЛИЗИОННЫЕ ВОПРОСЫ ПРАВОВОГО РЕГУЛИРВАНИЯ СУРРОГАТНОГО МАТЕРИНСТВА В МЕЖДУНАРОДНОМ ЧАСТНОМ ПРАВЕ

Статья посвящена актуальной проблеме суррогатного материнства и коллизионным вопросам ее проавового регулирования в международном частном праве. Исследованы сложные и многоаспектные вопросы, возникнове-

ние которых обусловлено рождением детей в результате договоренностей о суррогатном материнстве. Проанализированы существующие в мире основные подходы к проблеме суррогатного материнства и их последствия. Сделан ряд выводов, в частности относительно необходимости принятия неотложных мер по предотвращению нарушения прав всех участников отношений, связанных с суррогатным материнством, отсутствия в пределах юрисдикции Украины регулирования указанных правоотношений на уровне закона, гармонизации правовых норм национального и международного уровней, а также доступа к информации о происхождении и права на семейную жизнь.

Ключевые слова: суррогатное материнство; коллизионные вопросы правового регулирования трансграничного суррогатного материнства; защита прав ребенка; международная унификация правового регулирования суррогатного материнства.

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КОЛІЗІЙНІ ПИТАННЯ ПРАВОВОГО РЕГУЛЮВАННЯ СУРОГАТНОГО МАТЕРИНСТВА У МІЖНАРОДНОМУ ПРИВАТНОМУ ПРАВІ

Постановка проблеми. Статтю присвячено актуальній проблемі колізійних питань правового регулювання сурогатного материнства у міжнародному приватному праві. Досліджено складні й багатоаспектні питання, виникнення яких зумовлено народженням дітей у результаті домовленостей про сурогатне материнство.

Аналіз останніх досліджень і публікацій. Останніми роками окреслена проблематика є предметом досліджень багатьох міжнародних організацій. Насамперед у межах ООН цьому питанню було приділено окрему увагу в доповідях Спеціального доповідача ООН з питань торгівлі та сексуальної експлуатації дітей, включаючи дитячу проституцію, дитячу порнографію та виготовлення інших матеріалів про сексуальні наруги над дітьми. Відповідна робота з даної питання в напрямі міжнародно-правової уніфікації проводиться Гаазькою конференцією з міжнародного приватного права. Також проблемам сурогатного материнства присвячено велику кількість праць науковців на міжнародному та вітчизняному рівні, серед яких Ю. Бабенко, Ю. Печегіна, О. Трагнюк та ін.

Виклад основного матеріалу. У статті звернуто увагу на те, що сьогодні у світі можна ідентифікувати три основні підходи до врегулювання проблеми сурогатного материнства й насамперед торгівлі дітьми, оскільки з'ясування меж саме такого співвідношення дозволяє в подальшому врегулювати проблемні аспекти. Найбільш серйозні проблеми виникають у державах, де договори про сурогатне материнство не визнаються дійсними, не підлягають примусовому виконанню і навіть можуть бути підставою для кримінального переслідування, що спричиняє тяжкі наслідки для дитини, яка народилась у результаті міжнародної домовленості про сурогатне материнство.

Окрім питань громадянства, імені та родинних зв'язків у межах поваги до права дитини на збереження своєї ідентичності постає також питання участі держави в забезпеченні необхідної допомоги і захисту зазначених прав. Специфіка відносин, пов'язаних із сурогатним материнством, змінює співвідношення між генетичними, гестаційними та соціальними функціями батьків, які, поряд з іншими, є складовими поняття ідентичності, і це жодним чином не повинно змінювати основні права дитини.

Авторкою підкреслено, що, незважаючи на законність сурогатного материнства в Україні, правове забезпечення даного явища в цій юрисдикції є одним із складних і законодавчо не врегульованих питань у галузі сімейного права. Так само як і на транскордонному рівні, внутрішньодержавна актуальність проблеми здійснення процедури сурогатного материнства для України зумовлена відсутністю достатнього нормативного регулювання як здійснення безпосередньо самої процедури, так і вирішення проблем, що виникають на практиці під час реалізації програми сурогатного материнства.

Висновки. Підсумовуючи викладене, авторка зазначила, що дотримання наведених рекомендацій Спеціального доповідача з питань торгівлі дітьми й сексуальної експлуатації дітей, включаючи дитячу проституцію, дитячу порнографію та виготовлення інших матеріалів про сексуальні наруги над дітьми, потребує вжиття невідкладних заходів для запобігання порушенню прав усіх учасників відносин, пов'язаних із сурогатним материнством, через їхню вразливість. Щодо відсутності в межах юрисдикції України регулювання зазначених правовідносин

на рівні закону, ми хотіли висловити думку про певну виправданість такої ситуації до того часу, поки не буде прийнято уніфікованого нормативного акта за результатами роботи Гаазької конференції міжнародного приватного права. Гармонізація правових норм національного і міжнародного рівнів в подальшому сприятиме уникненню колізій у відносинах транскордонного сурогатного материнства з урахуванням питань торгівлі дітьми, недискримінації й права на здоров'я народжених за допомогою сурогатного материнства дітей, питань громадянства, імені та родинних зв'язків у межах поваги до права дитини на збереження своєї ідентичності, а також доступу до інформації про походження і права на сімейне життя та ін.

Ключові слова: сурогатне материнство; колізійні питання правового регулювання транскордонного сурогатного материнства; захист прав дитини; міжнародна уніфікація правового регулювання сурогатного материнства.

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