

LEGISLATION ON SURROGATE MATERNITY IN UKRAINE AND THE EUROPEAN UNION

Marian Yunatskyi¹

¹Ph.D. (Economics), Associate Professor Department of Civil and Economic Law

Donetsk Law Institute of the Ministry of Internal Affairs of Ukraine, Kryvyi Rih, Ukraine, e-mail: marionumo@gmail.com, ORCID: 0000-0003-2093-716X

Abstract. Services in the form of surrogate motherhood have always caused controversy in Ukrainian society. There is no proper legal regulation of this type of reproductive technology, so as a result of this, illegal actions occur in the form of the sale of newborn children, embryos and eggs. According to Ukrainian legislation, such behavior will be regarded as socially dangerous and is stipulated by the Criminal Code of Ukraine in Article 149 "Trafficking in people" [1].

At the same time, the Declaration of the Rights of the Child stipulates: "a child must be protected from all forms of neglect, cruelty and exploitation. It should not be an object of trade in any form" [2].

It is characteristic that the contract on surrogate motherhood is not determined by any provisions of the Civil Code of Ukraine (hereinafter referred to as the Civil Code of Ukraine), but it should be considered civil law, since the signing of the contract establishes and regulates the rights and obligations of both parties (as a surrogate mother or father, and and biological parents) and contributes to the emergence of civil legal relations [3].

Such a transaction should be recognized as consensual, because it is considered to have been concluded if the parties have reached agreement on all the essential terms of the contract in the proper form (Part 1 of Article 638 of the Civil Code of Ukraine). That is, it can be assumed that when performing such synalagmatic transaction, individuals must comply with Chapter 52 of the Civil Code of Ukraine, which establishes the basic provisions of the contract. But in view of the special object of the contract on surrogacy in the form of the process of conception, bearing, birth and transfer of the baby to the biological parents, there is a need

for its legislative recognition as a separate and independent type of contract in civil legislation. According to Part 5 of Article 626 of the Civil Code of Ukraine, a contract is retaliatory, unless otherwise established by the contract, the law or does not follow from the essence of the contract. Such a contract usually provides for a fee, but upon agreement of the parties, such a service can be free of charge, since there is no mandatory rule that would regulate it.

As a result of the armed aggression of the Russian Federation, new problems have appeared in this area, which prevent the honest performance of civil legal obligations. Examples include the risky border crossing by biological parents or the inability to pick up a newborn child due to the unknown location or occupation of the territory where the surrogate mother lived. To this day, the number of babies or children who are still in the womb of a surrogate mother is unknown, since the Ukrainian state does not have a register of newborn children who appeared as a result of a surrogate motherhood contract. A separate problem is not only the registration of such babies, but also obtaining documentation that would confirm the genetic link between the child and the biological parents. As a result, establishing the paternity of such children and their legal emigration are impossible. Due to the fact that the Ukrainian birth certificate of a child from a surrogate mother is not recognized in many less liberal countries, biological parents need to prove in court the fact of a genetic connection between a man and a woman who used the services of surrogate motherhood and a newborn baby. That is, it is actually necessary to adopt your own child.

There is also the problem of non-compliance with the provisions of the contract on surrogacy. So, for example, part 3 of

Article 143 of the Family Code of Ukraine establishes: "A child may be left by his parents in a maternity hospital or other health care facility if he has significant defects in physical and (or) mental development, as well as in the presence of other circumstances , which are of significant importance" [4].

At the same time, the right of an individual to a family, regardless of age or health status, which is formulated in part 1 of Article 291 of the Civil Code of Ukraine, is violated. In this case, there is a conflict of interests between the genetic parents and their newborn child from the surrogate mother.

The various legal frameworks among the member states of the European Union are reflected in the various forms and justifications of surrogacy contracts. These agreements often set up the expectations, responsibilities, and rights of all parties, notably the intended parents and the surrogate mother. Depending on the jurisdiction, these contracts may take the shape of private agreements, notarized documents, or documents that have been approved by a court.

These contracts sometimes include clauses relating to monetary compensation, the intended parents' obligations, the surrogate's renunciation of parental rights, and possible contingencies in the event of medical or legal issues. It is crucial to remember that these contracts' validity and enforceability vary between EU member states as a result of the various surrogacy-related regulatory frameworks and perspectives in the area.

The regulatory framework for regulating surrogate motherhood issues in the European Union is:

- The Treaty on the Functioning of the European Union (TFEU). The TFEU provides a framework for the EU's competence in matters related to public health, gender equality, and the free movement of persons. It is essential to analyze how these provisions may influence the regulation of surrogacy. For instance, Article 168(1) grants the EU authority in public health matters, enabling it to address cross-border health issues associated with surrogacy. Similarly, Article 19 ensures the principle of non-discrimination

on grounds of gender, which is relevant when considering the rights of surrogate mothers and intended parents [5].

- Charter of Fundamental Rights of the European Union. The Charter of Fundamental Rights of the European Union enshrines various rights that are relevant to the regulation of surrogacy. Article 7 protects the right to respect for private and family life, while Article 24 recognizes the rights of the child. These provisions play a crucial role in determining the legal framework for surrogacy and the balancing of rights and interests involved [6].

- European Convention on Human Rights (ECHR). The ECHR, although not an EU instrument, is significant in assessing the compatibility of national legislation with human rights standards. Relevant articles include Article 8 (right to respect for private and family life) and Article 12 (right to marry and found a family). The European Court of Human Rights has dealt with several cases related to surrogacy, providing valuable jurisprudence on the subject [7].

- Directives and Regulations. EU directives and regulations may have indirect implications for surrogacy regulation. For instance, the EU Gender Equality Directive (2006/54/EC) prohibits discrimination based on sex, including in the context of employment and social security. The EU Family Reunification Directive (2003/86/EC) also has implications for the recognition of parental rights and citizenship in cases involving cross-border surrogacy [8, 9].

Cross-border factors in surrogacy frequently include the nationality or place of residence of the intended parents, the surrogate, or the country of the child's birth. When various legal systems are involved, legal conflicts occur. Understanding the legal environment of cross-border surrogacy inside the EU requires careful examination of the EU rules on private international law and any potential inconsistencies between state laws.

By examining EU legislation, including treaties, directives and regulations, we can gain insight into how the existing legal framework affects surrogacy in the European Union. Understanding the compatibility of

EU legislation with the regulation of surrogacy is important for the development of an appropriate legislative and regulatory framework in Ukraine that would respect

human rights, ensure legal clarity and promote cross-border cooperation between member states and Ukraine.

Keywords: Ukrainian society; armed aggression; non-compliance.

References:

1. Kryminal'nyy kodeks Ukrayiny [Criminal codex of Ukraine]. (2001, April 05). *Vidomosti Verkhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo [in Ukrainian].
2. Declaration of the Rights of the Child. (1959). General Assembly Resolution 1386(XIV). Retrieved from <http://www.un-documents.net/a14r1386.htm>
3. Tsyvil'nyy kodeks Ukrayiny [The Civil Code of Ukraine]. (2003, January 16). *Vidomosti Verkhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo [in Ukrainian].
4. Simeynyy kodeks Ukrayiny [Family Code of Ukraine]. (2002, January 10). *Vidomosti Verkhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo [in Ukrainian].
5. Treaty on the Functioning of the European Union. (2008). Official Journal of the European Union, C 115/47. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>
6. Charter of Fundamental Rights of the European Union. (2012). Official Journal of the European Union, C 326/391. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AC%3A2012%3A326%3ATOC>
7. European Convention on Human Rights. (1950). ETS No. 5. Retrieved from https://www.echr.coe.int/Documents/Convention_ENG.pdf
8. EU Gender Equality Directive. (2006). Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation. Official Journal of the European Union, L 204/23. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32006L0054>
9. EU Family Reunification Directive. (2003). Directive 2003/86/EC of the European Parliament and of the Council of 22 September 2003 on the right to family reunification. Official Journal of the European Union, L 251/12. Retrieved from <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003L0086>

How to cite:

Yunatskyi, M. (2023). Legislation on surrogate maternity in Ukraine and the European Union. *International Conference on Corporation Management*. DOI: <https://doi.org/10.36690/ICCM-2023-45-47>.