

Establishment of Maternity and Paternity in Application of Artificial Human Reproduction Methods

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Abstract

Today, the Family Code of the Russian Federation allows the use of modern reproductive technologies in order to partially solve the infertility problem in Russia. Currently, medicine knows several methods of reproductive activity which are regulated in different ways from the point of view of law. The study of legislation has shown that at present there is no single act that could most fully regulate the use of ART (hereinafter referred to as assisted reproductive technologies).

Based on the analysis of the current civil legislation in the Russian Federation, and on the theoretical provisions of the legal regulation for the use of artificial human reproduction methods, the mechanism of maternity and paternity is used in the application of assisted reproductive technologies in modern civil law of the Russian Federation.

The general methodological basis was formed by the general scientific (dialectic) method of cognition, comparative legal and logical methods, what made it possible to consider the civil legislation development problems in the sphere of legal regulation of the assisted reproductive technologies being applied.

The paper presents the authors' own views and analyzes the theoretical studies of scientists in this field.

Keywords

Assisted Reproductive Technologies, Surrogate Motherhood, Potential Parents, Rights of a Child

Introduction

Currently, both in Russia and abroad, there is an acute problem of infertility among married couples. The causes of infertility are deviations in health, poor ecology, hereditary diseases, and social factors. The basis of "social infertility" may lie in divorces, widowhood, and voluntary sterilization [1]. In this regard, the possibility of using assisted reproductive technologies is gaining increasing popularity in the world. For example, such terms as "reproductive journey", "fertility tourism", "medical tourism", "reproductive tourism" were introduced by individual scientists quite a long time ago and accepted for use abroad [2; 3; 4]. However, the lack of proper legal regulation of these issues in foreign countries has created certain legal problems. So in India, the legalization of commercial surrogacy in 2002 was associated with an attempt to stimulate medical tourism in this area. The growing demand for surrogate motherhood in India and, at the same time, the lack of adequate legal regulation has caused problems, including problems related to the rights of the child [5]. In 2015, a law was issued in Thailand according to which only married Thai couples or couples where one spouse has been a Thai citizen, who has been married for more than three years, may seek a surrogate mother on a voluntary basis. Commercial surrogacy is prohibited and punishable by up to 10 years in prison [6]. In the UK, surrogate motherhood is allowed, provided that the biological parents pay reasonable expenses related to the pregnancy and childbirth of the surrogate mother. Commercial surrogacy is prohibited. Australian legislation on the use of this method of assisted reproductive technologies, such as surrogacy, also prohibits the commercial basis of these legal relationships [7]. In Kazakhstan, commercial surrogacy is prohibited [8].

In Russia, the use of assisted reproductive technologies is legally regulated by the Family Code of the Russian Federation, the federal law "On the basis of the protection of the health of citizens in the Russian Federation" dated November 21, 2011. № 323-FZ. The issues of assisted reproductive technologies are most fully settled by the Order of the Ministry of Health of Russia "On the procedure for using assisted reproductive technologies, contraindications and restrictions on their use" (hereinafter referred to as Order No. 107n). It contains more information of a medical nature, regulates the procedure for rendering medical assistance in the application of assisted reproductive technologies, but it provides the definitions necessary for a correct understanding of the norms contained in the Family code of the Russian Federation.

According to the Order No. 107n, assisted reproductive technologies should be understood as such methods of combating infertility when some or all stages of conception occur outside a female body. At the same time, it is possible to use our own reproductive material stored using cryopreservation, donor germ cells, tissues of the reproductive organs and tissues of embryos, and surrogate motherhood.

Thus, the Family Code of the Russian Federation indirectly recognizes three methods of assisted reproductive technologies: artificial insemination, embryo implantation, embryo implantation into the body of a surrogate mother.

Methods

The Russian legislation does not contain a legal definition of artificial insemination. Back in 2000, A.V. Mayfat formulated the definition and proposed to introduce it at the legislative level [9]. In his opinion, artificial insemination should be understood as a method of reproductive activity in which donor material is introduced to a female applicant, and conception occurs in the body of a female applicant, which then bears and bears a child.

From a medical point of view, when using the artificial insemination method, there can be a lack of a genetic connection between the child and the applicant's parents. Then the question fairly arises: who should be recorded as the parents of the newborn during the state registration of the birth of the child?

The Family Code of the Russian Federation regulates these legal relations imperatively, and not in favor of genetic donors. So, if a child was born using the method of artificial insemination or embryo implantation, then those who are married and have given consent to the use of artificial insemination or implantation of the embryo will be registered as parents of the newborn.

The Supreme Court of the Russian Federation has formed its position on this issue as follows: if a child is born using a donor material, then parental relations do not arise between him and the donor. It does not matter if the person was known to the child's parents or not (an anonymous donor). Moreover, when challenging and (or) establishing maternity or paternity, a donor does not have the right to refer to the fact that he/she is the biological parent of the child. Accordingly, the requirements of persons recorded as parents of the newborn to establish the paternity of the donor's motherhood are also not subject to satisfaction [10].

As for surrogate motherhood, the situation is complicated by the direct involvement of a surrogate mother in the process of bearing and delivery of a child. During the pregnancy of a surrogate mother, a close psycho-emotional connection arises between her and the child. In practice, there are a large number of cases when, due to this connection, a surrogate mother cannot give up her part after the birth of the child and refuses to give him/her to the biological parents. The Russian legislator in regulating this situation rises to protect the rights of the surrogate mother. The Family Code of the Russian Federation establishes that persons who are married and have given written consent to the implantation of an embryo to another woman for the purpose of carrying it can be recorded as the parents of the child only with the consent of the surrogate mother.

Thus, if the surrogate mother refuses to give such consent, she is specified by the registry offices as the mother of the newborn. This entails the emergence at a surrogate mother of property and personal non-property rights and obligations in relation to the child born by her.

This position of the legislator is not absolutely fair, since genetic parents are deprived of entire legal protection and become completely dependent on the will of the surrogate mother. The situation of manipulation of biological parents by a surrogate mother who agreed to the procedure for bearing a child is not excluded.

Results and Discussion

The views of lawyers described in modern legal literature on these legal provisions are ambiguous.

In our opinion, when using surrogate motherhood as a method of human reproduction, it is the biological parents that should be recorded as the parents of the newborn. In fact, in the current situation, they are less protected from the point of view of the law since they can be recorded as parents only with the consent of the surrogate mother. But their initial interest in the birth of a child and in the possibility of becoming parents is much higher than that of a surrogate mother.

Order No. 107n contains requirements for a woman who may be a surrogate mother. They can be considered as guarantees of the performance of a surrogate motherhood contract. They boil down to the following: a woman from twenty to thirty-five years old who has at least one healthy child of her own can act as a surrogate mother. She also needs a medical certificate of satisfactory condition and health. A future surrogate mother must give written informed voluntary consent to medical intervention in her body in order to implant the embryo. If the future surrogate mother is married, then the written consent of her spouse is necessary.

If the surrogate mother refuses, in the contrary to the contract, to transfer the child to his/her biological parents, then they are entitled to claim compensation for all the costs incurred by them related to the pregnancy and childbirth of the surrogate mother. Also, the surrogate mother is charged with the payment of appropriate penalties provided for by the contract. The court does not have the right to make a decision on the compulsory transfer of the child to biological parents if the surrogate mother is insolvent. Thus, there are no real objective guarantees of the exercise of parental rights and the exercise of the right to protection by biological parents. Undoubtedly, such a procedure for settling relations between parties to a surrogate motherhood contract puts not only biological parents in a difficult situation, but also the child himself who has the right to live and be raised in a family [11]. Based on the essence of civil law, the child cannot be the subject of a transaction. Accordingly, the condition of the contract on the mandatory transfer of the child after his/her birth to biological parents can be considered void.

However, the lack of consent of the surrogate mother to the transfer of the child to the biological parents is not an absolute basis for refusing to satisfy the claim on recognition of the genetic applicant parents as the child's parents. When considering disputes between a surrogate mother and biological parents about the fate of a newborn child, the court, first of all, in accordance with paragraph 31 of the Resolution of the Plenum of the Supreme Court "On the application by the courts of law in the consideration of the cases related to the identification of origin of children" dated May 16, 2017 No. 16 should be based on the interests of the child.

Legal problems regarding the future fate of the child also arise in the opposite situation, when biological parents do not want to adopt a child born by a surrogate mother. It remains unresolved questions about who will be listed in the birth certificate of the child as his/her parents. Do the biological parents have an alimony obligation in relation to their child?

In medical practice, another method of human reproduction, namely, posthumous reproduction is used. It is subject to cryopreservation and storage of reproductive material. Reproductive material of the deceased spouse can be used by another spouse to conceive and give birth to their common child through artificial insemination. In this case, problems during the procedure for establishing the child's origin are excluded. Thus, in accordance with paragraph 2, Art. 28 of the Family Code of the Russian Federation, if a child was born within three hundred days from the death time of their mother's spouse, and then the spouse of the mother is recognized as the father of the child. However, theoretically and practically posthumous reproduction can also be used by strangers who are not spouses. Thus, a surrogate motherhood agreement was concluded between the surrogate mother and grandmother of the intended child, the child was conceived with the help of posthumous reproduction and the donor was the deceased son of the female applicant [12]. Such situations are not regulated by the domestic legislator and, accordingly, the birth of a child through posthumous reproduction in this case gives rise to legal problems associated with the registration of his/her birth.

Summary

It should be concluded that issues related to the establishment of maternity and paternity at childbirth using assisted reproductive technologies are poorly regulated by the legislation of the Russian Federation. Special problems in this area arise when applying surrogate motherhood.

In accordance with the Family Code of the Russian Federation, the application of artificial insemination or implantation of an embryo into the body of a woman which agreed to the use of this method of assisted reproductive technologies, gives birth to parental relationships between this woman and the child. The parents of the child are recorded in this case by the applicant parents.

When using surrogate motherhood, the possibility of parental rights of spouses (single women) awaiting the transfer of a child is directly dependent on the will of the surrogate mother who bore and gave birth to the child. In accordance with the Family Code of the Russian Federation, applicant parents (biological parents) can be recorded by the parents of the child with the obligatory consent of the surrogate mother.

Some of the controversial issues arising from the application of family law, were clarified in the Resolution of the Plenum of the Supreme Court of the Russian Federation "On the application by courts of law when considering cases related to determining the origin of children" dated 05.16.2017.№ 16.

Unfortunately, in the Russian Federation there is no special law on surrogate motherhood, despite the fact that the practice of using surrogate motherhood is constantly expanding. Many problems in this area are not legally resolved. For example, until the end of the agreement does not define the status of surrogacy (it must execute a contract in the provision of paid services). There is no detailed regulation of the rights and obligations of the parties to the relationship related to the use of assisted reproductive technologies. The responsibility of the surrogate mother in refusing to give her child to potential parents, the responsibility of potential parents refusing to take the newborn child, the procedure for payment for the surrogate mother and so on are not defined. The lack of regulation of such important provisions related to the use of assisted reproductive technologies leads to the development of a shadow market for surrogate motherhood, to the violation of the rights and interests of participants in such relations [13].

In addition, legal problems associated with the use of assisted reproductive technologies exist abroad. The courts face the problem of the legal status of a child born by a surrogate mother [14].

As S.B. Bulets points out, in the family and civil law of Ukraine there are also no norms ensuring the protection of the interests of genetic parents [15]. For example, in the legislation of Ukraine there are no norms establishing the responsibility of a surrogate mother for blackmailing from the biological parents with interrupting pregnancy, refusing to give them a child after birth, disclosing information about the method of birth of a child, in demanding additional money for their maintenance during pregnancy. The surrogate mother, in turn, is also not protected from unfair actions by the applicant parents. For example, responsibility has not been established when genetic parents refused to pay to the surrogate mother the promised monetary compensation, to provide her with appropriate conditions during pregnancy and childbirth or if they have rejected from the child for various reasons [15].

The legislation of the Russian Federation also does not determine the fate of a child born using surrogate motherhood, but after the death of biological parents.

Conclusion

In connection with the lack of full-fledged legal regulation, the legislator took the initiative to ban surrogate motherhood. In March 2017, the State Duma introduced a bill No. 133590-7 "On Amendments to Certain Legislative Acts of the Russian Federation regarding the prohibition of surrogate motherhood" [16].

In the explanatory note to the bill, the initiators indicated that Russia is among the countries with the most liberal and least developed legislation governing surrogate motherhood, and therefore they propose to ban it at the legislative level.

In our opinion, the ban, as a method of regulation, is inadvisable in this case, since assisted reproductive technologies, in general, and surrogate motherhood in particular, are quite widespread both in Russia and abroad. For many couples,

the use of surrogate motherhood is a real salvation in a seemingly hopeless situation. With the introduction of the prohibition of surrogate motherhood, the demand for the services of surrogate mothers will not diminish, contracts will be concluded further. But in this case, the relations between the parties to the surrogacy agreement will become illegal and the participants will remain without legal protection.

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