

Surrogacy and its Legal Consequences According to the Legislation of Georgia

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Abstract

The present article overviews surrogacy and its legal consequences according to the Georgian legislation, compares surrogacy legislation of common-law and continental countries and Georgian Legislation. Differences in legislation regulating surrogacy field in Georgia, EU countries and United States are emphasized. The main purpose of the present article is to introduce the main legal problems that we face in Georgian legislation regarding the surrogacy issue. For example, how Georgian legislation ignores the rights of a surrogate mother and a child's interests; besides, how currently in forced Georgian legislation promotes commercial surrogacy in Georgia, and a child becomes an object of trade in exchange for certain remuneration, while a surrogate mother or a gestational mother is only a device, a vessel for an embryo development and maintenance. I believe that such kind of articles will facilitate creation and development of the legislation that will defend equal human rights and will secure not only "client parents" rights, but also the rights of a surrogate mother and a child and will interfere to establish surrogacy as "cheap and profitable business" in Georgia.

Keywords: Surrogacy and its legal consequences according to the legislation of Georgia

Introduction

Concept of surrogacy

Surrogacy means relocation of a fetus into another woman's body for the purpose of its further nurture and transfer to other persons. Surrogacy can be done by artificial or natural fertilization, or through embryo transplantation, and a baby is transferred to the "client couple" after the birth.

A surrogate mother is an "incubator" bearing an artificially fertilized embryo for nine months who had declared her consent before the pregnancy according to which, a baby will be given to this couple after the birth.

Types of surrogacy

There are two basic types of surrogacy: partial surrogacy and full surrogacy. In the case of partial surrogacy, a surrogate mother is also the genetic mother at the same time. In such cases, the egg is fertilized by artificial insemination, while a full surrogacy embryo is a bearer of the client couple's genetics, and the embryo gets relocated into the mother's womb after artificial insemination.

In case a person wishing to become a mother fails to produce an egg, she receives a donor mother's invitro fertilized egg implanted, and in this case the person wishing to become a mother is also the birthmother, while the egg donor is the genetic mother.

In some cases, surrogacy is performed free of charge, i.e. a surrogate mother agrees to donate a child after the birth to a childless couple (the so-called altruistic surrogacy), but in most cases, a surrogate mother transfers a child after the birth to a couple in exchange for a pre-agreed remuneration (the so-called commercial surrogacy).

The legislation of Georgia, in particular the Law "on Healthcare", recognizes surrogacy. In accordance with the Article 143 of the mentioned law:

1. Extracorporeal fertilization is allowed:

A) for the purpose of treatment of infertility, as well as in cases when there is a risk of transmission of a genetic disease on the part of the husband or wife; it (extracorporeal fertilization) uses the couple's or a donor's gametes or embryos, if the couple's written consent has been received;

B) if a woman has no uterus - for the purpose of relocation and nurture of an embryo, received as a result of fertilization, into another woman's ("surrogate mother") uterus; the couple's written consent is required.

2. In case a child is born, the couple is deemed to be parents with consequent responsibilities and authorities; the donor or "surrogate mother" has no right to be recognized as a parent of the child born.

Based on the analysis of the abovementioned Article, it is obvious that a donor is considered to be the genetic mother, while a person wishing to become a mother – as the mother, because the Article contains an imperative clause according to which, a donor - surrogate mother - does not have the right to be recognized as a parent. Accordingly, "client parents" wishing to have a child are deemed to be legally recognized parents, irrespective of whether a full or partial surrogacy was carried out. Legal relations between a mother and a child arise on the basis of the child's birth, rather than based on genetics. Even if a donor mother is the surrogate mother at the same time, according to the abovementioned Regulation, she is initially deprived of the right to recognition as a parent.

The said statutory provision directly promotes commercial surrogacy in Georgia, against the background where there are frequent cases of financial destitution, and a child becomes an object of trade in exchange for certain remuneration, while a surrogate mother or a gestational mother is only a device, a vessel for an embryo development and maintenance.

Comparative legal analysis of surrogacy according to legislation of common-law and continental countries

Regulations of the common-law countries are more humane than the Georgian legislation according to which, a woman who gave the birth to a child is regarded as his/her mother, rather than the client even if she was the genetic mother.

According to the legislation of the UK (“Law on Human Fertilization and Embryology”), surrogacy is permitted under the following restrictions: surrogacy shall be free of charge and merely the compensation of expenses shall be permitted. Surrogacy shall be carried out in a licensed facility. After the child’s birth, the surrogate mother shall not be deprived of her right to keep the child; on the contrary – she has the right to remain the child’s mother; and the client couple may receive parental rights by adopting the child or obtaining a parental order based on the court decision. At the same time, when making such a decision, the court shall clarify the following circumstances: whether or not the egg or the sperm, or both of these, belong to the client couple, whether or not those persons are in a registered marriage, or whether or not they have an actual coexistence. In addition, the child shall live with the client couple, and the surrogate mother shall declare her consent to issuing the parental order. It is also important that the client couple is at least 18 years of age, and the request for their recognition as parents is declared no later than 6 months after the birth of the child. The surrogate mother’s consent is not deemed to be valid if it was issued earlier than 6 weeks before the child’s birth, which is due to the desire to protect the surrogate mother’s interests based on the mental and emotional status of a woman who has given birth to a child.

In the United States, the current legal regulation is partly based on the case law and partly on the developed legislation, and deems any forms of surrogacy, including the commercial one, to be unacceptable.

Only altruistic surrogacy is allowed in some States (such States are: Washington, Nevada, Florida, Louisiana, etc.), and some of the States consider surrogacy as a wrongful act committed against public order and completely prohibit it. For example: New York, Michigan, Indiana.

German law is radical with regard to surrogacy; according to its Civil Code, mother is a woman who gave birth to a child. At the same time, the German law establishes a concept of legal and genetic motherhood. In

addition, special legislative acts prohibit surrogate motherhood and the German Civil Code considers a surrogate motherhood agreement as an illegal and immoral transaction.

Also the Swiss law considers surrogate motherhood inadmissible, and any form of surrogacy is strictly forbidden in France. It is prohibited also in Spain and the Czech Republic, while in Italy it used to be allowed by the court, although recently it has been completely banned by a legislative act.

An exception is made by the approach of Greece, where surrogate motherhood is permitted by a prior permission of the court, given the donor's informed consent and placement of a fertilized egg into the woman's body.

Registration of birth of a child born as a result of surrogacy

The Article 30 of the Law of Georgia "on Civil Acts" defines the registration procedure for children born as a result of extracorporeal fertilization. In particular, it is established that the birth registration of a child born as a result of extracorporeal fertilization shall be carried out in accordance with this Law, the Law of Georgia "on Healthcare", and the procedure established by a decree of the Minister of Justice of Georgia.

The paragraph 2 of the Article 143 of the Law of Georgia "on Healthcare" establishes that in case of birth of a child, the couple shall be considered to be parents, with the consequent responsibilities and authorities; a donor or a "surrogate mother" has no right to be recognized as a parent of the child born; the Article 19 of the civil acts registration procedure approved by the Decree №18 of the Minister of Justice of Georgia dated January 31, 2012 provides the following rule of registration of birth of a child born as a result of extracorporeal fertilization: in order to register the birth of a child born as a result of extracorporeal fertilization, along with the documents envisaged by the Georgian legislation, the following shall be submitted to the civil acts registration entity: A) a document certifying the extracorporeal fertilization, issued by the medical center directly upon the embryo implantation; B) an agreement concluded and notarially certified prior to the extracorporeal fertilization: B.a) between the woman who has born the child and the genetic parents, or; B.b) between the woman who has born the child, the genetic parents, the person to be registered as the child's parent in the birth act records (who is not the child's genetic parent) and the donor, or B.c) between the woman who has born the child, the couple and the donors. According to paragraph 2 of the same Article, the following persons shall be considered parents of a child born as a result of extracorporeal fertilization: A) the genetic parents; B) the genetic parent and the person to be registered as the child's parent in the birth act records based on the agreement; C) the couple. And paragraph 3 establishes that it is inadmissible to refer to the

donor or the “surrogate mother” as to the child’s parent in the civil birth record.

Thus, the Law “on Civil Acts”, as well as the by-law “Registration Procedure of Civil Acts” and the Law of Georgia “on Healthcare” (the Article 143) are fully consistent with each other and unambiguously prohibit referring to a surrogate mother as to the parent during the birth registration of a child born as a result of extracorporeal fertilization.

There is an interesting precedent in the judicial practice of Georgia related to disputes arising in connection with the birth act record of a child born by surrogacy (case #3/4101-14, 29.04.2015, Tbilisi City Court); in particular, the plaintiff, who considered herself a surrogate mother, was demanding to delete the data on her motherhood in the birth act record of a child born by her.

The mentioned suit was dismissed because the court did not consider the evidences presented by the plaintiff as sufficiently reliable to prove the fact of surrogacy; the court found that neither during the child’s birth registration, nor in the administrative entity or in the court had the plaintiff presented the documents provided by the legislation, which could definitely confirm the fact of transferring the embryo into another woman’s uterus; in addition, since the certificate issued by the medical institution did not specify whose embryos were transplanted into the plaintiff’s uterus, the court did not consider the said certificate as a document proving the surrogacy, and explained that according to the birth registration procedure of a child born as a result of extracorporeal fertilization, approved by the Decree №18 of the Minister of Justice of Georgia dated January 31, 2012, a medical institution shall issue a certificate directly upon an embryo implantation which had not taken place in that disputable case; dismissal of the suite based on the court’s reference was also largely due to the fact that the plaintiff had not presented the client couple’s written consent which is an imperative clause of the first paragraph of the Article 143 of the Law of Georgia “on Healthcare”; the abovementioned decision was upheld by the Court of Appeal; currently the dispute continues in the court of cassation.

Agreement on surrogate motherhood

The Law of Georgia “on Healthcare” allows surrogacy, provided there is a written consent of couples which, in turn, is a civil legal transaction. At the same time, no concept of a surrogate motherhood agreement is provided in the private part of the obligational law of the Civil Code of Georgia.

However, judging from the nature and legal results of the me agreement, it may be considered a kind of legal service. And, given the fact that a party wishes to achieve a specific goal as a result of surrogacy (birth of

a healthy child), the essential condition for concluding the agreement is the state of the contractor's physical and mental health. Also, the specifics of a surrogacy agreement lie in the fact that the by-law, the public law established that such an agreement should be concluded notarially (Decree №18 of the Minister of Justice of Georgia "on the Approval of the Procedure of Civil Acts Registration" dated January 31, 2012), which means allowing for public legal elements in private legal relationships.

The Law of Georgia "on Healthcare" considers surrogacy permeable only in favor of a client couple which means that a single woman or a single man does not have the right to have a child through surrogacy which, to a certain extent, is a legally allowed discrimination. At the same time, in the Georgian legislative space, where marriage is considered only a voluntary union of a man and a woman, a "couple" implies a couple consisting of a man and a woman, which is consistent with the principles of the Council of Europe.

Proceeding from the fact that in the Georgian legislative space a surrogacy agreement is considered a standard type of agreement, the principle of proper and conscientious fulfillment of the obligation established by the Civil Code applies to it. Accordingly, if a client couple has violated the agreement and has not paid the contractually agreed fee for the surrogacy, in accordance with the general civil law principles and common rules of the liability law, it may withdraw from the contract which, by a common procedure, shall be followed by a bilateral restitution and restoration of the initial status quo which is impossible due to the specifics of surrogacy. It turns out that a surrogate mother is not able to make use of general guarantees of full restoration of her rights as a result of non-compliance with the obligation. There is nothing left to her but the right to demand only the damage compensation. However, the legislation does not include any definition regarding constituents of a damage caused to a surrogate mother. The direct damage cannot be estimated based on the surrogacy agreement and the mother may demand financial compensation for the breach of the obligation by the counterparties.

The Georgian legislation does not provide for any restoration arrangements with regard to a client couple's parental rights, even in the case of violation of obligations by the surrogate mother. For example, if an unhealthy child is born due to the surrogate mother's culpable actions, the client couple may claim damages. The question arises: in what form is the damage to be compensated?

It is even more problematic when client parents refuse to be recognized as the parents of an unhealthy child born as a result of surrogacy and such a child is left without parental care. It is noteworthy that using general norms of the obligational law, client parents manage to restore their

right in case if the surrogate mother has violated her obligation to transfer the child. In such cases, the legal basis for the child transfer is shaped by the Article 361 of the Civil Code and the Article 143 of the Law on Healthcare.

Thus, it is completely incomprehensible and even alarming that there are no arrangements in the Georgian legislative space for restoring and protecting the rights of a surrogate mother and preference is given to client parents' interests. Especially since the Georgian legislation does not provide any protection norms at all for the rights and interests of children born as a result of surrogacy and they are rejected due to the state of health or other reasons both by the client parents and the surrogate mother (who, according to the Law of Georgia "on Healthcare", has initially no right to be recognized as a parent).

Conclusion

The contradictoriness of the Georgian legislation and its inconsistency with the regulations of the Council of Europe is due to the fact that from the very beginning, the Georgian legislation deprives a surrogate mother parental rights. Meanwhile, according to the 15th Principle of the Council of Europe, no doctor or institution shall have the right to use artificial impregnation for fertilization of a surrogate mother. At the same time, national states may allow surrogacy in exceptional cases with the proviso that the agreement between the surrogate mother and the couple is voluntary, free of charge and not profit-oriented, and the surrogate mother shall have the right to choose whether to keep the baby or give it to the client parents.

Given the fact that in case of surrogacy, the Georgian legislation does not provide for any of such matters, such an obvious contradiction to the principles of the Council of Europe is detrimental in terms of European integration.

Thus, it is unambiguous that the continental Europe and common-law countries do not recognize surrogacy as a possibility of obtaining parental rights by a couple - unlike Georgia. It emphasizes the unethical and inhuman approach of the Georgian legislation towards this issue. It is obvious that the Georgian legislation should regulate surrogacy issues more thoroughly based on the European standards and principles of international law; the vague legislative definitions enabling the interested parties to transform surrogacy into a legal source of income need to be eliminated.

When developing legislation, the rights of a surrogate mother, the child's interests, and certain psychological factors should be taken into account, and I believe that surrogacy should be performed under maintenance of a surrogate mother's parental rights. In case of a dispute between a surrogate mother and client parents, the surrogate mother should

also have the opportunity to obtain the right of recognition as a parent and protect her motherhood rights in the court.

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