

# Legal Regulation of Surrogacy in Georgia

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## Abstract

The present article reviews the legislation related to surrogacy in Georgia. It refers to the shortcomings provided in the legal regulations governing these issues and offer the recommendations for their elimination. Besides, the judgment made by the Tbilisi City Court Civil Panel on July 23, 2015 is considered which may be said to be of precedent character.

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**Keywords:** Surrogacy; Altruistic surrogacy; Commercial surrogacy

## Introduction

Modern reproductive medical technologies, findings and practice gives couples an opportunity to solve the infertility problem through surrogacy (in vitro fertilization). First baby - Louise Brown was born in the Cambridge University Clinic as a result of surrogacy in 1978<sup>49</sup>.

Surrogacy is the process under which the surrogate mother gets pregnant through artificial or in vitro fertilization, and gives birth in exchange for payment (commercial surrogacy) or without payment (altruistic surrogacy) for another couple or a person. Commercial surrogacy involves a transaction when a surrogate mother receives a reasonable compensation for the services rendered in addition to medical and other expenses. Surrogacy is altruistic when the surrogate mother is compensated or not compensated for medical and other reasonable expenses.

The present article reviews the legislation related to surrogacy in Georgia, it is about the shortcomings provided in the legal regulations governing these issues and offer the recommendations for their elimination. Besides, the judgment made by the Tbilisi City Court Civil Panel on July 23, 2015 is considered, which may be said to be of precedent character.

## Concept and Types of Surrogacy

There are two types of surrogacy in the medical field: traditional and gestational. In case of heterogeneous couples, we are facing the example of the traditional surrogacy, when ovum of the surrogate mother is fertilized

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<sup>49</sup> I. Gelashvili: The legal status of the fetus, Tbilisi, 2012, p. 47.

with the husband's sperm. In this case, the surrogate mother is both genetic and gestational mother of the child.

Surrogacy is gestational, when ovum of a third person - a donor is fertilized with the husband's sperm and embryo is placed in womb of the surrogate mother (i.e. ovum donor and surrogate mother are not one and the same person). In such a case, the ovum donor is the genetic mother and surrogate mother is the gestational mother of the child (partial surrogacy).

Ovum of the wife is fertilized with her husband's sperm and embryo is placed in the surrogate mother's womb. In this case, the ovum donor is the genetic mother and the surrogate mother is the gestational mother (full surrogacy).

Ovum of the wife is fertilized with the donor's sperm and the embryo is placed in the surrogate mother's womb. In such a case, the ovum donor is the genetic mother and the surrogate mother is the gestational mother (partial surrogacy).

### **Surrogacy according to the Legislation of Georgia**

The Legislation of Georgia regulates the issues related to surrogacy in diffusive manner. According to the Paragraph first, Article 143 of the Law of Georgia "On Health", in vitro fertilization shall be allowed: a) to treat infertility, as well as if there is a risk of transmitting a genetic disease from the wife or the husband to the child, using the gametes or embryo of the couple or a donor, if a written consent of the couple has been obtained; b) if a woman does not have an uterus, by transferring the embryo obtained as a result of fertilization to the uterus of another women ("surrogate mother") and growing it there; obtaining a written consent of the couple shall be obligatory. It is important to note, that if a child is born, the couple shall be deemed as parents, with the responsibilities and authorities proceeding from this fact. The donor or the "surrogate mother" shall not have the right to be recognised as a parent of the born child. According to the Article 144 of the above Law, it shall be possible to use male and female gametes or embryos that have been conserved by freezing for the purpose of artificial fertilization. The time of conservation shall be determined according to the couple's will, under the established procedure. Accordingly, the Legislation of Georgia regulates the birth registration rules of the child born as a result of in vitro fertilization<sup>50</sup>. In addition, the Legislation governs the rules of exit of a child born as a result of in vitro fertilization (surrogacy) from Georgia<sup>51</sup>.

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<sup>50</sup> Article 30 of the Law of Georgia "On Civil Acts".

<sup>51</sup> Joint Order №133–№144 of the Minister of Justice of Georgia and the Minister of Internal Affairs of Georgia "On approval of the Rule of exist of a child born as a result of in vitro fertilization (surrogacy) from Georgia", dated April 11, 2016 and April 5, 2016.

It should be noted that the legislation of Georgia permits both altruistic and commercial surrogacy. Georgia belongs to the category of the states where in vitro fertilization is allowed for a profit. Signing of a surrogacy contract means expression of the will by the parties - a couple and a surrogate, agreement on the essential terms in a complicated written form. It is not contested that surrogacy is a service contract. Surrogacy contract has specific characteristics and features, which are characterized by the specific object of the contract.

Embryo does not belong to the property within the classic sense of the word, however, the indisputable fact is that it is the value protected by law<sup>52</sup>. Consideration of an embryo in the special category is due to the unique feature, that distinguishes it from the things, in particular - the ability to become a human after implantation and gestation. Embryo is not an item in the classic sense of the term and its involvement into turnover should be inadmissible, however, in the terms of existing legal regime, when the embryo existing outside of the body is transferred to the others (donation) or is conserved (conservation) on the basis of the agreement of the parties in exchange of payment or free of charge, it must be considered a specific quasi property to which property-related provisions are applied in certain cases<sup>53</sup>.

Woman is believed to be the owner of the embryo. However, when the embryo is placed in a test tube or is frozen, then it is a co-ownership<sup>54</sup>.

### **Certain Legal and Moral-Ethical Problems related to Surrogacy**

Although the institute of surrogacy is an effective solution to infertility, it is linked to a variety of problematic issues in the legal and moral-ethical terms. Of course, discussion of all the disputed issue in this format is impossible. Therefore, following issues will be focused: 1. Either after the death of one of the parents a child born as a result of conservation surrogacy shall be considered as a legal successor of the deceased parent; 2. Or an embryo shall be destroyed in case if after signing the contract on surrogacy service and prior to implantation of a fertilized embryo in the womb of a surrogate mother, disagreements arise between the couple.

According to the Article 118 of the Civil Law of Georgia and Paragraph 2, Article 26 of the Law of Georgia “On Civil Acts”, “In the event of the death of the father, a child shall be deemed to have been born to the married parents if he/she is born no later than ten months from the death of the father.” Besides, according to the paragraph 2, Article 19 of the Order No.18 of the Minister of Justice of Georgia “On Approval of the Rule of Civil Acts Registration”, dated January 31, 2012, the parents of a

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<sup>52</sup> I. Gelashvili: The legal status of the fetus, Tbilisi, 2012, page 60.

<sup>53</sup> Ibid, pp. 61-62.

<sup>54</sup> Ibid, p. 97.

child born as a result of in vitro fertilization shall be the genetic parents, a genetic parent and a person and a couple to be written in the birth act record as the parent. Therefore, on the basis of systematic analysis of the above regulations it should be noted, that a child born as a result of conservation surrogacy in 10 months after death of one of the parents shall be considered as a legitimate successor of the deceased parent, as a deceased person will be indicated as a parent. In addition, it is worth noting, that the Article 144 of the Law of Georgia “On Health” allows the couple to agree on conservation of gametes or embryo, including the fate of the conserved material after the death of any person. Despite the fact that the legislation of Georgia regulates this issue, it is recommended to specify more clearly the issue related to recognition of the child born as a result of conservation surrogacy in 10 months after death of one of the parents as legal successor of the deceased parent in the corresponding acts as follows: “*A child born as a result of conservation surrogacy in 10 months after death of one of the parents shall be considered as a legitimate successor.*” In addition, it is better to determine the maximum term of storage of the conservation material on the legislative level. It should be noted that the child born as a result of conservation surrogacy has the right to get inheritance through the legal representative.

On July 23, 2015, the Tbilisi City Court Civil Panel considered the case, which is important for further development of the institute of surrogacy. According to the background of the case, the couple agreed on birth of the child, using the surrogacy instrument, material was fertilized, but prior to implantation in the surrogate mother’s womb, disagreement arose between the couple. Father refused to birth of the child through surrogacy; however the genetic mother desired to give birth to a child in this way. It is important to say that due to the mother’s health status, surrogacy was the only way to become a parent for her.

According to the court, in vitro fertilization and subsequent transfer of embryo in the womb of a surrogate mother shall be carried out through couple’s agreement. However, the law does not regulate the issue, how to solve the dispute between the parties in case of disagreement, and what should happen to the fertilized ovum - the embryo. The court notes that this dispute is highly sensitive and involves not only legal but also ethical and moral dilemma. According to it, in this case two diametrically different rights are facing each other - the right to become a parent and the right not to become a parent. According to the court, the parties’ interests are completely incompatible in this case, since if use of the embryo is allowed, the defendant will be forced to become a father, otherwise - the plaintiff will be deprived of the opportunity to become the genetic mother. Accordingly, the court evaluated the context when making the option, for which there rights

are competing. The court was focused on analyzing the rights of the parties, the opposite interests and, *inter alia*, the need to protect a fair balance and found that the mother's right - to become a parent in this case prevails the father's right - not to become a parent due to the fact that the mother does not have the opportunity to have a genetic child in any other way.

The court's approach to this case should be shared, given the fact that the interests of both parties were taken into account, although through consideration of the mother's situation, her right was prevailed. However, it is important that in the cases of such dispute, the case should be considered individually and specifically, in order to ensure a fair balance between the interfering legal benefits.

### **Conclusion**

In conclusion, it should be said that for more effective, clear regulation of the institute of surrogacy, unification on the diffusively available regulations related to this area and their formation in a single legislative act shall be reasonable in the Legislation of Georgia. Such method will regulate the issues related to the rights of children born as a result of surrogacy, recognition of fact of birth, essential cumulative conditions and termination of the contract, rights of parents and the surrogate mother, etc.

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