

SOME ISSUES OF EXECUTION OF THE SURROGACY AGREEMENT

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Abstract

This article delves into the legal and ethical complexities surrounding surrogacy agreements. It examines the various challenges faced by intended parents, surrogates, and legal practitioners in navigating the surrogacy process. Key issues discussed include the enforceability of surrogacy contracts, the rights of all parties involved, and the implications of differing legal frameworks across jurisdictions. The article also highlights case studies and recent developments in surrogacy law, providing insights into best practices for drafting and executing surrogacy agreements.

Keywords: Surrogacy, Surrogacy Agreement, Reproductive rights, Legal frameworks, Ethical Considerations, Contract Enforceability, Surrogates.

Introduction

The Family Code and other regulations should put an end to the debate about whether surrogacy is illegal or immoral, and the surrogacy contract should be considered as a contract within the framework of freedom of contract. After all, in our opinion, the Family Code norm on recognizing potential parents (a couple who have given their consent) as parents excludes surrogacy from the list of illegal and morally undesirable. Based on this point of view, in this part of the study we will conduct a study of the implementation of the surrogacy contract and the consequences of its refusal within the framework of national civil legislation.

According to the economic analysis of contract law, the performance of the surrogacy contract is necessary and fair [1]. According to this approach, when a contract improves the situation of two people without worsening the situation of anyone else, this is within the scope of freedom of contract and means that the contract is enforceable. Of course, the parties themselves know how to improve the situation of the parties. Their wishes and will must prevail over any paternalistic intervention of the legal system. Only individual cases are exceptions that must be clearly limited by public law regulation. The fact that our contractual relations regarding surrogacy not only lie within the scope of freedom of contract, but are also defined in the Family Code up to the moment of its execution (registration as a parent) once again confirms that this contract is valid and enforceable.

Also, as a general rule, the parties must fulfill the obligations arising from the surrogacy agreement not only in accordance with the terms of the agreement and the law, but also in accordance with the norms of custom and the general principle of honesty [2]. This is especially necessary during the pregnancy of the surrogate mother, which cannot be determined by specific terms of the contract or law. In this situation, the principle of fairness and



reasonableness should be applied. That is, some of the requirements that must be met are not established in any legislation or contract terms, but follow from good business practices and principles of honesty.

At the same time, contractual obligations (conditions) cannot limit the rights of the surrogate mother, such as privacy, autonomy of will, if such a condition is included, they will not act on their own. However, at the same time, the surrogate mother also has fiduciary obligations, which are expressed in not abusing the trust placed in her when performing her duties. This may include any actions that may have a negative impact on the fetus, which cannot be fully expressed in the contract, and therefore included in the content of the obligation in fiduciary form. In the surrogacy contract, an important issue is who will pay the financial expenses of the surrogate mother in fulfilling her obligations under this contract. As a general rule, the costs of fulfilling the obligation may be imposed on the surrogate mother, unless otherwise agreed [3]. However, usually in the contract, given that the health of the surrogate mother during pregnancy and childbirth, as well as the limitation of working capacity require additional expenses, this may be imposed on the customer. In our opinion, given that one of the parties participates with its health and life in the performance of contractual obligations, it is advisable to clarify the rules determining the burden of such expenses on the potential parent. Even in the absence of such rules, based on the content of Article 236 above, these expenses may be attributed to the customer in accordance with business practice. That is, in accordance with business practice established in legal systems where surrogacy is developed, surrogacy contracts concluded specifically for a fee usually provide that the customer - potential parents pay the costs of the surrogate mother's stay during pregnancy, travel expenses, loss of wages, medical expenses. and consulting services [4].

Unilateral refusal to perform obligations. Refusal to perform a surrogacy contract is a complex issue and is regulated differently in different legal systems. US courts consider surrogacy disputes under the freedom of contract framework, which helps create a predictable and clear legal approach to surrogacy [5].

In national legislation, as a rule, a surrogacy contract must be properly executed in accordance with its terms. This is clearly stated in Article 237 of the Federal Code, i.e. unilateral refusal or change of obligations is not allowed. But there may be legal or contractual exceptions. That is, a law or other normative document may grant one party the right to refuse to execute the contract or terminate it unilaterally [6]. But there are 3 different exceptions, because the terms of this agreement are not fulfilled by the other party, due to a certain event (for example, invalidity of the license) or unconditional refusal. The same exception is in the surrogacy agreement, which gives the surrogate mother the right to unconditionally refuse to hand over the child. That is, part six of Article 207 of the Family Code gives the surrogate mother the right to give her consent to the child's transfer and thereby obliges her to fulfill the agreement. If the surrogate mother does not agree to the transfer of the child to the future parents (recognition by them as parents), the child remains with her and the agreement remains unfinished. This means the right to "unilaterally" refuse to fulfill the agreement without any reasons or motives, even if the other party does not violate the terms of the agreement. At the same time, according to the theory of contract law, a unilateral refusal to fulfill the agreement means a unilateral termination of the agreement [7].



However, in the same situation, when the surrogate mother refuses to give up the child, she must compensate for the damage caused to the potential parents (i.e. the client), which is the cause of disputes in the courts and lawyers. It should be noted that part two of Article 707 of the Civil code is not applicable in this case, since if the termination of this agreement is the right granted to the general executor, then the right granted to the surrogate mother by the Family Code acquires a different content. Accordingly, the question of whether the surrogate mother is obliged to compensate for the damage is controversial.

Refusal by the customer. Of course, surrogacy is a very complex process, and there may be situations when the potential parent - the customer - unilaterally refuses to fulfill the terms of the contract (without violating the obligations of the surrogate mother). It should be noted that, based on Article 707 of the Civil Code, the customer has the right to unilaterally terminate the contract (i.e. refuse to fulfill it) upon full payment of the cost of the service. This can be applied to contracts for paid surrogacy. That is, unlike the surrogate mother, the law gives the customer the right to terminate the contract only after paying the fee. This rule applies to contracts for the provision of services for other remuneration, since after receiving the remuneration there is no need to provide the service (this is not work) to the customer, thereby the rights of the performer are not violated. But in surrogacy the situation is different, in which the birth of the child remains with the surrogate mother or is transferred to other guardianship authorities, which entails negative consequences for the surrogate mother. That is, the refusal of the surrogate mother to accept the child before or after birth will entail contractual losses. In legal literature, in particular, according to the opinion of the Russian scientist G. Romanovsky, it is noted that the birth of a child is considered civil damage for the surrogate mother if the future parents refuse to fulfill the surrogacy agreement before the birth of the child [8].

If the child is not born and termination of pregnancy (abortion) by agreement of the parties is possible with medication, the next step largely depends on the surrogate mother. She can have an abortion or carry the fetus and give birth to the child, and no one can limit her in this right. If the potential parent of the customer refuses to fulfill the contract due to the surrogate mother's violation of the terms of the contract and other illegal actions, then this is a justified refusal, and the surrogate mother is not obliged to compensate for any damage (even in the form of compensation). This is a traditional legal position that corresponds to both the content of the first part of Article 707 of the Civil Code and the content of the general provisions on obligations. In this case, we believe that the termination of the contract should occur due to a serious violation of the terms of the contract by one of the parties.

There is no norm or similar custom in the legislation regarding the adoption of a child born (born) from a surrogate mother by the parents of the customer. According to the provisions of the Civil Code on the provision of services, it seems that the future parents are not obliged to accept the child. In addition, the surrogacy contract is not just a service for a fee, it has both similarities and completely different aspects. However, the purpose and content of the surrogacy contract require that the future parent accept the child. After all, it is they who have expressed a desire to transfer the embryos to the surrogate mother, pay for and adopt the child (according to the contract). Therefore, if the surrogacy contract provides for the transfer of the child to the future parents, then the adoption of the child should be the responsibility of the future parents [9].



Thus, as mentioned above, failure of the future parents to accept the child will entail negative consequences for the surrogate mother (in the form of leaving the child under her responsibility) - damage that will have to be compensated by the potential parents. Another situation related to the refusal of the future parents to fulfill their contractual obligations is the refusal to pay the surrogate mother for medical and other necessary expenses and services. As we said above, if the surrogate mother has not violated her obligations and has fully fulfilled her conditions, a unilateral refusal by the future parent is unacceptable according to Article 237 of the Civil Code. In such a case, the rights of the surrogate mother must be protected, and full payment of the price specified in the contract must be determined in court. However, refusal to accept the child also causes serious problems. Because a child is not property that can be forced to accept. In addition, the rights and interests of the child must be protected. In this situation, the fact that the surrogate mother is considered the mother of the child after birth (this presumption of motherhood is fully valid in national legislation) also requires that the child stays with the surrogate mother. The surrogate mother cannot ask the court to force the future parents to accept the child, all she can get is damages [10 61].

In this case, the birth of a sick or stillborn child may also occur due to the fault of medical personnel. In this case, if the guilt of the medical worker is proven, he will be charged with compensation for damages. Here the question arises: to compensate the surrogate mother or the future parents? In our opinion, the potential parent is not directly involved in the situation until parental rights are established in accordance with the doctrine of national legislation, and it is quite appropriate for compensation to be awarded to the surrogate mother. But problems arise when the surrogate mother decides to terminate the pregnancy on her own without medical indications. In this situation, if we want to apply the rules for the provision of services on a paid basis, the executive surrogate mother will be able to terminate (refuse to perform) the contract, fully covering the damage caused to the potential parent-customer (embryo transplantation, all treatment costs, etc.). Some scientists add moral damage to this damage. Others, considering that the surrogate mother has the right to keep the child, emphasize the need to exclude moral damage related to the child. It is known that, according to Article 1021 of the Civil Code, moral damage is compensated only if it is the fault of the sender. Exceptions to this are listed in Part Two of the same article, and the situation of surrogacy does not fall under these exceptions.

Thus, a unilateral refusal to fulfill obligations under a surrogacy contract remains under the influence of other public-law procedures than contractual ones. When a surrogate mother refuses to give up the child, the same doctrine applies - the doctrine of the biological mother, which balances the relationship when the future parents refuse to accept the child. In all other cases, refusal is sufficient to recover damages and payment for services (if the contract is concluded for a fee).

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