

SELECTED LEGAL ASPECTS OF SURROGACY¹

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Abstract: The aim of this article is to analyse the Czech legislation applicable to surrogacy cases while considering some basic social aspects. First the basic facts of surrogacy as a medical reproductive technique are discussed. Surrogacy is also considered as a social trend, and in terms of selected social aspects, such as the growing number of couples interested in surrogacy and their social status. Nevertheless, the main goal of the paper is to analyse selected legal problems as regards surrogacy and the Czech legislation. Therefore, the authors describe the basic legal framework that has relevancy to surrogacy cases (establishing parenthood and adoption) and identify the most frequent problems concerning surrogacy applications using three model cases. In the concluding remarks the adequacy of Czech legislation is discussed.

Key words: surrogacy; adoption; IVF; ethics; family

Introduction

Although the family is a traditional social construct, it still holds relevance. The current concept of the family is being shaped by changes in social relationships (patchwork families, registered partnerships) and scientific developments, especially in reproductive technologies (Šimáčková, 2012). Surrogacy is one of the most controversial techniques (ECHR, 2019), and regulation is indisputably important (Shenfield & al., 2005). In the Czech Republic surrogacy is both accepted and carried out, although there is no specific (comprehensive) legislation. Surrogacy is one of the most challenging social phenomenon. The aim of this article is to analyse the current legislation relating to surrogacy and determine whether it is sufficient.

Surrogacy as a medical reproductive technique

Surrogacy is an assisted reproductive technique where “a woman (surrogate, gestational carrier) carries a pregnancy with an agreement that she will give the offspring to the in-

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tended parent(s)². Gametes can originate from the intended parent(s) and/or a third party (or parties)" (ICMART, WHO, 2009). According to the FIGO³, "Surrogacy describes a reproductive model where a woman carries a pregnancy and delivers a child on behalf of a couple in which a woman is unable to do so, for instance because of a congenital or acquired uterine abnormality, or because of a serious medical contraindication to pregnancy" (FIGO, 2009). There are various options for obtaining the gametes used in surrogacy. Where there is no genetic link between the surrogate and the future child, we talk about *full surrogacy* (Shenfield, 2005). In those cases, the gametes or embryo may come from the commissioning couple or from a donor(s). There are various possible combinations depending on the situation (donation of one gamete, surplus or newly created embryos). In cases of *partial surrogacy*, there is a genetic link with the surrogate mother because she provides the *oocyte* (Shenfield, 2005).

With the advances in reproductive techniques, the number of potential parents has been increasing. Because it is now possible to have a surrogate child with a genetic link (which is not possible *via* adoption), surrogacy has become popular amongst gay couples and transsexuals. In this context, ESHRE⁴ notes, "Medically assisted reproduction in non-standard situations is morally sound in many cases. There is no good reason to a priori dismiss access in these situations—such categorical dismissal would imply discrimination" (De Wert, G. & al., 2014). The ASRM takes a similar approach⁵, "Initially, gestational surrogacy was applied to cases of intended opposite-sex parents who had fertility or medical problems that precluded the female partner from carrying the pregnancy. Now, the process also is used for individuals and same-sex couples desiring to become parents" (ASRM, 2013).

As we have already mentioned, surrogacy is one of the most controversial assisted reproductive technologies. For this reason, "some societies have strong reservations about the practice of surrogacy, and make it illegal. In other societies the process is supported by specific legislation, enabling the commissioning couple to become the legal parents" (FIGO, 2009). As the European Court of Human Rights (ECHR, 2011) has observed, there is no uniform approach to this among the contracting states. Regulation in other countries ranges from outright prohibition (France, Germany) to wide acceptance of surrogacy, including commercial surrogacy (US, India, Ukraine). Generally, four main types of regulation can be identified: 1. Prohibition of all surrogacy agreements, 2. Surrogacy is left largely unregulated, 3. Expressed permission and regulation of "altruistic surrogacy" and 4. Permissive approach, including commercial surrogacy (Gerber & O'Byrne, 2015). It should be noted that even in countries with the strictest approaches, the limits of regulation have recently been debated.

The nature and scope of the law differ in each country: usually it covers type of surrogacy (altruistic, commercial), status of the intended parents (marital status, sexual orientation, age or motivation), becoming a surrogate (state of health, personal profile, marital status,

² Sometimes the term "commissioning couple" is used in the context of surrogacy.

³ International Federation of Gynecology and Obstetrics.

⁴ European Society of Human Reproduction and Embryology

⁵ American Society for Reproductive Medicine

intra-familiar surrogacy, age), limits and enforceability of surrogacy agreements, and harmonization of genetic (social) and legal parenthood (Konečná & Svatoš, 2018).

Social context of surrogacy in the Czech Republic

Although the Czech Republic has no specific legislation, surrogacy is relatively popular. Our long-term experience⁶ is that the number of surrogacy cases is progressively increasing. Whilst in 2009 several couples a year sought our counselling, in 2018 it was one couple per week. The total may be even higher.

We have also observed a change in the social structure and status of the population interested in surrogacy. At the beginning, only heterosexual couples sought surrogacy and for medical reasons. Now gay couples, transsexuals and single people are also interested in surrogacy, while the number of cross-border surrogacy cases has increased significantly (Prudilová, 2018; Honzová, 2019). This shift is bringing new moral and ethical dilemmas into the social debate, but it also shows the deficits in our legislation, which was not drafted to take account of these kinds of issues.

Surrogacy legislation in the Czech Republic

Unlike some other countries (UK, some US states), the Czech Republic has no specific legislation on surrogacy. It therefore has to be analysed from the perspective of general applicable law.

General regulatory framework

The essential framework is given by the following constitutional principles: according to Art. 2, para. 4 of the Constitution, “All citizens may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon them by law.” Art. 2, sect. 3 of the Charter of Fundamental Rights and Freedoms stipulates, “Everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon her by law.” From this it arises that if surrogacy is not *expressis verbis* prohibited by law, it should be considered lawful (if the general body of the law is adhered to) (Zemandlová, 2016).

One general provision applicable to surrogacy cases is the prohibition of commercial surrogacy in Sect. 169 of the Criminal Code. This provision criminalizes any behaviour undertaken with the aim of placing a child in another person’s custody for reward and for the purpose of adoption. This rule applies to the adoption process as well, because an adoption can be annulled if found to be unlawful.⁷

Although there is no specific law or act, surrogate motherhood is referred to briefly in Sect. 804 of the Civil Code in force from 1 January 2014: “Adoption is excluded between persons directly related and between siblings. This does not apply to surrogate motherhood.” This does not tell us much, but we can assume that it must be taken into account when

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⁷ See Sect. 840, para. 2 of the Civil Code.

establishing whether surrogacy is lawful: if the law anticipates the existence and practice of surrogacy, it should not be considered unlawful or even prohibited.⁸

In some countries, surrogacy is entered into based on a surrogacy agreement. However, this is not the case under Czech law. An agreement regulating the relationship between the intended parents and surrogate mother, covering artificial reproduction and the obligation to accept and hand over the child, to give consent, to start the adoption procedure and to provide financial compensation would be void at the very least (or contrary to the Criminal Code, see above) (Zemandlová, 2016).

It therefore follows that any surrogacy “contract” should be based on mutual trust, freedom of choice, lack of coercion and financial reward. It is a matter of moral commitment rather than an obligation enforceable by law. Anyone intending to undertake surrogacy must face the inherent risks.

Establishing parenthood

As there is no specific law on surrogacy, we have to rely on the general provisions regarding parenthood set out in the Civil Code. According to the ancient rule *mater semper certa est* reflected in Section 775, there can be no dispute over maternity.⁹ The mother is the woman who gives birth to the child even when not genetically related; the genetic aspect is irrelevant. The genetic mother of a child born from surrogacy is usually the applicant for surrogacy. After the birth of the child, the applicant for surrogate motherhood usually also becomes the child’s social mother. So harmonisation of the genetic (social) and legal reality has to be achieved through adoption¹⁰, and it is only on the basis of the adoption ruling that status of motherhood can be changed. A similar situation can occur in relation to fatherhood, if the surrogate mother is married. In that case the husband of the surrogate mother is generally presumed to be the father of the child.¹¹ The child’s genetic and social father is usually an applicant for surrogate motherhood. Generally, harmonising genetic (social) and legal fatherhood through adoption rather than by denying paternity would seem to be more effective (see Sects. 785–793 of the Civil Code). Establishing fatherhood in surrogacy cases is less complicated if the surrogate is unmarried. It is presumed the man consenting to artificial insemination is the father so the intended father can be recognized as the legal father of the child.¹²

⁸ For details see Zemandlová, A. (2012/2013). *Bioetika – vybrané otázky z pohledu práva* (Disertační práce). Available at: <https://is.muni.cz/th/bsv21/DISERTACE-FINAL.pdf?info=1>

⁹ “The mother is always certain.”

¹⁰ This procedure was envisaged when Sect. 804 was added to the Civil Code, as can be seen from the explanatory note. In Czech, available at: <http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>

¹¹ Sect. 776, para. 1 of the Civil Code: “If a child is born between the date of entry into marriage and the three hundredth day after the marriage is terminated or declared invalid, or after the mother’s spouse is confirmed absent, the mother’s spouse is presumed to be the father.”

¹² Sect. 778 of the Civil Code: “If a child conceived through artificial insemination is born to an unmarried woman, the man who gave consent to the artificial insemination is presumed to be the child’s father.”

Adoption

From the above, it is clear that the intended mother, at least, has to adopt the child in order to obtain legal parentage and exercise all parental rights and duties.

One of the basic requirements of lawful adoption is the freely given consent of the persons involved (parents, child). The legal parents must consent. There is a set of provisions regarding the nature of the consent and the process whereby it is obtained. For postnatal protection reasons, the mother cannot consent to adoption within the six week period following delivery. A three-month cooling-off period begins from the moment consent is given. During this time, a parent who has given consent can change his/her mind and take the consent back. Generally, consent to adoption must be given in court. If the surrogate mother is married, consent must be obtained from her and her husband. There is some confusion over obtaining paternal consent where the surrogate mother is unmarried. According to the Civil Code, both parents must consent. Nevertheless, the father in this situation, does not wish to lose his parental rights, on the other hand, he wants to show his positive attitude to the whole intention. This problem is not covered by the law and is resolved in various ways in judicial practice, as we will explain later.

In addition to the consent of the parents (and the child made by the child's custodian¹³), the Civil Code lays down a set of further conditions that must be satisfied for adoption to take place. Some relate to the person (persons) seeking to adopt, such as integrity and personal motivation, physical and mental health, quality of matrimonial cohabitation (where spouses are adopting) and lifestyle. Other conditions relate to the quality of the family environment and the mutual suitability of the adoptive parents and child. Six-months pre-adoption care is another condition, which is aimed at ensuring a satisfactory relationship with the child and quality parental care. All the conditions and requirements are assessed together, and should guarantee that the person will be a good parent to the child being adopted. Above all, the best interests of the child are held to be paramount in all actions involving children.¹⁴ It has to be emphasized that there is no specific procedure or set of conditions applying to surrogacy cases, and this may lead (and does lead) to inconsistencies in the adoption procedure (as we will show below).

Procedural aspects

As already mentioned, the intended mother or intended parents (depending on the marital status of the surrogate) have no parental rights until the adoption ruling comes into force. The whole adoption procedure takes at least 11 months from the birth of the child (Honzová, 2019). Usually the intended parents (mother) take the child immediately after birth as they wish to care for him/her as soon as possible. Nevertheless, until such time as the surrogate mother can give consent to the adoption (at the end of the six-week protection period) there are no legal grounds for them to care for the child. The most serious difficulties arise in

¹³ Given the probable age of the children to be adopted in surrogacy cases, they must have an independent legal representative (custodian) to give consent on their behalf.

¹⁴ Art. 3 of the Convention on the Rights of the Child (1989), available from: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

cases where the surrogate mother is married, and the child is legally related only to her and her husband. This can cause problems in daily life (obtaining basic medical care, parental allowances etc.), and it is psychologically difficult for the intended couple, as they have no legal relation to the child. For these reasons, the couple (or adoptive mother) tend to seek a custody decision from the court as soon as possible. The way the courts deal with this problem differs, as we will show below.

Selected problems in surrogacy cases

As we have observed (see introduction), surrogacy is becoming more and more popular. Couples who are encouraged by the existence of Sect. 804 of the Civil Code and positive experiences of those who have successfully completed the process, embark on their journey to obtaining their dream baby. Although it usually ends happily, it is difficult to predict how the authorities involved, especially the courts, will handle each case. There are no provisions directly relating to surrogacy. Consequently, the procedure designed primarily for “ordinary” adoptions may be interpreted variously because it does not fit the circumstances of surrogacy cases. The three model situations below may serve as an example.

Paternal consent

Both legal parents have to consent before a court of law before an adoption can take place. In surrogacy cases, the surrogate gives consent and so does her husband or the intended father if the surrogate is unmarried. In cases where one of the spouses is adopting (step-parent adoption), the consent of the other spouse – the parent of the child and the spouse of the adoptive parent (in surrogacy cases, the intended father) – is required.

The question is whether, in the case of surrogacy, the consent of the intended father – pre-registered as such before the birth – is required. He does not wish to relinquish his parental rights, but merely fulfil the legal conditions so his child can be adopted by his wife. The problem is the courts do not handle this problem in the same way. Some require the same type of consent as they do from the surrogate, which could theoretically lead to the *ad absurdum* scenario of the loss (or at least suspension) of the intended father’s parental rights. Our experience is that consent given that way does not ultimately have this negative effect. However, it is unpredictable and depends solely on the judge handling the case adopting a reasonable approach. On the other hand, there are some courts that require only the informal consent of the intended father, given during the first court hearing, which does not affect his parental rights. These procedural differences lead to legal uncertainty and unpredictability, because the persons involved cannot foresee how the individual courts or judges will decide.

Custody of a child born out of surrogacy

The second situation in which the lack of provisions dealing specifically with surrogacy cases causes problems is in awarding custody to the intended parents immediately after the birth. As noted, there is either no legal grounds for them to care for the child after the birth

(married surrogate mother) or only the father of the child has a legal tie, while the intended mother has no legally recognized position (where the surrogate mother is unmarried). As Czech adoption law does not anticipate this situation, there are different procedures that can be used to establish the relationship between the adoptive parent(s) and the child. The role of the surrogate mother in this process also varies considerably: whereas some courts require the surrogate mother to attend all the court hearings, others do not consider it necessary for her to be present throughout the process. Again, this shows how unpredictable the situation may be. It is not clear which procedures the court will accept and consequently how long the adoption process will take.

Model cases¹⁵

The Smiths' case: This is the most typical experience of the adoption procedure. The surrogate mother was unmarried and the intended father, Mr. Smith, had been recognized before the birth of the child. Both had given a common affirmative statement before the birth registrar. Six weeks post partum, the surrogate mother consented to the adoption by making a pronouncement before the court. The father gave his consent to the adoption later, rather informally, at the first court hearing. The first application to commence custody proceedings was lodged at four months after the birth. The court decision entered into force two months after the first application. The next court decision, on pre-adoption care, was issued at six and half months after the first court decision. The final court decision, the adoption ruling establishing the legal motherhood of the intended mother entered into force two months after it was issued. The surrogate mother was not required to attend any of the court hearings.

The Greens' case: This case was exceptional because of the extremely short duration of the adoption proceedings. In the Greens' case, the surrogate was a married woman, so her husband was entered into the birth register at the birth of the child. Both legal parents gave consent within six weeks of the birth. The court proceedings, at which the intended couple sought a custody decision, commenced five months after the birth of the child. Soon after the first decision, the court came to a decision about the adoption. Both the surrogate mother and her husband were required to attend the two court hearings. The adoption proceedings took seven months, which does not correspond to the timeframe set out in the Civil Code. The court informally noted that the "ordinary" process should not apply in cases of adoption (surrogacy). It is our opinion the court's opinion does not reflect the law.

The Johnsons' case: In the Johnsons' case, the surrogate mother was married. Therefore the fastest possible way of establishing a legal relationship with the child was chosen (in terms of custody decision). The application to seek a special preliminary decision (preliminary order) was lodged on the day the child was born. The court decided on custody of the Johnsons' child almost immediately. Six weeks post partum, the legal parents (surrogate mother and her husband) gave their consent to the adoption. After the first decision, the court decided on custody again in order to establish "pre-adoption care". The third application was lodged four months after the second court decision. The adoption

¹⁵ The names of the couples have been changed to protect individuals receiving legal counselling.

judgement in this case entered into force about 13 months after the birth of the child. Neither the surrogate mother nor her husband (legal parents) were required to attend the court proceedings.

Conclusions

Surrogacy is growing in popularity. It is generally accepted as legitimate method within medical community insofar as certain fundamental principles (non-commerciality, medical indication) are observed. Yet, it is beyond dispute that clear legislative limits are needed. All of this applies to the regulation of surrogacy in Czechia. Although surrogacy entered Czech legislation as a legal category in January 2014 (§ 804 of the Civil Code), a comprehensive set of rules have yet to be adopted. The basic legal framework that has to be relied upon at the moment was not primarily designed for surrogacy cases. Consequently, it does not adequately reflect the specific nature of these cases. This lack of dedicated legislation leads to unpredictability and legal (social) uncertainty, which becomes particularly apparent during adoption court proceedings. Taking all these factors into consideration, we have come to the general conclusion that surrogacy is a part of the social reality and as such cannot be ignored. It therefore deserves further legislative attention. An issue of such moral and legal importance cannot be left without a clear regulatory framework setting out comprehensible and functional limits.

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