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LEGAL ASPECTS OF SURROGACY IN BULGARIA

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Abstract: With the advancement of scientific technical process and medicine, women were given the opportunity to be able to conceive through assisted reproduction and to contribute to society by becoming parents. The Republic of Bulgaria ensures the possibility of providing medical assistance for the realization of assisted reproduction through the Center for Assisted reproduction, subject to certain criteria for this. Surrogacy, as an alternative to dealing with the aging of the population, the decline in population, the demographic crisis is the subject of many controversies, both on the territory of the Republic of Bulgaria, and is a sensitive topic for possible regulation within the European Union

Keywords: Surrogacy; Substitute motherhood; Assisted reproduction; Child origin adoptive parents; Biological parents; Family rights; Best interest of the child; Motherhood; Fatherhood.

Resumo: Com o avanço do processo técnico científico e da medicina, as mulheres tiveram a oportunidade de poder conceber através da reprodução assistida e contribuir para a sociedade tornando-se pais. A República da Bulgária assegura a possibilidade de prestar assistência médica para a realização de tratamentos assistidos de reprodução através do Centro de Reprodução Assistida, sujeito a certos critérios. A maternidade de substituição, como alternativa para lidar com o envelhecimento da população, o declínio da população, e a crise demográfica, é objeto de muitas polêmicas,

tanto no território como na história da República da Bulgária, e é um tema sensível para possível regulamentação na União Europeia.

Palavras-chave: Maternidade de substituição; Reprodução assistida; Pais adotivos de origem infantil; Pais biológicos; Família; Direitos; Melhor interesse da criança; Maternidade; Paternidade.

During the recent years, the humans has been exposed at risk, in connection with pollution of the environment, acceptance of poor-quality food products, pollution of water basins, stress and other factors. All this leads to the presence of diseases that hinder the normal conception process. The new technologies that surrogate motherhood provides, such as in vitro fertilization, make it possible to have children at a later age, including from individuals or couples with reproductive problems.

Surrogacy is also known in Bulgaria under the name of substitute motherhood and is a contract in which a woman agrees to carry a child for another person or other persons who after the birth of the child will become the child's legal parents. Two types of surrogacies have been identified - traditional and gestational, depending on whether there is a genetic link with the surrogate mother.

Traditional surrogacy is the fertilization of the surrogate mother's egg, who, after she has successfully carried the fetus to term and has given birth, passes the genetic child over to another couple, with the male partner in the couple being the biological father. The second type of surrogacy, the gestational kind, is accomplished through the in vitro method, and the carrying mother has no genetic link to the baby but carries to term a fetus implanted in her uterus, originating from a foreign egg and sperm.

In many countries, surrogacy is regulated by law, and in some of them it is remunerative and practiced for commercial purposes. Such countries are Ukraine, Russia, and India. In other countries, surrogacy payments are only eligible for the costs incurred by the surrogate mother during pregnancy, including examinations, medicines, food, costs associated with the pregnancy and childbirth

etc., but not as remuneration for a service. At least in many countries, surrogacy is prohibited by law, and in others there is no legal framework for this. So, that's why „surrogacy tourism“ exists.

I. An attempt for legal regulation in Bulgaria

For the first time in 2011, a Bill amending the Family Code was submitted to the 41-st National Assembly¹, as part of a package of legislative proposals, which was the first attempt to introduce the institution of surrogacy.

The legislative package was related to amendments to the Health Act, the Civil Registration Act, the Family Code, the Social Security Code, the Labor Code, the legislation on assisted reproduction and others in the same field, which regulate the fundamental rights of both the surrogate mother and the biological mother from whom the biological material will come.

In the texts voted at first reading² in the National Assembly for amendments to the Family Code, a new art. 60a, was introduced, which regulates surrogacy in assisted reproduction.

The regulation prohibits the remuneration of the surrogate mother, with the exception of reasonable expenses in connection with the healthy maintenance of the pregnancy, the necessary expenses for her recovery after birth, as well as the financial security in connection with her temporary incapacity for work.

The bill explicitly restricts that the procedure can be available only to married couples - Bulgarian citizens, provided that they have a valid civil marriage, allowing only the hypothesis of a mixed marriage between a Bulgarian and a foreigner. In other words, it excludes the possibility for foreign “tourism” in order to provide a surrogate “service”.

¹ Submitted to the National Assembly of the Republic of Bulgaria with entry No. 154-01-84 on 29.07.2011.

² Report on the first vote in the National Assembly of the Republic of Bulgaria with Entry No.: 153-03-110/26.09.2011

The envisaged surrogacy excludes profitability for the mother who carries the fetus to term and this is confirmed by the impossibility for persons with foreign citizenship to undergo procedures for assisted reproduction.

Surrogacy is possible only on condition that the wife has indisputably established infertility, and the regulation explicitly states the hypotheses for this.

Both the form and the content of the contract for surrogacy have been expressly regulated, namely that it may concern only one procedure for assisted reproduction. For each subsequent surrogacy it was necessary to conclude a new contract. The contract is strictly formal, and the consent of the parties is not sufficient to give rise to legal effects. The constitutive effect of the contract arises only after its approval by the court.

That was our vision to surrogacy.

The written motives for the bill for amendments to the Family Code were short and were declaratively based on the deepening demographic crisis, the aging of the population, the emigration of young people, and the increasing number of families with reproductive problems and infertility. And the bill was not passed and since then no action has been taken for the legal regulation of surrogacy on the territory of the Republic of Bulgaria.

II. Bulgarian Legislative Framework

Our national family law explicitly regulates the origin of the child and the identification of his mother by the legal fact of the birth given by the mother.

According to Art. 60 of the Family Code, the mother is the woman who gave birth to the baby, including in cases of assisted reproduction. So it can only be a woman and only that woman who gave the birth.

And this origin cannot be disputed on the grounds that the child was born by this procedure, an argument from Art. 60, para. 5.

The Bulgarian legal framework is categorical and does not allow the establishment of a different origin of a child, provided that the woman who gave birth to the baby is known.

But, we had a Regulation No 28/2007 for assisted reproduction activities where contains a definition for surrogacy. In its Additional Provisions paragraph 1, item 30, “surrogacy” is presented as a method in which a woman carries out a pregnancy instead of another and, after the birth of the child, the woman passes the child over to the biological parents. In the Medical Standard “Assisted Reproduction”, established in the same Regulation, item 5.14 explicitly prohibits the accomplishment of surrogate pregnancies in assisted reproduction. The same Regulation was repealed in 2020 for having been issued in violation of the administrative procedure rules³. At this stage in Bulgaria there is no legal term for surrogacy.

III. Public Order

Consideration of public order in our domestic law is a basic principle in international law based on the existence of considerations of public order, established in our domestic law in Art. 45 of the Code of Private International Law⁴. The consideration of public order places limits on the application of foreign law, in accordance with the national legal order, and the possibility of refusing to apply foreign law when it is clearly incompatible with the basic principles of the law

³ Decision 4655 of 21.04.2020 of the Supreme Administrative Court under adm. case No. 7771/2019.

⁴ Art. 45 of the Code of Private International Law of Bulgaria (1) A provision of foreign law, determined as applicable by this Code, is not applied only if the consequences of its application are clearly incompatible with the Bulgarian public order.; (2) The incompatibility is assessed, taking into account the degree of connection of the relationship with the Bulgarian legal order and the significance of the consequences of the application of foreign law. ; (3) When the specified in para. 1 incompatibility, another appropriate provision of the same foreign law shall apply. If there is none, a provision of Bulgarian law applies, if this is necessary to settle the relationship.

of the Bulgarian court referred to. The public policy consideration may be affected by the legal consequences that surrogacy provides, having already taken place in countries where it is legally regulated. Of course, it is important for this, in the first place, whether the legal relationship with an international element, on which the Bulgarian court is referred to rule, has such a connection with our country that it would affect its public order, such would for example be the case of same-sex parenting, carried out in surrogate service used. The consideration of public order remains at the discretion of the court at the time of application of the relevant foreign law in each specific case, taking into account the degree of connection of the relationship with the Bulgarian legal order and the significance of the consequences of the application of the foreign law.

However, the ECtHR has repeatedly ruled that the concept of “public policy”⁵ as a ground for allowing an exception to fundamental freedoms must be interpreted strictly, so that its scope cannot be determined unilaterally by the Member States without control by the Union institutions. It follows that the ECtHR allows reference to public order to be made only in the case of a real and sufficiently serious threat affecting a fundamental public interest.

IV. Crimes attributable to surrogacy under Bulgarian law.

Crimes related to surrogacy under Bulgarian Law the Bulgarian Penal Code contains *corpus delicti*, which, despite the lack of legal substance in the field of surrogacy, can bring to justice persons who aim to achieve such a result.

- *Declination*: Art. 182a, para 1 of the Penal Code, incriminates for criminal acts the one who persuades a parent through donation, promise, threat or abuse of official position to abandon a child or to give consent for the child’s adoption;

⁵ Paragraph 55 of the Judgment of the ECtHR (Grand Chamber) of 14 December 2021 in case C 490/20; paragraph 44 of the Judgment of the ECtHR of 5 June 2018, *Coman and others*, C 673/16, EU:C:2018:385.

- *Intermediation*: Other criminal act Art. 182a, para. 3 of the Penal Code incriminates mediation, but against unlawful pecuniary gain;
- *Sale of Child*: Art. 182b of the Penal Code declares criminal acts in which a woman or a pregnant woman consents to the sale of a child on domestic territory or abroad.

The main characteristic of these crimes is the fact that a prerequisite for the incrimination is the presence of a selfish purpose - obtaining property benefits, i.e., such an act will be disproportionate and the composition of the respective crime will not be committed when the act is committed gratuitously.

On the other hand, such crimes are not classified as “serious crimes” within the meaning of Art. 93 item 7 and are more leniently punishable.

- *Human trafficking*: Another crime we have is under Art. 159a, para. 3 of the Penal Code defines as a serious crime an act of human trafficking, criminalizing acts in which individuals or groups of people are recruited, transported, concealed or granted entry, also when it comes to a pregnant woman or pregnant women for the purpose of selling the child.

V. European Court of Human Rights

Challenges for the courts and the European Court of Human Rights
 The lack of legal regulations on the territory of the Republic of Bulgaria does not mean that the issue is not the subject of court cases when it comes to private legal relations with an international element. Surrogacy, as legally established in different countries, is also available to Bulgarian citizens, although this runs contrary to our domestic regulations. As Bulgarian citizens, their children, as well as the parties to surrogacy, should have the same rights as other Bulgarian citizens, without prejudice to fundamental rights such as citizenship, inheritance, right to free movement, right to family life, etc.

Administrative Court Sofia in Bulgaria⁶ made a reference to the Court of Justice of the European Union on issues related to the issuance of the Bulgarian birth certificate. In its motives the Bulgarian court considers the relevant case law of the European Court of Human Rights.

In this case⁷ the ECHR held that the impossibility of two children born in USA by a surrogate mother to recognize in France their relationship with their biological father, from whom they were conceived, and his wife, who is their foster mother, or “legal mother”, as recorded in the birth certificate of the children. According to the facts of the case, the French administrative authorities refused to register the birth certificates of the two children issued in USA, which included the names of their “adoptive parents”. Parents who have resorted to the services of a surrogate mother on the grounds that such a method of having a child is prohibited in France.

In its judgment, the ECHR emphasized that respect for privacy required everyone to be able to establish the details of their identity as a human being, including details of their kinship, and that an important aspect of an individual’s identity was questioned when kinship was affected. Adding that the right to respect for the private life of children born abroad by a surrogate mother, which includes the possibility for everyone to establish the identity of their identity, including their kinship, has been violated by the non-recognition of French law of kinship between these children and their parents.

In an advisory position following an inquiry by the French Court of Cassation⁸, within the framework of a review of this case, the ECHR found that the lack of recognition of the kinship between a child born to a surrogate mother abroad and his „adoptive“ mother had a negative effect on several aspects from the right to respect

⁶ Court Order No. 7424 of 2.10.2020 of the Administrative Court - Sofia under Admin. Case No. 3654/2020.

⁷ *Mennesson v. France; Labassee v. France*, § 96.

⁸ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother [GC], request no. P16-2018-001, French Court of Cassation, 10 April 2019.

for the child's private life. More generally, this disadvantages the child as it places him in a situation of legal uncertainty regarding his identity in society. In particular, there is a risk that the child will not have access to the citizenship of the „adoptive“ mother under the conditions guaranteed by kinship, which may complicate his residence in the territory of the country of which the „adoptive“ mother is a national, his inheritance rights in relation to that the mother to stop, the child has been placed at a disadvantage in maintaining its relationship with the „adoptive“ mother in the event of separation of the „adoptive“ parents or the death of the other parent, and the child has no protection against possible rejection by his „adoptive“ mother to take care of him.

Extremely important for the consequences of the recognition of surrogacy and the established in Art. 8⁹ of the European Convention on Human Rights, the right to respect for private and family life. This gives each person the right to learn the details of their identity, which includes the parent-child relationship. In its case-law, the Court considers that this category also includes children born to a surrogate mother outside a Member State whose legal parents, according to the foreign State, cannot be registered as such under domestic law. Article 8 of the European Convention on Human Rights does not oblige states to legalize surrogacy. The Court considers that the refusal to recognize the legal relationship between a child born under a surrogacy agreement abroad and the intended parents does not violate the right of parents and children to family life, if this inability to obtain recognition of the legal parent-child relationship does not interfere to enjoy their family life together. The court did not require states to legalize surrogacy and held that states may require proof of parentage of children born to surrogate mothers before issuing identity documents to the child. The Court also considered, however, that the child's right to respect for his private life required domestic law to provide for the possibility of recognizing the legal relationship between a child born

⁹ *Mennesson v. France*; *Labassee v. France*; *D. and Others v. Belgium*; *Foulon and Bouvet v. France*, §§ 55-58.

through a surrogacy arrangement abroad and the father, where he is the biological father¹⁰. The choice of means by which to achieve recognition of the legal relationship between the child and the surrogate mother, however, falls within the discretion of the State.

The opinion of General Advocate - Case C490/20 of Bulgarian`s court preliminary request says that „a Member State may not refuse to recognize the family relationships, established on the birth certificate issued by another Member State, between one of its nationals, her wife and their child for the purpose of exercising the rights conferred on that national by secondary EU law on the free movement of citizens, on the ground that the domestic law of that woman`s Member State of origin does not provide for either the institution of marriage between persons of the same sex or for the maternity of the wife of the biological mother of a child. This applies irrespective of whether the national of that Member State is or is not the biological or legal mother of that child under the law of her Member State of origin and the nationality of the child.“

The Court notes that the right to respect for family life enshrined in Article 7 of the Charter must be considered in conjunction with the obligation to take into account the best interests of the child¹¹ recognized in Article 24(2) thereof. Since Article 24 of the Charter, as recalled in the Explanations on the Charter of Fundamental Rights, makes the most important rights of the child enshrined in the Convention on the Rights of the Child, ratified by all Member States, part of Union law, the provisions of that Convention must duly to be taken into account when interpreting said Article 24¹².

In order to comply with the best interests of the child, it is also necessary that these rights are available in all countries with which

¹⁰ Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother).

¹¹ Point 63 of the Judgment of the ECtHR (Grand Chamber) of 14 December 2021 in case C 490/20.

¹² Judgments of 14 February 2008, *Dynamic Medien*, C 244/06, EU:C:2008:85, paragraph 39 and of 11 March 2021, *État belge (Return of a parent of a minor)*, C 112/ 20, EU:C:2021:197, point 37.

the child has a legal relationship, that is, there should be continuity between countries regarding this¹³.

The Court recalls¹⁴ that the rights recognized by Article 21(1) TFEU of nationals of Member States include the right for them to lead a normal family life together with their family members both in the host Member State and in the Member State of which they are nationals, upon their return to it¹⁵.

In conclusion it can be summarized, that the practice of the ECtHR is extremely rich and strives both to reconcile the protection of the rights and legitimate interests of the parties concerned, and to not prejudice the national legal framework of the member states, and also to a delicate harmonization of European law.

With the development of scientific and technological progress, genetics and the progress made by medicine, humanity is faced with the challenge of adopting a new approach to intervening in the creation of human life and regulation of the concept of family. Human rights make states inevitable in protecting them, forcing them to legally regulate in one way or another the scientific achievements and opportunities they provide as surrogacy. Of course, besides the problems in the field of legal aspects of the institute of surrogacy, regulation is necessary both in the religious affirmation of the method of reproduction, and as a psychological problem of the affected subjects.

¹³ Judgment of 2 October 2003, Garcia Avello, C-148/02, EU:C:2003:539). Requirement in the 2015 annual report of the UN High Commissioner for Human Rights (Recommendation A/HRC/31/29; Convention on the Rights of the Child.

¹⁴ Point 47 of the Judgment of the ECtHR (Grand Chamber) of 14 December 2021 in case C 490/20.

¹⁵ Judgment of 5 June 2018, Coman and others, C 673/16, EU:C:2018:385, paragraph 32 and the case-law cited.