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The place of surrogate agreement in civil law contracts system

This article is devoted to the problems of legal regulation of surrogate agreement. The relevance of the research due to the fact that at present time in the Republic of Kazakhstan surrogate agreement is not enough regulated legal construction that, in turn, affects the legal practice. The legal essence of surrogate agreement, its law nature is considered in this article. The study of several models of surrogate agreement and their elements, including the scope of the contract, subject structure and other terms that pass on the essential characteristics of the contract is carried out by authors on the basis of the analysis of different points of view of top-level scientists in the sphere of contract and family law, with a purpose to finding of an optimum construction. Taking into account the law enforcement practice, the theoretical features of surrogate agreement construction, as well as different points of view, characterizing the contemporary level of exploration of this issue, the authors draw conclusion about the independent place of surrogate agreement construction in civil law contracts system. Having a superficial similarity with the group of obligations on rendering of services surrogate agreement significantly stands out from this group of special requirements for subject composition and terms of its execution, which proves that the legal nature of these contracts is different.

Keywords: surrogacy, assisted reproductive technologies, surrogate agreement, legal nature of surrogate agreement, the essential terms of surrogate agreement, subject structure of surrogate agreement, compensated rendering of services, the legal nature of the contract.

Development of medicine in the sphere of reproductive technologies gives hope to those people who are desperate to have children of their own. But, as is often the case, the development of science advances the moral and legal adaptation of society to its new achievements. Legal support of surrogacy, as well as other programs based on reproductive technologies of today - one of the most difficult issues in modern legal practice, organize and develop the general trends of development which today is almost impossible.

Let return to the statistics. According to the Ministry of Health of the Republic of Kazakhstan data today infertile couples are in the order of 12-15 per cent of the total population, or 30-35 percent among couples. On this basis, about 7000 pairs per year require the use of assisted reproductive technologies. This number can be increased several times since as the national mentality often prevents to speak openly on the subject and apply to health services. In terms of the World Health Organization this scale should automatically output the problem at the state level, given that this fact affects the overall demographic situation across the country [1].

It should be noted that partly the creation of necessary conditions conducive to the procreation and education of children, increasing the role of family relationships, prestige of motherhood and fatherhood helps to solve this problem. In our country this problem is tried to solve at the legislative level, making the rules governing the process of assisted of reproductive technologies. In particular, the Code of the Republic of Kazakhstan «On people's health and health care system», which laid the legal basis for surrogacy was adopted September 18, 2009 [2], the Rules of assisted reproductive methods and technologies approved 30 October 2009 by the order of acting Minister of Health of the Republic of Kazakhstan № 627 [3], the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», which contains a chapter 9. «Surrogacy and use of assisted reproductive techniques and technologies» enacted January 7, 2012» [4].

All this contributes to the popularity of surrogate agreement among married couples in the Republic of Kazakhstan. However, despite the fact that the legislation on surrogacy in Kazakhstan gradually formed, in legal doctrine there is still no common understanding of the legal nature of the construction of surrogate agreement that dictates the need for a separate scientific researches on these issues, and confirms its relevance.

The concept of assisted reproductive technologies is formulated in Article 1 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», according to which the assisted reproductive methods and technologies are complex medical procedures for diagnosis, treatment and rehabilitation, aimed at correcting the reproductive activity of citizens [4]. Surrogacy is related to these methods.

Surrogacy is a bearing and birth of the child (children), including cases of premature birth, according to the contract between the surrogate mother and the spouses with the payment of remuneration. In turn, the

agreement of surrogacy - a notarized written agreement between persons of Marriage (Matrimony) and who wish to have a child and a mother, which gave its consent to the bearing and birth of a child through the use of assisted reproductive methods and technologies [4].

Despite the fact that at the legislative level definition of surrogacy contract is fixed, in theory there is no unanimity in the understanding of its essence, what is more, the scientists propose different constructions in support of the fact of its existence in the legal reality. For example, some authors believe that the agreement on surrogacy should not be considered as a civil contract and, accordingly, it is unacceptable to use the civil legislation on contracts. Other authors believe that this agreement in accordance with Art. 157 of the Civil Code of the Republic of Kazakhstan should be classified as void transactions, as violating the foundations of morality and law [5].

Analyzing the data points of view, we can say the following.

In accordance with sub-section 1 of Article 100 of the Code of the Republic of Kazakhstan «On people's health and health care» surrogate motherhood is a bearing and birth of the child (children), including cases of premature birth, according to the contract between the surrogate mother and the spouses with the payment of compensation [2]. Based on this, we can draw the following conclusions: the parties to the agreement are the surrogate mother, on the one hand, the couple - on the other, this contract is commutative.

According to sub-section 1 of article 54 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» surrogate agreement shall be in writing in compliance with the requirements of the civil legislation of the Republic of Kazakhstan and shall be subject to mandatory notarial certification [4]. Therefore, given the fact that the contract of surrogacy is not directly named in the Civil Code of the Republic of Kazakhstan, it is related to a system of unnamed civil legal contracts, the conclusion and the implementation of which is governed by the general rules of civil legislation despite the fact that the institution of surrogate motherhood is not an institution of civil law.

The legal nature of the legal entity or a civil legal contract is to identify the necessary conditions for its conclusion, the basis of which is determined by its origin and then, to what kind of legal phenomena it belongs.

Range of views of scientists is very different. From denial of surrogate agreement as the existing legal phenomenon to reckoning it to various types of civil contracts. Most recent ones inclined to think that this agreement is similar to the contract of compensated rendering of services, and therefore, it should be subject to the regulations of the compensated rendering of services.

For example, according to E.S. Mitryakova, surrogate agreement has a nature similar to those of civil-legal agreements, as lease, service contract, contract of sale [6; 72]. E.V. Stebleva considers that the agreement of surrogacy has family-legal nature altogether, because on the basis of signed parties surrogate contract surrogate mother agrees to bear and give birth genetically stranger to her child for genetic parents (parent), provided that the child's conception occurs through procedures of in vitro fertilization and embryo implantation obtained using gametes of genetic parents and genetic parents (parent) agrees to provide surrogate mother with necessary conditions for pregnancy and childbirth [7; 9].

Ye.A. Batler points out that in order to understand the species of a surrogate agreement it is necessary for a start to determine what serves as its subject: the rendering of services or performance of work? Therefore, in order to qualify the legal nature of the agreement it is necessary to define its subject, which includes what the aim relationship; subject composition and the resulting rights and obligations.

According to Art. 683 of the Republic of Kazakhstan Civil Code on the compensated rendering of services agreement performer undertakes, by the Customer to provide services (to perform certain actions or carry out certain activities), and the customer agrees to pay for such services [8]. If we imagine that a married couple acting as a customer, and the surrogate mother in the role of the performer, who for hatching reward for a couple a child, at first glance, based only on the determination of the contract, it is possible to agree with the fact that the contract of surrogacy follows from the nature of compensated rendering of services agreement.

However, the need for more detailed analysis of the surrogate agreement and compensated rendering of services agreement is appropriate. As far as they are identical, or still different contractual structure in their nature.

As mentioned above, an essential condition for conclusion of any kind of contract is its subject. In this regard, it appears that the identification of the legal nature of surrogate agreement is not possible without defining its subject matter. On this occasion, there are several points of view. According to a first one, subject of the contract are the actions that should be made on this contract [9; 78]. It is the opinion of the majori-

ty of researchers, considering as a subject of surrogate agreement, the actions in the form of services of a surrogate mother as a commitment to the development of the newborn human embryo into a child.

For example, Borisova T.E. writes that the surrogate mother grows implanted her embryo. She gives him the internal environment of her womb. Her body, lifestyle and actions since the conclusion of surrogate agreement are targeted at creating favorable conditions, the normal uterine development and subsequent prosperous childbearing [10; 65]. From this comes out is that the process itself is important, that is service. Similarly Mitryakova E.S. considers, according to which the provision of paid services of a surrogate mother for bearing and birth of genetically alien to her child for further transmission to customers serves as the subject of surrogate agreement [6; 78]. On this basis, she believed that an agreement of surrogacy follows from the compensated rendering of services and has a similar nature. And in view of this circumstance, E.S. Mitryakova offers to legislator «to take into account the undeniable similarities surrogacy agreement with a compensated rendering of services agreement and include it in the list of contracts, which are covered by chapter 33 of the Civil Code of the Republic of Kazakhstan» [6; 86].

And this, despite the fact that sometimes the surrogate agreement, by its legal nature, is gratuitous, although it should be noted that in most cases it is compensated in nature and, accordingly, has the features of a service agreement.

The second view identifies the subject of the agreement with the object of the legal relationship which arises from it. The grounds for the existence of such differences in the approaches to the definition of the contract subject are given by the law itself. The subject of the contract is identified with a particular object in the Civil Code of the Republic of Kazakhstan. For example, the things (goods) are as the subject of the contract of sale. In addition, some necessary actions on this property are included into the subject of the contract as a transaction in addition to specifying the subject of future legal - obligations. For example, Zhuravleva S.P. wrote in his works that, in view of the theory of contract law exactly the object of the contract is regarded as a «powerless» means, thing which transferred under the contract. Thus, in view of the current conventional practice, the embryo is subject of contract, for which actions are performed by implantation, nurturing, birth and transmission to potential parents being directly subject of the contract. In addition to services provided by a surrogate mother to potential parents, in some cases, the subject is also included services of the institution on the medical support of the contract. It seems that the position of «subject - object» of the contract is the optimal contract in the framework of the theory of contract law [11; 10].

In our opinion, it is necessary to agree with the authors, who believe that the subject of surrogate agreement should include only the obligations of the parties under the nurturing of the child and payment of «compensation», but not the embryo as an object for which implantation and development activities are made. Such arguments may sound unfamiliar from the moral point of view active in the community, because the person cannot be the object of relationships, but only as subject. As well as the surrogate mother cannot act as the object, for example, lending herself to hold a fertilized ovum.

Compensated rendering of services agreement in the same way as any other contract, has its own subject. And here it is possible to trace some resemblance to the surrogate agreement, as process - providing a variety of services for a fee is important in the compensated rendering of services agreement.

It should be noted that the surrogate agreement and the compensated rendering of services agreement are focused solely on the process of actions, not to the final outcome materialized, in contrast, for example, by works contract, where the result must be guaranteed the material object. Exactly it is upon consumption. The contract of surrogacy, as well as in the compensated rendering of services agreement has no such guarantee. This is confirmed by Art. 55 and 57 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family», according to which the surrogacy contract should contain: Data of spouses (customers) and surrogate mother; order and terms of payment of material costs for the maintenance of a surrogate mother; rights, duties and responsibilities of the parties in case of default of contract terms; the amount and procedure of compensation; other conditions, including force majeure circumstances [4].

And among the surrogate mother's duties such duties are as: to introduce to customers the medical report about her physical, mental and reproductive health; to observe by a doctor regularly and strictly follow his recommendations and destinations; to inform the people concluded the agreement with her on the course of pregnancy at the intervals specified in the contract of surrogate motherhood; to convey a child born to persons who have concluded with her the contract of surrogacy [4].

Of course, signing a contract of surrogacy, the result is expected, but the essence of the agreement is that the surrogate mother exactly is nurturing the child. And the contract will be valid, even if the result did not meet the expectations of participants of legal relations. The same happens with the compensated render-

ing of services agreement. Regardless of the result achievement agreement will be entitled to its legal existence. For example, getting a massage course does not guarantee the fact cure for a particular disease, but is an independent medical service, on the occasion of the implementation of which is the paid services.

Surrogate agreement is usually made between the surrogate mother and the child's biological parents. Simultaneously with the agreement of surrogacy spouses (customers) conclude an agreement with the medical organization applying assisted reproductive methods and technologies, which will provide the relevant services. That is in fact there are two independent contracts: between the couple and the surrogate mother - a contract of surrogate motherhood; between spouses and medical organization - the compensated rendering of services agreement, as in accordance with sub section 2 art.683 of the Civil Code of the Republic of Kazakhstan medical services are covered by the rules of compensated rendering of services agreement [8], and the use of assisted reproductive methods and technologies - is a group of methods and medical procedures.

Surrogate agreement is consensual agreement, as the rights and obligations arise for the parties from the moment of date of the Surrogate agreement and not from the moment of delivery of the thing date or the other action. Compensated rendering of services agreement has similar nature. The rights and obligations of the parties also arise from the moment they reach an agreement in this contract.

Both agreements are reciprocal, as carry certain rights and obligations for all parties of these relations.

Compensated rendering of services agreement is a bilateral; on the one hand, it is the customer, on the other - a performer. Surrogate agreement is also bilateral. However, along with this agreement, it is necessary to conclude a new treaty, without of which the contract of surrogacy cannot be executed because it is impossible to bear a child by a surrogate mother without transfer of the fertilized embryo into the uterine cavity of a surrogate mother. And these actions are carried out within the framework of a compensated rendering of services agreement concluded by the spouses with the medical organization. It turns out that these contracts are related. The need to conclude additional contracts for the performance of classical contract of compensated rendering of services available. This also manifests a certain difference between the two analyzed agreements.

Surrogate agreement may be concluded for a fee or free of charge. This follows from the list of those material costs which the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» refers to the category of the duties of the spouses. Among them, the material costs: for the maintenance of a surrogate mother; associated with the passage of medical examination by surrogate mother; related to the application of assisted reproductive techniques and technologies; on medicine services of a surrogate mother during pregnancy, childbirth, and for fifty-six days after birth, and in case of complications related to pregnancy and childbirth, to pay the expenses for seventy days after birth [4]. In this list there is no obligation of the spouses to pay the fee a surrogate mother.

In turn, the compensated rendering of services agreement by itself implies retribution, which is reflected in its name, that is, in this agreement provision of services by service provider to service taker is performed for a fee.

However, some authors believe that the process of bearing a child - this is the service for a concrete fee. For example, A.A. Pestrikova argues that in the contract between the prospective parents and surrogate mother - the subject of the contract is to provide a kind of service for which the surrogate mother receives compensation [12; 78].

In our opinion, it is difficult to imagine that the surrogate mother, nurturing, and is giving birth to a child, thus, has render a service or performs a specific job. Services and works, as objects of civil rights, always have a value of the estate. To estimate life and the birth of a child or to calculate the exact or approximate cost of surrogate mother's actions is not possible, either legally or morally. Payment for medicine service, nutrition and other conditions, which are set by the parties in the contract - do not make an agreement for compensation, as these costs should be considered as necessary costs, like, for example, costs of materials, forming part of the work required under the contract. Thus, monetary compensation may occur as gratitude, that's why it is the prerogative of the parties, which may appear as an additional condition in the contract, and not as a well established rules prescribed in legislation level.

Not less important is the form of the conclusion of analyzed contracts. Compensated rendering of services agreement often consists in simple writing form. At the same time, oral form of its conclusion is acceptable, for example, the services of a stylist or barber, which in turn provides for compensated rendering of services agreement. The legislator strictly spelled out the shape of its sentence for surrogate agreement. Thus, according to Article 54 of the Code of Republic of Kazakhstan «On Marriage (Matrimony) and Family» surrogate agreement shall be in writing in compliance with the requirements of the civil legislation of the

Republic of Kazakhstan and shall be subject to mandatory notarization [4]. On this basis, it is possible to formulate a conclusion that the surrogate agreement is always in writing only, which clearly regulates the rights, duties and responsibilities of the parties. In addition, the contract shall be subject to mandatory notarization. This is connected to the fact that the notarization procedure allows the identification of the actual will of the parties (by checking the identity and authority of the persons signing the deal, they clarify the content of the transaction and of the consequences of the transaction), check the legality of the transaction and undeniably, protection of rights abuses interests of the parties. Except as noted, a notarized form of contract is another important guarantee of the rights and legitimate interests of not only the parties of contract under consideration, but also the legitimate rights and interests of the future child and the interests of society and the state, which significantly affected in connection with the conclusion and implementation of the surrogate agreement.

For non-compliance with the agreement of surrogacy written form and notarization entails the fact of its invalidity in connection with the defect will, which does not happen with the compensated rendering of services agreement.

It is necessary to pay attention to the subject composition of the analyzed agreements. Thus, the subjects of a service agreement are - the Service Provider (contractor) and service taker (customer). The Civil Code of the Republic of Kazakhstan does not contain any restrictions regarding the subject composition of compensated rendering of services agreement, so it is necessary to focus on the general rules of citizens and legal entities participation in public circulation. For example, a customer of audit services or executor of the contract for the provision of telephone services can only be a legal person. Medical, educational activities subject to licensing, therefore, the executor of the contract for the provision of these types of services is the person who has the license to engage in private practice. From this it is possible to conclude that the service provider is always the person entitled to the production of paid services, i.e. business activity, the customer can also be any subject of civil law.

Thus, the legislator doesn't have clear restrictions to the subject composition for the compensated rendering of services agreement, but only general rules are used.

In turn, such restrictions are in surrogate agreement. The parties in the contract of surrogacy are customers (potential parents) and the surrogate mother. And, based on the requirements of the law to the parties of contract, it can be concluded that not everyone can be a participant. For example, a woman who wants to become a surrogate mother must be between the ages of twenty and thirty-five years old, have a satisfactory physical, mental and reproductive health, confirmed by the conclusion of the medical organization, as well as having their own healthy child [4]. As we can see, not every woman can become a surrogate mother, and the only one that meets the age and medical requirements. In addition, men are excluded from this group of subjects. Customers under the contract of surrogacy can only be spouses. According to sub section 26 of Article 1 of the Code of the Republic of Kazakhstan «On Marriage (Matrimony) and Family» marriage is an equal union between a man and a woman, entered into with the free and full consent of the parties in accordance with the law of the Republic of Kazakhstan, with the intent of creating a family, generating property and moral rights and duties between the spouses [4]. On this basis, it is possible to formulate a conclusion that surrogate agreement sets strict requirements for the subject composition.

Thus, the existence of certain requirements to the subject composition of the contract of surrogacy allows it to be distinguished from a compensated rendering of services agreement.

Another condition, which allows to distinguish an agreement of surrogacy from the compensated rendering of services agreement, is that surrogate mother can and should perform the service personally in the contract of surrogacy, that is, without the transfer of her rights to third parties, which is not the compensated rendering of services agreement where third parties can be held for the performance of services or works under the contract.

In addition, the compensated rendering of services agreement by its legal nature, is public. This means that the agreement does not limit the scope of, and binding manner should apply to all, which is not the surrogate agreement, which is not public, but rather has the personal character for participants of these relations.

Thus, analyzing the contracts, we are seeing some differences. The assignment of surrogate motherhood agreement to the compensated rendering of services agreement only under the terms of its retribution in the form of remuneration, in our opinion, it is not accurate, because the surrogate agreement can be signed, and at no charge.

Based on the above, we can conclude that the similarity is between the analyzed agreements, but this is not enough to recognize the agreement of surrogacy as a kind of compensated rendering of services agree-

ment. In addition, in our opinion, the contract of surrogacy has individual features that do not allow us to attribute it to any type of contracts, and thereby give good legal basis to allocate it as an independent form of a civil contract.

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Азаматтық-құқықтық келісімшарттар жүйесіндегі суррогат ана болу келісімшартының орны

Мақала суррогат ана болу туралы келісімшартты құқықтық реттеу мәселесіне арналған. Зерттеудің өзектілігі қазіргі уақытта Қазақстан Республикасында суррогат ана болу туралы келісімшарт жеткілікті құқықтық тұрғыда реттелмеген, бұл өз кезегінде құқық қолдану тәжірибесіне әсер етуде. Авторлар суррогат ана болу туралы келісімшарттың құқықтық мәні, оның заңды табиғатын зерттеді. Шарттық және отбасы құқығы жүйесіндегі жетекші ғалымдардың әртүрлі көзқарастарын талдау негізінде суррогат ана болу туралы келісімшартының бірнеше моделін, оның элементтерін, пәнін, субъективтік құрылымын және аталмыш келісімшарттың маңызды сипаттама беретін басқада талаптарына оңтайлы құрылым іздеу мақсатында зерттеу жүргізілді. Суррогат ана болу туралы келісімшартын, ерекше теориялық құрылымын, құқық қолдану тәжірибесін назарға ала отырып, сонымен қатар аталған мәселені қарастырудағы қазіргі деңгейін анықтайтын әртүрлі көзқарастарды, азаматтық-құқықтық келісімшарттар жүйесіндегі суррогат ана болу дербес келісім ретінде қорытынды қалыптастырды. Өтеумелі қызмет көрсету бойынша міндеттемелер тобына үстемдік ете отырып, суррогат ана болу туралы келісімшарт осы топтың субъективтік құрылымы мен оның орындалу мерзіміне ерекше талаптармен ерекшеленеді, бұл осы келісімшарттардың құқықтық табиғаты әртүрлі екендігін дәлелдейді.

Кілт сөздер: суррогат ана, қосымша репродуктивті технологиялар, суррогат ана болу туралы келісімшарты, суррогат ана болу туралы келісімшартының заңдық табиғаты, суррогат ана келісімшартының маңызды шарттары, суррогат ана келісімшартының субъективтік құрамы, өтеумелі қызмет көрсету, келісімшарттың құқықтық табиғаты.

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Место договора суррогатного материнства в системе гражданско-правовых договоров

Статья посвящена проблемам правового регулирования договора суррогатного материнства. Актуальность исследования обусловлена тем, что в настоящее время в Республике Казахстан договор суррогатного материнства является недостаточно урегулированной юридической конструкцией, что, в свою очередь, сказывается на правоприменительной практике. Рассматриваются юридическая сущность договора суррогатного материнства, его правовая природа. На основе анализа различных точек зрения ведущих ученых в сфере договорного и семейного права, с целью поиска оптимальной конструкции авторами проводится исследование нескольких моделей договора суррогатного материнства и их элементов, среди которых предмет договора, субъектный состав и другие условия, передающие существенные характеристики данного договора. Принимая во внимание правоприменительную практику, теоретические особенности конструкции договора суррогатного материнства, а также различные точки зрения, характеризующие современную степень разработанности данного вопроса, в статье формулируется вывод о самостоятельном месте договорной конструкции суррогатного материнства в гражданско-правовой системе договоров. Имея поверхностное сходство с группой обязательств по возмездному оказанию услуг, договор суррогатного материнства существенно выделяется из данной группы особыми требованиями к субъектному составу и условиям исполнения. Доказывается, что правовая природа данных договоров различна.

Ключевые слова: суррогатное материнство, вспомогательные репродуктивные технологии, договор суррогатного материнства, юридическая природа договора суррогатного материнства, существенные условия договора суррогатного материнства, субъектный состав договора суррогатного материнства, возмездное оказание услуг, правовая природа договора.

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