



## Surrogate motherhood from a legal and a practical point of view

**The institute of surrogacy remains unregulated by the Czech law.** In practice one could speak of a **legal limbo** (grey area); Legislation (also there people are employed) knows that it exists - and perhaps even uses it - but to take the step to create a legal basis one would rather desist from. It is not prohibited and at the same time the conditions of its exercise are not defined by the legislator. It is an increasingly popular solution for infertility of a couple, therefore its existence cannot be overlooked.

### In short:

Surrogate motherhood refers to the situation that the so-called surrogate mother pursuant to an agreement is fertilized with an embryo (i.e. an egg cell (usually of the intended mother) fertilized with the sperm of the donor, usually the intended father) produced in vitro (i.e. outside the body, e.g. in a test tube), carries the child, gives birth and then entrusts the child to the intended parents or - if only present - to the biological father.

### Shortly to the terminology:

**Surrogate mother, gestational surrogate, surrogate**, all these terms essentially mean the same thing.

To simplify matters, we simply stick to the most common term, the surrogate mother.

## Assisted reproduction

This quite technical sounding term has certainly been heard by some people before.

Simply put, this term describes various methods of artificial insemination.

The point here is that a surrogate mother is given an embryo produced by "artificial" fertilization. According to the origin of germ cells, we can differentiate between **traditional and surrogate surrogacy**. In the case of traditional surrogacy, the surrogate mother's egg cells are used and sperm insemination is induced in the surrogate mother's body. Surrogate motherhood does not use the surrogate's egg, but an egg donor. The latter represents in practice – from our practice - the preferred method, since this excludes a genetic link between the surrogate mother and the fetus / child. In this case the ovum of the desired mother or an egg donor and the sperm of the intended father are used - after artificial insemination (in the test tube) - to implant the resulting embryo in the surrogate mother.

In the case of surrogate motherhood, there arises a difference in genetic parents, biological parents, and later social and legal parents.

**Under civil law, the mother of the child is the biological mother, i.e. the woman who gave birth to the child.** Therefore, the maternity of a surrogate mother is always automatically determined in the light of this provision. The origin of the egg does not play a legal role in determining the maternity.

The concept of a genetic and biological parent merges in the person of the father.

In the case of an anonymous donation of germ cells, the concept of genetic parents loses significance, as the anonymity of the donor and infertile couple on the one hand and the donor and the born child on the other hand is maintained.

### **Determination of paternity**

The path to "legal parenthood" of intended parents usually begins with the determination of paternity.

In practice, the simplest and most frequently used solution is when in the case of an unmarried surrogate mother the paternity is determined by an affirmative **declaration of the surrogate mother and the (single or married) intended father before the registry office prior to the child's birth.**

In the case of a **married surrogate mother, paternity of her husband is presumed by law.** Therefore his paternity must be denied and at the same time the paternity of the intended father determined in court. If the sperm of the intended father is used to fertilize the egg, **the court will determine the paternity on the basis of a genetic test.** Inevitably, this process will lengthen the path to paternity and bring further costs, but still achieve the goal.

*At this point a short explanation may be allowed:*

*From **our practice** we have learned that it sounds to the affected couples as if this was a totally extraordinary situation and who would know what comes out of it. This is not the case. **It is a perfectly normal thing for a court, since these findings are not only in "surrogacy matters", but long before anyone had even thought of surrogacy, were legally regulated. This legal procedure is now simply being applied to another legal matter.***

Regarding the issue of **artificial fertilization**, the Civil Code also introduces another presumption of the determination of fatherhood, where it is considered that **the father of the child is a man who has given consent to the artificial insemination.**

**This presumption is mainly about protection of the mother (regardless of the institution of surrogate motherhood)** in the event that the intended father abandons in the course of pregnancy the intention to beget a child by artificial insemination and at the same time it would not be the case were the intended father's sperm is used, but donor's sperm is. In the absence of this presumption of paternity, such a mother would not have a chance to identify a father at all and get help in the care and nutrition of the child. Consent to artificial insemination means a written consent to perform assisted reproduction.

### **Adoption**

For the **intended mother**, the only way to legal maternity is to **adopt the child born to the surrogate mother.** When the fatherhood is already determined, the wife of the father, the intended mother, may adopt the child. The motion to initiate the proceedings is proposed by the intended mother (adopter). A consent of the legal mother of the child, i.e. the surrogate mother, is necessary for the adoption. The court examines the person of the adopter, both in terms of her age and legal capacity, but also deals with her personality or reasons leading her to an adoption of the child.

Not only the effort to ensure the child a family background is considered, but also to the wish of the adopter to meet the need for parenthood and to protect the child, love and ensure his/her proper development. If the court is convinced of this, the intended mother is registered as the legal mother in the birth certificate of the child born to the surrogate mother.

In the event that the paternity has not yet been determined, the intended parents, if they are married, can propose the motion for adoption together as joint adopters.

At the same time, in the section of the Civil Code regulating adoption, we find a single provision of Czech law expressly referring to surrogate motherhood. This is Section 804, which provides for an exception for adoption among relatives in the direct line and siblings. This protects the cases where for example the surrogacy mother is the mother or sister of the intended parent.

## **Surrogacy Agreement**

### **Is such a contract necessary at all?**

Legally, the answer is **"Yes" and "No"**. Since surrogacy is not legally regulated, there are initially no legal regulations on this type of contract. Everyone knows that e.g. purchase contracts, loan contracts, leases etc. have been legally regulated. In order to find clear solutions to the countless problems and issues that such legal relationships (e.g. legal relationship between buyers and sellers, landlords and tenants, borrowers and lenders) might develop. Of course, one can no longer deny that at least as many legal problems and issues can arise even with a relationship between surrogate mother and intended parents. However, the law remains silent on this matter. But there are other legal relationships/contracts that are not expressly regulated by law (e.g. option, franchise, distribution, license contracts), even so they can be regulate with the help of the institute of the so-called contract sui generis (contract of its own kind), since this institute has provided the possibility for these cases, where there is a - perhaps - atypical legal relationship between parties to be - based on other regulated legal relations - accordingly or entirely newly regulated.

If this is possible, why not formulate and use the surrogacy agreement as a contract sui generis?

The prevailing argument to date is that the "handover" of a child cannot be the subject of a contract.

It is clear that there is more than enough room for a long discussion on this topic. As a result, however, the legal view is still undivided, that the effectiveness of a surrogacy contract is rejected.

So far, we have come to the **"No"** to the question of the need for such a contract. Why then still close such a contract, if the court does not recognize this (so far)?

Practice makes it a necessity; so **"Yes"**!

**When people close contracts (especially written contracts), they are usually aware that they are dealing with something important, binding and in need of regulation.** Not seeing a surrogacy agreement in this light would not do justice to the importance of the (un-ruled) surrogacy institution. Even if courts do not recognize this agreement (we cannot tell for sure what a court would rule at present, because so far there is no judgment dealing with this question), at least the parties involved are "legally" bound and make a decision that is vital (meaningful) in any case.

We know from our practice that surrogate mothers of all kinds are willing to give birth to a child for other people. To consider this - for whatever reason - is one thing, another thing is to actually do it.

A written contract in which is essentially everything regulated, what will become necessary in preparation, what has to be observed during pregnancy and that this legal relationship will result in an adoption of the child by the intended mother, without any right of the surrogate mother to the child, will serve as clarification of fact and try to make the involved people, which should not be done frivolously.

**If, at this point, you are expecting an answer to your question as to what the contract will help, if one of the parties does not want to stick to the surrogacy agreement, I am sorry to disappoint you. I do not have it either!**

I will not reply that it is often the same case with legally enforceable titles, which have been won in court, but - despite legal regulation – have people come out empty-handed, because you just do not always find what you want or can enforce. The discussion, which one would have to lead, would have - with all respect – be lead on a much higher level.

Nevertheless, I would like to express what you already knew: **"There is nothing you can do"!**

Any contract you close includes a degree of trust, despite legal regulation. And that is even more the case in surrogacy cases. Should not one then do the least that one can contribute to make this clearer (contract conclusion)?! Although this is not enough to clarify the parties' self-chosen rights (since there are no legal requirements), duties, wishes, etc., then the **"defaulting" persons are those who obviously cannot understand what it is really about.**

#### **Summary:**

Undoubtedly, the intended parents and the surrogate mothers will get to know each other in a certain way, discuss their mutual wishes and expectations. It is hard to believe that one of the parties would not feel better if the discussion and especially the outcome of the discussion was put on paper. What was written down will form the basis of the hopefully trustful cooperation. Ideally, the parties also want to stick to what has been written down. Surely, you could easily remember everything that was agreed and come back to it if needed. However, those who want to claim that this has the same effect as a written agreement, which essentially (for example, taking into account different native languages of the parties) clearly spells out everything that was said, just ignore practice. The sentence: "But we have agreed that ..." we hear daily. Why not just avoid this sometimes hard realization, that it is only agreed, which – if necessary - can be proved (i.e. in case of a dispute) can be proved that it was agreed on, and simply put down in writing.

Another important aspect is that so far no case is known to us which was to be decided by a court in this context. How the courts actually decide on an individual basis, we do not know.

Ultimately, it should not be forgotten that the state of affairs could change and a legal regulation could be created or that the case-law in this connection could be positive (i.e. accepting those contracts as effective). With a contract in your hands you would be on the safe side.

**Maybe those concerned and not sure what to do should just ask them selves what they can lose when they draft a contract (about wishes, expectations, rights and obligations) in writing. Actually nothing!**

## Case law

Surrogate motherhood is marginally dealt with in a sole finding of the **Constitutional Court I. ÚS 3226/16**. This finding overturned the Supreme Court's decision, which refused to recognise a California Superior Court judgment recognizing the parenthood of two men constituted in accordance with the surrogate maternity contract. The Supreme Court did so on the ground that Czech law does not allow the parenting of two persons of the same sex. According to the Constitutional Court, parenting of a child acquired through the institute of surrogacy cannot be linked to the adoption of a child. And among other things because under California law the intended parents are becoming parents already with the birth of the child and legally there were no other parents of the child than the intended parents. This is a fundamental difference compared to adoption where the parenthood of the adopting part is established secondary after the original parents. At the same time, however, parenting with the use of surrogacy cannot resemble natural parenthood. It is therefore a separate third way to become a parent. The Court then considered whether surrogacy is in conflict with public order (ordre public). The Court stated that surrogate motherhood does not contradict the Czech legal system, it is legally regulated in the state of California and at the same time does not violate fundamental rights, thus it does not fulfil the requirement of the Constitutional Court, created by its case law, according to which the clause of public order should be invoked precisely if fundamental rights were violated abroad.

However, it is of fundamental importance here that the Court finds that **the institute of surrogate motherhood is not in conflict with public order**.

For explanation: "**Ordre Public**":

- Exceptionally, foreign law will not be used (here: parenting of a homosexual couple) if it contradicts essential principles of Czech law.
- Exceptionally, foreign decisions cannot be recognized or declared enforceable if the recognition or declaration of enforceability would be in conflict with essential principles of Czech law.

**The Ordre Public (the term is of French origin) Principle ensures each state the sovereignty of its legal principles.**

## Foreign regulations

The access of foreign countries to surrogate motherhood is varied. In principle, it is possible to distinguish states that do not regulate this institution, i.e. do not expressly allow nor prohibit it (e.g. **Czech Republic**), states which regulate the altruistic form of surrogate motherhood (e.g. **Great Britain**), states which legalize the commercial form of surrogate motherhood (e.g. **Ukraine**) or states that directly or indirectly forbid it.

Countries that have legalized some form of surrogate motherhood include the United Kingdom. At the same time, however, **Great Britain** does not recognize surrogacy contracts and the surrogate mother is only entitled to reimbursement of reasonable expenses. It is the so-called altruistic surrogate motherhood. The emergence of maternity is regulated in the UK in line with the Czech legal order. But if the surrogate mother is not married and the intended father is at the same time the genetic father of the child born, the court order to transfer parenthood can be used. Based on this order, so called parental order, the intended parents become parents and the child is issued a new birth certificate.

The court will issue this order if the request is made by both intended parents, who are spouses / registered partners, and at least one of them is genetically related to the child, and do so within 6 months after the birth of the child.

Greater freedom of surrogacy has been enshrined in the legal order of **Ukraine**, where also the so-called commercial surrogacy is legalized. According to the Ukrainian Family Act, it is not necessary to take further steps after the birth of a child and the intended parents become ex lege (by law) parents of the child born. The process takes place on the basis of a surrogacy contract between the intended parents, who must be married, and the surrogate mother.

Other states that have fully legalized surrogacy include the **Russian Federation**, some states of the **USA** for example **California, Georgia (in Europe)** and **India**.

In **Germany and Austria** surrogate motherhood is obstructed by the Embryo Protection Act, which prohibits any embryo disposal and thus excludes artificial insemination. In these states, not only surrogate motherhood is excluded, but the IVF method generally even if the intended mother could carry the baby herself.

In the **Slovak Republic** surrogacy is not explicitly prohibited, but contrary to the Czech legislation, the Family Act prohibits all contracts that would be in conflict with the provision regulating maternity under which the mother of the child is the woman who gave birth to it. It explicitly provides for the invalidity of surrogacy contracts.

## **Conclusion**

In conclusion, although the institute of surrogate motherhood is not regulated by the Czech law, it has been possible to find ways within the legal order to execute it in order to fulfil its purpose, namely the birth of the child and the determination of the parenthood of the intended parents.

Nonetheless, it remains undisputed that legal regulations could provide comprehensive legal certainty for all parties, including the expectant life. Hopefully, this will change at least in the medium term as the number of surrogacy cases increases and – as the case may be - the necessary legal interventions in court which might draw more and more attention.