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LEGAL ISSUES OF REGULATING RELATIONS ARISING FROM ASSISTED REPRODUCTIVE TECHNOLOGIES COMPLICATED BY THE "FOREIGN ELEMENT"

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Introduction: *this article discusses the problem of choice of law rules to govern relations arising as a result of the use of assisted reproductive technologies where a foreign element is involved. The article highlights the issues of conflicting norms arising due to the use of in vitro fertilization (IVF) and surrogate motherhood. The article states that the use of assisted reproductive technology demands solution to the issue of choosing competent rules of law for regulating contractual relations regarding IVF and surrogate motherhood, as well as for determining the origin of children born as a result of the use of the technologies mentioned.* ***Purpose:*** *to identify the issues of legal regulation of relations arising from the use of assisted reproductive technologies complicated by the "foreign element", and to suggest ways of improving conflict rules regulation.* ***Methods:*** *the methodological framework of this work is based on the following methods of scientific cognition: dialectical, historical, formal-logical, analytical, statistical, comparative law, and also the method of classification.* ***Conclusions:*** *regulation of conflicting norms should be developed through the use of in vitro fertilization subject to compliance with the international agreements and national legislation. The problems of conflicting norms arising from the use of assisted reproductive technologies can be solved by increasing the harmonization of law within the framework of regional organizations of countries. Eligibility of making appropriate amendments to the Kishinev Convention of 7 October 2002 "Convention on Legal Assistance and Conflicts of Law in Matters of Civil, Family and Criminal Law" is justified. Furthermore, the article reasons in favor of the use of autonomy of the free will of the parties (lex voluntatis) as the main conflict-of-law principle of regulating contracts in the field of assisted reproductive technologies.*

Keywords: assisted reproductive technologies; child; foreign element; genetic relation; donorship; in vitro fertilization; artificial insemination; surrogate motherhood; autonomy of the free will of the parties; connecting factor; genetic parents

Information in Russian

ПРОБЛЕМЫ ПРИМЕНЕНИЯ ПРАВОПОРЯДКА К ОСЛОЖНЕННЫМ «ИНОСТРАННЫМ ЭЛЕМЕНТОМ» ОТНОШЕНИЯМ, ВОЗНИКАЮЩИМ ИЗ ВСПОМОГАТЕЛЬНЫХ РЕПРОДУКТИВНЫХ ТЕХНОЛОГИЙ

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Введение: *в настоящей статье рассматриваются проблемы выбора правопорядка регулирования отношений с участием иностранного элемента, возникающего в результате применения вспомогательных репродуктивных технологий. Выделены коллизионные проблемы, связанные с применением экстракорпорального оплодотворения и суррогатного материнства. Указывается, что использование вспомогательных репродуктивных технологий требует разрешения вопроса о выборе компетентного правопорядка для регулирования договорных отношений об экстракорпоральном оплодотворении и суррогатном материнстве, а также для установления происхождения детей, рожденных благодаря их использованию.* ***Цель:*** *выявить проблемы применения правопорядка к отношениям, осложненным «иностранным элементом», возникающим из вспомогательных репродуктивных технологий, а также предложить направления совершенствования коллизионного регулирования.* ***Методы:*** *методологическую основу настоящей работы составили диалектический, исторический, формально-логический, аналитический, статистический, сравнительно-правовой методы познания, метод классификации.* ***Выводы:*** *коллизионное регулирование должно получить развитие за счет применения экстракорпорального оплодотворения на уровне международных договоров и внутригосударственного законодательства. Преодоление коллизионных проблем применения вспомогательных репродуктивных технологий возможно путем усиления унификации законодательств в рамках региональных организаций государств. Обоснована приемлемость внесения соответствующих изменений в Кишиневскую конвенцию от 7 октября 2002 года «О правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам». Кроме того, аргументировано использование в качестве основного коллизионного принципа регулирования договоров в сфере применения вспомогательных репродуктивных технологий автономии воли сторон (lex voluntatis).*

Ключевые слова: вспомогательные репродуктивные технологии; ребенок; иностранный элемент; генетическая связь; донорство; экстракорпоральное оплодотворение; искусственное оплодотворение; суррогатное материнство; автономия воли сторон; коллизионная привязка; генетические родители

Introduction

Assisted reproductive technologies play an important role in today's world. Their role is especially important in the countries with the low birth rate, which affects the demographic situation in these states. However, even in the countries where the overall demographic situation is stable, there are certain problems with reproduction. Tajikistan is one of the examples.

Today, the increasing use of assisted reproductive technologies has attracted global attention of not only medical scientists but also sociologists and lawyers. This phenomenon has acquired the character of a global process.

The complicated relations regarding the use of reproductive technologies by "foreign elements" require adequate regulation but at the same time they create additional opportunities for relationships between different states.

Some new terms entered the language. For example, such terms as "reproductive travel" [9, p. 12], "fertility tourism", "medical tourism", "reproductive tourism", which were introduced by some scientists, have become customary [10; 11; 12]. The German scientist A. Diel points out the need for international regulation of "surrogate reproductive tourism" [8, p. 232]. The term "reproductive tourism" today is commonly understood as a "temporary entry into the territory of another state in order to obtain reproductive care."

Given the fact that, on the one hand, many economically stable countries have introduced various legislative restrictions on the use of assisted reproductive technologies and, on the other hand, there are women willing to provide reproductive services for an average pay, this kind of relationship will increasingly develop and strengthen. The absence of adequate legal regulation at the international level entails confusion in the use of assisted reproductive technologies.

At the same time, one cannot state that this sphere is devoid of any legal regulation. There are a number of general documents related to reproductive rights: Universal Declaration of Human Rights (adopted at the third session of the UN General Assembly – Resolution 217 of December 10, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4, 1950); The UN Convention on the Rights of the Child (New York, November 20, 1989); European Convention on Human Rights and Biomedicine of January 24, 2002; the United Nations Declaration adopted on November 10, 1975, No. 3384 "Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind"; Universal Declaration on the Human Genome and Human Rights adopted on November 11, 1997; The UN General Assembly Resolution "Principles of Medical Ethics" of December 18, 1982; Convention on the Elimination of All Forms of Discrimination against Women of December 18, 1979; Convention on the Rights of the Child of November 20, 1989; International Covenant on Economic, Social and Cultural Rights of December 16, 1966 (New York), etc.

In the field of assisted reproductive technologies, there are a number of problems arising from the participation of foreign nationals. In particular, there are issues related to the choice of applicable law in establishing contractual relations, establishment of paternity/maternity, donation of gametes, penalties for violating the terms of use of assisted reproductive technologies, etc.

Issues of Conflict Regulation in Artificial Insemination

The scientific concept of "assisted reproductive technology" combines various medical technologies, treatments for infertility and related procedures. The use of *in vitro* fertilization, donation of sperm and egg cells, the use surrogate mothers all belong to the category of "assisted reproductive technology". This stipulates the need for differentiation of legal regulation, including conflict regulation, and application of various methods of assisted reproductive technology.

Contracting in assisted reproductive technology raises a number of issues of legal order. Firstly, it is the issue of legal regulation of contractual relations whose subject is the use of assisted reproductive technologies. The countries that permit the use of reproductive technologies often become a mecca for foreign nationals who wish to get the opportunity to become parents. The presence of a "foreign

element", which is the customer's citizenship, requires the solution of the legal conflict – the choice of the applicable law to regulate the contractual relationship between the parties.

In addition, conflicts can arise in determining the origin of a child born with the help of assisted reproductive technology. In this case, there are the following options for regulating: the personal law of the customer of assisted reproductive technology, the law of the place of birth of the child, the law of the person who provides services of assisted reproductive technologies.

Unfortunately, the conflict legal regulation of assisted reproductive technology lags behind the pace of the development of medical techniques and methods of infertility treatment.

Domestic and foreign legislation on private international law does not contain special connecting factors concerning regulation of agreements in the field of assisted reproductive technology and determination of the origin of children born due to their application.

The most compromising type of assisted reproductive technology is in vitro fertilization. It is a method of infertility treatment during which a female egg is extracted from the body and fertilized in vitro. Most countries of the world allow for the fertilization of the wife's egg by her husband's sperm. For example, law of the Islamic Republic of Iran, in spite of the negative attitude to assisted reproductive technologies, still admits the possibility of in vitro fertilization as an infertility treatment method using spouses' genetic material.

The presence of genetic relation between the parents and the child born as a result of in vitro fertilization allows the law to recognize the child's origin from them.

Assisted reproductive technologies using donor material has caused an ambiguous attitude to it throughout the world. For example, fertilization of an egg by donor sperm remains a controversial type of in vitro fertilization.

There may be a reverse situation, when a woman is infertile and it is necessary to use a donor egg which is fertilized by the husband's or donor's sperm. The embryo is then placed in the uterus of the woman supposed to undergo the procedures of in vitro fertilization.

In this case, the determination of the competent law governing the contractual use of in vitro fertilization is necessary, and the question of the link between the contractual relationships and the autonomy of the will of the parties becomes relevant.

The use of the autonomy will of the parties expresses the specificity of family regulation based on the principle of non-interference in the affairs of the family. If spouses express mutual will to use in vitro fertilization for infertility treatment, then they also have the right to determine the governing law for the contractual relationship between themselves and the medical institution providing such services. The law selected by the parties determines the subjects, rights and obligations of the parties, consequences of improper performance or failure to fulfil obligations under the contract, as well as adequate protection of the rights and legal interests of the child born with the use of assisted reproductive technology.

Recognition of the principle of autonomy of will as the main connecting factor facilitates the solution of the issue of the origin of the child born by using in vitro fertilization.

If the parties fail to choose the applicable law, it becomes necessary to refer to the connecting factors in legislation of the country where the conflict of laws arose.

As is known, in the absence of choice of the governing law by the parties, special connecting factors regulating certain contractual relationships shall be applied. At the same time, contracts to provide assisted reproductive technology services are not regulated by special rules of conflict of laws.

Nevertheless, the domestic law governing contractual relations complicated by "foreign element" provides flexible connecting factors. For example, Article 1219 of the Civil Code of Tajikistan provides

for the application of the law of the country with which the contract is most closely connected.

Regarding the application of civil legislation of Tajikistan to the contract providing in vitro fertilization services, it can be concluded that the agreement will be most closely linked to the law of the state of residence (or the principal place of business) of the party executing the contract. If it is impossible to determine whether the contract on the use of in vitro fertilization has been performed, the governing law shall be the law of the country with which the contract is most closely connected.

The problems of conflict of laws in establishing the origin of children in the case of in vitro fertilization shall be settled by the factors governing the determination of their origin under normal conditions. These factors often are the personal law of the child, the personal law of the parents, the law of the person applying for the establishment of origin of the child from a particular person (lex fori – the law of the court), and the law most favorable to the child. Of course, plans to have a child, including by the use of in vitro fertilization, are the internal affair of the family. However, the interests of a child born with the help of in vitro fertilization (especially when using donor material) should be given priority in the development of the conflict rules.

The above considerations lead us to the conclusion about the need to develop conflict regulation of the use of in vitro fertilization in accordance with international agreements and national legislation.

Legal Basis for Establishment of the Origin of Children When Concluding a Contract for Surrogacy Complicated by the "Foreign Element"

Since the relationship between parents and children involving the so-called "foreign element" are particularly complex, the issues arising from these relationships require special regulation in the conflict of family law.

Different countries use different connecting factors: the child's place of birth, the permanent place of residence of the parents, the citizenship of the parents, etc. Similar differences exist in the relationships depending on whether or not the child was born in wedlock. It also depends on how the child was conceived, naturally or through assisted reproductive technology.

The differences also arise when completely different legal systems are used, e.g. Common Law or Mohammedan law.

For example, Austrian law "On International Private Law" of 1978 contains various conflict principles in relation to the child born in or out of wedlock.

As A. M. Nechaeva points out, when a child is born, his or her parents (regardless of their joint or separate residence and presence or absence of a registered marriage) have a moral debt to them [5, p. 143]. From the legal perspective, for the institutionalized parent relationships to arise it is necessary to establish the origin of the child from his/her parents. In this connection, O. Yu. Ilina remarks that the regulation of relations between parents and children is determined by the norms of morality and ethics on the one hand, and by legal norms on the other [3, p. 53].

The problem of relations between parents and children may be complicated due to their link to different states. This can occur in cases when parents have citizenship of different states, if they reside in different states or if they are living in the territory of a foreign state when the child is born.

Between member states of the Commonwealth of Independent States (CIS), the general conflict rules that affect the relationship between parents and children were unified by the adoption of the Minsk Convention on Legal Assistance and Legal Relations in Civil, Family and Criminal Cases in 1993.

In the CIS, civil, family and criminal cases are internationally regulated by two conventions: the Minsk Convention of January 22, 1993 "On Legal Assistance and Legal Relations in Civil, Family and Criminal Cases" and the Kishinev Convention of October 7, 2002 "On Legal Assistance and Legal Relations in Civil, Family and Criminal Cases." In some CIS member states, the Minsk Convention is

applied whereasa other states apply the norms of the Kishinev Convention.

In the territory of the states that signed but not ratified the Kishinev Convention, the provisions of the Minsk Convention are in force.

The Minsk Convention does not distinguish between "local" nationals and foreign nationals, it equalizes them in their rights. The norms of the Convention contain provisions on conflict of civil law, some aspects of recognition and enforcement of foreign judgments, procedural rules that regulate the jurisdiction, and norms to be applied in family relations in the presence of the "foreign element".

The Minsk Convention regulates the relationships that arise between parents and children, in particular the establishment (or challenging) of maternity, paternity, relations concerning the establishment (or cancellation) of adoption, as well as the jurisdiction of these relations.

The norms of the Convention recognize the competence of the courts of the state that deal with disputes that arise between parents and children, by determining the legislation to be applied. It is the Minsk Convention, as the primary regulator of the private law relations with the "foreign element", that for a sufficiently long period occupied the leading position in the field of regional cooperation.

In 2002, the norms of the Minsk Convention were improved and reflected in the Kishinev Convention, signed on October 7 of the same year. In Tajikistan, the latter replaced the Minsk Convention. In general, the Kishinev Convention regulates private law relations with the "foreign element" for stateless persons and citizens of such countries as Belarus, Armenia, Azerbaijan, Kazakhstan, and Kyrgyzstan. The norms of both Kishinev and Minsk Conventions have effect not only on persons who are citizens of the participating countries, but also in relation to other persons residing within these countries.

The countries that signed but not ratified the Kishinev Convention continue to be regulated by the norms of the Minsk Convention.

Despite all the positive aspects of the Kishinev Convention, it is not without drawbacks. For example, it does not cover problematic issues related to the use of assisted reproductive technologies. In particular, many problems arise in the case when a person has to resort to the use of such type of reproductive technologies as surrogacy.

For example, Article 59 of the Marriage and Family Code of Kazakhstan of 2011 recognizes spouses (customers) using assisted reproductive technologies as the parents of the born child. Therefore, Article 57 of the Code establishes an obligation for the transfer of the child by the surrogate mother to the child's genetic parents who entered into the contract with her. It turns out that if a child is born using reproductive technologies in the Republic of Tajikistan, the surrogate mother will be found to be his mother, because, in accordance with the norms of the Tajik Family Code, the mother is the woman who gave birth to the child. In Kazakhstan, the woman who is a genetic parent of the child and entered into the surrogacy agreement will be the mother.

If the surrogacy contract is concluded by persons who are citizens of different states (which may either prohibit or regulate this matter differently), there is a conflict between domestic laws.

In Armenia, Azerbaijan, Brazil, Hungary, Great Britain, Georgia, Israel, India, Kazakhstan, Canada, Kyrgyzstan, Russia, Uzbekistan, the Netherlands, the United States (in some states), Hong Kong, South Africa surrogacy is allowed [7, p. 11]. In Austria, Germany, Norway, France, Sweden, and Switzerland surrogacy is not permitted by law. There are also countries where the law completely forbids only commercial surrogacy and lawsuits for such contracts are not allowed. These countries include Greece, the Netherlands, Norway, Switzerland, and Spain.

Spain has an ambivalent attitude to the programs of surrogate motherhood. In accordance with Article 10 of the Spanish law "On Assisted Reproduction Technologies" No. 14 of May 26, 2006, a contract providing for the rejection of motherhood in favor of the third parties is considered null and void. Thus, in this country, the presumption that the mother is the woman who gave birth is unwavering. However, under general law, it is possible for a genetic father to file a claim to the establishment of paternity. Meanwhile,

the donation of gametes in Spain is not prohibited and is even well regulated by legislation. Donation (both free and paid for) is allowed, as well as the posthumous use by the wife of her husband's gametes for one year after his death.

Thus, Article 9 of the law states that during his life, the husband, by his written consent, a notarial deed or a testamentary disposition, can give his consent to have his reproductive material used for the purpose of insemination of his wife in the period of up to 12 months from the date of his death. In this case, the husband will be recognized as the legal father of the child who was born after his death. In addition, the law also provides for the possibility for a dead woman to become a mother, if her husband or domestic partner will turn to the clinic for embryos previously exposed to cryopreservation.

Another complexity of cross-border regulation in this case may be that in some countries only the spouse of a deceased person has the right to use cryopreserved gametes, while in other countries – other persons as well.

Let us consider a situation when persons in a civil union who are citizens of different states had embryos cryopreserved in a medical facility. After the death of the woman, her partner decided to use the embryos. However, the woman's parents who live in another state do not agree with the decision, since, in their opinion, their daughter's partner even was not her husband. The determination of the applicable law in such a situation may be difficult.

Japanese law is also not unambiguous about the question of surrogacy. For example, genetic parents are not recognized as parents in the territory of the state of their citizenship – they can only be recognized as such in the country of the surrogacy. As a result, in Japan (in the same way as in Spain) "limping relationships" can arise, when citizens are forced to undergo the procedure of adoption of their own children in a foreign country.

In the case of non-compliance with the norms of the private law of the country on the use of assisted reproductive techniques, persons participating in agreements on surrogacy can face litigation; there can be non-recognition of kinship between the child and his/her genetic parents. In addition, there may be certain difficulties in the acquisition of citizenship by the child, problems with leaving and entering the territory of the state, as well as some other issues.

Today there is an objective need for regional cooperation in the field of settlement of relations regarding the use of assisted reproductive technologies. In particular, it would be advisable to make additions to the Kishinev Convention.

The collision method for regulating relations between parents and children with a "foreign element" has its drawbacks. The main problem is a mismatch of the conflict norms in different countries, which may result in frequent renvoi problems. A possible way out could be the harmonization of conflict of laws norms by the states and conclusion of international treaties establishing the uniform conflict rules.

Using the personal law of genetic parents may not always contribute to adequate regulation of relations, as it can often ban the use of surrogate motherhood. "Customers" usually travel outside the country of their citizenship in order to reduce the costs associated with the surrogacy contract, and in order to circumvent the adverse effects of legal norms in force in the country of their origin. Here we are talking about banning the use of certain types of assisted reproductive technologies and, as a consequence, the offensive responsibility for the use of such methods of infertility treatment.

Of course, when concluding a surrogacy contract, it is necessary to take into account the attitude of legislation of the country of genetic parents. In the case of a fundamental prohibition of the use of surrogate motherhood, conclusion of the contract can be problematic, because all the future relations between the child born using assisted methods of reproduction and genetic parents can become "limping", that is they will only be recognized in the state of execution of the contract, while not recognized by the law of the customers' country.

Conflict regulation of relations between parents and children has its own specific features in most foreign countries. For example, in some countries the main connecting factor for determining the regulation of personal relations of the child (including his / her defense) is the domiciliary law of the child (Article 3093 of the Civil Code of Quebec; §24 of the Austrian Law "On International Private Law" of 1978, Article 16 of the Law of the United Arab Emirates on Civil Transactions, 1985); in other countries, it is the law of the dispute (Article 27 of the Civil Code of Yemen, 1992); in third, it is the law of the state which regulates the origin of the child [4, p. 350]. In particular, in Turkey, the origin of the child is determined by the common citizenship of the parents (Article 17 of the Turkish Code of International Private Law and International Civil Process No. 5718 of November 27, 2007); if the parents have different citizenships, it is the law of the common place of residence of the spouses that is to be applied, and in the case of its absence – the law of their usual cohabitation.

The Significance of the Principle of the Autonomy of the Will in Conflict Regulation of the Surrogacy Contract

The presence of a "foreign element" stipulates that the choice of law for the regulation of the relations arising from the use of assisted reproductive technologies should be based on the principle of "lex voluntatis" (autonomy of the will of the parties), which is important in the regulation of conflict of contracts.

The connecting factors in the use of assisted reproductive technologies must reflect the specificity of the agreement concluded. A special place among such agreements takes a surrogacy contract.

In legal literature devoted to the choice of applicable law, a variety of opinions may be found. For example, some legal scholars point out the need to give a surrogate mother and genetic parents the right to choose the applicable law from a number of options, which may include the state law of the country in which the child is born, the state law of permanent place of residence of the surrogate mother, the state law of the permanent place of residence of genetic parents [2, p. 161]. Therefore, these authors recognize autonomy of the will, limited to a certain extent.

The position above is not devoid of rationality, because the choice of law of the state to which the contract of surrogacy is not relevant cannot take place. In other words, a contract to use assisted reproductive technologies cannot be governed by laws not connected with this contract.

International private law relationships recognize the principle of "lex voluntatis" as one of the fundamental principles, whose purpose (as rightly pointed out by A. G. Filippov) is "to identify opportunities for the use of the material-legal norms, to determine of the autonomy of the will of the parties in the choice of the law applicable to their relationship" [6, p. 425].

It should be noted that the principle of autonomy of the will is not an exclusive principle only belonging to private international law. Moreover, its origin and further development and dissemination proceeded in the sphere of contract relations of civil law. If this principle acts as fundamental in civil law, then its extension to the scope of international family law, as is correctly stated in legal literature, has only just begun [1, p. 15].

Legal regulation of the surrogacy contract only through mandatory connecting factors is not in the interest of both the parties and the child born with the help of assisted reproductive technology. Rigid connecting factors in modern society give way to the principle of the autonomy of the will, which facilitates intervention in the process by choosing a specific law regulating contractual relations. Family law also provides the possibility of applying the principle of the autonomy of the will both in the case of entering into a marriage contract and when signing an agreement to transfer alimony.

Application of the consequences of default or improper fulfillment of the agreement, in turn, will be regulated by law based on the principle of party autonomy.

Thus, if there is a "foreign element", a surrogacy contract should contain provision on the applicable law on the basis of "lex voluntatis" principle, which is nowadays consistently used in

"lex voluntatis", conflict contract regulation in the field of civil and family law.

We should not forget that in family law there are no special conflict law principles governing the above-mentioned contract. However, there is a solution, which should be based on the analogy of the law; in particular, in accordance with Article 1218 of the Civil Code of Tajikistan, they are norms of civil law subordinating the relationship from the contract to the law of the country specified in the agreement that may be subject to application.

The applicable law, in turn, should be pronounced, have a direct link with the contract provisions, or this relationship should arise from the circumstances of the case examined as a whole.

The "lex voluntatis" principle may be provided both in a general contract and in an additional agreement between the parties, but if the will of the parties is not expressed explicitly, it does not mean that the parties do not have it. In this case, the duty of the court should be to identify it.

If the parties have a proper will, but have not directly reflected it in the contract, we can talk about a "hidden" autonomy of the will. The will of the parties regarding the applicable law should be considered if the contracting parties do not object to the use of the revealed will of the parties by the court. Moreover, the parties should be interested in its application, while a close connection with legal relationship revealed by the court may well lead to the expression of discontent by at least one of the parties.

It should also be remembered that the "lex voluntatis" principle may be limited subject to the public policy or mandatory norms of the country. A separate legal basis applicable to limit the autonomy of the parties is the right of the court to apply the mandatory rules of a foreign country in cases where, in accordance with the legislation of this country, these rules should regulate relevant relationships.

As a rule, the presence of a "foreign elements" is linked to the prohibition on the use of certain types of assisted reproductive technology. In particular, the parties of a surrogacy contract may be citizens of foreign countries whose personal law prohibits the conclusion of such contracts. However, we should not forget that the consequences of surrogacy contract contain not only a moral and ethical burden, but also affect the future legal status of the child.

The Civil Code of the Republic of Tajikistan includes a norm according to which the procedure of execution and the measures used for improper fulfillment shall be determined by the law of the state in which the execution takes place.

However, we should not forget that the connecting factors provided for the civil turnover of things cannot be applied to a child, since a child born by surrogate mother is not a thing.

This type of agreement requires the establishment of a special control by the state. Violation of its terms and conditions by those directly involved (genetic parents and the surrogate mother) and by the medical organization should entail adverse property (and in some cases personal) effects. In this connection, in the contract, not only the law of the country of genetic parents, but also the law of the country of execution of the surrogacy agreement should be taken into account.

At the international level, one of the regulators of the issue of the applicable law in the relations between parents and children are the provisions of the Convention "On Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children" of 1996. (It should be noted that the Republic of Tajikistan is not a member of the said Convention). The main collision principle to establish the origin of children is the place of usual residence of the child. For example, the incurrence (or termination) of parental responsibility is governed by the law of the country where the child habitually resides. Similarly, the incurrence (termination) of parental responsibility under the agreement or unilateral act without the involvement of a court or administrative body is regulated by the law of the country where the child habitually resides at the time of entry of the unilateral act or contract into force.

Unfortunately, the norms of the Convention do not govern the establishment and challenge of the origin of children, whereas it is exactly this document that regulates conflict issues of parental responsibilities. In this case, the main reference is also the habitual residence of the child. In our view, such a state of affairs rests on a stable basis, because

reference to citizenship cannot always meet the child's interests. In addition, some problems may arise in dealing with conflict issues. The citizenship of a child depends on the citizenship of his/her parents, while the application of assisted reproductive technology makes it difficult to legally relate the child to certain persons as parents.

The Convention also includes provisions under which the responsibility in accordance with the legislation of the country of habitual residence of the child is not removed from the parents in the case of a change of habitual residence. If after a change of residence the situation improves for the child, and in accordance with the law of the new state, the person previously not burdened with responsibility shall be burdened with it, the relationship will be regulated by the law of the state of the new residence.

Thus, the incurrence (termination) of parental obligations is put in direct dependence on where the child was born and where he/she lives. If the child was born in the country of habitual residence of the surrogate mother, the question of incurrence of rights or duties of certain persons will be settled in accordance with the national law of the country where the child was born.

At the same time, in practice, a situation may occur when surrogacy applied outside the country of origin of the genetic parents is not recognized or explicitly prohibited by the law of the country of their origin. In this case, not only the surrogate mother and the genetic parents may find themselves in a difficult situation but also the child, which is considered unacceptable.

At the present stage of development of the society, despite the fact that there is a substantial number of international instruments affecting or concerning matters of reproduction, there is obviously an insufficient number of international agreements clearly regulating the issues of the legal status of children born with the use of assisted reproductive technologies.

Conclusion

Based on the above, we can conclude that overcoming the conflict problems of application of assisted reproductive technologies is possible through the unification of legislation within regional and international organizations. Special attention should be paid to the principle of party autonomy ("lex voluntatis"). In our opinion, the choice of the law to regulate relations complicated by a "foreign element" arising from the use of assisted reproductive technologies should be carried out exactly on the basis of the "lex voluntatis" principle. The latter occupies an important place in the conflict regulation of contracts, which is reflected in international agreements. In particular, it is advisable to make certain adjustments to the Kishinev Convention of October 7, 2002 "On Legal Assistance and Legal Relations in Civil, Family and Criminal Cases", which is in force in the territory of the Republic of Tajikistan. Only those cases should be an exception where the choice of the applicable law by the parties does not meet the interests of the unborn child, or it is in no way connected with the contract.

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