

Assisted reproduction in Russian Federation.

There are several legal regulations regarding assisted reproduction in Russian Federation. Among them: Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" of 21.11.2011 N 323-FZ, Order of the Ministry of Health of the Russian Federation of August 30, 2012 N 107n "On the order of use of assisted reproductive technologies, contraindications and restrictions on their use". Order of the Ministry of Health of the Russian Federation of October 30, 2012 N 556n "On approval of the standard of medical aid in infertility with the use of assisted reproductive technologies". These legal document serve as a foundation for implementing of assisted reproduction methods into wide usage in order to solve the increasing problem of infertility. These regulations introduce the notion of assisted reproduction: "The assisted reproduction is the range of methods for infertility treatment where particular or all the stages of conception and early-embryonic development are conducted out of the maternal organism (including the use of donor and/or cryopreserved sex cells, reproductive organs and embryos, and surrogacy)¹.

The list of the assisted reproduction technologies mentioned in the Order of the Ministry of Health of the Russian Federation of August 30, 2012 N 107n "On the order of use of assisted reproductive technologies, contraindications and restrictions on their use".

- In vitro fertilization.
- Sperm injection into the oocyte cytoplasm (ICSI).

¹ " 21.11.2011 N 323-
Par.1 Art.55 URL:
http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/

- Cryopreservation of germ cells, tissues of reproductive organs and embryos, transportation of germ cells and (or) tissues of reproductive organs.
- Use of donor oocytes.
- Use of donor sperm.
- Use of donor embryos.
- Surrogacy.
- Artificial insemination with the sperm of a husband (partner) or donor

Within current research I am going to focus on some issues of in vitro fertilization and surrogacy in particular.

In Russia, a child conceived in vitro was first born in 1986.² It was only on January 1, 2012 that the new Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" No. 323-FZ came into force, which gave the Russian legal regulation an official definition of surrogacy.

Surrogacy is the process of delivery of a child (including premature births) under a contract between a surrogate mother (a woman who carries a fetus after carrying a donor embryo) and potential parents whose sex cells were used for fertilization, or a single woman for whom it is not possible to carry a child for medical reasons.³

A similar approach was implemented in the Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" of 21.11.2011 N 323-FZ in accordance with para. 9 of Article 55 of which, "Surrogate motherhood is the bearing and birth of a child (including premature birth) under a contract concluded between a surrogate mother (a

² : . URL : http://www.surrogacy.ru/surrogacy_history.php.

³ : 21 2011 . 323- //

woman bearing a fetus after transferring a donor embryo) and potential parents whose germ cells were used for fertilization, or a single woman for whom she had and of the birth of a child is not possible for medical reasons.

1. Definitions of the types of surrogacy.

In order to have complete understanding of the surrogacy subject we should describe the medical features of this kind of technology.

Nowadays the surrogacy motherhood can be held in two forms:

- 1) The genetic motherhood. This type included the insemination of a woman with the genetic material of a donor. In this case the surrogate mother and the genetic mother is a one person. With other words, there is a genetic relation between a mother and a child.

According to the Russian legal regulations this type of surrogacy is forbidden.⁴

- 2) Gestational motherhood. The eggs of the customer eggs extracorporeally fertilized by the sperm of her spouse / donor afterwards implanted in the surrogate mother's body. And in this case, it is the woman who transferred the egg and the man whose sperm is used for insemination that will be the genetic parents of the child.

Thus, legally in several countries, including Russia, gestational motherhood can be carried out in 3 of its varieties:

- 1) The use of the spouse's egg and sperm;
- 2) Use of the egg of the spouse / woman and sperm of the donor;
- 3) Use of the donor's egg and the sperm of the husband/wife.

It is essential to highlight these concepts in order to identify the subjects of the relationship - who may be the future parent - as well as the possibility of using male and female donorships.

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21 2011 . N 323- "

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2. Subjective composition of surrogacy.

Federal Law No. 323-FZ of 21 November 2011 "On the Fundamentals of Public Health Protection in the Russian Federation" ⁵(par. 10 of art. 55) sets out certain requirements and criteria for a woman who can act as a surrogate mother. A surrogate mother can be a woman:

1. At the age of twenty to thirty-five years old.
2. Having at least one healthy child of her own.
3. Received a medical report on a satisfactory state of health.
4. Written, informed and voluntary consent to medical intervention.
5. A woman who is married and registered in accordance with the procedure established by the legislation of the Russian Federation may be a surrogate mother only with the written consent of her husband.
6. A surrogate mother may not simultaneously be an egg donor (as mentioned earlier, this type of surrogate motherhood is illegal in our country).

Federal Law No. 323-FZ "On the Fundamentals of Public Health Protection in the Russian Federation" ⁶(par. 3, art. 55) establishes a circle of subjects who may be participants in the mentioned relations: "A man and a woman, both married and unmarried, have the right to use assisted reproductive technologies in the presence of mutual voluntary information consent to medical intervention. The law does not prescribe the marriage status between potential parents as a mandatory criterion, but in the case of a couple, it requires mutual consent.

A single woman is also entitled to the use of assisted reproductive technologies with her informed, voluntary consent to medical intervention.

⁵ URL:
http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/

⁶ [21 2011 . 323-] : URL:
http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/

Even though the law allows a single woman to exercise the assisted reproduction methods, there were still a plenty of refusals in registration a single woman as a mother of surrogate child.

In 2009 the Kalininsky District Court of St. Petersburg in the case of Natalya Gorskaya ⁷ pointed out that, in accordance with Article 35 of the Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" of 21.11.2011 N 323-FZ⁸, a single woman has the same rights as married women to exercise the function of motherhood. The Court also clearly established that other norms relating to health care and family planning do not contain any prohibitions or restrictions on the possibility for an unmarried woman to become a mother. The judge who has delivered this decision noted that the civil registry office erroneously applied a private rule (Article 51.4 of the Family Code of the Russian Federation) as a general rule and concluded that it was impossible for a woman who was not in a registered marriage. The Court rightly noted that this interpretation of the legislation violates the rights of citizens established by Articles 38, 45, 55 of the current Constitution of the Russian Federation⁹, and specifically pointed out that the statement of the surrogate mother confirms that she doesn't pretend to be by the registered mother of the child, born out of the program of surrogacy. To the guarantee the rights of a surrogate mother, and it comes down paragraph 2, paragraph 4, article 51 of the Family Code¹⁰.

⁷ 5 2009 2-4104, https://svitnev.ru/nauchnie/sur_law_practice.pdf URL: http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/

⁸ " (. 12.12.1993) (. 30.12.2008 N 6- 30.12.2008 N 7- 05.02.2014 N 2- 21.07.2014 N 11-) URL: http://www.consultant.ru/document/cons_doc_LAW_28399/

⁹ " (. 29.12.1995 N 223- (. 29.05.2019) URL: http://www.consultant.ru/document/cons_doc_LAW_8982/

The Court has established the actions of the Civil Registry Office to be not in conformity with the law because of the refusal to register the child born of single mother as a result of the use of surrogate motherhood.

Gorskaya became the first Russian woman to defend her right to motherhood in court.

Regardless of the court decision delivered on the case of Natalya Gorskaya, there was a range of similar kind of cases. Despite the fact that the right to use assisted reproductive technologies was expressly enshrined in the law (Article 55 (3) of the Law No. 323-FZ¹¹), the civil registry office refused to register children born with the participation of a surrogate mother, and they had to apply to the court for restoration of their rights. In the case 2 -1633/16 of Tuapse Court¹² civil registry office refused to register a child born as a result of the use of assisted reproductive technologies for single woman. The court ruled that the administrative plaintiff met all the requirements for the registration of the child born to a surrogate mother, the refusal of the Department of Civil Registry Office of Tuapse region, is illegal and subject to cancellation, and the administrative claim is subject to satisfaction.

The question arises as to the admissibility of a single man's participation in a surrogacy programme - a provision that has not been provided for in the law or has deliberately omitted the regulation of the problem. Refusal to allow single men to exercise their legal right to paternity would be a clear violation of several provisions of the Constitution of the Russian Federation, in particular of article 7 of the Constitution of the Russian Federation: "State support for families, maternity, paternity and childhood is provided in the Russian Federation". Article 19(2) and (3) of the Constitution of the Russian

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Federation¹³, which states that "men and women have equal rights and freedoms and equal opportunities for their realization and Article 55 of the Constitution of the Russian Federation: "In the Russian Federation, no laws shall be issued which abolish or diminish human and civil rights and freedoms.

To date, court practice has answered the question about the possibility of using the method of surrogacy by single men. The decision of 4 August 2010 in the civil case No. 2-2745/10 of the Babushkinsky District Court of Moscow was of a precedent¹⁴: the court ordered the district civil register office to register a child born under the program of gestational surrogacy with donor oocytes for a single man. As a result of this decision, for the first time in the Russian Federation, a birth certificate for a single man with a dash in the column "mother" was issued.

Subsequently, Russian courts also decided on a number of similar cases involving single men who had become parents through the use of surrogacy. The Court in all the cases clearly established that the legislation in force did not explicitly prohibit the registration of births of a child born as a result of implantation of an embryo into another woman's body for the purpose of carrying it out, either by the single mother or by the single father of the child in question. The Court also found that the refusal to register the child was not based on the law and violated the rights and legitimate interests not only of the plaintiff but also of the newborn child.

So, The Smolninskiy District Court of St. Petersburg ruled on a lawsuit¹⁵ filed by a single man who had been refused in registration by the civil register office for a "surrogate" twin. Article 19.3 of the Constitution of the Russian

¹³ " (12.12.1993) (30.12.2008 N 6- , 30.12.2008 N 7- , 05.02.2014 N 2- , 21.07.2014 N 11-) URL: http://www.consultant.ru/document/cons_doc_LAW_28399/

¹⁴ . , 4 2010 . 2-2745/10, . , https://svitnev.ru/nauchnie/sur_law_practice.pdf

¹⁵ . , 4 2011 . 2-1601/11, . . , https://svitnev.ru/nauchnie/sur_law_practice.pdf

Federation¹⁶, the court stated that "the current legislation is based on the equality of rights of women and men. Neither is the exception to the right of single men to have children and to create a family that includes only children and their father.

Since the current legislation does not regulate the issue of paternity and registration of children with only a father, the Court considered it necessary to use the provisions of the current family law by analogy. In its ruling, the court emphasized the fact that "the absence of legal norms cannot be a ground for derogation and violation of the rights and legitimate interests of children and their father".

3. Criteria for conducting in vitro fertilization.

¹⁶ " (12.12.1993) (30.12.2008 N 6- , 30.12.2008 N 7- , 05.02.2014 N 2- , 21.07.2014 N 11-) URL: http://www.consultant.ru/document/cons_doc_LAW_28399/

This information raises the question of the imperative of the provisions - are the indications listed Order of the Ministry of Health of the Russian Federation of August 30, 2012 N 107n "On the order of use of assisted reproductive technologies, contraindications and restrictions on their use" exhaustive? Yes, the interpretation gives an idea of the use of surrogacy as an exceptional measure. The absence of references in the law to dispositive regulation establishes the imperative of the norm and the list of medical indications is exhaustive.

4. Legal regulation of surrogacy and its features.

The Russian legal regulation of assisted reproduction technologies, in particular the technology of surrogacy, is based on the Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" of 21.11.2011 N 323-FZ ²⁰ (Art. 55) and, issued in its implementation, the departmental order No. 107n²¹, the Family Code of the Russian Federation (para. 4, Art. 51 and para. 3, Art. 52)²², and also on the Federal Law "On Civil Status Acts" (para. 5, Art. 16)²³. This list of normative acts is exhaustive.

The introduction of a legal possibility to conclude a surrogate maternity agreement in accordance with Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation"²⁴ No. 323 (para. 9 of Art. 55) does not determine its legal nature and the possibility to attribute it to any type or type of named contracts. This causes certain difficulties not only for the participants of this technology, but also for the law enforcement agencies - notaries to whom citizens turn for the purpose of drawing up and certifying the surrogacy agreement, judges who consider disputes arising from this agreement.

Attribution of the surrogacy contract to the sphere of civil law regulation, both namely and unnamed contracts, means that the regulation of relations arising from it in accordance with the Civil Code of the Russian Federation

²⁰ http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/ URL:
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²² " 29.12.1995 N 223- (. 29.05.2019) URL:
http://www.consultant.ru/document/cons_doc_LAW_8982/

²³ " 15.11.1997 N 143- URL:
http://www.consultant.ru/document/cons_doc_LAW_16758/

²⁴ http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/ URL:

(paragraph 2 of Art. 421)²⁵ will be carried out by general provisions on obligations and contracts. Such a decision seems to be the most logical at the present time in connection with the absence of a unified legislation on this issue. Since surrogacy is beyond the scope of family law before the birth of a child, and intersects with it only when it is necessary to regulate the relations between a woman wishing to act as a surrogate mother and her husband, who in this case must give his informed consent.

The Civil Code of the Russian Federation (Article 421)²⁶ establishes that the parties may conclude an agreement not provided for by law or other legal acts. The rules on certain types of contracts provided for by law or other legal acts do not apply to such a contract, which does not exclude the possibility of applying the rules on the analogy of the law to individual relations between the parties to a contract. Then the question arises, what contract rules can be applied by analogy to the regulation of relations arising from a surrogate maternity contract?

For the purpose of typifying a contract, it is important to determine what interests of the parties underlie its conclusion, its legal purpose and the limits of the parties' discretion in forming a model of conduct.

The structure of the subjective right as such includes the power to take its own actions, the power to demand from the other party the performance of the duty corresponding to such right and the power to enforce the right, including through forcing the obligated party to perform certain actions (or abstain from them). Such a legal structure ensures the enforceability of subjective law. In turn, the freedom of contractual discretion allows the parties to the contract to form the necessary conditions for them, according to which

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²⁶ () 30 1994 . 51- URL:
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they have the right to rely on the voluntary performance of each of them assumed duties that do not contradict the basic principles of civil law. So what rights and obligations can the parties establish in such a specific contract?

The Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" No. 323-FZ²⁷ says that the surrogate mother's bearing and birth of a child is carried out on the basis of a contract, however, it is obvious that the bearing and birth of a child as such, being a natural physiological process, are not subject to regulation, in particular legal regulation. Birth and birth of a genetically unrelated child by a surrogate mother to potential parents means that the relationship between them directly affects the surrogate mother's right to physical integrity as a personal non-property right.²⁸ By entering surrogacy technology, the surrogate mother exercises her right to physical integrity. As M.N. Maleina points out in her scientific work, "the use and management of the body takes place through the exercise of the right to physical integrity".²⁹

In addition, future parents have an interest in protecting the health of the future child. A rather controversial question arises - how possible is it to realize this interest in the terms of the contract? In practice, this is expressed in the establishment of requirements aimed at limiting the rights of a surrogate mother to her physical inviolability - detailed regulation in the contract of the order of life of the mother during the period of carrying the fetus, up to the point that it is prescribed a ban on termination of pregnancy in the absence of medical indications, on her sexual life, the use of alcoholic beverages, etc. According to the general sense of civil law in terms of civil liability, the inclusion of such conditions in the content of the contract will not be provided

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by the coercive force of the state, as responsibility can be established only for the violation of the obligation, but a violation cannot be a situation where a person decides to exercise their right. This leads to the conclusion that the interest of potential parents in question, as not protected by law, cannot determine the legal purpose of the contract.

However, this does not mean that the parties cannot include restrictive conditions in the contract aimed at caring for the health of the future child, as such restrictions do not affect the rights of third parties and are not contrary to the public interest.

Personal non-property rights are absolute rights. In accordance with Article 150 of the Civil Code of the Russian Federation³⁰, non-material benefits belonging to a citizen from birth or by virtue of the law are inalienable and non-transferable in another way. What is the essence of personal non-property rights? These relations are deprived of economic content and their implementation is not accompanied by property provision by other persons - this feature predetermines the impossibility of foreclosure on the object of personal right. Thus, it is possible to consider the limitation of these rights through the prism of the Civil Code of the Russian Federation (paragraph 3 of Article 22)³¹, according to which full or partial waiver of legal capacity is insignificant, except for cases when such transactions are allowed by law. It is assumed that the nullity of a transaction as a negative legal consequence of such restrictions is aimed at protecting the rights of a person whose rights are limited by such a transaction, that is, the application of the consequences of the invalidity of the transaction is carried out in the interests of the bearer of personal non-property right, limited by the contract.

³⁰ () 30 1994 . 51- URL:
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³¹ () 30 1994 . 51- URL:
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On the basis of this analysis, it can be assumed that the inclusion in the text of the agreement of conditions aimed at restricting rights does not contradict the provisions of modern contract law, but by virtue of the exclusively personal nature of the regulated relationship is designed for voluntary execution by the surrogate mother. It can also be assumed that such obligations may be qualified as a kind of natural obligation. Natural obligations are understood as obligations that represent legally valid binding relations arising from contracts, the requirements of which cannot be fulfilled in court by virtue of the civil law.

Consequently, in the event that a surrogate mother voluntarily waives her freedom to exercise her right to physical integrity, she is entitled to receive appropriate compensation for this. If the parties have agreed that failure to comply with such restrictions may lead to property consequences in the amount and manner specified in the contract, this condition is subject to judicial protection. This position can be confirmed by one of the Court of Appeal rulings of the Moscow City Court³², which upheld the decision of the court of first instance to refuse to satisfy the claims for recovery of funds and compensation for moral damage. According to the case file, these amounts were claimed by the surrogate mother as the difference between the amount of remuneration due under the contract and the amount actually paid. Thus, the result of the court's assessment was a surrogacy contract, which included conditions restricting the rights of the surrogate mother (including: meeting the requirements of the daily regime, taking medications prescribed by the doctor, etc.). Due to the surrogate mother's violation of these restrictions, the parties entered into an additional agreement to the contract, which reduced the remuneration payable to the surrogate mother under the contract due to non-

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compliance with the restrictions. However, it is important that the court did not question the possibility of including such conditions in the contract in the case.

Returning to the question of what interests are at the heart of the contract, it can be said that the main interest of the surrogate mother in participating in the surrogacy program is to receive a certain amount of property from her. The content of such a grant should consist of compensation for all the consequences arising from medical intervention in a woman's body, bearing and giving birth to a child, as well as from compensation for the restriction of the surrogate mother's right to physical integrity, expressed in voluntary participation in reproductive technology for the benefit of the other party to the treaty. The legitimacy of this interest in our country is reinforced by the fact that there is no explicit legal prohibition on receiving payments from potential parents.

It is possible, of course, that a surrogate mother may have other interests and motives (e.g., a desire to help her relatives) when entering into these legal relations. But a personal motive does not exclude the interest in receiving compensation.

It can be concluded that the main interest of a surrogate mother when concluding a contract is property interest, can and should be taken into account when determining the legal purpose of concluding a surrogacy contract.

The main interest of potential parents entering into such a program is, first of all, to establish their parental rights in respect of the child born by the surrogate mother. However, forcing a surrogate mother under a contract to fulfil such a condition appears to be illegal and unenforceable under both civil and family law. The Civil Code of the Russian Federation (Article 169)³³ establishes that a transaction made for a purpose known to be contrary to the

³³ () 30 1994 . 51- URL:
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fundamentals of law and order or morality is null and void. Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.06.2015 No. 25³⁴ defines as a goal contrary to the principles of law and order and morality (para. 85) - "transactions that violate the principles of relations between parents and children". The Family Code of the Russian Federation, in turn, establishes a mandatory norm (para. 2, para. 4, Art. 51)³⁵ - "persons who have given their consent in writing to the implantation of an embryo to another woman for the purpose of carrying it out may be recorded by the parents of the child only with the consent of the woman who gave birth to the child (surrogate mother). Hence, it is impossible to establish the origin of the child as a legal purpose of the contract.

Meanwhile, potential parents in these legal relations also have a property interest in the conclusion of the contract, corresponding to the property interest of the surrogate mother to receive property payments. Such interest is conditioned by obtaining the desired result from the surrogacy technology, namely to be registered as the child's parents and, consequently, to be its lawful parents. In a surrogacy contract, this interest is embodied in the payment provisions, thus indirectly encouraging the surrogate mother to perform the actions provided for in the contract, as well as to obtain the right to be the child's lawful parents.

The terms of the contract, which provide for payments, can generally be divided into three groups:

1. Compensation for all expenses, losses and damages that a surrogate mother may incur as a result of participating in a surrogacy program.

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" 29.12.1995 N 223- (. 29.05.2019) URL:

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2. The provisions on the payment of basic compensation resulting from surrogacy technology, which is an incentive for the surrogate mother to consent to the registration of potential parents as legal parents of the child.

3. There are also conditions for the surrogate mother's liability for failure to comply with the requirements set out in the contract. However, it should always be remembered that any decision by a surrogate mother to decide who will be registered as the child's parents will be valid.

Now it is possible to answer the question raised earlier - the determining legal purpose of a surrogate motherhood contract is the conflicting property interests of the parties to pay (receive) the amounts of compensation for the restriction of the surrogate mother's right to her physical inviolability, as well as other compensation costs. The issues arising under the agreement are resolved and regulated in accordance with the general provisions on obligations and agreements. It is possible, if necessary, to apply the rules on unilateral binding obligations by analogy.

5. Legal status of the parties after the birth of the child.

The state registration of the birth of a child born to a surrogate mother is carried out in accordance with the general procedure and taking into account the right of the mother under the Family Code of the Russian Federation (art. 51, para. 4)³⁶ to consent to the registration of the genetic parents as the child's parents. Thus, the state registration procedure takes place in accordance with paragraph 5 of Article 16 of the Federal Law on Acts of Civil Status³⁷, "in the event of state registration of the birth of a child at the request of the spouses who gave their consent to the implantation of an embryo to another woman for the purpose of carrying it out, a document issued by a medical organization and confirming the fact of obtaining the consent of the woman who gave birth to the child to the registration of the said spouses by the parents of the child shall be submitted simultaneously with the document confirming the fact of the child's birth.

The statutory right of a surrogate mother to give her consent for the state registration of a child's birth as his or her parents to include genetic parents means that the surrogate mother has the possibility of recording the child's birth certificate as the mother of the child, which is also recorded in the child's birth certificate, thereby stipulating for the woman who gave birth to the child the rights and obligations of the mother (Article 47 of the Family Code of the Russian Federation³⁸). And in accordance with the Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" No. 323-FZ³⁹, such actions of a surrogate mother will not constitute a violation of their rights.

³⁶ " " 29.12.1995 N 223- (. 29.05.2019) URL: http://www.consultant.ru/document/cons_doc_LAW_8982/

³⁷ " " 15.11.1997 N 143- URL: http://www.consultant.ru/document/cons_doc_LAW_16758/

³⁸ " " 29.12.1995 N 223- (. 29.05.2019) URL: http://www.consultant.ru/document/cons_doc_LAW_8982/

³⁹ URL: http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/

This is the most controversial point in the relationship between the surrogate mother and the genetic parents. I would like to address the special opinion of the judge of the Constitutional Court of the Russian Federation S.D. Knyazev on this issue⁴⁰. Conformity of provisions of para. 4 art. 51 of the Family Code of the Russian Federation and para. 5 Art. 16 of the Federal Law "On acts of civil status" cause great doubts to the mentioned constitutional requirements. In fact, by fixing the exclusive prerogative of the surrogate mother in resolving the issue of granting the genetic (biological) parents with maternal and paternal rights, the legislator remains indifferent to the interests of persons whose sex cells were used for fertilization of a woman carrying a fetus. This creates a legal basis for the imbalance of constitutional values and infringement of the rights and legitimate interests of not only the genetic parents, but also of the child born as a result of the application of appropriate assisted reproductive technology.

From a medical and biological point of view, the birth of a child using this technology implies the "complicity" of the genetic parents and the surrogate mother. As a result, childbearing and childbirth alone cannot serve as sufficient grounds for recognizing the latter as having unlimited discretion in determining the holders of parental rights. Obviously, the surrogate mother's refusal to fulfil her obligations to the persons who are the biological parents of the child cannot undermine their natural rights.

It is also relevant to recall the UN Convention on the Rights of the Child, according to which the best interests of the child shall be a primary consideration in all actions concerning children, whether undertaken by institutions, courts of law, administrative authorities or legislative bodies (art. 3, para. 1).

⁴⁰ () URL: <http://base.garant.ru/77580428/>

Unfortunately, there are no strong grounds to assert that the domestic legislator follows these conventional requirements, which are an integral part of the Russian legal system by virtue of Article 15 (Part 4) of the Constitution of the Russian Federation, in the situation with surrogacy.

6. Post mortem fertilization.

Significant progress in postmortem reproductive health issues has allowed freezing and storing frozen genetic material for many years has led to other legitimate opportunities to have children. Reproductive material can now be obtained, preserved and used not only in life but also after death. Thus, the term "postmortem reproduction" is used only in the following ways if the child was conceived after the death of one or both of genetic parents, unlike postmortem births, when conception happened during both parents' lives. So-called "postmortem" programs are always carried out with using cryopreserved genetic material from one or even both parents, often in combination with surrogacy programs and gamete donation.

The first child conceived using sperm extracted from the father's body was born 19 years after his death, in 1999.

In Russia the first posthumous surrogacy program was successfully implemented in 2005 in the family of Ekaterina Zakharova⁴¹. The father of the child died before his birth, but while undergoing treatment in the hospital, he managed to surrender his sperm, which was subsequently used to conceive the child.

The mother of a child born by a surrogate mother may register a woman who is biologically related to the child - for example, a grandmother (decision of the Kuban District Court of Krasnodar on November 1, 2016 in case No. 2-13109/2016)⁴². Despite the fact that the origin of the child from the mother is established on the basis of medical documents or other evidence confirming the birth of the child by her (paragraph 1 of Art. 48 of the Family Code⁴³ of the Russian Federation). The essence of the case before the court was as follows.

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<http://www.zdrav.ru/articles/practice/detail.php?ID=77485;>

⁴² (1 2016 . 2-13109/2016https://www.garant.ru/files/7/3/1273537/reshenie_prikubanskogo_rayonnogo_suda_goroda_krasnodara_ot_1_noyabrya_2016_goda.odt

⁴³ " 29.12.1995 N 223- (. 29.05.2019) URL: http://www.consultant.ru/document/cons_doc_LAW_8982/

The plaintiff was the mother of the person who, due to a serious illness, carried out cryopreservation of his biological material (ejaculate). She used this material after his death, according to the contract on services between her and the surrogate mother. The plaintiff was unmarried, and on this basis the civil register office refused to point out the plaintiff as the mother of the child born.

The District Court ruled in favor of the woman, stating the following:

-The plaintiff's son gave her written consent to the disposal of his biomaterial in the event of his death;

-The surrogate mother, as well as her husband, gave their consent for the plaintiff to be recorded as a mother;

-The absence of provisions in the law allowing for the state registration of children born to a surrogate mother on the basis of an application by an unmarried woman having both a legal and genetic connection with the child born should not violate the rights of the applicant and the child;

In this situation, it is possible to apply the analogy of the law, in particular, to use the provisions according to which in order to register a child from a surrogate mother it is necessary to provide a document confirming the fact of his birth and the consent of the woman who gave birth and the future parent to the application of the method of artificial insemination (paragraph 5 of Art. 16 of the Law 143-FZ⁴⁴, paragraph 4 of Art. 51 of the Family Code of the Russian Federation⁴⁵).

At the same time, there is an opposite decision on a similar case. In January 2008, Lamara Kelesheva's son died of complications caused by acute leukemia. Before taking a course of chemotherapy, he cryopreserved several portions of semen in order to use it for artificial fertilization of the surrogate

⁴⁴ " " 15.11.1997 N 143- URL:
http://www.consultant.ru/document/cons_doc_LAW_16758/

⁴⁵ " 29.12.1995 N 223- (. 29.05.2019) URL:
http://www.consultant.ru/document/cons_doc_LAW_8982/

mother. Kelesheva took advantage of the gestational surrogacy programme in conjunction with the oocyte donation programme. In January 2011, four children were born. Grandmother was theoretically entitled to be registered as a mother on the birth certificate of these children. Thus, the district court refused to satisfy the claims of the plaintiff due to the fact that she was not married (decision of the Babushkinskiy district court of Moscow dated April 28, 2011 in the case 2-2222/112)⁴⁶. The same position was held by the court of appeal, leaving the decision of the district court unchanged (appeal decision of the Moscow City Court of Moscow of 16 January 2014 in the case 33-0819/20143⁴⁷).

We have found out from the examples of court practice that there is a gap in the legislation on state registration of births of "postmortem" children. The Family Code of the Russian Federation, p. Article 51⁴⁸ states that married persons who have given their consent in writing to the use of the artificial insemination method or to the implantation of an embryo, in the case of the birth of a child as a result of the use of these methods, are recorded by their parents in the book of births.

It is the will of the living that is at stake, and the consequences of births resulting from postmortem reproduction are not covered by the law. It also follows that if the client's parents have already started their reproductive programme by giving written informed consent to the use of in vitro fertilization or the implantation of an embryo, they are in any case recorded by the child's parents in the book of births. This means that no consideration is given to when the embryos were conceived or transferred and whether the birth

⁴⁶ 28 2011 2-2222/11 URL:<https://www.mos-gorsud.ru/mgs/services/cases/cassation-civil/details/96dfb30e-7a28-447f-92f1-7c99c5fd64cc?participants=%CA%E5%EB%E5%F8%E5%E2%E0>

⁴⁷ A 16 2014 33-0819/2014 URL:<https://www.mos-gorsud.ru/mgs/services/cases/appeal-civil/details/8f405924-508c-4d53-86dc-f978c805080a?participants=%CA%E5%EB%E5%F8%E5%E2%E0>

⁴⁸ " 29.12.1995 N 223- (. 29.05.2019) URL:
http://www.consultant.ru/document/cons_doc_LAW_8982/

occurred before or after the parents' death. Is it possible to extract gametes postmortem in Russia for further fertilization? This manipulation is not permitted, but is not prohibited. There is no legislation that would regulate the procedure of actions in such situations. But seed intake or amputation the testicle is not an organ transplant, but a tissue use. The use of deceased person's tissues regulates the art. 68 Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation"⁴⁹. In particular, it stipulates that the tissues of a deceased person may be used for medical purposes if there is a written expression of the will of the person made by him/her during his/her lifetime and notarized in accordance with the established procedure, about the possibility of such use.

That is, we are we can conclude that posthumous reproduction is possible only when the of the deceased's permission to use his gametes. In addition, the Order of the Ministry of Health of the Russian Federation of August 30, 2012 N 107n "On the order of use of assisted reproductive technologies, contraindications and restrictions on their use" in Art. 43⁵⁰ stipulates that harvesting of reproductive organ tissue from men for cryopreservation is carried out in the presence of their informed, voluntary consent in as part of the primary specialized Health care, including specialized, high-tech, medical care, medical care and other (b) The use of the term "medical aid" in medical organizations that have the license to carry out medical activities providing for the performance of work (provision of services) in urology. It can be concluded that this norm also allows postmortem reproduction, but only with the consent of the deceased.

⁴⁹ URL:
http://www.consultant.ru/document/cons_doc_LAW_121895/3b0e0cbbd6f1b1a07c0b0b3d4df406a2ecf108a1/

⁵⁰ b, 30 2012 . 107 URL:
<http://ivo.garant.ru/#/document/70318364/paragraph/1/highlight/> %20 %20 %20
 %20 %20 %20 %20 %20 %20 %20 %20 %20

It is necessary to pay attention to Article 1116 of the Civil Code of the Russian Federation⁵¹, which fixes among persons who can be called for inheritance only of citizens who are alive at the moment of the opening of the inheritance, as well as those conceived during the life of the testator and born alive after the opening of the inheritance.

From this, we can conclude that "postmortem" children are knowingly deprived of the right to inherit, which directly indicates the backwardness of legislation from the current realities. Based on the above, we can make the conclusion that Russian legislation does not is ready to settle issues related to a posthumous reproduction of a human being. This leads to the lack of protection of the interests and rights of children born after the death of one or both parents.

7. Preimplantation diagnosis regulations.

⁵¹ () 30 1994 . 51- URL:
http://www.consultant.ru/document/cons_doc_LAW_5142/

Modern methods of genetic diagnosis used in reproductive medicine, such as prenatal diagnosis and preimplantation genetic diagnosis, are successfully used to detect possible genetic pathology in a child. Prenatal diagnosis is performed during pregnancy for a sufficiently long period of time (starting from 10 weeks), so in the event of detection of genetic pathology in the fetus the parents face the question of artificial termination of pregnancy or preparation for the birth of a sick child. The material for prenatal diagnosis is the DNA of the fetus extracted from amniotic fluid cells, chorionic lint or umbilical cord blood. The study is invasive and involves the risk of spontaneous termination of pregnancy or severe complications. An alternative to prenatal diagnosis is preimplantation genetic diagnosis, carried out at early embryonic stages in the in vitro culture of embryos during the in vitro fertilization cycle.

Until recently, the Russian Federation, as well as most other former Soviet republics, did not have specific legislation governing the implementation of the preimplantation genetic diagnosis. The only mention in the Russian legislation on preimplantation genetic diagnosis in the section of the Order No. 67 of the RF Ministry of Health dated 26 February 2003. "On the Use of Assisted Reproductive Technologies in the Treatment of Female and Male Infertility", which briefly describes the possibilities and methods of the procedure⁵². However, as of January 1, 2012, Article 55 of the Federal Law "On the Fundamentals of Public Health Protection in the Russian Federation" came into force, paragraph 4 of which states: "When using Assisted Reproductive Technologies, the choice of the sex of the future child is not

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http://www.consultant.ru/document/cons_doc_LAW_42017/

». 2003 URL:

allowed, except in cases where it is possible to inherit diseases related to sex"

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Despite the fact that this law does not regulate the conduct of preimplantation genetic diagnosis and prenatal diagnosis in any way, it has become illegal to carry out these studies solely for the purpose of selecting the sex of the child, but no special permissions are required for these procedures to be carried out by clinical centers. At the same time, due to the extremely high cost, the preimplantation genetic diagnosis as a medical procedure remains inaccessible to the majority of Russians.

Conclusion.

Completing the current essay about assisted reproduction technologies in Russian Federation we can conclude about several legal problems in the field existing. First of all, the blanks in the text of law serve as a foundation of uncertainty in the legal practice and court decision. Secondly, the case of law is incoherent with leads to unpredictability of the vector of juridical decisions. This fact causes the lack of reliability of legal regulations for the use of assisted reproductive technologies and the reliability of the system as a whole. This hinders the development of modern reproductive methods in the country. The lack of proper detailed prescribed contract conditions for surrogacy as well as an absent of regulation of post-mortem fertilization and preimplantation diagnosis makes assisted reproduction less available for civilians and riskier in the terms of legal protection.