

LEGAL OVERVIEW OF FERTILITY TREATMENT IN UKRAINE

Legislation on assisted reproduction practice in Ukraine, including international fertility treatment programs:

- The Law of Ukraine No. 2801-XII of 11/19/1992 “Fundamentals of Health Legislation of Ukraine”;
- “Instruction on Procedures for Assisted Reproductive Technologies”, adopted by the Order of the Ministry of Health of Ukraine No. 787 of 09/09/2013;
- The Family Code of Ukraine, adopted by the Law of Ukraine No. 2947-III of 01/10/2002;
- Provisions of the Civil Code of Ukraine of Ukraine pertaining to contractual obligation;
- The Law of Ukraine 07/01/2010 No. 2398/VI “On Vital Statistics Registration”;
- “Rules for Vital Statistic Registration in Ukraine”, adopted by the Order of the Ministry of Justice of Ukraine No. 52/5 of 10/18/2000;
- The Law of Ukraine No. 2235-III of 01/18/2001 “On Citizenship of Ukraine”;
- The Law of Ukraine No. 3929-XII of 02/04/1994 “On Legal Status of Foreigners and Stateless Persons”.

Marital status of the patients

Most professional bodies and legislation in the various countries of Europe have recommended that ART should be restricted to heterosexual couples, legally married, or at least living in a stable relationship. The arguments for restriction of ART only to married couples are that children raised in family framework have an advantage of over children living with a single parent. On the other hand, the structure of our society is rapidly changing: there is an increasing divorce rate, and there are an increasing number of single women who wish to become a mother and establish a single-parent family. Moreover, co-habiting couples are inclined to get married once their child is born.

Ukrainian “Instruction on Procedures for Assisted Reproductive Technologies”, adopted by the Order of the Ministry of Health No. 771 of 12/23/2008 stipulates that each woman and/or man of majority age can undergo treatment by means of Assisted Reproductive Technologies on medical indication.

Thus, Ukrainian legislation allows medically assisted procreation for both married or co-habiting couples as well as single persons, with the only exception of surrogacy programs that are practiced only for officially married spouses so far.

Fertility treatment programs allowed:

- ❖ In vitro fertilization (IVF)
- ❖ Intracytoplasmic Sperm Injection (ICSI)
- ❖ Gamete Intrafallopian Transfer (GIFT)
- ❖ Zygote Intrafallopian Transfer (ZIFT)
- ❖ Intrauterine Insemination with husband or donor sperm (IUI)
- ❖ Egg donation
- ❖ Sperm donation
- ❖ Embryo donation
- ❖ Surrogacy

When is embryo transfer performed?

The Instruction on Procedures for Assisted Reproductive Technologies in Ukraine, adopted by the Order of the Ministry of Health of Ukraine No. 771 of 12/23/2008, allows embryo transfer at different stages, from *cleavage* stage (after only three days in laboratory) to the *blastocyst* stage (when embryos are cultured for 5-6 days until they have 60-100 cells).

How many embryos are transferred?

Of course, a greater the number of embryos transferred means a higher risk of a multiple pregnancy. When multiple pregnancies occur, the health of both carrying mother and child are affected, so that fertility clinics modify their procedures to minimize risks of multiple pregnancies.

According to the ESHRE's position paper "On Good Clinical Treatment in Assisted Reproduction" (2008) a two embryo transfer (DET) policy is now common in most European countries.

In Ukraine these trends are reflected the Instruction on Procedures for Assisted Reproductive Technologies, adopted by the Order of the Ministry of Health of Ukraine No. 771 of 12/23/2008. Its Section 3.6 namely stipulates that it is recommended to transfer no more than 1-2 embryos in the course of IVF procedure. When low rate of embryo implantation is anticipated, it should be possible to transfer more embryos, but not exceeding 3 embryos when a woman consents thereon. Subject to the woman's written consent a selective single embryo transfer combined with cryopreservation of the remaining viable embryos for the later use can be performed.

Selective fetal reduction of multiple pregnancy

According to Ukrainian legislation, embryo reduction is performed to prevent various obstetrical and prenatal implications associated with multiple pregnancy (three or more fetuses) arising as a result of ART. Fetal reduction is applied by decision of the board of at least three specialists and only after the pregnant woman has given her written informed consent for that. Specific number of embryos to be reduced is precised by the woman upon her doctor's advice.

Pre-embryo research

Preimplantation genetic screening of oocytes and embryos (PGD) for monogenic disorders and chromosome abnormality as well as determination of the embryo's sex in order to prevent an inherited condition related to the child's sex are performed in Ukraine as an alternative method of prenatal testing of women who are at risk of passing on an inherited genetic decease to their issue. The principal advantage of PGD is that it offers an opportunity to avoid invasive intervention into embryo/fetus egg and to interrupt the pregnancy in case any pathology is found.

Cryopreservation

While many embryos may be produced during a single IVF cycle, the common practice is to use cryopreservation of extra embryos for future use.

In Ukraine cryopreservation of sperm, oocytes and embryos is performed by using traditional slow-freezing method or vitrification (a novel device for safe storage of oocytes and embryos while using a specialized technique, which freezes the cells so quickly that ice crystals don't have time to appear).

Status of children born following IVF

The status of children resulting from IVF has been under discussion for some years. In many countries legislation concerning the practice of ART does not exist as of today, and the legitimacy of the child is determined by the courts in cases brought before them. The usual recommendation on this matter, including that of the Council of Europe, is that child conceived by virtue of IVF with the mother's husband should be treated under the law as the legitimate child of the husband. The donor should have no rights, obligations or interest with regard to the child born as a result of IVF, as the child shall have no rights of litigation or interest toward the donor. Furthermore, the Council of Europe recommends that all precautions should be taken to keep secret the identity of all parties involved.

Article 123 of the Family Code of Ukraine regulates affiliation of the child born by virtue of Assisted Reproductive Technologies as follows:

- 1. If the wife delivers the child conceived using Assisted Reproductive Technology, upon written consent of her husband, the latter shall be registered as the father of the child born by his wife.*
- 2. If the embryo conceived by the spouses using Assisted Reproductive Technology is transferred into the body of another woman, the spouses shall be the parents of the child. (remark: Gestational Surrogacy)*
- 3. The spouses shall be considered as the parents of the child, born by the wife, when an embryo conceived by her husband and another woman was transferred into the wife's body.*

Taking into account that traditional surrogacy is not mentioned in the law, the child born as the result of artificial insemination pursuant to a traditional surrogacy program is deemed to be the child of the

surrogate mother and commissioning biological father. If traditional surrogate is however married, her husband would be the legal father of this child.

Legal regulation of gestational surrogacy in Ukraine

Ukraine is one of very few surrogacy friendly states in the world. As cited above, if the embryo conceived by the spouses using Assisted Reproductive Technologies (ART) is transferred into the body of another woman, the spouses shall be the parents of the child (Article 123 of the Family Code of Ukraine). Thus, gestational surrogacy is absolutely legal in Ukraine, whereas the Family Code does not protect the rights of the gestational (biological) mother and conversely pays attention to the positions of agreement that has been concluded between the Surrogate mother and the Commissioning Parents.

Article 139 of the Family Code of Ukraine stipulates that a woman registered as the child's mother in general may contest her maternal affiliation. However, contesting maternal affiliation of genetic mother by gestational mother is expressly prohibited in Part 2 of this Article.

Accordingly, the child is legally considered to be the child of the Intended Parents from the very moment of its conception and the Surrogate mother can't keep the child after the birth under any reason or be registered as the child's mother.

According to Instruction on Procedures for ART implantation of an embryo is conducted according to *medical indications*, provided voluntary written consent of both commissioning parents and surrogate and their statements on application of ART. These medical conditions are namely as follows:

- *Absence of a womb (inborn or acquired)*
- *Deformation of the cavity or cervix uteri, making pregnancy and delivery impossible*
- *Synechi of womb cavity*
- *Severe somatic diseases, making duration of pregnancy impossible*
- *Multiple (more than 4) implantation failures associated with the transfer of high quality embryos.*

Hence, the first prerequisite for application of ART is full medical examination of the Intended Parents that proves medical indications for in-vitro fertilization. Theoretical situation when a couple is physically able to have a child and chooses the way of surrogacy in order to avoid gestation and delivery of a child by genetic mother for one reason or another, is not acceptable from legal point of view.

At the same time it should be emphasized that according to Ukrainian legislation gestation of a child by surrogate mother is only possible if the Intended Parents are officially married. So they should present a *marriage certificate* as a second condition. In case of participation of foreign citizens this document should be duly legalized or apostilled in accordance to the provisions of Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents.

According to Ukrainian Instruction on Procedures for ART a **Surrogate** has to be legally capable woman of majority age (over 18 years old) and have at least one healthy child of her own, to be physically and mentally healthy and capable to carry and deliver a child.

In this regard we note an obvious gap in Ukrainian legislation, since the provision of the Article 123 of the Family Code of Ukraine does not mention the consent of the surrogate's husband, assuming that his interests are not involved herein. According to law, nobody, including husband or wife, may limit the reproductive rights of a person. Still, Article 122 of the Family Code of Ukraine presumes that the father of the child born to the registered marriage shall be the husband of a woman who delivered a child. Hence, a husband of the Surrogate can contest parental affiliation of the genetic father, since the Family Code of Ukraine does not prohibit contesting parental affiliation in case of embryo transfer conceived by the spouses. Under these circumstances we strongly recommend our clients to get consent of the Surrogate's husband, if any, for participation of his wife in a surrogacy program in Ukraine.

If the candidate meets all medical, psychological and individual requirements of the Intended Parents and they decide in favour of her, a **Child-Carrying Contract** is signed between them. A contract involving foreign citizens is to be executed in writing and before a notary in two copies – in Ukrainian and native language of the foreign party.

Traditionally a Child-Carrying Contract contains the following counter obligations:

1. The Surrogate undertakes to gestate and deliver a child not genetically related to her complying to the best of her abilities with all provisions of the contract and relinquish custody of this child to the Genetic Parents.

The Genetic Parents should not hesitate to provide instructions for the Surrogate in fulsome detail that should facilitate uncomplicated course pregnancy and birth of a healthy child (e.g. to submit to medical examination and procedures, to follow all instructions and requirements of the physicians concerning daily schedule, nutrition regime, living conditions, to take medicines, not to smoke, drink alcoholic beverages, use any drugs, to avoid heavy physical activity and psychological stress, in case of any deviations in her health conditions urgently to inform the physicians etc.).

2. The Genetic Parents undertake to take custody of the child born by the Surrogate and pay for her services.

According to the Article 623 of the Civil Code of Ukraine the contract price is fixed by agreement of the parties. The value of a Child-Carrying Contract is usually comprised of two components. The Genetic Parents have firstly to compensate actual expenses incurred by the surrogate (e.g. medical examinations and expenses associated with any testing done, living expenses, special clothing, telephone calls to the Genetic Parents etc.) The second part is namely remuneration of the Surrogate for gestation and delivery of a child.

It is also advisable that a Child-Carrying Contract contains additional provisions for regulation of such real-life emergencies as: birth of several children; birth of a child with deformity or with special needed which has nothing to do with the performance by the surrogate of her duties; stillbirth or miscarriage; situation when the pregnancy of the Surrogate does not occur as the result of the full cycle of medical procedures; necessary abortion on medical indications; divorce of the Genetic Parents; death of one or both Genetic Parents etc.

Besides, a Child-Carrying Contract should involve provisions pertaining to liability of the Parties for non-performance or improper performance of their duties. In this section the Parties could specify fine sanctions for the case of regular violation of contract's provisions by the Surrogate or even stipulate her deprivation of reward if she doesn't follow all instructions and requirements which carries negative consequences for a foetus.

In addition to a Child-Carrying Contract the Genetic Parents also conclude a Contract of Rendering of Medical Services with a clinic that would undertake infertility treatment by virtue of ART.

As for **birth registration of a child**, it is worthy to note that Ukrainian legislation is very favourable in this regard, since the names of Genetic Parents are recorded in the birth entry of the Vital Statistics Office from the very beginning. Pursuant to the Rules for Vital Statistics Registration in Ukraine such registration upon applications of foreign citizens and stateless citizens is conducted in compliance with the Ukrainian legislation. If a child was born by the woman, impregnated with an embryo originating from the spouses, the birth registration is conducted upon the application of the married couple, who gave consent to implantation. It is only necessary to submit to the Vital Statistics Office a notarized consent of a Surrogate to record the names of the spouses as the child's/children's parents; the document, confirming the fact of the child's birth and certificate on genetic relationship of Intended Parents to the child. In this case the spouses are duly registered as parents of their new-born child/children and only the column "Remarks" contains record indicating the name of Surrogate Mother. However this record is kept with the Vital Statistics Office and is confidential.

At the same time, foreign citizens may apply for the birth registration of their child to the Consular Office of their own country and get a birth certificate issued together with a child's passport. However, it is only possible when surrogacy is legal in the county of residence of Genetic Parents.

One more question that has to be answered is who should be considered as the child's parents if an embryo was conceived by using of donated cells and biological material only from one of Intended Parents.

According to Paragraph 5.1 of the Instruction on Procedures for ART the embryo implantation is performed when anonymity of the donor and medical secrecy are protected. Thereby donor of gametal cells (eggs, sperm) can not acquire parental responsibilities and rights with regard to the child, which has to be born in the future (Paragraph 5.2). On the other hand, paragraph 7.11 of

the Instruction regulates that birth registration of the child, born by using of ART with the method of surrogacy, is accomplished in accordance to the current legislation of Ukraine on the basis of the certificate stating the genetic relationship of the Intended Parents (mother or father) with the foetus. Hence, neither gametal cell donors, nor Surrogate mother acquire parental rights with regard to the children, born by virtue of the above mentioned ART. In this case parental rights and responsibilities belong to the spouses, who concluded the contract on gestational surrogacy program in Ukraine.

In the frame of the Law "On the Citizenship of Ukraine" there is no room for automatic acquisition of Ukrainian citizenship by a child born by surrogate mother in Ukraine as a result of transfer of an embryo, conceived by a foreign married couple. A child born within the territory of Ukraine by foreigners can acquire the citizenship of Ukraine only in the event that the child has not acquired the citizenship of his/her parents, and that the parents live permanently within the territory of Ukraine on legal grounds. Thus, we should apply conditions of 'Procedure of Entry to Ukraine for Foreigners and Stateless Persons, Their Exit from Ukraine and Transit through its Territory', according to which foreigners and stateless persons shall enter/exit Ukraine through the crossing points on the State frontier in case of presence of a national passport and a visa, if otherwise is not specified by the Ukrainian legislation. Citizens of the States which have concluded international agreements with Ukraine on visa-free travelling enter into/exit from Ukraine with a valid national passport. Hence, the Intended Parents have to take steps for obtaining passport or visa for their newborn child/ren as the last step of surrogacy program in Ukraine.