

The Vietnam's Law on Marriage and Family 2014 and related documents: Unreasonable points about surrogacy and recommendations

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Abstract:

Since Vietnam's Law on Marriage and Family 2014 took effect, it has promoted positive effects in regulating this social relationship [1]. Allowing legal couples to use a surrogate mother when they meet the legal requirements has provided an opportunity for couples who cannot have a child naturally, even when using reproductive support techniques to have children with the same bloodline. However, after eight years of implementation, the regulations on surrogacy for humanitarian purposes recorded in Vietnam's Law on Marriage and Family 2014 still reveal many limitations, particularly regarding synchronisation with existing related legal regulations [1]. Among these, issues such as the conflict with divorce provisions in the Law on Marriage and Family Act; the protection of the right to life of children born from surrogacy in the Criminal Code 2015 [2] (amended and supplemented in 2017); protecting the legal rights of the surrogate mother and the intended mother in the Law on Social Insurance 2014 [3], and the right to adopt children in the Law on Adoption 2010 [4] have not yet been properly resolved. Realising the contradictions in the regulations on the aforementioned issues, the author analyses and clarifies the inadequacies between the provisions of Vietnam's Law on Marriage and Family 2014 [1] and the relevant legal documents concerning surrogacy in general and surrogacy for humanitarian purposes in particular. Specific recommendations were proposed to improve Vietnamese legislation regulating surrogacy, a newly emerged social issue.

Keywords: surrogacy, surrogacy for humanitarian purposes, synchronisation of the law.

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1. Introduction

From the perspective of protecting the parental rights of couples unable to give birth naturally, surrogacy for humanitarian purposes is considered one of the most important regulations. Progress is recognised in Vietnam's Law on Marriage and Family 2014 to help realise their dreams. These regulations have created a legal corridor to clearly define issues such as conditions for implementation, rights and obligations of parties involved, procedures, and dispute resolution. However, as this is a newly regulated social relationship, it raises many related legal issues such as determining the relationship between father, mother, and child; social insurance regimes for relevant entities; sanctions for violations; adoption relationships, etc., making it difficult to avoid

overlaps and conflicts between the Law on Marriage and Family and related legal documents. Therefore, to promote effective regulation, it is necessary to review and evaluate the compatibility between legal regulations related to the surrogacy regime, gradually improving the system effectively to implement legal provisions on this humanitarian issue.

2. The conflict between the Law on Marriage and Family and related documents on surrogacy for humanitarian purposes

The regulations on surrogacy for humanitarian purposes in the Law on Marriage and Family reveal certain limitations concerning other legal provisions within the same document and other relevant legal documents. The lack of consistency among legal

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documents has negatively impacted the legitimate rights and interests of related parties, especially the rights of children.

2.1. Regarding the provisions of the Vietnam's Law on Marriage and Family 2014

Right to request a divorce: The right to divorce between husband and wife is fundamental in protecting personal rights in Marriage and Family Law and human rights in civil law in general. However, for couples undergoing surrogacy, adjustments to the right to request a divorce need to consider specific factors to balance the legal rights and interests of the parties involved. This needs to be addressed in two specific cases:

First, Article 51, Clause 3 of Vietnam's Law on Marriage and Family 2014 states: "The husband does not have the right to request a divorce when the wife is pregnant, giving birth, or raising a child under 12 months old" [1]. This means the right to request a divorce is not restricted to the husband of the intended parents when the surrogate mother is pregnant. This is unreasonable, considering the psychological impact of divorce on the surrogate mother and the development of the foetus. During pregnancy, the husband of the intended parents requesting a divorce may cause concerns and worries about the child's future, possibly leading to neglect of responsibility to care for and raise the child, which can seriously affect the pregnant woman's health and the foetus's development.

Second, from the perspective of ensuring equal rights of the parties in marital relationships, the adjustment to divorce issues should reconcile the interests between husband and wife, individuals, families, and society. In this regard, the issue of limiting the right to request divorce for the husband needs to be considered on a reasonable basis. It is worth noting that Clause 3 of Article 51 of the Law on Marriage and Family 2014 [1] adds a case restricting the husband's right to request a divorce compared to the Law on Marriage and Family 2000 [5]: "The husband has no right to request a divorce if the wife gives birth". The legislative intent is to limit the husband's right to request a divorce from the husband's intended parents. During the wife's pregnancy or after birth and the child has been given to the intended parents, the husband has no right to request a divorce. However, the current law does not explicitly explain the case when the wife gives birth. If the wife does not take responsibility for raising the child

after birth, how long does the husband's restriction last? It is not appropriate to unify the time limit for the husband's right to request a divorce as 12 months after birth in both direct birth and surrogacy cases, as the surrogate mother only needs time to recover her health after giving birth. Therefore, if the regulation is applied such that the husband can request a divorce only after 12 months, as in other typical cases, it is not appropriate, unlike a mother who raises the child.

2.2. For the provisions of the 2015 Criminal Code, amended and supplemented in 2017

The provision regarding the timing of determining a child as a common child of a married couple through assisted reproductive technology (ART) from the time the child is born may cause irrationality in relation to the provisions of the Criminal Code 2015 [2] regarding the protection of the right to life of children - one of the most important human rights.

The right to life is one of the most fundamental human rights. Article 6 of the International Covenant on Civil and Political Rights of 1966 [6], of which Vietnam is a member, states: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". Recognising and protecting the right to life of children becomes even more urgent and meaningful because they are a vulnerable group, unable or less able to protect themselves. Protecting the right to life is protecting the integrity of human life and existence. To protect the right to life of children, Article 124 of the Criminal Code 2015 [5] regulates the crime of killing or abandoning newborns. Accordingly, "Any mother who, due to the heavy influence of backward thinking or in special objective circumstances, kills a child she has given birth to within seven days of age shall be sentenced to imprisonment from 6 months to 3 years; ...abandons a child she has given birth to within seven days of age leading to the consequence of the child's death shall be sentenced to non-custodial reform for up to 2 years or imprisonment from 3 months to 2 years". However, in the case of children born through ART, this issue needs to be considered more fully and comprehensively. This is because these are children at higher risk of infringement of the right to life than other ordinary cases, especially for children born with disabilities or for some other reason, leading to the legal parents of the child not accepting it after the woman who gave birth through ART.

A hypothetical situation is considered where, in the case of ART, a child has just been born (under 7 days old), is disabled, and subsequently dies. The woman who gave birth through ART, due to exceptional objective circumstances (such as this woman has many children, poor economic conditions, is experiencing a postpartum psychological disorder, or the child is born with congenital disabilities, etc.) decides not to raise the child. As a result, she abandons the child in a deserted place, leading to the child's death. Under these circumstances, can the woman who gave birth through ART be criminally responsible, and if so, under which specific crime?

Clearly, under current law, the criminal responsibility of a surrogate mother cannot be pursued for the crime of killing a newborn under Article 124 of the Criminal Code 2015 [2], because the surrogate mother, after giving birth, is not considered the "mother" of the child under the provisions of Article 94 of Vietnam's Law on Marriage and Family 2014 [1]. Of course, the applicable crime would be murder under the provisions of Article 123 of the Criminal Code 2015, with a much higher penalty. However, in our opinion, not applying the crime of killing a newborn under Article 124 of the Criminal Code 2015 to the above case is not reasonable or logical. Objectively, the surrogate mother in this case has just gone through a process of pregnancy and childbirth with many psychological impacts. Medicine has shown that women after giving birth may experience abnormal psychological conditions due to the effects of childbirth and unfavourable external factors, which may lead to their committing acts with dire consequences. Therefore, they clearly belong to the case that needs humane sanctions as stipulated in Article 124 of the Criminal Code 2015 [2]. However, this cannot be applied because it contradicts the provisions for determining the subject's status under Article 94 of Vietnam's Law on Marriage and Family 2014 [1].

2.3. According to the provisions of the Law on Social Insurance 2014

The regulation on determining the time of birth mentioned above also creates an overlap with the legitimate rights and benefits of the commissioning party and the surrogate in some cases as stipulated in the Law on Social Insurance 2014 [3], specifically as follows:

Firstly, regarding the entitlement to sick leave for a child's illness according to the provisions of Article 27 of the Law on Social Insurance 2014 [3], it is determined as follows: "1. The duration of entitlement to sick leave for a child's illness within one year for each child is calculated based on a maximum of 20 working days of childcare if the child is under 3 years old; a maximum of 15 working days of childcare if the child is from 3 to under 7 years old; 2. In case both the father and mother participate in social insurance, the duration of entitlement to sick leave for a child's illness for each father or mother is determined according to the provisions of Clause 1 of this Article" [3]. With this provision, it can be seen that the application of the law's provisions on resolving entitlements for the employee in case of a child's illness is only implemented when they themselves are determined to be the father or mother of the child. However, as analysed above, in the case of surrogacy, the principle of determining the relationship between the father, mother, and child is different from other normal cases where the child's legal parents are determined as the intended parents from the time of the child's birth. In reality, it is possible that after the surrogate gives birth, the intended couple may delay taking the child due to reasons such as the couple divorcing during the surrogate's pregnancy, or the child being born with disabilities. The surrogate may file a lawsuit demanding that the intended couple take the child, but The Lawsuit process could be prolonged. So, during this time, the intended parents still have an obligation to take care of and nurture the child even though legally the child is not theirs. Assuming that during that time the child falls ill and needs special care, with confirmation from a qualified medical facility [3], can the intended parents take sick leave to take care of the child? Clearly, legally, the intended parents are not the biological parents of the child, so there is no basis to apply Article 27 of the Law on Social Insurance 2014 as analysed above. In our opinion, this is unreasonable and does not ensure the humane nature that the provision of gestational surrogacy should have. Because before the child is transferred/received, the intended parents are identified as the ones who are nurturing and caring for the child. Therefore, their legitimate rights and obligations must be ensured if the child is sick. From our point of view, to address this issue thoroughly, it is essential to determine the appropriate legal status of the intended parents as parents in this case. This is first to protect the legitimate rights of children

born from surrogacy - subjects who cannot protect themselves, and then to ensure the legitimate rights of those who are nurturing the child. Only then can surrogacy provisions for humanitarian purposes in the 2014 Family and Marriage Law and the sick leave policy in the Law on Social Insurance 2014 truly fulfil their intended purpose.

Secondly, regarding the funeral allowance policy, Point a Clause 2 Article 67 of the Law on Social Insurance 2014 [3] stipulates that the relatives of the employee specified in Clause 1 Article 67 are entitled to monthly funeral allowances, including “Children under 18 years old; children from 18 years old and above if they have a loss of working capacity of 81% or more; children born when the father died while the mother was pregnant”. This regulation can lead to confusion regarding the funeral allowance entitlement of a child born through ART using a deceased father’s sperm. According to Article 94 of Vietnam’s Law on Marriage and Family 2014 [1], the child born is still considered the common child of the couple through ART, even if the father passed away before the child’s birth. However, it is noteworthy that in this case, the mother of the child was not “pregnant” before. Therefore, when applying the regulation at Point a Clause 2 Article 67, if the woman using ART becomes pregnant and the husband (the father of the child) dies, will the child be entitled to the funeral allowance of the father because the father has passed away even though the mother of the child was “not pregnant”? Under this interpretation, it means that the child born through ART would not be recognised as eligible for the funeral allowance policy according to the Law. This would adversely affect the legitimate rights and interests of the child. Therefore, this issue needs to be addressed and adjusted accordingly.

Thirdly, the new Marriage and Family Law only mentions protecting the rights of mothers but does not acknowledge or protect the rights of fathers who use a surrogate. In fact, the rights of the husband using a surrogate have yet to be adequately protected. This can be clearly seen in the provisions of the Law on Social Insurance 2014 [3]. Specifically, Article 31 of the Law on Social Insurance 2014 [3] regarding maternity leave entitlements only includes “male workers who are paying social insurance and have wives who give birth”. This means that only surrogate mother’s husband is entitled to maternity leave, while the husband of the intended parents is not entitled

to this benefit. According to Clause 2 of Article 34 of the Law on Social Insurance 2014 [3], if the wife gives birth, she is entitled to “maternity leave as follows: a. 5 working days; b. 7 working days if the wife gives birth by surgery or the child is born before 32 weeks; c. In the case of twins, 10 working days off, for each additional child, an additional 3 working days off; d. In case of twins or more requiring surgery, 14 working days off. The leave entitlement period for maternity leave specified in this clause is calculated within the first 30 days from the day the wife gives birth” [3]. The above regulation aims to ensure that the husband of the intended mother can exercise his rights and responsibilities, such as taking care of the wife and child during childbirth. This is entirely reasonable. However, this provision does not clarify whether a man who is enrolled in social insurance as the husband in an intended-parent couple is entitled to maternity leave if the surrogate mother immediately transfers the child to the intended parents for care after birth. According to Article 35(2) of the Law on Social Insurance 2014 [3], in the case of surrogacy, the intended mother is entitled to maternity leave from the time of receiving the child until the child is six months old. The rights of being a father or mother are equal rights of individuals. After receiving the child, not only the wife but also the husband needs to take responsibility for caring for the child - this is both a right and a duty of the relevant parties. From the gender equality perspective in the Law, the fact that the husband in an intended parent is not entitled to maternity leave (taking leave according to the number of days specified in Article 34(2) of the Law on Social Insurance 2014) is not appropriate. They also have the right to take care of and show their love for the newborn child. Therefore, in our opinion, the Law needs to recognise the right to maternity leave for male labourers in surrogacy arrangements to be consistent with the humanitarian spirit of the Law.

2.4. Regarding the provisions of the Law on Adoption 2010

The Law on Adoption 2010 [4] does not provide a specific provision regarding disputes related to adopting children born through assisted reproductive technology. However, we can infer that such disputes may be considered as disputes over parent-child relationships. This is because parent-child relationships can be established based on both biological and nurtured connections.

Regarding the jurisdiction for resolving disputes related to adopting children, Article 28 of the Code of Civil Procedure 2015 [7] stipulates that such disputes fall within the jurisdiction of the People's Court. However, this article does not explicitly mention disputes over adopting foster children. In a broader sense, disputes over adopting foster children can be understood as disputes over parent-child relationships, which may fall under the category of "disputes over determining parentage or child custody", as stipulated in Clause 4 of this Article of the Code of Civil Procedure 2015 [7]. However, The Lawmakers intended this provision to address disputes over parentage or child custody based on blood relationships. Therefore, in the case of disputes over adopting foster children, where the child in question is born through assisted reproductive technology, it is unclear whether the People's Court has jurisdiction to resolve such disputes under Article 28 of the Code of Civil Procedure 2015 [7]. We also hold the view that disputes over the right to adopt a child born through surrogacy fall under the category of "Other disputes regarding marriage and family" as regulated in Clause 8 of this Article. However, even if the dispute falls under the jurisdiction of the People's Court, there are still many shortcomings that make it difficult for the Court to handle and resolve the issue. This is evident in the conflicts and inconsistencies between the specific content regulations of Vietnam's Law on Marriage and Family 2014 [1] and the Law on Adoption 2010 [4].

Clause 2 of Article 99 of Vietnam's Law on Marriage and Family 2014 [1] stipulates the resolution of disputes related to the use of assisted reproductive techniques, surrogacy for humanitarian purposes as follows: "In cases where the child has not been delivered, if both intended parents die or lose their civil act capacity, the surrogate mother has the right to adopt the child" [1]. This means that if a child is born and the intended parents die or lose their civil act capacity, the surrogate mother has the right to adopt the child as a foster child. However, this provision is incompatible with the Law on Adoption 2010 [4] if the surrogate mother is not also the biological aunt/uncle; spouse of the child's biological uncle/aunt. According to Article 5 of the Law on Adoption 2010, the subject with the right to priority in adopting the first child is the stepfather, stepmother, aunt, uncle, great aunt, great uncle of the child to be adopted [4]. If the surrogate mother is a sibling of the intended parents, do they have priority to adopt the child if the legal parents of the child have passed away?

Clearly, in such a case, if the surrogate mother and the parties involved in accordance with the regulations under Article 5, Clause 1 of the Law on Adoption 2010 have a dispute over the right to adopt the child and initiate a lawsuit in court, resolving the priority of the right to adopt will become very difficult. In terms of legal principles, according to Article 156, Clause 3 of the Law on Promulgation of Legal Documents 2015 [8], in case legal documents promulgated by the same authority have different provisions on the same issue, the provisions of the legal document promulgated later shall apply. The author believes that this is appropriate. In the context of the legal relationship regarding surrogacy for humanitarian purposes [9], as well as from the perspective of best protecting the child's interests, it is clear that the surrogate mother is the one who has "borne the pain of childbirth" to give birth to the child. Even though the child and the surrogate mother may not be biologically related, they and the child they gave birth to have a close emotional connection.

3. Conclusions and recommendations

Based on the above analysis, the author proposes several recommendations to improve the Law on Marriage and Family and related legal documents on surrogacy for humanitarian purposes, specifically as follows:

Firstly, Clause 3, Article 51 of Vietnam's Law on Marriage and Family 2014 [1] stipulates that the right to request a divorce must be adjusted to ensure harmony in the subjects' legitimate interests. Accordingly, to ensure that the psychology of the mother is not negatively affected and does not impact the development of the foetus, we propose that the restriction of the right to request a divorce be applied even to married couples using surrogacy when the surrogate mother is pregnant. Additionally, it is necessary to specify how long the husband of the mother will be limited in his right to request a divorce after the surrogate mother gives birth and hands over the child. To ensure compatibility with the regulations on the maternity leave period of the surrogate mother after delivering the child in Clause 3, Article 97 of Vietnam's Law on Marriage and Family 2014 [1], we recommend a reasonable time limit for the right to request a divorce. The limit for the husband of the surrogate mother is 60 days (2 months) if the surrogate mother hands over the child within 60 days. In cases where the surrogate mother cannot hand over the child

for legitimate reasons after 60 days, the husband of the surrogate mother has no right to request a divorce while the surrogate mother raises the child until the child turns 12 months old.

Secondly, it is necessary to issue guiding documents on the application of regulations in Article 124 of the Criminal Code 2015 [2] regulating the crime of killing or abandoning newborn children. Accordingly, adding the case that “the surrogate mother, under the heavy influence of outdated ideology or in special objective circumstances, kills the child she gave birth to within 7 days of age, shall be sentenced to imprisonment from 6 months to 3 years; ...abandons a child born to her within 7 days of age leading to the death of the child, shall be sentenced to non-custodial reform for up to 2 years or to imprisonment from 3 months to 2 years”. The provisions of Article 124 of the Criminal Code 2015 [4] do not apply to the party requesting gestational surrogacy [10].

Thirdly, the Law on Social Insurance 2014 regulations also need to be adjusted appropriately. Specifically, it is necessary to add subjects entitled to maternity benefits in Article 34 of the Law on Social Insurance 2014, including husbands who rely on maternity benefits. Regulations on death benefits for children born from surrogacy for humanitarian purposes need to be adjusted by removing the regulation on “children born when the father dies but the mother is pregnant” at Point a, Clause 2, Article 67 of the Law on Social Insurance 2014 [3]. This regulation needs to be adjusted to: “Children under 18 years old; If a child is 18 years of age or older, his or her working capacity is reduced by 81% or more”. As long as the child is determined to be the child of a person who relies on legal aid, the child is entitled to the death benefit of the father or mother, even if the child’s father or mother died before the child was born.

Fourthly, with regard to the provisions in Article 5 of the Law on Adoption 2010 [4], when there are conditions for amendment and supplementation, adjustments should be made to add the surrogate mother as the subject with priority in adopting the child. This adjustment should ensure parents’ legal rights and provide the best conditions for children.

COMPETING INTERESTS

The author declares that there is no conflict of interest regarding the publication of this article.

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