

LEGAL POSITION OF AN AGENCY INTERMEDIATING SURROGACY IN THE CZECH REPUBLIC

Renata Švestková*, Hana Konečná**, JUDr. Roman Svatoš***1

Abstract: *An interest in surrogacy has recently been increasing by astronomical progression. In some countries, there are agencies that offer the applicants for surrogacy both of the services, looking for surrogate mothers and their “matching” with the applicants. This article is focused on the possibility of setting up such an intermediating agency in the Czech Republic. The described possibilities are based on the current legislation. Our analysis has shown that in spite of the Czech legislation insisting on the donation of body parts as a purely altruistic act, and in spite of the Czech legislation refusing and strictly punishing human trafficking, it is now still possible (with courage and calculation) to operate an agency that will intermediate surrogate motherhood.*

Keywords: *surrogacy, agency, intermediate, human trafficking, non-profit organization*

INTRODUCTION

Medical reproduction technologies have made great progress: nearly anybody can “become a parent” when supported by a suitable legal system. It could be an organization, as analysed in the article called “Access to medically assisted reproduction for legal persons: Possible?”² Nevertheless, in spite of the scientists’ efforts to produce artificial gametes,³ a naturally created (originated) egg, sperm and a uterus are still necessary to create a child. Using someone else’s body parts for the procedure is called “third-party reproduction”. The term is somewhat inaccurate since more than 3 parties or people participate in it. The surrogacy, is currently (as of May 2019) the most complicated procedure of assisted reproduction (ART), from the psychosocial, ethical and legal points of view. Many of these problems are described in legal terms in a relatively detailed way by the monograph Health Law, and it also analyzes the cases dealt with by the European Court of Human Rights.⁴

The interest in surrogacy is increasing by a geometrical progression, and is almost replacing the interest in international adoptions. Between 2004 and 2017, the number of international adoptions decreased by 80 %, from 45,483 (2004) to 9,387 (2017). On the other hand, the num-

* Mgr. Ing. Renata Švestková, Ph.D. Faculty of Health and Social Sciences, University of South Bohemia in České Budějovice, České Budějovice, Czech Republic

** Associate Professor, PhDr. Ing. Hana Konečná, Ph.D. Faculty of Health and Social Sciences, University of South Bohemia in České Budějovice, České Budějovice, Czech Republic

*** Associate Professor, JUDr. Roman Svatoš, Ph.D. Faculty of Health and Social Sciences, University of South Bohemia in České Budějovice, České Budějovice, Czech Republic

The team of authors thank the reviewers for a thorough reading of the text, important relevant feedback and for noticing new literature. We believe that by its higher professional level and readability the article will attract the attention of experts to another of the neglected problems of surrogate motherhood.

¹ Supported by the grant: GAČR 17-07753S “Surrogate motherhood in the Czech Republic: legal, psychosocial and ethical analysis.”

² KONEČNÁ, H., NOVÁKOVÁ, K. Access to medically assisted reproduction for legal persons: Possible? *Ethics and Bioethics (in Central Europe)*. 2018, Vol. 8, No. 1–2, pp. 109–120.

³ SMAJDOR, A., CUTAS, D. *Artificial Gametes. Nuffield Council on Bioethics. Background paper*. 2015.

⁴ ŠUSTEK, P., HOLČÁPEK, T. et al. *Medical law*. Wolters Kluwer ČR, 2016, p. 502.

ber of surrogacies has increased by 1000 %, the estimate accounts for 20,000 delivered children per year.⁵ The interest in the procedure is growing significantly in the Czech Republic.⁶

In the EU, surrogacy is legally accepted in the UK, Greece, Portugal and the Netherlands, and is explicitly prohibited, for example, in Germany, France, Spain or Slovakia. Most European countries do not have legal regulation, but somehow they accept the procedure. This is the case, for example, in the Czech Republic or Belgium. At present, a new regulation of surrogacy in the UK is being prepared;⁷ France⁸ and Ireland⁹ are introducing a whole new bioethical law; in both cases, the attitude to surrogacy is permissive. In the Czech Republic, there has been an interest in regulating the procedure several times, but the intention has never come true.

Our research plan is focused on creating the basis for regulation. The problems of family law was discussed in our article “The Issue of Determination of Parenthood in the Surrogacy,¹⁰ responsibilities mentioned egg in articles “Shared Responsibility in Surrogate Motherhood”¹¹ or “Surrogate Motherhood: The Country of the Czech Republic and Surrogate Motherhood: The State in the Czech Republic and the General Practitioner’s Responsibility”.¹² We also looked into who the surrogate mothers in the Czech Republic are and how they are searched, we proposed criteria for selecting a surrogate mother, if the procedure is allowed,¹³ and other context of the procedure.¹⁴ In this present paper, the possibilities to establish an intermediating agency in the Czech Republic will be analyzed.

II. WHO IS A SURROGATE MOTHER?

People who are not involved in the area of ART or surrogacy usually opine that the surrogate mother is a woman who is somewhat close to the applicant or applicants: the mother, sister, cousin or a close friend. The condition of blood relations for accepting the procedure is required in some countries, e.g. India, Thailand, Vietnam, Brazil.¹⁵ Actually,

⁵ According to FENTON-GLYNN, C. Adoption and surrogacy – two sides of the same coin? *International conference „Cesta za rodinou – Příběhy mezinárodní adopce. Právo, trendy a zkušenosti“*, Brno, 15.–16. 5. 2019.

⁶ KONEČNÁ, H., HONZOVÁ, I., PRUDIL, L., PRUDILOVÁ, L., ZEMANDLOVÁ, A., MICHELOVÁ, E., RUMPÍKOVÁ, T. & RUMPÍK, D. Surrogacy in the Czech Republic from the point of view of the law office: experience for the years 2009–2018. *35th Annual Meeting of European Society of Human Reproduction and Embryology*. Vienna, 24.–26. 6. 2019.

⁷ HORSEY, K. ‘*Surrogacy in the UK: Myth busting and reform.*’ Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).

⁸ Law 2011-814 of July 7, 2011, on bioethics was finally adopted by the French Parliament after months of debate and published in the JOURNAL OFFICIEL, France’s official gazette, of July 8, 2011. (Loi n° 2011-814 du 7 juillet 2011 relative à la bioéthique).

⁹ See General Scheme of the Assisted Human Reproduction Bill 2017 at gov.ie.

¹⁰ KONEČNÁ, H. & SVATOŠ, R. Issues in determining parenthood in “surrogacy”. *Human Affairs*. 2019, Vol. 29, No. 2. In print.

¹¹ KONEČNÁ, H., SVATOŠ, R. Sdílená odpovědnost v proceduře náhradního mateřství. *Časopis zdravotnického práva a bioetiky*. 2018, Vol. 8, No. 3, pp. 54–67.

¹² KONEČNÁ, H., NOVÁKOVÁ, K., PRUDIL, L., HONZOVÁ, I., PRUDILOVÁ, L. Náhradní mateřství: stav v České republice a odpovědnost praktického lékaře. *Prakt. lék.* 2018, Vol. 98, No. 6, pp. 270–274.

¹³ NOVÁKOVÁ, K., KONEČNÁ, H., SUDOVÁ, M. Náhradní mateřství v České republice: způsoby hledání náhradní matky. *ČZBP* 2018, Vol. 8, No. 2, pp. 32–42.

¹⁴ KONEČNÁ, H., WITZANYOVÁ, A., HONZOVÁ, I., PRUDIL, M., PRUDILOVÁ, L. Kritéria pro výběr náhradní matky. *Česká gynekologie*. 2019, Vol. 84, No. 1, pp. 28–32.

¹⁵ See also Chapter 3 of this text.

women from the applicant's close environment seldom become surrogate mothers.¹⁶ Another false idea is that surrogate mothers are women in a desperate financial situations.¹⁷ However, Czech studies have shown that these are mainly women whose life situation is not desperate but surrogacy offers them a comparatively undemanding way of obtaining quite a high amount of money.¹⁸ It can be said that the woman uses her capital (the uterus) as a time limited investment lasting 9 months. At present, most of the countries insist on selflessness to be the nature of the procedure, as demanded by the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, art. 21 “*The human body and its parts shall not, as such, give rise to financial gain*”,¹⁹ and on the fact that only costs spent purposefully in association with procedure can be reimbursed, i.e. so called the compensation as analyzed by the Guide for the implementation of the principle of prohibition of financial gain with respect to the human body and its parts from a living or deceased person.²⁰ The compensation must not be the motive or reason for the surrogate mother in the process of deciding whether or not to undergo the procedure.

In the Czech Republic, the surrogate mother is looked for by the applicants via Internet and the surrogates are usually women with a lower socioeconomic statute,²¹ similarly as in other countries.²² However, searching for a surrogate mother by advertising is forbidden in many countries, e.g. the Netherlands, UK, Belgium or Denmark.²³ The Czech Transplantation Act (§ 28) reads as follows: (3) *Advertising and publicity to demand and supply organs are forbidden. The procedure according to § 27 is not considered to be advertising and publicity* (§ 27 relates to the Ministry's duty to inform the public on the importance and possibilities of tissue and organ donation, note of the authors).²⁴ However, it is not clear how Czech legislation classifies advertising associated with the surrogacy. Is it included

¹⁶ See for example JADVA, V., IMRIE, S., GOLOMBOK, S. Surrogate mothers 10 years on: a longitudinal study of psychological well-being and relationships with the parents and child. *Human reproduction*. 2015, Vol. 30, No. 2, pp. 373–379, or NOVÁKOVÁ, K., KONEČNÁ, H., SUDOVOVÁ, M. Náhradní mateřství v České republice: způsoby hledání náhradní matky. *Časopis zdravotnického práva a bioetiky*. 2018, Vol. 8, No. 2, pp. 32–42.

¹⁷ See *The Miserables* (Victor Hugo), where kdy Fantine sells her hair and teeth to be able to send money for the education of her daughter.

¹⁸ See for example KONEČNÁ, H. et al. Surrogacy in the Czech Republic from the point of view of the law office: experience for the years 2009–2018. 35th *ESHRE Annual Meeting*, Vienna (Austria) from 23rd to 26th June 2019; HONZOVÁ, I., PRUDIL, L. Kvalita rodičovství u žadatelů o náhradní mateřství z pohledu právníka. *XVIII. ročník česko-slovenské konference Kvalitativní přístup a metody ve vědách o člověku*. 28.–29. ledna 2019 v Českých Budějovicích. A detailed article is being prepared.

¹⁹ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. In: *Council of Europe* [online]. 4. 4. 1997 [2018-08-10]. Available at: <<https://rm.coe.int/168007cf98>>.

²⁰ Guide for the implementation of the principle of prohibition of financial gain with respect the human body and its parts from living or deceased person. In: *Council of Europe* [online]. 2018 [2019-05-10]. Available at: <<https://rm.coe.int/guide-financial-gain/16807bfc9a>>.

²¹ NOVÁKOVÁ, K., KONEČNÁ, H. Surrogate motherhood in the Czech Republic: Ways to seek a surrogate mother. *Časopis zdravotnického práva a bioetiky*. 2018, Vol. 8, No. 2, pp. 32–42.

²² See chapter 3 of this text.

²³ Unofficial document of DH-BIO CoE “DH-BIO/INF (2016) 4 Addendum. Surrogacy.” –the main author of this article is a representative in the DH-BIO Committee.

²⁴ Law no. 285/2002 Coll., on donation, procurement and transplantation of tissues and organs and on amendments to some laws (Transplantation Act).

in the demand and supply of organs? The surrogate mother does not offer any organs. Thus, is it an offer of purposeful manipulation with organs? Or does surrogacy rather resemble some social services? Or prostitution?

In some countries there are agencies which offer the applicants for surrogacy both services (e.g. legal counselling before the beginning of the procedure or legal services for the transfer of parental rights and qui dance a round the duties after a child has been delivered by a surrogate mother) and looking for surrogate mothers and their “matching” with the applicants.²⁵

III. INTERMEDIARY AGENCIES WORLDWIDE

Intermediary agencies across the world have various legal positions. For example, in the U.S.A. surrogacy is not represented by any umbrella subject; it is a comparatively new matter, and there is nobody issuing permissions for the operation of such agency. However, certain standards established by the American Society for Reproductive Medicine need to be observed.²⁶ There are also differences in permissions for surrogate motherhood across the U.S. E.g. California, Connecticut, DC, Delaware, Maine, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont permit surrogacy for all applicants, and it is always guaranteed (before the child is born) by an agreement and the applicants are registered in the newborn’s birth certificate. In contrast, in Louisiana, Michigan, New York, Washington surrogacy is prohibited or is not possible for both applicants to be registered in the birth certificate.²⁷ In the case of an intermediary agency established on non-profit principle, it is to be mentioned that the non-profit US organizations are distinguished according to the rules of the Internal Revenue Service – IRS, section 501, and in accordance with the company and tax acts of individual states. IRS distinguishes more than 30 categories of organizations.²⁸ In some states commercial surrogate motherhood is respected. Therefore, the intermediary agencies need not be non-profit (or at least pretend to be non-profit). In Mexico, where the American business is gradually being shifted because of low prices, there is a similar situation as it would be in our country.²⁹

As another example, the United Kingdom can be mentioned. In the UK, non-profit agencies, e.g. Brilliant Beginnings, Surrogacy UK and COTS are permitted. Surrogacy is legal but it is treated neither by a contract nor other regulations – the woman who has delivered the baby becomes automatically mother and the applicant couple needs to hand in an application to the court – everything is sorted out as late as after the delivery and is based on trust. “It’s illegal to advertise for a surrogate in the UK; only non-profit agencies

²⁵ Its names for example in KONEČNÁ et al. Criteria for selecting a surrogate mother. *Czech Gynecology*. 2019, Vol. 84, No. 1, pp. 28–32.

²⁶ See About Surrogacy. In: *Surrogate.com* [online]. [2020-03-09]. Available at: <<https://surrogate.com/about-surrogacy/surrogacy-professionals/surrogacy-agencies/>>.

²⁷ See The United States Surrogacy Law Map In: *Creative Family Connections* [online]. [2020-03-09]. Available at: <<https://www.creativefamilyconnections.com/us-surrogacy-law-map/>>.

²⁸ See 26 U.S. Code § 501. In: *Legal Information Institute* [online]. [2020-03-09]. Available at: <<https://www.law.cornell.edu/uscode/text/26/501>>.

²⁹ RICHARDSON, J. TV Review: Unreported World – Mexico’s Baby Business. In: *BioNews* [online]. 2015 [2019-05-10]. Available at: <https://www.bionews.org.uk/page_95301>.

can help couples find a match,” says the owner of one British agency.³⁰ Intermediary agencies also exist in another European country regulating surrogate motherhood – in Greece. It needs to be mentioned that the UK has not signed the Convention on Human Rights and Biomedicine, and therefore, is not bound by the requirement of non-commerciality. However, Greece has signed and ratified the Convention. In the Netherlands, there are no intermediary agencies but recently, opinions have been heard suggesting the establishment of “surrogate mothers database”, substantiated as follows: “this database of surrogate mothers would prevent “*people searching abroad for surrogate mothers,*” which is not “*in the child’s interest*” because he/she will not know “*who brought them into the world*”. An English system would serve as the “*model*”: a non-profit organisation allows intended parents to meet surrogate mothers who are followed up in the centre.”³¹

IV. INTERMEDIARY AGENCY IN THE CZECH REPUBLIC

In the Czech Republic, there is no official agency (i.e. an agency established in accordance with the Czech law) to perform surrogate births. Though not regulated, surrogacy is performed, and the numbers of applicants have been increasing rather quickly³². If an amendment to the Civil Code 89/2012 is accepted granting equal rights to marriage bonds of individuals of the same sex as to those of opposite sex in the Czech law³³, the interest in surrogacy will significantly increase, and, as a result, the demand for surrogate mothers will increase. Again, it needs to be mentioned (see Chapter 2) that surrogate mothers are not usually women from the close environments of the applicant, as informed, by mistake, by the Explanatory report to CC,³⁴ but women originally unknown for the applicants. Therefore, there will be a pressure on establishments that will intermediate surrogate mothers. Some agencies are already in operation in the territory of the Czech Republic, e.g.: <http://surmama.cz/cz/>. However, it is not possible to trace its legal form, nevertheless, it can be estimated from the text of the websites that it is an agency owned by Russian or Ukraine subjects. The business of foreign businessmen in the territory of the Czech Republic has been regulated by relevant acts and it is not a goal of this article to deal with

³⁰ See MUFFITT, E. How to have a baby by surrogate in the UK. In: *The Telegraph* [online]. 7. 5. 2015 [2020-03-12]. <<https://www.telegraph.co.uk/women/mother-tongue/11583545/How-to-have-a-baby-by-surrogate-in-the-UK.html>>.

³¹ See A Surrogate Mother “Database” in the Netherlands? In: *Généthique* [online]. 11. 12. 2017 [2020-03-12]. Available at: <<http://www.genethique.org/en/surrogate-mother-database-netherlands-68744.html#.XCU7atJKjiw>>.

³² For example KONEČNÁ, H. et al. Surrogacy in the Czech Republic from the point of view of the law office: experience for the years 2009–2018. 35th *ESHRE Annual Meeting*, Vienna (Austria) from 23rd to 26th June 2019; HONZOVÁ, I., PRUDIL, L. The quality of parenthood of applicants for surrogate motherhood from the perspective of a lawyer. *XVIII. Czech-Slovak Conference Qualitative Approach and Methods in Human Sciences*. 28.–29. January 2019 in České Budějovice. A detailed article is being prepared.

³³ *It needs to be stressed that the Committee for Sexual Minorities of the Czech Council for Human Rights, which suggested to process an amendment of the CC to grant equal rights for persons of the same and opposite sexes in the Czech legislation by making legal the marriages of gay and lesbian couples, does not mention the substantiation and possibility of having a child using surrogacy. However, the term of a social parent is mentioned.* Explanatory Report. In: *Portál Odok* [online]. [2019-06-04]. Available at: <<https://apps.odok.cz/attachment/-/down/2ORNAAFPYPYCP>>.

³⁴ Explanatory report to the CC. In: *Justice* [online]. [2019-06-04]. Available at: <<http://obcanskyzakonik.justice.cz/images/pdf/Duvodova-zprava-NOZ-konsolidovana-verze.pdf>>.

the business itself. The article will be focused on the origin of Czech non-profit agencies. The described option is based on the current legislation.

V. ANALYSIS OF THE POSSIBILITY OF CZECH NGOs FOCUSED ON SURROGACY

Non-governmental non-profit organizations are legal entities of private law and belong to formalized civil structures. It is mostly used to strengthen citizens' participation in public life and to solve public problems.³⁵ As a preliminary point, it must be said that no research has been carried out in the Czech Republic concerning the abuse of NGOs for activities that would be contrary to the legal order. There are studies that map the transparency of NGOs, for example Bachmann (2012),³⁶ which says that the main tools of transparency in a non-profit environment are open decision-making mechanisms and active timely disclosure. Transparency, like social responsibility, is a voluntary activity that goes beyond the minimum legal requirements (see page 20 of this study for details). Czech legislation, namely Act No. 89/2012 Coll. Civil Code, distinguishes non-governmental non-profit organizations into corporations, which include Associations and Branch Associations, Constitution and Funds, which include foundations and endowment funds. They can also be divided according to their function into service, advocacy, interest and philanthropic - for more details see State Policy towards Non-Governmental Non-Profit Organizations for the years 2015 - 2020. This division and subsequent way of working with finances will be essential for we would establish to mediate surrogate motherhood. Service NGOs provide direct services to their clients, i.e. they directly address public problems. Typically, this group includes NGOs providing services (such as institutions and associations) in the social, health care, etc. Advocacy NGOs fight for the rights of defined groups or selected public interests, promote changes or prevent changes, such as associations, foundations and endowment funds. Interest NGOs focus on organizing hobby activities either solely for their members or overlapping with the wider public, where their activities are close to the services provided to certain groups. NGOs of interest are built exclusively on the membership principle and we include associations here. Philanthropic NGOs support financially and materially publicly beneficial activities. Typically, these are foundations and endowment funds.³⁷

A Czech non-profit organization seeking prospective surrogate mothers and mediating contact between them and applicants is not yet officially in the Czech Republic. Let's try to imagine whether or not it would be possible in the present circumstances, and if so, how. Let's do it using a simple thought experiment. As an intermediary agency for surrogate motherhood, philanthropic NGOs seem to be the most suitable. The psychological aspect of whom I will deal with as a potential applicant or surrogate mother may, in our opinion, make the individual feel that this is not bad, even if it is not in accordance with the law - see Act No. 359/1999 Coll. on Social and Legal Protection of Children or Act No.

³⁵ See Státní politika vůči NNO na léta 2015-2020. In: *Vláda České republiky* [online]. [2015-08-11]. Available at: <<https://www.vlada.cz/cz/ppov/rnno/dokumenty/statni-politika-vuci-nno-na-leta-2015-2020-133505/>>.

³⁶ BACHMANN, P. *Transparentnost organizací občanské společnosti*. Hradec Králové: Gaudeamus, 2012.

³⁷ See Státní politika vůči NNO na léta 2015–2020. In: *Vláda České republiky* [online]. [2015-08-11]. Available at: <<https://www.vlada.cz/cz/ppov/rnno/dokumenty/statni-politika-vuci-nno-na-leta-2015-2020-133505/>>.

89/2012 Coll. of the Civil Code, which, for example, in § 798 states that no one must gain undue profit from activities related to the mediation of adoption.³⁸ After all, a foundation or endowment fund is perceived as altruistic in the eyes of the public through a number of projects and media campaigns. Altruism is a legal requirement for the donation of body parts; an altruistic act is a one-time act of an individual, doing something purely of good will, with the intention of helping someone, without expecting any return or revenge. Philanthropy is the institutionalized form of altruism. While this is also the activity of the individual, but planned, usually long-term, more complexly organized.³⁹ Although the Endowment Fund (NF) is a simpler legal form, it was cheaper at the time of its creation, but the Foundation has more options (compared to the NF) that it can put into the foundation's assets. In the following, we start from the text of the foundation's founding guide, published on neziskovsky.cz and e-pravo.cz. Our considerations and comments are written in italics to distinguish them. They are provocative in places, but to provoke a discussion on the topic and to point out problems is the aim of not only this partial analysis, but also our entire research project. We reiterate that in the Czech Republic the legal requirement of non-trafficking in human beings and the definition of third-party reproduction as a purely altruistic procedure must be based on ordinary language: the child must not be sold; organization. Such an organization will certainly be under great scrutiny.

Officially, there is no Czech non-profit organization searching for potential surrogate mothers in the Czech Republic now (June 2019). Let us imagine that it is currently possible, how would it operate? For our purpose, the most suitable legal form would be a charitable foundation. Though the foundation fund (FF) is a simpler one, and at the time of the creation of the cheapest legal form, the charitable foundation has more possibilities (compared with FF) with regard to the foundation property. The next lines will be based on the text describing the instructions for establishing foundation which was published on the website neziskovsky.cz⁴⁰ and e-pravo.cz.⁴¹ To distinguish from these, *our considerations and comments are written in italics*. They are provocative here and there, but it is the aim of both this partial analysis and the whole study to initiate a discussion on the topic and to draw attention to subsequent problems. Once again, it needs to be emphasized that in the Czech Republic, surrogacy must be considered in the context of the ban on human trafficking, and in the context that third-party reproduction is defined as a purely altruistic procedure. Translated into common speech: a child must not be sold, and a surrogate mother must not have any financial profit. Similarly, the intermediary organizations must not have any profit.⁴² Such an organization will certainly be closely observed.

³⁸ Page 1114, Law no. 89/2012 Sb., Civil Code (CC).

³⁹ KALOUSOVÁ, P. Dárčovství a filantropie firem a individuálních dárců. In: *Vláda České republiky* [online]. [2020-03-09]. Available at: <https://www.vlada.cz/assets/ppov/rmo/dokumenty/studie_kalousova_darcovstvi_pro_web.pdf>.

⁴⁰ Proč a jak založit nadaci. In: *Nadace neziskovsky.cz* [online]. 2009 [2020-03-09]. Available at: <<https://www.neziskovsky.cz/clanek/1157/565/navody-legislativa/proc-a-jak-zalozit-nadaci/>>.

⁴¹ See SOJKOVÁ, K. Nadační fond podle nového občanského zákoníku. In: *Epravo.cz* [online]. 2. 7. 2014 [2020-03-09]. Available at: <<https://www.epravo.cz/top/clanky/nadacni-fond-podle-noveho-obcanskeho-zakoniku-94584.html>>.

⁴² CC § 798 says “no one can gain undue profits from adoption activities”. However, what is undue profit is not defined anywhere.

V.1 Establishment of a Charitable Foundation

Nongovernmental non-profit organization is generally established by compiling a memorandum. A charitable foundation is established by a foundation document which can be used as a memorandum or testament for the case of death (CC § 309). The charitable foundation is established for the purpose of a permanent service or an economically useful purpose. The purpose of foundations can be beneficial for the public or charities if it consists of the support of a certain circle of individuals (CC § 306 (1)). It is banned to establish a charitable foundation in order to support political parties and movements or to take part in their activities. It is banned to establish such foundation for exclusively profitable goals. *The purposes of our fictive charitable foundation would have to be very carefully prepared from the legal point of view so as not to be in contradiction with the Civil Code regulations, and as a result, legally unsound. The mission of charitable foundations could be the protection of interests of families, single mothers, and help to children in accordance with the United Nations Convention on the Rights of the Child – to fulfil the right for full life, development and education. In the memorandum the concepts of philanthropy and altruism would be dealt with.* The basic limiting factor of establishing charitable foundations is the legal requirement to have the foundation property of the value of at least 500,000 Czech Crowns.⁴³ For establishing charitable foundations it is necessary to have additional means which will ensure the operation of charitable foundations (double-entry bookkeeping, activities of an auditor, rent of an office, etc.). It is rather insensible to establish a foundation with just 500,000 CZK available, if there is no other financial sources – *which would be irrelevant in our case since the property would further involve the applicants' financial contributions. Though the "price" is voluntary, there is a recommended contribution amount (without being recorded) and if this amount were not to be paid, no surrogate mother is found. So, the applicants must actually pay the recommended amount.* The foundation property can consist of money, stocks and shares, immovable and movable goods, as well as other property rights and other property values that meet the condition of a permanent yield, and do not block mortgage rights. From movables to things of artistic value which meet the requirement of a permanent yield (loans, rent) can be taken into consideration. The profit is exempted from the income tax. Through the deposit of the property into the foundation property, the founder will relinquish this deposit for he/she will not be given back this property if the charitable foundation is cancelled. Charitable foundations have two legal advantages.

First, the yields of the foundation property registered in the foundation register are exempted from the income tax. Second, the right of charitable foundations to take part in the business of stock holding companies. However, the total range of such business must not exceed 20% of the property of the foundation after subtracting the value of the foundation property while the commercial proportion of the charitable foundation in the property of a stockholding company must not exceed 20%. These advantages, however, can be better usable only in foundation with a high property. *This great advantage*

⁴³ CC § 330 (1) Before establishing the foundation, the deposit duty is fulfilled at least by the amount of 500,000 Czech crowns.

could be, using the help of a lawyer specialized in nongovernmental non-profit organizations, used for the donations to be included in the net amount which would consist of both the costs of the charitable foundation (the staff's salaries, the operation – naturally in accordance with the law; however maximally reaching 20% -see further text) and the foundation contribution which would the foundation pay to the surrogate mother. "Our" foundation will have sufficient property, the third-party reproduction is regarded as a very perspective business. Next to these advantages, the law establishes a stricter regimen in the economic area for charitable foundations. Charitable foundations always have double-entry bookkeeping regardless of the height of the takings. The annual statement of the account needs to be checked by the auditor. This will be no problem with a good accountant and a good lawyer. It will also be useful to have a transparent bank account.

V.2 Money transfer from applicants to charitable foundations

As already mentioned, charitable foundations primarily represent a goal-directed association of the property. Nongovernmental organizations obtain finances by fundraising. It is a systematic activity, the result of which is obtaining finances or other means for a generally useful activity of organizations or individuals. This activity is also called marketing of non-profit organizations.⁴⁴ The basis of the fundraising strategy is the fundraising plan. The ability to be able to address the right people with the right fundraising product, to be on the right spot, at the right moment, with the right offer, this all makes up the so called fundraising mix. All these components need to be harmonized for the highest possible success of fundraising. A donation represents one of the forms of individual fundraising. The donation can be financial or material. *In our case both donation forms can be used. Naturally, financial donations will be more frequent but from time to time, the property of the charitable foundation, and/or the foundation fund, will have to be supported by a material form of a donation. We can imagine desperate parents, owners of shares in a company, who will transfer these shares to a foundation that will find them a surrogate mother. It needs to be emphasized that in the accounting of the charitable foundation cannot appear any documents showing that this is human trafficking. To manage a possible contradiction with the civil law, it cannot be suggested in our experimental consideration how big the donation should be, for otherwise, it could be assessed as commercial business. Though business is admitted in charitable foundations, it can never be the main activity (CC § 307). Charitable foundations can enterprise if enterprising represents just a subsidiary activity, and the yields are only used to support the foundation purpose; however, charitable foundations cannot do business if it was forbidden in the foundation document. Charitable foundation donations can be accepted according to § 336 of the Civil Code. The foundation capital consists of a set of objects, investments into the foundations, and/or foundation donations. It is supposed, however, that by means of foundation donations, the initial investment to the establishment of the charitable foundation was not ensured since it accounts for at least 500,000 Czech Crowns. This initial investment should consist of other*

⁴⁴ See Fundraising - formy, metody, strategie. In: *Chci pomoci* [online]. [2020-03-09]. Available at: <<http://www.chcipomoci.info/upload/1357092506.pdf>>.

finances than the donation of applicant/s. The donations would be used to pay contributions to surrogate mothers and the Foundation's day-to-day operations.

V. 3 Transfer of money from charitable foundations to surrogate mothers

Our fictive charitable foundation would solve the money transfer between the applicants and surrogate mother by the way of individual applications using open grant proceedings. The term “individual” means that the applicants are natural persons, and “open” means that anybody fulfilling established criteria can apply for being included in the grant proceedings. Whether the foundation provides individual grants is generally determined by the organization’s statute from which the granting strategy results.⁴⁵ This would replace the surrogacy contract, which is concluded in countries where commercial surrogacy is legal, i.e. the mother would be provided with the same as in a country where it is a commercial procedure within a surrogacy contract. Once again, it needs to be stressed that the surrogacy contract is a contract treating mutual rights and duties between the parties represented by the surrogate mother and the applicant/s. The purpose of this contract is an agreement on the fact that the surrogate mother will deliver a baby for the applicant couple, will hand it over after the delivery for which she will receive a reward. In the Czech Republic, such contracts are invalid and non-claimable, and could become a subject of a criminal procedure.

The division of finances among individuals represents, on the one hand, a higher risk and administrative burden for charitable foundations, but, on the other hand, it is tempting to support the applicants and see directly, what positive influence it has had for their lives, and/or the life of their significant ones. *Administration associated with the mother's individual application would be covered by the charitable foundation. The foundation's staff would help the contribution applicant (i.e. the surrogate mother) to write the application for the financial contribution which would be provided on a one-time basis for the time of 12 months. Exceptionally, short-time and middle-time contributions could be asked for. The application should be able to be handed in repeatedly, at the earliest, however 12 months after the payment of the approved foundation contribution. In the case of the amount of contribution to the surrogate mother, it would have to be determined in advance and it would have to be determined for what the contribution can be used so that all the legislative steps may be followed. Again, it needs to be reminded that if the mother undergoes surrogacy for payment, she commits a crime according to § 169 of the Penal Code (Putting a child in the charge of somebody else). In an ideal case, it would be an amount covering all the costs associated with pregnancy and delivery, and, moreover, this amount would contain a “reward” for the mother.*

The possibility of an individual application could be also used indirectly to obtain the mother. The charitable foundation would offer women e.g. money for educational activities for their own children. In personal contact, the members of the foundation staff could offer them the possibility to become surrogate mothers. However, nothing could be recorded. In

⁴⁵ See POJEROVÁ, K. Když jednotlivec shání peníze... In: *Nadace neziskovky.cz* [online]. 2010 [2020-03-09]. Available at: <<https://www.neziskovky.cz/clanek/1473/508/granty/kdyz-jednotlivec-shani-penize%85/>>.

this way, foundation would ensure contacts between the applicants and potential surrogate mothers, i.e. a sort of mediation. Naturally, mothers could say that they had been forced to become surrogate mothers but this would be solved by refusing the application of “an unsuitable mother” saying that she would not meet the criteria for awarding the foundation contribution. Once more, it needs to be emphasized that this is a thought experiment which must not contravene the law. Nevertheless, it may contravene morals, ethics, and the individual’s conscience.

V.4 Criminal liability of nongovernmental non-profit organizations intermediating surrogacy

The criminal liability of surrogacy is discussed in the article called Surrogacy with respect to criminal law,⁴⁶ which deals with the criminal liability of a surrogate mother. For the purposes of the present article, it can just be summed up that on the surrogate mother’s part, actus reus was committed, called “Putting a child in charge of somebody else,” according to § 169 of the Penal Code (Act 40/2009)⁴⁷ only under specific conditions, i.e. if the main purpose of surrogate mother’s activity had been a profit, and/or if this activity had been performed repeatedly as a sort of business, or if the mother had been a member of an organized group, or had caused a severe harm to health, or had done it with the aim to get for herself or somebody else a considerable profit, (at least 500,000,- Czech Crowns). As for the applicants, their criminal liability is associated with the criminal liability of the surrogate mother since they could be in the position of a participant – inciter. If the applicants recruit a surrogate mother for example by advertising, they could be accused of the suspicion of a crime of “Putting someone else in charge of the child”, in the position of a participant – inciter according to § 24, par. 1 letter b) of the Penal Code: *a person intentionally encouraged another person to commit a crime (inciter) ...*

One of the first very difficult steps, but by far not the only one and the last one, is to find a surrogate mother. How can the mediator be seen from the point of view of criminal law?

In the case of a natural person, who would intermediate a surrogate mother for the applicants, arrange the draft of the surrogate contract, participate in the hand-over of the child, participate in the hand-over of the reward or at least know about the hand-over of the reward, could be suspected of committing a crime of “Putting someone else in charge of the child” as a participant in the form of an organizer according to § 24, par. 1 letter a) of the Penal Code because the organizer is a person who hatched or managed the crime. In such case, the mediator can be regarded as a person who has perpetrated the crime.

In the case of a legal person, e.g. a charitable foundation, the conditions of the legal liability would be the same as in the case of a natural person, however, in addition, other conditions of legal liability, which are required in legal persons, would need to be met (Law no. 418/2011).⁴⁸ The fact that if an act committed (or participated in) by a legal person

⁴⁶ SVATOŠ, R., KONEČNÁ, H. Surrogacy with respect to criminal law. *The Lawyer Quarterly*. 2019, Vol. 9, No. 3, pp. 197–212.

⁴⁷ Act no. 40/2009, Penal Code.

⁴⁸ Act no. 418/2011 Col., on criminal liability of legal persons and proceedings against them.

can be called a crime, it needs to be illegally committed in the interest of the legal person or within the legal person's activities, if done so by (§ 8)

a) a statutory body or a member of a statutory body, or another person in the leading position of the legal person, who is authorized to act in the name or for the legal person,

b) a person in the leading position within a legal person performing control activities for the legal person though not mentioned in letter a),

c) a person having a decisive influence on the management of this legal person, if his/her action was at least one of the conditions of the result basing the legal liability of the legal person or

d) a member of staff or a person in a similar position in fulfilling the working tasks though not mentioned a) to c),

if he/she can be held responsible for it. A legal person can be held responsible for committing a crime if the crime was committed by

a) an action of the bodies of the legal person or persons mentioned in letters a) to c), or

b) a member of staff in letter d) based on the decision, approval or instruction of the bodies of the legal person or persons mentioned in letters a) to c) or because the bodies of the legal person or the persons mentioned in letters a) to c) have not done such provisions which should be done according to another legal regulation or which can be fairly demanded from them, particularly if they did not perform an obligatory or necessary inspection of the activities of the staff or other persons which had been ordered to them, or did not meet necessary measures to prevent or avoid the consequences of a committed crime.

In this connection, it needs to be mentioned that if a legal person committed a crime (or took part in a crime), the above mentioned natural persons must act on behalf of the legal person, and responsibility resulting from these persons passes to the legal person. It means that it concerns even the crimes committed by natural persons. To sum it up, an act done by a legal person can be called a crime only if it can be contributed to the above mentioned persons. In the case of a charitable foundation it could be e.g. a natural person who acts for the foundation, further the members of the supervisory board, members of the board of directors, or even the auditor, if the supervisory board has not been established, and also the members of staff if the above mentioned conditions are met. Naturally, this would not exclude criminal liability of these natural persons since it results from the regulation of § 9 par. 3, of the Act no. 418/2011. According to this regulation, the criminal liability of the legal person is not affected by the criminal liability of natural persons mentioned in § 8, par. 1, and by the criminal liability of these natural persons is not affected by the criminal liability of the legal person. If the crime was committed by a joined action of more persons, at least one of whom was a legal person, each of them is responsible for the crime, as if it were committed individually.

In contrast to natural persons who can commit crimes, there are some limitations for the legal persons as far as the range of crimes is concerned. This results from the regulation of paragraph 7 of the Act, where crimes which cannot be committed by a legal person are mentioned. The crime "Putting somebody else in charge of the child" according to § 169 of the Penal Code is not mentioned here, as a result, it can be committed (or participated in) by a legal person.

As for the possible criminal liability of the legal person who would intermediate surrogacy, it can be summed up that the legal person would be a participant in (organizer of) the crime “Putting somebody else in charge of the child,” whose main perpetrator would be the surrogate mother.

However, the establishment of intermediating agencies, e.g. in the form of a foundation, could have another purpose, e.g. organizing of human trafficking under the cloak of a charitable activity helping surrogate mothers. What can be understood under human trafficking? The Penal Code states in § 168 among others: *“Those who will make, engage, hire, wheedle, transport, hide, arrest, accept or hand over a child to be used a) by others for sexual intercourse or other forms of sexual abusing, or harassing or to produce pornography b) by others to collect tissue, cells or an organ from the child’s body c) for service in arms, d) for slavery or serfdom, e) for forced labour or other forms of exploitation, or those who profit from such activities ...”* Could a legal person (foundation) e.g. arrange the hand-over of a child to be used by others for sexual intercourse or other forms of sexual abusing, or harassing or to produce pornography? It certainly cannot be excluded. Human trafficking, particularly children trafficking, is increasing,⁴⁹ and this “publicly useful activity” could cover the real reason for establishing an intermediating agency.

In this connection, a new question appears: what about so-called money laundering? The meaning is also explained in the Penal Code saying in paragraph 216 of the crime called Legalization of yields from the criminal activity: *“Those who hide the origin or strive in another way to complicate or make impossible a discovery of the origin of a) a thing that has been obtained by a crime committed in the territory of the Czech Republic or abroad or as a reward for the crime or b) a thing which was got for the thing mentioned in the letter a), or those who enable to commit such a crime or affiliate to somebody to commit such a crime ...”* If intermediating agencies were, among others, established for human trafficking, then it is necessary to legalize finances obtained for such “services”. And this could be a good way of legalizing them as donations from persons interested in mediation of a surrogate mother.

VI. CONCLUSION

“Modern technologies are not only effective or hopeful instruments, but also real biological risks, as well as potent market-oriented decoys of the trade in hope. All the more difficult is the gradual construction of an ethical framework, administrative and legal regulations arising only after the scientific development and under the scientific pressure to “apply and exploit the applicable,” says the preface to the monograph “We can do what we know?”.⁵⁰

The interest in surrogacy is increasing steeply, both in the Czech Republic and worldwide. Surrogate mothers exceptionally recruit from the circle of persons close to the applicant/s; a willing woman needs to be found somehow. It is naive to suppose that with

⁴⁹ UNODC. Global Report on Trafficking in Persons. In: *United Nations Office on Drugs and Crime* [online]. 2009 [2019-06-04]. Available at: <http://www.unodc.org/documents/Global_Report_on_TIP.pdf>.

⁵⁰ Quoted from the preface to the monograph “*Can we do what we know?*”. Dean of the First Faculty of Medicine, prof. Aleksi Šedo.

such an amount of performed procedures, it is always the question of an altruistic act. Where the demand is, there is the supply. As soon as in a country surrogacy is legalized, a wide space is opened for business in this area. Our analysis (we apologize for the complexity and intricacy) has shown that in spite of the Czech legislation insisting on the donation of body parts as a purely altruistic act, and in spite of the Czech legislation refusing and strictly punishing human trafficking, it is even now possible to operate an agency intermediating surrogacy. To be true, it is irrelevant, which legal form is chosen, whether it will be a business plan or established as a non-profit activity. In our opinion, aware of the huge increase in the number of applicants, which is supported by the development worldwide, there are only two solutions: surrogacy should be banned and consequently punished, or permitted as a commercial procedure. The authors of this paper support the former solution though they are sceptical whether it is feasible.

In the article “Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights”⁵¹, the author analyzes the rulings of the European Court of Human Rights in the cases of surrogacy and concludes as follows: “The ECtHR’s foray into the field of international commercial surrogacy has left the law in a state of disarray ... National authorities are left to grapple with the fruits of an incomplete human rights analysis, and inconsistent and ambiguous dicta on paramountcy, on the desirability of crossborder continuity of parental status and on the significance of intended and genetic motherhood”.

Our proposed solution for the Czech Republic is described in the article “Regulation of Surrogation in the Czech Republic: Expert Opinion”, which we are probably finishing for the *Journal of Health Law and Bioethics*. The compromise of the research team, in which the medical team from the clinic that is most engaged in surrogacy in the Czech Republic, lawyers with a law firm, which until recently was the exclusive consultant for patients and clinics, and a team of psychology and ethics experts, very strict conditions (only for heterosexual couples, only medical indication, only own gametes). Only three people from the ten-member team were in favor of an explicit ban, one of them commenting on their opinion as follows: “It is documented that the vast majority (up to 98% of the procedures) do not meet the conditions of non-commerciality and conditions of use. I do not see a real way to prevent this, even if we set very strict conditions in the law. Ireland, which creates the law, is inspired by NL, which has strict conditions. NL, however, glances at UK laws where conditions are looser. The UK, where surrogate motherhood is currently on the way to change the law (planned for 2021), peeks around California, where it is officially a commercial procedure for anyone. India and other Asian states, which had a very sophisticated commercial system, changed laws to very restrictive two years ago because it has developed into unsustainable trafficking in women and children.”⁵²

Will the Czech Republic go through this circle?

⁵¹ See Shuilleabhain, M. N. *Surrogacy, System Shopping, and Article 8 of the European Convention on Human Rights, International Journal of Law, Policy and The Family*, 2019, 33, pp. 104–122, p. 116.

⁵² KONEČNÁ, H., CHARAMZA, P., PRUDIL, L., RUMPÍK, D., SVATOŠ, R. *Regulace náhradního mateřství v České republice: expertní názor. 29. Sympozium asistované reprodukce*. Brno, 13.–14. 11. 2019.