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SURROGACY REGULATION: TRENDS IN INTERNATIONAL AND RUSSIAN LAW

INTRODUCTION. *This paper reflects the main points and approaches to the international legal regulation of surrogacy. It demonstrates the existing inconsistency in the stances of states concerning this controversial (first of all from the ethical point of view) kind of assisted reproductive technologies, and the resulting contradictions. The current extremely fragmented international legal regulation of surrogacy issues presented in the article illustrates the need of the parties involved in the process to develop unified approaches, at least regarding the most commonly encountered issues that would guarantee the protection of human rights and freedoms, especially those of a child.*

The article also cites the example of one of the most liberal legal systems for surrogacy, the Russian Federation, to discuss an issue that has arisen for the Russian legislator in the practical implementation of surrogacy - the right of single people, especially of single men, to become a single parent under the surrogate motherhood programme in the Russian Federation. The article draws attention to the absence of legal documents regulating surrogacy for single fathers in the Russian Federation, while the existing documents regulating the institution of surrogacy breed a number of contradictions (such documents include: Family Code of the Russian Federation No. 223-FZ of 29 December 1995; Federal Law “On Basics of Health Protection of the Citizens in the Russian Federation” No. 323-FZ of 21 Novem-

ber 2011; Federal Law “On Acts of Civil Status” No. 143-FZ of 15 November 1997; Order of the Ministry of Health of the Russian Federation No. 107n of 30 August 2012 “On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions on Their Use”; Order of the Ministry of Health of the Russian Federation No. 803n of 31 July 2020 “On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions on Their Use”).

Analysing current practice, based on existing Russian legislation, gives ground for its revision. The special character of the issue is that under the existing legal framework, the question of their right to a surrogate child arises for single men twice: at the stage of ‘conceiving the child’ and at the stage of registration (i.e., the stage of registration of such a man as the sole parent for a surrogate child). The article puts an emphasis on the great role of the Russian courts in resolving a number of issues with ambiguous interpretation of the current legislation. The court practice on the indicated issues is noted to have strengthened the arguments in favour of the reform. The article pays special attention to the investigation process in a new criminal case - the “2020 Doctors’ case”. Amid the existing norms of Russian law on surrogacy as well as this “Doctors’ case”, the article indicates the emerging discrimination against single men in the Russian Federation.

MATERIALS AND METHODS. *The analysis in the article is based on international universal and regional European legal instruments, case-law of the European Court of Human Rights and the Court of Justice of the European Union, documents of the European Parliament, the International Commission on Civil Status, the Hague Conference on Private International Law, the International Social Service, UN treaty bodies and the UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and the production of other materials containing child abuse. It is also based on the legal acts of the Member States of the European Union and of the Russian Federation, academic articles and emerging practice. The research is based on analysis, synthesis, deduction, induction, analogy, hermeneutics, observation, dialectics, as well as on descriptive, systematic and comparative methods. Given the specific nature of the topic, an interdisciplinary approach is also applied, which allows the issues raised to be considered from the legal, medical and social perspectives.*

RESEARCH RESULTS. *Presently, it is beyond doubt that a unified international instrument on surrogacy needs developing. Such a document should, first and foremost, contain a clear conceptual apparatus enabling all parties concerned to have a common understanding of the key issues surrounding surrogacy. Furthermore, it should reflect the main basic approaches to the most common issues encountered in practice, which today are resolved ambiguously and, in fact, their resolution depends on the circumstances of each particular case. Even the minimal outline of the common dimensions in the field of surrogacy at the international level would provide serious guarantees of the human rights protection and, above all, of the rights of a child.*

The authors consider that, as far as surrogacy regulation in the Russian Federation is concerned, it is reasonable to avoid a complete ban on assisted reproductive technologies in Russia. Forasmuch as it is an act of cooperation aimed at giving every person the opportunity to become a parent, rather than the commercialization of child-bearing. In view of this,

it seems necessary to revise the range of surrogacy subjects in the Russian Federation with an eye to its expansion.

DISCUSSION AND CONCLUSIONS. *Assisted reproductive technologies have recently become increasingly common, on the one hand due to relevant scientific advances, and on the other hand due to the ever-growing demand for such technologies. This paper examines some of the topical issues related to the surrogate motherhood. Practice shows that the exclusive regulation of this issue at the national level does not allow for the relations ensuing the application of such assisted reproductive technologies to be regulated completely. Thereupon, the authors deem it reasonable to define common principles and standards of surrogacy application at the international level in order to remove a number of controversies existing today in relation to the use of international surrogate motherhood. At the same time, when defining such common international approaches, special attention is suggested to be paid to particular issues arising at the national level and being of principal importance in terms of international legal regulation of surrogacy, such as the possibility for single persons to use this kind of assisted reproductive technology and to enjoy the relevant state support measures.*

KEYWORDS: *assisted reproductive technology, surrogacy, international surrogacy, reproductive rights, right to reproductive choice, international human rights law, single parent, single man, single father, human rights protection, protection of rights of the child, best interests of the child, maternity (family) capital, Doctors' case*

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РЕГУЛИРОВАНИЕ СУРРОГАТНОГО МАТЕРИНСТВА: ТЕНДЕНЦИИ В МЕЖДУНАРОДНОМ И РОССИЙСКОМ ПРАВЕ

ВВЕДЕНИЕ. Данная научная статья отражает основные моменты и подходы к международному правовому регулированию суррогатного материнства. Демонстрируются существующая несогласованность позиций государств по указанному неоднозначному, в первую очередь с этической точки зрения, виду вспомогательных репродуктивных технологий и вытекающие вследствие этого коллизии. Приведенное в статье актуальное, крайне фрагментарное международное правовое регулирование вопросов суррогатного материнства иллюстрирует потребность вовлеченных в процесс сторон в выработку единых подходов, хотя бы в части самых распространенных моментов, что предоставит гарантии защиты прав и свобод человека, в особенности ребенка.

Также на примере одного из наиболее либеральных правовых порядков для суррогатного материнства – Российской Федерации, рассматривается вопрос, вставший перед российским законодателем в ходе практической реализации суррогатного материнства – право одиноких людей, особенно одинокого мужчины, стать родителем-одиночкой по программе суррогатного материнства в Российской Федерации. В статье обращается внимание на отсутствие норма-

тивно-правовых документов, регулирующих суррогатное материнство для отцов-одиночек в Российской Федерации, в то время, как существующие документы, регулирующие институт суррогатного материнства, порождают ряд противоречий. К таким документам относятся: Семейный кодекс Российской Федерации от 29 декабря 1995 г. № 223-ФЗ; Федеральный закон «Об основах охраны здоровья граждан в Российской Федерации» от 21 ноября 2011 г. № 323-ФЗ; Федеральный закон «Об актах гражданского состояния» от 15 ноября 1997 г. № 143-ФЗ; Приказ Министерства здравоохранения Российской Федерации от 30 августа 2012 г. № 107н «О порядке использования вспомогательных репродуктивных технологий, противопоказаниях и ограничениях к их применению»; Приказ Министерства здравоохранения Российской Федерации от 31 июля 2020 г. № 803н «О порядке использования вспомогательных репродуктивных технологий, противопоказаниях и ограничениях к их применению».

Анализ существующей практики, основанной на действующем российском законодательстве, дает основание для его пересмотра. Специфичность обозначенного вопроса заключается в том, что при существующем правовом регу-

лировании одинокие мужчины дважды сталкиваются с вопросом о своем праве на суррогатного ребенка: на этапе «зачатия ребенка» и на этапе регистрации (речь идет об этапе регистрации такого мужчины в качестве единственного родителя для суррогатного ребенка). В статье указывается на большую роль судов Российской Федерации в решении ряда вопросов с неоднозначным толкованием норм действующего законодательства. Отмечается, что судебная практика по обозначенным вопросам усилила аргументы в пользу реформы. В статье особое внимание уделено следственным действиям по новому уголовному делу – «делу врачей 2020 года». В свете данного случая, а также существующих норм российского права в сфере суррогатного материнства отмечается складывающаяся дискриминационная ситуация по отношению к одиноким мужчинам в Российской Федерации.

МАТЕРИАЛЫ И МЕТОДЫ. Статья основана на международных универсальных и региональных европейских правовых документах, судебной практике Европейского Суда по правам человека и Суда Европейского Союза, документах Европейского парламента, Международной комиссии по гражданскому состоянию, Гаагской конференции по международному частному праву, Международной социальной службы, договорных органов ООН и Специального докладчика ООН по вопросу о торговле детьми и сексуальной эксплуатации детей, включая детскую проституцию, детскую порнографию и изготовление прочих материалов о сексуальных надругательствах над детьми, а также на нормативных правовых актах государств – членов Европейского Союза и Российской Федерации, на научных статьях и складывающейся практике.

В основу исследования положены анализ, синтез, дедукция, индукция, аналогия, герменевтика, наблюдение, диалектика, а также описательный, системный и компаративистский методы. Принимая во внимание специфику темы, в ходе написания статьи также применяется междисциплинарный подход, который позволяет рассмотреть поднимаемые вопросы с правовой, медицинской и социальных точек зрения.

РЕЗУЛЬТАТЫ ИССЛЕДОВАНИЯ. Необходимость выработки единого международного инструмента по вопросам суррогатного материнства сегодня не вызывает никаких сомнений. Данный документ должен прежде всего содержать четкий понятийный аппарат, позволяю-

щий всем заинтересованным сторонам иметь единое представление о ключевых моментах суррогатного материнства. Кроме того, в нем должны быть отражены основные общеподходные к наиболее часто встречающимся на практике вопросам, которые сегодня разрешаются неоднозначно и фактически в зависимости от обстоятельств каждого конкретного случая. Даже минимальное обозначение единых векторов в сфере суррогатного материнства на международном уровне предоставит серьезные гарантии защиты прав человека и в первую очередь ребенка.

В части регулирования суррогатного материнства в Российской Федерации авторы полагают целесообразным избежать полного запрета данного вида вспомогательных репродуктивных технологий на территории России, так как, по мнению авторов, он не является коммерциализацией деторождения, а представляет собой своеобразный акт сотрудничества, нацеленный на предоставление каждому человеку возможности реализовать себя в качестве родителя. В свете последнего представляется необходимым пересмотреть круг субъектов суррогатного материнства в Российской Федерации с целью его расширения.

ОБСУЖДЕНИЕ И ВЫВОДЫ. Вспомогательные репродуктивные технологии в последнее время получают все большее распространение, с одной стороны в связи с соответствующими научными достижениями, а с другой с возрастающим спросом на такие технологии. В настоящей статье рассмотрены некоторые актуальные вопросы, связанные с реализацией суррогатного материнства. Практика показывает, что исключительное регулирование данного вопроса на национальном уровне не позволяет в полной мере урегулировать отношения, возникающие в связи с применением такого вида вспомогательных репродуктивных технологий. В этой связи авторы полагают целесообразным определить на международном уровне единые принципы и стандарты применения суррогатного материнства с тем, чтобы снять ряд коллизий, существующих сегодня в связи с реализацией международного суррогатного материнства. Вместе с тем при определении таких общих международных подходов предлагается обратить внимание на частные вопросы, возникающие на национальном уровне и имеющие принципиальное значение в контексте международного правового регулирования суррогатного

материнства, например, возможность одиноких людей прибегать к данному виду вспомогательных репродуктивных технологий и пользоваться соответствующими мерами государственной поддержки.

КЛЮЧЕВЫЕ СЛОВА: *вспомогательные репродуктивные технологии, суррогатное материнство, международное суррогатное материнство, репродуктивные права, право на репродуктивный выбор, международное право в области прав человека, родители-одиночки, одинокий мужчина, отец-одиночка, защита прав*

человека, защита прав ребенка, наилучшие интересы ребенка, материнский (семейный) капитал, дело врачей

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1. Introduction

Reproductive rights have been increasingly moving up the legal agenda, both at the national and at the international level. The concept of reproductive rights was first documented in 1968 when the Tehran Conference on Human Rights thereby acknowledged that “couples have a basic human right to decide freely and responsibly on the number and spacing of their children and a right to adequate education and information in this respect”¹. But it was the Programme of Action of the International Conference on Population and Development in Cairo in 1994 that clearly put human reproduction law at the international level². Thus, “...reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and

future children and their responsibilities towards the community”³.

In addition, reproductive rights also owe their rise at the international level to the adoption of the Report of the Fourth World Conference on Women, which resulted in the “Platform for Action”⁴, signed by 180 states, among them the Russian Federation [Efimova 2021:178].

Surrogacy is a form of realisation of human reproductive rights. However, the legal framework of reproductive rights in general and the legal regulation of surrogacy in particular remain rather fragmented.

2. International instruments regulating surrogacy

There is currently no specific international instrument relating to surrogacy [Zaouaq 2020:4], although the need for such an instrument has been regularly expressed. In particular, this was reiterated during an inter-agency meeting on surrogacy and human rights held in Bangkok in 2018, spearheaded jointly by the Office of the UN High Commissioner for Human Rights, the UN Population Fund and the World Health Organization. Issues requiring particular attention in the regulation of surrogacy are also regularly identified by the UN Special Rapporteur on the sale and sexual exploitation of chil-

¹ Final Act of the International Conference on Human Rights. 1968. P. 15. URL: https://digitallibrary.un.org/record/701853/files/A_CONF-32_41-EN.pdf (accessed 17.10.2021).

² International Conference on Population and Development. 1994. URL: https://www.un.org/en/development/desa/population/publications/ICPD_programme_of_action_en.pdf (accessed 17.10.2021).

³ Ibid. Para. 7.3

⁴ Beijing Declaration and Platform for Action. 1995. (In Russ.). URL: <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20R.pdf> (accessed 17.10.2021).

dren, including child prostitution, child pornography and the production of other child sexual abuse material⁵.

The only international document which sets out provisions specifically relating to surrogacy is a non-binding document of the international non-governmental organisation World Medical Association – the 1987 Declaration on In Vitro Fertilization and Embryo Transfer⁶. However, in October 2006 it was decided to abolish the declaration [Sylkina et. al. 2020:40].

At the same time, a number of universal and regional documents enshrine the fundamental principles that provide guidance in terms of surrogacy. Thus, in the context of this type of assisted reproductive technology (the “ART”), of great importance is the principle of respect for human dignity, which is reflected more specifically in the 1948 Universal Declaration of Human Rights⁷; the 1966 International Covenant on Civil and Political Rights⁸; the International Covenant on Economic, Social and Cultural Rights⁹; the 1979 Convention on the Elimination of All Forms of Discrimination against Women¹⁰; the 1989 Convention on the Rights of the Child¹¹; the 2005 UNESCO Universal Declaration on Bioethics and Human Rights¹².

Surrogacy has been primarily addressed within the relevant UN treaty bodies. The Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women are the bodies most often called upon to promote human rights norms and standards and to prevent abuses and violations¹³. For instance, the Committee

on the Rights of the Child, as part of its consideration of country reports, has emphasised the need to develop appropriate legal regulation of the use of ART in general and surrogacy in particular. Significantly, the violations of the rights of children born to surrogate mothers are faced equally by jurisdictions where this method of ART is allowed and those where it is prohibited (for example, recommendations have been made to Austria, Belgium, France, Ireland, the Netherlands, Spain) [Khazova 2021:23].

It is worth noting that, despite the ambiguity of surrogacy from ethical and legal points of view, and the unacceptability for many of the use of this method of ART, the UN Committee on the Rights of the Child members still believe that banning surrogacy would lead to even greater violations of the rights of surrogate mothers. In this regard, the UN Committee on the Rights of the Child has repeatedly highlighted the need for elaborate regulation of surrogacy use [Khazova 2021:23].

The issues of surrogacy are also reflected in the documents and activities of the Council of Europe. The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms¹⁴, underpinning the Council of Europe law, in Article 8 sets forth the right of universal importance to respect for private and family life. A reservation is made, however, to the possibility of interference by public authorities with the exercise of this right, given that such interference meets the conditions set out in that Article.

The 1997 Convention for the Protection of Human Rights and Dignity of the Human Being with

⁵ OHCHR: Report of the Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material – Note by the Secretariat. December 27, 2018. Para. 16. URL: <https://www.ohchr.org/en/calls-for-input/report-sale-and-sexual-exploitation-children-context-sports> (accessed 17.10.2021).

⁶ Déclaration de l'AMM sur la fécondation in vitro et le transfert d'embryon. 1987. URL: <https://www.wma.net/fr/policies-post/declaration-de-lamm-sur-la-fecondation-in-vitro-et-le-transfert-dembryon/> (accessed 17.10.2021).

⁷ Universal Declaration of Human Rights. 1948. URL: <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 17.10.2021).

⁸ International Covenant on Civil and Political Rights. 1966. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (accessed 17.10.2021).

⁹ International Covenant on Economic, Social and Cultural Rights. 1966. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> (accessed 17.10.2021).

¹⁰ Convention on the Elimination of All Forms of Discrimination against Women. 1979. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women#:~:text=On%2018%20December%201979%2C%20the,twentieth%20country%20had%20ratified%20it> (accessed 17.10.2021).

¹¹ Convention on the Rights of the Child. 1989. URL: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (accessed 17.10.2021).

¹² Universal Declaration on Bioethics and Human Rights. 2005. URL: <https://unesdoc.unesco.org/ark:/48223/pf0000146180> (accessed 17.10.2021).

¹³ OHCHR: Special Rapporteur on the sale and sexual exploitation of children. URL: <https://www.ohchr.org/en/special-procedures/sr-sale-of-children/surrogacy> (accessed 17.10.2021).

¹⁴ European Convention on Human Rights. 1950. URL: <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c> (accessed 17.10.2021).

regard to the Application of Biology and Medicine¹⁵, is another Council of Europe means providing for a number of bioethical rules. It enshrines, among other things, such essential principles as equal access to medical care (Article 3), conformity with professional requirements and standards (Article 4), informed consent (Article 5), and respect for every person's private life, including when it concerns health information (Article 10).

Also, provisions concerning surrogacy are reflected in the Council of Europe's "Principles enshrined in the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI)"¹⁶.

There are no unifying or harmonising regulations on surrogacy at European Union level either. However, some safeguards are reflected in the 2000 Charter of Fundamental Rights of the European Union¹⁷ – the right of every child to maintain regular personal relations and direct contact with both their parents, unless it contradicts the child's best interests (Article 24 par 3). Apart from that, Directive 2004/23/EC of the European Parliament and of the Council of the European Union "On Setting Standards of Quality and Safety for the Donation, Procurement, Testing, Processing, Preservation, Storage and Distribution of Human Tissues and Cells"¹⁸ includes, among other things, standards applicable in cases where donated gametes are required for the performance of surrogacy in the European Union. However, the 2014 Annual Report on Human Rights and Democracy in the World and European Union Policy on the matter condemns "the practice of surrogacy as degrading the human dignity of a woman as her body and her reproductive functions are used as commodities; the practice of gestational surrogacy

involving the reproductive exploitation and use of the human body for financial or other gain, particularly for vulnerable women in developing countries, is believed to have a negative impact on the human dignity of women and therefore should be abolished and treated as a matter of urgency in human rights documents"¹⁹.

To a certain extent, the European Union's disapproval of surrogacy practices can also be found in the case law of the EU Court of Justice, e.g. C-167/12 C. D. v S.T²⁰ and C-363/12 Z. v A Government department and The Board of management of a community school²¹ it is noted that European Union law does not provide surrogate mothers with the right to paid leave equivalent to maternity or adoption leave, and that this does not constitute discrimination on the basis of sex.

However, the European Union is developing a unified approach to surrogacy. Indicatively, in 2013, for example, under the auspices of the European Parliament, a "A comparative study on the regime of surrogacy in EU member states" was issued [Brunet et al. 2013].

As a result of conducted analyses, European Union member states are divided into the four following groups depending on the regulation of surrogacy [González 2019:439]:

1. there is no regulation of surrogacy, but in practice surrogacy agreements are signed and enforced (Belgium, Cyprus, Czech Republic, Ireland, Netherlands (altruistic surrogacy), Romania, Slovakia);
2. surrogacy is not allowed, but discussions are taking place on whether to allow it in the future (Bulgaria, Latvia, Malta, Spain);

¹⁵ Oviedo Convention and its Protocols. URL: <https://www.coe.int/en/web/bioethics/oviedo-convention> (accessed 17.10.2021).

¹⁶ Report on Human Artificial Procreation. Principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), 1989. URL: <https://rm.coe.int/16803113e4> (accessed 17.10.2021).

¹⁷ Charter of Fundamental Rights of the European Union. 2009. URL: http://data.europa.eu/eli/treaty/char_2012/oj (accessed 17.10.2021).

¹⁸ European Union: Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0023> (accessed 17.10.2021).

¹⁹ European Union: European Parliament resolution of 17 December 2015 on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's policy on the matter. URL: https://www.europarl.europa.eu/doceo/document/TA-8-2015-0470_EN.pdf (accessed 17.10.2021).

²⁰ European Court of Justice: D. v S. T. Case No. C-167/12. Judgment of the Court (Grand Chamber) of 18 March 2014. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1395675669953&uri=CELEX:62012CJ0167> (accessed 17.10.2021).

²¹ European Court of Justice: Z. v A Government department and The Board of management of a community school. Case No. C 363/12. Judgment of the Court (Grand Chamber) of 18 March 2014. URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1395675773534&uri=CELEX:62012CJ0363> (last accessed on 28 October 2021).

3. surrogacy is allowed and the law provides for the regulation of surrogacy (Greece);

4. surrogacy is strictly prohibited by law (Austria, Croatia, Denmark (in its case, traditional surrogacy for the purpose of subsequent transfer of the child for adoption purposes free of charge is possible / altruistic surrogacy), Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Luxembourg, Poland, Portugal, Slovenia, and Sweden) [Blikhar, Zharovska, Ortynska 2021:24].

Developing the Verona Principles for the protection of the rights of the child born through surrogacy (Verona Principles)²² by the international non-governmental organisation International Social Service (ISS)²³ is a significant step in the context of developing approaches to the protection of children's rights during surrogacy.

Much work is being done by such intergovernmental organisations as the International Commission on Civil Status (ICCS)²⁴ and the Hague Conference on Private International Law (HCCH) to develop a common approach on some of the most common issues in private international law relating to surrogacy.

As part of its work in 2003, the International Commission on Civil Status made a report on “maternal filiation and surrogacy in the ICCS States” which reflected the legal approaches of France, Greece, Spain and the UK. In 2014, the International Commission on Civil Status produced another study on surrogacy and the family status of the child [Maydanyk, Moskalenko 2020: 2868].

The Hague Conference on Private International Law's Ad Hoc Experts' Group on the Parentage / Sur-

rogacy Project²⁵, following its regular meetings, concludes at this stage that, among other things, a future international instrument should ensure “predictability, reliability and continuity of parental status, based on the law, where a foreign element is present for all persons involved <...>²⁶. This need seems to be prompted by the life itself, including the judicial practice of the European Court of Human Rights, which generally contributes quite a lot to the development of the legal regulation of surrogacy in Europe.

3. The case-law of the European Court of Human Rights on surrogacy

An analysis of a number of cases, mainly related to the recognition of foreign certificates of surrogate births, suggests that the ECtHR has predominantly been guided by the best interests of the child – *Mennesson v. France* (application No 65192/11²⁷), *Labasse v. France* (application No 65941/11²⁸)²⁹. In the aftermath of these two rulings, France has begun to register certificates for children born to a surrogate mother abroad if the alleged father named on the certificate is the biological father (confirmed, inter alia, by the judgment in *Foulon and Bouvet v France*³⁰). However, with regard to the surrogate child's relationship with its intended mother, the ECtHR has not indicated its stance, thus on 12 October 2018 the French Court of Cassation, pursuant to Article 1 of Protocol No 16 to the ECHR, requested an advisory opinion from the ECtHR on the respective issues. Thus, on 10 April 2019, the ECtHR published, as an aside, its first Advisory Opinion since Protocol No. 16 to the ECHR came into force [Dedov, Gadzhiev,

²² Principles for the protection of the rights of the child born through surrogacy. 2021. URL: https://www.iss-ssi.org/images/Surrogacy/VeronaPrinciples_25February2021.pdf (accessed 17.10.2021).

²³ Official Website. The International Social Service (ISS). URL: <https://www.iss-ssi.org/index.php/en/> (accessed 17.10.2021).

²⁴ Official Website. The International Commission on Civil Status (ICCS). URL: http://www.ciec1.org/WD210AWP/WD210Awp.exe/CONNECT/SITECIEC?_WWREFERER_=http%3A%2F%2Fwww.ciec1.org%2F&_WWNATION_=5 (accessed 17.10.2021).

²⁵ The Hague Conference on Private International Law: The parentage / Surrogacy project. URL: <https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy> (accessed 17.10.2021).

²⁶ The Hague Conference on Private International Law: “Report of the experts' group on the parentage / Surrogacy project”. March 2019. URL: <https://assets.hcch.net/docs/c25b558d-c24e-482c-a92b-d452c168a394.pdf> (accessed 17.10.2021).

²⁷ European Court of Human Rights: Case of *Mennesson v. France*. Application No. 65192/11. Judgment of 26 June 2014. URL: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-145389%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-145389%22]) (accessed 17.10.2021).

²⁸ European Court of Human Rights: Case of *Labasse v. France*. Application No. 65941/11. Judgment of 26 June 2014. URL: [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-145180*%22\]](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-145180*%22]) (accessed 17.10.2021).

²⁹ See also: European Court of Human Rights: Press Release: “Totally prohibiting the establishment of a relationship between a father and his biological children born following surrogacy arrangements abroad was in breach of the Convention”. June 26, 2014. URL: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-4804617-5854908&filenome=003-4804617-5854908.pdf> (accessed 17.10.2021).

³⁰ European Court of Human Rights: *Foulon and Bouvet v. France*. Application No. 9063/14 and No. 10410/14. Judgment of 21 July 2016. URL: <https://hudoc.echr.coe.int/app/conversion/pdf/%3Flibrary%3DECHR%26id%3D003-5444584-6823729%26filename%3DJudgments%20and%20decisions%20of%2021.07.16.pdf> (accessed 17.10.2021).

Cherenkova 2019:45], under which recognition in domestic law (in which surrogacy contravenes public order) of a legal parent-child relationship between a child born through gestational surrogacy abroad and the intended mother is possible³¹.

At the same time, it should be noted that the ECtHR in surrogacy cases attaches particular importance to the existence of a biological relationship between the surrogate child and at least one of the intended parents. Notable in this respect is the case of *Paradiso and Campanelli v. Italy*³², in which the child-parent relationship resulting from surrogacy carried out in Russia was not recognised due to the lack of biological relationship between the child and the intended parents (a mistake was made during the surrogacy procedure when the medical facility used the wrong biomaterial; the possibility of legal testing to confirm the genetic relationship between the parties before allowing the child to enter the country has also been decided by the Court – in *D. et al. v. Belgium*³³). In the case of *Paradiso and Campanelli v. Italy*, the ECtHR addressed a crucial point in the context of surrogacy – the notion of family life. Thus, the ECtHR held that from a legal point of view due to the lack of genetic connection between the child and the intended parents, as well as the short duration of their relationship and the uncertainty of the ties between them, the absence of family life was established [Khramova 2019:51]. This decision illustrates the need for an solely individual and diversified approach to the examination of each particular case. Indeed, shortly before this court ruling in *Wagner and J.M.W.L. v. Luxembourg*³⁴, the ECtHR recognised that in certain circumstances *de facto* family life may arise in the absence of genetic or legal ties, provided that genuine personal ties are established. In such a case, the quality of the interpersonal ties,

the role the applicants play in relation to the child and the length of time they have lived together with the child (in this case the child had already lived with the adoptive mother for more than ten years) must be taken into consideration. Most likely, in the context of *Paradiso and Campanelli v. Italy*, the Court suggests that in such cases the best interests of children in general, rather than the best interests of the individual child, should guide the decision and thereby a direct violation of national law should be avoided [Ni Shuilleabhain 2019:107].

Thus, based on the ECtHR rulings, in the absence of a single international instrument on surrogacy, states must not only find a balance between the interests of society and its individual representatives, but at the same time protect the best interests of the child [Fenton-Glynn 2017:567].

4. Current Issues of Legal Regulation of Surrogacy in the Russian Federation

4.1 Current Russian Legislation on the Matter of Persons Entitled to Resort to Surrogacy

The Russian Federation is one of the few states that allow commercial surrogacy [Piersanti et al. 2021:5]. Moreover, Russia appears to be one of the most liberal spaces for surrogate motherhood.

Today, surrogacy in Russia is regulated by the provisions of four separate normative legal acts:

- Family Code of the Russian Federation No. 223-FZ of 29 December 1995 (the “Family Code”)³⁵;
- Federal Law “On Basics of Health Protection of the Citizens in the Russian Federation” No. 323-FZ of 21 November 2011 (the “Federal Law of the Russian Federation ‘On Basics of Health Protection of the Citizens in the Russian Federation’”)³⁶;

³¹ European Court of Human Rights: Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother. Requested by the French Court of Cassation. April 10, 2019. URL: <https://hudoc.echr.coe.int/eng/%7B%22itemid%22:%5B%22003-6380464-8364383%22%5D%7D> accessed 17.10.2021).

³² European Court of Human Rights: Case of *Paradiso and Campanelli v. Italy*. Application No. 25358/12. Judgment of 24 January 2017. URL: <https://hudoc.echr.coe.int/eng/%7B%22fulltext%22:%5B%22paradiso%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-170359%22%5D%7D> (accessed 17.10.2021).

³³ European Court of Human Rights: Case of *D. and Others v. Belgium* – refusal to authorise entry to Belgium of child born in Ukraine from surrogate pregnancy. Application No. 29176/13. Decision of 8 July 2014. URL: <https://hudoc.echr.coe.int/eng/%7B%22itemid%22:%5B%22001-146420%22%5D%7D> (accessed 17.10.2021).

³⁴ European Court of Human Rights: Case of *Wagner and J.M.W.L. v. Luxembourg*. Application No. 76240/01. Judgment of 28 June 2007. URL: <https://hudoc.echr.coe.int/fre/%7B%22itemid%22:%5B%22001-81328%22%5D%7D> (accessed 17.10.2021).

³⁵ Family Code of the Russian Federation No. 223-FZ dated 29 December 1995 (as amended on 6 February 2020). (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_8982/ (accessed 17.10.2021).

³⁶ Federal Law “On Basics of Health Protection of the Citizens in the Russian Federation” No. 323-FZ dated 21 November 2011 (as amended on 1 April 2020). (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_121895/ (accessed 17.10.2021).

- Federal Law "On Acts of Civil Status" No. 143-FZ of 15 November 1997 (the "Federal Law of the Russian Federation 'On Acts of Civil Status'")³⁷;

- Order of the Ministry of Health of the Russian Federation No. 803n dated 31 July 2020 "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions on Their Use" ("Order of the Russian Ministry of Health No. 803n").³⁸ This entered into force on 1 January 2021, replacing Order of the Ministry of Health of the Russian Federation No. 107n dated 30 August 2012 "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions on Their Use"³⁹.

The category of persons who may benefit from surrogacy finds no unequivocal definition in the aforementioned documents; in practice, people involved in surrogacy may face obstacles for the lack of the unique definition of the subjects concerned.

The Family Code, in its Article 51(4) concerning the conditions of entering a child's parents into the register of births, provides that, in cases of surrogate motherhood, only married couples may be registered as the child's parents, and only provided that they have obtained the consent of the woman who had given birth to the baby (the surrogate mother). Articles 55(3) and 55(9) of the Federal Law of the Russian Federation "On Basics of Health Protection of the Citizens in the Russian Federation", however, names as subjects of assisted reproductive technologies (the "ART"), first of all, a man and a woman, whether married or not, and, secondly, a single woman unable to carry to term and give birth to a child due to medical reasons. Such reasons for surrogacy are listed, in particular, in Order of the Russian Ministry of Health No. 803n.

This inconsistency is also aggravated by Article 16(5) of the Federal Law of the Russian Federation "On Acts of Civil Status" that requires that the spouses who had benefitted from the surrogate mother's services file two documents for the state registration of the baby's birth: the document confirming the ba-

by's birth, and the document issued by the relevant healthcare organisation that confirms the surrogate mother's consent to the registration of the married couple as the baby's parents.

Therefore, according to these laws, the persons authorised to apply for the surrogacy may be a man and a woman, whether married or not, as well as a single woman, provided that they are unable to carry to term and give birth to a child for medical reasons; the persons entitled to register the baby born as a result of surrogacy are only the spouses who had resorted to surrogate motherhood.

Due to this lack of coherence in the rules of law and the resulting problems that arise at the stage of registration of children born from reproductive methods, in May 2018, the members of the Federation Council of the Federal Assembly of the Russian Federation submitted Draft Law No. 473140-7 "On Amending Certain Legislative Acts of the Russian Federation as Regards the State Registration of the Birth of Children as a Result of the Use of Assisted Reproductive Technologies"⁴⁰, which was expected to eliminate a number of legal lacunae that exist in this sphere – in particular, by modifying the Federal Law "On Basics of Health Protection of the Citizens in the Russian Federation" and the Family Code and thus providing the right to register a child born through surrogacy equally to married couples, unmarried couples, and single women. As of October 2021, this Draft Law is pending review by the State Duma of the Federal Assembly of the Russian Federation (the "State Duma").

It should be noted that practice has also created another subject who may resort to surrogacy: namely, a single man. On the one hand, the legislator provides an exhaustive list of subjects entitled to benefit from surrogacy; on the other hand, the laws do not provide for any sanctions for the use of a surrogate mother's services by single men; hence, some single men become single fathers to surrogate children. This raises the question of why the Russian laws allow single women to benefit from surrogacy services, while

³⁷ Federal Law "On Acts of Civil Status" No. 143-FZ dated 15 November 1997 (as amended on 24 April 2020). (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_16758/ (accessed 17.10.2021).

³⁸ Order of the Ministry of Health of the Russian Federation No. 107n dated 30 August 2012 (as amended on 1 February 2018) "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions on Their Use". (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_142595/ (accessed 17.10.2021).

³⁹ Order of the Ministry of Health of the Russian Federation No. 107n dated 30 August 2012 (as amended on 1 February 2018) "On the Procedure for the Use of Assisted Reproductive Technologies, Contraindications and Restrictions on Their Use" (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_142595/ (accessed 17.10.2021).

⁴⁰ Draft Law No. 473140-7 "On Amending Certain Legislative Acts of the Russian Federation as Regards the State Registration of the Birth of Children as a Result of the Use of Assisted Reproductive Technologies". (In Russ.). URL: <https://sozd.duma.gov.ru/bill/473140-7> (accessed 17.10.2021).

these remain unavailable to single men. At the same time, the abovementioned Draft Law No. 473140-7 contains no provisions on the matters of registration of the relevant rights for single men who become the birth fathers of the children born through surrogacy, although this issue is in fact on the agenda and needs resolving. Going back to the medical reasons permitting the use of surrogacy, these relate to the characteristics of a woman's physique and health that make a woman unable to carry to term and give birth to a child herself; on the other hand, if one applies these reasons to a man, one can well conclude that a single man, too, can be included among the subjects of surrogacy by virtue of his nature (for instance, in view of his lack of a uterus) and, consequently, his inability to carry to term and give birth to a child on his own.

The legislator, however, fails to explain the reasons why the category of subjects of surrogacy came to include single women. If the decisive factor was of social character – namely, the inability to find a partner (“social infertility”, so to speak) – it is unclear why single men could not be included on the list of subjects of surrogacy as well. Granting this right solely to single women, but not to single people generally, can be viewed as discrimination [Bogdanova, Belova 2021:5] within the meaning of Article 19(3) of the Constitution of the Russian Federation (the “Constitution”)⁴¹.

It should be noted that the possibility of redefining infertility within the framework of the World Health Organisation has been acknowledged. In 2016, for instance, the British newspaper *The Telegraph* reported on an initiative to broaden the definition of infertility, as of now defined as the inability to achieve a pregnancy after regular unprotected intercourse for 12 months or more⁴², by classifying as an infertile person also those who have no sexual relationship or partner with whom to conceive. David Adamson, MD, one of the authors of the new World Health Organisation guidelines, told *The Telegraph* that the change was intended to reflect the rights of

all people to found a family, including single men, single women, gays and lesbians⁴³. However, on 4 February 2020, the World Health Organisation's official website published information stating that the WHO was leaving the previous definition of infertility unchanged, as it provides a clinical description of the disease⁴⁴.

At the same time, only half of the European countries provide single women with access to some types of ART (e.g. Austria, Belgium, Bulgaria, Denmark, Estonia, Finland, France, Greece, Luxembourg, the Netherlands, Portugal, Spain and Sweden [McDermott, Ronan, Butler 2022:2,4-8] and, even in fewer countries such an access is given to lesbians [Calhaz-Jorge et al. 2020:4-5]. Notably, between 2013 and 2019, the Spanish Ministry of Health restricted the range of actors with access to public services in terms of ART exclusively to married couples, although in some autonomous communities single and lesbian couples still had access to them [Alon, Pinilla 2021:3]. In 2021, France joined the group of states in which all women, including singles and lesbians, have the right to access ART, with Bioethics Law 2021-1017⁴⁵ providing for the right to in-vitro fertilisation.

For the lack of an official position of the Russian legislator on this topic, we should like to bring to light the situation that requires special attention in the context of the rights of single men to use surrogacy services: in particular, this is the situation where a specific single man – a widower – wishes to become a father using his late wife's frozen eggs. Apart from all the questions usually posed in the discussions of surrogacy in the context of single parents, this raises a number of ethical and legal issues that must be carefully considered and clearly regulated. Here, two aspects should be elucidated as a priority: the possibility for such a single man to become a father through surrogacy, and the subsequent registration of the baby born as a result of this type of ART.

Despite all of the problems outlined above, current practice shows that both a man and a woman

⁴¹ Constitution of the Russian Federation (adopted at the national referendum on 12 December 1993, as amended based on the all-Russian referendum on 1 July 2020). (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_28399/ (accessed 17.10.2021).

⁴² World Health Organization: International Classification of Diseases. 11th Revision (ICD-11). URL: <https://icd.who.int/en> (accessed 17.10.2021).

⁴³ Bodkin H. Single men will get the right to start a family under new definition of infertility. – *The Telegraph*. October 19, 2016. URL: <http://www.telegraph.co.uk/news/2016/10/19/single-men-will-get-the-right-to-start-a-family-under-new-defini/> (accessed 17.10.2021).

⁴⁴ World Health Organization: Multiple definitions of infertility. URL: <https://www.who.int/news/item/04-02-2020-multiple-definitions-of-infertility> (accessed 17.10.2021).

⁴⁵ LOI No 2021-1017 du 2 août 2021 relative à la bioéthique. URL: <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043884384/> (accessed 17.10.2021).

who are not married, single women, and single men do become lawful parents to children born through surrogacy. That said, until 2010, single women had to face civil registry offices denying them registration of children, since the laws did not provide for a procedure for the registration of children born through surrogacy to single mothers. Thus, such single mothers were often forced to resort to adoption of their biological children.

The approach to these situations started changing in summer 2009, when a resident of Saint Petersburg, Ms. Natalya Gorskaya, lodged a complaint with the Kalininsky District Court of Saint Petersburg against the Civil Registry Office that refused to register her as a mother to her surrogate son. The Court found that the Civil Registry Office's denial of registration was unlawful and ordered that it proceeded with the registration⁴⁶. According to Judge A.Y. Korchagina who handled the case, civil registry offices err in applying Article 51(4) of the Family Code as a general provision and mistakenly conclude that a single woman may not resort to surrogate motherhood. At the same time, the court observed that such an interpretation of the laws violated the civil rights guaranteed by Articles 38, 45, and 55 of the Russian Constitution. It also expressed an opinion on the possibility for unmarried couples to resort to surrogacy. That, according to the Court, would, in particular, result in a breach of one of the mandatory preconditions for marriage envisaged in Article 12 of the Family Code – namely, mutual and freely given consent.

Later, in November 2009, the Kuntsevsky District Court of Moscow delivered the same judgment in a similar case.

Civil registry offices gradually began registering the children of single women without forcing the latter to apply to courts to resolve the matter. Thus, for instance, on 3 January 2010, a Veliky Novgorod Civil Registry Office registered a surrogate child born to an unmarried female resident of the Novgorod Region on the day she applied for registration⁴⁷.

Nevertheless, there have been many cases of denial of registration of children by civil registry offices to single women who had become mothers through surrogacy. Thus, in 2016, a Tuapsinsky District Civil Registry Office denied to a single mother, Ms. I.B. Diakonova, state registration of the birth of her surrogate child, reasoning that the making of the relevant entry in the register of births required the surrogate child to have both parents who, moreover, had to be an officially registered married couple. Following the refusal, Ms. Diakonova approached the Tuapsinsky City Court of the Krasnodarskiy Krai. The latter quashed the decision of the Registry Office and obliged the Tuapsinsky District Civil Registry Office to proceed with the state registration of the surrogate child's birth, indicating Ms. Diakonova as the "mother" and leaving a blank field on the form for the "father"⁴⁸.

Similarly, in 2018, the Meschansky District Court of Moscow declared unlawful the refusal to register newly born surrogate twins, and obliged the Civil Registry Office in question to enter Ms. Y.V. *** into the register as their mother⁴⁹.

The Plenum of the Supreme Court of the Russian Federation contributed the most to elucidating this matter by issuing the Judgement No. 16 of 16 May 2017 "On the Application by Courts of the Laws in Considering Cases Related to Establishing Parentage"⁵⁰, with paragraph 31 stating that the provision found in Article 51(4)(2) of the Family Code equally applied to cases where the person resorting to surrogacy was a single woman, incapable of carrying to term and giving birth to a child for medical reasons. At the same time, this Judgement did not in any way address the issue of whether that rule applied to single men.

The issue of entry of information on single fathers into the acts on the birth of children brought into this world by surrogate mothers is one with a complex and mixed history in Russia. The first court decision ordering a district civil registry office to reg-

⁴⁶ Kalininsky District Court of Saint Petersburg: Decision of 5 August 2009 in Civil Case No. 2-4104 (In Russ.). URL: http://kln.spb.sudrf.ru/modules.php?name=docum_sud&rid=9 (accessed 17.10.2021).

⁴⁷ Court Judgment Not Required to Register a "Surrogate" Child Born for a "Single" Woman. – *Rosjurconsulting*. January 15, 2010. (In Russ.). URL: <http://www.jurconsult.ru/news/news6.php> (accessed 17.10.2021).

⁴⁸ Decision of 24 November 2016 No. 2A-1633/20162A-1633/2016~M-2000/2016M-2000/2016. URL: <https://sudact.ru/regular/doc/PUrL9uU1EsC> (accessed 17.10.2021).

⁴⁹ Official Website for Courts of General Jurisdiction. Information on Case No. 02a-0121/2018. (In Russ.). URL: <https://mos-gorsud.ru/rs/meshchanskij/services/cases/kas/details/2a103a6d-1fc5-492a-96d1-eea8aa74fc28?caseNumber=2%E0-0121/2018> (accessed 17.10.2021).

⁵⁰ Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16 of 16 May 2017 (as amended on 26 December 2017) "On the Application by Courts of the Laws in Considering Cases Related to Establishing Parentage". (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_216881/ (accessed 17.10.2021).

ister a single man as a single father to a child born through gestational surrogacy with oocyte donation arrived in August 2010 and was delivered by the Babushkinsky District Court of Moscow⁵¹. In the decision, the court established that the Russian laws contained no prohibitions or restrictions in terms of a single woman's or a single man's opportunity to fulfil themselves as a mother or a father using ART. The result was Russia's first ever certificate confirming the birth of a surrogate child with a single man indicated as the "father" and a dash written in the field for the "mother" in birth certificate.

Although Russian law does not recognise the binding force of judicial precedent, when considering similar cases, courts nonetheless rely on that judgment referring, *inter alia*, to Article 19(3) of the Russian Constitution. Thus, in practice, courts allow single men to become the sole parent to a child born through surrogacy. In the decision of the Smolninsky District Court of Saint Petersburg⁵² under a claim filed by a single man after a civil registry office refused to register his surrogate twins, the court stated that the existing laws were based on equal rights for women and men, hence single men also had the right to have children and create families (including ones that only consist of the children and their father). The court found that the existing laws provided for no prohibition of registration of surrogate children by single women or single men who were the natural parents to the child in question⁵³. Furthermore, the Court emphasised that such a refusal by civil registry offices entailed a violation of the rights not only of a single man, but also of a newborn baby. Indeed, very frequently, the existing legal lacunae resulted in delays in the relevant bureaucratic procedures and in

children born through surrogacy ending up in specialised institutions called "infant homes".

The position of the Smolninsky District Court of Saint Petersburg was later repeated by a decision of the Tverskoy District Court of Moscow⁵⁴. The latter highlighted that the lack of statutory provisions governing the situation where a single man was the only parent to a surrogate child could not serve as a basis for a refusal to register the child. Other courts followed this practice⁵⁵.

Among recent decisions on this issue, the decision of the Dzerzhinsky District Court of Saint Petersburg of 8 April 2020⁵⁶ must be noted. It required the Committee for Civil Registry Offices of the Saint Petersburg Government to complete the state registration of the birth of a child born through surrogacy, indicating Mr. *** (a single man) as the "father" and leaving the field for the "mother" blank in the birth certificate. This case is significant because the civil registry office denied registration, explaining that civil registry offices generally lacked the authority to proceed with such registration, since the Federal Law "On Acts of Civil Status" did not contain a detailed description of the procedure for registering a child born through surrogacy, where the surrogacy was used by an unmarried man. For that reason, according to the civil registry office, only a court decision could be grounds for such registration. The civil registry office referred to its limited mandate, rather than a prohibition of such registration (like civil registry offices in the majority of cases of this sort do).

Therefore, in considering such cases, courts take into account the fact that the effective laws do not regulate the issue of establishing paternity and registering the birth of children who have no mother, but

⁵¹ Babushkinsky District Court of Moscow: Decision of 4 August 2010 in Civil Case No. 2-2745/10. (In Russ.). URL: <https://mos-gorsud.ru/rs/babushkinskij/search> (accessed 17.10.2021).

⁵² Archive of the Smolninsky District Court of Saint Petersburg, Decision of 4 March 2011 in Civil Case No. 2-1601/11, Judge T.P. Matrusyak. (In Russ.). URL: https://smolninsky--spb.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=case&case_id=343531368&case_uid=1d467be2-1763-47fb-9560-0b3fa989e6ce&delo_id=1540005 (accessed 17.10.2021).

⁵³ See: [Svitnev 2011:52-61].

⁵⁴ Tverskoy District Court of Moscow: Decision of 25 March 2011 in Civil Case No. 2-1894/2011. (In Russ.). URL: <https://mos-gorsud.ru/rs/tverskoj/search> (accessed 17.10.2021).

⁵⁵ Khamovnichesky District Court of Moscow: Case No. 2-497/13. (In Russ.). URL: <https://mos-gorsud.ru/rs/hamovnicheskij/search> (accessed 17.10.2021); Golovinsky District Court of Moscow: Case No. 2-1251/13. (In Russ.). URL: <https://mos-gorsud.ru/rs/golovinskij/search> (accessed 17.10.2021); Perovsky District Court of Moscow: Case No. 2-2023/1-2013. (In Russ.). URL: <https://mos-gorsud.ru/rs/perovskij/search> (accessed 17.10.2021).

⁵⁶ Dzerzhinsky District Court of Saint Petersburg: Decision No. 2-980/2020 2-980/2020~M-740/2020 M-740/2020 of 8 April 2020 in Case No. 2-980/2020. URL: https://sudact.ru/regular/doc/8LeGc3YT3IZV/?regular-txt=%D1%81%D1%83%D1%80%D1%80%D0%BE%D0%B3%D0%B0%D1%82%D0%BD%D0%BE%D0%B5+%D0%BC%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D0%BD%D1%81%D1%82%D0%BE®ular-case_doc=®ular-lawchuninfo=®ular-date_from=®ular-date_to=®ular-workflow_stage=®ular-area=®ular-court=®ular-judge=&_id=1616842863954&snippet_pos=152#snippet (accessed 17.10.2021).

only have a father, and find it possible to apply the existing legal rules *mutatis mutandis*.

Still, there has been a number of cases in the practice of Russian courts to deny the registration as fathers to surrogate children, although they are in fact the natural parents. Such decisions exist even despite paragraph 20 of Judgement of the Plenum of the Supreme Court of the Russian Federation No. 16 of 16 May 2017 “On the Application by Courts of the Laws in Considering Cases Related to Establishing Parentage”⁵⁷ that provides that, to clarify the issues of a child’s parentage, a court may (subject to the opinion of the parties and the facts of the case) employ an DNA expert in order to reliably and accurately establish paternity (maternity).

Thus, the Tushinsky District court of Moscow in its Decision of 19 March 2014⁵⁸ dismissed Mr. S.S. Tinkov’s request to be recognised as a father to two girls born through a surrogacy programme. Moreover, the court ordered that the Tushinsky Civil Registry Office with the Moscow Directorate for Civil Registry register the birth of the two children without any mention of their surrogate mother or birth father. In its Decision, the Court relied on Articles 48(3) and 51(2) of the Family Code, stipulating that when a child’s birth is registered, information on the father is entered based on the certificate of the parents’ marriage and a joint application from the father and mother, or an application by the child’s mother, if the father has not been identified. The decision was challenged, but the court of appeal⁵⁹ upheld the first court decision and dismissed the appeal.

In cases of such judicial denials, single men have to seek other ways to be officially registered as fathers to their biological children. Some enter into fictitious marriages to that end, although that does not always prove to be an efficient solution; others resort to

adoption. Notably, Russian laws do not provide for any special restrictions for single persons wishing to adopt. Therefore, it is not entirely clear why a single person – in particular, a man – cannot be registered as a parent of his natural child, but can nonetheless become his adoptive father.

In light of this, it appears clear that there are no reasons to prevent single men from being included on the list of subjects entitled to use surrogacy. At the same time, the lack of legal certainty on this matter creates various precedents.

4.2 2020 Doctors’ Case

Autumn 2020, it was reported that the Investigative Committee of the Russian Federation (the “Russian IC”) was carrying out investigative actions in consolidated criminal cases on the trafficking of surrogate children. The children were born through the services of Rosjurconsulting and European Surrogate Technologies⁶⁰, organisations that, in particular, helped single men to become single fathers through surrogacy.

The first criminal case was initiated in January 2020 under Article 109(1) of the Criminal Code of the Russian Federation (the “Criminal Code”) and Article 127.1(2) of the Criminal Code after the dead body of a newborn baby boy was discovered in one of the apartments in the VNISSOK settlement of the Odintsovo City District of the Moscow Region. It was later established that the death was caused by sudden infant death syndrome⁶¹. According to journalists, the baby was born through surrogacy for a national of the Philippines⁶². Because of the COVID-19 pandemic, the boy’s biological father could not come to Russia to execute the proper documents, and the infant, as well as four other children – a biological child to Thai parents, a biological child to a Filipino couple,

⁵⁷ Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16 of 16 May 2017 (as amended on 26 December 2017) “On the Application by Courts of the Laws in Considering Cases Related to Establishing Parentage”. (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_216881/ (accessed 17.10.2021).

⁵⁸ Decision of the Tushinsky District Court of Moscow of 19 March 2014 in Case No. 2-1472/2014. (In Russ.). URL: http://www.garant.ru/files/7/3/1273537/reshenie_tushinskogo_rayonnogo_suda_goroda_moskvi_ot_19_marta_2014_goda.odt (accessed 17.10.2021).

⁵⁹ Appellate Ruling of the Moscow City Court of 22 July 2014 in Case No. 33-29316/2014. (In Russ.). URL: <https://www.mosgorsud.ru/mgs/services/cases/appeal-civil/details/b9c61f32-d674-4b0a-b2dc-b019babe95ad?participants=%F2%E8%E2%EA%E2> (accessed 17.10.2021).

⁶⁰ Baby Trafficking Case: Plans to Arrest Fathers of Surrogate Children. – *TASS.ru*. September 30, 2020. (In Russ.). URL: https://tass.ru/proisshestviya/9596727?fbclid=IwAR1Zbhn7PXt_lia12XQglskee9YQnlxvrq6MVXj6msE9u4sy0CVl6Q0nb4U (accessed 17.10.2021).

⁶¹ Website of the Main Investigative Directorate of the Investigative Committee of the Russian Federation for the Moscow Region. (In Russ.). URL: <https://mosobl.sledcom.ru/news/item/1428307/> (accessed 17.10.2021).

⁶² Massacre of the Surrogate Innocents. – *Novaya Gazeta*. October 15, 2020. (In Russ.) URL: <https://novayagazeta.ru/articles/2020/10/15/87536-izbienie-surrogatnyh-mladentsev> (accessed 17.10.2021).

and the Filipino twins Anika and Arturo (whose genetic and official parents are the well-known Filipino politician Fredenil Hernaes Castro and his spouse Jane Tan Castro⁶³) – were taken care of by nannies. All the children found in the rented apartment were born through surrogate motherhood.

In June 2020, the case was consolidated with another criminal case initiated after the discovery of a flat in Moscow with five babies; found in the same flat were documents on IVF procedures and surrogacy agreements⁶⁴. The babies found were also born through surrogacy. According to media reports, their genetic parents were nationals of the People's Republic of China who could not come for their children to Russia straight away due to the COVID-19 pandemic. In view of those cases, the crime under Article 127.1(2) (human trafficking of two or more persons) of the Criminal Code was requalified into a more serious category, namely, Article 127.1(3) (human trafficking resulting in death, serious injury or other serious consequences). This was the origin of the case that the media later dubbed the “Doctors’ case” (on trafficking and attempted trafficking of children from surrogate mothers).

In summer 2021, however, the mass media started citing the results of forensic medical expert opinion No. 2045702874 of 24 April 2020 (allegedly part of the case files) that confirmed a direct genetic relation to the putative parents who had donated sperm in Moscow reproductive clinics, and pointed out that in that case, there could be no “child trafficking”⁶⁵. Furthermore, the defendants initially criminally prosecuted were “traditional” families that met the Russian legal requirements for surrogacy. According to media reports, on 25 November 2021 the Vidnovsky City Court ordered the relevant authorities

to transfer Anika and Arturo Castro to their parents, spouses Fredenil and Jane Castro⁶⁶. Up to that moment, the twins, as well as other children involved in this case, were placed into childcare institutions. Investigators believe that the crimes were committed by an organised crime group; in light of this, 8 persons have been arrested in the case, including the heads of the companies that facilitated surrogacy and the doctors (embryologists and fertility specialists), as well as a lawyer, an interpreter, and a courier. The surrogate mother who gave birth to a child for the Filipino couple was placed under house arrest⁶⁷. On 5 November 2020 K.N. Svitnev, the General Director of Rosjurconsulting, was placed on the international wanted list⁶⁸. On 12 July 2021, the pre-trial restrictive measure for four defendants in the case was replaced with house arrest, although later, the First Appellate Court of General Jurisdiction granted the prosecutor’s appeal that challenged the Decision of the Moscow City Court⁶⁹, and the defendants were once again put into detention.

Importantly, in the Russian Federation, commercial surrogacy is allowed; hence, the criminal case discussed seems to be rather illogical – after all, it is a case regulated by the relevant rules of the Russian law. Nevertheless, as discussed above, the Russian laws define the subjects entitled to resort to surrogacy in such a way that the rules have been interpreted and implemented in diametrically opposed manners. In view of that, competent authorities might have assumed that single men could not use surrogacy services and proceed with the relevant checks. However, as the media reports, the Russian IC focuses, *inter alia*, on the sexual orientation of the single fathers who were the defendants in the case⁷⁰. If so, such an approach raises many issues, as Russian laws on ART

⁶³ A Filipino Politician Addresses Putin over the “Child-Trafficking” Case. – *Ria.ru*. August 18, 2020. (In Russ.). URL: <https://ria.ru/20200818/1575931832.html> (accessed 17.10.2021); The Castros File a Claim against the Russian Federation with the Tverskoy District Court of Moscow to Defend Their Infants. – *Novaya Gazeta*. June 5, 2021. (In Russ.). URL: <https://novayagazeta.ru/articles/2021/06/05/surrogatnoe-sledstvie> (accessed 17.10.2021).

⁶⁴ Cases on Child Trafficking in Moscow and the Moscow Region Consolidated, Lawyer Says. – *Ria.ru*. July 21, 2020. (In Russ.). URL: <https://ria.ru/20200721/1574662620.html> (accessed 17.10.2021).

⁶⁵ Investigation into Surrogacy. – *Novaya Gazeta*. June 5, 2021. (In Russ.). URL: <https://novayagazeta.ru/articles/2021/06/05/surrogatnoe-sledstvie> (accessed 17.10.2021).

⁶⁶ Moscow Region court ordered the return of surrogate children to a politician from the Philippines. – *Ria.ru*. November 25, 2021. (In Russ.). URL: <https://ria.ru/20211125/bliznetsy-1760801343.html> (accessed 01.12.2021).

⁶⁷ Babies Become Evidence, Doctors Become Detainees. – *Novaya Gazeta*. July 24, 2020. (In Russ.). URL: <https://novayagazeta.ru/articles/2020/07/24/86392-nezakonnorozhdennye> (accessed 17.10.2021).

⁶⁸ Main Defendant in the Case on Surrogate Child Trafficking Put on the Wanted List. – *TASS.ru*. November 5, 2020. (In Russ.). URL: <https://tass.ru/proisshestiya/9918561> (accessed 17.10.2021).

⁶⁹ Court Orders Pre-Trial Detention for Four Defendants in the Case on Trafficking of Children from Surrogate Mothers. – *TASS.ru*. August 5, 2021. (In Russ.). URL: <https://tass.ru/proisshestiya/12068561> (accessed 17.10.2021).

⁷⁰ “Single Fathers” Case: Why Surrogacy Is Prosecuted in Russia. – *DW.com*. October 12, 2020. (In Russ.). URL: <https://www.dw.com/ru/delo-odinokih-otcov-pochemu-v-rossii-presledujut-za-surrogatnoe-materinstvo/a-55246927> (accessed 17.10.2021).

contain no provisions on the sexual orientation of the subjects entitled to use ART in general and surrogacy in particular.

In view of the claims named above with respect to the Russian IC's actions, one of the defendants in the criminal case, the General Director of Rosjurconsulting K.N. Svitnev, approached the Russian IC for explanations, basing its position on violations of Articles 137, 285, and 299 of the Criminal Code; according to him, however, he never received a reply. Moreover, according to the information published in the mass media, the Prosecutor General of the Russian Federation received a request on the verification of reports on the detentions and arrests of homosexual men in the criminal case in question from the Deputy Head of the State Duma Committee for Matters of Family, Women, and Children, Ms. Oksana Pushkina⁷¹. In her opinion, the homosexuality of single fathers could not serve as a ground for limitation of their rights; Ms. Pushkina believes the Russian IC's measures were unconstitutional and violated Articles 19 and 38 of the Russian Constitution. Additionally, according to Ms. Pushkina, the actions taken by Investigative Committee action may have serious consequences in the future.

The current Russian legislation does not stipulate that a parent's sexual orientation or gender identity serve as a ground for the termination of parental rights or the annulment of adoption and the placement of a child in an orphanage. Pursuant to Article 77 of the Family Code, a guardianship and custody bodies may take the child away immediately only if there is an imminent threat to life or health of a child. The parent, in turn, may appeal against such actions to the relevant court.

In practice, the only case (at least the only case released to public) where adoptive children were taken away from a family based on gender identity dates back to 2017, when the officers of guardianship and custody bodies of the Ordzhonikidze District

of Yekaterinburg took two adopted sons from Yulia Savinovskikh⁷².

4.3 2021 Legislative Initiative to Limit the Scope of Subjects Eligible to Seek Surrogacy Based On "Marital Status" and Citizenship

Today, the legal regulation of the category of subjects entitled to benefit from surrogacy services has nothing to do with the sexual orientation of such persons. At the same time, the issue of "marital status" in the context of surrogacy is being raised with increasing frequency. Thus, at the beginning of 2021, it was announced that State Duma deputies had drafted a law amending the existing procedure for surrogacy in the Russian Federation. The draft law provides, in particular, a ban on surrogacy for foreign nationals, as well as for unmarried persons. The draft law's authors stand for granting the opportunity to benefit from surrogacy only to couples officially married for at least a year and unable to carry to term and give birth to a child for medical reasons (which should be established by a council of medical professionals), while separately emphasising that surrogacy will be unavailable to single persons, as it would be inconsistent with the constitutional principle, envisaged in Article 38 of the Russian Constitution and stating that "motherhood, childhood, and family shall be protected by the state".

As regards the ban on surrogacy for single persons, State Duma deputy Ms. Pushkina expressed her disagreement, noting that the proposal to introduce a sort of "marital status" contradicts the key provisions of the Constitution, including Article 19 that guarantees equality of all before law and court⁷³. During the parliamentary hearings on 20 January 2021 on that draft law, one of its authors, Deputy Chairman of the State Duma Mr. Petr Olegovich Tolstoy, responded to allegations of unconstitutionality of some of the provisions of the draft law, relying on the position of the Constitutional Court of the Russian Federation of 23 September 2014⁷⁴ that stated that legislative

⁷¹ Pushkina Writes to the Prosecutor General in the "Gays & Surrogate Mothers Case". – *RBC.ru*. October 1, 2020. (In Russ.). URL: https://www.rbc.ru/society/01/10/2020/5f75ac259a7947743186e7e3?from=materials_on_subject (accessed 17.10.2021).

⁷² Yulia Savinovskikh, Whose Adopted Children Were Taken Away after a Breast Surgery, Complains to the ECtHR. – *TVRAIN.ru*. March 19, 2019. (In Russ.). URL: https://tvrain.ru/news/julija_savinovskih-482310/ (accessed 17.10.2021). This post (article) has been created and/or disseminated by a foreign mass media organisation performing the functions of a foreign agent, and/or a Russian legal entity performing the functions of a foreign agent.

⁷³ Deputies Prepare a Ban on Surrogacy for Singles: Oksana Pushkina Spies Inconsistency with the Constitution. – *RBC.ru*. January 19, 2021. (In Russ.) URL: <https://www.rbc.ru/politics/19/01/2021/6006e6759a79472e23983481> (accessed 17.10.2021).

⁷⁴ Resolution of the Constitutional Court of the Russian Federation No. 24-P of 23 September 2014 "On verifying the constitutionality of Article 6.21(1) of the Administrative Offences Code of the Russian Federation in view of a complaint by Messrs. N.A. Alexeev, Ya.N. Yevtushenko, and D.A. Isakov". (In Russ.). URL: <https://rg.ru/2014/10/03/sud-dok.html> (accessed 17.10.2021).

regulation in the sphere of family should be based on the values of family, motherhood, and childhood as traditionally understood. Moreover, the State Duma's Deputy Chairman noted that neither the Constitution nor international legal documents contained any provisions that would guarantee the right "of an individual to get oneself a child, like one gets oneself a dog"⁷⁵. Mr. Tolstoy also announced that the draft law was submitted to the State Duma for review in March 2021; at the same time, he left open the possibility that the wording might be elaborated on the issue raised to achieve a compromise⁷⁶.

On 11 June 2021, Russian senator M.N. Pavlova as well as a group of State Duma deputies, led by Mr. Tolstoy, introduced to the State Duma a set of amendments into separate legislative acts of the Russian Federation in Draft Law No. 1191971-7 "On Amending Certain Legislative Acts of the Russian Federation" (setting forth the requirement that the persons using surrogacy on the territory of the Russian Federation should hold Russian nationality)⁷⁷. The Draft Law's wording, as submitted, clarified, inter alia, that prospective parents should, firstly, be married to each other, secondly, be unable to carry to term and give birth to a child on their own for medical reasons, and, thirdly, hold Russian nationality (citizenship) (or at least one of them should). Therefore, the Draft Law was aimed at narrowing the list of subjects of surrogacy in the Russian Federation. This Draft Law provided an absolute prohibition for foreign nationals and stateless persons to apply to surrogacy in the territory of the Russian Federation. The explanation given is that, otherwise, a child born on the territory of the Russian Federation would enjoy

no further protection from the competent Russian authorities.

The authors of the Draft Law found it reasonable to set forth a procedure where children born for foreign parents will enjoy protection on the territory of the Russian Federation until they cross the border or are handed over to their biological parents. For this reason, the Draft Law provided for mandatory Russian nationality for children born or carried by surrogate mothers as at the date of entry into force of the relevant amendments, if the prospective parents/parent (in the case of a single woman) of such children are foreign nationals or stateless persons, or if the decision to grant Russian nationality to the prospective parents/parent (in the case of a single woman) has been annulled in accordance with the Federal Law "On Citizenship of the Russian Federation" as at the day of state registration of the child's birth.

At the same time, according to the opinions of the State Duma Committee on Issues of Family, Women, and Children⁷⁸ and the Legal Department of the State Duma Office⁷⁹, some of the provisions of the Draft Law in question both suffered from internal contradictions, and are not in compliance with some of the existing provisions of the relevant Russian laws. For that reason, according to Article 112(6)(a) of the State Duma Regulations⁸⁰, it was suggested that the text of the Draft Federal Law be adjusted before its first reading by the State Duma.

On 20 October 2021, this Draft Law was supported by the Government of the Russian Federation, but with the stipulation that, before the State Duma considers this draft law in the first reading, the draft must be finalized in the light of the recommendations out-

⁷⁵ State Duma Explains the Ban on Surrogacy for Single Russians. – *Rossiiskaya gazeta*. January 20, 2021. (In Russ.). URL: <https://rg.ru/2021/01/20/v-gosdume-obiasnili-zapret-surrogatnogo-materinstva-dlia-odinokih-rossiian.html> (accessed 17.10.2021).

⁷⁶ Foreigners Told to Bugger Off. – *Kommersant.ru*. January 20, 2021. (In Russ.). URL: <https://www.kommersant.ru/doc/4654340> (accessed 17.10.2021).

⁷⁷ Draft Law No. 1191971-7 "On Amendments to Certain Legislative Acts of the Russian Federation". (In Russ.). URL: <https://sozd.duma.gov.ru/bill/1191971-7> (accessed 17.10.2021).

⁷⁸ Conclusion of State Duma Committee on Issues of Family, Women, and Children to the draft federal law No. 1191971-7 "On Amendments into separate legislative acts of the Russian Federation" (in terms of establishing the requirement for citizenship Russian Federation when using surrogate motherhood on the territory of the Russian Federation) submitted by the deputies of the State Duma P.O. Tolstoy, V.I. Piskarev, N.G. Zemtsov, I.A. Yumasheva; Senator of the Russian Federation M.N. Pavlova. (In Russ.). URL: <https://sozd.duma.gov.ru/download/BE4D3A84-87BE-480A-BFAC-6ED5653A8707> (accessed 17.10.2021).

⁷⁹ Conclusion of the Legal Department of the State Duma Office according to the draft federal law No. 1191971-7 "On Amendments to Certain Legislative Acts of the Russian Federation", submitted by the deputies of the State Duma P.O. Tolstoy, V.I. Piskarev, N.G. Zemtsov, I.A. Yumasheva and Senator of the Russian Federation M.N. Pavlova (first reading). (In Russ.). URL: <https://sozd.duma.gov.ru/download/814AAB72-134C-46FD-83F0-C5114B151ADA> (accessed 17.10.2021).

⁸⁰ Regulations of the State Duma of 22 January 1998. URL: <http://duma.gov.ru/duma/about/regulations/> (accessed 17.10.2021).

lined by the Russian Government on amendments to Article 55 of the Federal Law “On Basics of Health Protection of the Citizens in the Russian Federation” and the Family Code⁸¹.

Despite the calls for limiting access to surrogacy on the territory of the Russian Federation for foreign nationals and stateless persons – in particular, because the children born in such situations are later removed from the territory of the Russian Federation – Order of the Government of the Russian Federation No. 635-r dated 16 March 2020 (as amended on 28 July 2021) “On Temporary Restriction of Entry into the Russian Federation for Foreign Nationals and Stateless Persons and Temporary Suspension of Granting and Issuance of Visas and Invitations”⁸² provides for the possibility of entry of the biological parents to children born by surrogate mothers on the territory of the Russian Federation, who enter the Russian Federation for the purposes of state registration of the birth of the child, provided that information on such persons has been submitted by the Ministry of Health of the Russian Federation to the Ministry of Internal Affairs of the Russian Federation.

On 21 December 2021, when the State Duma members considered the Draft law in the first reading, they rejected it. However, before the vote, Nina A. Ostanina, Chairwoman of the State Duma Committee on Family, Women and Children’s Issues and a member of the “Communist Party of the Russian Federation” faction, clarified that “child trafficking in general should be prohibited, including the right of Russian citizens to order and purchase children <...> the authors, who prepared this law, are ready to introduce it again in a new version” and asked to vote against Draft Law No. 1191971-7⁸³.

The Draft Law discussed above may bridge the legal gaps of surrogacy in general and the right of single persons to enjoy the surrogacy in the Russian Federation in particular.

4.4 Possibility of providing maternity (family) capital for single fathers who become parents as a result of resorting to surrogacy

At the same time, it is becoming evident that, at this point, Russian legislators are failing to approach the issue of regulation of surrogacy comprehensively. They are elaborating on specific issues related to this type of ART, while practice still pushes Russian citizens who have become parents through surrogacy to face the existing lacunae in the legislation. One of these such gaps is the issue of whether a single father (including one who later got married) who had become a father through the use of surrogate motherhood may receive state support in the form of maternity (family) capital (national program to support families with children). On the one hand, by enacting Federal Law No. 256-FZ dated 29 December 2006 “On Additional Measures of State Support of Families with Children” (the “Federal Law of the Russian Federation ‘On Additional Measures of State Support of Families with Children’”)⁸⁴, the legislator has defined the specific category of persons entitled to apply for maternity (family) capital. On the other hand, the fact that single fathers to surrogate children (including those who later got married; given that their spouses also accrue no right to claim additional state support for their adopted sons or daughters) are not on the list cannot be construed as a prohibition, but is rather an omission on legislator’s part. Thus, statutory uncertainty has left the final decision in each specific case to the courts. This is why, in practice, there have been both cases where courts recognised that such fathers were entitled to receive a state certificate to maternity (family) capital⁸⁵, and the opposite cases. Claimants in such cases have invoked the existing inequality between themselves and the persons listed in Article 3 of the aforementioned Federal Law, and argued that that rule was contrary to Article 19 of the Constitution.

⁸¹ State Duma of the Russian Federation: Official Review on the draft federal law No. 1191971-7 “On amendments in separate legislative acts of the Russian Federation”, submitted by deputies of the State Duma P.O. Tolstoy, V.I. Piskarev, Senator of the Russian Federation M.N. Pavlova. (In Russ.). URL: <https://sozd.duma.gov.ru/download/717B04C2-8BCF-46CF-8C82-485446C19889> (accessed 17.10.2021).

⁸² Order of the Government of the Russian Federation No. 635-r dated 16 March 2020 (as amended on 28 July 2021) “On Temporary Restriction of Entry into the Russian Federation for Foreign Nationals and Stateless Persons and Temporary Suspension of Granting and Issuance of Visas and Invitations”. (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_347693/f62ee45faefd8e2a11d6d88941ac66824f848bc2/ (accessed 17.10.2021).

⁸³ On the draft Federal Law No. 1191971-7 “On Amending Certain Legislative Acts of the Russian Federation”. December 21, 2021. (In Russ.). URL: <https://video.duma.gov.ru/watch/?id=324273> (accessed 17.10.2021).

⁸⁴ Federal Law No. 256-FZ dated 29 December 2006 “On Additional Measures of State Support of Families with Children”. (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_64872/ (accessed 17.10.2021).

⁸⁵ Decision of the Khimki City Court of the Moscow Region No. 3321541/2014 of 3 March 2014. (In Russ.). URL: <https://rospravosudie.com> (accessed 17.10.2021).

In this context, some clarification arrived with the Judgement of the Constitutional Court of the Russian Federation No. 30-P of 29 June 2021 “On verifying the constitutionality of Article 3 of the Federal Law ‘On Additional Measures of State Support of Families with Children’ under a request of the Konakovo City Court of the Tver Region.”⁸⁶ Mr. T., a national of the Russian Federation and the biological father to two children born through surrogacy on 3 September 2019, took legal action to the Konakovo City Court of the Tver Region, and argued that the territorial body of the Pension Fund of the Russian Federation refused to provide him with a state certificate for maternity (family) capital, stating that the claimant did not fall within the categories of persons envisaged in the Federal Law of the Russian Federation “On Additional Measures of State Support of Families with Children”. When considering the case, the Konakovo City Court of the Tver Region was uncertain as to whether Article 3 of that Federal Law was in compliance with the Constitution, as it “placed the fathers to two or more children born by a surrogate mother”⁸⁷ in a position of inequality as compared to the categories of persons entitled to claim maternity (family) capital by operation of law.

For this reason, the Konakovo City Court of the Tver Region sent the relevant request to the Constitutional Court of the Russian Federation. The issue at stake in this case was that the original birth certificates of the children indicated Mr. T. as the “father” and had a blank field for the “mother”, but when Mr. T. married Ms. K. on 19 October 2019, with her adopting her husband’s children, the register of births was amended accordingly, and new birth certificates were issued.

This is significant, since the judicial body for constitutional review in the Russian Federation defined

as the subject matter of its analysis only the first part of the Article 3 of the Federal Law ‘On Additional Measures of State Support of Families with Children’ and only “to the extent that it underlies the matter of granting the right to receive maternity (family) capital to a man who has been recognised, in accordance with the prescribed procedure, as the sole parent (father) to children born for him by a surrogate mother, and subsequently got married and is raising his children together with his spouse who has adopted them, in a family that has not received the right to benefit from state support in line with the aforementioned Federal Law”⁸⁸.

Therefore, the Constitutional Court of the Russian Federation stated that in such situations it was not the man who found himself in a position of inequality, but rather the family, since such families are generally in worse conditions as compared to families that do receive the relevant state support as they fall within the category of persons under the Federal Law of the Russian Federation “On Additional Measures of State Support of Families with Children” (and these may include parents to children born through ART). For this reason, the Constitutional Court of the Russian Federation has found that Article 3(1) of the Federal Law of the Russian Federation “On Additional Measures of State Support of Families with Children” was inconsistent with the Constitution “to the extent that it did not provide the right to receive maternity (family) capital for a man who has been recognised, in accordance with the prescribed procedure, as the sole parent (father) to children born for him by a surrogate mother, and subsequently got married and is raising his children in a family together with his spouse who has adopted them”.⁸⁹ The respective amendments must be implemented into the laws of the Russian Federation.

⁸⁶ Resolution of the Constitutional Court of the Russian Federation No. 30-P of 29 June 2021 “On verifying the constitutionality of Article 3 of the Federal Law ‘On Additional Measures of State Support of Families with Children’ under a request from the Konakovo City Court of the Tver Region”. (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_388562/ (accessed 17.10.2021).

⁸⁷ Resolution of the Constitutional Court of the Russian Federation No. 30-P of 29 June 2021 “On verifying the constitutionality of Article 3 of the Federal Law ‘On Additional Measures of State Support of Families with Children’ under a request from the Konakovo City Court of the Tver Region”. (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_388562/ (accessed 25.02. 2022).

⁸⁸ Resolution of the Constitutional Court of the Russian Federation No. 30-P of 29 June 2021 “On verifying the constitutionality of Article 3 of the Federal Law ‘On Additional Measures of State Support of Families with Children’ under a request from the Konakovo City Court of the Tver Region”. (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_388562/ (accessed 25.02. 2022).

⁸⁹ Resolution of the Constitutional Court of the Russian Federation No. 30-P of 29 June 2021 “On verifying the constitutionality of Article 3 of the Federal Law ‘On Additional Measures of State Support of Families with Children’ under a request from the Konakovo City Court of the Tver Region”. (In Russ.). URL: http://www.consultant.ru/document/cons_doc_LAW_388562/ (accessed 17.10.2021).

Thus, the Ministry of Labor and Social Protection of the Russian Federation has developed a draft law⁹⁰ in accordance with the instructions of the Deputy Prime Minister of the Russian Federation Ms. T.A. Golikova in the framework of the execution of the Judgement of the Constitutional Court of the Russian Federation No. 30-P of 29 June 2021 in order to improve the legislation of the Russian Federation on additional measures of state support in terms of expanding the circle of persons entitled to additional measures of state support in connection with the birth (adoption) of children. On 29 September 2021, this draft was received by the Government of the Russian Federation.⁹¹ At the governmental session held on 28 October 2021, it was decided to approve the Draft Federal Law “On Amendments to the Federal Law ‘On Additional Measures of State Support of Families with Children’ and submit it to the State Duma through the established procedure, which was done on 1 December 2021⁹² – Draft Law No 28410-8⁹³.

In its judgement, the Constitutional Court of the Russian Federation has, in a way, “commented” on the emerging practice where men become single fathers by resorting to surrogacy. In our view, that is a big step forward in developing the national legislation in favour of single men willing to have children.

5. Conclusion

In light of all of the aspects discussed above, we believe it reasonable, firstly, to stipulate at the level of the Federal Law of the Russian Federation “On Basics of Health Protection of the Citizens in the Russian Federation” the right of single men to use assisted reproductive technologies, and, secondly, to bring the provisions of said Federal Law in line with the provisions of the Federal Law “On Acts of Civil Status” as regards the right to register a child born as a result of surrogacy. It also appears to be essential for the legislator to clarify that the regulation of surrogacy

(including the registration of surrogate children) as envisaged in the Family Code should apply as particular rules, rather than as general rules. Respective amendments will solve the issues outlined in the present article, namely: the inconsistent interpretation by courts of the provisions of the laws as regards the regulation of surrogacy and continued violation of human rights and freedoms that should be protected irrespective of sex and “married/family status”; and the uncertainty with respect to the subjects entitled to resort to surrogacy and subsequently to register a child born through surrogacy. Furthermore, we believe that the Judgement of the Constitutional Court of the Russian Federation No. 30-P of 29 June 2021 “On verifying the constitutionality of Article 3 of the Federal Law ‘On Additional Measures of State Support of Families with Children’ under a request from the Konakovo City Court of the Tver Region” has raised new issues that have to do with the unequal treatment of fathers of surrogate children and other categories of persons entitled to receive maternity (family) capital. It appears feasible to enact the definition of “family” at the level of the Federal Law of the Russian Federation “On Additional Measures of State Support of Families with Children”, or to amend that Federal Law according to which the right to maternity (family) capital will depend on the marital status of the persons concerned. At the same time, it must be taken into account that in such instance the right to receive maternity (family) capital of other categories of citizens listed in Article 3(1) of the Federal Law of the Russian Federation “On Additional Measures of State Support of Families with Children” will be also directly dependent.

With regard to the international legal regulation of surrogacy, it would seem possible to propose that the international community first and foremost develop universal and harmonised approaches to the key terms for surrogacy and the parties involved in this type of ART, taking into account the experience of the Russian Federation on these matters.

⁹⁰ Federal portal of drafts of normative legal acts: On amendments to the Federal Law “On Additional Measures of State Support of Families with Children”. (In Russ.). URL: <https://regulation.gov.ru/projects/List/AdvancedSearch#npa=119127> (accessed 17.10.2021).

⁹¹ The Ministry of Labor promised maternity capital to fathers of children from surrogate mothers. – *RBC.ru*. September 13, 2021. (In Russ.). URL: <https://www.rbc.ru/society/13/09/2021/613e9b869a794792ae7778da> (accessed 17.10.2021).

⁹² Official Website of the Government of the Russian Federation. (In Russ.). URL: <http://government.ru/news/43695/> (accessed 28.02.2022).

⁹³ Draft Law No. 1191971-7 On Amending Certain Legislative Acts of the Russian Federation (in terms of establishing the requirement for citizenship of the Russian Federation when using surrogate motherhood on the territory of the Russian Federation). (In Russ.). URL: <https://sozd.duma.gov.ru/bill/1191971-7> (accessed 17.10.2021).

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