

# ПРОБЛЕМИ ПРИВАТНОГО ПРАВА

УДК 347.63

DOI: 10.31359/1993-0909-2022-29-3-124

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## ПРАВОВІ КОЛІЗІЇ ЗАСТОСУВАННЯ ТЕХНОЛОГІЇ СУРОГАТНОГО МАТЕРИНСТВА ІНОЗЕМЦЯМИ В УКРАЇНІ ТА ШЛЯХИ ЇХ ПОДОЛАННЯ

**Анотація.** *Актуальність дослідження обумовлена тим, що в Україні на разі відсутні чіткі законодавчі вимоги щодо процедури сурогатного материнства. Відносно низька вартість допоміжних репродуктивних послуг зумовлює значний попит серед іноземців на використання сурогатного материнства. У зв'язку із цим постає питання про необхідність удосконалення правових засад застосування технології сурогатного материнства. Вказане обумовлює і мету дослідження – встановити правові колізії застосування технології сурогатного материнства іноземцями в Україні, розробити механізми їх подолання. У дослідженні використано методологію, що включає міждисциплінарний підхід, що дозволяє системно аналізувати теоретичні та практичні аспекти правових колізій при використанні іноземцями в Україні технології сурогатного материнства, а також розробляти пропозиції щодо їх визначення. У статті розглянуто окремі аспекти правового регулювання та правові колізії при використанні технології сурогатного материнства для іноземців в Україні. Звертається увага, що в Україні понад 80% подружніх пар, які скористалися послугами сурогатного материнства, є іноземними громадянами. Розкриваються аргументи за та проти заборони сурогатного материнства для іноземців*

в Україні. Звертається увага на необхідність гарантування балансу приватних та публічних інтересів при законодавчому регулюванні сурогатного материнства. Досліджено порядок застосування процедури сурогатного материнства для іноземців в Україні, проблеми укладання та розірвання договору про надання послуг сурогатного материнства, а також порядок реєстрації народження дитини. Аргументується необхідність внесення змін до законодавства України та встановлення заборони на односторонню відмову від угоди про сурогатне материнство після впровадження ембріона. На основі аналізу судової практики встановлено, які проблеми можуть виникнути при реєстрації батьківства та материнства іноземними генетичними батьками у зв'язку із застосуванням іноземцями в Україні процедури сурогатного материнства у випадках, коли їхнє вітчизняне законодавство не дозволяє або обмежує сурогатне материнство. Встановлено, що незалежно від заборони чи обмеження використання сурогатного материнства в країні, якщо дитина народилася у громадян таких батьків за кордоном, Європейський суд з прав людини виходить із позиції захисту, перш за все, права дитини та її найкращі інтереси. Для усунення юридичних колізій пропонується прийняти на рівні міжнародного акта уніфіковані підходи до визначення походження дитини, народженої внаслідок використання технології сурогатного материнства.

**Ключові слова:** допоміжні репродуктивні технології, сурогатне материнство, іноземний громадянин, закон, рішення суду.

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## LEGAL CONFLICTS OF APPLICATION OF TURNOVER TECHNOLOGY BY FOREIGNERS IN UKRAINE AND WAYS TO OVERCOME THEM

**Abstract.** The relevance of the study is due to the fact that in Ukraine there are currently no clear legal requirements for the procedure of surrogacy. The relatively low cost of assisted re-

*productive services leads to significant demand among foreigners for the use of surrogacy. This raises the question of the need to improve the legal framework for the use of surrogacy technology. This determines the purpose of the study – to establish legal conflicts between the use of surrogacy technology by foreigners in Ukraine, to develop mechanisms to overcome them. The study used a methodology that embodies an interdisciplinary approach that allows systematic analysis of theoretical and practical aspects of legal conflicts in the use of surrogacy technology by foreigners in Ukraine, as well as develop proposals for their elimination. The article examines certain aspects of legal regulation and legal conflicts in the use of surrogacy technology for foreigners in Ukraine. Attention is drawn to the fact that in Ukraine more than 80% of married couples who have used the services of surrogacy are foreign citizens. The arguments for and against the prohibition of surrogacy for foreigners in Ukraine are disclosed. Attention is drawn to the need to guarantee the balance of private and public interests in the legislative regulation of surrogacy. The procedure for applying the surrogacy procedure for foreigners in Ukraine, the problems of concluding and terminating an agreement on surrogacy services, as well as the procedure for registering the birth of a child have been investigated. The need to amend the legislation of Ukraine and the establishment of a ban on unilateral refusal from the surrogacy agreement after the embryo has been implemented is argued. Based on the analysis of judicial practice, it was established what problems may arise in the registration of paternity and maternity by foreign genetic parents in connection with the application of the surrogacy procedure by foreigners in Ukraine in cases where their native legislation does not permit or restricts surrogacy. It has been established that, regardless of the prohibition or restriction of the use of surrogacy in the country, if the child was born to citizens of such parents abroad, the European Court of Human Rights comes out from the position of protecting, first of all, the rights of the child and his best interests. It is proposed to adopt at the level of an international act unified approaches to determining the origin of a child born as a result of the use of surrogate motherhood technology to eliminate legal conflicts.*

**Key words:** *assisted reproductive technologies, surrogacy, foreign nationals, law, court decisions.*

## INTRODUCTION

In Ukraine, the procedure of full surrogacy is currently allowed (a surrogate mother should not have a genetic link with the child). At the same time, the lack of clear legal requirements for the procedure of surrogacy, the relatively low cost of its implementation in Ukraine leads to significant demand among foreigners for the use of this reproductive technology.

Experts note that after the ban on surrogacy for foreigners in India, Ukraine has only increased demand for surrogacy, which has become an additional factor in transforming our country into one of the centers of surrogacy at the world level [1]. Given that more than 80% of couples who have used the services of surrogate mothers in Ukraine are foreign nationals, the issue of banning foreigners from using this method of assisted reproductive technologies has been repeatedly raised. At the same time, different legal regulation of surrogacy in Ukraine and abroad leads to legal conflicts over the use of this assisted reproductive technology by foreign nationals, creates additional obstacles in determining the origin of the child and further registration of his birth.

The relevance of the study is confirmed by the fact that in December 2021 and January 2022, four bills on the legal regulation of assisted reproductive technologies were submitted to the Verkhovna Rada of Ukraine. Undoubtedly important is the desire of the Parliament of Ukraine to legislate the legal aspects of the use of various assisted reproductive technologies, which include surrogacy. Despite criticism in the press and public statements by some politicians, the bills do not propose to ban the use of surrogacy technology in Ukraine. That is, such reproductive technology will remain available to foreigners. At the same time, the government and three alternative projects have different, sometimes even opposite approaches to the legal regulation of surrogacy, different requirements for surrogate mothers, no equality and balance of interests in regulating the rights and responsibilities of genetic parents and surrogate mothers. requirements for the form of the surrogacy agreement and its essential conditions. There are no single approaches to resolving the legal consequences of force majeure. Yes, there are still many unresolved issues regarding the legal consequences of multiple pregnancies, the birth of a child with illness or the death of a child or the death of a surrogate mother. All bills require such a surrogate mother as having a child. However, there are no guarantees for the child in the event of the death of the surrogate mother. Currently, there is a public and expert discussion of the bills, which shows a number of unresolved issues. This confirms the need for thorough research that would solve a number of practical problems and create the preconditions for the development of quality legislation in the field of regulating the use of all possible reproductive technologies.

Among scientists, the problem of legal regulation of various assisted reproductive technologies is of considerable interest, and the subject of most scientific papers is the analysis of the legal basis of surrogacy [2], the nature, conclusion and elements of surrogacy [3], clarifying the features of legal the status of the parties to the surrogacy agreement [4], protection of the rights of surrogate mothers [5] and children [6]. In addition, scientists have analyzed in a comparative aspect of the problem of legal regulation of the use of surrogacy technology in Ukraine and some foreign countries, including the United States [7] and European countries. At the same time, in these works, the problems of legal regulation of surrogacy are not comprehensively clarified, which did not allow to develop common approaches to the use of such important assisted reproductive technology, taking into account a number of ethical, legal and religious aspects.

Scientists also substantiate the peculiarities of legal relations in the field of such ART as surrogacy, in particular the combination of public and private legal aspects, their regulation by the system of civil, medical and family law [9]. At the same time, in our opinion, the wording is more correct that in the relationship of surrogacy not only public and private legal aspects are combined, but a balance of public and private interests should be ensured. It is the guarantee of such a balance of interests that should be the basic value that will become the basis of the legislative act that will regulate the

use of assisted reproductive technologies. Moreover, the regulation should have a clear legal definition of the possibility of surrogacy by foreigners and establish special legal protection for children born to surrogate mothers. Ensuring the best interests of the child in the use of surrogacy should be key to regulating the legal relationship between the genetic parents, the surrogate mother and the medical institution. This determines the purpose of the study – to establish legal conflicts between the use of surrogacy technology by foreigners in Ukraine, to develop mechanisms to overcome them.

## 1. MATERIALS AND METHODS

The study used a methodology that embodies an interdisciplinary approach that allows systematic analysis of theoretical and practical aspects of legal conflicts in the use of surrogacy technology by foreigners in Ukraine, as well as develop proposals for their elimination. The specified system of methodology included: the historical method which is applied at the analysis of transformation of legislative approaches to regulation of technology of surrogacy; systemic to determine and clarify the legal nature of surrogacy; the formal-legal method was used in the analysis of the texts of current domestic regulations, the legislation of the Member States of the European Union governing surrogacy, as well as case law; legal hermeneutics was used to clarify the content of regulations governing the procedure for the use of surrogacy; the comparative legal method was used to clarify the differences in the legal regulation of the procedure of surrogacy in Ukraine and abroad; the forecasting method provided an opportunity to develop proposals for resolving legal conflicts that occur when using the method of surrogacy by foreigners in Ukraine; The dialectical method has helped to clarify the possibility of protecting the rights of genetic parents and children born to surrogate mothers. Methods of critical analysis have become the basis for clarifying the positions of scientists. This methodology allowed a thorough study of empirical data, statistics, case law of Ukrainian courts, as well as the case law of the European Court of Human Rights.

Scientific researches, international conventions, national legislation of Ukraine, judicial practice, legal and ethical issues were used in the research.

The research work included three main stages. At the first stage of the work, the analysis of doctrinal sources, analytical materials, legislation and case law on the use of surrogacy in Ukraine was carried out. The essence of such assisted reproductive technology as surrogacy, as well as the types and legal basis for its use were clarified.

At the second stage of the research the working hypotheses were tested, the peculiarities of the conclusion, form and content of surrogacy agreements were investigated at the theoretical and practical levels. The importance of informing the genetic parents and the surrogate mother about the essential terms of the contract, the consequences of refusing to perform the contract, the legal consequences of the surrogate mother's failure to follow the doctor's instructions during pregnancy. In addition, they analyzed the legal positions of the European Court of Human Rights on the possibility

of using surrogacy technology, legal certainty in the use of assisted reproductive technologies. Investigated the threats posed by the COVID-19 pandemic in the use of surrogacy technology by foreigners, as well as the protection of the rights and interests of children born to surrogate mothers. Legal conflicts were also revealed over the use of surrogacy technology by foreigners in Ukraine.

The third stage of the study included an analysis of possible ways to overcome the identified legal conflicts with the use of surrogacy technology by foreigners in Ukraine. At this stage, a scheme of the legal mechanism for registering the birth of a child by a surrogate mother and its export abroad by foreign genetic parents was formed. This scheme provides for two variable algorithms: 1) in the case where the genetic parents are citizens of a foreign state, which does not restrict the use of surrogacy; 2) in the case where the genetic parents are citizens of a foreign state that prohibits or restricts the use of surrogacy. It was established that with the second variable algorithm there is an additional stage – the court decision in Ukraine to establish the fact of family ties between the child and genetic parents. In addition, theoretical conclusions were substantiated and ways to improve the legal regulation of surrogacy were developed.

## 2. RESULTS AND DISCUSSION

Demand among foreigners for the services of surrogate mothers in Ukraine has led to the division of politicians, experts and citizens into two groups. Proponents of the ban on surrogacy in Ukraine refer to the provisions of Article 21 of the Convention for the Protection of Human Rights and Dignity of Human Rights in connection with the use of biology and medicine: the Convention on Human Rights and Biomedicine, which prohibits financial gain from the human body and its parts [8]. Emphasis is placed on the biotic aspects, the disruption of the emotional connection between mother and child in the perinatal period. In addition, it is noted that the amount of compensation for surrogate mothers contributes to the orientation of these medical services for foreign nationals and may worsen the demographic crisis in Ukraine and even threatens the nation's gene pool.

The Presidential Commissioner for Children's Rights Mykola Kuleba noted in 2020 that surrogacy in Ukraine is not regulated and leads to violations of children's rights, is a form of exploitation of women to earn income by private business [9]. In this regard, there are often suggestions that if not ban, then at least prevent the development of «surrogate tourism» [10]. The COVID-19 pandemic and the closure of borders have further drawn attention to the issue of surrogacy, when as of June 18, 2020, foreign parents who were citizens of 27 different foreign countries could not enter Ukraine and reunite with their 161 genetically related children. A total of 149 pairs of foreigners applied for permission to enter Ukraine [11].

Opponents of banning surrogacy by foreigners in Ukraine, including the Ukrainian Association of Reproductive Medicine, argue that restricting the use of surrogacy for foreigners is unacceptable, as it will not promote the development of reproductive medicine in Ukraine and significantly reduce financial revenues of clinics [12].

At present, Ukrainian legislation does not contain restrictions on the use of ART by foreigners, including the provisions of Article 123 of the Family Code, if an embryo conceived by a spouse who is a foreign citizen is transferred to a Ukrainian citizen, they are recognized as the child's parents [13].

In addition, the surrogacy procedure is regulated by the Order of the Ministry of Health of September 9, 2013 № 787, which stipulates that this method is used in the presence of medical indications and the necessary list of documents (surrogate mother's application, copy of passport, marriage certificate or on the divorce of a surrogate mother (except single women), a copy of the birth certificate of the child (children), the consent of the surrogate mother's husband to participate in the program, patient applications for ART, copies of their passports, marriage certificates, notarized copies of written contracts which is the surrogate mother and the genetic parents of the child) [14, 15].

In practice, the use of surrogacy in Ukraine is regulated by treaties. In the absence of legislation, there are many practical problems that can result in litigation, namely in cases where the surrogate mother does not want to give up the child or the future parents officially divorce, or the child is born with defects and so on.

The surrogacy agreement must contain the following conditions:

1) the subject of the contract (services provided by the surrogate mother for childbirth, childbirth and transfer to the genetic parents);

2) conditions and procedure for performance of the contract by the parties, conditions and procedure for the procedure, provision of necessary medical care and medical services to ensure the physical and psychological health of the surrogate mother, her place of residence during pregnancy, and household and other living conditions, the procedure for providing genetic parents with information about the health of the surrogate mother during pregnancy, etc.);

3) the procedure for settlements between the parties (the amount of compensation for childbirth, compensation for medical care, life and health insurance, daily expenses during pregnancy, including meals for surrogate mothers, household expenses, transportation costs, other costs agreed parties);

4) the rights and responsibilities of both surrogate mothers and genetic parents include: the right to information about the health of the fetus and surrogate mother, as well as her age, nationality, level of education, pregnancy, the right to be present at ultrasound; research and other important medical procedures, etc. The surrogate mother has the right to information about the child's genetic parents, the course of pregnancy, compensation for childbirth, reimbursement of personal and household expenses.

The duties of a surrogate mother include the following: to register for medical treatment; regularly visit a medical institution; monitor the progress of pregnancy, monitor health, follow the advice of a doctor, inform genetic parents about their health and the health of the child, transfer the child after it;

5) liability of the parties for non-compliance with the terms of the contract. Given a number of practical problems in the implementation of surrogacy agreements,

including failure to perform their duties, both surrogate mothers and genetic parents, it is necessary to clearly define the responsibilities of the parties, to provide for penalties [17]. The surrogacy agreement may provide for additional (optional) conditions, including the confidentiality of the terms of the agreement.

The unresolved problem is the lack of legal regulation of unilateral waiver of the surrogacy agreement. We are convinced that unilateral refusal is possible only before the implementation of the embryo in the body of a surrogate mother. After implementation, there should be a strict legislative ban on unilateral waiver of the surrogacy agreement, which must be established in the Law of Ukraine «On the use of assisted reproductive technologies», which is before parliament or, according to today's realities, prescribed in the agreement.

As a general rule, the surrogacy agreement must be terminated by its proper performance and the achievement of the desired result. At the same time, early termination of the contract is possible due to other circumstances: termination by mutual consent of the parties (it should be emphasized that both unilateral refusal and termination by agreement of the parties is possible only before the embryo is implemented in the woman); termination due to unforeseen circumstances (for example, termination of pregnancy for reasons beyond the control of the parties or due to threat to the life of the surrogate mother, death of the surrogate mother, death of the child during childbirth, etc.).

To register the birth of a child, the surrogate mother submits an application for the surrogate mother's consent to the spouse's consent to the spouse's registration of the child's parents, the signature of which must be certified by a notary, and a certificate of genetic relatedness of the parents (mother or father). with baby [18].

Foreign citizens apply to embassies to bring their children to their country of origin. Parents from the United States and Canada apply for an average of three weeks, from Ireland for two to three weeks, from Australia for seven to eight weeks, and longer from the United Kingdom for about four months [19].

At the same time, problems may arise from the registration of paternity and maternity by foreign genetic parents due to different legislative regulations on the procedure of surrogacy in Ukraine and their country of origin. If surrogacy is prohibited in the country of origin, there is a risk of non-recognition of the paternity and maternity of a child born to a surrogate mother.

In addition, in some European countries (Germany, Spain, Great Britain) the law requires that a court decision issued in the country of birth of the child to confirm the family ties between the child and parents [20]. Without such a decision, the biological parents will not be able to legalize the fact of their paternity in the state of citizenship.

The Unified State Register of Judgments of Ukraine contains many examples of judgments in favor of genetic parents to establish the fact of kinship with a child. Thus, in the decision of the Solomyansky District Court of Kyiv of July 15, 2020, it was established that a child born in Kyiv through the use of assisted reproductive technologies is the son of Spanish citizens. The court decision states that the appeal to the court is

conditioned by a special procedure for Spain to register paternity of children born by surrogacy abroad. In particular, according to paragraph 2 of the Instruction of the Main Directorate of Registers and Notaries of Spain of 18 February 2019 №2367 on updating the registration of paternity of persons born by surrogacy, application for registration in the Consular Register of Civil Status on paternity of children born after publication orders are not subject to review, except when there are decisions of the judicial authorities of the country concerned, which are final and have entered into force [21]. Thus, the legislation of Spain establishes an imperative requirement for spouses to register in Spain the paternity of a child born to a surrogate mother – to obtain in Ukraine a relevant court decision confirming their family relationship.

In the decision of the Kupyansk District Court of the Kharkiv region of April 3, 2018, a German citizen was recognized as the father of two children (twins) born to a surrogate mother in Ukraine. Despite the fact that on February 2, 2018, the Kharkiv City Department of Civil Status Registration issued birth certificates of children, which indicate the parents of German citizens. At the same time, the German embassy does not issue passports to children without a court decision establishing paternity, and in addition, a man who is married to a surrogate mother must be involved in the trial. This situation is due to the fact that German law prohibits surrogacy. The legal mother of children under German law is the woman who gave birth, ie the surrogate mother [22]. The possibility of acknowledging paternity of children exists only when the surrogate mother is not married. If the surrogate mother is married, the presumption of paternity of the surrogate mother’s husband must also be rebutted in the court decision.

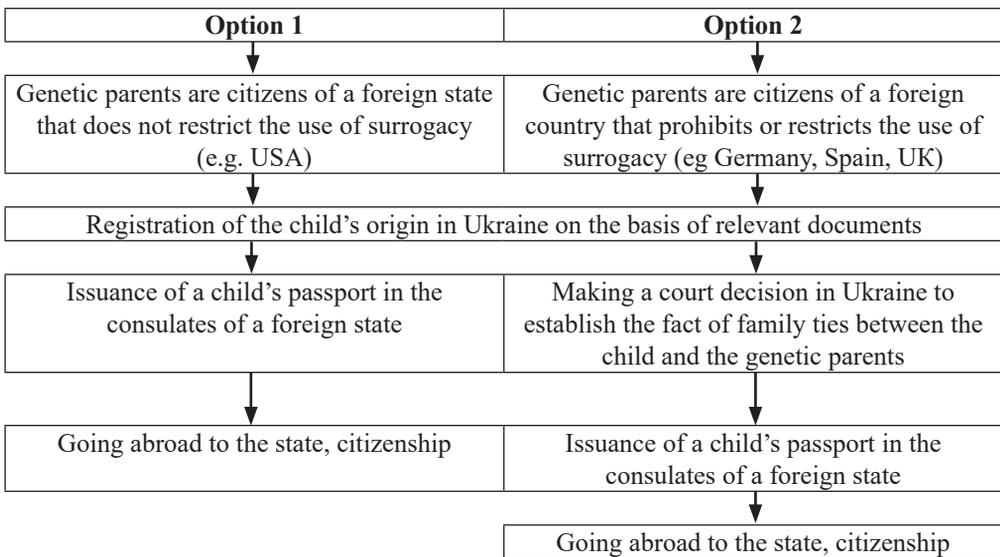


Figure 1. Legal mechanism for registration of the birth of a child by a surrogate mother and its export abroad by foreign genetic parents

Litigation can be heard for more than one month, which entails additional financial costs for foreign nationals, related to both litigation and transport and other costs.

There is a well-known situation when in 2011 Italian citizens used the services of surrogacy in Ukraine. Despite the fact that the spouses were not provided with genetic material, the child, born to a surrogate mother, was registered as descended from Italian parents on the basis of documents issued by a medical institution. In October 2011, the child was transported to Italy, but after the Italian authorities established that there was no genetic link between the child and the parents, she was selected and transferred to a children's institution [23].

In dealing with the seizure of children from parents born to surrogate mothers, the ECtHR proceeds from the protection of the right to privacy and the principle of the best interests of the child. In particular, in *Paradiso and Campanelli v Italy* (2017), the Grand Chamber emphasized the State's discretion in recognizing the right to use surrogacy and, given the facts, acknowledged the impact of the decision on the applicants, but concluded that there had been no violation of Article 8. Convention for the Protection of Human Rights and Fundamental Freedoms [24].

In the case of *Mennesson v. France*, the applicants traveled to California to use the services of an egg donor and a surrogate mother who gave birth to twins in March 2000. However, the French embassy refused to register the fact of birth due to lack of genetic connection of one of the parents, despite the decision of the California court. The applicants lived in France and challenged the refusal to register the birth with the ECtHR, which found no violation of Article 8 of the Convention on Parents and admitted a violation of Article 8 on children (applicants 3 and 4) as the latter were in a state of legal uncertainty and: "... the consequences of non-recognition in French law of the legal relationship between parents and children are not limited to parents who have chosen a certain method of ART, prohibited in France. They also affect children themselves, whose right to respect for private life, which means that everyone should be able to establish the components of their personality, including the legal relationship between parents and children, is significantly violated. Accordingly, there is a serious question about the compatibility of this situation with the best interests of children» [25]. Thus, regardless of the prohibition or restriction of the use of certain ARTs in a foreign country, if the child was born to citizens of such parents abroad, the European Court of Human Rights proceeds from the position of protecting the child's rights and best interests.

## CONCLUSIONS

In Ukraine, there is no proper legislative regulation of the use of surrogacy, as well as other assisted reproductive technologies. That is why it is time to adopt a law that would establish legal certainty in the use of assisted reproductive technologies, would be high quality and effective in regulating surrogacy. Improving the current Ukrainian legislation by adopting a high-quality, clear and predictable law is in line with the case law of the European Court of Human Rights and meets international standards.

There are legal conflicts in connection with the application of surrogacy by foreigners in Ukraine in cases where their legislation of their country of origin does not allow or restrict surrogacy. Hundreds of cases are heard by the courts of Ukraine every year on the basis of applications from citizens of Great Britain, Spain and Germany to confirm their family ties with children born to surrogate mothers. This is due to the requirements of foreign law, not Ukraine.

Analysis of the legal mechanism of registration of the birth of a child by a surrogate mother and its export abroad by foreign genetic parents allowed to identify two variable algorithms: in the case where the genetic parents are citizens of a foreign state, which does not restrict the use of surrogacy; in the case where the genetic parents are citizens of a foreign state that prohibits or restricts the use of surrogacy. It was established that the second variable algorithm has an additional stage – a court decision in Ukraine to establish the fact of family ties between the child and genetic parents.

In order to eliminate such legal conflicts, it is necessary to establish common approaches at the level of an international act to determine the origin of a child born as a result of surrogacy technology, which in our opinion will be in the best interests of children and relevant ECtHR practice.

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**Рекомендоване цитування:** Яроцький В. Л., Надьон В. В., Менджул М. В. Правові колізії застосування технології сурогатного материнства іноземцями в Україні та шляхи їх подолання. *Вісник Національної академії правових наук України*. 2022. Т. 29. №3. С. 124–136.

**Suggested Citation:** Yarotskiy, V. L., Nadon, V. V., & Mendzhul, M. V. (2022). Legal conflicts of application of turnover technology by foreigners in Ukraine and ways to overcome them. *Journal of the National Academy of Legal Sciences of Ukraine*, 29(3), 124–136.

Стаття надійшла / Submitted: 18.07.2022  
Доопрацьовано / Revised: 18.08.2022  
Схвалено до друку / Accepted: 29.08.2022