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The Relationship and Differences Between Surrogacy and Adoption in the Czech Republic

ABSTRACT: *Surrogacy is a phenomenon that is receiving increasing attention all around Europe (but not limited to it). Some countries have already managed to incorporate it into their legal systems through explicit regulations or bans of such practice, whereas others remain reluctant about it. This unique mechanism of establishing a family has an interesting bond with another mechanism for family establishment – adoption. Although one may believe the difference between the two is clear as adoption has always been described as ‘accepting a foreign natural person as one’s own’, in reality, it is somewhat complicated, particularly in a country, whose legal regulations almost pretend that surrogacy does not relate to it. This study aims to analyse the two institutions, their differences, and the relationship between them. The key question is ‘Is there any difference, and if so what is the difference, between surrogacy and adoption of a minor child right after it has been born?’ This question entails other interesting questions, such as ‘Who can be a surrogate?’ or ‘Can she be already pregnant at the time she agrees to be one?’ Considering surrogacy is being broadly understood as based on a type of contract between the intended parent(s) and the surrogate, what characteristics should the surrogate have with respect to the close connection with adoption? Can she be already pregnant? All those questions are analysed primarily with respect to the Czech Republic and its blurred approach to surrogacy and missing special legislation. However, other countries and their approach to surrogacy are mentioned as well to provide additional context.*

KEYWORDS: *Adoption, surrogacy, Civil Code, children, the Czech Republic*

List of abbreviations

CC Act No. 89/2012 Coll., Civil Code, as last amended
CRC Convention on the Rights of the Child

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ECAC	European Convention on the Adoption of Children from 1967
ESHRE	European Society on Human Reproduction and Embryology
HFEA	Human Fertilisation & Embryology Authority
IVF	in vitro fertilisation
SLPC	Act no. 359/1999 Coll., on the Social and Legal Protection of Children, as last amended
UN	United Nations

1. Introduction

This study focuses on two interesting institutions of family law. Both are connected to children in a certain way. The first is adoption, a respectable institution with an ancient history, known and used in all European and other countries. Second, surrogacy is much more recent and controversial. Several key issues ethical or medical, and legal are often discussed regarding surrogacy. This study focuses on the legal aspects.

This study aimed to examine the mutual relationships and differences between adoption and surrogacy. The outcome may not be the same depending on the country in which the law is being discussed. This study, focuses on the laws in the Czech Republic. In many countries, the relationship between these two is clear, however, the case of the Czech Republic is different and interesting. This study elucidates the origin of this distinction and assesses its causes. The key question here is whether there is a difference (and if so, what it is) between surrogacy and adoption in the Czech Republic, particularly regarding the direct adoption of a newborn child. The following two sections examines the regulations of adoption and surrogacy in the Czech Republic. The next section deals with the primary issues of this study. The final section summarises the previous sections and suggests topics for further discussion.

2. Adoption in the Czech Republic

2.1. The Concept and Principles of Adoption in the Czech Republic

Adoption is an institution of family law with a long and rich history in many countries, including the Czech Republic. Its history and roots can be traced back to the ancient Roman times. The modern concept of adoption is somewhat different from the ancient one, however, its basic definition and understanding are the same: accepting a foreign person as one's own.

Considering the long tradition of adoption, many important international conventions have dealt with it. The Czech Republic is also a party to them. The significant conventions are the European Convention on the Adoption of Children from 1967,¹ the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption from 1993 (the Haag Adoption Convention),² and the Convention on the Rights of the Child,³ and the Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 (the European Convention on Human Rights).⁴ It is interesting to mention that the Czech Republic was a party only to the original version of the ECAC from 1967 and not to its revised version from 2008. However, the principles in the revised version of the ECAC were implemented in the Czech Civil Code,⁵ which came into force on 1 January 2014.

The primary source of adoption regulations in the Czech Republic is the Civil Code. The provisions regarding adoption are S 794-854 CC. Complementary regulations can be found in the Act on the Social and Legal Protection of Children,⁶ which deals primarily with the public law aspects of adoption, such as maintaining a register of prospective adoptive parents, mediation of adoption, or immediate help to the child's natural family so that the child can stay with them and does not have to be adopted. Another important statute is the Act on Special Civil Proceedings,⁷ which regulates court proceedings accompanying the adoption process. The entire adoption process occurs in multiple shorter court proceedings which follow previous ones. The Civil Code and the Act on Special Civil Proceedings are closely linked to adoption. The former lays down the rules for adoption and the latter ensures that these rules are respected and fulfilled.

What are these rules? The regulation of adoption within the CC includes a definition of adoption in its first provision (S 794): '*Adoption is to be understood as taking a person of another to be one's own*'. Thus, adoption is a substitute for natural

1 The European Convention on the Adoption of Children from 24 April 1967, promulgated in the Czech Legal Order as a Notice of the Ministry of Foreign Affairs, No. 132/2000 Int. Coll. (hereinafter 'ECAC').

2 The Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, promulgated in the Czech Legal Order as a Notice of the Ministry of Foreign Affairs, No. 43/2000 Int. Coll.

3 The Convention on the Rights of the Child from 2 September 1990, promulgated in the Czech Legal Order as a Notice of the Federal Ministry of Foreign Affairs, No. 104/1991 Coll. (hereinafter 'CRC').

4 The Convention for the Protection of Human Rights and Fundamental Freedoms from 4 November 1950, promulgated in the Czech Legal Order as a Notice of the Federal Ministry of Foreign Affairs, No. 209/1992 Coll.

5 Act No. 89/2012 Coll., Civil Code, as last amended (hereinafter 'CC').

6 Act No. 359/1999 Coll., on the Social and Legal Protection of Children, as last amended (hereinafter 'SLPC').

7 Act No. 292/2013 Coll., on Special Civil Proceedings, as last amended.

(biological) parenting. Moreover, the definition distinguishes between adoption and determination of parentage, where the determination of parentage is a manner of establishing a legal relationship between (usually and presumably) biologically related persons in a direct line, and adoption is a manner of establishing a similar relationship between foreign persons.⁸ The chief consequence of adoption is a change in the status of the adoptee. For the adoption decision, the adoptee is considered the natural child of the adoptive parent(s) (i.e. the adoption of a minor as the most common type). Upon adoption, the family relationship between the adoptee and his/her natural family, and the rights and duties arising from this relationship are terminated [S 833(1) CC]. The Czech regulation of adoption is generally based on several basic principles derived from the aforementioned conventions. These principles are subsidiarity, the best interests of the child, voluntariness, a sufficient relationship between the adoptee and prospective adoptive parents, non-profit, and the court's decision.

The principle of 'subsidiarity' and the principle of 'the best interests of the child' are closely connected and are the most important. Adoption is usually used in situations where there is a problem with the child's natural family. However, it can and should only be used when there is no other less severe solution. For example, if a child's natural parents cannot take care of the child properly, however, are attempting to do their best, or if the family is in a bad financial situation or lives in an unsatisfactory home, adoption should not be a solution to that particular problem. Instead, the State and its bodies (particularly the Child Legal and Social Protection Authorities) should intervene and adopt such measures to solve the initial problem in the family (e.g. counselling, influencing the natural parents to exercise their parental responsibility properly). It is always better for a child to remain in his or her natural family rather than be removed from it. Remaining with the family is usually in the best interests of the child. The principle of the best interests of the child is derived from art. 3(1) and 9(1) of the Convention on the Rights of the Child. Adoption cannot occur if it is not in the best interests of the child. This principle is explicitly mentioned in the last sentence of the S 795 CC.

One principle that is closely related to the previous ones is the principle of 'voluntariness'. All the parties involved must provide consent for adoption. The prospective adoptive parents must agree to become one; no one can force them to adopt a child. However, no one can force the child's biological parents to provide their consent for adoption. Their consent is so important that even in cases where they cannot provide consent, it must be replaced by a special guardian appointed solely for this purpose. Finally, the child to be adopted should also provide consent for adoption. This principle also represents art. 9(1) of the CRC within the Czech legal order.

⁸ Sedlák and Kyselovská, 2020, p. 560.

§ 795 CC expresses another principle related to the required 'quality of the relationship between the child and his or her prospective adoptive parents'. Even if the circumstances of a particular situation suggest that adoption is generally possible and that it is necessary to remove the child from his/her natural family, it is not possible to match any child with any prospective adoptive parent. It is essential to determine the right adoptive parents. One way of determining this is to carefully consider both the prospective adoptive parent and the child and whether they are an appropriate match. Moreover, there always exists a mandatory period of pre-adoption care during which prospective adoptive parents become familiar with the prospective adoptee and vice versa. This is aimed to monitor and evaluate mutual relationships. Therefore, the Civil Code stipulates that an adoption can only occur if there is a relationship between the adoptee and prospective adoptive parents that is similar to the relationship between natural parents and their child, or a basis for such a relationship. This implies that the child must perceive the prospective adoptive parent as his/her natural parent. These relationships should also be mutual. If there is no such relationship, or even its basis (on either side), the child should not be adopted, not by the prospective adoptive parent in question.

Adoption is strictly 'non-profit'. No one can ask for remuneration or any other profit for granting their consent to adoption, or 'giving up' their child for adoption. No one can be paid for becoming an adoptive parent; nor can anyone, including the State bodies involved in the adoption process, demand an unreasonable profit for arranging adoption. These rules reflect efforts to prevent the trafficking of children and exploitation of both children and their natural parents. The provision of this principle is contained in § 798 CC. It does not prohibit any profit; it is only an unreasonable profit. The important question is what is a reasonable profit? First, it is necessary to indicate that the mediation of adoption is allowed only for the Child Legal and Social Protection Authorities. Other authorities, natural persons, and legal persons are prohibited from this activity [§ 19a(1)d SLPC]. The profit that can be demanded by the Child Legal and Social Protection Authorities is usually administrative fees.

Finally, adoption must always be decided by the court during proper court proceedings. The adoption procedure comprises several shorter procedures, each of which deals with specific issues such as a decision to conceal the adoption, a decision to place the child in the care of a prospective adoptive parent before adoption, or a decision on the adoption itself.⁹ This principle is closely related to all the previous principles. In particular, the court must ensure that the best interests of the child are met and that the rights of all concerned people are protected and not violated.

⁹ All of those 'shorter' proceedings relating to adoption are regulated in § 427 – § 451 of the Act No. 292/2013 Coll., on Special Civil Proceedings, as last amended.

2.2. Types of Adoption

There is more than one type of adoption. Contrarily, adoption can be divided into many categories based on different factors. First, it is possible to distinguish different types of adoption based on the age of the adoptee. There is the classic adoption of a minor, and the adoption of an adult. The adoption of a minor concerns children under the age of 18 who have not yet acquired full legal capacity. This is traditional and much more common than adult adoption. The adoption of an adult, which essentially means the adoption of any other person over the age of 18, may appear unusual or new. However, the adoption of an adult was possible and legal in former Czechoslovakia (based on Act No. 56/1928 Coll., on Adoption) until 1950, when the new Act on Family Law came into force.¹⁰ There are two subtypes of adult adoption: the adoption of an adult which is the adoption of a minor-like and the adoption of an adult which is not the adoption of a minor-like. The first can be used only in cases set down in S 847(1) Civil Code if:

- a) the natural sibling of the adoptee has been adopted by the same adoptive parent;
- b) the adoptee was a minor at the time of submission of the adoption application, and the adoption process was not completed by the time he/she reached the majority.
- c) the adoptive parent has taken care of the adoptee, even in the adoptee's minority, as if he/she has been his/her own child.
- d) the adoptive parent intends to adopt the child of his/her spouse.

However, the adoption of an adult, which is not similar to the adoption of a minor, can occur if there are special circumstances; it is beneficial to both the adoptee and the adoptive parent and does not conflict with the important interests of the adoptee and the adoptive parent's descendants. The consequences are also different in the two cases; for example, in the areas of property rights and kinship of the adoptee and his/her descendants towards the adoptive parent's family.¹¹ The provisions on the adoption of an adult apply by analogy if the child is a minor who has been granted full legal capacity (S 854 CC).

The second method of classifying the different types of adoption is based on the number of adoptive parents. There can be a single-parent, joint, or step-parent adoption. The preferred type of adoption is joint adoption, in which there are two adoptive parents. This type of adoption is only available to spouses, who according to S 655 CC, can only be men and women. Same-sex couples, whether registered or not, and opposite-sex cohabiting couples cannot be joint adoptive parents. However,

¹⁰ Kornel, 2020, p. 694.

¹¹ *ibid.*, pp. 694-696.

single-parent or individual adoption is available to any person, married or not, if he or she meets all other requirements. Section 800(1) of the Civil Code states that single-parent adoption should preferably be conducted by one of the spouses and only in exceptional cases by other persons. Both this and the rule on joint adoption clearly demonstrate that Czech legislators prefer marriage as an ideal family environment for adoptees. This conclusion is supported by the judicial practice of the Constitutional Court of the Czech Republic.¹² In the case of step-parent adoption, the adoptive parent of the child is the spouse of the child's natural parent (S 833 [2]). This is the only type of adoption in which original kinship with the natural parent is preserved (relative to the spouse of the prospective adoptive parent). Similar to joint adoption, this type of adoption is available only to the spouses.

The third classification of adoption is based on how adoptive parents are sought out. There are direct and indirect (or State-mediated) adoption. The child's biological parents select the prospective adoptive parents in direct adoption, whereas the State and its bodies determine suitable adoptive parents in indirect adoption. However, even if natural parents select someone they prefer to be their child's prospective adoptive parent, this does not automatically imply that the selected person will be the child's adoptive parent. The court can decide otherwise, particularly if the intended person's adoption is against the child's best interests. The intended person may also refuse to become an adoptive parent.

2.3. Conditions for Adoption

2.3.1. Conditions for the Adoptee

For adoption to occur, several requirements (apart from respecting basic principles) must be met. They can be divided into three groups, each relating to one of the parties involved: the adoptee, adoptive parents, and the child's biological parents.

The most important condition is adoptee consent. From the age of 12 years, the child must provide his or her consent unless there is no doubt that such a measure is fundamentally contrary to his or her best interests or if the child is unable to understand and consider the consequences of his or her consent [S 806(1) CC]. The child should always be properly informed by the court regarding the content and consequences of providing consent for adoption. If the child is under 12 years old,

¹² See, for example, the Constitutional Court's decision No. Pl. ÚS 10/15, of 19 November 2015. The Constitutional Court stated that it was not unconstitutional nor contrary to the CRC that the legal regulation of adoption did not allow joint adoptions of cohabitants because: 1. marriage is a more stable relationship than cohabitation, and 2. the child's situation would be better after the termination of marriage than of cohabitation.

consent for adoption is provided by a specially appointed guardian. The guardian is obliged to first ascertain all the relevant facts that lead him or her to the conclusion that the adoption is in the best interest of the child (S 807 CC). The child may also revoke the consent until the final decision on adoption is made. Both granting and revoking consent for adoption should be performed before the court.¹³

Moreover, it is important to assess the child's specific needs. For example, a child's health is extremely important. If a child has a serious illness or disability (mental or physical), adoptive parents should be selected carefully, as not everyone will be able to properly care for a child with special needs. The same applies to the child's ethnicity, cultural background and religion. Finally, there should be a reasonable age difference between the child and adoptive parent, usually at least 16 years (S 803 CC). The age difference should help create a parent-child relationship in which there is usually a natural age difference between the parents and the child (at least 16 years, but usually more). The upper age limit is not specified, although this is important as the adoptive parent should also consider the future and whether he/she will be able to raise the child until he/she reaches the age of majority. The upper limit is then left to the court's discretion.¹⁴

2.3.2. Conditions for the Adoptive Parent(s)

First, the adoptive parent must be an adult and have full legal capacity. His or her personal characteristics and way of life should also guarantee that he or she will be a good parent for the adoptee [S 799(1) CC]. The court must thoroughly and carefully examine the prospective adoptive parents. It aims to find a 'new parent and family' for a child who has recently lost his or her natural parents. Therefore, even the small details of personal characteristics play a crucial role. What is assessed? For example, the motivation to become an adoptive parent, reputation at work and in the neighbourhood, household, financial situation, debts, whether they have children of their own, addiction, and health. The aim is to find the right adoptive parent for the child and not vice versa. Therefore, while in some cases the prospective adoptive parent may be older, in other cases, they will not be suitable if they are significantly older or disabled (e.g. if the child to be adopted is very young). S 799(2) CC states that '*the state of health of one or both of the adoptive parents must not significantly limit their ability to care for the adopted child*'. However, in the case of joint adoption, if one is ill or disabled and the other is healthy, both can be joint adoptive parents.

¹³ Sedlák, 2020a, p. 607.

¹⁴ Sedlák, 2020b, p. 595.

A prospective adoptive parent cannot be closely related to the adoptee. However, there is an exception. According to S 804 CC, this does not apply to surrogate motherhood (for more information on surrogacy, see Section 3). Similar to the conditions of the adoptee's, the consent of the adoptive parent is required. If only one spouse is an adoptive parent, the other spouse must also provide consent. These conditions must be simultaneously fulfilled. In particular, in the case of the personal characteristics and health of the prospective adoptive parent, the final decision rests with the court, which should assess each case separately, considering its specific circumstances. However, it is possible to imagine a few characteristics that would almost automatically rule out the possibility of becoming an adoptive parent: drug addiction, gambling, habitual drinking or criminalisation. These personal characteristics are definitely not in the best interests of the child.¹⁵

2.3.3. Conditions for the Child's Natural Parents

Finally, consent of the child's natural parents is an important criterion. This is the only condition; however, if it is not met, adoption cannot occur. Parental consent must be provided to the court and must be free, serious, and cannot be subject to a condition. It must also be specific; the specific child or children to be adopted must be named or identified. It is not possible to provide blanket consent for the adoption of all of your future children. Parents must provide it freely, and be informed of the consequences of their consent. The father can provide consent for adoption from the birth of the child. The mother of the child can provide her consent to adoption only six weeks after the birth of the child [S 813(1) CC]. The consent is valid for six years from the date it is provided. If the child is not adopted within this period, informed consent must be provided again. Both parents may also revoke consent within three months of providing it. Under special circumstances,¹⁶ it is possible to revoke consent even after three months.

Consent for adoption is so important that it cannot be omitted in any situation, even if the parent has not yet acquired full legal capacity, or is unknown. However, in the case of the partial legal capacity of a minor, the parent must be at least 16 years old to provide consent; if he/she is younger, he/she cannot provide consent, and therefore, adoption is excluded. Parents whose legal capacity has been limited can undertake juridical acts only to the extent that their legal capacity has not been limited. There

¹⁵ Sedlák, 2020c, pp. 582-583.

¹⁶ According to S 817(2) CC those special circumstances are: a) the child hasn't not been handed over to the pre-adoption care yet; b) according to the court's decision issued on the application of the natural parents, the child should be handed over by the person to whom it was entrusted because it is in the best interest of the child to be with its natural parents.

may also be a special situation where natural parents are unknown, deceased, incapable of expressing their will, recognising the consequences of their actions, or have been deprived of their parental responsibility and the right to consent to adoption, or where legal parentage has not been established. If such circumstances exist on the part of both natural parents, their consent must be replaced by a guardian or specially appointed tutor during court proceedings. The guardian or tutor is obliged to find all relevant facts about the child, his/her family, and close relatives before deciding whether to provide consent to adoption. In another situation, the consent of the natural parent may be substituted if the natural parent is obviously uninterested in his or her own child (continuously fails to demonstrate genuine interest in his or her own child).¹⁷

3. Surrogacy

3.1. Surrogacy in a Broader Global Context

Surrogacy is discussed here in a broader context. It is receiving popularity in many countries, including European countries. Although, many definitions exist, most are similar. They all agree that surrogacy is a process whereby a woman carries and gives birth to a child for another person and then gives up the child born as a result of surrogacy pregnancy. Usually, there is a contract between the surrogate and the intended parents. In this contract, the parties lay down rules for their mutual relationship, the surrogacy process, etc.

According to the HFEA (Human Fertilisation & Embryology Authority): *'Surrogacy is when a woman carries and gives birth to a baby for another person or couple'*.¹⁸ The UN (United Nations) Special Rapporteur generally agrees with that definition when he says that it is *'...a reproductive practice on the rise. It refers to a form of third-party reproductive practice in which intending parent(s) contract a surrogate mother to give birth to a child'*.¹⁹ The ESHRE definition provides more or less the same answer; however, it is more detailed because it is the chief European body dealing with human reproduction issues. According to ESHRE (European Society on Human Reproduction and Embryology): *'A "surrogate" is a woman who becomes pregnant, carries and delivers a child on behalf of another couple (intended or commissioning parents). The term surrogacy covers several situations. In the first situation (full surrogacy), the gestating woman has no genetic link to the child. In that case, (i) the gametes of both*

¹⁷ Sedlák and Šohajdová, 2020, p. 632.

¹⁸ No date, 'Surrogacy', *Human Fertilisation & Embryology Authority* [Online].

¹⁹ No date, 'Surrogacy: Special Rapporteur on the sale and sexual exploitation of children', *UN Special Rapporteur* [Online].

commissioning parents are used; (ii) both gametes come from donors (donation of either supernumerary or de novo-created embryos); or (iii) one of the commissioning parents provides the gametes and a gamete donor the other. In the second situation (partial surrogacy), the surrogate mother has a genetic link by providing the oocyte. In either case, the gestating woman intends to relinquish the child to the commissioning parents, who want to assume parental responsibility'.²⁰

In general, there are three primary approaches to surrogacy. Countries that belong to the first group impose an explicit and unyielding ban on surrogacy (e.g. Germany), while²¹ the second group of countries approach surrogacy in exactly the opposite manner. They have adopted proper legal regulations of surrogacy (e.g. the United Kingdom,²² the Netherlands, Greece, Ukraine, and India)²³ Some of them only allow altruistic surrogacy, whereas others allow its commercial version. The third group of countries lies in between. Countries in this group do not ban surrogacy however, do not sufficiently regulate it. The Czech Republic is one example of such a country. Despite its simplicity, this approach has several limitations. Some of them will be described in the following subsections. Apart from the commercial-altruistic categories, surrogacy is commonly divided into two other classes: gestational and traditional. Gestational (or host) surrogacy implies that the surrogate is not genetically related to the child she carries. The embryo is created in vitro using the intended mother's (or donor's) eggs and the intended father's (or donor's) sperm. In traditional (or natural) surrogacy, a surrogate is inseminated with the intended father's (or donor's) sperm. The fertilised egg is her own. Therefore, she is both the genetic and gestational mother of the child she carries.²⁴

3.2. Regulation of Surrogacy in the Czech Republic

As the previous subsection suggests, the Czech Republic has an indifferent approach to surrogacy. The Czech legislature is aware that surrogacy exists, however, its awareness does not extend to the idea of properly dealing with the issue. The only provision of the Civil Code, and indeed of the Czech legal system, that mentions surrogacy is S 804. This provision bans the adoption by close relatives or siblings. The only exception to this ban is surrogate motherhood. This provision is relatively new and was introduced for the first time in the current Civil Code in 2014. There are no

20 Shenfield et al., 2005, p. 2705.

21 Vacová, 2020, pp. 62-69 [online].

22 See e.g. Surrogacy Arrangements Act 1985 c. 49 (hereinafter 'Surrogacy Arrangements Act 1985').

23 Vacová, 2020, pp. 62-69 [online]. See also, Herts, 2019, pp. 421-422.

24 Banerjee, 2013, p. 439 [online].

other provisions that suggest whether there are any requirements or conditions for surrogacy, nor who can participate in it, and not even its legal definition.

This is a tricky part because the legislators undoubtedly knew that such an institution exists however, apparently believed that it did not concern the Czech Republic or did not want to regulate it further. The latter idea is somewhat understandable, particularly considering the serious and complicated legal, ethical, and social issues raised by surrogacy practices in many countries. However, the legislature's position was dichotomous. While it does not want to regulate it, it admits that it exists, and the background story of why the mention of surrogacy was included in S 804 CC clearly indicates that it occurs, has occurred, and will probably continue to occur in the Czech Republic. The background story is as follows: A young woman suffered serious medical problems that prevented her from safely carrying and giving birth to a child. Her mother, who wanted to help her, offered to carry her daughter's child in her place. The process was conducted by IVF with the daughter's egg, and the child was born. As the Czech Republic respects the ancient Roman principle of '*Mater semper certa*', the older woman who gave birth to the child became its legal mother. Therefore, the younger woman (the child's genetic mother) is the legal sister. If there were no exceptions to the general ban on adoption between close relatives and siblings, their mutual relationship could not be levelled.²⁵

Apart from S 804 CC, there are other provisions that are closely related to surrogacy, although they do not explicitly mention it. The first is S 775 CC. This provision addresses the determination of maternity. The (legal) mother of the child is the woman who gave birth. No exceptions are permitted. The second provision, or a group of provisions, is located within the Criminal Code. S 168(1) and S 169(1) of the Criminal Code describe two primary criminal offences that can be committed during surrogacy. The first is human (or child) trafficking, which occurs when a surrogate mother is paid to give up and hand over the child. The second involves entrusting the child to the care of another person, which can occur when someone places the child in the care of another person for adoption or similar purposes. However, despite the possibility of prosecuting those involved in a surrogacy agreement, to the best of the author's knowledge there has been no criminal case involving the prosecution of either the surrogate or the intended parents (despite the obvious practice and general knowledge of this institution among the public; see the following section). According to some authors, despite the theoretical possibility of prosecuting those who participate in surrogacy, this may not be easy in practice. In their article from 2019, Svatoš and Konečná analysed some of the criminal law aspects of surrogacy (primarily in relation to the offence of entrusting a child to another person). They admit that the characteristics of the aforementioned offence are fulfilled in the case of surrogacy.

²⁵ Králíčková and Kyselovská, 2020, p. 493.

However, they believe that a special circumstance may apply that excludes illegality (consent of the injured person) and that in some cases, there would be no harm to the surrogate mother's act that could otherwise be labelled as entrusting the child to the care of another person.²⁶ There is no space to discuss their opinion in this article, however, they are right in that Czech Criminal Law lacks regulation concerning surrogacy, similar to Civil Law, and that the Czech legislature should deal effectively with the issue of surrogacy.²⁷

Moreover, it is important to add that any surrogacy contract normally concluded within this institution will be deemed invalid because it is manifestly contrary to the law, public order, and good morals. The court will consider such invalidity *ex officio*, without the need to point it out. Such an agreement would be contrary to the law because the Civil Code states that the parent of the child cannot renounce his or her rights and obligations towards the child, and that the subject of the obligation must have the nature of property. A child or any other natural or legal person cannot be owned as property. Simultaneously, the rules for determining maternity are binding. They cannot be omitted or excluded, not even by contracts. This is another reason why, according to the Czech law, a surrogacy agreement is invalid if it is in obvious contradiction to the law.²⁸ Being invalid simultaneously means being unenforceable.

Finally, surrogacy itself has not been the subject of court cases. From time to time, surrogacy appears to be one of the many other factors in court decisions, however, there is no decision dealing with a specific issue arising from surrogacy alone, such as disputes arising from surrogacy agreements, declaring a surrogacy agreement null and void, or the surrogate's refusal to hand over the child. Surrogacy was a key factor in the 2017 decision of the Czech Republic Constitutional Court. The applicants were a same-sex couple who became parents of a child born in California through surrogacy (under the law of the State of California). They applied for recognition of their parentage in the Czech Republic because one of them had Czech citizenship. However, State authorities refused to register the two men as the child's parents on the grounds that this would be contrary to Czech law and public policy. However, the Constitutional Court stated that abstract principles cannot be placed above the best interests of the child in a particular case and allowed the recognition of same-sex parentage in this particular case. Surrogacy was not the subject of the court's decision; it simply stated that the family life between the applicants and the child, established in accordance with the law abroad, must be respected in the Czech Republic.²⁹

26 They specifically mention a situation where the surrogate receives only a reasonable and proportionate amount for her action, e.g. the actual cost of her pregnancy and delivery. For further details, see Svatoš and Konečná, 2019, pp. 7-13.

27 *ibid.*

28 Králíčková, 2015, pp. 725-732.

29 Decision of the Constitutional Court of the Czech Republic No. I. ÚS 3226/16-2, of 29 June 2017.

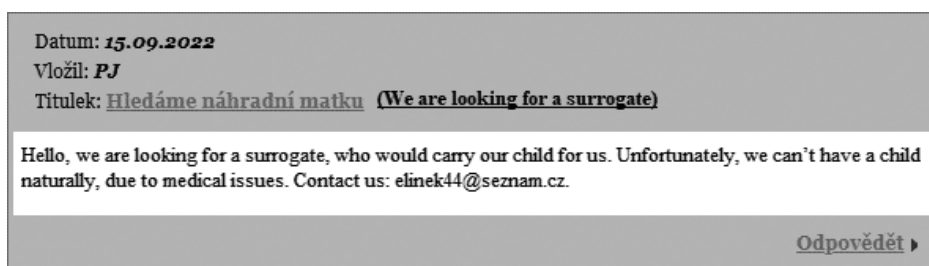
Apart from this decision, surrogacy may be one of the many factors in some adoption cases. However, one can only guess the true number, as the parties are not obliged to admit that they have undergone surrogacy, nor do they specifically search for this fact. This aspect corresponds to the general approach of the legislator, State, and its bodies to surrogacy in the Czech Republic.

3.3. The Practice of Surrogacy in the Czech Republic

The aforementioned case suggests that the legislators expected surrogacy to occur, although rarely, and between close relatives within one family. Moreover, it is strange that they took an indifferent and overlooking approach. However, practice suggests that the Czech legislators were incorrect in both assumptions. Surrogacy exists and even flourishes unnoticed in the Czech Republic, and usually occurs between strangers, not within a family or between close relatives.

Although surrogacy is not regulated and is not even a part of the enumerated assisted reproduction techniques and purposes, several fertility clinics openly offer surrogacy as one of their services. This is the case for a fertility clinic in Brno, called Reprofit, which has a section on its website dedicated to surrogacy and procedures. They offer it as a purely medical service, similar to the classic assisted reproduction methods in cases of infertility or subfertility. The only service that Reprofit does not offer is the search for surrogate mothers. This is left to the intended parents.³⁰

Surrogacy is well-known, and popular in the Czech society. There are special websites and private and public Facebook groups about surrogacy. People search for surrogates, and women offer themselves as surrogates. A few examples of advertisements from mid-September of this year can be found on one of the special websites translated into English:



Datum: 15.09.2022
Vložil: PJ
Titulek: Hledáme náhradní matku (We are looking for a surrogate)
Hello, we are looking for a surrogate, who would carry our child for us. Unfortunately, we can't have a child naturally, due to medical issues. Contact us: elinek44@seznam.cz.
Odpovědět ▶

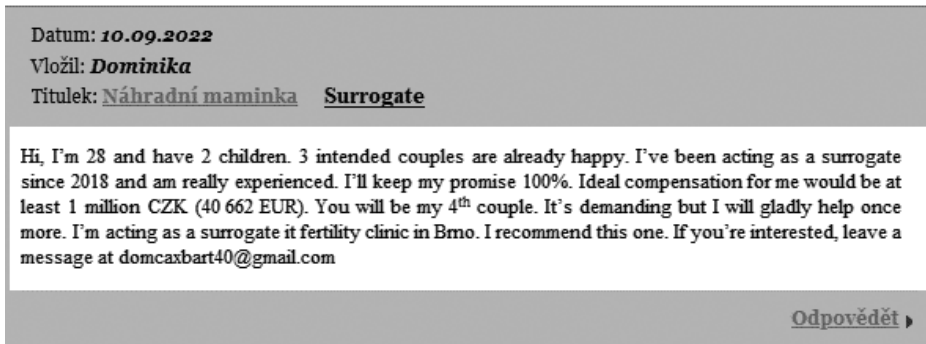
Figure 1: Example of an advertisement which poses a demand for surrogacy.³¹ This can be described as a common example of advertisements made by infertile couples (married or

³⁰ No date, 'Surrogate motherhood', *Reprofit*, [Online].

³¹ PJ, 15 September 2022, *Hledáme náhradní matku* [Online].

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living together) who have serious health problems and are unable to conceive a child naturally or through assisted reproduction methods.



Datum: **10.09.2022**
Vložil: **Dominika**
Titulek: **Náhradní maminka** **Surrogate**

Hi, I'm 28 and have 2 children. 3 intended couples are already happy. I've been acting as a surrogate since 2018 and am really experienced. I'll keep my promise 100%. Ideal compensation for me would be at least 1 million CZK (40 662 EUR). You will be my 4th couple. It's demanding but I will gladly help once more. I'm acting as a surrogate at fertility clinic in Brno. I recommend this one. If you're interested, leave a message at domcaxbart40@gmail.com

Odpovědět ▶

Figure 2: Example of surrogacy offered by potential surrogate.³² This also proves that surrogacy is deeply rooted in the Czech society, as some women have extensive experience acting as surrogates. Moreover, it can be considered as an example of commercial surrogacy, because the woman offering her 'services' as a surrogate is charging a fairly reasonable amount of money and appears to be doing so on a fairly regular basis. Note that the term 'regularly' should be understood in the context of a woman's ability to repeat several pregnancies in a row. Therefore, the time frame in which she is doing this may be much longer than the term 'regular basis' would normally suggest.

In practice, all advertisements demonstrate that surrogacy exists in various ways and in both altruistic and commercial versions. As written in the description of Figure 2, Czech women who act as surrogates know 'their price' and are not afraid to ask for reasonable sums of money, which would probably not fit into the altruistic scheme.³³ However, as Figure 1 suggests, an altruistic version is also present, usually among those searching for a surrogate. There is also quite a lot of supply and demand. These are not the most recent advertisements on the site. At the time of writing (second half of November 2022), there were advertisements in both October and November that year. The history of these advertisements go back a long way. Some advertisements were repeated, however, new ones were generally added every month.

³² Dominika, 10 September 2022, *Náhradní maminka*, [Online].

³³ It is extremely difficult to determine what sum is within the altruistic range. The example of the UK makes this clear. Although the UK allows only altruistic surrogacy, in some cases supposedly 'unreasonable' payments for surrogates have already been authorised by courts. See, for example, the case of X & Y (Foreign Surrogacy) [2008] EWHC 3030 (Fam).

4. Relationship Between Adoption and Surrogacy

4.1. Adoption as a Tool for Surrogacy

It is clear that both institutions are known and used in the Czech Republic, and that they are different. How do they relate to one another? In general, there are two dimensions to their relationships. The first is evident and has already been mentioned. Adoption serves as a surrogacy tool. This dimension results from S 804 CC, which prohibits adoption by close relatives and siblings, with the exception of this prohibition in the case of surrogacy. This provision assumes that adoption is involved in the surrogacy process because it states that adoption between close relatives and siblings is allowed in the case of surrogacy. However, adoption must be present in all surrogacy cases that occur in the Czech Republic.

One of the problems associated with surrogacy is the difficulty of handing over the child and transferring legal parentage. The mother of a child is always the woman who gives birth, and the father is the man to whom one of the presumptions of paternity points. Particularly, when it comes to mothers, it is difficult to change their position. There are two ways to achieve this goal. The first is to deny and establish maternity. However, the reasons why it is possible to deny motherhood are limited. However, surrogacy is not one of these. The situation of the child's father is much easier because the intended father can become the child's legal parent even if the legal mother is a surrogate. The intended father can use the presumption of consent for the artificial insemination of an unmarried woman or the presumption of a joint declaration of paternity. However, these mechanisms only apply if the surrogate is unmarried. Therefore, the only way to change the parent (or rather the mother) is through adoption. The surrogate provides her consent for adoption, and the intended parents adopt the child as their own. This applies similarly in cases where the intended father has already been established as the child's legal father. In this case, step-parent adoption can be used, however, only if the intended parents are married.

Unlike other countries, the Czech Republic does not have a mechanism to change the parent. There is no divided parentage or parental responsibility which allows a child to have more than one parent. Unlike the United Kingdom, there is no parental order.³⁴ Parental responsibility, a set of mutual rights and duties between parents and children, is inseparable from parentage. The parents of a child are always the carriers of parental responsibility. As a rule, they are also executors, however, this is not necessary, and they can also be executed by other persons. These changes are closely related to the ways in which parental responsibility can be affected by a court's suspension, limitation or deprivation. The court may suspend parental responsibility

³⁴ See more, No date, 'Parental orders (surrogacy law)', *NGALaw* [Online].

if serious circumstances prevent the parent from exercising it. In the case of a minor parent who has not yet acquired full legal capacity, parental responsibility is legally suspended until the parent acquires full legal capacity [S 868(1) CC]. Similarly, in the case of an adult parent whose legal capacity has been limited, or the parental responsibility is suspended for the duration of the limitation [S 868(2) CC]. The court may limit parental responsibility if the parent is not exercising parental responsibility properly and if such a measure is in the best interests of the child (S 870 CC). Finally, the court can deprive the parent of parental responsibility if he/she seriously neglects or abuses parental responsibility or if he/she has committed an offence against the child, used the child to commit an offence, etc. (S 871 CC). It is clear that the suspension of parental responsibility is an instrument for the protection of both the parent and the child, whereas the other measures, particularly the deprivation of parental responsibility, are primarily punishments for the parent.

4.2. Thin Line Between Surrogacy and Direct Adoption of a Newborn

4.2.1. Explanation of the Problem

The second dimension of the relationship between adoption and surrogacy is subtle and discrete. Both adoption and surrogacy involve young children, surrogacy exclusively and adoption partially. However, notably the children best suited for adoption, those with the highest possibility of being adopted (soon), are young and healthy. It is a sad fact that the older the child, the more problems they have, health problems, behavioural problems, or ethnicity, and the less adoptable they are. This is supported by the current statistics of the Ministry of Labour and Social Affairs of the Czech Republic for 2021, when 369 children were enrolled. The vast majority (271) were aged 0-2 years. Only 36 were 3-5 years, 30 were 6-9 years, 19 were 10-14 years old, and only 7 were disabled.³⁵ Therefore, the line between surrogacy and adoption is blurred and unclear. However, in countries with proper surrogacy regulations, this issue is usually easily overcome because of the precise definition of surrogacy and its processes. Is this the case under the Czech law?

There is no definition of surrogacy. Each author who writes about surrogacy usually creates his own version, often drawing inspiration from foreign articles and definitions. In practice, we can come across unusual advertisements that combine aspects of both surrogacy and the direct adoption of newborns. An example:

³⁵ Ministerstvo práce a sociálních věcí, no date, *Roční výkaz o výkonu sociálně právní ochrany dětí za rok 2021* [online].

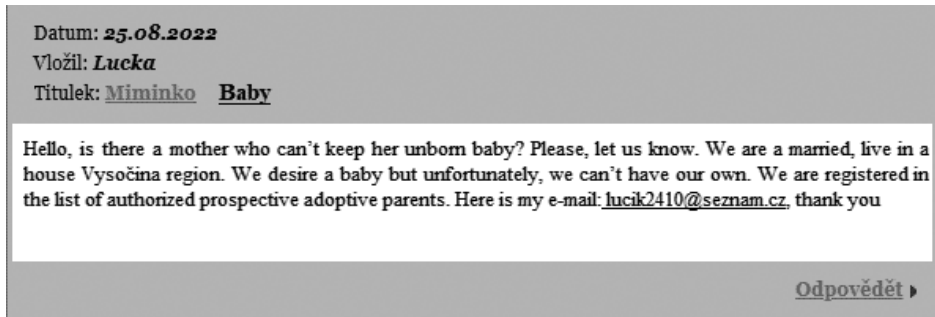


Figure 3: Example of an advertisement which removes barriers between surrogacy and direct adoption of a newborn.³⁶ The woman who wrote the advertisement specifically searched for a woman (mother) whose baby has not yet been born, but who will not be able to keep it.

Such a situation can be briefly summarised as follows: an infertile couple, intended parents find and meet a woman who agrees to be their surrogate mother and carries the child for them. She states that she is already pregnant but does not want the baby. The intended parents agree that they do not mind having a child not genetically related to them (they would have to use donor-assisted reproduction). The direct adoption process occurs after the baby is born. Can this situation be referred to as surrogacy? Certainly not in many countries where surrogacy is not properly regulated.

4.2.2. Examination under the Czech Law – Surrogacy ‘Largo Sensu’?

However, this situation differs in the Czech Republic. Two primary questions need to be answered (under the conditions of Czech law) to provide a proper examination and a final answer. The first question is whether the surrogate was already pregnant. The second issue is whether the surrogacy agreement must include a promise to undergo IVF to become pregnant.

These two questions can be considered simultaneously because the arguments and answers are similar, if not identical. It is important to realise that there is no legal definition of surrogacy. The only explanation in the Czech language is that this motherhood is substitutive or surrogate. The mother of the child is the woman who gives birth. If she is a surrogate mother, then we can say that she is the mother instead (in the place) of someone else. However, this explanation does not define a surrogate mother, except that the term ‘surrogacy’ or ‘surrogate motherhood’ implies that the surrogate must be a woman (female).

³⁶ Lucka, 25 August 2022, *Miminko* [online].

Another important point is the general constitutional principle expressed in art. 2(3) of the Charter of Fundamental Rights and Freedoms of the Czech Republic: 'Everyone may do what is not prohibited by law, and no one may be compelled to do what is not required by law'. A similar provision is contained in the Civil Code S 2(2): 'Unless expressly prohibited by a statute, persons can stipulate rights and duties by way of exclusion from a statute;...' As there are no requirements for the surrogate or the content of the surrogacy agreement, there is no reason why a pregnant woman cannot be a surrogate. Similarly, the surrogacy agreement does not have to include any obligation to undergo IVF or become pregnant. Although there are some definitions in various articles of Czech jurisprudence, none of them are legal, and usually, each of the authors creates his/her own or finds inspiration abroad and in foreign (proper) surrogacy regulations.

Therefore, there is limited or no difference between surrogacy and direct adoption of a newborn child. Adoption is necessary for achieving surrogacy. However, regarding the adoption of newborn children, when the legal mother of the child designs its future adoptive parents long before the child is born, there is almost no difference from surrogacy. Therefore, it can be called 'surrogacy *largo sensu*'.

One question that remains unanswered is whether this situation is optimal. One may consider this as only a theoretical problem without any real impact. However, 'surrogacy *largo sensu*' has the potential to partially replace regular adoption or create competition between the two. Another reason for considering this issue is the manner in which the intended parents and surrogates are found. The Child Legal and Social Protection Authority is the only institution that mediates adoption. However, regarding surrogacy, even for the *largo sensu* type, there are many online groups of like-minded people searching for surrogates, intended, and adoptive parents. Overall, this inability to clearly distinguish between the direct adoption of a newborn child and surrogacy adds to the general problem of surrogacy, which is the lack of regulations in the Czech legal system.

5. Conclusion and Discussion

In general, there are definite differences between adoption and surrogacy. Adoption is understood as accepting a foreign person as one's own, whereas surrogacy is usually understood as subsidiary infertility treatment. Adoption concerns children of all ages, and sometimes even adults, whereas surrogacy concerns only newborn babies. Adoption is postnatal, it occurs after the birth of the child, whereas surrogacy is prenatal, as the surrogacy agreement and most of the process occurs before the child is conceived. Adoption is a well-known, protected, and established institution, whereas surrogacy is highly controversial and problematic in many ways.

As far as the Czech Republic is concerned, there are other differences between the two: adoption is an independent, sovereign institution, whereas surrogacy depends on the existence of adoption. Adoption is well regulated in the Civil Code, whereas surrogacy depends on the existence of adoption and remains ignored. Adoption is legal, whereas surrogacy carries a high risk of being prosecuted for the crime of human trafficking if there is any payment for handing over the child or providing consent for adoption.

However, the two institutions are closely connected. Surrogacy, its practice, and its existence in the Czech Republic depend on adoption. Owing to the principle of *mater semper certa est*, and the impartible concept of parentage, adoption is the only way to complete the process of surrogacy. This close relationship has several dimensions. Owing to the lack of a definition of surrogacy and surrogate mothers and proper regulation of surrogacy, surrogacy and the adoption of young children and babies are almost indistinguishable, which can cause some problems. This is another reason for reconsidering the current (non-)regulation of surrogacy in the Czech Republic. Thus, there should be a clear and undisputed line between surrogacy and adoption. This may be achieved by adopting a surrogacy regulation that either bans it completely or sets reasonable rules and definitions. The choice depends on the legislature and whether such change will occur in future. There are several examples of inspiration from the literature. One is the UK surrogacy law, which has been a model for many countries in the past. For example, the inspiration can be drawn from S 1(2) of the Surrogacy Arrangements Act 1985, which states that a surrogate mother is '*a woman who carries a child in pursuance of an arrangement made before she began to carry the child and with a view to any child carried in pursuance of it being handed over to, and parental responsibility being met (so far as practicable) by, another person or other persons*'.³⁷ This provision further states that a woman, who carries the baby should be treated as the surrogate '*as beginning to carry it at the time of the insemination or of the placing in her of an embryo, of an egg in the process of fertilisation or of sperm and eggs, as the case may be, that results in her carrying the child*'.³⁸

The aforementioned provision from the Surrogacy Arrangements Act 1985 makes the British regulation of surrogacy an excellent model for the Czech legislature. There are several laws and court rulings on surrogacy, including the Surrogacy Arrangements Act of 1985, the Human Fertilisation and Embryology Act of 2008, and the Adoption and Children Act of 2002. In general, surrogacy arrangements are not enforced. The legal mother of a child is always the woman who gives birth, similar to the Czech Republic. However, the mechanism for transferring legal parenthood to intended parents is different. It is not done by adoption, but by parental order. The

³⁷ S 1(2) Surrogacy Arrangements Act 1985.

³⁸ S 1(6) Surrogacy Arrangements Act 1985.

order transfers parental responsibility exclusively to the applicant(s).³⁹ The application for a parental order can be made by a married couple, civil partners, or two people living in an enduring relationship, and single person. The applicants should be at least 18 years old and the gametes of at least one of them should have been used to create the embryo. The application can be made within the period between the child's birth and six months after that.⁴⁰ However, the case law relativized this requirement, stating that the deadline can be relaxed and a parental order can be granted, even in the case of much older children.⁴¹ Children must also live in a home with one or both applicants. It is also necessary that the woman who carries and gives birth to the child (and the other legal parent, if he is not the applicant) fully understands, freely, and unconditionally consents to the order. Therefore, even if she has given birth, she can refuse consent. Clearly, the court must decide whether issuing an order complies with the child's welfare being a paramount consideration.⁴²

The UK's surrogacy regulation only allow for an altruistic version of surrogacy, in which only reasonably incurred expenses can be paid to the surrogate for handing over the child, granting her consent, or concluding the arrangement. Payments exceeding this limit can be authorised by courts. Case law in the UK soon developed the attitude that even unreasonable payments could be authorised retrospectively. The key questions for authorising such payments were: 1) whether the sums paid had been disproportionate to reasonable expenses, 2) whether the applicants had been acting in good faith in their dealings with the surrogate, and 3) whether they had been party to any attempt to defraud the authorities.⁴³ Beginning with this decision, some UK academics remark that English Law does not view commercial surrogacy as an intrinsic wrong through case law development.⁴⁴ Similar to the issue of excessive payments, other requirements for a parental order may be waived if the issuance of the order is in the best interests of the child (e.g. the applicant couple has separated or the surrogate mother could not be found and, therefore, could not provide her consent). Generally, only a situation indicating a clear abuse of public policy can rebut the primacy of a child's welfare.⁴⁵

No third party can be involved in the process of making the surrogacy arrangement, although since 2008, non-profit organisations have initiated negotiations with a view to making such arrangements. The body can only charge reasonable costs

39 Herring, 2019, p. 374.

40 The case of *Whittington Hospital NHS Trust v XX* [2020] UKSC 14.

41 See, for example, the case of *Re X (A Child) (Surrogacy: Time limit)* [2014] EWHC 3135 (Fam).

42 Herring, 2019, pp. 374-375.

43 The case of *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam). A similar decision was stated in the case of *Re C (Parental Order)* [2013] EWHC 2408 (Fam).

44 The case of *Whittington Hospital NHS Trust v XX* [2020] UKSC 14.

45 Herring, 2019, p. 376.

for its activities. Commercial surrogate agencies are prohibited. Advertisements indicating that someone is searching for a surrogate/is willing to enter into a surrogacy arrangement/wants to act as a surrogate are banned, with the exception of advertisements by non-profit organisations, which are not covered by the ban.⁴⁶

There is no need to introduce parental order as an entirely new practice into the Czech Family Law, particularly when there is adoption which appears to work well in most cases for the completion of surrogacy. The same applies to the definition of, the intended parent. As the UK and the Czech Republic are in slightly different positions on the issue of parenthood (particularly same-sex parenthood), there is no need to introduce the possibility of surrogacy for same-sex couples, particularly if Czech experts consider it as another subsidiary way of infertility treatment.⁴⁷ However, inspiration can be drawn from the strong position of the surrogate, and the allowed form of surrogacy and the case law on reasonable and unreasonable payments can certainly provide inspiration. It is advisable to focus on the precise definition of who can be a surrogate and the requirements, rights, and obligations of both the surrogate and intended parents. However, it would be useful to consider that the UK regulations are tailored to the common law legal system, whereas the Czech Republic belongs to the continental legal system, and therefore does not mechanically copy every single rule and provision on surrogacy in the UK. Another important and closely connected point to consider is the different approaches to the best interests of the child (or child's welfare in the UK). However, in the Czech Republic, this is the primary consideration, whereas in the UK, this is the paramount principle. We can see that the UK case law has developed a practice in which the child's welfare is the strongest, and the winning argument. The Czech judicial practice of dealing with family law matters does not place the child's best interests above all else; there may be other interests or arguments of equal importance that justify a decision against the child's best interests. Therefore, although it is an excellent idea to examine UK surrogacy legislation and case law, it is highly advisable not to copy every provision in force in the UK as it may not be in accordance with the legal tradition of the Czech Republic. The legislature could also opt to ban surrogacy altogether, however, even that would be better than the current grey area of the law, which creates legal uncertainty for all parties involved, particularly for the child.

46 The case of *Whittington Hospital NHS Trust v XX* [2020] UKSC 14.

47 See, for example, *Konečná and Charamza and Prudil et al.*, 2020, pp. 1-14 [Online].

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