

ASSISTED HUMAN REPRODUCTION BY USING A DONOR A NOVELTY OF THE ROMANIAN LEGISLATIVE SYSTEM

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Abstract

Medically assisted human reproduction by using a donor is one of the novelties of the new Civil Code. The social reality claimed the need to legislate medically assisted human reproduction in order to respond to the evolution of medicine and also the tendency to reduce the country's birth rate, infertility and sterility. At the present time, the Civil Code merely set the guidelines in regulating this medical and legal procedure, but, in the future, the need to pass a special law which will clearly regulate all the aspects mentioned by specialty literature is needed. The present study wishes to discuss the main aspects regarding the medically assisted human reproduction by using a donor as well as the phrasing of some de lege ferenda suggestions.

Keywords: *private law, medically assisted human reproduction, donor, filiations, conception, infertility, sterility.*

1. Introduction

The passing of the new Civil Code on October 1st, 2011 brought on a series of novelties in regard to medically assisted human reproduction by using a donor, being regulated in articles 441-447 of the third title, second chapter, and the second section. The need to legislate human assisted reproduction by using a donor is generated by the evolution of genetics and medicine of the 20th century, which determined the rising of new techniques, medically, religiously and judicially controversial¹. However to need to use the technique of medically assisted human reproduction is justified by the impossibility of some couples or single mothers to procreate naturally, as infertility is a major problem of contemporary society. The statistics show that 30% of women over 35 years and 50% of women over 40 are infertile. Also, almost 15% of couples are unable to procreate naturally. Infertility is defined by doctrine² as a couple's inability to conceive after a year of intercourse

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¹ C. C. Hageanu, *Family law*, Hamangiu Publishing House, 2012, p. 228

² Stefan Butureanu, Gabriela Lupsa, *Medically assisted human reproduction: an interdisciplinary challenge*, Junimea Publishing House, Iasi, 2001, p. 11.

without contraception or, as a reduced capacity to conceive as opposed to the general population, While infertility can be reduced or even cured as a medical state, sterility is of a permanent nature and is defined as the inability to procreate. We must also consider that the birth rate has significantly dropped in the last years and the aging of the population is one of the most important social and economical challenges of the present society. Given these statistical facts, the need to legislate medically assisted human reproduction procedures is fully justified, as it is an effective method to positively influence the birth rate, as well as the proportion of active population.

Given all these, the new Civil Code set the guidelines for this matter, but a special law is needed in the future, a law which will regulate this issue with all necessary details. Law no 95/2006 regarding the health reform does not regulate medically assisted human reproduction, but only mentions human reproduction. Title VI of the mentioned law refers strictly to *in vitro* fertilization, mentioning also issues like transplants, organ donation, informed consent, as there are no special regulations regarding the techniques for medically assisted human reproduction. This is currently a legislative void. However, this procedure has several phases: inside body and outside of body procedures, which harvest, process and preserve the gametes, the fertilization process, creating pre embryos, genetic diagnosis, transfer and embryo reduction, as the procreation process is no longer an intimate procedure, the medical team intervenes in the intimate life of the couple, becoming part of the process of human reproduction. In regard to assisted human reproduction by using a donor, the used medical techniques include:

- artificial insemination with the sexual cell of a donor;
- embryo and zygote transfer, achieved by *in vitro* fertilization by using a sperm donor or the transfer of eggs or both sexual cells, separate or under the form of an embryo or zygote;
- surrogate mothers³.

In regard to the last medical technique, the doctrine⁴ clearly distinguishes between the “surrogate mother” and the “substitute mother”, also mentioning a maternity contract, without any legal regulation existing in this matter. In case of a “surrogate mother”, it is the mother who ensures the gestation of the embryo and, after the child is born, it is given to the beneficiaries. The “substitute mother” is the woman impregnated with the sperm of her husband or another man whose wife or concubine is sterile. As in the case of the surrogate mother, the beneficiary couple will be given the child. This technique can generate emotional trauma in regard to the mother and the child, by ignoring the connection which is naturally established between any mother and the fetus and subsequently the child born.

³ Daniela Frasier, *Medically assisted human reproduction - a legal and medical challenge of contemporary society*, doctoral thesis, unpublished, presented at ULBS, May 9th, 2004, p. 13.

⁴ I. Turcu, *Health law. The common ground between the doctor and the legal adviser*, Wolters Kluwer Publishing House, Bucharest, 2013, p. 423-454.

The use of medically assisted human reproduction techniques must focus on the newborn child, in regard to his legal status and his rights. The provisions of the Civil Code show that the legislator has regulated general aspects regarding the regime of descendants, the conditions and the denial of filiation, the confidentiality of information as well as the relation between father and child⁵, without mentioning the rights of the child conceived and born through this procedure. Given all these, a special law regulating all these should be a priority.

2. The regime of filiation – notion, conditions, the denial of filiation

According to the provisions of article 405 of the civil Code, filiation in relation to the mother results from birth. It can also be established by admission and legal decision. Filiation in regard to the father in marriage is established by the effect of the paternity assumption, while filiation in regard to the father outside of marriage is determined by admission or legal decision. In regard to the procedure of human assisted reproduction by using a donor, article 441 the first alignment of the Civil Code states that this does not establish any filiation between the child and the donor⁶. As stated by the Civil Code, a single woman or a man and woman can undergo this procedure and subsequently become parents.

The procedure to follow in case of assisted human reproduction by using a donor is expressly regulated by the provisions of the Civil Code. Thus, the parents who wish to use this technique will express their confidential consent in front of a public notary. Article 26 of the Romanian Constitution, article 74 letter g) of the Civil Code⁷ and article 21 of Law no 46/2006 regarding the patient's rights⁸, all state that any information regarding a patient's condition, the result of any medical investigation, diagnosis, prognosis, treatment or personal data are confidential even after the person's death. In regard to European regulation, we mention article 8 of the European Convention on Human Rights, according to which every person has the right to have its private and family life respected. The public notary is obliged to expressly explain the consequences of such an act in regard to filiation, also informing the parents that the relation with the donor does not provide any legal rights or obligations. Thus, the *ad validitatem* form is that of an authenticated document.

By comparison to the law of other states in which the medically assisted human reproduction procedure by using a donor is clearly regulated, also

⁵ Marieta Avram, *Civil Law. Family*, Hamangiu Publishing House, 2013, p. 400.

⁶ Also see I. Turcu, *Health law. The common ground between the doctor and the legal adviser*, Wolters Kluwer Publishing House, Bucharest, 2013, p. 423-454.

⁷ According to article 74 letter g) of the Civil Code, broadcasting material containing images of a person undergoing treatment in a medical facility, as well as any personal data regarding the health, diagnosis, prognosis, treatment, circumstances in connection with the illness, including the result of an autopsy without consent from the person and in case the person is dead, without consent from the family is considered a crime.

⁸ Published in the Official; Bulletin no. 51/29 January 2003, Part I.

requiring a psychological evaluation of the two parents⁹, it is noticed that the Romanian legislator didn't consider the psychological effects of this procedure. The psychological testing would be necessary in order to establish the psychological history of the couple and/or single woman, their mental state, their capacity to exercise the parental duties, the risks involving this procedure and the risk of failure of this procedure.

Another role of the psychological evaluation is to make the future parents aware of the legal status of the child conceived by using this technique as well as the child's legal relations to his family. Some studies have shown that, in time, a significant change can occur in the attitude of the people involved in this procedure regarding the medical techniques and the result – the newborn child¹⁰; thus, the initial positive feelings of the future parents can easily turn into negative reactions of regret, anxiety, rejection of the child.

In regard to consent, according to article 442 second alignment of the Civil Code, the consent is without effect in the following hypothesis occurred before the moment of conception:

- death;
- a plea for divorce;
- separation.

Consent can be revoked at any time, in writing and even in front of the doctor who provides assistance.

The lawmaker forbids the possibility to deny filiation in case of medically assisted human reproduction. The character of filiation is based on the will of the parent/parents, expressed before the medical procedure takes place, a procedure to which they legally consent, in front of the public notary, thus determining the legal status of the child¹¹. By exception, the mother's husband who did not agree to medically assisted human reproduction by using a donor, has the right to deny paternity. The text of article 443 of the Civil Code provides this right for the following:

- the man who, at the time of conception, was the mother's husband but did not express consent for this procedure;
- the man who was, at the time of conception, the mother's husband but after expressing consent but before the medical procedures took place, revoked his consent;

⁹ Cousineau M Tara, *Psychological impact of infertility*, in *Best Practice&Research: Clinical Obstetrics and Gynecology*, 2007, vol. 21, no. 2, p. 293-308, source www.sciencedirect.com, accessed July 10th, 2014 at 10:48.

¹⁰ Leiblum L Sara, Greenfield A David, *The course of infertility: immediate and long-term reactions*, in *Infertility: psychological issues and counseling strategies*, John Wiley&Sons, New York, 1997, p. 83-102, source : www.bestpracticeobgyn.org, accessed July 10th, 2014 at 11:05.

¹¹ Daniela Frasier, *Medically assisted human reproduction - a legal and medical challenge of contemporary society*, doctoral thesis, unpublished, presented at ULBS, May 9th, 2004, p. 110.

- the man who, at the time of conception, was not the mother's husband and did not express consent, but legally marries the mother before the child is born.

The lawmaker also states that in case the child was conceived in any other ways, the provisions regarding the denial of paternity still apply¹². This hypothesis refers to the situation in which the mother's husband denies paternity if the child was born as a result of the medically assisted human reproduction procedure by using a donor although he consented to this procedure.

The father, who consented to the medically assisted human reproduction procedure by using a donor and subsequently denies paternity of the child born outside of marriage, is liable to the child and the mother under the provisions of article 444 of the Civil Code. In this final hypothesis, the child's paternity is established by the court in agreement with the provisions of article 411 and 423 of the Civil Code. In regard to the child, he has the possibility to establish paternity by way of trial which forces his father to provide for the child. Liability toward the mother is conditioned by promoting a legal action by which the mother will ask for the following type of damages:

- half of the expenses of birth and after-birth period;
- half of the expenses of providing for herself during pregnancy and after giving birth¹³.

Thus, the rights and obligations of the father are the same regardless if the child was born by medically assisted human reproduction by using a donor or by natural conception, inside and outside of marriage. The child outside the marriage whose filiation was established by admission or by court order has the same legal status in regard to the parents and their relatives as the child born inside the marriage¹⁴. We must also mention the content of article 487 of the Civil Code, according to which the parents have the right and duty to raise the child, provide for his medical and physical development, education and professional training according to their own beliefs and the child's needs; they must provide the child with guidance and advice in order to exercise his legal rights.

3. Confidentiality of information - a principle of medically assisted human reproduction by using a donor

One of the main principles of the medically assisted human reproduction by using a donor is that of respecting confidential information, as article 445 of the Civil Code states that any information regarding medically assisted human reproduction is confidential. The lawmaker thought it was necessary to dedicate an entire chapter of the Civil Code to the respect owed to the human being and its inherent rights, that is Chapter II of the second title, Book I. The respect owed to private life implies the prohibition of using any information about a person's

¹² See article 443 of the Civil Code.

¹³ See article 428 first alignment of the Civil Code.

¹⁴ See article 448 of the Civil Code.

private life without its agreement and without respecting the legal boundaries. According to doctrine's definition, private life is formed by three components: a certain behavior of the person (full control over their own decisions and actions as well as any information that concern that person), maintaining anonymity and the relations with fellow citizens¹⁵.

However, article 445 alignments 2 and 3 of the Civil Code state a series of exceptions as follows:

- when the lack of information presents the risk of a serious prejudice for a person's health or the health of its descendants;
- when depriving a person of information can cause serious damage to the descendant's health or to a person close to them.

In the first case, the court will authorize the transmission of the information to the doctor or competent authorities. In regard to the second hypothesis, any descendant of the person has the right to ask for that information. They will file a claim asking for authorization in sending confidential information. In justifying such a request, the lawmaker stated a "serious damage to a person or its descendants" as well as a serious damage to its health, without defining what prejudice means or who is considered to be a close person. These facts will be analyzed by the court which will rule on the matter. What we notice is that authorizing the transmission of confidential information is strictly limited to the existence of an imminent risk and serious damage for the health. It can be extended to other aspects of one's private life. In regard to the close person mentioned by the lawmaker, we can assume that the legal text means strictly the donor or the person to which filiation has been established.

As these notions are very vague, we feel that, in the future, this area should be more precisely regulated and the notions of serious damage and close persons must be defined. This will create a starting point in analyzing these specific notions and it will protect one's right to a private life.

We must also notice that the lawmaker did not regulate the possibility to perform a marriage between people conceived by medically assisted human reproduction by using a donor, as the performing officer must acquire information about the biological father in order to prevent marriage between relatives. One of the conditions needed for marriage is the prohibition of marriage between relatives, as well as those between collateral relatives to the fourth degree, as stated by article 274 first alignment of the civil Code. As the exceptions from the confidentiality principle are strictly listed in article 445 second and third alignment of the Civil Code, in the future, we feel it is necessary to grant access to these confidential information to the officer performing the marriage. The risk of marriage between relatives or collateral relatives is a concern for the entire society,

¹⁵ C. Jugustru, *The Respect of private life - issues in regard to legal protection*, source: www.humanistica.ro, accessed July 11th, 2014 at 8:20.

as it protects a general interest. We must also consider the medical side of this issue, as the children resulting from marriages between relatives are unhealthy.

In conclusion, we suggest, *de lege ferenda*, that the officer performing the marriage be included in the category of people with access to confidential information regarding the procedure of medically assisted human reproduction in case he must perform a a marriage between people conceived through this procedure or in case such a person marries a person conceived by natural conception.

Considering those stated above and corroborating these aspects to the provisions of article 447 of the Civil Code according to which medically assisted reproduction by using a donor as well as the confidentiality of any information in connection with this procedure are established by special law, we feel that, in the future, the general guidelines set by the Civil Code should be improved by passing a special law which will clarify all these aspects.

4. A short preview of the regulations in other European states; *de lege ferenda* suggestions

Using the medically assisted human reproduction technique by using a donor is meant to answer the needs of infertile or sterile families or women, that of giving birth to children. However, the attention is turned from the child who should be the center of attention to the people who choose this procedure. Thus, the special law must grant attention to the principle of the superior interest of the child conceived through this medical procedure.

An analysis of the laws in other states, where this procedure is especially regulated shows that access to this procedure must be granted to a certain category of people: heterosexual, married couples and single women. For example, in Germany, a single woman can use this procedure only if the attending physician feels that the man she is living with presents stability and will give the child the possibility to be raised by a mother and a father. In Belgium, medically assisted human reproduction is meant only for women of age, who can use this procedure only by signing a convention together with her partner. In Denmark, in order for couples to choose medically assisted human reproduction by using a donor, they must prove they can raise the child and the attending physician must provide his agreement for this procedure.

Thus, the lawmaker should limit the category of people who are allowed to use this procedure to heterosexual, married couples or couples who can prove stability and other aspects significant to raise a child in a safe environment, as well as to single women.

In Spain, for example, the sexual orientation of those involved in the procedure is not important as it applies regardless of the status or sexual orientation. However, our country forbids marriage between people of the same gender and

partnerships between people of the same gender are not acknowledged, so we chose to regulate this medical procedure for heterosexual couples, married or not.

We must also notice that in other states' law, there are certain age limitations for those who wish to use this procedure, an aspect which is very important and should be regulated in the future. In our regulated legal frame, the procedure is accessible to anyone regardless of age. It is somewhat against human nature for an emancipated 16 year old woman to become a mother. Stating a minimum age for this procedure in regard to the woman's age would leave not room for interpretation. Also, it would be important to realize that this procedure should be used only by couples who have been medically diagnosed with infertility in order to avoid the risk of passing certain diseases to the child or parent. These are just a few of the issues which will be regulated by a special law.

5. Conclusions

Medically assisted human reproduction by using a donor is a novelty in Romanian law and still generates debate as a result of the social, psychological, medical, religious, bio ethical and legal aspects it involves. Considering the legislative void in these areas, the doctrine debate is quite useful in this context, as the need for a special law is more and more stringent.

The specialists in this area must collaborate in order to ensure cohesion so that the final result meets the needs and guarantees the exclusive right of the individual to procreate. Ensuring the full respecting of the rights of the people involved in this process must become the lawmaker's main objective, as the national and European regulations in this matter must guarantee the right to a private life and the right to dignity of any human being in the present society. It must also define the principles of this matter, it must raise awareness in the matter of bioethics without ignoring the results of the medical research and the impact it has on the individual.

References

- [1] Hageanu, C. C., (2012), Family law, Hamangiu Publishing House, pp. 228;
- [2] Butureanu, S., Lupsan, G., (2001), Medically assisted human reproduction: an interdisciplinary challenge, Junimea Publishing House, Iasi, pp. 11;
- [3] Frasier, D., (2004), Medically assisted human reproduction - a legal and medical challenge of contemporary society, doctoral thesis, unpublished, presented at ULBS, May 9th, pp. 13;
- [4] Turcu, I., (2013), Health law. The common ground between the doctor and the legal adviser, Wolters Kluwer Publishing House, Bucharest, pp. 423-454;
- [5] Avram, M., (2013), Civil Law. Family, Hamangiu Publishing House, pp. 400.
- [6] Turcu, I., (2013), Health law. The common ground between the doctor and the legal adviser, Wolters Kluwer Publishing House, Bucharest, pp. 423-454;

[7] Cousineau, M. T., (2007), Psychological impact of infertility in *Best Practice&Research: Clinical Obstetrics and Gynecology*, vol. 21, no 2, p.293-308, source www.sciencedirect.com, accessed July 10th, 2014 at 10:48;

[8] Leiblum, L. S., Greenfield, A. D., (1997), The course of infertility: immediate and long-term reactions, in *Infertility: psychological issues and counseling strategies*, John Wiley&Sons, New York, pp. 83-102, source: www.bestpracticeobgyn.org, accessed July 10th, 2014 at 11:05;

[9] Frasie, D., (2004) *Medically assisted human reproduction - a legal and medical challenge of contemporary society*, doctoral thesis, unpublished, presented at ULBS, May 9th, 2004, p. 110.

[10] C. Jugastru, *The Respect of private life - issues in regard to legal protection*, source: www.humanistica.ro, accessed July 11th, 2014 at 8:20.