

POST MORTEM ASSISTED REPRODUCTIVE TECHNOLOGY (ART) AND THE PARTICULAR CASE OF THE WILL IN ROMANIA

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Abstract

The latest and most remarkable technological discoveries/developments, which allow gamete cryopreservation (spermatozoa, embryos, ovarian tissue), raise many legal, social, ethical and moral issues, especially regarding the right to post-mortem reproduction, that includes either a woman's request to conceive a child after her husband's death or a man's to require a surrogate mother's help to carry the dead wife's embryos. Romania is one of the few European countries which does not benefit from a legislative framework with respect to assisted reproductive technology (ART). Starting from real cases which took place in the United States and France, this work wishes to go even further and to discuss the will in connection with the assisted reproductive technology (post mortem), under the light of the New Civil Code, more precisely: mandating the surviving spouse (wife/husband) to start and go through all the necessary procedures for giving birth to a child (with the sperm, embryo etc. left by the deceased spouse), the recognition of a child not conceived and not born at the date of the inheritance's opening, as well as the right to inheritance of the child resulted from such a situation.

Keywords: assisted reproductive technology, post mortem reproduction, the New Civil Code, ECHR, recognition of a child through a will

1. Introduction

The latest and most remarkable technological discoveries/developments, which allow gamete cryopreservation¹ (spermatozoa, embryos, ovarian tissue), raise many legal, social, ethical and moral issues, especially regarding the right to post-mortem reproduction², that includes either a woman's request to conceive a child after her husband's death or a man's to require a surrogate mother's help to carry the dead wife's embryos³ [Aziza-Shuster, (1994)].

There are also religious controversies. According to a publication of the European Society for Human Reproduction and Embryology (ESHRE⁴) [ESHRE, (2006)], there is no consensus amongst different religions on post-mortem reproduction. Roman-Catholics reject this idea because it separates human reproduction from sexual relations and it implies the insemination of a single woman, without a partner. The Islam also rejects this procedure because it takes place after the natural termination of the marriage.

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¹ Human reproductive cells bearing sexual chromosomes.

² Procedure to achieve conception of a child by one parent when the other parent has died by using cryopreserved gametes.

³ E. Aziza-Shuster, *Ethics and Society, A child at all costs: posthumous reproduction and the meaning of parenthood*, Oxford Journals, Human Reproduction, vol. 9 nr. 11, 1994: 2182-2185.

⁴ European Society for Human Reproduction and Embryology (2006). “ESHRE Task Force on Ethics and Law 11: Posthumous assisted reproduction”, Human Reproduction Volume 21, No. 12, p. 3050-3053.

On the contrary, the Jewish legislation allows post-mortem reproduction. Post-mortem reproduction is an extremely controversial topic and it can generate a conflict between two ethical principles – the respect for the persons' autonomy to decide with regards to human reproduction and the principle of the superior interest of the child expressed through the concern for its wellbeing. Other considerations may include the guardianship's issue which intervenes after the death of the genetic parent.

The European Court of Human Rights (ECtHR) gives an interpretation to the cases on ART under the light of the rights guaranteed and protected in the European Convention of the Human Rights⁵ [Consiliul Europei, (2011)]. Nevertheless, although the Council of Europe has adopted an European strategy for the promotion of sexual and reproductive health and rights⁶ [Consiliul Europei, (2004)], the absence of a convention visibly reflects the lack of an agreement on this matter.

Romania is one of the few European countries which does not benefit from a legislative framework with respect to assisted reproductive technology (ART) (the most known techniques of assisted reproductive technology being gamete cryopreservation, artificial insemination and in vitro fertilization). Until now/to date several draft laws/law projects in this field have been rejected or abandoned, currently only the medically assisted human reproduction with third donor being regulated (Articles 441- 447 of the New Civil Code). A legal framework for ART as a whole is needed and not just a small segment represented by ART with third donor, considering the fact that most of these procedures take place with the reproductive cells of the couple's members. Excluding the persons who wish to use their own gametes will make impossible their access to ART because special norms apply only to the category of people expressly nominated and the application of such norms is not permitted by analogy (Article 10 of the New Civil Code): the special law has priority over/takes precedence over the general one, it is of strict interpretation⁷, *specialia generalibus derogant*. Guțan Sabin, doctor of laws with the thesis "Medically Assisted Human Reproduction and Filiation"⁸, considers that under these conditions the law allows only two possibilities, opinion to which this paper adheres as well:

1. The prohibition of ART without a donor, since it is not regulated; or
2. Allowing ART without a donor without any restrictions, anywhere, as social service, since common law would apply to it.

By the treaties to which Romania is a party and the recommendations available on European level the regulation of the entire field is required.

2. The Structure of the Paper

Starting from real cases which took place in the United States and France, this work wishes to go even further and to discuss the will in connection with the assisted reproductive technology (post mortem), more precisely: mandating the surviving spouse

⁵ Council of Europe: European Court of Human Rights (2011), "Reproductive Rights".

⁶ Council of Europe: Parliamentary Assembly, "European strategy for the promotion of sexual and reproductive health and rights". Resolution 1399 (2004)

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/ERES1399.htm>.

⁷ Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil, Comentarii pe articole (art. 1-2664)*, Ed. C.H. Beck, București, 2012, p. 12.

⁸ Ed. Hamangiu, București, 2011.

(wife/husband) to start and go through all the necessary procedures for giving birth to a child (with the sperm, embryo etc. left by the deceased spouse), the recognition of a child not conceived and not born at the date of the inheritance's opening, as well as the right to inheritance of the child resulted from such a situation.

The paper is divided into four sections: the first section presents the practical case-law regarding medically assisted human reproduction post-mortem, the second section briefly discusses the will and its clauses which do not have to refer only to the assets, the third section deals with recognizing the child by means of a will in the Romanian law, but also the possibility or the necessity of recognizing the baby conceived post-mortem by means of ART, and last the fourth section presents the right to inheritance of the child conceived this way. Ultimately, conclusions are briefly presented.

2.1. Case-law on Post-mortem ART

The first case, the one from the United States, was published and discussed in media⁹. William Everett Kane [Hecht vs Curtea Superioară, (1993)] was a lawyer from California, United States, who deposited his spermatozoa at a cryobank in California, with instructions allowing his girlfriend to use it after he committed suicide. He also had two college-aged children with a former wife he had divorced 15 years before. The appeal court decided that spermatozoa, same as embryos, is gamete material and a unique type of property, thus the source of the gametes should decide on the way to use them. Therefore, a probate judge in Los Angeles ruled that as an effect of a division-of-property agreement signed by the parties after Mr. Kane's death, his girlfriend, Ms. Hecht, was entitled to at least 3 of the 15 vials of sperm left by the deceased¹⁰ [Margolick, (1994)]. The appeal courts in the United States found only one precedent, but not in the United States, but in France, a case that will shortly be discussed next.

In the case of *Parpalaix v. CECOS – Centre d'Etude et de Conservation du Sperme Humain – 1984*¹¹ [Benshushan, Schenker; (1998)], a man deposited spermatozoa before starting a treatment for testicular cancer, but without any instructions at the time of the deposit. The French Court decided that the wife had the right to be inseminated with her deceased spouse's sperm. However, it is to be noted, that she did not win the case on the basis of a property argument, but regarding the legal status of the sperm, the court described it as 'the seed of life . . . tied to the fundamental liberty of a human being to conceive or not to conceive'¹² [Rothschild, (2010)]. Corinne Parpalaix was inseminated in November 1984 but she did not get pregnant.

⁹ <http://www.nytimes.com/1994/04/29/us/15-vials-of-sperm-the-unusual-bequest-of-an-even-more-unusual-man.html?pagewanted=all&src=pm>.

¹⁰ D. Margolick, *15 Vials of Sperm: The Unusual Bequest of an Even More Unusual Man*, The New York Times, US, 1994; <http://www.nytimes.com/1994/04/29/us/15-vials-of-sperm-the-unusual-bequest-of-an-even-more-unusual-man.html?pagewanted=all&src=pm>.

¹¹ A. Benshushan and J.G. Schenker, *The right to an heir in the era of assisted reproduction*, Oxford Journals, Human Reproduction, vol.13, nr. 5, 1998: 1407-1410.

¹² G. Rothschild (partner of the law firm of New York Moses & Singer), *Issue of Issue*, chapter 15, 2010, p. 15-9.

Another relevant case for the present work is *Davis v. Davis* (1990)¹³ [Supreme Court of Tennessee, Knoxville; (1992)] which involved 7 frozen embryos made by in vitro fertilization (IVF) whose custody and control were contested in a divorce action. The Court decided that the partners should decide on the fate of the embryos, not the Court, nor anyone else. Only if the couple could not reach a decision, did the Court allow their destruction.

2.2. *The Will and its Clauses*

Article 60 of the New Civil Code of Romania, called “The Right to Dispose of Oneself”, provides that the natural person has the right to dispose of oneself/decide on oneself if he or she does not violate others’ rights and liberties, public order or morals. In other words, a person is his own body’s owner, this special right if property distinguishing from others because it bears ‘on an object attached to a person and therefore it is non-transferable upon death and imperfect available’. The result would be that ‘The human things (*les choses humaines*) can be owned without difficulty and can, consequently, be regarded as goods’. According to a different opinion, the living body is seen as a part of the person and then we talk about the rights of the personality, *stricto sensu*/strictly speaking, and about the rights over one’s own body, as an object. Based on the right to dispose of oneself, the natural person may get involved willingly in dangerous activities or he/she may give his/her consent with the result that his integrity may suffer, such as: medical intervention consisting of experiments, tests, samples, treatment or other interventions for therapeutic purposes and scientific research in the cases and conditions (expressly and exhaustively) provided by law¹⁴ [Baías, Chelaru, Constantinovici, Macovei; (2012)].

The New Civil Code of Romania defines the will, in Article 1034, as the personal, unilateral and irrevocable act by means of which the testator decides (in the forms required by law) for the time when he will no longer be alive. Article 1035 provides that the will may also contain other clauses which do not refer only to the assets, such as: the recognition of a child, the appointment of a guardian for the child, naming an executor and limiting his powers etc. Besides all these clauses above mentioned, the law offers the possibility of empowering/mandating a person through a will in order to administrate one or more goods or assets that do not belong to him. However the empowerment by will only produces effects if it is accepted by the administrator designated by the testator. Based on the case-law discussed above and on the possibility of including such a clause in a will, even in the absence of ART’s regulation in our country, we consider that a husband can leave his wife or partner cryopreserved gametes and, hypothetically, may empower the latter to carry out all the necessary procedures to have a child after his death, if she wishes and accepts, especially in conjunction with Article 80 of the same Civil Code, suggestively called “Compliance With/Respecting the Will of the Deceased”,

¹³ Supreme Court of Tennessee, Knoxville, decision no. 34/1992, First Embryo Disposition Case – *Davis v. Davis*; http://biotech.law.lsu.edu/cases/cloning/davis_v_davis.htm.

¹⁴ Fl. A. Baías, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil, Comentarii pe articole (art. 1-2664)*, Ed. C.H. Beck, București, 2012, p. 65.

which provides in paragraph 1 that any person may dispose with regard to his/her body after his/her death.

2.3. The Recognition of a Child by Means of a Will in The Romanian Law

Article 415 of the New Civil Code lists as a form of child recognition the will, only that in conjunction with Article 36 which states that the rights of the child are recognized from conception if he is born alive, it results that one can recognize by will only the child conceived (not necessarily born) at the time of his father's death, that is why Article's 412 provisions regarding the legal time of conception are important. The legal provision contained by Article 36 comes from the Latin saying 'infans conceptus pro nato habetur, quoties de commodis ejus agitur' (The unborn is deemed to have been born to the extent that its own benefits are concerned). This rule has different meanings to authors¹⁵. Some believe that even from conception the baby has a conditional personality confirmed by birth, while others think that his personality is given only after birth, here connected to the retroactivity of the conceived child's capacity of use when there is a need to protect the minor's interests. We refer here to the conceived child's anticipated capacity of use which relies on a fiction and which was elaborated for inheritance purposes in order to allow the child to inherit his pre-deceased father¹⁶ [Baias, Chelaru, Constantinovici, Macovei; (2012)].

Nevertheless, the post-mortem conceived children are a product of the 20th century's technology in the field of assisted reproduction. Impossible in the past, nowadays one can use the cryopreserved gametes of a deceased partner to conceive a child. It is law's duty to protect these children, who same as the ones conceived but not born at the opening of the inheritance, are entitled to a name and to be recognized. Same, the father of a potential future child (conceived post-mortem) has the right to recognize him by will.

2.4. The Right to Inheritance of the Post-Mortem Conceived Child

This last section proposes to discuss the right to inheritance of the child conceived through ART (post-mortem). The Romanian Constitution guarantees in Article 46 the right to inheritance referring to both legal inheritance and testamentary inheritance. By Constitutional Court's Decision No. 312/2002¹⁷ [Monitorul oficial al României, (2003)] it was held that article 1 paragraph 2 of Law No. 9/1988¹⁸, republished, are

¹⁵ To see B. Starck, H. Roland, L. Boyer, *Introduction au droit*, p. 389-392.

¹⁶ Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil, Comentarii pe articole (art. 1-2664)*, Ed. C.H. Beck, București, 2012, p. 42.

¹⁷ Constitutional Court, Decision No. 312/2002, published in "Monitorul oficial al României" (Romanian Official Gazette), part I, No. 81 from 7 February 2003. Dispozițiile art. 1 alin. (2) au fost declarate neconstituționale prin Decizia Curții Constituționale nr. 312/2002, publicată în "Monitorul oficial al României", partea I, nr. 81 din 7 februarie 2003, "în măsura în care înlătură moștenitorii testamentari de la beneficiul acordării compensațiilor prevăzute la alin. (1) al art. 1 din aceeași lege".

¹⁸ Law No. 9/1988 on granting of compensations to Romanian citizens for assets transferred to the Bulgarian state's property from the application of the Treaty between Romania and Bulgaria, signed in Craiova on 7 September 1940. Art. 1: (1) Cetatenii romani prejudiciati in urma aplicarii Tratatului dintre Romania si Bulgaria, semnat la Craiova la 7 septembrie 1940, denumit în continuare tratat, au dreptul la compensațiile stabilite potrivit prezentei legi, în măsura în care nu au primit anterior sau au primit numai

unconstitutional/contrary to Article 42 of the Constitution (now Article 46), as far as limiting the scope of persons entitled to compensation only to the former owners and their legal heirs, excluding the testamentary heirs. The European Court of Human Rights links inheritance rights to family life, the right to respect for private and family life enshrined in Article 8 of the European Convention on Human Rights and other provisions such as Article 1 of Protocol No. 1 on ownership, in a case considering succession as an element of family life that cannot be neglected¹⁹ [Bîrsan, (2005)]. To note here is that the institution of inheritance is treated indirectly by the Convention, ‘as a consequence of other rights such as the right to privacy, the right to property’²⁰ [Vădeanu, (2010)].

As far as the New Civil Code is concerned and the capacity to inherit, Article 957 provides in paragraph 1 that a person can inherit if he/she exists at the time of the inheritance’s opening and that the provisions of Article 36 amongst others are applicable. From this stipulation it results that natural persons who are not alive (the child born dead, the predeceased, the unborn child at the opening of the succession who does not benefit from the presumption of Article 142 on the legal time of conception) do not have the capacity to inherit²¹ [Baiaș, Chelaru, Constantinovici, Macovei; (2012)].

It is our opinion that the child conceived and born through ART (post-mortem) should benefit from the same rights, guarantees and legal protection as the others, especially if he is recognized by his father through will and is his heir. The American lawyer Gideon Rothschild lists a number of factors to be taken into account to determine whether a claim to inheritance of a posthumously conceived child will be successful, for example:

- a) The genetic relationship between the presumed parent and child;
- b) Whether the child already has two legal parents;
- c) The intention;
- d) The consent of the gamete donor;
 - For the post-mortem use of his gametes;
 - To provide for the resulted children.
- e) The existing legislation regarding the gamete or embryos donors – whether or not they are protected;
- f) The efficiency in the administration/management of the inheritance;
- g) The existing laws regarding the right to inheritance of the post-mortem conceived child.

Thus, concerning point e), namely the existing laws on donors, the fact that today embryos can be created by in vitro fertilization sheds a new light on debate on the legal

parțial compensații ori despăgubiri pentru bunurile imobile – construcții și terenuri – pe care le aveau în proprietate în județele Durostor și Caliacra, cedate Bulgariei, pentru recoltele neculese de porumb, bumbac și floarea-soarelui, precum și pentru plantații de pomi fructiferi și/sau pepiniere de pomi fructiferi altoiți.

(2) De prevederile alin. (1) beneficiază și cetățenii români, moștenitori legali ai foștilor proprietari.

¹⁹ C. Bîrsan, *Convenția Europeană a Drepturilor Omului, Comentariu pe articole, vol. I, Drepturi și libertăți*, Ed. All Beck, București, 2005, p. 645.

²⁰ Fl. Vădeanu, *Transmisiunea moștenirii*, Ed. Wolters Kluwer România, București 2010, p. 20.

²¹ Fl. A. Baiaș, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil, Comentarii pe articole (art. 1-2664)*, Ed. C.H. Beck, București, 2012, p. 1003.

status of the human embryo²² [Ungureanu, Jugastru, (2007)]. The Romanian legislator has chosen to guarantee respect for the human being from conception, prohibiting, among other things, in Article 63²³, the creation of human embryos for research²⁴ [Baiaș, Chelaru, Constantinovici, Macovei; (2012)]. However, from corroborating the provisions of Article 63 paragraph 2, second thesis, with paragraph 3 follows that creation of human embryos for medically assisted human reproduction is still allowed²⁵; this permission is implicitly pursued by Article 142²⁶ letter e) of Law No. 95/2006, which refers to the techniques of in vitro fertilization. From here results that also the post-mortem reproduction in the hypothesis discussed in this article can take place as it is not forbidden and the child resulted in this way should benefit from all related rights, including the one to inheritance.

Conclusion

In conclusion, we consider that the lawmaker should amend/modify the laws on filiation and succession to include the new generation of children born through assisted reproductive technology: ‘...wills and trusts should be modified to reflect the new technological realities of the current and future eras of reproduction’²⁷ [Rothschild, (2010)]. To date it has never been the question, but nowadays it is an absolute necessity to regulate this domain because as Judge Edward M. Ross of Los Angeles County Superior Court said, in Kane case, since December 1992, ‘We are forging new frontiers, because science has run ahead of common law’²⁸, but as to not affect the lives and interests of other people involved, directly or indirectly (other children, parents, former spouses, creditors etc.) we propose the introduction of a time limit (1-2 years) until when

²² O. Ungureanu, C. Jugastru, *Drept civil. Persoanele*, ed. a II-a, revăzută, Ed. Hamangiu, București, 2007, p. 36-37.

²³ Article 63 Interventions on genetic characters

(1) Sunt interzise orice intervenții medicale asupra caracterelor genetice având drept scop modificarea descendenței persoanei, cu excepția celor care privesc prevenirea și tratamentul maladiilor genetice.

(2) Este interzisă orice intervenție având drept scop crearea unei ființe umane genetic identice unei alte ființe umane vii sau moarte, precum și crearea de embrioni umani în scopuri de cercetare.

(3) Utilizarea tehnicilor de reproducere umană asistată medical nu este admisă pentru alegerea sexului viitorului copil decât în scopul evitării unei boli ereditare grave legate de sexul acestuia.

Read more: <http://legeaz.net/noul-cod-civil/art-63-interventiile-asupra-caracterelor-genetice-drepturile-la-viata-la-sanatate-si-la-integritate-ale-persoanei-fizice-respectul-datorat-fiintei-umane-si-drepturilor-ei-inerente>.

²⁴ Fl. A. Baiaș, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod Civil, Comentarii pe articole (art. 1-2664)*, Ed. C.H. Beck, București, 2012, p. 68.

²⁵ For the presentation of medically assisted human reproduction techniques, see N.-A. Dagħ, D.-M. Iorga, *Medically assisted procreation – news and insights*, in "Dreptul" No. 3/2010, 83-84.

²⁶ Law No. 95/2006 on healthcare reform, published in "Monitorul oficial al României" (Romanian official Gazette), No. 372 from 28 April 2006. Article 142 e) transplant – aceea activitate medicală prin care, în scop terapeutic, în organismul unui pacient este implantat sau grefat un organ, țesut ori celulă. Reglementările cuprinse în prezenta lege se adresează inclusiv tehnicilor de fertilizare in vitro.

²⁷ G. Rothschild, *Issue of Issue*, chapter 15, 2010, p. 15-3.

²⁸ Judge Edward M. Ross of Los Angeles County Superior Court, December 1992; D. Margolick, *15 Vials of Sperm: The Unusual Bequest of an Even More Unusual Man*, The New York Times, US, 1994: <http://www.nytimes.com/1994/04/29/us/15-vials-of-sperm-the-unusual-bequest-of-an-even-more-unusual-man.html?pagewanted=all&src=pm>.

the surviving partner may accept the discussed testamentary clauses and conceive a child by assisted reproductive technology (post-mortem)²⁹.

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²⁹ Valid written consent of the deceased is required in Argentina, Belgium, Latvia, the Netherlands, New Zealand, Spain and the UK together with some states of the United States. In the UK there must be a named partner. There are varied restrictions on the time after death by which treatment must be started or completed, but in general, posthumous reproduction is not used. [http://www.wikigender.org/index.php/Practices_and_controversies_surrounding_Assisted_Reproductive_Technology_\(ART\)](http://www.wikigender.org/index.php/Practices_and_controversies_surrounding_Assisted_Reproductive_Technology_(ART)).