

ON THE CONSENT OF POTENTIAL FATHER REGARDING THE TRANSFER OR DESTRUCTION OF AN EMBRYO¹ FORMED BY EXTRACORPOREAL² FERTILIZATION

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In order to generalize the scope of the problematic issue provided in the abstract of the paper, let us imagine a situation when a couple is willing to have a biological child-in-common, but it is impossible without a relevant medical involvement. They declared their consent that the medical facility would carry out extracorporeal fertilization with their biological material – gametes (sperm cell, egg), which the medical facility did (on the grounds of the respective agreement signed between the

1 This article discusses the cases of fertilized eggs, also non-cryopreserved and cryopreserved embryos. The term 'embryo' is used with the following meaning: Embryo – the result of joining human gametes at every stage of development until the formation of a fetus.

2 In this paper "Extracorporeal fertilization" is used interchangeably with in vitro fertilization. In Vitro fertilization is joining the human egg cell and sperm cell in a laboratory procedure.

couple and the medical facility). Embryos were created, they were cultivated,³ some were prepared for the transfer (implantation)⁴, and others were cryopreserved⁵ (with the purpose of keeping them for future transfer).⁶

After the medical facility carried out the above mentioned activities, before the transfer of embryos (it may happen at the moment when the embryos are created and/or any time since their creation, in many years), the potential biological father refused to the further transfer of embryos, and;

- a. Just refused and did not do anything else;
- b. Referred to the medical facility with the request to destroy the embryos they have created, including the cryopreserved ones.

In this particular case, the potential mother, whose biological material was used for creating the embryo(s), may be deprived of ability to have children in the future, which means that she can only become a biological (genetic) mother through the transfer of already created embryos.

What shall a medical facility and/or a court do in this and/or similar legal situations?

Medical, philosophical or bioethical grounds of the origin of artificial fertilization⁷ imply to support people to have biological (genetic) child in the environment when it is complicated or practically impossible as the result of copulation (between the future biological parents). Artificial fertilization supports to realize the will of individuals, when their physical ability cannot make it happen. This only exists for perfecting the realization of the will of individuals and not vice versa.

The human nervous system, the brains, represents a pedestal of an individual's physiology, together with the will – an important concept from the legal standpoint, which is a result of a developed nervous system. Fertilization too, is a result of an expression of the will. In the absence of artificial fertilization, the man's volitional attitude ends when he makes a decision about the location of his ejaculation. When ejaculation takes place in the vagina, the man's volitional attitude regarding the likely pregnancy of a woman is already demonstrated (if the parties of copulation do not use contraceptives). However, egg fertilization, and - after the egg fertilization – the fetus development and giving or not giving birth to a child do not depend on the man's further volitional attitude. The man has demonstrated his volitional attitude by the completion of sexual intercourse.

When there is an artificial fertilization, sperm donation, etc., the man's volitional attitude (creation of embryos with the usage of his sperm) ends at the moment when he transfers his sperm to the respective medical facility.

However, when a woman is pregnant, majority of countries nowadays allow abortion within the period of 12 weeks in accordance with the effective regulation, which (in the countries where it is allowed) represents the right of a woman, only of the woman who is pregnant. Per se, abortion cannot be the right of another person. The right to abortion and its enjoyment cannot depend on a man or any other person (neither within the statutory period, and obviously, nor beyond it).

If we address the issue of abortion vis-à-vis the issue of discussion, which is about artificial fertilization, no other person should have the right to abortion but the pregnant surrogate mother despite whose biological child she is carrying, because the abortion from its side is related to the processes taking place in the body of a pregnant woman and to the health of this person. It is also important that in case when the embryo has already been created, the issue of embryo destruction or its further transfer can no way be linked to the so called sperm donor, because he has already demonstrated his volitional attitude

3 Cultivation – growing to blastocyst. Blastocyst implantation is the process of implanting the blastocyst in the uterine lining (transfer to uterus).

4 Implantation – transferring the blastocyst in the uterine lining (transfer to uterus).

5 Cryopreservation – a form of storing-conservation, which is done through (special) freezing.

6 Transfer – implantation that can be done to the uterus of a biological mother, also to that of a surrogate mother as well.

7 For the purposes of this research, artificial fertilization means a medical achievement existing as of the time when the research was done. The reasoning contained in the paper may not be valid in cases when artificial fertilization and all the stages of fetus development is possible outside the woman's body – in an artificial uterus. In that time the issue of embryo destruction needs rethinking and new reasoning in the part of making decisions on embryo destruction – in the light of the right to abortion.

towards this issue by giving/donating sperm to, and/or concluding a respective agreement with the medical facility.

Correspondingly, irrespective of the legal situation among the parties (potential parents, surrogate mother, medical facility) in the agreement, the issue of destruction and/or transfer of embryo should depend on:

- a. The woman, whose egg was used for creating an embryo, in case if this woman is one of the parties to the agreement and represents a so called potential parent;
- b. Both of the potential parents – if the donor material (egg and sperm) was used for creating an embryo, then in the absence of such consent the clinic should make a respective decision after the expiry of the agreed term.

It is impossible to destroy an embryo without a woman's will, who is at the same time a potential parent (one of the parties to the agreement), because, as I have mentioned before, artificial fertilization exists only for facilitating the realization of the will of those people who are not capable of having child(ren)-in-common with physiological, ordinary copulation. As the result of such analogy, although a potential parent (mother-woman) is not pregnant (physiologically, by her body), there is her egg fertilized, which is equal to the pregnancy of egg donor, until the embryo is transferred to the uterus of a surrogate mother (except the case when it is the donor's egg). Correspondingly, nobody has the right to interfere in this person's right to abortion, as we may think about the right of any other person to destroy this embryo based on this person's will, unless there is a will of the person whose egg has been fertilized.

As for the embryo transfer, based on the already concluded agreement, despite the legal situations in the agreement and their wording, only the biological mother has the right to transfer the created embryo (except the case when the biological mother is a donor), as far as based on the above-mentioned analogy she is pregnant until such transfer takes place, and it is only her who has the right to destroy the embryo.

Conclusions:

In the legal relations linked to artificial fertilization, when we have embryo(s) created with the biological materials of potential parents, decision of a potential biological mother should be sufficient for the medical facility concerning the embryo transfer⁸ and/or cryopreservation (storing) and/or destruction, and it is inadmissible for the medical facility to request the consent of any other person, including the potential biological father⁹, as much as this consent per se is the right to abortion, which is something that only a pregnant person¹⁰ has.

When deciding similar cases, the courts should be guided by the reasoning provided in this paper while making their judgment, because any other reasoning would be against the philosophical essence and purpose of artificial fertilization that has existed so far.¹¹

RESUME

The paper discusses the issue regarding a potential biological father when he is against the transfer of the created embryo(s) (by means of artificial fertilization), before having the embryo transferred into the body of a surrogate mother, and/or when he requests the medical facility to destruct the embryo(s), but the potential biological mother is willing to carry out the above-mentioned transfer.

8 Before the transfer (implantation).

9 In this context, the rights and obligations of a potential father is the issue of a separate discussion, like other issues – alimony and other domestic-legal obligations, their scope and legal grounds.

10 In this case we mean: a) a potential mother, whose biological material was used for creating an embryo; b) a surrogate mother, whose uterus the embryo was transferred to.

11 Until the time when all the stages of fetus development takes place outside the woman's body, starting from the egg fertilization process – in the artificial uterus with all the stages of fetus development, until the moment when fetus comes out of the artificial uterus (birth). Purpose of creation of an artificial uterus can be different from today's philosophical-legal purpose of artificial fertilization, and it may basically imply the desire to take some processes away from the human body, which can be an alternative to 'less physical wear and tear' of the woman's body (gaining weight, metabolism, fatigue, etc.), reduction of various risks, and full preservation of labor capacity.

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In this case any action from the medical facility is facing a certain legal gap, as far as the embryo(s) has (have) already been created, and a written consent of both potential parents (parties of the agreement) is necessary for their destruction. Besides, the written consent is also necessary for the transfer of embryo(s) into the body of a surrogate mother. What should a medical facility and/or a court do in such and/or similar legal situation?

The paper addresses the above-mentioned issues, and the discussion is taking place in the light of philosophy, law, medicine and bioethics, and guiding proposals are offered for the subjects involved in the disputable issue(s). The discussion and applicability of reached conclusions are not limited to any particular country, and they can be applied to various countries worldwide, and may represent a source of formation of a future positive law.

პოტენციური მამის თანხმობის საკითხი ემბრიოაკორპორალური განაყოფიერებით შექმნილ ემბრიონის ტრანსფერზე ან მის განადგურებაზე

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საკვანძო სიტყვები: ნაყოფი, ემბრიონი, კრიოპრეზერვაცია

რეზიუმე

ნაშრომში განხილულია საკითხი, როდესაც ემბრიონ(ებ)ის შექმნის (ხელოვნური განაყოფიერება) შემდეგ, სუროგატი დედის სხეულში ემბრიონის ტრანსფერის განხორციელებამდე, პოტენციური ბიოლოგიური მამა უარს ამბობს ტრანსფერის განხორციელებაზე ან/და მოითხოვს სამედიცინო დაწესებულებისგან ემბრიონ(ებ)ის განადგურებას, ხოლო პოტენციურ ბიოლოგიურ დედას სურს ზემოხსენებული ტრანსფერის განხორციელება.

ასეთ დროს სამედიცინო დაწესებულების მხრიდან ნებისმიერი ქმედების განხორციელება აწყდება გარკვეულ სამართლებრივი ვაკუუმს, ვინაიდან უკვე შექმნილია ემბრიონ(ებ)ი, მათი განადგურებისათვის კი აუცილებელია ორივე პოტენციური მშობლის (ხელშეკრულების მხარის) წერილობითი თანხმობა. ასევე, აუცილებელია წერილობითი თანხმობა ემბრიონ(ებ)ის ტრანსფერზე სუროგატი დედის სხეულში. როგორ უნდა მოიქცეს სამედიცინო დაწესებულება

გიორგი ბ. თუმანიშვილი

ან/და სასამართლო ასეთ ან/და მსგავს სამართლებრივ სიტუაციებში?

ნაშრომში განხილულია ზემოხსენებული შემთხვევები, მსჯელობა მიმდინარეობს ფილოსოფიის, სამართლის, მედიცინისა და ბიოეთიკის ქრილში და შემოთავაზებულია სახელმძღვანელო წინადადებები სადავო საკითხ(ებ)ში მონაწილე სუბიექტებისათვის. მსჯელობა და მიღებული დასკვნების გამოყენების

შესაძლებლობა არ შემოიფარგლება რომელიმე ერთი კონკრეტული ქვეყნის მასშტაბით. იგი შეიძლება გამოიყენოს თანამედროვე მსოფლიოს სხვადასხვა ქვეყანამ და შესაძლოა წარმოადგენდეს მომავალი პოზიტიური სამართლის ფორმირების წყაროს.