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Biomedically Assisted Reproduction in the Republic of Slovenia and the Republic of Macedonia

Procreatio artificiali imitatur naturam

In the past half century, humanity has witnessed astonishing changes in science and technology. Some of the most remarkable developments have occurred in the field of reproductive medicine, such as the procedure of biomedically assisted fertilization. In April 2013, the British Robert Edwards, known as pioneer in the field of in vitro fertilization for which he was awarded with the Nobel Prize for Medicine in 2010, has passed away. He started working on the procedure of in vitro fertilization in the 50s of the XX century. The first “baby from tube”, Louis Brown was born in 1978, as a direct result of his work. Since then, more than five million children were conceived and born, thanks to the application of this procedure.

The progress of science and technology in the past few decades has led to prosperity and welfare for a big part of human kind, but also opened very serious legal, ethical and moral questions and dilemmas. One of the fields where revolutionary changes have taken place in the past three decades is the sphere of biotechnology and reproductive medicine. The emergence of new technologies such as artificial insemination, in vitro fertilization and surrogate motherhood opened up new possibilities for infertile couples to become parents.¹

In this article, through a comparative analysis of the Law on Biomedical Assisted Fertilization of the Republic of Macedonia and the Law on Infertility Treatment and Bio- Medically Assisted Procreation of the Republic of Slovenia, we will point out to some of the contentious and problematic issues related to the artificial insemination in these legal codes.

The right to have or not to have children enjoys constitutional protection in both Macedonia and Slovenia. The Constitution of the Republic of Macedonia stipulates that it is a human right to decide freely on the procreation of children (Article 41).² That means that every citizen may freely decide about the number of children and the dynamics of giving birth. The Constitution of the Republic of Slovenia also guarantees the freedom of decision of childbirth (Article 55).³ This constitutional provision embraces two elements: 1) deciding on the birth of one's own children is free and 2) the state has to guarantee the possibilities for exercising this freedom and provide for the conditions enabling the parents to decide to have children. With this important fundamental freedom, the Constitution of Slovenia

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¹ Mickovik Dejan, ‘The Law on Biomedically Assisted Fertilization – Dilemmas’, *Lawyer*, Skopje, March 2009, p. 44.

² *Official Gazette of the Republic of Macedonia* no 52/91.

³ *Official Gazette of the Republic of Slovenia* no 33/91, 42/97.

enables people (men and women of childbearing age) to exercise their will concerning the questions of whether, when and how many children they will have. Although it is a fundamental freedom (and not a right), according to the interpretation of the Constitutional Commission there are some rights that derive from it, such as: the right to diagnose and treat sub-fertility or infertility, the right to prevent pregnancy (contraception and sterilization) and the right to terminate pregnancy (the right to abortion).⁴

Nowadays, in circumstances when the means of artificial procreation tend to imitate nature, some crucial philosophical, moral and legal concerns provoke interest of science and broader public. In the following sections, we will attempt to throw light on some of these contentious issues, such as the right of a single woman to be a beneficiary of BAF, the posthumous reproduction, the donor's anonymity etc.

In this context, Lin points out that: "with the development of assisted reproductive technologies such as in vitro fertilization, human inventiveness opened a Pandora's box of bioethical and legal issues".⁵

The new reproductive technologies in Republic of Macedonia are regulated in the Law on Biomedical Assisted Fertilization from 2008.⁶ This Law is the first attempt to regulate all issues related to biomedically assisted reproduction that was not subject of legal regulation before the enacting of this Law.

The Republic of Slovenia has two Laws on the matter. The basic (old) one is the Law on Medical Measures for the Realization of Freedom of Choice in Childbearing of 1977.⁷ In the area of enabling conception, this law was incomplete, because it regulated only artificial insemination and not some more recent and more efficient methods of assisting infertile persons. This includes extra-corporal (in vitro) fertilization with embryo transfer into the woman's body.⁸ In this paper, we will refer to the actual one - the Law on Infertility Treatment and Bio-Medically Assisted Procreation, enacted in July 2000.⁹ The purpose of the new Law was to replace the regulation in the Law on Medical Measures for the Realization of Freedom of

⁴See: Zupancik Karel, Žnidaršič Skubic Viktorija, 'Two aspects of freedom of childbirth' in: *Law and Medicine*, Cankarjeva Založba, Ljubljana, 1998, p. 195-249; Cited by Žnidaršič Skubic, Viktorija: The Law on Infertility and Bio-Medically Assisted Procreation in Slovenia, *11th World Conference the International Society of Family Law: Family Life and Human Rights*, 2nd-7th August 2002, Copenhagen, Oslo, p. 1017.

⁵See: Lin Olivia, 'Rehabilitating Bioethics: Recontextualizing In Vitro Fertilization outside Contractual Autonomy', *Duke Law Journal*, Vol. 54, n. 2, November 2004, p. 510.

⁶*Official Gazette of the Republic of Macedonia* no 37/08.

⁷*Official Gazette of the Republic of Slovenia* no 11/77.

⁸Žnidaršič Viktorija, 'The Law on Infertility and Bio-Medically Assisted Procreation in Slovenia', *11th World Conference the International Society of Family Law: Family Life and Human Rights*, 2nd-7th August 2002, Copenhagen, Oslo. *Family life and human rights : handbook & abstracts*, p. 1018.

⁹*Official Gazette of the Republic of Slovenia* no 70/00.

Choice in Childbearing of 1977, i.e. the chapter “Diagnosis and treatment of sub-fertility”.¹⁰

Article 1 of the Macedonian Law on Biomedical Assisted Fertilization envisages that it shall regulate the right to biomedical assisted insemination, the requirements for exercising the right to biomedical assisted insemination, donation safety, the rights and obligations of the patients, healthcare workers and healthcare institution.

In the Slovenian Law on Infertility Treatment and Biomedically Assisted Procreation, Article 1 underlines that the provisions of this Law serve to regulate the health measures that help women and men to conceive a child and by this, allow them to exercise freedom of choice in childbearing.

Article 5 of the Law on Biomedical Assisted Fertilization presents a brief description of the procedure of BAF, saying that it is a medical procedure that enables joining of female and male genital cells for the purpose of achieving pregnancy in a manner different from the sexual intercourse. Although the means and the procedures of biomedically assisted reproduction vary, what is common for all of these procedures is that they can only be carried out in order to achieve pregnancy and give birth to a child and for no other purpose. The procedures of biomedically assisted reproduction in both legislations mainly include: a) fertilization inside of a woman's body - the introduction of sperm cells into a woman's sex organs and the introduction of egg cells together with sperm cells into a woman's sex organs; b) in-vitro fertilization, which involves the joining of egg and sperm cells outside of a woman's body (in a glass container) and the introduction of fertilized egg cells or embryos in early stage of development into the reproductive organs of a woman.

The Macedonian legislator envisages that during the BAF procedure, priority shall be given to using personal reproductive cells. The same rule is applied in Slovenian law. It says that couples may be assisted only by homologous methods of fertilization: only their genetic material (ova and sperm) may be used. In case when during the BAF procedure it is impossible to use personal reproductive cells of the married or unwed couples, the Law provides exceptional allogeneic (heterologous) procedures. Additionally, allogeneic procedures may be used for the purpose of preventing transmission of severe congenital disease to the child, as it could be the case if the couple used their own genetic material.

In Macedonia, the authorized healthcare institution for allogeneic BAF shall be obliged to obtain consent for allogeneic BAF from the State Commission on Biomedical Assisted Insemination for each married or unwed couple or the woman referred to in Article 9.

¹⁰Žnidaršič, op cit, p. 1018.

Informed Consent

The Article 12 of the Macedonian Law on BAF notes that the procedure shall be implemented on a request of the married or unwed couple, or the single woman (Article 9), provided that they are previously informed and counseled about the BAF procedure and provided that for the determined procedure they have obtained a written consent.

The given consent for those procedures has legal significance as a statement for accepting paternity/maternity after the child is born. The woman and/or the man can withdraw the consent and abandon the BAF procedure until the spermatozooids, the ova or the embryos are not inserted in the woman's body. In Slovenian legislation as well, the formal, free and informed consent of married or unmarried couples is condition sine qua non for carrying out the BMAP procedure.¹¹

Beneficiaries of the procedure of BAF

In the Slovenian Law on IT BMAP, the right to biomedically assisted fertilization is reserved solely for couples of opposite sex, either married or not (cohabitation) that, according to the medical science, cannot be expected to achieve pregnancy through sexual contact and pregnancy cannot be achieved with other medical infertility treatments.¹²

When it comes to cohabitation (extra-marital union), we must emphasize that in both legislations, the concept of unregistered non-marital cohabitation is accepted. Professor Žnidaršič – Skubic stipulates that in Slovenia, it is a special question to ascertain who is competent to establish the existence of cohabitation. As it does not rise in a formal way, the doctor should more likely be satisfied with the assurance of the couple in question that cohabitation exists.

The Law on the Family in Republic of Macedonia defines the non-marital cohabitation as a union of a man and a woman that lasted longer than a year. According to the Macedonian family law, it is equalized to marriage in terms of the right of mutual maintenance and common property.¹³ In Macedonia as well as in Slovenia, it is not stated how the existence of cohabitation will be proved. Thus, organizations that carry out the procedure of BAF must simply trust the man and woman who are submitting the application that they live in non-marital cohabitation.¹⁴

¹¹More in: Žnidaršič Skubic Viktorija, Slovenia, *International Encyclopaedia of Laws*, Wolters Kluwers, Alphen aan den Rijn, Netherlands, 2013, 150.

¹² Law on Infertility Treatment and Bio- Medically Assisted Procreation, *Official Gazette of the Republic of Slovenia* no 70/00, Article 5.

¹³Law on Family, *Official Gazette of the Republic of Macedonia* n. 80/92, 9/96, 38/2004, 33/06, 84/08 and 157/08, Article 13.

¹⁴Read more in: Mickovik Dejan, Ristov Angel, 'The Legal Regulation of Nonmarital Cohabitation in Macedonian Family Law', *International Survey of Family Law*, 2012, p. 197.

The Macedonian legislator, compared to the Slovenian lawmaker, has adopted more liberal approach concerning the question who may be a beneficiary of biomedically assisted fertilization. Therefore, beside married couples and the ones that live in extra-marital union, he also foresees a right to assisted fertilization to a single woman, but only if the previous treatment was not successful.¹⁵

As a consequence of the legal provision allowing a single woman who is not married and does not live in non-marital union to occur as a beneficiary of biomedically assisted fertilization, the legislator creates a scenario of giving a birth to a fatherless child. This would be the case, as the provisions dedicated to establishment of paternity of the Law on Family in the Republic of Macedonia do not mention biomedically assisted fertilization, where the donor is anonymous. This solution, which ultimately creates a situation where the child conceived through biomedically assisted fertilization would not have a father, is inconsistent with the most important international document regulating and protecting the rights of children – the UN Convention on the Rights of the Child, which has been ratified by the Republic of Macedonia.¹⁶ Article 5 of the UN Convention on the Rights of the Child stipulates that States must respect the rights and responsibilities of parents. Furthermore, Article 11 underlines that both parents have common responsibilities for upbringing and raising the child.

In the European states, there are different legal solutions regarding the possibility for a single woman to be recipient of the procedure for BAF. For example, Great Britain, Belgium, Bulgaria, Greece, Montenegro, Russia, Spain and many other countries allow a single woman to use artificially reproductive technologies. However, this is not the case in Slovenia, Croatia, France and other countries, where the right to BAF is exclusively intended for married couples and extramarital partners. Switzerland is even more restrictive in this regard and it envisages access to BAF procedures only to married couples.

The Slovenian Law on Infertility Treatment and Procedures of Biomedically–Assisted Procreation was heavily criticized by the Commission of Justice and Peace (CJP), which stressed that there are severe ethical obstacles in relation to the artificial insemination, because of the tendency to reduce the human person to a nameless biological mass. The CJP in particular refused the methods of heterologic artificial insemination.¹⁷ In April 2001, the National Assembly enacted changes to the Law on Infertility Treatment and Procedures of Biomedically–Assisted Procreation, which intended to open the possibility for artificial insemination treatment to single fertile women. Almost everybody in Slovenia had an opinion of their own regarding the questions raised by the referendum and, logically,

¹⁵Law on Biomedical Assisted Fertilization, *Official Gazette of the Republic of Macedonia* no 37/08, Article 9.

¹⁶Read more in: Mickovik Dejan, Ristov Angel, op.cit, p. 195.

¹⁷See: Ivanc Blaz, 'Slovenian Experiences Concerning Religion and Biolaw', p.135. Access Mode:
http://www.deltapublicaciones.com/derechoyreligion/gestor/archivos/07_10_18_569.pdf

the passing of the Law on Changes to the Law on Infertility Treatment and Bio- Medically Assisted Procreation caused a heated public debate. The polemic articles and the responses to them inundated us with various points of view of individuals and individual social groups with regard to a single question: should single (healthy-not infertile) women have the right to BMAP or not.¹⁸ Not just the Commission of Justice and Peace (CJP), but also the National Medical Ethics Committee (NMEC) was against the proposed change of the bill. Finally, the bill was a subject of a subsequent national referendum and a vast majority of voters (72.3%) did not support the proposed changes of the bill.¹⁹

Infertility can only be determined for couples; it is impossible to determine with certainty whether a woman who does not have regular sexual relations is fertile or infertile without invasive procedures into the body.²⁰ In the case that insemination is allowed for single women using donated semen, the right to have children with state intervention follows *de facto*. This is not a treatment that cures infertility, but a substitute for partner in the social sense.²¹ This could be seen as a base for sexual discrimination of men. Professor Viktorija Žnidaršič – Skubic thinks that it is necessary to ask why do men not also have the right to have a child. She highlights that according to the nature of things, men cannot carry and give birth to children, but a woman who is impregnated with donated semen is also, in some sense, “cheating” nature.

Even in countries where single women are provided with the opportunity to be beneficiaries of the procedure, there is a strong resistance among doctors. The medical professionals in the field of assisted reproduction can object and decide not to take part in these procedures from conscientious reasons (the right of conscientious objection). In United Kingdom, 65% of physicians dealing with biomedically assisted fertilization would not accept to artificially fertilize a woman who does not have a partner under any circumstances. Similarly as the conscientious objection in abortion cases, Slovenian legislation allows doctors and other biomedical and medical staff to refuse to participate in conducting BAF procedure. In the Republic of Macedonia, the so-called “conscience call” is envisaged, as well. Article 42 stipulates that the healthcare workers and associates participants in the implementation of a BAF procedure shall have the right, due to ethical, religious or moral views, to invoke to conscience call and thus refuse the implementation of a BAF procedure or participation in such procedure.

In the Republic of Serbia, the right of a single woman to be artificially fertilized is provided only as an exception. Article 26 of the Law on Infertility Treatment, through a Procedure of Biomedically Assisted Fertilization in Republic of Serbia, provides the right of BAF for the capable women who live alone and meet the requirements of Paragraph 1 of this Article, with the consent of the Minister

¹⁸Žnidaršič Viktorija, ‘The Law on Infertility and Bio-Medically Assisted Procreation in Slovenia’, p. 1027.

¹⁹Ibid.

²⁰Ibid., p. 1029.

²¹Žnidaršič V., *op.cit*, p. 1031.

responsible for Health and Minister assigned for Family Relationship, if there are justified reasons.²²

On the other side, we must face the reality that the number of marriages decreases, the rate of divorced marriages increases and one third of the children in EU were born out of marriage. Therefore, the single parent families nowadays are very common, and cannot be considered as a deviation from the universal family model consisted of the married couple and their offspring.

In Macedonia, an adult women having legal capacity, who are not married and do not live in an unwed partnership shall have the right to use the BAF procedure, provided that the previous treatment is unsuccessful or the treatment with other methods is forlorn, and who in accordance with their age and general health condition are capable of parenting.²³ Therefore, we should note that it is already “acquired right” in Macedonia and, if the legislator bans the right of a single woman to use the procedure of BAF, this could be perceived as a legislative attack on the woman’s reproductive freedom. In addition, it could stimulate the so-called “reproductive tourism”, where infertile couples or individuals from one country go abroad for implementing the procedure of BAF, as a result of legal restrictions in their countries.²⁴ So, the Macedonian Law on BAF should be supported, because it guarantees the reproductive rights for single women, trend that is accepted by many other countries in Europe.

Right to Posthumous Reproduction

Another difference between the Macedonian and Slovenian legislation may be found in relation to the legal treatment toward the issue of posthumous reproduction.

The birth of the idea of posthumous reproduction originates from 1866, when the Italian scientist Montegazza found that semen can be successfully frozen. He believed that this discovery could be very useful for women whose spouses go to war where they might die. Within science, cryopreservation of sperm gained credibility in 1953, when Bunge and Sherman proved that the sperm that is frozen can be used to fertilize a woman and thus, healthy and normal baby can be born.²⁵ By combining the cryopreservation of sperm and methods of artificial reproductive technologies, it is possible to achieve posthumous reproduction, child can be born after the death of one parent and, when it comes to frozen embryos, even after the death of both parents.²⁶

²²Official Gazette of the Republic of Serbia no 72/2009.

²³Law on Biomedical Assisted Fertilization, *Official Gazette of the Republic of Macedonia* no 37/08, Article 9.

²⁴Find more in: Mickovik Dejan, Ristov Angel, ‘Biomedically Assisted Fertilization in Republic of Macedonia’ in: Brigitte, E.S. Jansen, Elena Ignovska (eds) *Law, Public Health Care System and Society*, Volume 8, Macedonia, Social Policy, Legislation, Biomedicine and Ethics of Organ Transplantation, Fertilization and Assisted Reproductive Medicine, AVM-Verlag (Akademische Verlagsgemeinschaft) Munich, Munich, 2012.

²⁵Mickovik Dejan, ‘Posthumous reproduction and the Succession Law’, *Juridica*, Strumica, February 2010, p. 4.

²⁶Ibid.

The use of frozen sperm for fertilization is the most common kind of posthumous reproduction, although the progress of methods of cryopreservation enables the use of pre-embryos and ova for posthumous reproduction.²⁷

One of the main issues raised in posthumous reproduction concerns the motives and reasons for using this radical (by some authors even morbid) modus of reproduction. Quite often, a man suffering from a severe illness can freeze his semen in an authorized medical facility and, after his death, the woman uses the sperm for fertilization, as an expression of deep love and desire to get an offspring with the deceased spouse.²⁸

Having in mind that the principle of the child's best interest is the highest priority in all jurisdictions and that this principle includes the basic right of the child to live with and to be raised by both parents, it seems that the issue of posthumous reproduction truly threatens the child's best interest.²⁹

The first important court case in Europe, in which the posthumous reproduction was discussed and which sparked enormous debates in general public, not only in France but worldwide is *Parpalaix c. CECOS* (Centre d'Etude et de Conservation de Sperme). In 1981, only two years before his death, Alain Parpalaix, to whom testicular cancer has been diagnosed, right before commencing chemotherapy treatments, decided to deposit semen in the Bank for conservation of sperm CECOS.³⁰ After his death, in the judicial procedure, the Court had to decide to whom belongs the right over the cryopreserved reproductive cells after the death of the donor.³¹ The French Court did not consent to apply the rules of contract law in the particular case, emphasizing that sperm is the "semen of life... accompanied with the fundamental freedom of the human being to conceive a child". The Court accepted a position that in this case it should embrace the real intention of the donor of the sperm. Upon this basis, the Court awarded the right of use of the sperm to Mrs. Parlapaix, as a result of its assurance that the true intention of donor was that his sperm is used for insemination of his wife.³²

In Europe, posthumous reproduction is permitted in a small number of countries: Austria, Belgium, Greece, Netherlands, Great Britain, Spain and Republic of Macedonia. Slovenia, Croatia, Bulgaria, Sweden, Switzerland, Lithuania, Finland and Portugal

²⁷Mickovik D., op.cit. p. 5.

²⁸Ibid, p. 5.

²⁹Article 7 of the Convention on the Rights of the Child acknowledges that the child shall have, as far as possible, the right to know and be cared for by his or her parents. It is clear that the legislation that allows posthumous reproduction violates the Convention. The Macedonian Law on Family envisages that the children have right to live with their parents (Article 47). In addition, Article 46 stipulates that the child has the right to be cared for and supported by both parents.

³⁰Mickovik Dejan, Ristov Angel, 'Biomedically Assisted Fertilization in Republic of Macedonia', op.cit, p. 30.

³¹Ibid.

³²Read more about the CECOS case in: Scharman CA, 'Not without my father: the legal status of the posthumously conceived child', *Vanferbilt Law Review*, Vol.55, 2002.

prohibit post mortem reproduction. There is significant number of countries without legal provisions concerning this contentious issue.

In USA, there are no unified rules regulating the issue of posthumous reproduction. The first attempt to create some directives related to inheritance rights of posthumously conceived child was made by the Uniform Status of Children of Assisted Conception Act. The Act claims that the individual whose reproductive cells were used for conceiving a child after his death, would not be considered as a parent of the child and, consequently, the child would not have a right to inheritance.³³

On the other hand, the Uniform Parentage Act foresees a different solution. Namely, it says that if the spouse dies before conceiving the child, he is not considered as a parent of the child, unless the donor of the reproductive cells agrees to be regarded as a parent of the posthumously conceived child that would be born after his death.³⁴

By placing aside the romantic perception of posthumous insemination as a victory of love over death, in real life we face problems concerning the identity and social and inheritance rights of posthumously conceived children. Social and inheritance rights of posthumously conceived children were matter of consideration and law making in the following cases: *Woodward v. Commissioner of Social Security* and the *Estate of Kolacy*.

Woodward v. Commissioner of Social Security is the most important case in which the Supreme Court of Massachusetts had to decide on the inheritance rights of posthumously conceived children. Lauren Woodward, two years after her husband died from leukemia, gave birth to twins after conducting a procedure of artificial insemination with the sperm of her deceased husband.³⁵ After the birth of the children, the woman asked to be awarded with social care and was denied by the Department of Social Care. Later, this decision was reaffirmed by the Administrative Court. Lauren Woodward submitted an appeal to the District Court. Upon the request from the District Court in which it was highlighted that there is no legal precedent in Massachusetts about the rights of posthumously conceived children, the Supreme Court of Massachusetts decided that posthumously born children may become heirs of their deceased father.³⁶ In reaching a decision in this case, the Supreme Court noted that the case contains three important issues: the best interests of children, the interest of the

³³This approach is accepted in North Dakota and Virginia. Additionally, the Law in Virginia prescribes that donor could be recognized as a parent of the child only if he has given a written consent for posthumous insemination prior his death.

³⁴The Uniform Parentage Act says that if the spouse dies before the conceiving of the child, he is not regarded as the parent of the child unless he has already agreed to be recognized as a parent of the posthumously conceived child.

³⁵Mickovik, 'Biomedically Assisted Fertilization in Republic of Macedonia', *op.cit.*, p. 31.

³⁶*Ibid.*

state for effective dissolution of inheritance and the reproductive rights of the deceased spouse.³⁷

We believe that by allowing a single woman to fulfill her dream of becoming a mother through the procedure of biomedically assisted procreation, we do not have contra arguments about the issue of posthumous insemination, which is allowed and regulated in Macedonia.

Namely, according to the Article 33 of the Macedonian Law on BAF, a man and a woman that shall be threatened with infertility due to health reasons in accordance to the medical sciences, by submitting a written consent in the authorized healthcare institution can preserve their spermatozoids, ova, ovum or testis tissue, for the purpose of their own usage. The paragraph 2 of the cited article says that in case of death of the man, it shall be permitted to perform posthumous BAF, with his previous written consent, one year after the day of his death, at the most.

In this sense, under the Macedonian Law on BAF, it is envisaged that the child is conceived within one year of the death of the donor. We consider that this deadline is too short. After the death of the spouse, the woman should have reasonable time for grieving and time to consider whether she wants to start the procedure of posthumous reproduction. Immediately after the death of the partner, she finds herself in a difficult emotional condition, when she has to face the loss of the beloved and close person. During this period, she is not capable of making such a serious decision as to conceive a child who would not have a father and for whom she would have to take care alone.³⁸

Another contentious issue is the status of posthumously conceived child. If the child is born after the death of the father (in a period longer than 300 days) the child would be registered as a child born out of marriage. The Macedonian Law on Family foresees an opportunity of recognition of fatherhood before the child's birth, if the child is born alive. According to the Macedonian Law on Succession, the posthumously conceived child does not have the right to inherit its father. We consider that this is an omission made by the legislator in the time when the right of posthumous reproduction was accepted in our legislation. Having in mind the current legal situation, we may stress that the posthumously conceived children are unduly

³⁷The same issue was considered in the case *Estate of Kolacy*. In 2000, the Supreme Court of New Jersey was asked to determine whether twins conceived through in vitro fertilization and born 18 months after the death of their genetic father may obtain a status of legal successors according to the Succession Law in the state of New Jersey. Just like in Massachusetts, the New Jersey Law also predicts that descendants can be only people who were alive at the time of death of the testator, or who were conceived during the lifetime of the testator and were born 300 days after his death. The Court decided that the twins may be descendants of the testator. In making this decision, the Court had in mind the fact that there is clear and unambiguous evidence showing that the deceased is the biological father of both twins. Moreover, the Court determined that the children have right of inheritance due to the overall determination of the legislator that enables children to inherit their parents.

³⁸*Ibid.*

discriminated only as a result of the moment of conception. It is more than evident that certain changes in the domestic succession law that would provide a right to inheritance of this category of children need to be made as soon as possible

In the Republic of Slovenia, legal provisions do not provide this opportunity to women whose spouse or cohabitation partner has passed away. In Slovenia, post-mortem biomedically assisted procreation is prohibited. This prohibition derives from the duty of the health institution to ensure if the donor is alive or dead before the transfer of gametes is being made. The prior intention of the Slovenian legislator by enacting this rule is to ensure that in case the child needs a medical help from the donor, it would get it, having in mind the genetic link between the child and the donor.³⁹ Another argument for prohibition of posthumous reproduction in Slovenia can be found in the regulation that demands the existence of the marriage or cohabitation of a man and a woman who are assisted with BMAP at the time of the placement of the sperm, fertilized ova or early embryo into the woman's body. As at the moment of death the marriage or cohabitation ceases to exist, post-mortem BMAP is not acceptable.⁴⁰

Donorship & Parental Rights of Beneficiaries

In the Republic of Slovenia, donorship is not solely limited to men, which means that women can also donate oocytes. The Slovenian Law on BMAP claims that donor of sperm cells is a man whose sperm cells are used to impregnate women who is not his spouse or cohabiting partner, while donor of ova is a woman whose ova are used to fertilize another woman.⁴¹ According to Article 13 of the Slovenian Law, the donation of human embryo is not allowed. The use of both – the sperm cells and the egg cells from the donors at the same time is prohibited. It is also forbidden to use a donated embryo, i.e. to implant an embryo into a woman's body that was created with donated genetic material. In this way, the Slovenian legislator wants to ensure that the procedure of assisted reproduction guarantees that the child is a genetic offspring of at least one of the individuals of the couple that is being treated.

In Macedonia, this is not the case. In accordance with the provisions of the Law on BAF, if the embryo donors (a man and

³⁹It is forbidden to conduct BMAP with gametes or with early embryos in the woman's body when the donor is no longer alive. Before inserting the gametes of the donor or the early embryo that was created with the help of donated gametes, the doctor must determine whether the donor is still alive. See: Article 28 of Law on Infertility and Bio-Medically Assisted Procreation, *Official Gazette of the Republic of Slovenia*, n. 70/00.

⁴⁰Znidaršič Skubic Viktorija, 'Slovenia', *International Encyclopaedia of Laws*, Wolters Kluwers, Netherlands, 2013, p. 150.

⁴¹Law on Infertility and Bio-Medically Assisted Procreation, *Official Gazette of the Republic of Slovenia* no 70/00, Article 9.

woman who have waived their personal usage of the embryo created by their procreation) consent, their embryo could be applied for procreation by other married or unwed couples or the woman referred to in Article 9.⁴²

One of the most controversial issues related to BAF is whether to allow the possibility for the child to find out who are his biological parents. Basically, there are three major concerns of the process of getting data on genetic origin: primarily it is a medical concern, then the psychological interest and third is the interest in establishing ties with blood relatives.⁴³

Several European countries foresee the opportunity for the child to find out who are his biological parents (Sweden, Austria, Great Britain etc.). Still, the protection of the identity of the donor in both Macedonia and Slovenia is absolute.

In the Republic in Macedonia, the anonymity of the donor is guaranteed. The Law on BAF stipulates that the authorized healthcare institutions shall be obliged to provide protection of all personal, medical and genetic data of the donor and acceptor and undertake all necessary measures not to reveal the identity of the donor and his/her family and vice-versa (Article 17). Article 57 of the Law on BAF determines who has the right to insight in the register. The child born by insemination with donated genital cells or embryos, who is 18 years of age and capable of judgment, only due to a medically justified reason and with a previous obtained approval from the State Committee can request insight in the data regarding the health condition of the donor or the donors in the State Register of BAF.

As we already mentioned, the Slovenian Law provides complete anonymity of the donors of reproductive cells, in general as in the relation to children, so the child is prevented from learning the identity of the male or female donor. The child is only entitled to learn such data about the donor that are important for his/her health (to diagnose a child's disease, for treatment). This data are available for health reasons if the child is capable of judgment and at least 15 years old.⁴⁴

In the Macedonian legislation, it is foreseen that the donors of reproductive cells and embryos shall not have any parental rights or any obligations towards the child conceived by applying their genital cells in a BAF procedure (Article 15). Similar formulation exists in Article 27 of the Slovenian Law on IT BMAP, which says that donors have no legal or other rights and obligation towards the child

⁴²Law on Biomedically Assisted Fertilization, *Official Gazette of the Republic of Macedonia* no 37/08, Article 13.

⁴³Mickovik Dejan, Ristov Angel, 'Biomedically Assisted Fertilization in Republic of Macedonia', op. cit. p. 11.

⁴⁴See: Law on Infertility and Bio-Medically Assisted Procreation, Article 18; Žnidaršič Skubic, 'The Issue of Consent in Biomedically Assisted Reproduction Procedures (The Case of Evans Vs United Kingdom)', *Civil Medical Law* 2010/11 Access Mode: http://www.pf.uni-lj.si/media/Žnidaršič_evans.2012_13.pdf

conceived through the procedure of assisted reproductive technologies.

The Macedonian Law on BAF underlines that as a father of the child conceived through a BAF procedure would be considered the spouse or extramarital partner of the mother of the child (who has given written consent for the procedure).⁴⁵ In the Slovenian law, the father of the child conceived with donated sperm is the mother's spouse or the man (with full knowledge of his deed – informed consent) agreed to this kind of biomedically assisted procreation.⁴⁶ Logically, the woman who gave birth to the child would be considered as the mother of the child conceived through BAF procedure (and has given consent). The Macedonian Law on Family prescribes two situations where to contest fatherhood is not permitted, that is in case of adoption and when the woman was artificially fertilized with prior consent of her spouse or extramarital partner.⁴⁷ More precisely, the given consent for the procedures of biomedically assisted fertilization has legal significance as a statement for accepting fatherhood and motherhood after the child is born.⁴⁸ In Slovenia, it is allowed neither to establish nor to contest fatherhood of a child conceived by BMAP procedure (Article 42 Law on IT BMAP). Paternity of a child conceived by application of BMAP is not allowed to be challenged, unless it is claimed that the child was not conceived with ART procedure.⁴⁹

⁴⁵Read: (Parenting rights and beneficiary status) of the Law on Biomedical Assisted Fertilization, *Official Gazette of the Republic of Macedonia* no 37/08, Article 12 Also: Law on Family, *Official Gazette of the Republic of Macedonia*, no 80/92, 9/96, 38/2004, 33/06, 84/08 and 157/08.

⁴⁶Read: Žnidaršič Skubic Viktorija, Pipan Tina, 'Establishing Maternity and Paternity of a Child Conceived by Medical Assistance', *Pravnik* no 9-10, 1997, p. 555-580; Also: Žnidaršič Skubic Viktorija, 'The Law on Infertility and Bio-Medically Assisted Procreation in Slovenia', *Family Life and Human rights, 11th World Conference the International Society of Family Law*, 2nd-7th August 2002, Copenhagen, Oslo, p. 1027.

⁴⁷See: Article 71 of the Law on Family, *Official Gazette of the Republic of Macedonia* no 80/92, 9/96, 38/2004, 33/06, 84/08 and 157/08. Also see: Article 75.

⁴⁸See: Article 12 (Parenting rights and beneficiary status) of the Law on Biomedical Assisted Fertilization, *Official Gazette of the Republic of Macedonia* no 37/08.

⁴⁹In that case, the provisions of 96 to 99 of the Law on Marriage and Family Relations (*Official Gazette* no 14/89 and *Official Gazette of Republic of Slovenia*, no. 60/99) will be applied.

Prohibitions

The Macedonian Law on BAF and the Slovenian Law on IT BMAP, as most European laws regulating biomedically assisted reproduction, prohibit conducting this procedure if the donor and the woman that made alogeneic BAF are blood relatives and cannot conclude a valid marriage. In Slovenia, sperm donors' cells may not be used to impregnate woman that is blood related (consanguinity) to the donor and due to this genetic link they are not allowed to conclude a valid marriage. The same refers to ova donors (Article 14). In the Macedonian Law on BAF, it is stipulated that the donation of genital cells shall be voluntary and without compensation (Article 18). The Slovenian legislator prescribes that it is not allowed to give and receive any payment or any other benefit for the donation of gametes (Article 10).

Pursuant to the Macedonian Law on BAF, the donated genital cells from one person can be used until the birth of two children, at the most (Article 23). Similar provision is present in the Slovenian law. Namely, Article 29 stipulates that reproductive cells of one donor may be used for artificial reproduction, until it comes to childbirth in up to two different families.

Another prohibition is the one related to the gender selection. Article 24 of the Macedonian Law underlines that it shall be prohibited to use the BAF procedure in order to select the gender of the future child, except in case of avoiding gender-related severe congenital disease. The Article 31 of the Slovenian Law is on the same line and it says that fertilization of an ovum with semen that is specifically selected in order to determine the child's sex is prohibited. The exception of this ban is the same as in the Macedonian legislation, where selecting the child's sex is allowed only if it is intended to prevent serious hereditary gender-related disease. In addition, during the BAF procedure, it shall be prohibited to mix male and female genital cells, produced from spermatozooids of two or more men or ova of two or more women.

In Slovenia, because of the possibility of multiple pregnancies, only three embryos may be implanted into a woman's body.⁵⁰ Identically, the Macedonian legislation prescribes that it shall be prohibited to insert more than three embryos in the woman's body in a single procedure. The remaining embryos, provided they meet the quality criteria, shall be preserved for another possible application, in accordance with the requirements determined by this Law.⁵¹

Article 29 of the Law on BAF says that during the BAF procedure, it shall be prohibited to enable extra-bodily development of embryo older than 14 days. The same solution is applied in Slovenia.

⁵⁰Law on Infertility and Bio-Medically Assisted Procreation, *Official Gazette of the Republic of Sloveni* no 70/00, Article 32.

⁵¹Law on Biomedical Assisted Fertilization, *Official Gazette of the Republic of Macedonia* no 37/08, Article 19.

The prohibition on trade or public announcement is accepted in both countries. Macedonian Law on BAF provides a ban on announcing public ads that are seeking or offering cells or embryos (Article 26). In Slovenia, the proposals for the Law on Changes to the Law on Infertility and Bio-Medically Assisted Procreation were discussed on a referendum on 17th of June 2001. Beside the question whether single woman shall have the right to BMAP, the principle of prohibition of trade in gametes was challenged. The question was connected to the import of seed-cells (that have to be paid). However, such demand was rejected on the referendum and this proposal was invalidated. The strict and consisted ban of trading in gametes is still valid.⁵²

Worldwide, every country prohibits cloning human beings. Although the reproductive cloning is universally prohibited, the legal regulation of surrogate motherhood differs.

Basically, surrogate motherhood presents a contract in which the natural or surrogate mother after she has been impregnated by the semen of the natural father, for a certain compensation carries and gives birth to the child while giving up her parental right after birth. There are two types of surrogacy: traditional and gestational surrogate motherhood. Traditional surrogate means that a woman was inseminated with the sperm of father, and that she is genetically related to the child. She relinquishes the baby at birth, giving up her parental rights in favor of the intended mother. The term "gestational surrogacy" refers to a treatment process, in which another woman ("gestational surrogate") undergoes the embryo transfer process and then carries the pregnancy to term. The intended parents are involved with the pregnancy, and take over parenting responsibilities immediately thereafter.⁵³

From a legal point of view, surrogacy contracts are divided in two categories: altruistic and commercial. For many opponents of surrogacy, the essence of the commercial surrogacy contracts is the sale of parental right by turning women into incubator for giving birth of children intended for someone else. The basic argument against surrogate motherhood refers to the fact that through these contracts surrogate mother and baby are converted into objects that are bought and sold on the market (concept of commodification).⁵⁴

⁵²Žnidaršič Skubic Viktorija, 'The Law on Infertility and Bio-Medically Assisted Procreation in Slovenia', *Family Life and Human rights, 11th World Conference the International Society of Family Law*, 2nd-7th August 2002, Copenhagen, Oslo. p. 1034

⁵³Gestational Surrogacy, USC Fertility, Access Mode:

http://uscfertility.org/fertility_options/gastational_surrogacy.php

⁵⁴The most important argument against surrogacy is the so-called theory of "commodification" which underlines that the commercial contracts on surrogacy introduce market elements in the process of reproduction. See more in: Mickovik Dejan, 'Surrogate Motherhood Agreement: Legal and Ethical Aspects', *Pravni Život*, Belgrade, 2008, p.4.

Surrogacy leads to fragmentation of motherhood. In case of surrogacy, the child can have two or even three mothers. In terms of traditional surrogacy, the child may have two mothers and in case of gestational surrogacy the child may have three mothers - the woman who donated the egg, the woman who appears as a surrogate mother giving birth to the child and the woman who signs a contract with a surrogate mother who upon signing the contract gives up her parental rights in favor of this woman (the social mother of the child).⁵⁵ New reproductive technologies, such as surrogate motherhood, question the very pillars of our civilization, due to the reason that the psychological, legal, functional and symbolic notion of the mother is the basis of our existence as human creatures. To question the concept of motherhood in modern civilization, which is prominent in alienation, termination of human relationships and weakening of marriage and family, means that the child is exposed to risk of losing the psychological, moral and educational backbone that is necessary for its proper formation and development of his personality.⁵⁶ Another argument against the commercial surrogacy is the possible economical exploitation of surrogate mother who is commonly forced to conclude such an agreement due to existential needs.⁵⁷

Having in mind the moral, legal and ethical dilemmas that surrogacy opens, we may justify the standpoint of most of the countries where commercial surrogacy contracts are prohibited or, if such a contract has been concluded, it would be considered null and void. However, there is significant number of countries that permit surrogacy.⁵⁸

When it comes to the issue of surrogacy, the Macedonian and Slovenian legislator share the same attitude. More exactly, Article 27 of the Law on BAF claims that it shall be prohibited to use public announcement, mass media or any other manner for the purpose of seeking or offering service of giving birth to a child for somebody else. In addition, it shall be prohibited to agree or to perform BAF in order to give birth to a child for somebody else. Article 6 of the Slovenian Law on IT BMAP prescribes that a woman who intends to

⁵⁵Ibid.

⁵⁶Surrogate Motherhood Agreement, op.cit. p. 3.

⁵⁷Ibid.

⁵⁸Israel holds the most liberal attitude regarding contracts of surrogate motherhood. In this country, the Parliament permitted contracts of surrogate motherhood in 1996. The Family Code of Russia from 1995 envisages that spouses who have given consent to embryo implantation in another woman in order to get a child are able to acquire the status of parents only if there is consent of the surrogate mother. In UK, the Surrogacy Arrangements Act from 1985 permits only altruistic contracts - the couple who wants to get the child pays only the reasonable costs of the surrogate mother. However, uncertainties arise from the fact that the Law does not specify what exactly this category "reasonable costs" covers. Beside the above-cited countries, surrogate motherhood is also allowed in: Belarus, Belgium, Greece, Holland, Armenia, New Zealand, Hong Kong, Brazil, South Africa, Australia, Thailand, Canada and the United States.

give the child after the birth to a third person (for a compensation or free) has not right to be a beneficiary of the procedure of BMAP.

Preservation of reproductive cells and embryos

The Article 30 of the Macedonian Law on BAF deals with the manner and deadlines for taking and preserving reproductive cells. According to this article, the reproductive cells and embryos shall be preserved up to five years as from the day of acceptance, in accordance with the requirements adjusted with the scientific and technical progress, medical sciences and experiences and the requirements of the Law. The deadline can be extended on the basis of a written request of the persons from whom the reproductive cells and embryos originate. The Slovenian legislator has envisaged more precise provisions on this matter. It foresees that reproductive cells can be preserved five years at most, but the State Commission for BMAP, for exceptional medical reasons, can prolong the time for additional 5 years. After the mentioned deadlines expire, the embryos must be left to die. Hereby, it is important to stress that the Slovenian legislator does not use the verb “to be destroyed” as many other legislations, but it says: “to be left to die”.⁵⁹

Conclusion

One in six couples worldwide experiences some form of infertility problem at least once during their reproductive lifetime. The current prevalence of infertility lasting for at least 12 months is estimated to be around 9% worldwide for women aged 20-44.⁶⁰ Around 1.5 million ART cycles are performed each year worldwide, with an estimated 350,000 babies born.⁶¹

From the above mentioned data, especially having in mind the giant numbers presented in the cited ESHRE report, we may summarize that the era of development and creating more sophisticated, efficient and even new procedures of achieving pregnancy will continue.

The list of the procedures numbered in the cited legislation in Macedonia and Slovenia is not exhaustive, which means that the Laws

⁵⁹Read more in: Žnidaršič Skubic Viktorija, ‘Civil Medical Law: The Issue of Consent in Biomedically Assisted Reproduction Procedures (The Case of Evans Vs United Kingdom)’.

⁶⁰Around 20-30% of infertility cases are explained by physiological causes in men, 20-35% by physiological causes in women and 25-40% of cases are because of a problem in both partners. In 10-20% no cause is found. Infertility is also associated with lifestyle factors such as smoking, body-weight and stress. The increasing age of the female partner is one of the most common explanations today. Read more: ART fact sheet, Access Mode: <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/ART-fact-sheet/page.aspx/1061>

⁶¹Ibid.

do not close the doors to other procedures that are being or will be developed by biomedical science and if it will mark them as suitable.⁶²

At the end, we must note that the issue of biomedically assisted reproduction opens a whole range of sensitive questions that touch the most intimate part of human existence. We have to agree that it is a real art to find a balance between the right of anonymity of donors and the right of the child to know its origin; between the right to treat infertility and the possibility to have reproduction without sex; the right of the widow by biomedically assisted procedure to conceive and give birth to a child although her spouse died; the right of a single woman to become mother versus the right of the child to be raised by both parents etc.

Unfortunately, it remains unclear who is going to make the major contribution in answering this serial of complicated ethical, moral and legal issues – maybe it would be medical science, medical practitioners, jurisprudence, philosophers, religious communities or perhaps, ordinary people using the right to express their opinion on a referendum.

⁶²Žnidaršič Skubic Viktorija, 'The Issue of Consent in Biomedically Assisted Reproduction Procedures (The Case of Evans Vs United Kingdom)', *Civil Medical Law* 2010/11. http://www.pf.uni-lj.si/media/Žnidaršič_evans.2012_13.pdf

Abstract

In the past half century, astonishing changes have occurred in the field of science, reproductive medicine and biotechnology. The procedure of in-vitro fertilization is just one of them. Since its introduction in the fifties of the 20th century, more than five million children were conceived and born as a result of the application of this procedure.

In this paper, the authors make comparative review on the Law on Biomedically Assisted Fertilization in the Republic of Macedonia and the Law on Infertility and Bio-Medically Assisted Procreation in the Republic of Slovenia.

They pay particular attention to the different legal solutions adopted in the cited legislations. One of them is the right of a single woman who does not have a partner to be a beneficiary of the procedure of biomedically assisted fertilization. The Slovenian legislator foresees that only couples (married and cohabitation partners) are allowed to use the procedure of biomedically assisted fertilization. On the other hand, the Macedonian legislator has adopted a more liberal approach toward this contentious issue, by giving a right to a single woman who is capable and is in childbearing age, to become a mother, assisted by the BAF procedure.

The second issue that the authors address is the question of posthumous insemination. In Macedonia, this procedure can be realized if following conditions are being met; first, the spouse or unwed partner has given a written consent for fertilization of his wife prior his death and, second, the very strict time limit for performing post-mortem insemination – only one year after the death of the married or cohabiting partner. The Slovenian legislation does not allow the post-mortem reproduction, because at the time of the death the marital or extramarital union ceases to exist. Another reason for this is the obligation of licensed institution for BMAP procedures to perform the procedure only by using the reproductive material from living donors.

In the end, the authors speak about the prohibitions that are common to both legislation and adopted in most of the European countries, such as the ban of reproductive cloning and surrogacy, prohibition of compensation for donation of reproduction cells etc.

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