

УДК 347.6

DOI: 10.37635/jnalsu.27(4).2020.214-230

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ОСОБЛИВОСТІ ПРАВА СПАДКУВАННЯ ДІТЕЙ, НАРОДЖЕНИХ У РЕЗУЛЬТАТІ ШТУЧНОГО ЗАПЛІДНЕННЯ

Анотація. Серед інноваційних медичних технологій, що підвищують народжуваність, виділяються допоміжні репродуктивні методи лікування безпліддя, при застосуванні яких деякі або всі стадії зачаття та раннього розвитку ембріонів проводяться поза організмом матері. За допомогою допоміжних репродуктивних технологій (включаючи штучне запліднення) діти народжуються в сім'ях, в яких питання зачаття та пологів не вирішено природним шляхом. Дослідження охопило питання спадкових прав дітей, народжених в результаті штучного запліднення. Спадкові права дитини, народженої за допомогою технологій штучного відтворення, є досить важливими для подальшого здійснення інших її прав. Таким чином, це може сприяти здійсненню прав дитини, які мають матеріальну, тобто фінансову основу. Виконати цей обов'язок можна в різних країнах, забезпечивши право дитини на спадкування, не дискримінуючи інших генетичних дітей, оскільки всі діти, народжені з однаковим обсягом прав, також мають однакову кількість правових очікувань. Також акцентується увага на тому, що однією з найгостріших юридичних проблем сурогатного материнства в Україні є те, що закон не передбачає реєстрації такої дитини в органах державної реєстрації у разі розлучення батьків-генетиків, смерті генетичної матері або обох генетичних батьків до народження дитини сурогатною матір'ю, а отже, подальша доля цих дітей залишається невизначеною. Участь у програмі сурогатного материнства громадян тих іноземних держав, в яких застосування цього методу заборонено, наразі залишається актуальною проблемою. Спадковий правовий статус особи, не тільки народженої, але і задуманої після смерті спадкодавця із застосуванням допоміжних репродуктивних технологій, залишався поза правовим полем та поза увагою вітчизняного законодавця. Щодо цього факту вчені України пропонують включити дітей, зачатих після смерті спадкодавця, до кола спадкоємців за заповітом спадкодавця і називати їх "посмертними дітьми". Обґрунтовано наступні умови надання таким дітям спадкових прав: наявність відповідного волевиявлення спадкодавця у заповіті, здійснення запліднення із застосуванням допоміжних репродуктивних технологій виключно з генетичним матеріалом спадкодавця протягом шестимісячного строку, встановленого для прийняття спадщини.

Ключові слова: спадкові права, штучне запліднення, сурогатне материнство, посмертна (постмортальна) репродукція.

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FEATURES OF THE INHERITANCE RIGHTS OF CHILDREN BORN AS A RESULT OF ARTIFICIAL INSEMINATION

Abstract. *Among the innovative medical technologies that increase the birth rate, assisted reproductive methods of treating infertility stand out, in the application of which some or all stages of conception and early development of embryos are carried out outside the mother's body. Using assisted reproductive technologies (including artificial insemination), children are born into families in which the issue of conception and childbirth has not been resolved naturally. The study covered the issues of the inheritance rights of children born as a result of artificial insemination. The inheritance rights of a child born through artificial reproduction technologies is quite essential for the further exercise of its other rights. Thus, it can contribute to the exercise of the rights of the child, which have a material, i. e. financial basis. It is possible to perform this obligation in different countries by ensuring that the child has the right to inherit, without discriminating among other genetic children, because all children, born with the same amount of rights, also have the same amount of legal expectations. Emphasis is also placed on the fact that one of the most acute legal problems of surrogacy in Ukraine is that the law does not make provision for the registration of such a child with the vital records authorities in case of divorce of genetic parents, death of genetic mother or both genetic parents prior to the birth of a child by a surrogate mother, therefore, the future fate of these children remains uncertain. Participation in the programme of surrogacy of citizens of those foreign states in which application of this method is forbidden currently remains a relevant problem. The hereditary legal status of a person, not only born but also conceived after the death of the testator with the use of assisted reproductive technologies, remained outside the legal field and out of the attention of the domestic legislator. Regarding this fact, scientists of Ukraine propose to include children, conceived after the testator's death, in the circle of heirs by will of the testator, and call them "postmortem children". The following conditions for granting such children inheritance rights are substantiated: the presence of a corresponding expression of the will of the testator in the will, the implementation of fertilisation using assisted reproductive technologies exclusively with the genetic material of the testator within a six-month period established for accepting the inheritance.*

Keywords: inheritance rights, artificial insemination, surrogacy, posthumous reproduction.

INTRODUCTION

There are many treatments for infertility, ranging from simple interventions, such as drugs that help a woman ovulate, to more complex procedures, such as in vitro fertilization (IVF). Surrogacy is associated with married couples, where it is proven that the wife is not able to bear and give birth to her own children, but still has the ability to produce ova. In this case, couples can get help through advanced assisted reproductive technologies (ART) – treatments used to help people achieve pregnancy. The concept of artificial insemination includes two procedures: insemination and IVF. The first involves fertilisation of the ovum under natural conditions (i. e. inside the female body), the second – outside the female body. Both reproductive techniques are designed to help

conceive a child, however, each of them has its own indications and features [1]. For example, artificial insemination, sometimes called intrauterine insemination (IUI), involves the insertion of sperm from a male partner (or donor) into a woman's uterus during or just before ovulation. IUIs can help couples with so-called unexplained infertility, or couples who have minor sperm abnormalities, achieve pregnancy. To date, in vitro fertilization (IVF) is considered the most reliable method. The essence of the method is to fertilise the ovum outside the body using the sperm of a partner or donor. The fertilised ovum is implanted in the uterus, then the pregnancy proceeds as usual. It has become possible to delay the IVF process due to cryogenics, which is described as the science of freezing, subsequent defrosting and regeneration of body parts. Since the late 1970s, medical technicians have been able to freeze sperm and ova before they are combined for fertilisation. Significant is the fact that after fertilisation, embryos can also be stored frozen until implantation.

At present, surrogacy is a form of ART when a woman (surrogate mother) agrees to bear and give birth on behalf of another person or couple, the so-called “authorised parent(s)” or “alleged parent(s)” [2]. In other words, the surrogate mother “leases” her uterus to implant an embryo derived from the sperm and ova of the prospective parents. This agreement is called a gestational agreement. The problem is whether the child is considered the legitimate child of the prospective parents or the surrogate mother. The ability to classify a child from a legal standpoint will make it easier to determine from whom the child has the right to inherit. Understanding the legal fate of gestational surrogacy is also crucial in determining a child's inheritance rights. In this context, the issue of genetic relatedness deserves attention, which is conditionally divided into two different types: traditional surrogacy and gestational surrogacy. Traditional surrogacy, as defined in the 8th edition of Black's Legal Dictionary, is “a pregnancy in which a woman provides her own ovum, fertilised by artificial insemination, bears a foetus, and gives birth to a child for another person.” As for gestational surrogacy, this concept is contained in the same publication and is considered as “pregnancy, when one woman (genetic mother) gestates an ovum that is fertilised, and another woman (surrogate mother) gestates a foetus and gives birth to a child” [3]. Although traditional surrogacy has been the only way to conduct surrogacy for most of history, over the past 30 years, gestational surrogacy has become the more popular of the two types of surrogacy. This not only allows both parents of a heterosexual couple to have a biological relationship with their child, but also helps to eliminate some legal and emotional problems that arise from the genetic connection of a surrogate mother with the child she is gestating.

Another factor that distinguishes types of surrogacy is the payment for surrogacy, which includes compensated surrogacy (so-called commercial surrogacy) and altruistic surrogacy [4]. Commercial surrogacy refers to any surrogacy agreement under which the surrogate mother receives compensation for her services, apart from a compensation for medical expenses. In case of altruistic surrogacy, a woman must act as a surrogate mother with the consent of the prospective parents without receiving any income from the act, but may still receive payment to cover certain surrogate mother's expenses, such as travel expenses, medical care, etc. These two types differ in the desire to undergo the procedure, either performing it selflessly and without reimbursement demands, or performing it with compensation. The third factor that classifies the types of surrogacy is where it ends. This factor mainly classifies the place of the procedure: domestically or

abroad. The location of the home can be chosen by prospective parents who live in a country with careful and clear rules of surrogacy. Being in a country where there are no surrogacy rules, or in a country that prohibits such actions, the intended parents will have no choice but to carry out the procedure abroad. If there is a possible danger, a person has the right to use the so-called “deferred parenthood” – cryopreservation of sperm for further use during artificial insemination, which can occur in a number of years. In this regard, the term “posthumous (postmortem) reproduction” refers to the birth of a child after the death of each parent. From a historical standpoint, the corresponding fact made provision for the conception of a child by both parents, but its birth – after the death of its father. Currently, posthumous conception with the use of cryopreserved sperm and embryos is used. In modern medical technology, it has become possible to obtain the required amount of sperm from a recently deceased man for further use in in vitro fertilisation programmes. This technique has become known as “postmortem sperm production” and tends to increase in cases of reproductive problems [5].

Against the background of the growing popularity of these technologies, in practice there are several complex issues regarding the exercise of the rights of children born in the above ways. The birth of a child automatically gives rise to its rights and responsibilities, which are inextricably linked to parents and families, and which, even after the death of relatives, will affect the issue of inheritance and the rights of legal heirs. For children born by artificial insemination, the division of their share of the inheritance seems much more difficult than for children born in traditional families. In this regard, the need for a scientifically sound search and identification of the specific features of the right to inherit children born as a result of artificial insemination becomes quite relevant. To achieve this purpose, the following tasks of the study are defined: 1) to consider specific mechanisms of legal regulation of the right to inherit by children born due to assisted reproductive technologies in Ukraine and in some foreign countries; 2) to identify problems in the implementation of the inheritance rights by children born as a result of artificial insemination; 3) to determine ways to solve the relevant problems of exercise of the inheritance rights by children born as a result of the use of the mechanism of assisted reproductive technologies.

The scientific literature lacks comprehensive studies of legal relations that arise within the institution of surrogacy, with the exception of articles that fragmentarily cover the issues and problems that emerge from the use of assisted reproductive technologies. In general, certain issues of the subject matter were considered by Ukrainian and foreign scientists, whose works were used in the study. In the process of scientific research the studies by H.V. Anikina [6], V. Valakh [7], O.A. Yavor [8], D. Hudyma [9], F. Dakhno [5], E. Zhuravlova [10], A. Kasatkina [11], J. D'Almaine [12], K. Kirichenko [13], O.Kukharev [14], O. Malkin [15], I. Rosenblum [16], O. Rozgon [17], M.J. Xavier [18], E. Riabokon [19], D. Savulescu [20], R. Stefanchuk [21], K. Tremellen [20], S. Simana [22], O. Shyshka [23] and others.

1. MATERIALS AND METHODS

The methodological basis of the study includes such methods as: dialectical, comparative law, historical law, analysis and synthesis, Aristotelian, dogmatic, analogy, legal modelling, etc. The leading method in the research process was the dialectical method of cognition of phenomena and processes, which allowed to determine the state, directions

and prospects of research and legislative developments in the field of legal regulation of surrogacy in Ukraine and inheritance of children born by artificial insemination. A special place is also occupied by the comparative legal method, which was used in the comparative analysis of the current Ukrainian legal provisions in the field of inheritance based on the results of the approbation of surrogate motherhood with the systems of legislation and scientific developments of other states, in order to identify positive legislative practice that would be appropriate and eligible for approbation on the territory of Ukraine, considering the specific features of the legal system in this country.

The historical and legal method facilitated the study of the genesis of the development of legislation governing the use of assisted reproductive technologies in Ukraine and foreign countries in the context of regulating the inheritance of newborns with the use of such technologies; methods of analysis and synthesis were used to establish the nature and content of the powers of heirs born as a result of artificial insemination. Furthermore, these methods allowed to outline the variability of legal definitions of the concept of “surrogacy” at both the doctrinal and legislative levels.

Analysis of the literature indicated that the institution of surrogacy was not an independent subject of study in the research of post-Soviet countries in recent years, the dissertations covered only issues related to the establishment of parental rights under the use of surrogacy, the legal nature of surrogacy, the implementation of constitutional human rights. Despite the considerable number of studies in the field of surrogacy, the legal regulation of this institution remains imperfect, the interpretation of terminology is especially difficult. Furthermore, the elimination of gaps by the legislator is extremely slow, which does not correspond to the modern development of the outlined legal relations. Given the above, it can be argued that the outlined issues do not lose their relevance, given the innovative component of modern realities, and require additional study, proposals and recommendations to improve the current legal regulation.

The Aristotelian method allowed to identify gaps in the current national legislation of Ukraine in the subject area. With the help of the dogmatic method, conclusions were formulated in accordance with the purpose of the study. The method of analogy allowed, considering the experience of foreign countries, to draw a conclusion about the need to reform the domestic legal field and focus on promising innovations of family and civil legislation. During the formulation of legislative proposals, the normative-semantic method, logical methods of cognition and the method of legal modelling were used.

The methodology used is conditioned by the purpose of the study and the outlined tasks, which, in turn, allowed to maximally cover the issues indicated in the study and propose an original solution to the problems arising in law enforcement in modern realities.

2. RESULTS

In modern conditions, a special place is given to the problems of establishing paternity and motherhood during the use of artificial insemination. In this regard, a correct interpretation of the definitions of “biological child” and “heir” is required. The legal status of the embryo of the child which was conceived during the life of the testator at use of the concluded contract on surrogacy has significant features. The Family Code of

Ukraine¹ quite clearly describes the legal relationship between a surrogate mother and the child's genetic parents. According to Article 123, part 2, the parental rights to the newborn belong exclusively to the spouses who are biological parents. If an embryo conceived by a married man and another woman is implanted in his wife's body, the child is considered to be born of a spouse. In the case of application of a contract for the provision of services, according to O. Rozgon, the relevant legal document must be concluded before conception of the child, due to the fact that after conception it will be an agreement on the assignment of an already conceived or born child [17]. Therefore, the testator must be alive at the moment of the conclusion of this contract, and in case of death a will must be written in advance in favour of the yet unborn child, which will help protect the interests of the child.

In accordance with the law, surrogacy in Ukraine has the following features: a surrogacy agreement, which was concluded on a commercial basis (that is, implying payment of a fee to a surrogate mother), is permitted in Ukraine and has no restrictions on the amount of remuneration; there is no need to obtain permission from the guardianship authority (as in the case of adoption). However, the adoption itself is also not required: at the birth of a baby, surrogate mother simply writes permission to transfer the child to biological parents. It is also not envisaged to consider the case in court, all legal relations are regulated primarily by the Family Code of Ukraine² and the concluded agreement; the birth certificate immediately indicates the names of the biological parents; the parental rights to the child belong entirely to the genetic mother and father; the surrogate mother cannot make any claims and declare her motherhood. Also, the basis of legal regulation is the Law of Ukraine "On the basis of legislation on healthcare"³ and the Procedure for the use of assisted reproductive technologies in Ukraine, approved by the Order of the Ministry of Health of Ukraine No. 787 dated 09.09.2013⁴. Notably, there is also a list of special legal requirements for medical institutions that render medical services during the surrogacy procedure. This suggests that the current legislation of Ukraine lays the foundation for the possibility of using assisted reproductive technologies, one of which is surrogacy.

Recently, legal scholars have had quite serious discussions regarding surrogacy, concerning the rights and obligations of future children born as a result of using the appropriate method. Notably, the leading issues that remain unresolved by law include, inter alia, the procedure for registration of a child in the state registration of civil status, born to a surrogate mother – in case of divorce of genetic father and mother, in case of death of genetic parents (or one of the parents) at the time of birth. It is not possible to precisely determine the future fate of these children at the legislative level. Particularly acute in modern realities is the issue of participation in surrogacy programmes for citizens of states where the use of a suitable method of infertility treatment is prohibited

¹ Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/

² *Ibidem*, 2002.

³ Law of Ukraine No 2801-XII "On the basis of legislation on healthcare". (1992, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/2801-12#Text>

⁴ Order of the Ministry of Health No 787 "On approval of the Procedure for the use of assisted reproductive technologies in Ukraine". (2013, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/z1697-13#Text>

at the legislative level. The problems related to the execution of documents for the export of children born in Ukraine as a result of the legal process of infertility treatment by surrogacy and who are registered with the civil registry office as children of their biological parents remain unresolved. Accordingly, there is a risk that parents will be forced to leave the child in Ukraine. In this regard, it is necessary to note the following legislative initiatives that were registered in the Verkhovna Rada of Ukraine in 2011: 1) the draft Law of Ukraine No. 8282 “On Amendments to Certain Legislative Acts of Ukraine on Restrictions on the Use of Auxiliary Reproductive Technologies” dated 23.03.2011¹, which made provision for the introduction of a ban on the use of the surrogacy method for citizens of countries where the use of this infertility treatment is banned, and contained a number of uncertain points about the procedure and process of fixing the countries concerned; 2) draft Law of Ukraine No. 8703 “On Foster Care” dated 17.06.2011², which made provision for an increase in the number of persons (non-married couples, single women or men), the introduction of social requirements, the division of foster care into public and private, regulatory consolidation of some issues of surrogacy. However, the proposed draft laws have not passed the approval procedure in the Verkhovna Rada of Ukraine and remain unfinished.

Addressing the specific features of inheritance by such children, it is worth noting that, according to Article 1222 of the Civil Code of Ukraine³, heirs by will and by law can be individuals who are alive at the time of the opening of the inheritance, as well as persons who were conceived during the life of the testator and who were born alive after the opening of the inheritance. Thus, to be recognised as an heir, a person must be born alive, or at least be conceived during the life of the testator. Thus, the hereditary legal status of a person, not only born but also conceived after the death of the testator with the use of assisted reproductive technologies, remained outside the statutory requirements. In other words, the exercise of the inheritance rights by persons conceived after the opening of the inheritance is ruled out by Ukrainian legislation. This, in turn, indicates that inheritance law does not fully consider the achievements of modern medical science and the specific features of the relevant legal relationship. The latest innovative scientific technologies give a reason to take a different approach to the analysis of the problem of conceiving a child after the death of its parents. Furthermore, natural disasters, anthropogenic disasters, the widespread spread of cancer, numerous war zones indicate a considerable number of deaths of persons of reproductive age. Frozen gametes are capable of retaining their properties under appropriate conditions for a long time; therefore, the conception of a child born through their further use may take place well after the death of the testator. And despite the fact that in 1980 the first case of not only posthumous birth, but also of the posthumous take-off of reproductive material was already described, there is no proper legal regulation of this procedure and its subsequent consequences in almost any country in the world [18].

¹ Law of Ukraine No 8282 “On Amendments to Certain Legislative Acts of Ukraine on Restrictions on the Use of Auxiliary Reproductive Technologies”. (2011, March). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8282&skl=7

² Law of Ukraine No 8703 “On Foster Care”. (2011, June). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_2?pf3516=8703&skl=7

³ Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/

The possibility of conception after the death of the testator creates the problem of exercise of inheritance rights by such children. Thus, the presumption of paternity established in Article 122 of the Family Code of Ukraine¹, which determines the origin of a child born before the expiration of ten months after the dissolution of marriage, cannot be applied to this legal relationship. It is proposed to call children conceived after the death of the testator from the latter's genetic material by ART “post-mortem children”, from Latin “*post mortem*” – after death. Assisted reproductive technologies allow the use of donor and cryopreserved gametes in artificial insemination, which can cause certain legal issues, in particular, regarding the child's inheritance rights.

Legislation in different countries has a different position on this matter. In the United States, major litigation revolves around embryos after the divorce of potential parents. Ex-husbands do not intend to pay child support for children conceived without their consent. To resolve this conflict, a law was adopted in Arizona stipulating that in case of divorce, the embryos must be transferred to the former spouse who wishes to have a child. According to a state Supreme Court ruling, an Arizona woman cannot use frozen embryos fertilised by her ex-husband to have children, and she must donate them. According to court documents, Ruby Torres fertilised ova before cancer treatment in 2014. At the time, she and her then-partner John Joseph Terrell signed an agreement at a reproductive health clinic stating that if they shared embryos, they could be transferred to another couple or used by one of them to have children – but only with the “express written consent of both parties”. A few days later, the couple married and underwent in vitro fertilization, viable embryos were frozen and preserved. Court documents say that Torres's chemotherapy caused a “significant reduction in her reproductive function”. The family court initially ruled in Terrell's favour, declaring that his “right not to be a forced father outweighs (Torres's) right to have a child and the desire to have a biologically born child”. The appellate court then overturned the family court's decision and ruled in Torres's favour. In its decision, the Arizona Supreme Court pointed to the contract and the conditions under which embryos “cannot be used for conception against the will of a partner”, but because the couple could not agree, the court ruled that under the contract, the court could only award direct embryo donation” [24]. According to E. Trenchman, an ambiguous and aggressive law was passed that would order judges to ignore the parties' wishes regarding the future of their genetic material and the future of their descendants [25].

The regulatory framework governing post-mortem reproduction varies from country to country. In some countries, such as Germany and France, post-mortem reproduction is prohibited. The key points in determining the origin of a posthumously conceived child from deceased parents, according to foreign legislation, is the consent of the deceased to post-mortem reproduction and their consent to be the father of such a child. Traditionally, in order to inherit, it is necessary to be alive on the day of the testator's death or to be conceived before their death, but this rule has already been changed in 21 US states and the Canadian province of British Columbia, where posthumously conceived children have the right to inherit. However, apart from establishing their origin from the testator, there are several additional conditions for the

¹ Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/

emergence of their inheritance rights. According to the legislation of those states in which posthumous reproduction is not only practiced but also regulated in detail, the key condition for its implementation and further establishment of the child's descent from a person who provided their genetic material but died before conception is the person's consent to posthumous use of assisted reproductive technologies. The form of such consent must, as a rule, be in writing. In the absence of a written expression of will, consent, for example in Israel, can be established by a court. The fact is that intravital cryopreservation of genetic material (gametes, embryos) by itself does not necessarily indicate an intention to resort to posthumous reproduction: in some cases, when donating genetic material and creating embryos, only their intravital use is planned for the purpose of giving birth to a child, in others – both types of reproduction are meant (intravital, and in case of failure – post-mortem), or the task of posthumous conception is directly posed, considering the expected or supposed death of a person who seeks to have a child. For greater certainty in establishing a person's will for posthumous reproduction (consent or absence, identification of the person authorised to dispose of the deceased's genetic material), Israeli lawyer Irit Rosenblum proposed a so-called biological testament that can be made by Israeli servicemen with regard to their deaths excludes the possibility of having children. The author of this idea proceeds in part from the fact that frozen gametes and embryos are objects of property rights [16]. A well-known company New Family currently operates in Israel, which develops and stores such documents. To date, it has made about 5,000 wills [26].

Establishing the origin of children born as a result of posthumous use of ART abroad is regulated separately. The registration of the deceased as the father of a child in case of post-mortem conception, except for the consent of the deceased to the post-mortem use of his genetic material, is conditioned by his written consent to be the father of such a child. Such a condition is contained, for example, in the Uniform Parentage Act¹ approved in most US states, which concerns cases of posthumous birth of children only to spouses, and the UK Fertilisation and Human Embryology Act². The latter makes provision for the registration of the deceased husband as the father of the child even when the woman, after the death of the specified man, but with his consent (moreover, a written one) to be registered as the father of the child, was implanted with an embryo created using donor sperm, that is, when the deceased is not the genetic father of the child. A record of the paternity of the deceased husband in both cases (both in case of the genetic origin of the child from the deceased, and when using the donor sperm under these conditions) is made if the child's mother indicates it in writing no later than 42 days (no later than 21 days in Scotland) from the date of birth of the child. The marital status of the parents is irrelevant. This approach corresponds to the theory of intention, which underlies the emergence of parental rights in cases of ART [13]. In the absence of written consent to register the child's father and the deceased's intention to be its father, as stated

¹Uniform Parentage Act. (2017, October). Retrieved from <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e4a82c2a-f7cc-b33e-ed68-47ba88c36d92&forceDialog=0>

² Human fertilisation and Embriology Act (2008, December). Retrieved from <https://www.legislation.gov.uk/ukpga/2008/22/contents>

in the commentary to the US Uniform Probate Code¹, which includes provisions on the origin of children, paternity can be confirmed by other convincing evidence.

Article 1116 of the Civil Code of the Russian Federation² stipulates that “citizens who are alive at the time of the opening of the inheritance, as well as conceived during the life of the testator and born alive after the opening of the inheritance” may be called upon to inherit. In the “Medical Encyclopaedia”, conception is interpreted as “the occurrence of pregnancy”, which includes “fertilisation of the ovum and implantation of a fertilised ovum”. If an ovum has been fertilised but not implanted in a woman, conception is not considered to have occurred. Russian law has not yet defined the legal status of the embryo obtained by IVF³. In other words, when the Family and Civil Codes⁴ were written and clarified, childbirth took place mostly naturally, and nowadays the legislation does not keep up with medical technologies. In Russia, when concluding an IVF agreement, lawyers advise to immediately think about the possible divorce or death of one of the participants and indicate who has the right to dispose of the fate of embryos. In particular, there are court precedents where one of the parties has in fact been forced into parenting against their will. Thus, a married couple from Moscow signed a contract with one of the capital's reproductive clinics, the ova were fertilised and placed in a cryogenic storage. Soon the man decided to divorce and hoped that this process would serve as the basis for the destruction of embryos [27]. However, in 2014, the Moscow City Court denied the plaintiff's claims. The reason is that both have signed an informed consent, where, in case of divorce, the right to dispose of the embryos passes to the woman. Another court precedent occurred in Rostov-on-Don in 2018. The woman and her husband signed a contract with a reproductive clinic for in vitro fertilisation. The first attempt was unsuccessful, and soon the man, who was 30 years older than the woman, died. After the funeral, the widow attempted to make a second IVF attempt, but it turned out that prior to all medical manipulations the man and woman signed an agreement that in case of death of one of them, the clinic must dispose of all biomaterial, which was ultimately destroyed.

Judicial practice in the United States led to a positive solution to the issue of the possibility of inheriting the father's property by his posthumously conceived children. Thus, since the 1990s, lawsuits have been filed in the country at the request of mothers of children conceived after the death of their parents to receive social benefits in connection with the loss of a breadwinner (Social Security Survivors' Benefits). In accordance with the legislation governing such payments, in deciding whether the applicant is the child of the insured, the same law shall apply as would have been applied by the court in determining the right to inheritance under the law after the deceased⁵. Therefore, the right of posthumously conceived children to monthly insurance benefits began to be linked by

¹ Uniform Probate Code. (2020, January). Retrieved from <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=df980b01-f7c0-d66e-20fb-8b7425Dialog=0>

² Civil Code of the Russian Federation (part three). (2001, November). Retrieved from http://www.consultant.ru/document/cons_doc_LAW_34154/620cbac8df1078128fbd57102ac49f59876e857e/

³ *Ibidem*, 2001.

⁴ Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/; Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/

⁵ U.S. Code. Retrieved from <https://www.law.cornell.edu/uscode/text/42/416>

the courts to whether children could be considered heirs of the deceased by law, governed by the law of that state in which the deceased resided. In 2005, the California Hereditary Code was described as the most modern in approbation of approaches to solving the issue of the possibility of inheritance by posthumously conceived children of the testator. It stipulates the following conditions of inheritance by a posthumously conceived child of the testator: written consent of the testator for the posthumous conception of a child using his genetic material (which can be revoked or changed by the testator also in writing); limitation of the period of conception (“in utero”) to a two-year period from the date of the death certificate or the court's decision to establish the fact of death, if it preceded the issuance of the certificate; the appointment by the testator of a person to exercise control over the use of their genetic material; notice after opening the inheritance by such a person (by registered mail with acknowledgment of receipt) about the presence of the genetic material of the testator for the purpose of posthumous conception. The notice must be sent to the person authorised to control the distribution of the deceased's property or payments in connection with their death, not later than four months from the date of issuance of the death certificate or court decision to establish the fact of death, if it preceded the issuance of the certificate²⁵⁶. In California, the child's exercise of the inheritance rights in such cases is guaranteed by the fact that, after receiving notification, the person authorised to control the distribution of the property of the deceased or social benefits in connection with his death does not have the right to distribute this property or give orders for such benefits before the expiration of the two-year period (the start of which is defined in the manner specified above), unless the birth of a posthumously conceived child would not affect such distribution and payments, or a written message was received with a personal signature, and also signed by a witness, that the person does not want his the genetic material used after his death to conceive his child. During this period, the issue of the distribution of the deceased's property or receiving social benefits in connection with his death may be decided in court at the request of the person concerned, provided that it will not cause property damage to the posthumously conceived child of the deceased¹.

The study allowed to state the following:

- in Ukraine, the following aspects are not regulated at the legislative level: the procedure for registering a child with the state registration of civil status acts born of a surrogate mother, in the event of a divorce of the genetic father and mother, or in the event of the death of the genetic parents (or one of the parents) at the time of the child's birth; procedural issues of paperwork for the export of children from Ukraine, born as a result of the legal process of infertility treatment by surrogacy and registered with the civil registry office as children of their biological parents;

- the possibility of conception after the death of the testator creates the problem of exercise of inheritance rights by such children. Thus, the presumption of paternity established in Article 122 of the Family Code of Ukraine², which determines the origin of a child born before the expiration of ten months after the dissolution of marriage, cannot be applied to this legal relationship. It is proposed to call children conceived after the

¹ California Probate Code. Retrieved from <https://codes.findlaw.com/ca/probate-code/prob-sect-249-5.html>

² Family Code of Ukraine. (2002, January). Retrieved from https://protocol.ua/ua/simeyniy_kodeks_ukraini_stattya_123/

death of the testator from his genetic material with the help of ART “post-mortem children”. Assisted reproductive technologies allow the use of donor and cryopreserved gametes during artificial insemination. This can cause legal issues, in particular with regard to the child's inheritance rights;

- the testator's consent to posthumous reproduction and the limitation of the period of conception of the child, as mentioned above, are recognised abroad as necessary conditions for calling for the inheritance of his posthumously conceived children, but in order not to imbalance the regulation and the period of conception or time of birth of the child-heir, is defined more thoughtfully and humanely, and also the additional rules providing certainty of relations and preservation of hereditary property are established.

3. DISCUSSION

In legal doctrine, there are two opposing positions on the possibility of recognising inheritance rights for a child in Ukraine who was not only born but was conceived after the discovery of the inheritance. Proponents of the former deny the possibility of inheritance by post-mortem children, basing their position on the legal uncertainty that arises between the day of the opening of the inheritance and the possible birth of a child, which in turn can destroy the structure of all inheritance law [23]. E. Ryabokon emphasises that a will made in favour of a child conceived in the future must be declared invalid, and not based on a special rule of Article 1257 of the Civil Code of Ukraine¹, given the absence of violations regulated by it as grounds for invalidity (nullity) of the will, and under Part 1 Article 203 of the Civil Code of Ukraine², which, among the general conditions of the agreement, determines that the content of the transaction may not contradict the Civil Code, other acts of civil legislation, as well as the interests of the state and society, its moral principles [19]. However, opposite opinions are also expressed in relation to the issues under study.

In particular, D. Hudyma [9], A. Malkin [15] consider it appropriate to admit persons conceived as a result of IVF to inheritance after the death of the testator, by introducing corresponding changes to the current legislation. Some legal scholars conclude that the state of modern legislation allows to inherit persons born as a result of posthumous reproduction. Thus, O.A. Yavor came to the conclusion that the testator's child belongs to the heirs of the first order, regardless of the method of conception and gestation, as well as regardless of the date of birth after the death of the testator, if the testator left genetic material during his lifetime for a specific purpose regarding the subsequent birth of the child [8]. A. Kasatkina takes a similar position with the only caveat that the birth of a post-mortem child must take place within one year from the date of the opening of the inheritance [11].

The lack of legislative regulation of the problems of inheritance by persons conceived after the opening of inheritance forced researchers to look for other possibilities of solving them. Scientist V. Valakh proposes to use the mechanism of changing the order of obtaining the right to inherit, defined by Article 1259 of the Civil

¹ Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/

² *Ibidem*, 2003.

Code of Ukraine¹, considering the possibility of birth of a biological descendant of the testator. The author also considers it possible to establish such a condition of the will as the conception of a child after the death of the testator using his biological material. This is conditioned by the fact that the conscious desire of two people to give birth to an heir, even after the death of one of them, cannot be considered illegal, and therefore there is no reason to declare such a condition of the will invalid in court [7]. According to O. Zhuravlova, it is advisable to extend the legal status of *nasciturus* to a post-mortem child born in accordance with the will of the testator within a certain time after the opening of the inheritance [10]. The legal literature also suggests that the only way to transfer property from the inheritance to a person who was not conceived on the day of the opening of the inheritance is a testamentary renunciation [28].

The current legislation of Ukraine does not consider a legal heir, or a person conceived and born after the death of the testator with the use of assisted reproductive technologies to be legal. However, the recognition of the testator as the heir of a post-mortem child concerns not only the implementation of the principle of freedom of will, but is also closely related to the personal non-property right of an individual to reproductive choice. According to R. Stefanchuk, the meaning of this right refers to a person's choice of the way in which they will perform a reproductive function – by natural biological means or using safe, effective, affordable, and acceptable assisted reproductive technologies permitted in Ukraine and international treaties, consent on the binding nature of which was granted by the Verkhovna Rada of Ukraine [21]. According to O. Kukharev, it is possible to expand the personal inalienable human right to reproductive function, including in its content the choice of the timing of this function – during the life of the person or after their death [14]. The scientist believes that, despite the fact that artificial insemination from the genetic material of the testator is carried out after their death, the exercise of the right to reproductive choice in this case can reasonably be recognised as a person's consent to such reproductive technology. The regulatory potential of private law in the context of its adequate impact on hereditary relations is not fully used, which requires amendments to the Book 6 of the Civil Code of Ukraine². In particular, to expand the dispositive basis of inheritance law, A. Kukharev proposes to include the children of the testator, conceived after his death in the circle of heirs by will. It is proposed to call such persons “post-mortem children”. The lawyer substantiates the following conditions for granting them inheritance rights: the presence of appropriate will of the testator in the will, insemination with the use of assisted reproductive technologies exclusively by the genetic material of the testator within six months established for acceptance of the inheritance. Notably, the proposed innovation will contribute to the implementation of the principle of freedom of will and the exercise of personal non-property right of the testator to reproductive choice.

However, not all modern bioethics experts agree with the thesis that new reproductive technologies bring future generations only benefit. Any interference with the natural process can have negative consequences. Scientific advances allow to extract and use the gametes of a deceased person, thus creating a child after the death of the

¹ Civil Code of Ukraine. (2003, January). Retrieved from https://protocol.ua/ua/tsivilniy_kodeks_ukraini_stattya_1222/

² *Ibidem*, 2003.

genetic father. Sh. Simana, examining and comparing the legislation governing post-mortem reproduction in the United States, Britain, Australia, and Israel, concludes that each country has its distinctive features, but there are three common elements: legal ambiguity, requiring prior consent and permission from the partner, but not their parents, to remove and use the deceased's gametes. The scholar states that courts often do not comply with the law, and therefore there are no clear guidelines for post-mortem reproduction [22]. S. Simana gives three excuses for the implementation of posthumous reproduction in the absence of prior consent of the deceased. The first excuse is related to the interest in "genetic inheritance", which reflects the desire of people to leave a "particle" of themselves in the world and maintain the chain of succession. The second justification concerns the model of autonomy of "respect for desires", according to which people should be treated the way we assume that they would like to be treated. The third excuse affects the interests of the partner and parents of the deceased, as well as the newborn child.

Based on the results of this scientific discussion, the following conclusions can be drawn:

- in modern realities in Ukraine, there are opposing positions on the possibility of recognising inheritance rights for a child who was not only born but was conceived after the discovery of the inheritance. Some deny the possibility of inheritance by post-mortem children, others consider it appropriate to allow the inheritance of persons conceived as a result of IVF after the death of the testator, by introducing appropriate changes to current legislation;

- legal scholars substantiate the following conditions for granting hereditary rights to children born as a result of artificial insemination: the presence of appropriate will of the testator in the will, insemination with the use of assisted reproductive technologies exclusively by the genetic material of the testator within six months. The proposed innovation will contribute to the implementation of the principle of freedom of will and the exercise of personal non-property right of the testator to reproductive choice.

CONCLUSIONS

Recent advances in medical technology have led to possible conflicts with succession. Three specific medical advances that cause inheritance laws to malfunction are artificial insemination, surrogacy, and post-mortem children. Assisted reproductive technologies allow the use of donor and cryopreserved gametes in artificial insemination, which can cause legal issues, in particular the right to inherit the child. It can be concluded that hereditary relations involving children born through artificial insemination require detailed legislation, such children are the most vulnerable subjects of these relationships, so there are many problems in this area of law enforcement. Existing legal provisions do not meet the interests of heirs, such as surrogate mothers and post-mortem children. The following issues remain unresolved in legislation: the procedure for registration of a child born to a surrogate mother, in case of divorce of the genetic father and mother, in case of death of the genetic parents (or one of the parents) at the time of the child's birth; issues related to the execution of documents for the export of children from Ukraine who were born as a result of the legal process of infertility treatment by surrogacy and who are registered with the civil registry office as children of their biological parents. It is also

necessary to point out the fact that the possibility of conception after the death of the testator creates a problem of exercise of inheritance rights by such children. Therefore, the presumption of paternity established in Article 122 of the Family Code of Ukraine, which states the origin of a child born before the expiration of ten months after the termination of marriage, cannot be applied to this legal relationship.

As a result of the analysis, it was concluded that the consent of the testator to posthumous reproduction and the limitation of the period of conception of a child are recognised abroad as necessary conditions for inheritance by posthumous conceived children, but in order not to unbalance the regulation and not violate the interests of all persons involved, a period that limits the period of conception or birth of a child-heir is determined more thoughtfully and humanely, and additional rules are established to ensure certainty of relations and preservation of hereditary property. In Ukraine, there are opposing views on the possibility of recognising inheritance rights for a child who were not only born but also conceived after the discovery of the inheritance. Some legal scholars deny the possibility of inheritance by post-mortem children, others consider it appropriate to allow the inheritance of persons conceived as a result of IVF after the death of the testator, by introducing appropriate changes to current legislation. Lawyers substantiate the following conditions for granting hereditary rights to children born as a result of artificial insemination: the presence of appropriate will of the testator in the will, insemination with the use of assisted reproductive technologies exclusively by the genetic material of the testator within six months. The proposed innovation will contribute to the implementation of the principle of freedom of will and the exercise of personal non-property right of the testator to reproductive choice.

These circumstances demonstrate that the legislation of Ukraine does not fully consider the current achievements of reproductive medicine. At present, the legislator must clearly identify possible options for the development of events, because these issues are increasingly arising in practice and remain, unfortunately, unresolved. Furthermore, as a result of the proposals made by lawyers, it will be possible to avoid many controversial issues in establishing the inheritance rights of children born with the help of assisted reproductive technologies.

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Suggested Citation: Diakovych, M.M., Mykhayliv M.O., & Kossak, V.M. (2020). Features of the inheritance rights of children born as a result of artificial insemination. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(4), 214-230.

Submitted: 27/08/2020

Revised: 19/10/2020

Accepted: 04/12/2020