

# MEDICAL ASSISTED REPRODUCTION IN GREEK LAW

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## **Introduction**

In Greece the first and fundamental law for the artificial fertilization has been voted by the Greek Parliament in 2002 (Law 3089/2002). The new law has been incorporated into the Greek Civil Code, something that is not usual. Usually, new legislation consists a special law.

Three years the Parliament voted another Law (Law 3305/2005), for the “medical assisted reproduction” faced a variety of organizational and administrative subjects related to the function of the centers of the artificial fertilization (“AF”).

In the following the term “artificial fertilization” is used as synonymous to the term “medical assisted reproduction”

In order to be comprehensible the regulation of the artificial fertilization, it is necessary to follow a small introduction in the general Greek kinship law.

## **General Regulations**

According to the Greek Civil Code (issued: 1940), the basis of the kinship is the biological origin<sup>1</sup>. The birth of a child (the delivery) defines the kinship with its mother and her relatives and therefore the motherhood is established.

In order the fatherhood to be established (the establishment of child’s kinship with father and his relatives), the basis is again the biological origin from this particular man. Due to the fact that this biological origin is not obvious as in the case of the “delivery”, it is considered that, when a man is married to the woman who gives birth to the child, who is born within a marriage or 300 days after the marriage, is considered to be the child of the husband; that is the “presumption” that the mother’s husband is the father. It is so regulated in most legal systems

This is how the rule applies:

- 1) *Children that are born during a marriage or within 300 days after its end:*

The husband of the wife is concerned is regarded as the father. If the child's biological origin does not come from the husband, the kinship can be doubted, during a trial usually commenced by the husband. If the child is not biologically connected to the husband, the decision is solving the presumption, which if established mean that the child and the husband do not have any relation. The decision does not influence the motherhood status.

2) *Children that are born out of the marriage:*

- a) If the man wants to affiliate the child, this is possible, after the woman's consent. The appropriate declarations are held before a notary. If this child does not have biological origin from the man who declares it to be, it is possible, on special occasions, that a trial will take place again, again in order to be proved that the child was not fathered by this particular man.
- b) If the biological father does not want to affiliate a child who has been born by a single woman, then it is possible for the mother or the child to commence proceedings during which it has to be proved that this particular man is the biological father.

As it was expected, these principles of legal status were struck a heavy wound by advances in biotechnology. Relatively early, compared to the other European countries, in 1983 Greece already had its first regulation on the subject of artificial fertilization.

The husband who has given his consent to the artificial fertilization of his wife with a sperm different from his own (sperm of a donor), can not doubt the fatherhood in the relevant trial. In other words, he can not succeed the disruption of the kindred bond with the child that has been born within his marriage, although this child does not draw his biological origin by the husband. The important part in this case is that the husband gave his consent for an artificial fertilization with use of a sperm different from his own.

This means that actually the consent for the artificial fertilization comes prior, in matter of importance, to the biological origin. Although the Laws of 2002 and 2005 came thereafter, the above regulation is still in force. This was the legal status up 2002 as it was in that year that the special regulation of artificial fertilization came into force.

## **The regulation of artificial fertilization**

### **A. Prerequisites**

- 1) Medical necessity for recourse to artificial fertilization<sup>2</sup>

After the legislation, assisted reproduction is not an alternative method or a supplementary method of giving birth to a child. The medical necessity consists either in the weakness of

having children, or in the danger of infecting the child with a serious hereditary disease. In either case artificial fertilization is permitted, in order for the contagion of serious disease to be restricted.

2) Age of the assisted person

According to the Civil Code, up to the limit of the normal reproduction capability but according to the separate law<sup>3</sup>, this is the fiftieth year for women.

3) Consent on behalf of the interested individuals<sup>4</sup>

It is required the individuals to have been informed about the methods, and to give their written consent. In case of unmarried couples or single women, a notarial consensus is required.

The same procedure is followed in case of the consent recall, until the ova implantation, as provided for in the civil code.

The human reproduction, by the methods of cloning, as well as the choice of sex, are not allowed to be achieved by the means of artificial fertilization, unless, concerning the choice of sex, there is a case of contagious hereditary disease that is affiliated with the sex.

Marriage is not considered as a prerequisite for a couple or an unmarried woman that wants to have a child (in other words an unmarried couple can be subjected to artificial fertilization if there is a weakness of having children etc.). The consent in these two cases is to be given before notary.

Under the 2005 Law<sup>5</sup>, a the couple is also permitted to undergo some medical tests for serious diseases. Furthermore, an authority or permission is required in event that a person is positive to HIV. The matter of underage individuals seeking assistance is also regulated by that Law<sup>6</sup>.

If artificial fertilization takes place without due compliance with the Law's requirements then, penal and administrative penalties are provided for in the Law<sup>7</sup>.

## **B. Kinship establishment**

For the motherhood the following rule is in force:- the criterion is the delivery of the child. This means that if an third party ovum is used, the woman who provides it does not establish kinship with the child. The child that is born, establishes legal relationship with the birth-mother, by reason of being delivered.

For the fatherhood: the presumptions referred to above. Under the Civil Code<sup>8</sup>, fertilization with a sperm different from the husband's sperm is regulated. Despite the

fact that child does not draw its origin from the husband, since 1983, if the husband has given his consent to the AF procedure, he is not able to dispute fatherhood.

In addition, there has been a difference as far as it concerns the voluntary affiliation of the child in the case of assisted reproduction. It takes place before the child's birth (on the contrary normally the affiliation takes place only after child's birth according to the Civil Code<sup>9</sup>). The consent to the artificial fertilization (which is a consent that must be evidenced by a notarial act) operates as a voluntary affiliation on behalf of the husband/man and as a consent to the voluntary affiliation on behalf of the mother<sup>10</sup>. The donor can not establish fatherhood; neither can he sue for affiliation, neither can he be sued for fatherhood affiliation, either if he was or becomes known<sup>11</sup>.

### **C. Exceptions**

However, in case of motherhood and fatherhood establishment, there are two exceptions to the rule. Those two cases of assisted reproduction have undergone major criticism, not having won unanimous approval but also having doubted, especially in continental Europe.

#### **I. The exception to the establishment of motherhood**

Although the rule also in the artificial fertilization is that mother is the woman who gives birth to the child, there is an exception for the situation known as "surrogate motherhood". It is the case of using another woman who is going to be pregnant and give birth to the child that another woman (and her husband or her companion) wants to have.

In fact there are two cases: Surrogate motherhood is used when the woman cannot carry the baby

- 1) Either the woman who wishes to acquire a child has her own ova but she cannot be pregnant or she cannot give birth to the baby, so she needs to use only the uterus of another woman (genetic and birth mother).
- 2) The woman who wishes to acquire the baby needs not only the uterus of another woman, but also an ovum, because she has not her own ovum.

In order the surrogate motherhood to be legally possible, the following requirements are necessary<sup>12</sup>:

- Written agreement between the surrogate mother and the woman who wants the child (and their husbands, if they are married);
- Lack of financial exchange (ie no "consideration")<sup>13</sup>;
- Suitability of the surrogate mother;

- Residence of both women in Greece<sup>14</sup>;
- Judicial consent granted before the transfer takes place. Consent is given before the Court after the voluntary consent to jurisdiction<sup>15</sup> – there is always a judicial decision.

In the case of surrogate motherhood, the presumption is reversed and the child has as its mother not the woman who has delivered it, but the woman who is written in the court decision approving the procedure, and the child does not establish kinship with the surrogate mother. The reproductive material is not required to come from the candidate mother and her husband, although it often happens. In other words, it is possible the reproductive material to come from other donors.

### *Special question*

Could the ovum come from the surrogate mother? The answer is that legislature discourages this situation by establishing only in these particular circumstances (when the ovum comes from the surrogate mother) a legal action disputing the motherhood, which can be brought to the court either by the candidate mother or by the surrogate within 6 months after the delivery. If the legal action succeeds, the child has for a mother, the woman who gave birth to it, since the child's birth. In other words, we return to the rule of Article 1464 of the Civil Code, referred to above. If the candidate and the surrogate mother are married, the presumption is that the legal responsibility of fatherhood follows that motherhood.

This method has caused social problems especially in the case that both women do want the child or when neither of these two women wants the child. There is also the criticism that this situation constitutes a new type of exploitation of financially weak women and that it is depreciatory for a woman to become a “hatching” machine.

## **II. The exception to the establishment of fatherhood - Post mortem artificial fertilization**

The exception of the rule of the fatherhood establishment is known as “post mortem” artificial fertilization,

By this method, the fertilization of ovum is achieved by the sperm of a man who is dead by the time of the fertilization procedures, so the child is born after the time that the presumptions of fatherhood are in force (after 300 days from husband's death). The relevant issues in order for this method to take place are the following:

- The man could suffer from a disease that would possibly lead to infertility or otherwise there could be the danger of death (e.g. war)
- He could have given his consent through a certified notarial act, for the use of his sperm after his death.

- The relevant application is submitted to the appropriate court and the case is judged after the voluntary jurisdiction<sup>16</sup>, - again there is always a judicial court decision.
- Under those terms, a permission is given by the court. Afterwards, the artificial fertilization must be conducted, within a specific time frame (6 months after the man's death but no later than two years after his death).

The child that is being conceived in this way is born with judicial permission (see above) on the one hand is considered as a relative of his father<sup>17</sup> and on the other hand inherits by intestacy<sup>18</sup> and can be established as trustee<sup>19</sup>.

It is how the Greek legislature regulated the above two methods that is doubted in the rest of continental Europe.

They are permitted but it is always necessary to obtain prior judicial permission; the Court examines the prerequisites of the law and must be satisfied that they have been fulfilled before giving that permission.

#### **D. Two specific issues**

##### Redundant fertilized ova or reproductive material in general<sup>20</sup>

In a technical way it always remains reproductive material unused because the whole material is not implanted. What happens in this case? The answer is founded in the agreement of the assisted persons to the medical Center. It is usually kept for future use by these persons. The parts should sign a document (declaration) in which the chance of the fertilized ova is defined by the following ways:

- They can be used by third couples without exchange, according to the judgement of the doctor or of the medical center;
- They can be used for research or treatment purposes without exchange; or,
- They can be destroyed.

If there is no declaration, the fertilized ova are preserved for 5 years and then they can be used for research or they can be destroyed.

As far as it concerns the preservation and the research: The research is permitted only until the fourteenth day. Then the material has to be destroyed. The time of refrigeration is not taken into account<sup>21</sup>.

The anonymity of the donor of the reproductive material<sup>22</sup>

There is identity of the donor of the reproductive material and also of the receiver of that reproductive material is kept anonymous. For medical reasons, confidential files are kept without disclosure of the person's identity<sup>23</sup>. These files can only be used for health reasons. In any event, if the donor is, or become known, then it is not permitted for legal action to be brought against him for doubt of the fatherhood or motherhood.

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<sup>1</sup> Greek Civil Code (GCC) Article 1463

<sup>2</sup> GCC Article 1455

<sup>3</sup> Law 3305/2005 (article. 4.1)

<sup>4</sup> GCC Article 1456

<sup>5</sup> Law 3305/2005 (article 4)

<sup>6</sup> Law 3305/2005 (article 7)

<sup>7</sup> Law 3305/2005 (articles 26 and 27)

<sup>8</sup> GCC Article 1483

<sup>9</sup> GCC Article 1475

<sup>10</sup> GCC Article 1475, Par. 2

<sup>11</sup> GCC Article 1479

<sup>12</sup> GCC Article 1458

<sup>13</sup> Law 3305/2005 (article 13)

<sup>14</sup> Law 3305/2005 (article 8)

<sup>15</sup> Code of Civil Procedure (Art. 614, 615, 619 and 799)

<sup>16</sup> Code of Civil Procedure (Article 799)

<sup>17</sup> GCC Article 1463 & 1464. Par. 2

<sup>18</sup> GCC Article 1711

<sup>19</sup> GCC Article 1929

<sup>20</sup> GCC Article 1459

<sup>21</sup> GCC Article 1459 C.C. and Law 3305/2005 (art. 9; par. 5).

<sup>22</sup> GCC Article 1460

<sup>23</sup> Law 3305/2005 (art. 8; par. 6)