The Role and Significance of Assisted Reproductive Technology in Russia’s Inheritance Law

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Abstract: The article examines the legal relations arising in the use of assisted reproductive technology, which are not practically regulated by Russian inheritance law. In Russia, this technology has been in use since 1986, yet Russia’s legal framework covering the subject is currently confined to a handful of scrappy, fragmentary and sometimes even contradictory norms scattered across sundry sources. The article addresses the issues of grading kinship into physical (kinship by blood) and social kinship, which is becoming a subject of significance in the area of inheritance law amid a wider use of innovative medical methods, which no longer allows us to associate the descent of a child, to which legal significance is attached, with just the biological descent. The author has conducted a comparative legal analysis through the example of several European countries and the US, where law regulates the use of assisted reproductive technology, although, likewise, there are certain grey areas that still need work.

Key words: Testator · Heir · Will · Reproductive technology · Surrogate motherhood · Social kinship

INTRODUCTION

The current alarming demographic situation calls for the use of all available resources in trying to boost the birth rate, which is setting the scene for the emergence of an innovative, efficient and sought-after field - reproductive medicine. According to available (incomplete) data, as many as over 2 million people were born by the beginning of the 21st century through the use of assisted reproductive technology (ART) [1]. However, the socialization and inclusion of this issue in the subject field of law has faced a number of obstacles in, as well as outside, Russia.

The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 recognized as one of the fundamental human rights the right to private life and, above all, the right to have a family and, regardless of one’s civil status, the right to have progeny. Certain enactments adopted, for instance, in some of the US states entitle their citizens to the right to use the accomplishments of science – ART, in particular – for procreation purposes [2].

The legal regulation of the use of ART is the best developed in Western European countries. Currently, the European Union is already discussing general legislative principles bearing on ART methods. It is being stressed that signing these into law will mean adopting more restrictive rules in respect of the laws of certain countries. According to J. Cohen (1999), the former Chairman of the European Society of Human Reproduction and Embryology (ESHRE), this can lead to the prohibition of surrogate motherhood, research into embryos and cloning and using embryonic stem cells throughout the EU [3].

In Costa Rica, ART is officially banned as violating the national constitution (based on the conviction that a human life is begun with artificial insemination and is then ruined with reduction). Moreover, this is just one country with restrictive laws. Stricter restrictions on ART are enshrined in German laws, the “ Adoption Brokerage Law” (2006) and the “Federal Embryo Protection Law”(1990). In Italy, the “Rules on Medically Assisted Procreation” (2004) almost entirely ban gamete and embryo donation, surrogate motherhood, as well as reduction (a partial abortion) in multiple pregnancies [1]. These methods, as the rules suggest, are redolent of “an experimental study on a woman’s body” [4].

As many as 30 countries have specific legislation or guidelines for the application of ART methods. However, even in these countries there is a degree of anxiety over delays in updating the laws or sectoral instructions [5].

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In Russia, the application of ART is regulated through the Federal Law No.323-FZ “On the Fundamentals of Protecting the Health of Citizens in the Russian Federation” (Chapter 6, Article 55), which came into force on January 1, 2012 and the Order No.67 of the Ministry of Health of the RF, dated February 26, 2003. The issue of physical and social kinship has gained special significance in inheritance law, which deals mainly with kinship, due to the development of innovative medical methods. Consequently, the topic of grading kinship has become the subject of heated debate among men of law, who do not always see eye to eye on various issues. It should be noted that the framework dealing with the use of reproductive technology and consequences associated with it is yet to be included in the legal field of Russia’s inheritance law.

**Methods:** The methodological basis of our study is an aggregate of generally and partially scientific methods. We used the comparative analysis method looking at some international experience of inheritance law regulation; the induction-deduction method helped detect private issues through the identification of general trends and general issues through the identification of private situations; the use of the functional method helped forecast certain trends in the development of inheritance law and work out a number of scientifically grounded recommendations.

**Main Part:** Many theorists, such as J.R. Vçbers for instance, believe that kinship is a primordial relation between humans and is one of the least subject to change [6]. Kinship cannot be repealed; kinship in civil law is the blood connection, with the existence of which the existence of rights and obligations is associated. According to anthropologist Meyer Fortes, the relations of kinship connect people in a special way and create inevitable requirements and obligations [7].

In the mid-60’s of the 20th century, scientists (C. Lévi-Strauss [8], N. Rouland [9] and others) once again turned to streamlining the theory of kinship. Later on, the subject retained its topicality: in the late 19th and early 20th centuries, foreign authors (Testard 1996 [10]; Parkin 1997 [11]; Dziebel 2007 [12]) released several monographs and large collective works.

Nominally, in terms of significance, we can point up three major kinship theories in inheritance law: biological, social and biological-volitional. The biological theory of kinship views kinship as just the blood connection between people [9]. This theory has regarded adoption as just a legal relation equated to parental relations but not based on kinship.

Despite the dominance of the biological theory, certain scientists continued to uphold the social (formal) concept of kinship, recognizing that the latter (at least in the legal sense) is a more social connection between individuals [6]. Recognizing the legal character of kinship behind close social ties was reflected, above all, in the interpretation of the adoption establishment.

Firstly, it is as kinship that such type of adoption where adopters sign up as a child’s parents must be regarded (from the standpoint of law, they become such in the end).

Secondly, compared with other forms of accommodating children left without parental custody, the consequences of adoption are of significance not only to family law but other areas as well (e.g., heirship), while adoption itself, generally, is indefinite and does not terminate even after the child comes of age.

Thirdly, adoption creates not only legal but also factual close ties, oftentimes even prior to the legal processing of adoption, when the child begins to consider the adopters as his/her parents.

Fourthly, the adopted and their progeny in relation to the adopters and their relatives are equated to relatives by descent [6].

In the 1970’s, S.Y. Palastina brought forward the biological-volitional theory of kinship. In establishing motherhood and fatherhood, the constitutive factor is the biological, blood-based, descent of a child. However, there are two grounds to establishing the fatherhood of a child of an unmarried woman: natural-biological and volitional [14].

Researchers into kinship systems deal with three major areas: ways of descent and heirship; forms of marriage; the regulation of relations through imposing an incest taboo. In this regard, the following considerations are taken into account:

- The blood relationship between individuals descending from one another or from a common ancestor is recognized as kinship or the kindred relationship. The ground for the arising of the blood relationship is the biological descent, i.e. the birth substantiated in an established legal manner. The blood relationship does not necessarily become a legal fact just if it has been registered.
Kinship has a degree-based structure. In this regard, the blood relationship between individuals is recognized as kinship or the kindred relationship; the kindred relationship is stronger in relation to the closest-degree relatives and is weaker in relation to distant-degree relatives. Therefore, the law entitles the closest-degree relatives to special rights, places specific obligations on them and establishes particular restrictions which are dictated by the nature of but the kindred relationship.

There is no blood relationship between people connected by in-law kinship. These are relations between the relatives of one spouse and the other or relations between the relatives of both spouses (the father-in-law (the wife’s father), the mother-in-law (the wife’s mother or the husband’s mother), the brother-in-law (the wife’s brother), etc.). In law and modern civil literature, kinship is viewed in the broad sense – as a biosocial category.

M.P. Melnikova believes that in the theory of inheritance law, along with the notion of blood kinship we should as well use the notion of social kinship [15]. We agree with the author and would like to point out that this notion requires a more detailed elaboration, a re-thought and a more accurate definition inclusive of present-day realities.

As is justly pointed out by O.A. Zubrilova and O.V. Tanimov, the wide application of state-of-the-art medical technology no longer permits us to associate the descent of a child, to which legal significance is attached, with just the biological descent, i.e. blood kinship. In this regard, the authors stress that modern law, which is an aggregate of traditional norms, is sometimes unable to regulate relations reaching beyond the “boundaries of law”.

In the near future, the majority of relations will have to be controlled and regulated through other methods, which would imply the introduction of elements of convention and application of the legal fiction theory in current law. In this sense, the artificial methods of human reproduction – surrogate motherhood and in vitro fertilization – are a legal fiction. The artificial methods of human reproduction begin to exist as a legal fiction after getting enshrined in the fundamentals of the protection of citizens’ health, which entitle each woman of child-bearing age to the right to in-vitro fertilization and embryo implantation and set out the rules for these procedures. In a way, a gap has been filled in legislation regulating legal relations in the area of “human reproduction” at large.

According to some researchers, kinship arising as a result of the birth of children through the use of ART methods is unambiguously social kinship. Analyzing the norms of the Family Code of the Russian Federation, K.A. Kirichenko [16], points out that the legislator has not provided for the attributes of the administration, modification, or termination of the parental rights and obligations of parents who resorted to ART as opposed to those of the parents of a child born in a traditional way and concludes that the legislator recognizes biological kinship and social kinship. Exploring the grounds for the inheritance rights of children after the death of their parents, M.P. Melnikova [15] proves that social kinship should be construed as kinship arising as a result of the birth of children through embryo implantation and artificial insemination. Unfortunately, currently there are very few research studies covering ART within the ambit of inheritance law. However, to substantiate or controvert any conclusions on social kinship, which arises as a result of the birth of a child through the use reproductive technology, we need to analyze and dissect ART methods.

These methods can be divided into methods implying the use of one’s own materials, those implying the use of one’s own and donor materials and those implying the use of donor materials. Throughout the world, one of the ART procedures that poses certain legal challenges is the donation of gametes (oocytes and spermatozoa), the material genetically foreign to the system of one of the members of a family and embryos, which are foreign to the systems of both members of the family [3]. Thus, a child born through the use of one’s own materials will be a blood child; when it is about the use of donor egg cells, we are talking about social motherhood; and when donor spermatozoa are used, it is social fatherhood. Social kinship arises in the event a child is born using donor materials. In a regular situation, kinship on the father’s side is based on genetic kinship, while kinship on the mother’s side – on genetic and gestational kinship.

Thus, social motherhood (fatherhood) is the non-biological relationship between parents and children, which arises as a result of adoption or the application of assisted reproductive technology with the use of donor materials and is approved by society. The express consent of individuals willing to become parents, which reflects their will that has formed as a result of their reproductive interest, becomes the basis of their parenthood.
The genetic link between the child and the donor has no practical significance for the law, does not create the relations of kinship in the public sense, but can be viewed as a right-restraining legal fact in entering into marriage (yet even in this sense such kinship is really limited, for by analogy with Paragraph 3 of Article 14 of the Family Code of the RF, it has to hold just for the-first-degree-kinship relatives, as well as the-second-degree-kinship linear relatives) [16].

Thus, as K.A. Kirichenko justly points out, the need to re-address the issues relating to the notion, grounds for the arising and nature of kinship is a result of the development of assisted reproductive technology, which allows us to separate the processes of conceiving, carrying, bearing and rearing children [16].

CONCLUSION

Assisted reproductive technology is being engrafted into daily medical practice faster than this area’s legal framework is developing, which is the case not just in Russia but throughout the world as well. The time is ripe for the correction of legislative norms in the area of inheritance law. The emergence of the innovative industry of reproductive medicine, when the large-scale use of ART methods no longer lets us associate a child’s descent with just the biological descent, creates the need to define clearly the notion of blood and social kinship in accordance with present-day reality.

In the majority of cases of application of ART methods, the legal relations between parents and children are established based on the recognition principle. The recognition of a child takes place back before his/her birth or even conception – at the moment one consents to the use of an ART method. Having said that, worthy of mention is a law passed in Great Britain, which repealed anonymous donorship as of April 1, 2005. As a result, children who have reached the age of 18 and their parents are now entitled to receive full information on the donors of the germ cells.

Inferences: On balance, we can conclude that, apart from blood kinship, social kinship is also a basis for heirship. When it comes to inheritance law, the development of reproductive medicine and large-scale adoption of assisted reproductive technology brings about the need to modernize the still imperfect social kinship framework and fine-tune whatever definitions still need work in this field.

We basically define social kinship as a sanctioned form of interpersonal and social-group, daily-life and spiritual relations, whose nature is fashioned by the characteristics of social organization, which is predicated on marriage, birth and adoption and arises as a result of the birth of children through the use of assisted reproductive technology involving the use of donor materials. In this regard, blood kinship is construed as kinship arising as a result of the birth of children through the use of assisted reproductive technology without the use of donor materials.

REFERENCES
