REPRODUCTIVE FUNCTION: THE PROTECTION OF THE RIGHTS OF THE PEOPLE WHICH ARE SENT TO THE AREA OF THE FIGHTING

FUNKCJA REPRODUKCYJNA: OCHRONA PRAW OSÓB WYSYŁANYCH NA OBSZARY OBJĘTE DZIAŁANIAMI ZBROJNYMI

Vitalii Pashkov, Nataliya Gutorova, Petro Noha
POLTAVA LAW INSTITUTE OF YAROSLAV MUDRIY NATIONAL LAW UNIVERSITY, POLTAVA, UKRAINE

ABSTRACT

Introduction: The issues of problems of the legal regulation of posthumous reproduction in Ukraine and foreign countries are analysis in the article. The author substantiates the necessity in the creation and acceptance of the State Program of the retrieval of reproductive cells in people who are sending to the area of the fighting.

The aim: the purpose of our work is a comprehensive study of post-mortem (post-mortem) reproduction and substantiation of the possibility and necessity of adopting a state program for the selection of reproductive cells of individuals who are sent to a combat zone to ensure their full social protection and assistance in the realization of the right to fatherhood or motherhood.

Materials and methods: the experience of certain countries is analyzed in the research. Additionally, we used statistical data of international organizations, conclusions of experts and foreign legal acts dealing with posthumous reproduction and auxiliary reproductive technologies, judicial practice, doctrinal ideas and views on this issue.

Review: there are medical (practical) preconditions for the introduction of posthumous reproduction programs. Among them is the technology of obtaining reproductive cells (post-mortem too), their preservation and successful subsequent use. In addition, foreign experience shows the success of the application of these technologies and the real guarantee of full implementation of the range of rights to the family, fatherhood or maternity.

Conclusions: we note the urgent need to develop and adopt a state reproductive cell selection program for individuals who are sent to the combat zones (according to a model that exists in such countries as the USA and Israel).

KEY WORDS: the right to parenthood, the right to motherhood, posthumous reproduction, program from the retrieval of reproductive cells

Wiad Lek 2018, 71, 2 cz. II, 403-407

INTRODUCTION

The protection of the right to motherhood and fatherhood is regulated by the following international instruments: International Covenant on Economic, Social and Cultural Rights dated December 16, 1966

In Ukraine, the right to motherhood and fatherhood is guaranteed by Part 3 of Art. 51 of the Constitution of Ukraine and Art. 49, 50 of the Family Code of Ukraine. It is the personal non-property right of every person, which provides the ability to perform the reproductive function at any time, if there is a physiological possibility.

But how to be in the case, when personally or with the help of another person, this right can not be realized because of performance of the official duty? It is about performing a military duty. Because during it realization in the so-called "hot spots" there is a significant risk of the death of one of the spouses or loss of reproductive functions. In such cases, the person loses the ability to realize the right provided for in art. 49, 50 of the Family Code of Ukraine. In addition, according to Part 2 of Art. 49 and Part 2 of Art. 50 of the Family Code of Ukraine, the inability of one of the spouses to give birth to a child may be the reason for the dissolution of the marriage.

On April 13, 2014, an anti-terrorist operation was formally launched in eastern Ukraine on the basis of the Presidential Decree "On Counterterrorist Operation" and "On Urgent Measures to Overcome the Terrorist Threat and Maintain the Territorial Integrity of Ukraine". The feature of such an operation is the permanent and long-term military operations (military conflicts), as a result of which every day we get information about the loss and injury of military personnel.

From 2014 to 2017, according to the Presidential Decree in Ukraine, seven partial mobilizations were carried out and about 250 thousand people were mobilized. According to Order of the Minister of Defense of Ukraine dated September 14, 2008 No. 402 "On Approval of the Regulation on Military Medical Examination in the Armed Forces in Ukraine", persons who are fit for health reasons can be mobilized. These are mostly young men under the age of 35 and volunteers.

According to various data, by 2017 in the east of Ukraine during a counterterrorist operation about 10 thousand mobilized people died. The age of most of the dead is 25-45 years old. Aged from 18 to 25 years old - about 1 thousand dead [1]. In addition, accurate data about injuries is totally absent.

In view of the above, the issue of developing and adopting a program for the selection of reproductive cells of individuals who are sent to a combat zone (the territory of the anti-terrorist operation), that is, the possibility of posthumous reproduction, is relevant at the state level.

Also, the relevance of the topic is determined by the lack of a comprehensive scientific and theoretical study of posthumous reproduction and legal regulation of this issue in Ukraine, as well as the lack of a state program for the selection of reproductive tissues of persons who are sent to the zone of combat operations.

THE AIM

The purpose of our work is a comprehensive study of post-mortem (post-mortem) reproduction and substantiation of the possibility and necessity of adopting a state program for the selection of reproductive cells of individuals who are sent to a combat zone to ensure their full social protection and assistance in the realization of the right to fatherhood or motherhood.

MATERIALS AND METHODS

The experience of certain countries has been analyzed in the research. Especially we analyzed the experience of the United States, Israel, EU countries. Additionally, we used statistical data of international organizations, conclusions of experts and foreign legal acts dealing with posthumous reproduction and auxiliary reproductive technologies, judicial practice, doctrinal ideas and views on this issue.

In general, the theoretical bases of our research are the following researches: Pashkov V. [2, 3] Hrekov Y., Hrekova M. [4], Olefir A. [5,6], Harkusha A. [7, 8], Gutorova N. [9, 10, 11] and other.

REVIEW

From ancient times, there are known situations when a person died from an illness, an accident or a battlefield after the child was conceived, but before his birth. Such children were called "posthumous". In most cases, these children were recognized as being born from their father only if they were born before the expiration of a certain period of time after his death. In the literature we can also find cases where the birth of a child occurred after the physical death of the mother: at birth or as a result of an accident [12].

Nowadays, the latest high-tech scientific technologies make it possible in a new way consider the issue of children born after the death of their parents. The use of auxiliary reproductive technologies and methods of treatment of infertility, leads to situations when not only the birth of a child, but even his conception may occur after the death of biological parents. To put it more precisely, it is about posthumously conceived children. Frozen gametes can be stored under appropriate conditions for quite a long time. Therefore, determining the origin of the child born with the help of their use is not connected with the moment of death of parents or one of them. Although the first case of posthumous reproduction of reproductive material was described in 1980, the proper legal settlement of this procedure and its consequences does not exist in virtually any state in the world [13].

Post-mortem reproduction means such a method of birth of children, in which operations with reproductive tissues are carried out after the death of the donor (in addition, part of such operations is carried out in vitro), which during his life left the order with intention to exercise his right to fatherhood or maternity, and transfered the reproductive material to cryobank

The problem of posthumous reproduction has become urgent for modern society in the last two decades. This is not only due to the development of medicine and new reproductive technologies, but also because of natural disasters, man-made disasters, the spread of oncological diseases and presence of numerous areas of hostilities. All this leads to a large number of deaths of people of reproductive age. In many states there is an increase in the number of appeals from citizens who would like to give birth to children from already dead persons. Some time ago this seemed impossible and fantastic, now it became quite real [14]. Examples we can find in the court practice of the United States (Hall v. Fertility Institute of New Orleans [15]), France (Parlaix vs. CECOS sperm bank [16]), and others. Possibility and practice of posthumous auxiliary reproductive technologies is a vivid example of a situation when social relations and needs evolve faster than their legal regulation.

Working with cryopreserved reproductive cells and embryos, their extraction has become common, sometimes routine job for specialised health care facilities.

In May 2010, in Virginia (USA) was set a world record for the duration of the storage of frozen human embryos - 20 years [17], followed by its successful use in reproductive technologies.

Of course, the interest of the professional associations of reproductive scientists in the phenomenon of posthumous auxiliary reproduction is based more in the area of jurisprudence and medical ethics, than in the field of medical technology [18]. Posthumous selection of reproductive cells is especially relevant when parents or other relatives of the deceased have expressed their desire to use the services of surrogate motherhood.

DISCUSSION

However, the fact of the post-mortem application, and the birth of children as a result of the application of such technologies puts a number of moral, ethical, medical, religious, philosophical and legal issues in front of modern society.

Maybe that's why it is forbidden in Germany, Australia, Sweden and Canada. At the same time, posthumous reproduction of the reproductive cells of individuals who are sent to the combat zone, taking into account the risks they bear due to the military duty, is a pressing, objectively-conditioned problem that needs to be solved.

In Ukraine there is no legal regulation of posthumous reproduction in general, if the general rules of the legislation regulating the issues of auxiliary reproductive technologies are not taken into account.

An analysis of foreign experience suggests that most developed countries can be divided into three groups de-

pending on the degree of legal regulation of posthumous auxiliary reproductive technologies:

1) countries, in which they are permitted (Israel, USA, United Kingdom);
2) countries, in which they are forbidden (Germany, Australia, Sweden, Canada);
3) countries, in which there is no legal regulation of this issue (Ukraine, Russian Federation).

The last group of countries can be divided into:

1) those in which posthumous reproductive technologies are not used (Ukraine);
2) those in which, despite the lack of legal regulation, these technologies are applied (in the Russian Federation - the case of A. Klimov [18]).

It should be noted that today only in the United States and Israel has become the norm for military to hand over reproductive material before the trip to the "hot spots" [19]. This happened with Sergeant Sutherland before leaving for Iraq. He intended to conceive a child with his wife Mary after the war, but was killed in 2005. After six months his wife participated in the reproductive program and soon gave birth to a boy [19].

In Israel, all servicemen have a duty to hand over the reproductive material before traveling to combat zones. All related expenses and organization of this process are covered by state funds. However, further disposal of reproductive material takes place in accordance with the will of the person who delivered them, and in the case of death, this right is granted to the parents and the other spouse, but without the involvement of public funds.

The judicial system of Israel has formed a practice in which the soldier's parents can use the reproductive material of their son in order to use the services of a surrogate mother, in addition, before the passage of chemotherapy, all patients are required to hand over the genetic material [19].

It is clear that such prudent steps was introduced also for the case when a person who physiologically can not have children in the future will have a desire to take advantage of the right to fatherhood or maternity.

Posthumous reproductive programs became possible even in orthodox Iran. In 2006, there were two cases of appeal to the Iranian court on posthumous reproduction. Both lawsuits were satisfied [19].

In the United States, France, Britain, the question of the possibility of conception of a child after the death of a person depends on establishing the existence of the intention to do so [20]. However, the logical question arises, what exactly to consider as a statement of intention. Can the written order in case of death or the fact of giving reproduction material for storage serve as indicator of the intention to exercise the right to fatherhood or maternity? Is it necessary to take into account the will of another spouse or other persons in the selection of reproductive material, if this is a state program?

Let's consider several situations. The first one - when the person left his will about the disposal of cryopreserved reproductive tissues in the event of death, and the second - when there is no such will. If the person leaves the will to dispose her reproductive material after death, the situation does not cause particular difficulties [20].

Written instruction or its cancellation is sufficient evidence of the presence or absence of intent to exercise their right to fatherhood or maternity.

In the UK in 2002, the widow demanded a frozen gamet of a deceased man, but received a refusal, because before death he withdrew his permission to the disposal of gametes after death by his wife. The plaintiff argued that her husband's consent had been withdrawn under the pressure of the employees of one of the medical institutions, but the court refused her, because was convinced that her husband's intention was completely understandable [15]. So, in each case, the will of the dead person was decisive.

Some experts say that if the person has already deposited their gametes, then this should be considered as confirmation of the desire to become a father or mother. On the other hand, how to determine if a person intended to acquire this status in life and only for the purpose of raising his or her own child, or preferred the birth of a genetically native child in any conditions, even in the case of death. Such categorical approach is not justified in this category of cases. Different variants should be considered as possible. For example, if a partner, other close relatives of the deceased insist on the conception of the baby from his gametes and confirm such a desire of the deceased, it is obvious that denying the birth of another desirable human life only because of formal inconsistencies would be, at least, not humane. On the other hand, testimony of the deceased's successors not in favor of the birth of a child may be due to personal interest and not correspond to reality [20].

We agree with the conclusion given above. We believe that in this case should be used the principle of reproductive autonomy of a person, and the refusal to give birth to the child should be clearly expressed (in writing). In all other cases, auxiliary reproductive technologies for the birth of a child must be used. The non-application of these technologies without expressed refusal is an obstacle to the realization of reproductive freedom and autonomy. Those who leave their reproductive material must realize this (in particular, that it can be used after their death, because it is the subject of civil-law relations).

In Ukraine, the state program on the selection of reproductive tissues from individuals who are sent to the combat zone will perform several tasks. Firstly, it will guarantee the realization of rights, defined by Art. 49, 50 of the Family Code of Ukraine, for the persons who are in military service on the territory of the antiterrorist operation (military operations), and secondly, the preservation of a healthy gene pool of the nation.

However, we are confronted with the main problem of posthumous reproduction in Ukraine - the lack of any normative basis for the state reproductive cell selection program for individuals who are sent to the combat zones. That's why we insist on the development of such state program, and to make changes to the existing system of normative acts regulating the issues of auxiliary reproductive technologies.

In order for the child to be conceived after the death of parents, first of all, it is necessary for a potential father to leave his reproductive material in cryobank together with the order [21]. Cryobank system in Ukraine is represented by accredited private health care facilities that are not located in all administrative-territorial units. In view of this, in case of acceptance of state reproductive cell selection program for people who are sent to the zone of hostilities, it is necessary to conclude medical care contracts with private institutions or to expand the network of state cryobanks.

However, we should not forget that with the implementation of the program of posthumous reproduction, we can face a lot of ethical and legal issues.

For example, if close relatives of the deceased ask for permission to use his gametes for conception, perhaps this opportunity should be given. But what if these people can not reach agreement on this issue? For example, individuals with whom this child will be competing in inheritance, can be "against". In this case, the court may find more arguments against its conception and birth. The question arises whether these individuals would be against birth, if their interests were not affected? Perhaps in such a situation it is necessary to refuse a child in legal relationship with the deceased parent in order not to refuse to give birth [20]?

In view of this, it is necessary to regulate in detail the use of posthumous reproductive programs with all the consequences for children, parents and other interested subjects (for example, recognize the child as not originated from the father or vice versa).

The main provisions of our proposed program should be as follows: 1) definition of concepts and terms; 2) establishing a compulsory written form for contracts for the storage of reproductive material and for the consent to participate in posthumous reproductive programs, indicate the will of the person to dispose of her reproductive material in case of death (to determine whether or not a person agrees to use reproductive material after death, or another state that does not allow expressing the will). 3) approving a model contract with its mandatory conditions for the storage of reproductive material and consent to participate in posthumous reproductive programs; 4) determination of who has the right to use the reproductive material of the person who has deposited it in case of death or other condition that does not allow expressing his or her will; 5) establishing a list of subjectswho have the right to free participation in the state reproductive program (these are the persons whose list is contained in Article 19 and 6 of the Law of Ukraine "On the Status of War Veterans, Guarantees of Their Social Protection"); 6) clearly identifying the origin of the child conceived as a result of the implementation of a posthumous reproductive program (in the presence of the written expression of the deceased father's or mother's will during the lifetime, such child will origin from parents); 7) determining the range of state bodies responsible for the implementation of the state program; 8) determining the financial sources of the state program; 9) determining the system of authorized health care institutions that will provide medical services in the field of reproductive technologies, etc.

It should be noted separately that it is not necessary to allow the disposal of reproductive material for other relatives of the deceased, because it leads to the appearance of a number of complex issues, such as inheritance or the use of surrogate mothers without the consent of the widow. In addition, the parents of dead person don't have a constitutional right to fatherhood or maternity, and also do not bear any responsibilities regarding the child (there is no legal representation, the guardianship is required). In this case, the person who participates in the state reproductive program should be provided with the opportunity to identify those who have the right to use reproductive material after the death of the donor.

If the person who gave his reproductive material to the storage did not leave an instruction on its use in case of death or did not indicate the persons authorized to make such a decision, the question of the possibility of such use is decided by the court, on the basis of the determination of the life-time intentions of the person [20].

CONCLUSIONS

Thus, we rely on the court to resolve any legally complex issues arising from the use of posthumous reproductive technologies. Such a positive practice we can observe in foreign countries, although it is not characteristic of continental countries.

Consequently, we note the urgent need to develop and adopt a state reproductive cell selection program for individuals who are sent to the combat zones (according to a model that exists in such countries as the USA and Israel).

Beyond doubt aspects of posthumous reproduction are today among the most unregulated and controversial both from legal and ethical point of view.

We have proved that there are medical (practical) preconditions for the introduction of posthumous reproduction programs. Among them is the technology of obtaining reproductive cells (post-mortem too), their preservation and successful subsequent use. In addition, foreign experience shows the success of the application of these technologies and the real guarantee of full implementation of the range of rights to the family, fatherhood or maternity.

REFERENCES

1. Generalization of data on the dead [Uzahalnennia danykh po zahyblym]. URL: http://memorybook.org.ua/indexfile/statage.htm.
2. Pashkov V., Golovanova I., Noha P.: Principle of serviceability and gratuitousness in transplantation?. Wiadomości lekarskie. 2016, 3:565-569.
3. Pashkov V., Kotvitska A., Noha P. Protecting the rights of producers original medicines. Wiadomości lekarskie. 2017, 4:834-838.
4. Pashkov V., Hrekov Y., Hrekova M.: European experience of regulating distance selling of medicines for Ukraine. Wiadomości lekarskie. 2017, 1:96-101.
5. Olefir A.A., Pashkov V.M., Bytyak O.Y.: Legal features of the drug advertising. Wiadomości lekarskie. 2017, 1:133-139.
6. Olefir A.A., Pashkov V.M. Problems of Rehabilitation of mentally Ill persons: the International Legal Aspect (Ukrainian Experience). Acta Balneologica. 2017, 4:341-354.
7. Harkusha A., Pashkov V.: Certain aspects on medical devices software law regulation. Wiadomości lekarskie. 2016, 6:765-768.

8. Pashkov V., Hutorova N., Harkusha A. Vat rates on medical devices: foreign experience and Ukrainian practice. Wiadomości lekarskie. 2017,2:345-348.
9. Gutorova N.,Harkusha A., Pashkov V.: Medical devices software: defining key terms. Wiadomości lekarskie. 2016, 6:813-818.
10. Tatsiy V., Gutorova N., Pashkov V.: Legal aspects of cancer deseases prophylactics: patients rights context. Wiadomości lekarskie. 2017, 6:1108-1114.
11. Pashkov V., Kotvitska A., Harkusha A.: Legal regulation of the production and trade of medical devices and medical equipment in the eu and us: experience for Ukraine. Wiadomości lekarskie. 2017, 3:614-619.
12. Svitnev. K.N. Life after death. Legal and ethical aspects of posthumous reproduction [Zhizn posle smerti. Yuridicheskie i eticheskie aspektyi posmertnoy reproduktsii]. URL: http://www.jurconsult.ru.
13. Grothaus-Day C. From pipette to cradle, from immortality to extinction. URL: http://org.law.rutgers.edu/publications.
14. Filimonova I.V. Problems of legal regulation of postmortal reproduction in the family legislation of Russia [Problemyi pravovogo regulirovaniya postmortalnoy reproduktsii v semeynom zakonodatelstve Rossii]. Politics, state and law. 2015. № 2. URL: http://politika.snauka.ru/2015/02/2333.
15. Cheri L. The Impact of Modern Reproductive Technology on the Law of Probate: «Frozen Pops» and Inheritance. URL: http://www.actec.org/public/WenigCompetition/Winners/2004/.
16. Katz A. G. Parlaix c. CECOS: Protecting Intent in Reproductive Technology. Harvard Journal of Law & Technology. 1998. № 1. URL: http://jolt.law.harvard.edu/ articles/v11.php.
17. Oehninger S., Dowling-Lacey D., Mayer J.F. Live birth from a frozen-thawed pronuclear stage embryo almost 20 years after its cryopreservation. URL: http://embryology.researchtoday.net/archive/6/10/2688.Htm.
18. Svitnev K. N. Posthumous reproduction enables to realize the inalienable right of a person to continue the genus even after death [Posmertnaya reproduktsiya daet vozmozhnost osuschestvit neot'emlemoe pravo cheloveka na prodolzhenie roda dazhe posle smerti]. Legal issues in health care. 2011. 6:30-43.
19. Smagina L. New reproductive technologies: myths and reality [Novyie reproduktivnyie tehnologii: mifyi i realnost]. URL: http://www.the-medical-practice.com/survey/technologies/eko1.
20. Rubets I. Problems of legal regulation of posthumous reproductive programs [Problemi pravovogo regulyuvannya posmertnih reproduktivnih program]. Publishing House of Lviv National University. I. Frank. URL: http://nbuviap.gov.ua/images/justice/Ap/07.pdf.
21. Ruth Z. Dying to be a Father: Legal Paternity in Cases of posthumous conception. URL: http://www.law.uh.edu/hjhlp.

ADDRESS FOR CORRESPONDENCE
Vitalii Pashkov
Department of Civil, Commercial and Environmental Law,
Poltava Law Institute, Poltava, Ukraine
tel: +380532560148
e-mail: poltava_inst@nulau.edu.ua

Received: 02.12.2017
Accepted: 05.03.2018