The Right of Inheritance and Modern Reproductive Technologies

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Abstract

The article deals with the issues related to the right of inheritance of a child born with the help of modern reproductive technologies. The paper discusses appropriate legislative amendments in the Civil Code and in the decree of the Minister of Justice on "Approval of the Registration of Civil Acts" enforcement of which will facilitate to define the rights and obligations of a child born by surrogacy and a donor's participation.

Keywords: Surrogacy, extracorporeal fertilization, embryo donation

Introduction

Worldwide recognition of property and inheritance rights by the Constitution of Georgia made us see the origin of property and inheritance rights and their interrelation in a new way (1.3). According to the paragraph 1 of the Article 21 of the chapter 2 of the Constitution of Georgia, property and inheritance rights are recognized and inviolable. The right of ownership, acquisition, alienation and inheritance cannot be abolished.

As the Articles 16 and 20 of the Constitution empower a person's free development and the privacy rights in Georgia, they should be considered as the constitutional-legal ground for reproduction.

Traditionally, inheritance law is one of the main fields of private law. Accordingly, advances in modern medicine in the field of artificial insemination caused a lot of problems which, on its turn, were unfamiliar and unexpected for inheritance law.

Assisted medical reproduction is available in many countries. In accordance with the **Article 136 of the Law of Georgia on "Health Care"**, every citizen has the right to independently determine the number of children and the time of their birth. The state ensures human rights in the field of reproduction as defined in the legislation. The same law implies **fertilization with a donor's sperm** and **extracorporeal fertilization** for treatment of infertility as well as the risk of transmission of genetic diseases.

According to the same law, **female and male gametes or embryos conserved with the freezing method** can be used for the purpose of artificial insemination. Conservation time is determined minding the couple's will under the established procedure.

Embryo donation for the purpose of a child's birth is also possible. Embryo donation is the process when gamete providers reject an embryo created in the test-tube and give it to genetically unrelated person. (Gametes are female and male reproductive cells, eggs and sperm, which form the zygote - fertilized egg by merging (9)).There are two kinds of donation: direct - when a recipient and a donor are familiar with each other and anonymous donation - when a recipient childless woman is unknown to a donor. Embryo donation is prohibited in many countries. Law of Georgia on Health Care does not directly recognize the donation of an embryo (embryo donation is the process when gamete providers reject an embryo created in the test-tube and give it to a genetically unrelated person (5-117)). However, Part 1 of the Article 143 **considers the possibility of extracorporeal fertilization using a donor's gametes or embryos** to overcome infertility; according to the Article 144, **the use of the embryo conserved with the freezing method is permitted**. There is no direct indication in any regulations whether the embryo should be transferred directly to the genetic mother or it can be transferred to another person for artificial insemination (5,123). According to the Part 2 of the Article 11 of the Civil Code of Georgia, **inheritance right starts from the moment of conception**; however, its exercising depends on a child's birth. According to the paragraph "a" of the Article 1307 of the Civil Code of Georgia, heirs can be: in the event of hereditary succession – the persons who survived the decedent as of the moment of his death, as well as the decedent's children **born alive after his death**. According to the paragraph "b" of the same Article heirs can be: in the event of inheritance by will – the persons who survived the decedent as of the moment of his/her death, as well as **those conceived during the decedent's lifetime and born after his death**, regardless of their filiation with the decedent, and also legal persons.

Recognition of a human as a natural person and the ability to have rights is related to only one circumstance – his/her life (2.100). According to the part 1 of the Article 11 of the Civil Code of Georgia, like civil-legal systems of other constitutional European States, the starting point of the legal capacity is related to a child's birth. Under "birth" is implied complete separation of an alive child from the mother's body. According to the Civil Code of Georgia, arising the legal capacity have no additional preconditions (2.102). An embryo has a special legal status. Despite not being born yet, it still has certain rights. The elements of having rights precede the moment of birth (3. 133).

An embryo has limited legal capacity (right on inheritance) and conditional legal capacity (depended on birth) (2.105). In the Roman Law, according to Justinian's Digesta "those who are distant relatives of the decedent, than those in the mother's uterus, were not called heirs until it was clear whether the child was born or not" (4.126).

The status of artificially inseminated embryo is different. According to the active legislation of Georgia, a test-tube embryo falls within the category of a special law which applies to the rules that regulate property (8-137).

According to the Article 1336 of the Civil Code of Georgia, in the event of inheritance by law, the following persons shall be deemed to be heirs entitled to inherit in equal shares: In the first case – the decedent's children, a child of the decedent born after his death, the decedent's spouse, and his parents (including adoptive parents).

According to the Civil Code of Georgia, the basic pillars of the legal relationship between parents and children are: **birth of a child in the registered marriage and blood ties**. To determine rights and obligations between mother and child and prove blood kinship the **fact of giving birth to a child** is enough. Whether or not mother was in registered marriage with a partner from whom the child was born does not matter. As for the origin of the relationship between father and a child, it is mostly related to the registration of marriage as well as blood kinship, except the cases when a person voluntarily recognizes his fatherhood towards a child born in unregistered marriage and of his paternity is determined by the court. Thus, **the reciprocal rights and duties of parents and their children shall arise from the filiation of the children, proved in accordance with the procedure prescribed by law** (6.123) (Article 1187. Grounds Giving Rise to the Rights and Duties of Parents and Children).

According to the Article 30 of **Law of Georgia on Civil Status Acts**, birth registration of children born as a result of extracorporeal fertilization shall be conducted under the procedure determined by this Law, the Law of Georgia on "Health Care" and an order of the Minister of Justice of Georgia.

In case of extracorporeal fertilization (donation), situations can arise when the interest of people legally registered as parents will not be considered in the child's birth record.

According to the part II of the Article 143 of the Law of Georgia on Health Care, based on the written consent of the couple, it is allowed to move the embryo created through artificial insemination to another woman's - surrogate mother's uterus. In such a case, a surrogate mother does not have the right to demand recognition of motherhood.

It seems that **for recognition of motherhood genetic relationship is crucial**; however, as specified in part I of the same Article, egg donation is permitted and **the ordering woman is considered to be mother and not the donor - genetic parent**. **Consequently, while assisted reproduction, written consent and not genetic ties or child birth is considered to be the legal ground in the process of recognition of motherhood** (7.134).

In today's Georgia, according to the active legislation, it is permissible to make a deal with one person concerning egg donation and achieve agreement with the other (surrogate mother) to grow the embryo. As a result of these procedures, mother of the born child is the ordering woman. Eventually, all three women can claim to motherhood, each having the equal right. This is a case when a woman is deprived of genetic motherhood as well as the ability of child bearing.

According to the part 2 of the Article 1190 (Proof of Filiation Between a Child and Unwed Parents) of the Civil Code of Georgia, one of the grounds for proving paternity is the application of the child himself or herself, having attained the age of majority. According to the part 3 of the same Article, the court determines paternity according to the results of a biological (genetic) or anthropological tests conducted for determining the paternity of a child. If the abovementioned does not provide the possibility to determine the paternity of a child, the court considers other evidences **or/and circumstances that clearly proves the paternity of the claimant. It means that any kind of evidence can be presented at the court: consent on cryopreservation, contract on gamete donation, the donor's medical records, examination report, etc. Once the fact of kinship is determined, inheritance relationships enter into force.**

According to the Criminal Code of Georgia, rights and obligations of parents and children arise from the moment children are born that is confirmed by the rules established by law. When a child is born with extracorporeal fertilization (surrogacy), the established rules consider that the application on requiring registration of the civil birth record is presented the agency on behalf of the people to be indicated in the civil birth record. In case a "client", biological parents of a child die before a child's birth, they cannot be registered as parents in the birth record. Consequently, legal relations and inheritance right cannot arise.

Surrogacy as well as donor involvement in the birth process arises rights of several parties. One of the most important rights is the child's right to know his/her origin. Most families prefer to hide the fact of surrogacy / donation not only from children, but also from close friends and relatives. They believe that it will help to maintain normal relations between children and parents, to avoid stress, but the non-disclosure, on its turn, heightens tension in the family. Minding the medical

and ethical considerations, sometimes it becomes necessary to disclose the truth to the child (8).

The Article 19 of the Decree N18 of the Minister of Justice of Georgia of January 31, 2012 on "Approval of Civil Registration Procedure" considers the registration rule of a child born by means of extracorporeal fertilization, which obliges all participants in the agreement to present the contract, though what kind of personal data it should contain, is not given.

According to Article 18^1 of the Civil Code, a person is entitled to have access to the personal data and records relating to its financial / economic status or other private matters, and obtain copies of this information, except the cases defined by the legislation.

A person can not be denied access to the information which includes personal data or records about him.

Any person shall hand over the personal data and records to another person upon the written request, if this person submits a written consent of the person whose personal data contains the relevant information. In such a case, the person is required to keep the data and information in secret.

Considering exigency of the mentioned Article, it is desirable the subparagraph "b" of the first paragraph of the Article 19 of the Decree N18 of the Minister of Justice of Georgia of January 31, 2012 on "Approval of Civil Registration Procedure" to be formulated in a way that the agreement of the parties participating in extracorporeal fertilization (surrogate mother, donor entity) contain detailed personal data to identify individuals. Thus, according to the Article 18^1 of the Civil Code, children born by means of extracorporeal fertilization will have the opportunity to acquire exact information about their origin and genetic data.

Serious legal problems can arise in the process of determining the inheritance rights of a child born by means of embryo preservation (freezing). According to the Law on Health Care, Article 144 conservation time shall be determined minding the couple's will under the established procedure. In Yekaterinburg the baby was born by means of frozen sperm, whose father died long before the child was conceived; the client was the father's mother (6).

The problem stems from the time of artificial insemination, can a child be his/her father's successor, if the father dies before the formation of the embryo and its implantation in the mother's uterus. Some believe that from the moment of the merge of egg and sperm, embryo should be equalized with fetus and its limited capacity should be recognized. Others believe that equalization of embryo and fetus is possible only after embryo is implanted in a woman's uterus (3,136).

Conclusion

On the basis of the aforementioned can be concluded that inheritance law can consider advances of reproductive technologies.

The current Civil Code does not consider any kind of special regulation related to the origin of a child born by a surrogate mother or/and a donor's participation. The Code considers determining the origin of a child born to married or unwed parents. Thus, it is necessary to add to the Civil Code the Article 1190[1] which will imperatively determine that mutual obligations do not arise among a surrogate mother, a donor and a child (children) born by a surrogate mother or/and a donor's participation.

In case "client" biological parents die before a child is born, to solve the problem that arises while determining the inheritance right, **it would be reasonable to consider a child as a legitimate heir of the deceased parents on the grounds of surrogate motherhood agreement. In this case, the child's interests to determine inheritance can be presented in court by the Guardianship and Curatorship Agency. Thus, the court will recognize the child's inheritance rights. Based on the aforementioned, it is reasonable to add to the Civil Code of Georgia the Article 1340[1] which would state the following:**

If a child is born to a surrogate mother after the spouses who gave a written consent to implant embryo in another woman's (surrogate mother) uterus died, the child's origin can be determined by the court on the grounds of the declaration made by representatives of Guardianship and Curatorship Agency.

This amendment on its turn will require new wording of the first part of the **Article 1275** of the Civil Code which would state the following:

Guardianship and curatorship shall be established for the protection of the personal and property rights and interests of a minor child left without parental care because of the death of the parents, the deprivation of parental rights from his/her parents, recognition of parents' missing without trace or recognition of child's abandonment. **Also, guardianship and curatorship shall be established for the protection of the personal and property rights and interests of a minor child born to a surrogate mother whose biological "client" parents died before the child was born.**

It would be reasonable to announce father of children born by assisted reproductive technologies as a successor when the donor father dies before the formation of the embryo and its implantation in the mother's uterus minding that interests of a testator, a successor born with this method and other heirs are balanced.

This goal can be achieved **after opening the inheritance by setting restrictions on time of using assisted reproductive technologies, e.g. for 6 months**. The proposed time is in compliance with the terms of getting

inheritance and will make it possible to exclude situations when it will be necessary to re-divide the inheritance. In addition, it will be necessary that decedent expresses his will on possibility/impossibility of using assisted reproductive technologies after his death. The will can be expressed by informative voluntary consent on the relevant technologies.

As the norm stated in the paragraph "a" of the article 1307 of the Civil Code of Georgia is not complete and does not respond to the demands of public relations, it would be appropriate to form the above mentioned norm as follows:

Heirs can be:

In the event of hereditary succession – persons who survived the decedent as of the moment of his death, as well as the decedent's children who will be born alive after his death;

Persons born by assisted reproductive technologies can be heirs if the decedent expressed the will his gametes to be used after his death and conception took place within the set terms of getting inheritance.

The article 1188 should also be amended and formed as follows: In the event of the death of the father, a child shall be deemed to have been born of the married parents, if he is born not later than ten months following the death of the father; **except the children,** as stated in the Article 1307, **who were born by using assisted reproductive technologies**.

Juridical fictional recognition of fetus' inheritance right implies fictional imposing certain duties on fetus as according to the Article 1328 of Civil Code of Georgia, inheritance property includes the aggregate of both property rights (assets of the estate) and liabilities (liabilities of the estate) of a decedent as of the moment of his death. Consequently, if born alive, a child bears the same property responsibilities as the decedent had in his life but did not fulfill.

In order to satisfy a decedent's creditors before the birth of a child conceived by the abovementioned method, we suggest adding the paragraph 3 to the Article 1456 (Right of conceived heirs in the partitioning of the estate). We think that the paragraph 3 should be formulated as follows:

"3. If the decedent, when alive, legally expressed the will on conservation-freezing of his embryo and its use after his death, then before the child conceived by assisted reproductive technologies is born, other successors have the right, on mutually agreed terms, to partition the property and allocate a share to yet unborn child. The other heirs have the right to manage the unborn child's property according to the entrustment agreement issued by the court and get benefit from it. The property will cover the decedent's debts pro rata to his share. In the event of a liveborn child, the court's decision on property management is abolished and the successor does not have a right to claim on benefit."

Legislative acts

Constitution of Georgia

Civil Code of Georgia

Law of Georgia on Health Care

Law of Georgia on Civil Acts

Decree N18 of the Minister of Justice of Georgia of January 31, 2012 on "Approval of Civil Registration Procedure"

Joint Decree №133–№144 of the Minister of Justice of Georgia and the Minister of Internal Affairs of Georgia of April 11, 2016 and April 5, 2016 on Approval of Regulations for Withdrawal of Surrogate Children from Georgia

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