



# Abuse of assisted reproductive technology

## Abuso de la tecnología de reproducción asistida

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### Abstract

At the present development stage of society, the issues of legal regulation and development of a reproductive technology mechanism are becoming more and more urgent in people's lives. An important place in solving these issues is given to the law-making policy of the state in this area<sup>1</sup>, which makes it possible to overcome difficult life situations in cases of the expressed intention of persons to become parents but having medical obstacles to this. The sought-after social patterns, supported by a legal component, include reproductive technology, which is lagging in matters of regulation in Russia. Indeed, attempts have been made for many years to understand, accept, and apply reproductive possibilities in the everyday life in legal science. However, the Federal Law "On Assisted Reproductive Technology and Guarantees of Citizens' Rights in Their Implementation" has not been adopted in Russia, which undoubtedly intensifies legal discussions in this area. Within this topic, particular attention should be paid to clause 1 of Article 38 of the Constitution of the Russian Federation, which proclaims that "motherhood, childhood, and family are under the state protection". In this regard, it is necessary to achieve clarity and unity of views, to unify legal relations to achieve harmony of the components of theoretical and legal significance in matters of reproduction, since the effectiveness of application and the number of abuses in this area depends on the solution of this issue. The main aim of the study is to investigate the domestic law enforcement practice and the controversial issues of the use of assisted reproductive technology arising in practice, which indicates the lack of clear interaction in solving general social problems of reproduction and a rational law formation method.

**Keywords:** motherhood, fatherhood, childhood, reproductive, technology, law, family, protection, abuse

### Resumen

En la actual etapa de desarrollo de la sociedad, las cuestiones de la regulación legal y el desarrollo de un mecanismo de tecnología reproductiva son cada vez más urgentes en la vida de las personas. Un lugar importante en la solución de estos problemas se le da a la política legislativa del Estado en este ámbito<sup>1</sup>, que permite superar situaciones difíciles de la vida en los casos de la intención expresa de las personas de convertirse en padres, pero con obstáculos médicos para ello. Los patrones sociales buscados, respaldados por un componente legal, incluyen la tecnología reproductiva, que se está quedando atrás en materia de regulación en Rusia. De hecho, durante muchos años se ha intentado comprender, aceptar y aplicar las posibilidades reproductivas en la vida cotidiana de las ciencias jurídicas. Sin embargo, en Rusia no se ha aprobado la Ley Federal "Tecnología de Reproducción Asistida y Garantías de los Derechos de los Ciudadanos en su Implementación", lo que indudablemente intensifica las discusiones legales en esta área. Dentro de este tema, se debe prestar especial atención a la cláusula 1 del artículo 38 de la Constitución de la Federación de Rusia, que proclama que "la maternidad, la infancia y la familia están bajo la protección del Estado". Al respecto, es necesario lograr claridad y unidad de puntos de vista, unificar las relaciones jurídicas a fin de lograr la armonía de los componentes de trascendencia teórica y jurídica en materia de reproducción, ya que la efectividad de la aplicación y la cantidad de abusos en este ámbito. Dependen de la solución de este problema. La relevancia del tema en estudio radica en el hecho que la práctica de la aplicación de la ley doméstica resuelve ambigüamente asuntos controverciales del uso de la tecnología de reproducción asistida que surgen en la práctica, lo que nuevamente indica la falta de una interacción clara en la solución de problemas sociales generales de reproducción y métodos racionales de formación de leyes.

**Palabras clave:** maternidad, paternidad, infancia, reproductiva, tecnología, derecho, familia, protección, abuso.

## Introduction

The issues of legal regulation of medical and family law, protection of the rights and interests of children in the healthcare field are important in the study of intersectoral interaction. The rights of parents and children through the prism of medical and family law in healthcare matters are central to the state in terms of both creating a family, its normal functioning, and the implementation of the rights and legitimate interests of the subjects of these legal relations. Motherhood is also a constitutional value and is enshrined in the Basic Law of Russia. Article 7 of the Constitution of the Russian Federation stipulates that the Russian Federation provides state support for family, motherhood, fatherhood, and childhood<sup>1,2</sup>. The methodological basis of our study is formed by modern methods of general scientific knowledge, applied from the standpoint of dialectics, analyzing the use of assisted reproductive technology in its development in direct connection with the law enforcement practice.

## Methods

Methodological provisions regarding synergetics, which pay attention to reproduction as an evolving and self-organizing system, are of essential importance in considering the ontology of law in legal reality and system of being. These research methods allow using a comprehensive approach to the application of assisted reproductive technologies in the context of various parameters, systemic interdisciplinary research of social phenomena and processes in this area.

Taking into account the specific nature of the study of social processes, it will naturally be the use of the sociological method in the study of abuses in the field of using the assisted reproductive technology, the edge of socio-demographic problems in the study of social trends in life. The study of social reality in the issue under study is of a deeply essential nature, which is based on the people interaction or activity communication - the fundamental principle, the matrix of everything social<sup>3,4</sup>.

## Results and Discussion

Russian sectoral legislation contains special rights of women who, based on the interpretation of legal provisions, have a number of rights regarding motherhood: treatment of infertility with the use of assisted reproductive technology (Article 55 of the Federal Law No. 323-FZ dated 21.11.2011 "On the Fundamentals of Health Protection of Citizens in the Russian Federation" (hereinafter - the Federal Law No. 323-FZ))<sup>5</sup>, artificial termination of pregnancy (Article 56 of the Federal Law No. 323-FZ); medical sterilization (Article 57 of the Federal Law No. 323-FZ), etc.

The right to resolve the motherhood issue includes the implementation of powers declared in the law, expressed in the desire to have or not have a child, to exercise the right to be or not to be a mother, the way of their implementation (taking

into account the numerous practice of birth at home) if they do not contradict the law. Therefore, many parents, not understanding the danger of such manipulations, acting out of their interests, give birth at home, sometimes causing death to their child in the home delivery, which falls under criminal liability.

It is quite difficult to resolve medical cases due to the many subtleties that one has to deal with at critical moments. For example, a girl was charged for refusing of cesarean section due to fear of having scars, as a result of which her child died in 2004 in the USA<sup>6</sup>.

Assisted reproductive technology (ART) is the infertility treatment method, in the application of which some or all stages of conception and early development of embryos are carried out outside the mother's body (including using donor and (or) cryopreserved germ cells, tissues of reproductive organs and embryos, as well as surrogacy)<sup>7</sup>.

Formation of a woman's legal interest in implementing her rights to be a mother is carried out in the social interaction systems with a family (husband) and a medical organization (performing medical manipulations). From the point of view of the structural and functional analysis, there can be no "arguments" for abusing this right.

In our opinion, the independent solution of the issue of the implementation of motherhood by a woman falls under the category of legal relations and contains a heuristic toolkit that allows solving the issue of motherhood, sometimes without resorting to the consent of a biological father, using a donor cell, that is, finding non-trivial ways to solve the problem<sup>7</sup>.

The right to independently resolve the issues of motherhood includes the following elements:

- freedom not to resort to artificial pregnancy termination. Pregnancy termination is not allowed solely at the request of medical professionals. This should only be done in consultation with the patient;
- the woman's right to have a child without the prior consent of the biological father; the latter does not have the right to sue her if the pregnancy occurs without prior consultation with him;
- a woman's right not to have a child; this right cannot be limited either by law or by the second partner;
- the woman's right to choose contraception. This provision cannot be limited either by the law or by the sexual partner<sup>8</sup>.

However, Part 2 of Article 31 of the Family Code regulates that the issues of motherhood, fatherhood, upbringing, education of children, and other issues of family life should be jointly resolved by spouses based on the principle of equality of spouses. Consequently, as noted by Malyshev<sup>9</sup>, a married woman who independently resolves the issue of motherhood will infringe on the rights of her second spouse<sup>9</sup>. The author proposes to resolve this conflict by making additions to the Family Code of the Russian Federation with a duplicate norm from Federal Law No. 323-FZ.

Abuses of assisted reproductive technology can be:

- of a physical nature (when abuse occurs within the framework of a violation of rights with physical manipulation of patients). In this case, one can express a point of view about violations of patients' rights, illegal behavior, a causal relationship between illegal behavior and resulting harm, as well as the fault of a medical institution. It is also important to understand the motives of medical personnel and whether there is a purpose of abuse in their actions<sup>10</sup>. Another issue requiring a moral and ethical analysis is the prohibition on choosing the sex of the unborn child during preimplantation diagnostics, which is not yet regulated by domestic legislation but is applied in some countries in one way or another<sup>11-13</sup>.

In accordance with the healthcare legislation, a woman has the right to information about artificial insemination and embryo implantation, its medical and legal consequences, etc. If the doctor has violated his/her obligations to provide such data (did not take the necessary actions, which led to a threat to health or life of the recipient), then such inaction will be considered unlawful and entail the legal responsibility of a medical organization.

- of a documentary nature.

Indeed, motherhood is a value that can belong only to a woman, but the issues of the use of reproductive technology should be jointly resolved by spouses within their marriage relationships. It is a legally significant medical document that contains the most important information about the quality and completeness of medical care provided<sup>14,15</sup>.

There was a case in the author's practice, where a medical organization, in violation of the document management rules, repeated the ART procedure to a spouse, without obtaining the written informed consent of the patient - the second spouse, which resulted in a trial in the future. Assisted reproductive technologies were performed using donor material for fertilization.

According to the Order of the Ministry of Health of Russia No. 107n dated 30.08.2012 "On the Application of Assisted Reproductive Technology, Contraindications and Restrictions on its Use" (hereinafter - the Order), after establishing the cause of infertility, the patients are sent for treatment using ART. According to the Order, the general condition for the use of any of the ART methods is the written informed consent of the patients, the receipt of which is a mandatory requirement before any medical intervention.

According to clause 3 of Article 55 of the Federal Law No. 323-FZ dated 21.11.2011 "On the Basics of Protecting the Health of Citizens in the Russian Federation", "a man and a woman, both married and unmarried, have the right to use the assisted reproductive technology if they have a mutual informed voluntary consent to medical intervention".

The conclusion of a written contract is a mandatory criterion for performing any artificial insemination procedure.

Clause 30 of the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 16 dated 16.05.2017 "On the Application of Legislation by Courts when Considering Cases Related to the Establishment of the Origin of Children"<sup>13</sup> indicates that persons who are married and have given their written consent to the use of artificial insemination method or embryo implantation, if they have a child as a result of the use of these methods, are recorded as his/her parents in the book of births (paragraph 1 of clause 4 of Article 51 of the Family Code of the Russian Federation). However, based on the case files, it should be noted that about a year had passed by the time of the first and second application of the ART method; respectively, the situation regarding the implantation of a man's donor cell has changed.

According to the same Resolution, a spouse who (in accordance with the procedure established by law) has given written consent to the use of artificial insemination method or embryo implantation, does not have the right to refer to these circumstances when challenging paternity, but there is no prohibition on challenging his paternity record on other grounds.

In this case, how to deal with a situation when the spouse gave consent to fertilization long before the use of ART (during the initial visit to the clinic), after which he was not present during the manipulations. The wife said that the donor cell had taken root and the pregnancy had begun.

However, over time, it turned out that pregnancy occurred without the participation of ART, and the legal spouse (misled and referring to clause 30 of the Resolution), who initially agreed to a donor male cell, had no right to refer to paternity.

### Summary

The significance of the study lies in the need to improve legislative mechanisms and harmonize legislative acts in the field of using assisted reproductive technology. In this area, an imperative method of regulating many relations is needed to exclude conflict relations in society. Based on research data and clear legal regulation, it is possible to exclude abuse of ART as guilt in the form of intent and negligence. All this can be achieved by an exceptionally clear prescribed legislative mechanism for the implementation of the law in the form of operating procedure. From the point of view of the achieved theoretical results in the study of this topic, there is a way to clarify some of the difficult points that arise in the law enforcement practice, and are sometimes interpreted as abuse leading to harmful consequences.

### Conclusions

In connection with the study, at the present development stage of legislation in the field of assisted reproductive technology, one should adhere to a systematic and rational law-making

path in the formation of the rule of law. It is an integrated cross-sectoral approach, the use of an objective and subjective approach to legal development that will make it possible to understand all the problems arising in this activity field and to develop approaches to their solution. The application field of assisted reproductive technology is developing in our country and socially significant. The effectiveness of a functioning system will largely depend on the ordering of norms and the evolution of legal norms in parallel with social relations.

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