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SURROGATE MOTHER. THE GREEK LAW.

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Abstract: According to the Greek Civil Code (GCC), medically assisted human reproduction (MAHR) is permitted in order to treat the incapacity to have children by natural way or to avoid the transmission of a severe genetic disease to the child or to maintain fertility, regardless of medical necessity. Such medical assistance is permissible up to the reproductive age of the assisted person (54th year of age and 0 days when the latter is a woman). Women aged fifty years and one day (50 years and 1 day) to fifty-four years (54 years and 0 days) may be subjected to MAHR only with the permission of the National Authority for Medically Assisted Reproduction. The transfer of fertilized ova to another woman and pregnancy by her (Surrogacy) is allowed by a court permit issued before the transfer, so long as there is a written, and without any financial benefit (consideration), agreement among the parties involved, i.e. the persons wishing to have a child and the surrogate mother and, if the latter is married, her spouse as well. The woman asking for the court permit or the woman who gestated can have their permanent or provisional residence in Greece. Regarding the issue of whether an unmarried single man has the possibility of accessing the method of surrogacy, the most recent jurisprudence denies this possibility to the single man, on the ground that the nature of men and women is different, that only a woman can be pregnant and give birth and, as a consequence, she is the only

one who can have the relevant medical impotency, which allows her to have recourse to the surrogate mother.

The identity of the third persons who have offered gametes or fertilized ova may, at the option of those persons, be anonymous or not, or be disclosed to the child after the child has reached the age of majority, if the child so requests. If the third person chooses to be anonymous, the medical information concerning him or her shall be kept in a confidential file without any indication of his or her identity. Access to this record shall be allowed only to the child and for reasons related to his or her health. It shall not be possible to establish paternity or maternity with the third donor or donor, nor shall it be possible to create any obligations on them. The choice of an anonymous or named third donor shall be made by the assisted person and, in the case of marriage, cohabitation pact or unmarried union, by both spouses or partners. The identity of the child and its parents shall not be disclosed to third donors of gametes or fertilized ova.

Keywords: Age of the assisted person; Court permit; Disclosure of the Donator; Donation of cryo-preserved sperm and ova; Medical examination; Medically assisted human reproduction (MAHR); National Authority for Medically Assisted Reproduction; Permanent or provisional residence in Greece; Registration in the Birth Registry; Single man and surrogacy; Written Consent.

Resumo: De acordo com o Código Civil Grego (CCG), a reprodução medicamente assistida (RMA) é permitida para tratar a incapacidade de ter filhos por via natural ou de evitar a transmissão de uma doença genética grave para a criança ou para manter a fertilidade, independentemente da necessidade médica. Essa assistência médica é permitida até a idade reprodutiva da pessoa assistida (54 anos de idade e 0 dias quando esta for mulher). Mulheres com cinquenta anos e um dia (50 anos e 1 dia) a cinquenta e quatro anos (54 anos e 0 dias) podem submeter um pedido à Autoridade Nacional de Reprodução Medicamente Assistida (ANRMA) e fazê-la com autorização daquela entidade. A transferência de óvulos transplantados para outra mulher e a gravidez dela (maternidade de substituição) é permitida por autorização judicial emitida antes

da transferência, desde que haja um acordo escrito, e sem qualquer benefício financeiro (contraprestação), entre as partes envolvidas, ou seja, as pessoas que desejam ter uma criança e a mãe substituta e, se esta for casada, o seu cônjuge também. A mulher que pede autorização judicial ou a mulher que gerou pode ter residência permanente ou provisória na Grécia. Quanto à questão de saber se um homem solteiro tem a possibilidade de acesso ao método de maternidade de substituição, a mais recente jurisprudência nega esta possibilidade ao homem solteiro, com fundamento que a natureza dos homens e das mulheres é diferente, que só uma mulher pode estar grávida e dar à luz e, como consequência, ela é a única que pode ter a impotência médica relevante, o que lhe permite recorrer à mãe substituta.

A identidade dos terceiros que ofereceram gametas ou os óvulos fertilizados podem, de acordo com o critério dos próprios, ser anónimos ou não, ou ser divulgado à criança depois que ela atingir a idade maioridade, se a criança assim o solicitar. Se a terceira pessoa decidir ser anónima, as informações médicas que lhe dizem respeito serão mantidas num arquivo confidencial sem qualquer indicação da sua identidade. O acesso a este registo será permitido apenas à criança e por razões relacionadas com a sua saúde. Não será possível estabelecer paternidade ou maternidade com o terceiro doador ou doador, nem será possível criar quaisquer obrigações sobre eles. A escolha do anonimato do terceiro doador nomeado, será feita pela pessoa assistida e, no caso de casamento, pacto de coabitação ou união de facto, por ambos os cônjuges ou companheiros. A identidade da criança e de seus pais não serão divulgadas a terceiros doadores de gametas ou óvulos fertilizados.

Palavras-chave: Idade da pessoa atendida; Autorização judicial; Divulgação do doador; Doação de espermatozóide preservado e óvulos; Exame médico; Reprodução humana medicamente assistida (RHMA); Autoridade Nacional de Reprodução Medicamente Assistida; Residência permanente ou provisória na Grécia; Cadastro no Registo de Nascimento; Homem solteiro e maternidade de substituição; Autorização por escrito.

I. Convergence or Divergence from other legal orders?

“Immoral Contracts in Europe” is the 19th book in the series the “Common Core of European Private Law”, a project that was launched in 1993 at the University of Trento, in Italy, which adds an in-depth study of the law and practice on immorality of contracts in Europe. In this book, Prof. Aurelia Colombi Ciacchi, one of the editors, comparing the answers given to a case regarding surrogate motherhood agreements,¹ by the contributors of 28 jurisdictions, to whom I had the honour to belong, resumes by saying that: “...Surrogate motherhood contracts are deemed unenforceable in the vast majority of the considered jurisdictions (25 out of 28). In this regard, a common core evidently exists. Only three legal systems run against the mainstream: Cyprus, Greece and Romania....”².

What are the reasons for which Greece deviates from the approach of the majority of the countries? As mentioned in the Greek jurisprudence,³ the right to reproduction, not only to the natural one, but also by means of the technology, constitutes a special aspect of the right to the personality and is based in art. 5 para. 1 of the Greek Constitution, which provides that “All persons shall have the right to develop freely their personality and to participate in the social, economic and political life of the country, insofar as they do not infringe the rights of others or violate the Constitution and the good usages”.

¹ For said answers see A. Colombi Ciacchi/ Ch. Mak/ Z. Mansoor (eds.), *Immoral Contracts in Europe*, Intersentia, Cambridge- Antwerp- Chicago, 2020, pp. 267-340.

² Aurelia Colombi Ciacchi, 28 Jurisdictions and 12 Types of Morally Dubious Contracts: To What Extent is There a Common Core?, (Case 5), *supra*, p. 724.

³ Thessaloniki Multi-member Court of First Instance 59/2019 Dikaïossini (=Justice, Dni) 2020, 812; Patras Multi-member Court of First Instance 398/2018 Nomiko Vima (= Legal Tribune, NoV) 2019, 455; 387/2019, published in data bank NOMOS.

II. Medically assisted human Reproduction (MAHR) and Relevant Greek Legislation

With this in mind, already in 2002, twenty years ago, the Greek legislator passed L. 3089/2002⁴ on medically assisted human reproduction (MAHR),⁵ which added a new relevant chapter in the Greek Civil Code (GCC, chapter eight, comprising of 6 articles, arts. 1455 to 1460⁶), allowing MAHR under certain conditions, provided therein. Three years later, in 2005, L. 3305/2005 on the application of the MAHR was enacted, regulating the general principles for it (respect of the freedom of a person and of the right to the personality and the satisfaction of the need to have descendants, but on the basis of the principles of bioethics and the interest of the child to be born, art. 1) and set the conditions for the application of the methods for the MAHR. According to its preamble,⁷ infertility, from which, according to the estimate of the World Health Organization approximately 15% of the totality of couples in reproductive age all over the world are suffering, is a serious problem with a lot of social and psychological consequences that needs to be medically treated and that ensuring effective ways of medical treatment constitutes a fundamental human right that is connected to the protection of the development of the personality of the individual. So, L. 3305/2005, in order to face the new reality and fill the existing then legislative lacuna, regulated the general frame for the application of MAHR, provided for the creation of the National Authority for Medically Assisted Reproduction, for

⁴ For its preamble see Kodikas Nomikou Vimatos (= Legal Tribune Code, KNoV) 50 (2002), p. 2622 f.

⁵ For the medical assistance in the human reproduction (in French) see *P. Agallopoulou*, *Les procréations médicalement assistées selon le droit hellénique*, in Odile Roy (ed.), *Réflexions sur le Pluralisme familial*, Presses universitaires de Paris Nanterre, 2010, pp. 65-80 and the dissertation of *K. Rokas*, *L'assistance médicale à la procréation en droit international privé comparé*. Droit. Université Panthéon-Sorbonne - Paris I, 2016. Français. NNT : 2016PA01D051.

⁶ Previous articles 1455-1460 GCC had been abolished with art. 17 of L. 1329/1983.

⁷ See KNoV 53 (2005), p. 23.

criminal and administrative sanctions in case of violation of its provisions, as well as for the insurance coverage of the assisted individuals by the social security program.

According to the above-mentioned provisions of the GCC, MAHR (artificial fertilization) is permitted only in order to treat the incapacity to have children by natural way or to avoid the transmission of a severe genetic disease to the child. Such medical assistance is permissible up to the reproductive age of the assisted person. Human reproduction by the method of cloning is prohibited. Gender selection of the child to be born is prohibited, unless a severe hereditary gender-related disease is to be avoided (art. 1455 GCC).

Though the preamble of L. 3305/2005, mentioned the 55th year of the woman's age as the age of natural reproductive ability,⁸ finally art. 4 para. 1 of said law stipulates that the reproductive age of the assisted person, when the latter is a woman, is considered the 50th year of age. The Piraeus Court of Appeal⁹ has held that this maximum age put by the legislator for women – contrary to men – after the elapse of which it is unrebuttably presumed that there is no natural capacity of reproduction, without giving the possibility to check whether there is natural capacity of reproduction, despite the age limit, at each particular case, does not raise a constitutional issue of lack of equality, as the natural capacity of reproduction of the two sexes is different.

However, not all Greek Courts apply this age limit very rigidly. In particular, the Multi-member Court of First Instance of Serres,¹⁰ in Northern Greece, permitted MAHR, though the woman seeking it exceeded the 50th year of age by one and a half month, as, according to the Court, the right to reproduction must not be hindered from the moment the risks for which the age limit has been set do not exist.

⁸ See KNoV 53 (2005), p. 25.

⁹ Piraeus Court of Appeal 275/2016, published in NOMOS, rejecting the appeal against the decision 391/2016 of the Piraeus Single-Member Court of First Instance.

¹⁰ Serres Multi-member Court of First Instance 4/2018, NoV 67 (2019), 458, followed by Remarks of V. Peraki, The Maximum Age Limit at the Medically Assisted Reproduction, NoV67 (2019), 460-465.

Also the Multi-member Court of First Instance of the city of Patras in the Peloponnese, in two cases,¹¹ allowed MAHR from the moment the 55th year had not been exceeded, with the same reasoning, given also that the woman seeking it was still in the natural reproductive age. To the contrary, the Multi-member Court of First Instance of the city of Irakleio,¹² in the island of Crete, is of the view, as the Piraeus Court of Appeal, that above mentioned art. 4 para. 1 L. 3305/2005 introduces an un rebuttably presumption about the reproductive age of the assisted person, which is not contrary to the Constitution; thus, the granting of a relevant permit to a woman exceeding the 50th year of age should be rejected. The relevant discussion, however, might come to an end, as, just recently it has been announced that the Government intends to raise the age limit to the 54th year.

Any medical act aiming at the assistance of human reproduction, pursuant to the stipulations of art. 1455 GCC, is undertaken with the written consent of the persons wishing to have a child. If the assistance concerns an unmarried woman, her consent and, in the case of a cohabiting relationship, the consent of the man she cohabits with, are furnished by a notarial deed. The consent is revoked with the same form up until the transfer of the sperm or the fertilised ova to the female body. Without prejudice to art. 1457 GCC, which provides for the *post-mortem* assisted reproduction,¹³

¹¹ Patras Multi- member Court of First Instance 398/2018 (the applicant was 54 years old), supra (fn. 3); 387/2019, (the applicant was 51 years old), supra (fn. 3).

¹² Irakleio Multi-member Court of First Instance 14/2019 (the applicant was 58 years old), published in NOMOS.

¹³ Art. 1457 GCC: "Assisted reproduction is allowed after the death of the spouse or the partner with whom the woman lived in free union by court permit and only if both of the following requirements are met:

- a. The spouse or the partner of the woman either suffered from a disease that could affect fertility performance or he was under a risk of death.
- b. The spouse or the partner had consented via a notary document to the *post-mortem* fertilization.

The assisted reproduction is carried out after the elapse of six months and before two years have passed from the death of the spouse or partner."

A child born after *post-mortem* fertilization is presumed, provided that the requested – according to article 1457 GCC – court permit is granted, to be born within marriage (art. 1465 para. 2 GCC).

the consent is presumed revoked if one of the persons, who had already consented, died before the transfer (art. 1456 GCC).

The transfer of fertilized ova to another woman and pregnancy by her (Surrogacy) is allowed, according to art. 1458 GCC – one of the most controversial regulations which was the object of severe critique not only by the opposition but also by the deputies of the majority at the discussions of the Parliament during its voting – by a court permit issued before the transfer, so long as there is the above mentioned written, and without any financial benefit (consideration), agreement among the parties involved, i.e. the persons wishing to have a child and the surrogate mother and, if the latter is married, her spouse as well. The payment of expenses required for the success of the pregnancy, gestation and puerperium does not constitute consideration.

The court permit is issued following an application of the woman who wants to have a child, provided that evidence is produced not only in regard to the fact that she is medically unable to conceive but also that the surrogate mother is in good health condition and able to conceive.

III. Necessary Conditions for the Issue of the Court Permit

More particular, the applicant, who wishes, but is not able, to gestate due to medical reasons, shall not exceed the age of natural reproduction ability, which is essentially fixed, as mentioned above, in the fiftieth year of her age. Additionally, both the woman who is about to gestate and the persons who wish to have a child have to be subjected to a medical examination concerning the viruses of human immunodeficiency (HIV1 and HIV2), hepatitis B and C and syphilis. The woman willing to gestate is further subjected to a thorough psychological examination.

L. 3089/2002 (art. 8) used to stipulate that Arts. 1458 and 1464 GCC only apply where the woman asking for the court permit and the woman who gestated have their *permanent* residence in Greece. New L. 4272/2014 (art. 17), though, which replaced said article, provides that the woman asking for the court permit or the woman who gestated can have their *permanent or provisional* residence in Greece.

The Legal Council of the State, with its Opinion No. 201/2018, rejected the possibility to Greek citizens who used surrogate mothers who did not have the Greek nationality and lived abroad the possibility to register the children in the Greek Registries, as the latter did not acquire the Greek nationality by birth.

IV. Surrogacy and Unmarried Single Men

There has been a big discussion about whether an unmarried single man has the possibility of accessing the method of surrogacy.¹⁴ According to one opinion, the man does not have this possibility. According to the opposite opinion,¹⁵ however, a man can also use the said technique. The jurisprudential data in this matter are very few. Decision no. 2827/2008 of the Athens Single Member Court of First Instance¹⁶ and no. 13707/2009 of Thessaloniki Single Member Court of First Instance¹⁷ are the only two decisions, to my knowledge, that have accepted the applications of unmarried men for the use of the surrogacy method on the basis of the application of art. 1458 GCC by analogy.

An appeal was filed, though, by the Public Prosecutor of the Athens Court First Instance against the decision 2827/2008 of Athens Single Member Court of First Instance, which was accepted and the Athens Court of Appeal, with its decision 3357/2010,¹⁸ reversed the first instance decision. According to the grounds of the Court of Appeal decision, the single man has no right to use the surrogacy method, on the ground that the nature of men and

¹⁴ For the relevant problematic see, among others, *N. Koumoutzis*, Artificial Procreation of the Unmarried Single Man, *Chronika Idiotikou Dikaiou* (= Chronicles of Private Law, ChrID) 11/2011, 316 f.

¹⁵ For the scholars supporting the one or the other opinion see *K. Kipouridou / M. Milapidou*, Surrogant Motherhood in Greece and in Sweden: A Comparative Overview of Two different Legislative Approaches in the Frame of Globalization, *Armenopoulos* 71 (2017), p. 1845, fn. 9

¹⁶ ChrID 9/2009, 817, followed by Remarks of *Th. Papahristou*, ChrID 9/2009, 818.

¹⁷ ChrID 11/2011, 267.

¹⁸ NoV 2012, 1437, followed by a Note of *P. Nikolopoulos*, 1440 = Dni 2013, 740 = ChrID 13/2013, 508.

women is different; only a woman can be pregnant and give birth and, as a consequence, she is the only one who can have the relevant medical impotency, which allows her to have recourse to the surrogate mother. This approach is also followed by the majority view of the Multi-Member Court of First Instance of Thessaloniki in a decision of 2017.¹⁹

It is of interest to mention that after the granting of the permit to the single man to use the surrogacy method with the above decision 2827/2008 of the Athens Single Member Court, another issue arose when the Registration of the newly born twins had to take place at the Birth Registry: what name was going to be registered as the name of the babies' mother. The Legal Council of the State, to which the issue was referred, gave the Opinion No. 261/2010²⁰, according to which the woman who gave birth is to be registered as the mother, as provided in art. 1463 GCC, given that no kinship was established according to art. 1464 GCC, which provides that "if the child is born after medically assisted reproduction of a surrogate mother, under the conditions of Art. 1458 GCC, it is presumed that mother is the one who has obtained the court permit. This presumption can be reversed by a court action concerning the maternity, within six months of the birth of the child. Maternity can be contested via a court action either by the presumed mother or the surrogate mother, provided that evidence is produced that the child is the biological issue of the latter. The court action must be filed by the woman entitled to do so personally or by her specially authorised attorney or, with court permission, by her legal representative. Following the irrevocable court decision that accepts the court action, the surrogate mother is considered to be the mother of the child with retroactive effect as from the time of the child's birth".

Prof. of Civil Law Dr. *D. Papadopoulou-Klamari*,²¹ in her remarks on the above Opinion, though, is of the view that this ap-

¹⁹ Thessaloniki Multi-member Court of First Instance 8641/2017, published in NOMOS.

²⁰ Theory and Practice of Civil Law (TPCL) 2010, 1205 ff.

²¹ Acquisition of a Child by an Unmarried Single Man- Issues of Motherhood and Mother's Name, TPCL 2010, 1215.

proach is not correct and that the children do not legally acquire a mother, as the conditions of art. 1464 GCC are not met. According to the author, no mother's name should be registered, as in the case of abandoned children who have no father or mother, given that books kept in the Registry only show the personal status of a person, they do not establish kinship.

V. Donation of cryo-preserved sperm and ova. Non- disclosure of the Donator

Persons resorting to assisted reproduction can decide by a joint written declaration – to their doctor or the responsible person in the medical center, which takes place before beginning the appropriate procedure, whether the cryo-preserved sperm and cryo-preserved ova not required for the reproduction procedure should be donated for fertility treatment of other persons that the doctor or the fertility clinic will decide, used for research or therapeutic purposes or destroyed. If there is no joint declaration of the persons concerned, the sperm and fertilized ova are preserved for a period of up to five years from their receipt or creation and after the expiry of that period, they are either used for research or treatment purposes or destroyed. Non cryo-preserved fertilized ova are destroyed after the elapse of fourteen days from fertilization. The eventual period of cryo-preservation in between is not counted (Art. 1459 GCC).

The identity of third parties who have donated the sperm and fertilized ova is not disclosed to the persons who wish to have a child. Medical information concerning the third-party donor is kept in a confidential archive with no indication of the donor's identity. Access to this archive is permitted only to the child and for reasons relating to the child's health. The identity of the child and of the parents is not disclosed to the third-party donors of sperm or fertilized ova (Art. 1460 GCC).