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Legal Status of a Man in Assisted Reproductive Technology in Polish Law**

ABSTRACT: The purpose of this article is to describe the legal status of a man who is a donor of reproductive cells; he might be the husband or cohabiting partner of a woman who is to be a recipient of either these cells or an embryo created from them. The author answers the question of whether this man, in the capacity of a husband, partner, and father, is treated as a subject in medical procedures related to artificial insemination. He stresses that the Polish Law of 25 June 2015, on the treatment of infertility—with its many weaknesses, which, however, are not the subject of this article—makes only married couples and cohabiting heterosexual couples eligible for the assisted reproductive technology treatment. This should be viewed positively as a protection of children's rights, including the right to live in the family. Special attention has been paid to those provisions that relate to both the informed consent of a man to perform medical procedures and the withdrawal of his consent. In conclusion, the view expressed was that the Polish legislation adequately regulates this issue.

KEYWORDS: procreation, assisted reproductive technology, artificial insemination, consent, good of the child, partner donation, non-partner donation, reproductive cell, embryo.

1. Preliminary remarks

When a child is born, attention is overwhelmingly focused on the child and their mother. This is understandable, because it is natural. At that moment, the father is a kind of background figure. The purpose of this article is not to question this fact but to highlight the role of the man—father or cell donor, in the case of assisted reproductive technology (hereinafter ART).

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The titular “man”, according to the provisions of the Infertility Treatment Act of 25 June 2015¹ (hereinafter ITA), is the donor of the reproductive cells, but also (often at the same time) the husband of the woman who will give birth to a child conceived through ART, or her cohabiting partner, referred to in the legislation and in this paper, as a partner, that is, a man remaining in permanent cohabitation with the woman (recipient). Sometimes, it is also the donor of an embryo created from reproductive cells or a person subjected to medical measures to prevent infertility in the future.

2. Eligibility for assisted reproductive technologies: The context of man’s participation

Among the many questions and doubts formulated in connection with the idea of assisted reproductive technology, the most important is the so-called “decisive” question: Is ART a morally permissible action, should it be performed, and should it be allowed?² The answer to this question has been, is, and will be contingent on the adoption by the respondent of a certain philosophical and/or religious doctrine, that is, on the adoption/acceptance of some concept of morality.³ An increasing number of countries accept the view that what is technically possible is also doable. Whether as a result of the rejection of moral principles or despite ethical doubts, these countries have adopted legislation that leans towards the liberal side. However, almost nowhere is the politico-legal (legislative) victory of the proponents of ART absolute. Restrictions on its eligibility refer to the scale of availability of certain medical procedures (e.g., surrogate motherhood is banned in Poland)⁴ as well as the imposition of certain requirements on ART applicants. Differences between countries exist in the scope of the protection of embryos conceived through ART. All of these issues, as well as many others, are of high moral importance once the question “whether ART can be used” has been answered in the affirmative. Many specific

¹ Ct. Journal of Laws 2020, item 442.

² The Congregation for the Doctrine of the Faith, 1987; Czujek, 2014, pp. 102-148; Singer and Wells, 1988.

³ A representative review of positions on this subject in Galewicz, 2010, pp. 241-371.

⁴ Cf. Article 61(1) of the FGC: ‘The mother of the child is the woman who gave birth to them’; Bączyk-Rozwadowska, 2018, p. 524.

questions about “how to use it” are, of course, far less relevant because they are secondary in nature.

As previously mentioned, one of the questions concerning the legal regulations of ART is: Who should these procedures be available? The obvious addressee of ART (so to speak, the target group) are married couples, especially those who have not been successful in conceiving a child. The infertility rate of married and cohabiting couples is not precisely defined, and the officially reported figures are unreliable, due to how widespread these figures are.⁵ However, even personal observations of one’s circle of close and distant friends allow us to conclude that this is not a marginal phenomenon. At the same time, the desire to have a child by those who want to experience parenthood—despite anti-natalist tendencies—is strong.⁶

Owing to the high cost of ART, it is not targeted at married couples who already have a child (or children) and are trying to have another child, although this is not excluded. In practice, such situations are rare.

Because of widespread negative demographic trends in Europe (dramatically low fertility rates, declining marriage rates, and rising divorce rates), ART treatments have also been extended to informal heterosexual unions (here, cohabitating couples). This is only occasionally criticised⁷, and if so, due to concerns about the permanence and stability of such unions, which are not legally established and thus may entail greater risks than marriages to the protection of the interests of the child to be born into them. The argument about the formally lesser protection of the permanence of cohabitation (and thus the good of their children) than the legal protection of marriages loses strength in the face of the high rate of divorce, which constitutes a grim social phenomenon.⁸

It follows from Polish literature that the law on infertility treatment can be circumvented, and in defiance of the ban, the status of a parent of a child born through ART can be obtained by a single person or a person

⁵ After all, the information that there are between 60 and 168 million infertile people in the world, or that infertility affects about 15-25%. 60-180 does not say much; Dudziak, 2016, pp. 467.

⁶ Bielawska-Batorowicz, 2014; Bidzan, 2010, p. 146; Domagalska, 2015.

⁷ Smoczyński, 1996.

⁸ Central Statistical Office (GUS), 2022, *Rocznik Demograficzny* (‘Demographic Yearbook 2022’) 2022, [Online]. Available at: https://stat.gov.pl/download/gfx/portalinformacyjny/en/defaultaktualnosci/3328/3/16/1/demographic_yearbook_of_poland_2022.pdf (Accessed: 20 June 2024), pp. 230-249.

living in a stable same-sex relationship. By law, partner donation involves the donation of reproductive cells for use in ART by a male donor to a female recipient who is married to the donor or remains in a cohabiting relationship, i.e., cohabitation (Article 2(8) of the ITA). The latter situation must be confirmed by a consensus statement from both cohabitating partners. However, these declarations have not been verified. In addition, persons declaring cohabitation may not in fact be in cohabitation nor does the law require them to prove that they have been in a relationship for a specific, legally designated number of months prior to ART treatment to make it permissible. However, as in the case of married couples, cohabiting partners are required to remain in therapy other than ART for one year prior to ART treatment. Declarations of cohabitation are not made under oath nor are any sanctions imposed in case they turn out to be false. Such legal regulation may lead to abuse, for instance, by submitting untrue declarations to bring about the birth of a child by a single person or a person in a same-sex relationship.⁹ Such behaviour cannot be ruled out if one considers that representatives of the same-sex community firmly claim that under the banner of the so-called reproductive rights (recognised in numerous publications and declarations of a political nature as human rights) and the protection of reproductive health, same-sex partners are entitled to adopt children and undergo ART treatment. They treat failure to be granted those rights as discrimination.¹⁰

It should be added that the abuse of cohabitation to circumvent the law and obtain undue benefits occurs in Polish social welfare law, in which many provisions favour single people. However, the status of this singlehood is not vetted, and some of these people (almost exclusively women) live in cohabitation. They do not apply to establish the paternity of their children; they actually live with their father in cohabitation but formally have the status of a single parent. They receive social benefits in the form of cash and, for example, privileged access to nurseries and kindergartens. This raises objections in society, because in practice, there is a preference for cohabitation over marriage, contrary to Article 18 of the Constitution of the Republic of Poland.¹¹

⁹ Gałązka, 2018, p. 163.

¹⁰ Pogodzińska, no date.

¹¹ Ruling of Constitutional Tribunal, of May 18, 2005. File reference K 16/04, Journal of Laws 2005, item. 806.

A strong argument in support of only married couples and cohabiting couples being eligible for ART treatment is rooted in pedagogy and developmental psychology. It stems from the thesis that for optimal development a child needs both a female (mother) and a male (father) role model.¹² The ITA additionally invokes the principle of the good of the child to be born as a result of artificially assisted procreation, as well as the protection of the child's rights. One of the most important rights of the child, in light of the provisions of the Convention on the Rights of the Child¹³ (CRC), is the child's right to a family (understood traditionally, i.e., based on the union of a man and a woman, as parents (though not necessarily spouses) and their child, or children.¹⁴

What should especially be emphasised and ensured is respect for the right of the child to be born through ART and live in a family grounded in the permanent union of a woman-mother and a man-father. After all, it is technically possible to apply these procedures while not giving due respect to the natural biological, psychological, and pedagogical environment in which the child should grow. There are doubts as to whether some of the issues raised by ART can be considered within the area of family law or even whether they can be placed in the broader category of legal protection of the family. I negate the validity of legal solutions that would allow a few people to aspire to be the parents of a child conceived through ART (the two donors of reproductive cells, the surrogate mother, the people who ordered and paid her for the "service" and possibly others).¹⁵ Such an arrangement does not constitute family relations; rather, it is a manifestation of the irresponsibility of legislators and the aforementioned individuals, fulfilling their wishes without regard for the devastating influence on the child's life at their inception.

For those who intend to resort to ART treatment, the issues it generates are the most important in their individual lives, the history of their families, and the children to be born. Therefore, they must be thoroughly considered by all those individuals. It should be emphasised, however, that ITA regulations do not require verification of applicants' personal characteristics, education, economic status, etc. (patterned after the adoption

¹² Czub, 2014; Rydz, 2014, pp. 247-251; Petri, 2012.

¹³ Journal of Laws 1991, item 526.

¹⁴ Smoczyński, 1999; Stadniczeńko, 2015; Andrzejewski, 2003, 163-269; Haberko 2016, pp. 78-79.

¹⁵ Soniewiecka, 2020.

proceedings), particularly to exclude persons whose motivation or other characteristics raise legitimate concerns about whether they will create living conditions appropriate to the child's well-being. However, the similarity between ART treatment and the procedure of adoption is the intended result: the appearance of the child in the family. The only provision of the ITA specifying an intention to check the motivation of candidates is one year of conventional infertility treatment before the candidates are admitted to ART treatments. The adoption procedure provides for the training and testing of candidates by adoption centres set up specifically for this purpose and staffed with psychologists and educators. In contrast, the candidates for the ART procedure are examined only medically.

In many countries, a subject of fierce dispute has been, and still is, the eligibility of ART treatment for same-sex couples. It is a known fact that in many legal systems, in countries where civil same-sex unions were legislated, what followed was the renaming of the unions into marriages, who—after some time—were eligible to adopt children, as well as to ask for ART treatment. These changes applied both to female as well as male same-sex couples. In Poland, the results of public opinion polls prove the reticence of the majority of the public towards this idea, as well as towards the possibility of single-sex couples adopting children.¹⁶ Doubts about the eligibility of single people, both men and women, for ART.

According to the ITA regulations, the use of ART procedures cannot serve solely to satisfy the desires of adults to become parents. This is because the regulations mandate respect for the principle of the good of the child to be born and protection of the child's rights. Despite the growing influence of progressive philosophical trends in the Polish debate, the thesis of the alleged right to have a child loses out to the claim that there is no such right; , but there is instead the right of the child to live in a family.¹⁷ Consequently, ART treatments leading to procreation are permitted in Poland for married men and women, or in a permanent de facto union

¹⁶ Increase in support for adoption by same-sex couples, "Wciąż jest wiele do zrobienia", *Rzeczpospolita* 19 June, 2024, [Online]. Available at: <https://www.rp.pl/spoleczenstwo/art40664161-wzrost-poparcia-dla-adopcji-przez-pary-jednoplciowe-wciaz-jest-wiele-do-zrobienia> (Accessed: 03 September 2024).

¹⁷ Czujek, 2014, pp. 123-130; Brachowicz, 2010; Grzymkowska, 2009, pp. 186-189; Haberkowicz and Olszewski, 2008, p. 67.

(concubinage).¹⁸ This is because this is a model arrangement from the perspective of a child's developmental needs.

3. Participation of men in ART treatment

3.1 Introductory remarks

Anyone who participates in medically assisted reproductive technology treatment to overcome one's infertility is entitled to the right to respect their dignity as well as legal protection of their private and family life, with particular regard to the legal protection of life and health (Article 4 of the ITA).¹⁹ The phrase "anyone" makes it possible to claim that it includes both persons undergoing treatment and donors of reproductive cells, as well as embryos, i.e., children conceived as a result of these procedures. These statutory declarations are of significant importance, particularly when seeking the correct interpretation of the ITA.

It is in the context of the dignity of the human person, which is a constitutional value in Poland (Article 30 of the Constitution of the Republic of Poland), and their protection that the following injunctions should be interpreted: a ban on the creation of 'human embryos for purposes other than the ART treatment', as well as chimeras and hybrids; the prohibition of any interventions aimed at making 'hereditary changes in the human genome that can be passed on to future generations'; and finally the ban on formatting 'an embryo whose genetic information in the cell nucleus is identical to the genetic information in the cell nucleus of another embryo, foetus, human being, corpse, or human remains' (Article 25 of the ITA).

As indicated above, in Poland artificial forms of infertility treatment are not available to anyone who applies for it. Married couples and cohabiting couples, for whom ITA has been adopted, are admitted to the relevant medical procedures after a minimum of 12 months of treatment with other methods. It is possible to launch such a medical procedure before the 12 months have elapsed, even though other methods of treatment have not been exhausted, only exceptionally—based on a doctor's opinion, if the doctor determines that 'according to current medical knowledge, it is not possible to obtain a pregnancy as a result of these methods' (Article 5(2) of the ITA).

¹⁸ Bączyk-Rozwadowska, 2018, pp. 217-235, 676-705.

¹⁹ Haberko, 2016, pp. 73-80.

Cells taken from a man can be used within three frameworks:

- partner donation (when the recipient of these cells is his wife or cohabiting partner),
- non-partner donation (when the recipient is a stranger, anonymous to the donor), or
- donation of an embryo.

The law also provides a procedure for preserving fertility.

If the reproductive cells taken from a man have not been used in ART treatment, he may, at any time, demand their destruction or donation for research purposes (Article 19 of the ITA).

3.2 Male informed consent in ART

3.2.1 Preliminary remarks

As previously mentioned, only married and cohabiting couples are eligible for the infertility treatment specified in the ITA. This condition implies that a man—the husband or cohabiting partner of the recipient, as well as an anonymous donor of cells or an embryo—participates in all medical procedures involved in this treatment.²⁰ In each of them, he is treated as a subject, which is mainly manifested in his competence to consent to the implementation of these procedures as well as to withdraw his consent. The fact that medical procedures are contingent on patients' consent statements is obvious under medical law.²¹ In the context of infertility treatment, this condition precipitates a further argument, namely, that these marriages and cohabiting partnerships are seen as unions formed by persons loyal to each other, for whom procreative decisions have been jointly made. Moreover, the ITA provisions promote the child's right to a family and to be raised in a family, as well as the realisation of the principle of the good of the child to be born in the family as a result of ART treatment.

3.2.2 Giving consent - general issues

In any situation in which a patient's consent is sought, the physician or other authorised person is obliged to ensure that the patient, or a person acting on

²⁰ Ibid. pp. 75-76.

²¹ Nesterowicz, 2008, pp. 119-145.

the patient's behalf, obtains knowledge of the issue to which the consent relates.²² It is the duty of the staff to guarantee maximum access to that knowledge and make it comprehensible so that patients fully understand what they are consenting to. In particular, it is paramount that patients are made aware of the possible effects of the medical action taken, including side effects, the degree of risk involved, alternative treatment options to those proposed, or the consequences that may result from resigning from it, among others.

To ensure that consent is not reduced to mechanically signing a pre-prepared formula, the ITA regulations mandate that the persons who give consent must have the full legal capacity and give it voluntarily in the presence of a doctor, in writing, and that they must have the opportunity to ask questions about the medical procedure and receive comprehensive answers.

The cell donor must also be informed of the legal consequences of the action taken, especially with regard to the provisions of the Family and Guardianship Code (hereinafter the FGC) regarding the legal situation of a child born as a result of ART treatment.

Without going into detail, it should be stated that the issue of the consequences of applying ART in law is very complicated. By its nature, it is difficult to explain this, in particular, to persons unfamiliar with the law, and such people are predominantly cell donors. Therefore, it would be sufficient to point out the need to make a man aware that, after a possible divorce, his ex-wife can have a frozen embryo created from their cells while they were married implanted in her body. This might happen many years after their possible separation. It must be emphasised that the task of addressing this very topic with respect to a couple intending to undergo ART is very daunting. The intention of the couple in question or a couple in permanent cohabitation, is to have a child. Under these circumstances, the topic of the consequences of a possible divorce is outside the scope of their thinking.

In addition, doctors and other medical personnel are subject to the duty of confidentiality concerning issues of consent in particular medical procedures or their subsequent stages.

²² Nesterowicz, 2008, pp. 146-160.

3.2.3 Giving informed consent - specific issues

Several ITA provisions clarify the manner and circumstances in which consent is to be given for each separate activity of a medical procedure. Each time, the legislator tried to reflect on peculiar characteristics of the situation in which informed consent is to be given; for example, in each case of cell donation other than partner donation, the donor is informed prior to the procedure regarding the legal aspects of such a procedure, in particular about its legal consequences, including the fact that information will not be made available to him on the further handling of the donated reproductive cells and that he will have no rights to the child who will be born as a result of ART treatment. Before consenting to the procedure, the donor of reproductive cells should also be informed about what information concerning his person may be transferred to the recipient of the cells and the person born as a result of ART after coming of age (Article 30(1), Item 5 and Article 38 of the ITA). This information does not identify the donor but discloses the donor's health status, that is, the results of the medical and laboratory tests he underwent prior to the procurement of reproductive cells or prior to the creation of an embryo from his cells (Article 37(2), Item 3 of the ITA).

Such information can be provided to the legal representative of a child born as a result of an ART procedure if the information can contribute to averting imminent danger to the life or health of the child. The basis for providing 'the information about the donor shall be determined by the child's physician treating the child and it shall be noted in the medical records'; moreover, the information shall be made available by the Minister of Health at the request of persons authorised to learn about it (Articles 37(4) and (5) of the ITA).

In addition to consenting to donate cells for non-partner donation, the donor also consents to the posthumous use of the reproductive cells taken from him and to the donation of an embryo created from these cells.

In addition to the role of reproductive cell donor, a man may also find himself in the position of husband or partner of a woman who is the recipient of reproductive cells from another man. In both cases, the donor remains an unknown person. In such situations, the use of reproductive cells or embryos in a procedure involving this woman is performed after obtaining the written consent of her husband or cohabiting partner. Before

giving his consent, he must be informed in writing about the legal consequences of the use of ART that concern the paternity of the child born as a result of the treatment.

3.2.4 Consent at embryo donation

A man's legal position is modified when, as a result of ART treatment, a human embryo is created using his reproductive cells, or the cells of another man and the reproductive cells of his wife or cohabiting woman.

The transfer of embryos created from a combination of reproductive cells taken from a woman's husband or cohabiting partner into a woman's uterus requires her consent and the consent of the man.

On the other hand, if an embryo resulting from non-partner donation (when the donor of reproductive cells is anonymous) is to be transferred into a woman's uterus, consent must be obtained from that woman (the recipient) and her husband. On the other hand, if the recipient woman is living in a cohabiting relationship, then she consents to the transfer of an embryo resulting from anonymous donation when her cohabiting partner makes a declaration of acknowledgement of paternity of the child born following an ART treatment using that embryo, and the recipient woman confirms that the father of the child will be that man (Article 75(1) of the FGC).

In describing the legal status of a man involved in embryo donation, it is important to note that embryo donors must be informed of the legal consequences of the treatment before giving their informed consent, and in particular that they will not have access to information on the further handling of the donated embryos nor will they have rights and obligations to the child born as a result of the ART treatment. They will not be informed of whether and what information about their health has been obtained by the person (or their legal representative) born as a result of embryo donation.

The above consent must be granted before ART treatment begins. However, if the donors of the embryo have withdrawn their consent to its transfer, or the recipient has done so, or her husband or cohabiting partner has not given his consent, then the treatment is impermissible (Article 22 of the ITA).

In the specific case when it is not possible to directly use the embryos created from the husband's or cohabiting partner's reproductive cells and it is necessary to transfer them for storage, all of the above consents shall be

given again ‘before restarting ART treatment in which the stored embryos are to be used’ (Article 20(3) of the ITA).

3.2.5 Consent in case of a change in the application of reproductive cells

Written consent from the donors of reproductive cells is also necessary if cells collected for partner donation are to be used in an ART treatment for non-partner (anonymous) donation.

The reverse situation can also occur, i.e., cells originally collected for non-partner donation in an ART treatment can be used for partner donation. This requires the withdrawal of consent by the donor for the original purpose for which his reproductive cells were intended. Again, the medical justification for using reproductive cells collected for non-partner donation for partner donation is assessed by a physician (Articles 18(2) and (3) of the ITA).

3.3. *Lack of consent and withdrawal of consent given in ART treatment*

As a rule, a statement of consent to undergo treatment can be subsequently withdrawn; however, this move is subject to limitations. In the period between the expression of consent and the performance of the action contingent upon it, various circumstances, including afterthoughts, may arise that prompt one to change one’s mind.

Under the ITA, both the submission of consent and its withdrawal must be done in writing and given ‘in the presence of a person employed by the reproductive cell and embryo bank where the reproductive cells are stored’ (Article 30(2) of the ITA). Regardless of whether consent is given in the context of partner or non-partner donation, withdrawal of consent ‘may take place until ART treatment is initiated in the recipient’. As for the in-vitro fertilisation procedure (*inseminatio*), that moment is marked by the insertion of reproductive cells inside the woman's uterus, whereas in the case of in vitro fertilisation outside the uterus, it is the beginning of the process of creating an embryo from those reproductive cells (Articles 29(3) and 30 of the ITA). If the withdrawal of consent occurs before these events, then a prohibition is imposed on the use of cells taken from that donor (Article 18(1) Point 1) of the ITA) or an embryo created from his cells (Article 22 of the ITA) in ART treatment.

If the above situation occurs, it is the responsibility of the gamete and embryo bank to immediately communicate the withdrawal of consent to the

assisted reproductive techniques centre or the gamete and embryo bank to which the gametes or embryos were transferred (Articles 29(4) and 30 (4) of the ITA).

Of particular relevance is the withdrawal of consent for the transfer of an embryo. As indicated, this forfeits the transfer of embryos donated for embryo donation to a recipient (Article 22(1) of the ITA). However, if an embryo has already been created, then the provisions of the ITA mandate the protection of human life created as a consequence of the inception of ART treatment. In this regard, the ITA is in compliance with Article 38 of the Constitution of the Republic of Poland,²³ the Law of 7 January 1993 on family planning, protection of the human foetus, and the conditions of the permissibility of abortion.²⁴ This is consistent with the jurisprudence of the Constitutional Tribunal of the Republic of Poland on the protection of life.²⁵ Indeed, the relevant provision reads as follows:

If the husband or the donor of the reproductive cells taken for the purpose of partner donation from which the embryo was created does not consent to the transfer of the embryo, permission for the transfer shall be granted by the guardianship court (Article 21(2) of the ITA).²⁶

Withdrawal of consent for embryo transfer became a contentious issue between former spouses, which became the subject of a court decision.²⁷ Based on the cited provision, a district court issued a ruling²⁸ in which the court took the following position: ‘The embryo’s right to life and to be borne by the genetic mother outweighs the right to be raised in a full family and the father’s autonomy to decide on his procreation.’

²³ Lis, 2022; Żelichowski, 1997.

²⁴ Ct. Journal of Laws 2022, item 1575.

²⁵ Nawrot, 2022; Żelichowski, 1997.

²⁶ The permissibility of replacing the consent of the donor of reproductive cells by a court decision raises serious objections in the doctrine, the essence and complexity of which go beyond the scope of this article, cf. Haberko, 2016, pp. 148-151; Smyczyński and Andrzejewski, 2024 pp. 234-238; Igantowicz and Nazar, 2016, pp. 407-415.

²⁷ File reference: III RNs 266/23 (unpublished).

²⁸ Cydzik, S.: Sąd: prawo zarodka do życia jest ważniejsze od tego, co myśli ojciec, Rzeczpospolita, [Online]. Available at: <https://www.rp.pl/ochrona-zdrowia/art40916181-sad-prawo-zarodka-do-zycia-jest-wazniejsze-od-tego-co-mysli-ojciec> (Accessed: 05 August, 2024).

The ruling was based on facts, which were presented as follows. The couple underwent an in vitro fertilisation procedure, which resulted in the birth of a child; however, a second embryo was frozen. Subsequently, the couple lived to see the birth of two naturally conceived children, after which they divorced. The parties agreed that the woman was given the right to decide on the future of the second embryo. She also agreed that her ex-husband (the biological father) would not bear the cost of storing the embryo nor any subsequent child support. When the woman decided to give birth to the child, her ex-husband demanded that the embryo be disposed of or put up for adoption.

From the legal perspective, this case is not problematic as only the recipient's refusal to consent to the embryo transfer is absolute. However, the man (donor of reproductive cells) has no way of forcing his wife/partner to allow the embryo to continue its development in her body. The same is true when the dispute involves a woman wishing to give birth to a child whose embryo has already been created through an assisted reproductive technique, wherein the donor of the reproductive cells is a man who opposes it (wants to withdraw his previously given consent). In such a case, the woman can override this objection by taking legal action so that a court ruling will supersede the man's consent (Article 21(2) of the ITA).

The court was correct in assuming that the essence of the case is the personal status of the human embryo²⁹ and its subjectivity, and therefore, its right to life.³⁰ What is less relevant is that the embryo was created as part of a partnership donation and that the dispute arose when the man and woman were no longer married. In this context, it is also less relevant that the woman's will to give birth limits her ex-husband's autonomy and reproductive rights. An argument that also carried far less weight than the protection of the child's life was the child's father's claim that in this situation, the newborn's right to know their origins would be violated and that the child would not be raised in a complete family. In this context, the man's willingness to dispose of the embryo blatantly demonstrated a lack of parental responsibility.³¹

²⁹ Lis, 2022, pp. 196-206; Haberko, 2016, p. 8.

³⁰ Haberko, 2016, pp. 78-79.

³¹ Haberko, 2016, p. 145.

4. Procedure to prevent infertility

The ITA regulations on male infertility treatment have been supplemented with provisions for a procedure to prevent infertility (Articles 10 and 31 of the ITA). Many circumstances pose serious threats to a fertile person's ability to conceive a child. If knowledge of the threat is obtained in time, then treatment can be implemented to secure fertility in the future by collecting reproductive cells from a donor.³² This procedure can, for example, ensure having a child for a man who has become infertile as a consequence of life-saving treatment related to testicular cancer. The extraction of reproductive cells before he undergoes chemotherapy or radiation and their deposition in a sperm bank provides such an opportunity.

This procedure, too, is preceded by obtaining written consent from the sperm donor after he is provided with information, specifically regarding the type, purpose, risks, expected consequences and nature of the procedure, the right to obtain the results of pre-treatment tests, medical confidentiality, and security measures leading to the protection of the donor's data and others.

The procedure in question can be applied to a minor or an incapacitated person. The extraction of reproductive cells can then be carried out on the basis of the written consent from the patient's legal representative. His consent is also needed if he is at least 13 years old or partially incapacitated.

5. Summary

This article deals with only a few of the many complex issues related to assisted reproductive treatment. However, if the assumption of the ITA is correct—that a child conceived artificially should be born in the family and grow within it—then the legal position of their father also requires due attention. The same applies to the legal position of a man who is a donor of reproductive cells for the birth of a child in a marriage or a cohabiting relationship in which he is not a part. However, a critical approach should be adopted towards a regulation that allows for the circumvention of the law, which leads to the application of ART procedures for the conception of a child by a single person or person in a permanent same-sex relationship.

³² Haberko, 2016, pp. 103-105.

This article's research premise dispenses with elaborating on the question of the status of a man who is the father of a child conceived through the ART treatment, that has already been born. This issue is specifically addressed by Articles 68 and 75 of the FGC. The first provision does not raise any doubts. This is a consequence of the previously adopted theoretical reflection that if a wife gives birth to a child as a consequence of ART treatment for which the husband has consented, the presumption is that he is the child's father.³³ The second provision, on the other hand, contradicts the assumptions of filiation law regulated by the FGC and has been met with deep criticism in the doctrine,³⁴ since it allows a child to be recognised by a cohabiting partner before the fusion of reproductive cells has been completed, and thus before the embryo has been formed. This has several negative consequences under family and inheritance law, the description of which goes beyond the scope of this article.

The analysis of the ITA law provisions allows us to conclude that the man who is the husband or cohabiting partner of the woman who is to give birth to an ART-conceived child is treated as a subject in Polish law. The legal situation for male donors of reproductive cells in partner and non-partner donations should be assessed similarly. The preliminaries of his informed consent to various procedures, including providing him with full knowledge of the complex characteristics of his situation, were formulated in such a way as to allow him to participate in the measures as a fully informed subject.

Legal regulations on obtaining a man's consent to particular procedures—including provisions mandating that he should be fully informed of the complex specificities of his situation—are formulated in such a way as to allow him to participate in the actions taken as a subject. As indicated above, one may be concerned whether, in practice, institutions performing complex ART procedures have developed ways to provide cell donors with full information about their legal status.

³³ Radwański, 1979, pp. 171-187.

³⁴ Smoczyński and Andrzejewski, 2024, pp. 234-238; Igantowicz and Nazar, 2016, pp. 407-415.

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