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The Creative Use of Non-Specific Legal Provisions Regarding Assisted Reproduction in Romania***

ABSTRACT: Romania, like any other contemporary high-income society, has its share of fertility and demographic problems. The last several decades have seen a resurgence in both medically assisted reproduction techniques and the societal demand for solutions to fertility issues. The statutes currently in force have not kept pace with technical evolutions and, due to both political and technical reasons, there is currently no comprehensive and targeted statute concerning medically assisted reproduction. However, society at large and the fertility services market have not been kept back by this lack of specific statutory provisions. General, non-specific or tangentially relevant normative provisions have been brought to the fore to construct a patchwork statutory environment for the needs of medically assisted reproduction providers and beneficiaries.

This patchwork approach is not without its drawbacks, and we will try to identify the gaps and unanswered legal questions that arise at each step using a black-letter approach to applicable Romanian law up to October 2024. A future statute on assisted reproduction should cover at least the areas of parental eligibility, informed consent, allowed and banned techniques, liability, parental filiation and confidentiality.

KEYWORDS: family, fertility, parents, children, medically assisted reproduction.

1. Introduction

Romania has never had a comprehensive and specific statute on assisted reproduction. Although technical possibilities for assisted reproduction have

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been present in the country since at least the 1990s, the legal framework has never kept pace with medical capabilities. Some relevant traditional tenets of Romanian private law are, first, that a court cannot refuse to adjudicate a matter brought before it on the grounds that the law is either unclear or lacking, and second, that any conduct that is not expressly forbidden by law is *prima facie* presumed to be allowed. These prior theoretical foundations and the strong societal demand for medically assisted reproduction have led to the creative use of existing non-specific regulations to bring a semblance of order and legality to the gamut of medically assisted human reproduction techniques. Predominantly using a black-letter law approach, this study will explore the current relevant provisions of Romanian law that can be used to regulate assisted reproduction while also highlighting the deficiencies of this patchwork approach and the areas where legal doctrine or case law have identified practical and theoretical uncertainties brought about by the lack of specific and comprehensive statutory norms. The referred legal doctrines and relevant statutes are current up to October 2024.

2. Infertility as the Main Reason for Assisted Reproduction

Infertility is the primary reason for the development of medically assisted reproductive techniques.¹ The first historical attempts at artificial insemination, dating back to the 18th and 19th centuries, were performed in order to supplant natural reproduction when the latter was unsuccessful.² The first successful artificial insemination with frozen sperm dates back to 1953, while the first human to be conceived by in vitro fertilisation was born in 1978. The first successful embryo transfer to a surrogate mother occurred in 1984.³

Infertility statistics are always inconsistent, but credible estimates put the number of infertile couples worldwide at least 90 million at any given time, and approximately 40% of these instances are attributable to male infertility.⁴

The 2017 Policy Audit on Fertility – Analysis of 9 EU Countries reported, for Romania, a primary infertility rate (difficulty in having a first child) of 1.6% and a secondary infertility rate (difficulty in having a second

¹ Predescu, 2022, p. 44, pp. 64-65.

² Ibid. pp. 54-55

³ Ibid. p. 31, p. 40, pp. 60-61; Hageanu, 2023, p. 210.

⁴ Predescu, 2022, p. 51.

child) of 15.9%.⁵ The same study reported a 41.33% success rate for the publicly funded In Vitro Fertilisation Programme.⁶

Other infertility statistics in Romania were collected in two sampling/polling studies conducted in 2018 and 2023 by the Romanian Association for Human Reproduction.

The 2018 poll was conducted online on 4680 respondents, of which 3331 were considered the fertile demographic contingent, including women between 25 and 45 years of age and men between 25 and 60 years of age, in relationships with partners in the appropriate age range. Of these, 16.8% were affected by infertility, either currently or in the past. Considering only those couples who wanted children as soon as possible (29.1%), 27% had failed to have a child despite trying for between one and five years was, while an additional 11% had been trying unsuccessfully for more than five years.⁷

A 2023 follow-up study on infertility in urban environments reached similar conclusions. On average, 18% of the pregnancies between 2018 and 2023 were the result of some form of fertility treatment. 17.1% of the couples who responded either were still or had been infertile. Only 21% of the interviewed couples wanted to have a child as soon as possible. Of these, 40% had been trying unsuccessfully for children aged between 1 and 5 years, while 10% had been trying for more than 5 years. Between January and February 2023, 23% of extant pregnancies were already the result of fertility treatment. Between 2018 and 2023, there were about 102,000 successful fertility treatments, so the average is approximately 20,000 per year. However, we can speculate that the total number of fertility treatments required to obtain this result must be at least two times or possibly three times higher (40,000 to 60,000 per year) because the reasonable target success rate for public funding is 30%.⁸

⁵ Fertility Europe, European Society of Human Reproduction and Embryology (ESHRE) (2017) *A Policy Audit on Fertility*, pp. 36-39, [Online]. Available at: https://fertilityeurope.eu/wp-content/uploads/2018/03/EPAF_FINAL.pdf (Accessed: 09 August 2024).

⁶ Ibid. p. 36

⁷ ASOCIAȚIA PENTRU REPRODUCERE UMANĂ DIN ROMÂNIA (2018) *Primul studiu de analiză a problemelor de infertilitate din România*, Bucharest: self-published.

⁸ Neagu, 2023.

3. The Legal Concept of Infertility

Infertility is caused by factors related to both members of the reproductive couple. For women, the most common medical issues causing infertility are vaginal infections, endometriosis, obstructed or surgically removed tubes, lack of ovulation, high levels of prolactin, polycystic ovaries, uterine fibrosis, side effects of medication, and thyroid issues. For men, the most common medical issues are related to lack of sperm cells, reduced number of sperm cells, reduced mobility or structurally deficient sperm cells, and genetic disease. Other issues affecting fertility are lifestyle-related, such as nutrition, stress, radiation exposure, and exposure to toxic factors.⁹ Infertility is medically defined in women below 35 years of age as not having conceived after one year of vaginal sexual activity without contraception.¹⁰

The 2019 official Health Ministry Guide on infertility considers it an affliction defined by the failure to get pregnant after 12 months of regular unprotected intercourse or as the reduced capacity for reproduction of either member of the reproductive couple.¹¹ Interventions for infertility can be initiated after less than one year based on medical, sexual, and reproductive history, age, clinical exams or diagnostic tests.¹² The generally accepted breakdown of the underlying causes of infertility is as follows: 25% unexplained infertility, 20% ovulatory dysfunction, 20% tube dysfunction, 30% male infertility factors, 10% uterine and peritoneal afflictions. In 40% of cases, both partners exhibit infertility-inducing afflictions.

The joint Order no. 2155/20917/2022 of the Work and Social Solidarity Minister and Family, Youth and Equal Opportunities Minister on the regulations concerning the implementation of the social national interest programme of supporting couples and single persons for increasing childbirth broadly defines infertility as having an affliction that is incompatible with natural reproduction, diagnosed by an OB-GYN M.D., with further specialisation in medically assisted reproduction (Article 4).

⁹ Iordăchescu, 2020, p. 169.

¹⁰ Vlădăreanu and Onofriescu, 2019, p. 8.

¹¹ Adopted as Annex no. 30 of the Health Minister's Order no. 1241/2019 regarding the approval of official guides for gynecology and obstetrics, published on September 10th, 2019, in the Official Journal no. 738bis.

¹² Ibid. Section 1.

4. Assisted Reproduction Techniques

The previously mentioned official guide on infertility approved by Annex No. 30 of the Health Minister's Order No. 1241/2019 regarding the approval of official guides for gynaecology and obstetrics specifically mentions the following assisted reproduction techniques: intrauterine (artificial) insemination, in vitro fertilisation (IVF), embryo transfer, intracytoplasmic sperm injection (ICSI), and artificial insemination with sperm or oocytes from a third-party donor. This guide is a technical one, addressed mainly to health professionals, containing medical recommendations and best practices, without any concern whatsoever for a legalistic point of view; it rarely defines the concepts it uses and does not address the legal issues that may arise from medically assisted reproduction situations. Still, because it is a lower-level regulation, it should only legally define the concepts and techniques used from a technical point of view and leave the more controversial issues of parental eligibility, informed consent, liability, banned techniques and parental filiation to a higher-level statute enacted by parliament.

Due to the lack of a comprehensive and specific statute on assisted reproductive procedures, their legal regulation can be inferred from several non-specific statutes such as the Civil Code of 2009, the Law on Healthcare Reform no. 95/2006, the Law on the Rights of the Patient no. 46/2003, as well as lower-level regulations such as the Health Minister's Order on Therapeutical Transplants no. 1763/2007, the Health Minister's Order no. 964/2022 on the Implementation of National Public Health Programmes or the aforementioned joint Order no. 2155/20917/2022 on the regulations concerning the implementation of the social national interest programme of supporting couples and single persons for increasing childbirth. The legal regimes of fertility treatments and medically assisted reproductive procedures must be inferred from the different regulations pertaining to adjacent issues.

Assisted reproductive procedures (ARPs) are not extensively regulated in either the primary legislation (laws enacted by the parliament and governmental decrees or emergency decrees) or in secondary legislation (such as ministerial orders). There are no identifiable bans on specific assisted reproductive procedure techniques; thus, we can confidently assert that both intracytoplasmic sperm injection (ICSI) and in vitro fertilisation (IVF) are allowed. Moreover, both IVF and ICSI were mentioned without

being defined as such, in the 2019 Health Minister's official technical guide on infertility for the use of health professionals. Most restrictions pertaining to assisted reproductive procedures are broad and principled ones included in the Civil Code of 2009, which came into force on 1 October 2011.

5. Relevant Regulations Pertaining to Assisted Reproduction in the Romanian Civil Code

The Romanian Civil Code has a special section, number 2, on the rights to life, health, and physical integrity of natural persons, which is part of Chapter II, with respect to human beings and their inherent rights, and part of broader Title II regarding the natural person.¹³ Article 61 guarantees the “inherent” rights of the human being by equally safeguarding the life, physical and psychological health of any human being. The well-being and interests of any human being should take precedence over those of society as a whole.¹⁴ Article 62 of the Civil Code bans eugenics and any attempt to alter the human species, which is understood to refer to alterations of the human genome. Eugenics is legally defined as any practice which tends to organise the selection of persons, whereas the scientific definition of the concept refers to the practical applications of hereditary biology in the genetic enhancement of individuals.¹⁵

The Civil Code also bans any medical intervention on the genetic characteristics of a person with the purpose of modifying that person's descendance, with the sole exception of curative and preventative interventions for genetic diseases (Article 63, paragraph 1). The legal ban extends to human cloning with the purpose of creating identical human beings and human embryos solely for research purposes (Article 63, paragraph 2). Human medically assisted reproductive procedures are not allowed to choose the sex of the future child unless it is to avoid a gender-related genetic disease (Article 63, paragraph 3).¹⁶

The current Civil Code also regulates the sanctity of the human body (Article 64), restricting the examination of genetic characteristics to medical, research and judicial purposes (Article 65), and forbids giving monetary value to the human body or its component parts (Article 66). It

¹³ Diaconescu and Vasilescu, 2022, pp. 303-307.

¹⁴ Chelaru, 2021, pp. 77-78.

¹⁵ Ibid. pp. 78-79.

¹⁶ Ibid. pp. 79-81.

also states broad principles for medical interventions on a person and for transplants from a living person (Articles 67-68 of the Civil Code).¹⁷

6. Medically Assisted Reproduction with a Third-party Donor

The 2009 Civil Code includes a specific seven-article section concerning medically assisted reproductive procedures with a third-party donor. These general provisions were supposed to be followed by a new special and detailed law on medically assisted reproductive procedures with third-party donors; however, almost 13 years have passed without result.¹⁸

The general provisions of Article 441, paragraph 3 of the Civil Code specifically determine that both heterosexual couples and single women have access to medically assisted reproduction with a third-party donor. This provision is not restricted to married couples but specifically refers to 'heterosexual' couples (a man and a woman)¹⁹. Legal doctrine debates whether a 'single woman' refers only to women that do not have a partner whatsoever or if it also includes women whose partner has not consented to the medical procedure. Some further provisions, which allow the husband to deny paternal filiation if he had not previously agreed to the medically assisted reproduction with a third-party donor, suggest that this procedure is also available for women who are not technically 'single', but whose partner does not wish to agree to take part in and consent to such procedures.²⁰ This 'progressive' aspect of Romanian law stops short of recognising a right to take part in medically assisted reproduction with a third-party donor for same-sex couples or for single men.²¹ However, without an outright ban, women who are a part of a consensual same-sex couple could use this procedure as 'single' women, with the caveat of lacking any future possibility of establishing some kind of formal parental rights for their same-sex partner in regard to the child born out of this procedure.

The law does not distinguish between male and female third-party donors, so it can be broadly construed to include both types as well as simultaneous donations of both sperm and oocytes for the same receiving

¹⁷ Ibid. pp. 82-87.

¹⁸ Florian, 2022, p. 468; Avram, 2022, p. 309; Nicolescu, 2023, p. 463; Hageanu, 2023, p. 211; Irinescu, 2014, p. 16; Neamț, 2022, pp. 634-635.

¹⁹ Motica, 2021, p. 224; Hageanu, 2023, p. 212.

²⁰ Florian, 2022, pp. 474-475; Avram, 2022, pp. 310-311; Nicolescu, 2023, p. 468; Irinescu, 2014, pp. 19-21.

²¹ Nicolescu, 2023, p. 468.

couple or single woman.²² Recent legal doctrine has emphasised that these regulations are not applicable if the gametes come only from “inside” the beneficiary couple, even if they receive medical assistance for reproduction and that these provisions are also not applicable to surrogacy.²³

One aspect that is extensively regulated in this section is the issue of parental consent for medical procedures. Consent must be given by both prospective parents before the procedure, confidentially, in written form, authenticated by a notary; the latter is also required to explain the consequences of their act regarding filiation (Article 442, paragraph 1).²⁴ Parental consent is without effect in cases of death, initiation of divorce procedures, or *de facto* separation before conception (Article 442, paragraph 2).²⁵ Any consenting parent can withdraw their consent in writing before conception, even in front of the attending physician.²⁶

The lack of detailed regulations on the procedure and conditions of oocyte donation in Romanian law has led to avoidance by local medical professionals of using this technique, preferring to work with foreign fertility clinics in countries where the legislation is more permissive and unequivocal.²⁷

A child born through an assisted reproduction procedure with a third-party donor has the same legal status as a child born through natural procreation (Article 446 of the Civil Code).²⁸

7. Lower-level Ministerial Regulations on Reproductive Techniques

Regarding the regulation of reproductive techniques other than medically assisted reproduction with a third-party donor, we identified only secondary legislation concerning transplants (such as the Health Minister’s Order no. 1763/2007) that tangentially referenced access to these procedures. This secondary legislation only mentions different-sex couples in a (declared) intimate relationship as having access to reproductive cell ‘transplants’ between partners.

Romanian legislation is notably traditional and restrictive regarding

²² Motica, 2021, p. 224; Florian, 2021, pp. 594-595; Nicolescu, 2023, pp. 464-465.

²³ Nicolescu, 2023, pp. 464-465.

²⁴ Hageanu, 2023, p. 213.

²⁵ Ibid. p. 214.

²⁶ Ibid.

²⁷ Nicolescu, 2023, p. 465.

²⁸ Ibid. p. 467.

civil partnerships and same-sex marriages. The Civil Code only recognises the 'traditional' marriage between a man and a woman and specifically bans, in Article 277, the recognition in Romania of any effects of a foreign civil partnership of any kind or a foreign same-sex marriage, except for freedom of travel purposes derived from secondary European Union laws (Article 277, paragraph 4). The 2018 European Court of Justice decision in Case No. C-673/16, *Coman and Hamilton*²⁹, as well as the subsequent and related Romanian Constitutional Court decision no. 534, rendered on July 18th, 2018,³⁰ have stressed that same-sex marriages contracted in a European Union member state allow spouses to reside for more than 3 months in Romania, according to the requirements of E.U. freedom of travel regulations, if one of them is a third-country national. On 23 May 2023, the European Court of Human Rights found in Case no. 20081/19 *Buhuceanu and others* that Romania had violated the plaintiffs' (21 same-sex couples) rights to family and private life, which was enshrined in Article 8 of the European Convention on Human Rights, by not providing any form of legal status or recognition for same-sex couples.³¹

Publicly funded in-vitro fertilization (IVF) with embryo-transfer (ET) is subject to a national public health subprogramme since 2011³², with extended funding from 2022 under the renewed Government's Decision no. 1.103/2022 regarding the approval of a national-interest social programme for supporting couples and single persons for raising the birthrate. It is restricted to infertile heterosexual couples, defined as couples diagnosed (by a certified specialist M.D.) with an affliction incompatible with natural reproduction or who could not reproduce after one-year of unprotected sexual relations, with no third-party donations allowed for sperm or oocytes, as well as specifically excluding surrogacy in what is perhaps one of the few specific mentions of this procedure in Romanian domestic law³³. To receive public funding for in vitro fertilisation (IVF), both partners must have public health insurance, the woman must be between 20 and 45 years of age (which is a change, since 2022, from the previous 24-40 years age interval),

²⁹ Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne*, 05 June 2018.

³⁰ Available in Romanian online at https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_534_2018.pdf (Accessed: 19 October 2024).

³¹ *Case of Buhuceanu and Others v. Romania* App. Nos. 20081/19 and 20, 25 September 2023.

³² Brodeala, 2016, p. 64.

³³ Ibid. pp. 64-65; Florian, 2022, p. 473.

with a body mass index (BMI) between 20-25 and an ovarian reserve determined to be within the normal limits.³⁴ A 2024 amendment (as part of the modifications brought about by the Government's Decision no. 590/2024) expressly stipulates that at least one member of the infertile couple or the single woman requiring public funding must be a Romanian citizen domiciled in the country.

8. Anonymity in Third-party Donations

All assisted reproductive procedures are considered confidential according to the general provisions of Article 445, paragraph 1 of the Civil Code, which has been interpreted to cover the identity of the parents or single parent, the identity of the child born through these procedures, the identity of the third-party donor and the notarised parental agreement to undergo the procedure—all considered integral parts of the constitutional right to private life.³⁵ As it is also a medical procedure, assisted reproduction is also covered by the patient's right to confidentiality of medical information, which is stipulated by Article 21 of Law No. 46/2003 on the rights of the patient.³⁶

The only specified exceptions to the confidentiality requirements are made in Article 445, paragraph 2 of the Civil Code, for the court-authorised transmission of information to a physician or to competent authorities to prevent serious health harm to children born out of these procedures or to their descendants.³⁷ Confidentiality can also be curtailed at the request of the descendants of the child born out of this procedure, in order to avoid serious health harms to them or their close ones, according to Article 445, paragraph 3 of the Civil Code. Legal doctrine has interpreted this provision to mean that only children or their descendants have legal standing to demand this kind of information.³⁸

All details about ensuring the confidentiality of medically assisted reproduction should have been included, according to Article 447 of the Civil Code, in a special statute on the matter of assisted reproductive procedures with third-party donors, which has yet to be adopted in the 13

³⁴ Florian, 2022, p. 473.

³⁵ Florian, 2022, pp. 470-471; Nicolescu, 2023, p. 465; Hageanu, 2023, p. 216.

³⁶ Florian, 2022, p. 471.

³⁷ Avram, 2022, p. 312; Nicolescu, 2023, p. 465.

³⁸ Florian, 2022, p. 471; Nicolescu, 2023, p. 466.

years since the new Code came into force on October 1st, 2011.

The Health Minister's Order on transplants mentions, for transplants of reproductive cells (other than from the recipient's partner), the requirement to register information about the donor's age, health, medical history, medical risks for themselves or others, tests for transmissible diseases (which specifically include HIV, syphilis, hepatitis B or C, Human T-cell Lymphotropic Virus, Chlamydia), supplemental tests depending on risk factors (including malaria, cytomegalovirus, *Trypanosoma cruzi*) and genetic screening for autosomal recessive genes.

Recent legal doctrine has made a subtle distinction between the expressly stated principle of 'confidentiality' and the implied 'anonymity' of this type of reproductive procedure³⁹, mainly because the latter collides with the child's fundamental human right to know one's origins, which would include at least knowing the generic age, physical characteristics, and medical history of the donor.⁴⁰ The right to know one's origin is a fundamental human right that serves as the 'outer' limit of the confidentiality principle of medically assisted reproduction with a third-party donor.⁴¹ Both these principles must endure in a future detailed regulation of medically assisted reproduction, allowing the child reaching a certain age threshold, probably between 14 and 18 years of age, to receive generic and non-identifiable information about the donor (age, physical characteristics and medical history) even in the absence of medical necessity or, in certain cases, to be detailed by the law, to receive even more precise information about the identity of the donor.⁴² Nonetheless, a complete cancellation of the confidentiality principle would imperil the availability of third-party donations; therefore, we can presume that not all information about the donor's identity is freely available.

Because specific regulations on information transmission regarding this procedure have not yet been enacted, there are only general regulations on patient information confidentiality and the Civil Code provisions on the court-authorized transmission of information to a physician/authority to prevent serious harm to children or their descendants.

³⁹ Florian, 2018, pp. 128-129.

⁴⁰ Florian, 2022, pp. 470-471; Nicolescu, 2023, p. 466.

⁴¹ Nicolescu, 2023, p. 466; see also ECHR, 2012, pp. 44-45.

⁴² Nicolescu, 2021, pp. 693-694.

9. Patient's Rights Regulations and Assisted Reproduction

Although 2003's Law No. 46 on patients' rights does not primarily target beneficiaries of medically assisted reproduction, its broad provisions are highly relevant to these peculiar situations.

First, the statute considers both healthy and sick individuals using health services as patients. Beneficiaries of assisted reproduction receive medical services for diagnostic and curative purposes.

Second, the generous principles embodied in this statute are relevant to assisted reproduction situations: patients have the right to receive the best available medical care (Article 2), to be respected as human beings without discrimination (Article 3), the right to medical information and a second opinion (Articles 4 -12), the requirement of prior and informed patient consent for any medical intervention (Articles 13-20), the right to confidentiality and private life (Articles 21-24)⁴³, and the right to receive treatment and medical care (Articles 29-36).

In addition to the generally applicable provisions mentioned above, the statute on patients' rights has a brief three-article section specifically on the rights of the patient concerning reproduction, although it is not specifically targeted towards medically assisted reproduction. Article 26 states that a woman's right to life takes precedence when pregnancy represents a major and immediate risk to her life. Patients also have the right to receive information, education and the services necessary for a normal sexual life and healthy reproduction without discrimination (Article 27). Women have a guaranteed right to decide whether to have children, but only without endangering their own lives (Article 28, paragraph 1). All patients have the right to choose the safest methods for healthy reproduction (Article 28, paragraph 2) and to use efficient and risk-free methods for family planning (Article 28, paragraph 3).

10. Issues Regarding the Preservation of Biological Material

Cryopreservation of gametes or embryos is legally allowed in Romania, although it has been specifically excluded from public funding from in vitro fertilisation (IVF) with embryo-transfer (ET) national public health programs since 2017, even in the more generously funded fertility program that started in 2022. Romanian law has no specific conditions for the

⁴³ Florian, 2022, p. 471.

cryopreservation of gametes or embryos. The only general conditions are the informed consent of the ‘donor’ and a contract with the authorised medical institution that harvests and deposits the biological material.⁴⁴

This lack of regulation gave rise to serious legal issues when the “ownership” of the frozen embryos was questioned in a court case resulting from a criminal investigation and asset seizures involving a fertility clinic: were they mere material goods or living beings?⁴⁵ This case (*Knecht v. Romania*, application no. 10048/10) reached the European Court of Human Rights⁴⁶, which rendered a decision in 2012, stating that the case involved the applicant’s (mother’s) right to private life, not her property rights. A later case (*Nedescu v. Romania*, application no. 70035/10) was decided in 2018 based on the breach of the right to private life by the Romanian authorities’ incoherence and unpredictable administrative procedures for giving back frozen embryos to a parental couple after they were seized during a criminal investigation of the fertility clinic.⁴⁷

11. Legal Parenthood as a Consequence of Medically Assisted Reproduction

The gamete ‘donor’ can only be the parent of a child conceived through assisted reproductive procedures if there is a reproductive cell ‘transplant’ between partners, which can be construed as the basic in-vitro fertilisation (IVF) or other forms of artificial insemination. Third-party gamete donations, either male or female, do not give rise to legal parenthood because maternal filiation depends solely on giving birth to the child, in a similar manner to ‘natural’ motherhood⁴⁸, while the ‘fatherhood’ of the third-party donor (the ‘genetic’ father) is specifically excluded by Article 441, paragraph 1 of the Civil Code, which states in broad terms that medically assisted reproduction with a third-party donor does not give rise to any filiation between the child and the donor.⁴⁹ A child’s filiation cannot be challenged by any person, including the children themselves, for reasons solely pertaining to its medically assisted nature (Article 443, paragraph 1).

⁴⁴ Tec, 2017, p. 246.

⁴⁵ Ibid., pp. 236-239.

⁴⁶ *Case of Knecht v. Romania* App. No. 10048/10, 02 October 2012.

⁴⁷ *Case of Nedescu v. Romania* App. No. 70035/10, 16 April 2018.

⁴⁸ Florian, 2022, p. 475; Nicolescu, 2023, p. 465; Neamt, 2022, p. 650.

⁴⁹ Nicolescu, 2023, pp. 466-467; Hageanu, 2023, p. 212.

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There are no special presumptions of parenthood for the assisted reproductive procedures, the mother is the person giving birth and the father is presumed to be the mother's husband at the time of birth⁵¹, the former husband at the time of conception or the mother's cohabiting partner at the time of conception (the latter presumption is applied only during paternity trials).

The true source of paternal filiation in the case of medically assisted reproduction with a third-party donor is the notarised written consent provided by the mother's husband or consensual partner to undergo the procedure. Paternal filiation can be contested only for the lack of prior notarised written consent from the father or if the pregnancy did not arise from a medically assisted procedure, but because of straightforward intercourse.⁵²

A consensual partner who gave his consent to this medically assisted procedure was liable to recognise paternal filiation after birth⁵³ if there was no intervening marriage between the parents before the child's birth, which would automatically presume the child to be the son of the mother's husband at the time of birth.

12. The Controversies Regarding the Legal Status of Surrogacy in Romania

Surrogacy is not expressly forbidden, but neither is it specifically allowed or regulated in Romania.⁵⁴ The provisions that the mother is the one giving birth (irrespective of the genetic relationship), even in medically assisted reproductive procedures⁵⁵, and that parental authority cannot be voluntarily transferred to another person, make surrogacy legally difficult.⁵⁶

Article 408, paragraph 1 of the Civil Code makes no distinction in stating that motherhood is always derived from the fact of birth, thus making no special provisions for medically assisted pregnancies, artificial

⁵⁰ Nicolescu, 2023, p. 467.

⁵¹ Florian, 2022, p. 475.

⁵² Ibid. pp. 476-477; Motica, 2021, p. 228; Nicolescu, 2023, pp. 470-471; Hageanu, 2023, p. 215.

⁵³ Florian, 2022, pp. 478-480.

⁵⁴ Hageanu, 2023, p. 222.

⁵⁵ Florian, 2022, p. 469; Nicolescu, 2023, p. 474.

⁵⁶ Dobozi, 2013, pp. 64-65.

insemination or in vitro fertilisation.⁵⁷ The source of the biological material was not relevant, and genetic testing for motherhood was used only as a proxy for determining who gave birth to a certain child.

Parental authority is usually exercised by both biological parents, who agree on how to “divide” it in practice. However, parental agreement alone cannot voluntarily relinquish parental authority or transfer it to a third party. Only through court-approved adoption can parental authority be permanently transferred from biological to adoptive parents.⁵⁸ All other court decisions regarding the exercise of parental rights, even the most dramatic ones concerning the removal of the exercise of parental rights, are essentially temporary in nature and can later be reversed when the parents’ situation improves. Thus, there is no legal means to “contractually” transfer parental authority from the birth mother to another woman, even if she is the parent of the child.

Both types of surrogacy, gestational and traditional⁵⁹, are equally impeded by legal provisions on birth motherhood and the impossibility of voluntarily relinquishing or transferring parental authority.

One of the ‘legal’ ways to circumvent the ‘scepticism’ of Romanian legislation regarding surrogacy is using a simplified adoption where the biological father first voluntarily recognises paternity and then his wife adopts the child, with the consent of the ‘surrogate’ mother, who was legally registered as the child’s biological mother. This option implies that the male gametes come from the father, with a compulsory DNA test to verify paternity and that the surrogate mother agrees to adopt after giving birth without any financial reward.⁶⁰

Altruistic surrogacy is not explicitly banned, although it is heavily impeded by the current legal framework; however, commercial surrogacy falls foul of multiple legal bans on trading products of the human body, trading biological products, or even human trafficking.

Surrogacy is heavily impeded in all cases, but medical infertility or gestational impediments sometimes bring an undeclared ‘sympathy’ from the courts in trying to overcome the legal hurdles to its recognition. There were a few published court cases where the effects of surrogacy have been

⁵⁷ Nicolescu, 2023, p. 474.

⁵⁸ Ibid. pp. 478-479.

⁵⁹ Predescu, 2020, p. 477; Nicolescu, 2023, p. 472.

⁶⁰ Nicolescu, 2023, pp. 478-479.

recognised⁶¹ with circumvented legal reasoning. Paternal filiation (fatherhood) was voluntarily recognised by the genetic parent and maternal filiation (motherhood) was recognised, on demand, as an effect of the so-called *possession of civil status (status by habit and repute)* and genetic filiation. There was also special regard to the provisions of Article 8 of the European Convention of Human Rights about the right to private and family life.⁶²

The best known and most discussed domestic case involving surrogacy involves the 2013 decision rendered by the Court of Appeals in Timișoara, sitting on an *appeal on points of law* ('recurs') and reversing the lower courts' decisions by recognising the effects on maternal filiation of an altruistic gestational surrogacy. The woman giving birth was the sister of the intended mother, the latter providing the genetic material but lacking an uterus to carry the pregnancy to term.⁶³ While the effects on paternal filiation were recognised even by the Lower Court due to the genetic link between the father providing genetic material and the child, the recognition of maternal filiation went against the clear national rule that the mother is giving birth, with maternal genetic links being relevant only insofar as they serve as proof of birth. The court's decision heavily referenced Article 8 and the right to private and family life from the European Convention on Human Rights. This type of "judge-made" law is quite unusual in a statute-based justice system such as the Romanian one, and it cannot sustainably cancel the explicit statutory rules on maternal filiation, being *de lege lata* inextricably tied to birth.

13. Issues Regarding Cross-border Surrogacy for Romanian Parents

Filiation in Romanian private international law, regulated by Book VII, Chapter 2, Section 2 of the Civil Code, is subject to either the law that governs the general effects of parents' marriage for children born or conceived during marriage (Article 2.603), or to the national law of the child at the time of birth for children born out of wedlock (Article 2.605).⁶⁴ There are no special provisions for surrogacy in Romanian private

⁶¹ Ibid., pp. 482-485; Brodeala, 2016, pp. 70-73.

⁶² Irinescu, 2019, pp. 213-214; Hageanu, 2023, pp. 221-222.

⁶³ Decision no. 1196/26.09.2013, detailed by Nicolescu, 2023, pp. 482-485; Motica, 2021, pp. 229-230; Avram, 2022, p. 274.

⁶⁴ Macovei, 2017, pp. 343-345; Popescu and Oprea, 2023, pp. 463-480.

international law because there are few references to this procedure in domestic legislation.

In cases concerning surrogacy performed abroad or with a foreign element, Romanian courts would probably apply either the national law of the woman giving birth, who would be the surrogate mother if she was single, or possibly the law that governs the general effects of her marriage. If these foreign laws allowed for surrogacy and the voluntary transfer of parental authority from the birth mother to the intended parents due to their previously concluded agreement, we could speculate that only international public order grounds could lead to a refusal to recognise the lawful consequences of these procedures in Romania.

On the other hand, the ECHR case law is quite narrow in scope in cases concerning surrogacy (*Menesson v. France*, application no.56192/11; *Labassee v. France*, application no. 65941/11; *Paradiso and Campanelli v. Italy*, application no. 25358/12; *K.K. and others v. Denmark*, application no. 25212/21), recognising a violation by the state of the right to private or family life only in very qualified circumstances when there were insurmountable obstacles to legal recognition for people already having an established *de facto* family relationship.⁶⁵ The Strasbourg Court weighs each time the competing public order and private life interests and takes a holistic approach in examining whether domestic law provides means for legal recognition, considering not only the situation when the child was born or even when it considered the complaint but also whether there was a possibility for subsequent legal recognition.

The European Court of Human Rights found, in a 2019 Grand Chamber advisory opinion on the request of the French Court of Cassation, “that the child’s right to respect for private life within the meaning of Article 8 of the Convention does not require a specific form of legal recognition such as entry in the register of births, marriages and deaths of the details of the birth certificate legally established abroad; another means, such as adoption of the child by the intended mother, may be used provided that the procedure laid down by domestic law ensures that it can be implemented promptly and effectively, in accordance with the child’s best interests.”⁶⁶ A distinguished Romanian legal scholar immediately

⁶⁵ Hageanu, 2023, pp. 219-220.

⁶⁶ Grand Chamber of the European Court of Human Rights, *Advisory opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy*

commented on this 2019 E.C.H.R. advisory opinion that it leaves unsettled several similar situations that could be brought to the fore based on the principle of non-discrimination: unmarried intended parents, same-sex couples as intended parents and single women as intended parents.⁶⁷

In Romanian domestic law, a genetic link is required only for paternal filiation (fatherhood) out of wedlock, whereas maternal filiation (motherhood) is intrinsically dependent on giving birth. Paternal filiation (fatherhood) is legally presumed for the current husband at the time of birth or for the former husband at the time of conception, and is presumed to be between 300 and 180 days prior to giving birth. An apparent maternal filiation, even if it is based on a birth certificate, coherent with ‘habit’ and ‘repute’, could still be challenged if the listed mother is not the woman having given birth (Article 411, paragraph 3 of the Civil Code). On a domestic birth certificate, a woman who has given birth is automatically listed as the mother of the child, whereas her current or former husband, or the person who voluntarily recognises the child, is listed as the father.

The civil status of a person is subject to national law, according to Article 2.572, paragraph 1 of the Civil Code.⁶⁸ Foreign birth certificates are registered in Romania if they concern a person born abroad. The 2022 European Commission Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European certificate of parenthood⁶⁹ would have a dramatic effect on the recognition of parenthood in cross-border situations by automatically recognising court decisions and authentic instruments from other Member States about the establishment of parenthood. Due to the very limited grounds for refusing recognition and the severe constraints imposed on the public policy/*ordre*

arrangement abroad and the intended mother, requested by the French Court of Cassation, request no. P16-2018-001, April 10th, 2019, [Online] Available at <https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22003-6380464-8364383%22%7D> (Accessed: 19 October 2024); Florian, 2022, pp. 469-470.

⁶⁷ Tec, 2019, section 2.1.

⁶⁸ Popescu and Oprea, 2023, p. 195.

⁶⁹ Proposal for a COUNCIL REGULATION on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood {SEC(2022) 432 final} - {SWD(2022) 390 final} - {SWD(2022) 391 final} - {SWD(2022) 392 final}, [Online]. Available at: https://eur-lex.europa.eu/resource.html?uri=cellar:01d08890-76e7-11ed-9887-01aa75ed71a1.0001.02/DOC_1&format=PDF (Accessed: 1 September 2023).

public exception, such a regulation would ensure that any type of parenthood that is recognised even by a single Member State whose law is deemed applicable would be granted automatic recognition in every other Member State, even if the local family law provisions on parenthood of the forum were very different.

14. The Romanian Criminal Law Approach to Assisted Reproduction

Because it is not a regulated procedure, surrogacy could give rise to criminal charges for each of its constituent acts for the participating parties (surrogate mother, gamete, donor and facilitator), either as an author, instigator or accessory.

Healthcare Reform Law no. 95/2006 criminalises donating cells or tissues for material gain (Article 156, paragraph 1), advertising for cell/tissue donation for material gain (Article 156, paragraph 3), and organising or harvesting cells or tissues for transplantation for material gain for either the donor or the person who organises the process (Article 157, paragraph 1).

There were several well-publicised cases involving ‘oocyte trafficking’, in 2009-2014, some finalised with jail time for the owners, involving private fertility clinics in Bucharest and Timisoara, that were carrying out IVF procedures without proper authorisations, involving ‘buying’ oocytes from poor women and implanting them using IVF for foreign infertile couples. The most common unlawful practices publicly recorded were the remuneration of gamete (female) donors and selling gametes to couples for IVF procedures.

There have also been attempts to circumvent the restrictions on surrogacy by making the surrogate mother give birth outside medical institutions and then declaring the birth in the special procedure for the late registration of births, which involves a DNA test for the mother. This could allow the genetic mother to be registered by hiding the fact that she did not give birth to the child.⁷⁰

15. Conclusions

In Romania, regulation of human reproductive procedures tends to be scant and general. Although the Civil Code attempted to go further by regulating

⁷⁰ Dobozi, 2013, pp. 65-66.

medically assisted reproduction with a third-party donor, while also banning eugenics and genetic manipulation without a therapeutic purpose, the special legislation meant to implement these generous principles is still lagging. Although there are detailed provisions on all types of transplants, including reproductive cell transplants, and firm regulations on patient confidentiality and informed consent for any medical procedure, these lack a specific focus on reproductive issues. Public financing for reproductive procedures is very limited, and the surrounding regulations tend to be very restrictive, with a traditionalist approach to reproductive health.

De lege ferenda, Romania should have a comprehensive statute on assisted reproduction, regulating not only the medically assisted reproduction with a third-party donor, referenced by art. 441-447 of the Civil Code, but also the other types of commonly used medically assisted reproduction techniques such as artificial insemination, all types of in-vitro fertilisation, intracytoplasmic sperm injection, intratubal or intrafallopian gametes transfer⁷¹, gametes and embryo preservation and at least some direct regulations in regard to gestational and traditional surrogacy. This statute should at least cover the areas of parental eligibility, informed consent, allowed and banned techniques, liability, parental filiation, and confidentiality. The difficult political choices implied by the controversies surrounding some types of medically assisted reproduction techniques should not preclude a healthy political and legal debate or the choice of whether to explicitly ban certain techniques or allow them in some clear and predictable conditions.

⁷¹ Motica, 2021, p. 223.

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