

TO THE QUESTION ON THE CIVIL LEGAL NATURE OF EMBRYOS IN VITRO IN UKRAINE

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Due to the growing number of people seeking medical treatment for assisted reproductive technology (hereinafter referred to as ART) programs and the lack of legal regulation of relations in this area, there is a need to investigate the further legal fate of unused embryos left after successful extracorporeal implantation. There are four possible ways to solve the «fate» of such embryos, as M. Shhyrba points out: 1) thawing and destruction; 2) transfer for research; 3) storage for an indefinite period; 4) donation to other people for the purpose of their possible birth [1, p. 149]. Ukrainian law provides for the possibility of applying the latter two options. Thus, in accordance with paragraph 7.1 of the Procedure for the use of assisted reproductive technologies in Ukraine, approved by the Order of the Ministry of Health of Ukraine of September 09, 2013, № 787 (hereinafter referred to as the Procedure), upon the request of patients, embryos may be cryopreserved and stored in a cryobank for a period to be agreed upon by the patient and the healthcare facility.

Section V of the Order contains rules governing the donation of gametes and embryos. In paragraph 5.1, embryo donation is defined as the procedure by which donors, on written consent, donate their embryos for use by others in the treatment of infertility. In this case, donors of embryos, according to paragraph 5.21 of the Procedure may be patients in vitro fertilization program, which after the birth of the baby remains unused cryopreserved embryos. Based on the analysis of the above provisions of the Procedure, it can be concluded that donation is possible after the birth of a child by persons who have used the in vitro fertilization program and only for unused cryopreserved embryos.

At the same time, according to paragraph 3.12 of the Procedure, upon completion of the fertilization cycle, in the presence of the remainder of unused embryos, the patient may decide to use these embryos for the treatment programs of other patients, including the infertile patient/recipient couple and non-recipient women marriage. That is, in this case it is a matter of deciding whether to use the rest of the embryos not after the birth of the baby, but after the completion of the fertilization cycle, that is, the onset of

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pregnancy. In this case, embryos can be both frozen and non-frozen, as indicated by the need to clarify this in the statement on the use of donor embryos, the form of which is approved by the Ministry of Health of Ukraine and is an annex to the Procedure.

In this regard, it is appropriate to clarify that embryo donors may be in vitro fertilization program patients who remain unused, both frozen and non-frozen, after the completion of the fertilization cycle or after the baby is born.

As noted above, the donation of embryos occurs on informed voluntary consent. The form of such a statement is also approved by the Ministry of Health of Ukraine (annex to the Procedure) and specifies that patients allow their embryos to be used in treatment programs for assisted reproductive technologies for other patients (recipients). The said consent also stipulates that patients are under no obligation to identify the patient (recipient) as well as the child born as a result of the use of their embryos in assisted reproduction methods (in the case of anonymous donation). In turn, recipients are required to make a counter statement, according to which, by voluntary consent, they ask for medical assistance using assisted reproductive technologies using donor embryos and undertake not to establish the identity of the donor/donors if he/she is anonymous. Such wording indicates that embryo donation may be anonymous and open, apparently targeted.

In arguing that cryopreserved embryos in vitro are civil rights objects until they are transferred to the uterine cavity, where they begin their prenatal development, it is advisable to consider the civil legal nature of the donation of cryopreserved embryos in vitro. According to Art. 11 of the Civil Code of Ukraine, civil rights and obligations arise from the actions of persons envisaged by the acts of civil law, as well as from the actions of persons not envisaged by these acts, but by analogy give rise to civil rights and obligations. Civil rights and obligations, in particular, are based on contracts and other transactions. Analyzing the provisions of the Procedure, we can conclude that embryo donation can be attributed to the actions of a person not provided for by civil law, but is an effort to terminate civil rights and obligations for cryopreserved embryos. This transaction is one-sided as it creates an obligation only for the donor patient who is to transfer their unused cryopreserved embryos to a healthcare facility for use by others in the treatment of infertility using ART in the case of anonymous donation. Donation of cryopreserved embryos to specific recipients at targeted donation appears to be a two-way transaction, as recipients have a responsibility to use these embryos to provide them with medical care through infertility treatment. Moreover, given that the term «donation» is defined in the explanatory dictionary as «something of value, that is given to help a person or organization such as a charity, or the act of giving some value», the process of

donation of embryos is close to the legal nature of the donation agreement regulated by the Civil Code of Ukraine, since the donor donates his embryos to recipients or healthcare facility free of charge for a specific, predetermined purpose. At the same time, in the case of anonymous donation of embryos, the donor cannot exercise control over the use of his embryos, as he undertakes not to identify the patients who will use them for infertility treatment. However, despite the proximity of the embryo donation transaction to the donation agreement, given that the subject of the latter is matters, its provision on embryo donation cannot be applied.

It should be noted that in the legal literature there is a very different approach to the donation of frozen embryos in vitro, which consists in the recognition of such donation by adoption by their recipients. As A. Pestrikov points out, the American Life Union proposes to legally protect contracts between genetic parents and potential parents during embryo adoption so that parties to such agreements feel protected [2, p. 90]. At the same time, as G. Romanovsky correctly points out, domestic law does not provide for the possibility of adoption of the embryo, since adoption is possible only in relation to the person born [3]. For this reason, in order to apply the provisions of adoption of cryopreserved embryos to in vitro adoption of donors, it is necessary to determine their status as legal entities, which is contrary to the legal nature of in vitro embryos, which in general refers to biological material.

In view of the foregoing, it should be concluded that, given the particular legal regime of cryopreserved embryos in vitro, the legislator should provide for a more sophisticated embryo donation procedure that would prevent abuse in the use of donor embryos in ART programs.

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