SPERM DONATION,
SINGLE WOMEN AND FILIATION

Elena IGNOVSKA
Sperm Donation, Single Women and Filiation
Elena Ignovska

Note: This book is the product of a PhD project under the supervision of Professor Gerd Verschelden, University of Ghent, Faculty of Law, to whom the author is very grateful.

© 2015 Intersentia
Cambridge – Antwerp – Portland
www.intersentia.com | www.intersentia.co.uk

Cover image: © Gustav Klimt (1862–1918), Baby (Cradle) – Courtesy of National Gallery of Art, Washington

D/2015/7849/95
NUR 822


No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
To my family,
our history, presence and future
FOREWORD

On 10 September 2014, Ghent University Law School (Belgium) awarded Elena Ignovska the degree of Doctor of Law. It was my privilege to supervise her three year research project resulting in this doctorate, which was funded by the Basileus Erasmus Mundus Action 2 Programme of the European Commission. The present volume is the commercial edition of her dissertation, which was entitled “Affiliation of Children Conceived by Sperm Donation to Single Women: The (Im)possibility to Establish Fatherhood from an International Perspective with a Focus on the Republic of Macedonia”.

This book holds a methodologically well thought-out analysis of the complex and captivating issues connected with deliberate solitary motherhood both in international law and in the national law of ten European countries. It is a legal dissertation based on empirical, sociological and ethical literature. This multifaceted approach helps to develop the author’s argument. Discussing the topic from interdisciplinary, national and international viewpoints and in a historical context offers a clear perspective for finding universal solutions. This opens the until now mostly nationally perceived field of family law up to international observation, and thus enhances the discussion on affiliation in the Macedonian family law context.

From a fitting abstract position, the author offers in Part II an original analysis using three different perspectives: the standpoint of the single mother with the desire to have children, the viewpoint of the sperm donor, and thirdly the perspective of the children, born of single mothers who were fertilised with donor sperm. One of the key issues is whether the right to have access to assisted reproductive technology of the deliberately solitary mother combined with the protection of the donor’s anonymity isn’t inevitably in conflict with the child’s fundamental human rights, including the right to know one’s genetic identity, the right to family life (and to have a relationship with one’s parents) and the right to due process. The author makes a comparative assessment throughout the whole thesis, by collating the position of children born of single mothers fertilised with sperm from an anonymous donor and the position of children of heterosexual couples or (of secondary importance) of children born to single mothers whose fathers are known.

As a conclusion, Ms Ignovska expresses a well founded, balanced and nuanced preference to give priority to the fundamental rights of the child over the desires of single mothers and donors.
The bibliographical unit encompasses not only legal documents, court judgments and literature, but also medical websites, newspaper articles and public and governmental opinions.

The author has dealt with the subject in a thorough and creative way, resulting in refreshing insights. The sense of nuance as well as an understanding for the position of all actors, are clearly the strengths of this PhD thesis. The combination of the legal, ethical and sociological positions of the participants of the reproductive project of single women conceiving children with the assistance of sperm donors is enriching. The author clearly shows her ability to keep up with an evolving research topic, to find the rationale behind the policy, and accordingly to anticipate future action in terms of turning policy into law and its consequences.

Elena Ignovska already proved to be a researcher with a particularly broad view on the law when she was working at the University Ss. Cyril and Methodius in Skopje (FYR of Macedonia). Even before she came to Ghent, she had acquired expertise in the fields of family law, the law of succession, and sociology of the family, all subjects which proved to be extremely relevant for this research project. Her constant drive to gain more in-depth knowledge and to further improve her research skills is witnessed by her additional degree in Bioethics. During her time spent in Ghent, Ms Ignovska was always eager to present and discuss her work in progress, in order to get extra feedback, looking for new perspectives. During our discussions, I was impressed by her very extensive knowledge of the literature and her exhaustive and creative thinking about the subject, always proceeding in a very cautious way with all appropriate differentiations and nuances, understanding the position of the three main actors: the single woman, the sperm donor and the child.

This book offers innovative perspectives, not only for Macedonian citizens, but for all legal scholars. It reminds us that, in the words of Karl Marx, the philosopher’s task is not so much to describe the world, but to change it. The author’s hope has been to cast light on the problems of children conceived by sperm donation to single women in Macedonia, and to advance their perspectives. May this aspiration come true in a practical sense. I have no doubt that this thesis will prove to be of value for the development of Macedonian Family Law in the next years or decades.

Prof. Dr Gerd Verschelden
Director of the Institute for Family Law
Ghent University, Belgium
CONTENTS

Foreword ................................................................. vii
List of Abbreviations .................................................. xv

Introduction .............................................................. 1
1. Research questions and topics of interest ....................... 3
2. Methodology ........................................................ 4

PART I. MAPPING THE TERRAIN FROM AN INTERDISCIPLINARY AND INTERNATIONAL PERSPECTIVE

Chapter 1.
Terminology .......................................................... 11
1.1. Reproduction, procreation, insemination, fertilisation and conception . 11
1.2. Wish, desire and need to have a child .......................... 13
1.3. Rearing, bearing and begetting a child ......................... 13
1.4. Progenitors/begetters, donors and parents (genetic, biological, social and legal) ........................................ 15
1.5. Kinship and family .............................................. 19
1.6. “Artificial insemination” and sperm donation as assisted reproductive technologies ............................. 30

Chapter 2.
International Regulations ......................................... 33
2.1. The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights ...................... 37
2.2. The Convention on the Elimination of all Forms of Discrimination Against Women ...................................... 38
2.3. The Convention on the Rights of the Child ...................... 38
2.4. The Oviedo Convention, the Universal Declaration on the Human Genome and Human Rights and the Universal Declaration on Bioethics and Human Rights ........................................ 42
2.5. European framework .......................................... 44
2.6. The consideration of the international conventions by the European Court of Human Rights ............................................. 45
2.7. European Convention on Human Rights and the margin of appreciation in the field of family life ............................... 49
2.8. The case law of the European Court of Human Rights ................. 53
  2.8.1. The case law in the field of reproductive rights and the right to found a family ............................................... 53
    2.8.1.1. The reproductive right of a couple .............................................. 53
        2.8.1.1.1. Right to access to assisted reproductive technology for a couple (competing public and private interests) .............. 53
        2.8.1.1.2. Right to sperm and ova donation of a couple and in general .......... 53
    2.8.1.2. The reproductive right of an individual ............................... 55
        2.8.1.2.1. Competing interests between two individuals comprising a couple regarding the reproductive choice in the use of assisted reproduction ....................... 55
        2.8.1.2.2. Right of a single person to found a family by adoption ............... 56
  2.8.2. The case law in the field of parental rights ........................... 57
    2.8.2.1. Establishing and rebutting the parental legal affiliation grounded in the marital presumption ........ ....... 57
    2.8.2.2. Establishing parental legal affiliation out of wedlock ............... 62
    2.8.2.3. Establishing parental legal affiliation for the sperm donor ......................... 66
  2.8.3. The case law in the field of children’s rights .......................... 69
    2.8.3.1. Right to information about genetic origin or personal history ............................... 69
    2.8.3.2. Right of the child to be taken care of by both parents ............... 72

Chapter 3.
Overview of the National Regulations in Ten European Countries ......... 81

  3.1. General overview .......................................................... 81
    3.1.1. The right of single women to use ART ............................... 81
    3.1.2. The right of the child to know the identity of the donor ............... 82
    3.1.3. Legal proceedings for establishing paternity of ART conceived children ...................................................................... 83
3.2. Republic of Macedonia ............................................. 85
  3.2.1. Introduction of the legal context in applying ART ............... 85
  3.2.2. The right of single women to use ART .......................... 86
  3.2.3. The right of the child to know the identity of the donor .......... 87
  3.2.4. Legal proceedings for establishing paternity of ART conceived children ..................................................... 88

3.3. Croatia ............................................................. 89
  3.3.1. Introduction of the legal context in applying ART ............... 89
  3.3.2. The right of single women to use ART .......................... 90
  3.3.3. The right of the child to know the identity of the donor .......... 90
  3.3.4. Legal proceedings for establishing paternity of ART conceived children ..................................................... 91

3.4. Serbia ............................................................. 91
  3.4.1. Introduction of the legal context in applying ART ............... 91
  3.4.2. The right of single women to use ART .......................... 92
  3.4.3. The right of the child to know the identity of the donor .......... 92
  3.4.4. Legal proceedings for establishing paternity of ART conceived children ..................................................... 93

3.5. Italy ............................................................... 94
  3.5.1. Introduction of the legal context in applying ART ............... 94
  3.5.2. The right of single women to use ART .......................... 95
  3.5.3. The right of the child to know the identity of the donor .......... 95
  3.5.4. Legal proceedings for establishing paternity of ART conceived children ..................................................... 95

3.6. France ............................................................. 96
  3.6.1. Introduction of the legal context in applying ART ............... 96
  3.6.2. The right of single women to use ART .......................... 97
  3.6.3. The right of the child to know the identity of the donor .......... 97
  3.6.4. Legal proceedings for establishing paternity of ART conceived children ..................................................... 99

3.7. Germany .......................................................... 99
  3.7.1. Introduction of the legal context in applying ART ............... 99
  3.7.2. The right of single women to use ART .......................... 100
  3.7.3. The right of the child to know the identity of the donor .......... 100
  3.7.4. Legal proceedings for establishing paternity of ART conceived children ..................................................... 101

3.8. The Netherlands ................................................... 102
  3.8.1. Introduction of the legal context in applying ART ............... 102
  3.8.2. The right of single women to use ART .......................... 103
  3.8.3. The right of the child to know the identity of the donor .......... 103
  3.8.4. Legal proceedings for establishing paternity of ART conceived children ..................................................... 104
Part II. The Legal, Ethical and Sociological Positions of the Participants

Chapter 4. Assisting Single Women to Found Families

4.1. The “nature” of the reproduction ........................................ 120
4.1.1. The reproductive right as an individual right .................... 122
4.1.2. The reproductive right as a right to privacy ...................... 125
4.2. The “artificiality” of reproduction ...................................... 127
4.2.1. The reproductive right as a right to family life .................. 127
4.2.2. The reproductive right as a greater public good ................. 130
4.2.3. The reproductive right as a right to access ART on equal grounds for everybody – principle of non-discrimination ................ 137
4.3. Infertility as an inability to conceive in the context of single women .. 142
4.4. The reproductive rights and the correlative responsibilities of the couple ........................................ 151
4.4.1. Rights ........................................................................ 151
4.4.2. Responsibilities ........................................................ 154
4.4.3. Marriage .................................................................. 155
4.4.4. Extra-marital relationship ............................................ 161
4.4.5. Not regulated relationship .......................................... 163
4.5. The individual reproductive rights and correlative responsibilities
of single women ................................................... 164
  4.5.1. Rights ..................................................... 164
  4.5.2. Responsibilities ............................................. 166
  4.5.3. Single women as involuntarily single parents ................. 168
  4.5.4. Single women as parents by posthumous reproduction ........ 170
  4.5.5. Single women as parents by choice ........................... 171
4.6. Discussion of the position of single women using assistance by sperm
donors to reproduce ............................................... 177

Chapter 5.
Sperm Donors as Assistance to Reproduction for Single Women ........ 183
  5.1. “The nature” and “the artificiality” of sperm donation ............... 188
  5.2. The rights and correlative obligations of sperm donors donating to
couples and single women .......................................... 198
       5.2.1. Anonymous sperm donor ................................... 199
       5.2.2. Non-anonymous sperm donor ............................... 204
  5.3. Discussion of the position of sperm donors assisting single women
to reproduce ...................................................... 212
       5.3.1. Differences and similarities between the legal positions of
              sperm donors donating to couples and single women ........ 212
       5.3.2. Differences and similarities between the legal positions of
              anonymous and non-anonymous sperm donors ............... 218

Chapter 6.
Children Conceived by Sperm Donors’ Assistance to Single Women ...... 225
  6.1. Children conceived “naturally” ..................................... 231
       6.1.1. Children born in and out of wedlock ......................... 233
       6.1.2. Children living in stepfamilies ............................... 241
       6.1.3. Children given up for adoption and adopted .................. 242
  6.2. Children conceived “artificially” .................................... 246
  6.3. Discussion of the position of children conceived by sperm donation
to single women ................................................... 249
       6.3.1. Conflicting rights in conceptions by sperm donations to single
              women ......................................................... 253
       6.3.2. Harmonising differences between children conceived
              “naturally” and “artificially” .................................. 261
       6.3.2.1. The reasons why children should have a right to
               access the data on their genetic origin .................... 261
6.3.2.2. The reasons why children’s parents/the state should have a right to make the genetic origin a non-accessible secret
6.3.2.3. The reasons why children conceived “naturally” and “artificially” are treated differently by law

PART III. LEGAL WAYS OF ESTABLISHING FATHERHOOD

Chapter 7.
Establishing Fatherhood through an International Prism

7.1. “Natural” conceptions – biological/genetic fatherhood as a principle rule
7.1.1. Marriage
7.1.2. Extra-marital relationships
7.1.3. Not regulated relationships

7.2. “Artificial” conceptions – social and legal fatherhood as a principle rule
7.2.1. Marriage
7.2.2. Extra-marital relationships
7.2.3. Single women – parents by choice

7.3. Extrapolating a universal concept for paternal attribution

Chapter 8.
Applying the Results of the Analysis in the Case of the Republic of Macedonia

8.1. Mapping the terrain for the discussion
8.2. De lege lata and considering de lege ferenda
8.2.1. The Family Law
8.2.1.1. Family
8.2.1.2. Marriage
8.2.1.3. Extra-marital relationships
8.2.1.4. Affiliation and establishment of parental responsibilities
8.2.2. The Law on Bio-medically Assisted Fertilisation
8.2.2.1. Beneficiaries of bio-medically assisted fertilisation and the establishment of parental responsibilities
8.2.2.2. The right of the child to know his/her genetic origins

8.3. Conclusion: harmonising rights

References

References
## LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ART</td>
<td>assisted reproductive technologies</td>
</tr>
<tr>
<td>bis Regulation</td>
<td>concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility</td>
</tr>
<tr>
<td>CCC</td>
<td>Convention on Contact concerning Children</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>Draft Recommendation</td>
<td>Draft Recommendation on the Rights and Legal Status of Children and Parental Responsibilities</td>
</tr>
<tr>
<td>ECECR</td>
<td>European Convention on the Exercise of Children’s Rights</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECLSCBOW</td>
<td>European Convention on the Legal Status of Children Born Out of Wedlock</td>
</tr>
<tr>
<td>ECtH</td>
<td>European Court of Human Rights</td>
</tr>
<tr>
<td>HEFA</td>
<td>Human Fertilisation and Embryology Authority</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
</tr>
<tr>
<td>IVF</td>
<td>in vitro fertilisation</td>
</tr>
<tr>
<td>UDBHR</td>
<td>Universal Declaration on Bioethics and Human Rights</td>
</tr>
<tr>
<td>UDHGHR</td>
<td>Universal Declaration on the Human Genome and Human Rights</td>
</tr>
<tr>
<td>UDHHR</td>
<td>Universal Declaration on Human Rights</td>
</tr>
</tbody>
</table>