

Medical involvement in procreation in Greek Law

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MEDICAL INVOLVEMENT IN PROCREATION IN GREEK LAW

ABSTRACT: Greek Family Law already quite early (since 2002) provided for a modern legal framework regulating the medical involvement in procreation. The legislator proved his social sensitivity regarding the right of citizens to reproduce by passing Law 3089/2002, which was pioneering. The author has set out to briefly analyze conditions for the implementation of art. 1455 of the Greek Civil Code and the consent to artificial insemination and its withdrawal.

KEYWORDS: Medically assisted human reproduction; artificial insemination; consent; conditions; legal capacity

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1. Introduction

The art. 1456 of the Greek Civil Code stipulates that medically assisted human reproduction (artificial insemination) is only allowed to intervene with the inability of having children naturally or to avoid the transmission of a serious disease to the child. This is allowed up to the age that the assisted person is naturally capable of human reproduction. Human reproduction by cloning is prohibited. Choosing the sex of the child is not allowed unless a serious hereditary disease should be avoided.

Medically assisted human reproduction is, therefore, a way of establishing a family connection of motherhood and fatherhood. The terms “assisted reproduction”, “artificial reproduction” and “artificial insemination”, suggest having descendants with medical assistance and without sexual intercourse. There are two methods of artificial insemination: a) in vivo fertilization, where the tissue remains inside the living organism in which it is normally found and b) in vitro fertilization where the fertilization of the egg takes place outside the female body and in a test tube. The fertilized egg is then transferred to the woman’s body and carried by her. The sperm may come either from the husband /partner (homologous artificial insemination), or a third donor (heterologous artificial insemination). Accordingly, the eggs may belong to the woman wishing to have a child, or to a third donor. In the case of in vitro fertilization, the fertilized egg is transferred either into the body of the woman

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who wants to have a child, or into the body of another woman, who will carry and bear the child (surrogate). When the egg comes from the woman carrying the baby (surrogate), it is a complete gestational surrogacy, which is forbidden by Greek law.¹

The general framework for the implementation of artificial insemination methods was determined by Law 3089/2002. However, there are restrictions on the right to assisted reproduction. Such are the restrictions in art. 1455 of Greek Civil Code and 2 § 3 and 4 § 1 of 3305/2005.²

2. The legitimacy of artificial insemination

2.1. Conditions for the implementation of art. 1455 of the Greek Civil Code

a) Inability to reproduce – Avoiding the transmission of a serious disease

Medically Assisted Reproduction (MAR) is only permitted in case of infertility or to avoid the transmission of a serious disease to the child.³ MAR is permitted when it is medically essential⁴ and when “the inability to have children naturally”⁵ is determined objectively. The doctor determines the inability to reproduce, while the law does not define infertility. The inability to have children naturally may be because of the inability to either conceive or carry children. MAR suggests a subsidiary, not an alternative method of having children.⁶ Artificial insemination is not excluded in the case of other children, who have been conceived and delivered naturally (in case of secondary infertility) or have been adopted.⁷ MAR is also allowed when there is need to avoid the transmission of a serious disease⁸ to the child, thus recognizing, legally, the right of the child to be born healthy. In this case, it should be determined that there are diseases inherited by the parents.⁹ This covers, not only the case of the inability to have a child, but also the inability to have a healthy child. It is, also, medically essential to avoid the transmission of a disease from the person requesting assistance to the other and vice versa

¹ A. PAPACHRISTOU, *Family Law*, 2014, 205; V. PERAKI in AP. GEORGIADIS (ed.), *Brief Interpretation of Civil Code*, article 1458, 15.

² *Court of Appeal of Athens*, 3357/2010, in *Nomiko Vima*, 2012, 1440; *Multimember Court of First Instance of Thessaloniki*, 8641/2017, in *EfAD*, 2017, 945.

³ *Court of Appeal of Athens*, 3357/2010 *op. cit.*, *Court of First Instance of Thessaloniki* 7013/2013 *EfAD* 2013, 336; A. VATHRAKOKILIS, in *ErNomAK*, Article 1455, 3; *Court of First Instance of Athens*, 1320/2004, in *Armenopoulos*, 2004, 374.

⁴ F. SKORINI-PAPARRIGOPOULOU, in P. GEORGIADIS, V. STATHOPOULOS (eds.), *Interpretation of Civil Code*, VII, Articles 1455-1456, 6.

⁵ A. PAPACHRISTOU, *Family Law*, 207-208, in A.P. GEORGIADIS (ed), *Family Law*, 428.

⁶ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 8, V. PERAKI, *op. cit.*, Article 1455, 2.

⁷ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 11, V. PERAKI, *op. cit.*, 3. Opposite, when it comes to surrogacy, K. PANTELIDOU, *Issues of the new institution of “surrogacy”*, in *Armenopoulos*, 2004, 979.

⁸ *Court of First Instance of Athens*, 1320/2004, in *Armenopoulos*, 2004, 374.

⁹ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 8, V. PERAKI, *op. cit.*, 4.

(e.g., HIV).¹⁰ Assisted reproduction is not permitted when it is performed for reasons other than medical necessity.¹¹

Transgender people cannot resort to MAR after gender correction (Law 4491/2017) because they no longer have the genital system or the genital material that suits their current sex for MAR, and as a result, they do not meet the condition of medical necessity.

b) Age

Assisted Reproduction is permitted until the age that the assisted person is physically able to reproduce.¹² Moreover, according to art. 4 § 1 sub. a', c' of Law 3305/2005, the methods of MAR are applied to adults up to the age that the assisted person can reproduce. MAR application to minors is exceptionally allowed due to a serious disease that poses a risk of infertility, to ensure the possibility of childbearing.

In case the assisted person is a woman, the age of natural reproductive capacity is the fiftieth year (art. 4 § 1 sub. b' of Law 3305/2005).¹³ After this limit is exceeded, it is indisputably presumed that there is no natural ability to reproduce. However, it is not possible to determine whether a woman can reproduce naturally, despite the older age. There is no question of unconstitutionality in setting an age limit for women, as opposed to men, as long as the natural reproductive capacity of the two sexes is different. Any redefinition of the upper age limit, for women, to a higher age limit, is a matter for the common legislator. This will only take place when widely accepted research on the subject, demonstrates a higher or lower age limit for natural reproduction for women in Greece. Additionally, there is need for a legislative will to change the existing law.¹⁴ Regarding minors, cryopreservation is allowed under certain conditions (art. 7 § 6 of Law 3305/2005), while especially married minors can also resort to MAR.¹⁵

There are significant ethical dilemmas and pregnancy medical (maternal and fetal) complications near and after menopause in women. Regarding medical complications, the consensus in evaluative research suggests that there is a higher risk of complications in natural pregnancy when the mother is older (e.g. > 35 years old). This risk can be mitigated by careful maternal medical examination and the use of IVF in healthy women. In these cases, an elderly mother, who is otherwise healthy, may become pregnant with a similar risk profile to younger women, when using foreign oocytes.¹⁶

¹⁰ F. TERRÉ/ D. FENOUILLET, *Droit Civil - La Famille*, 2011, 779-780, criticizing this possibility, adopted by the French legislature, arguing that the child's interest in the prospect of losing his or her suffering father or mother is not safeguarded from the disease. But it should not be forgotten that infectious diseases are now medically treatable by modern medicine (such as antiretroviral treatment for HIV).

¹¹ *Court of Appeal of Athens*, 3357/2010, *op. cit.*

¹² *Court of Appeal of Athens*, 3357/2010, *op. cit.*; *Court of First Instance of Athens*, 1320/2004, *op. cit.*

¹³ See and provision 27, 3 *SGB V*, where German law, in contrast to the natural margins of natural reproduction, provides for a maximum of 40 years for women and 50 years for men.

¹⁴ *Court of First Instance of Piraeus*, 275/2016, in *NOMOS*, βλ; however, maternity leave for a 52-year-old woman, *Court of First Instance of Korinthos*, 224/2006, in *ISOCRATES*.

¹⁵ AP. GEORGIADIS, *op. cit.*, 430.

¹⁶ J. HARRISON, MR. BRITTANY, ET AL., *Advanced maternal age: ethical and medical considerations for assisted reproductive technology*, in *International Journal of Women's Health*, 2017, 561-570.

2.2. Reproduction by cloning

The production of people with specific genetic material is prohibited. It runs counter to the principle of respect for human dignity.¹⁷ However, therapeutic cloning is allowed.¹⁸ Therapeutic cloning involves creating a cloned embryo for the sole purpose of producing embryonic stem cells with the same DNA as the donor cell. Researchers hope to use embryonic stem cells, which have the unique ability to generate virtually all types of cells in an organism, to grow healthy tissues in the laboratory that can be used to replace injured or diseased tissues.¹⁹ There are no more provisions for therapeutic cloning in the legislation.

2.3. Sex selection

Sex selection is not permitted, unless a serious sex-linked disease is to be avoided;²⁰ it is only allowed to avoid a serious inherited disease, linked specifically to the sex of the child. Such diseases are, for example, Duchenne disease, hemophilia, and severe mental deprivation, which are transmitted from the carrier mother to her male children exclusively.²¹ The choice of other biological characteristics is also excluded since, even in this case, the personal autonomy of man is violated.²²

This legal choice is pioneering because it takes into account the best interests of the child to be born and particularly the right to be born healthy. So, although it is prohibited to select the sex of the child to be born, in order to prevent people, that can have children in a natural way, to choose MAR in order to select the sex of their child, or to eliminate inequalities between the natural method and MAR, Greek legislation permits this choice for the sake of the children to be born healthy.

2.4. Legal nature of genital material

There is not an expressed provision of the legislation on the matter. According to one point of view highlighted in the literature, sperm, which along with the egg and the fertilized egg constitute human genital material, has a dual legal nature when outside the human body. According to this view, it is at the same time a thing, according to the general article 947 of the Greek Civil Code that provides the legal meaning of things (generally-tangible, impersonal, self-existent object receptive to human power and therefore can be an object of ownership [art. 999 of Greek Civil Code that provides the legal meaning of the objects of ownership generally]) and an element of the personality of the individual (art. 57 of Greek Civil Code).²³ This view, however, runs counter to the basic distinction of modern law between persons and things. Therefore, the view that it is an element of the donor's personality is more correct.²⁴

¹⁷ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 35

¹⁸ *Ibidem.*, 40, K. FOUNTEDAKI, *Human Reproduction and civil medical liability*, 206., V. PERAKI, *op. cit.*, 15

¹⁹ <https://www.genome.gov/about-genomics/fact-sheets/Cloning-Fact-Sheet>.

²⁰ *Court of First Instance of Athens*, 1320/2004, *op. cit.*

²¹ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*; E. MALLIOU, *Genetic testing and law*, 2004, 49.

²² T. VIDALIS, *Life without a face*, 2003, 138.

²³ *Multimember Court of First Instance of Athens*, 1143/2016, in *Chronicles of Private Law*, 2016, 586.

²⁴ C. STAMBELOU in A.K. GEORGIADIS, V. STATHOPOULOS (eds.), VIII, article 1459, 10.

3. Consent to artificial insemination and its withdrawal

According to the provisions of art. 1456 of the Greek Civil Code and art. 5, 7 § 6 L. 3305/2005, consent is a necessary condition for every act that aims at MAR. In particular, art. 1456 of the Greek Civil Code stipulates that consent to any act is declared by persons wishing to have a child. From art. 1456 §1 of the Greek Civil Code in combination with art. 7 § 6 of Law 3305/2005 it is indirectly concluded that only married or heterosexual couples in a consensual union can resort to MAR, while same-sex couples are not allowed²⁵ to do so. Thus, medical assistance is only allowed to heterosexual couples, a single unmarried woman, or an unmarried man.²⁶ It is disputed whether an unmarried man can have access to MAR because the law refers only to unmarried women. It is appropriate to accept the access of unmarried men for reasons of equity between women and men according to art. 5 of the Greek Constitution.²⁷ In relation to the interdiction for same-sex couples' access to MAR, which is quite a traditional bio-conservative position for a progressive legal framework, it can be explained by the general interdiction to same-sex couples to have children according to Greek Law. It doesn't mean that Greek Law excludes same-sex couples specifically from MAR, but it is a general provision, excluding parenting to a same-sex couple. Also, according to the more accurate opinion, consent is also required for the cryopreservation of the genital material by the person or persons submitting it.²⁸

It could be argued that the gender-neutral wording of art. 1456 § 1 sub. α' of the Civil Code, along with the possibility of conducting a cohabitation agreement between two adults, according to art. 1 of Law 4356/2015, leaves a margin for same-sex partners, who live together with a cohabitation agreement, to have the right to have a child following MAR procedures. This view, however, would be unfounded, as in all the discussions that led to the enactment of Law 4356/2015, it was clarified that the extension of the cohabitation agreement to same-sex partners will only concern the relationship between them. For this reason, the legislator did not want to grant them the right to have children either by MAR or adoption. In addition, art. 1456 of the Greek Civil Code, introduced by Law 3089/2002, precedes the time of Law 4356/2015 and its gender-neutral wording is not due to the inclusion of same-sex couples in those eligible to resort to MAR, as the only conceivable forms of cohabitation at that time were marriage and consensual union. The cohabitation agreement, especially for homosexuals, had not yet been introduced to the Greek legal system.²⁹

It could be said that the present framework allows *de facto* a same-sex female couple to have access to MAR (pending all the relevant medical conditions), as long as the person that applies is an "unmarried woman" outside a "consensual union". This could lead to the *prima facie* absurd conclusion that the same woman cannot have access to MAR if she is in a cohabitation agreement with her partner. But it's not the right to access MAR, of the woman that wishes to have the child, that is important in this case. The same woman can declare to be an unmarried woman, although she lives in a consen-

²⁵See indicative in A. KOUKOULIS, *Possibilities of acquiring children by same-sex couples in the Greek legal system*, in *EfAD*, 2019, 282.

²⁶A. PAPACHRISTOU, *Family Law*, 205 ss.

²⁷A. KOUKOULIS, as above.

²⁸K. FOUNTEDAKI, *Human Reproduction and Civil Medical Liability*, 228, 233.

²⁹K. PANAGOPOULOS, V. PERAKI, *Summary of Family Law*, 30-31.

sual union, and can have a child through MAR, establishing the above conclusion to be wrong. The difference between these two situations is that Greek law does not recognize that a child can have, through MAR, parents of the same sex.

3.1. Persons whose consent is required

In married couples, the consent of both spouses is required. In unmarried couples, the consent of both partners is required, including the consent of the unmarried and single woman who requires medical assistance (the same applies to single unmarried men). Consent is provided before any medically assisted reproduction procedure.³⁰ Motherhood and fatherhood are established only with persons who consent to MAR.

3.2. Type of consent

Adherence to this type of consent is justified by the seriousness of the undertaking.³¹ For spouses, a private document is enough. The same must apply to partners who have entered into a cohabitation agreement (law 4356/2015).³² In the case of a consensual union, a notarized document is required.³³ The same applies to single women (and single men). This type of consent is essential.³⁴ Thus, relevant written consent is invalid (art. 159 of Greek Civil Code), if the constituent notarial form, according to art. 1456 sub. b' of the Greek Civil Code, for the unmarried woman and her partner is not followed. It is noteworthy that while, in general for medical procedures, the legislator requires valid (informal) consent by the patient, without the obligation to obtain written consent,³⁵ consent to MAR is considered essential to secure the reliability of the persons involved.

Written consent allows the exercise of the right to have children by artificial insemination, and also covers the recognition of paternity. If there is no document, in principle there is no consensus and legality issues of the medical act may arise. In addition, following law 3305/2005, family ties of the child with the natural father may be affected.³⁶ In this case, the abusive exercise of a right, in defense of infringement of paternity, shall not be excluded.³⁷

As mentioned above, an unmarried woman in a consensual union can resort to artificial insemination with her partner's sperm. According to the general provisions,³⁸ if there is no consent of the latter, by providing a notarized document, to gain voluntary recognition, the judicial recognition of the child is feasible.

³⁰ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, Articles 1455-1456, 55; *Court of First Instance of Athens*, 1320/2004, *op. cit.*

³¹ A. GEORGIADIS, *op. cit.*, 381.

³² C STAMBELOU., *Termination of the Cohabitation Agreement - Presumption of Paternity*, in *EfAD*, 2009, 13. Opposite A. GEORGIADIS, *op. cit.*, 434; D. PAPADOPOULOU-KLAMARI, *The Kinship*, 175-176.

³³ *Court of Appeal of Athens*, 3357/2010, *op. cit.*

³⁴ A. PAPACHRISTOU, *Handbook of Family Law*, 205; A. VATHRAKOKILIS, *op. cit.*, 4. Opposite I. SPYRIDAKIS, *Artificial Insemination*, 45, who argues that the formula is probative.

³⁵ A. KOUKOULIS, *Handbook of Medical Responsibility and Ethics*, 34

³⁶ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 66.

³⁷ E. KOUNOUGERI-MANOLEDAKI, *Family Law II*, cit., 137.

³⁸ *Areios Pagos*, 898/2014, in *Chronicles of Private Law*, 2014, 669.

On the one hand, written consent of art. 1456 § 1 of the Greek Civil Code allows the exercise of the right to have children by artificial insemination and following art. 1471 § 2. approx. 2 of Greek Civil Code, it includes paternity. On the other hand, the consent of this second article establishes the inviolability of paternity, regardless of the legality of the medical act. This consent, therefore, as a ground for excluding infringement of paternity, is different from the consent required as a condition to allow artificial insemination. The law does not require written consent for the consent of art. 1471 § 2 approx. 2 of Greek Civil Code and, therefore, it may be given written or orally, or even silently deduced from the circumstances. As such is the case where the husband, despite the lack of written consent for artificial insemination, appears and participates with his wife in all stages of the artificial insemination process.³⁹

However, when a man does not legally consent to the MAR procedure of an unmarried woman, he should be treated as a donor, for whom Civil Code 1479 § 2 applies, and not as a person whose paternity may be recognized in court in the future.⁴⁰

3.3. Content and legal nature of the consent

The necessary content in art. 5 § 3 par b' Law 3305/2005 stipulates that the MAR Authority determines the necessary data included in the information forms and consent documents. Specifically, art. 6 of the Code of Ethics for Medically Assisted Reproduction (decision 73 / 24-1-2017 - Government Gazette 293 / B / 7-2-2017) stipulates that the MAR Units should ensure that every person who gives his consent states that: a) he has been given sufficient information to understand the nature, purpose, and effects of the treatment that he or his partner will receive after consent; b) he has been allowed to receive appropriate counseling on the effects of the treatment which he or his / her partner will receive after the consent and c) he/she was given information about the procedure of modifying or withdrawing the consent.

Consent has a legal character⁴¹ because its legal effects are intentional. Informing those involved, as a condition for written consent, is a condition of active consent in this case.⁴² Consent may be defective, invalid, or void. If it is revocable and the MAR has taken place, then the spouse who was deceived, threatened, or cheated may seek the annulment of the consent, based on art. 140 of the Greek Civil Code, and then may infringe on the paternity of the child, according to art. 1469-1470 of the Greek Civil Code.⁴³

³⁹Areios Pagos, 1233/2017, in *NOMOS*; Areios Pagos, 823/2013, in *Greek Justice*, 2014, 91. See *Court of Appeal of Athens*, 594/2016, in *QUALEX*, rejecting a lawsuit filed by a husband who had consented to heterologous artificial insemination because he had explicitly consented to this artificial insemination of his wife.

⁴⁰ FOUNTEDAKI, *Issues from medically assisted reproduction in an unmarried woman* (opinion), in *EfAD*, 2010, 1010.

⁴¹ F SKORINI-PAPARRIGOPOULOU, *op. cit.*, 91; A. PAPACHRISTOU, *op. cit.*, 211; D. PAPADOPOULOU-KLAMARI, *The Kinship*, 124; V. PERAKI, *op. cit.*, Article 1456, 4; See FILIOS, *Family Law*, 198, where he argues that this is a quasi-legal act. There is also disagreement about whether it is a direct legal act. See thus I. SPYRIDAKIS, *op. cit.*, 18; LEKKAS, *Deadlines and Affinity in the Civil Code*, 44; E. KOUNOUGERI-MANOLEDAKI, *op. cit.*, 11, considers that it is simply notified to the doctor.

⁴² F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 114,115.

⁴³ I. SPYRIDAKIS, *op. cit.*, 19.

3.4. Time of consent

Consent is provided before any medically assisted reproduction procedure has taken place.⁴⁴ Any subsequent consent (approval) does not remove the illegal nature of artificial insemination.⁴⁵ However, it is rightly argued that, even if delayed, the consensus brings about the prescribed consequences of art. 1471 § 2 approx. 2 of Greek Civil Code, when it comes from spouses and of art. 1475 § 2 of Greek Civil Code, when filed from partners.⁴⁶

3.5. Legal capacity

To provide consent, the person is required to have full legal capacity.⁴⁷ The exemption is possible for the person who is in subsidiary judicial support, with the consent of the judicial counselor.⁴⁸ The proportional implementation of the special capacity of marriage, for married couples, is possible and it also covers the co-decision of art. 1387 of the Greek Civil Code.⁴⁹ If one of those who consent is legally incompetent, then the consent is invalid.

3.6. Withdrawal of consent

Withdrawal is done in the same type that the consent is made until the transfer of the gametes or the fertilized eggs to the female body.⁵⁰ It is considered that consent is withdrawn if one of the persons who consents dies before the transfer, unless the conditions of art. 1457 of the Greek Civil Code are satisfied. Given consent is withdrawn freely. It cannot be considered abusive⁵¹. Refusal of consent to either homologous or heterologous fertilization (in the case of heterologous, it must be justified, since art. 1386 of the Greek Civil Code is violated) and the unjustified withdrawal of consent to artificial insemination (art. 1386-1387 of Greek Civil Code) constitutes breakpoint marital events.⁵²

4. Conclusion

Greek Family Law, already quite early (since 2002), provided for a modern legal framework regulating the medical involvement in procreation. The legislator proved his social sensitivity, regarding the right of citizens to reproduce, by passing Law 3089/2002, which was pioneering. Reproductive problems have plagued citizens for many years. The formulation of a special Greek legislative framework, which regulated artificial insemination and determined its consequences in the field of kinship, was imperative. In fact, the Greek legislation on Medically Assisted Reproduction is considered to be one of the most liberal and patient-friendly in Europe. From the analysis above it is proved that the legis-

⁴⁴ V. PERAKI, *op. cit.*, 18.

⁴⁵ A. PAPACHRISTOU, *op. cit.*

⁴⁶ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 66.

⁴⁷ *Ibidem*, 95.

⁴⁸ E. KOUNOUGERI-MANOLEDAKI, *Family Law II*, 16.

⁴⁹ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, No. 97.

⁵⁰ *Court of First Instance of Athens*, 1320/2004, *op. cit.*

⁵¹ F. SKORINI-PAPARRIGOPOULOU, *op. cit.*, 151 ss. .

⁵² A. KOUKOULIS, *Grounds for divorce*, 167.

lator provided regulations, which are in the best interests, not only of the interested parties, but also of the child to be born, protecting it from potential diseases.

Deipectives

