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POSTHUMOUS ASSISTED REPRODUCTION AND TRANSNATIONAL SUCCESSIONS

Il presente contributo rappresenta un output del progetto di ricerca "GoInEU - Governing Inheritance Statutes after the Entry into Force of EU Succession Regulation", cofinanziato dallo European Union's Justice Programme 2014-2020 con il coordinamento dell'Università degli Studi di Firenze, ed è stato già pubblicato sulla rivista "Biblioteca della Fondazione Italiana del Notariato": viene qui ripubblicato con il consenso della Fondazione Italiana del Notariato. Ad ogni modo, il contenuto del presente contributo è di esclusiva responsabilità dell'autore e non può essere preso in considerazione come orientamento della Commissione europea.

The paper aims at discussing the inheritance law consequences of the increasing recourse to posthumous assisted reproduction in cross-border situations, in the light of the EU Regulation 650/2012.

Il presente articolo prende in esame le conseguenze in ambito successorio del crescente ricorso alla riproduzione assistita postuma nei casi transfrontalieri, alla luce del Regolamento UE 650/2012.

Summary: 1. Ancient aspirations and modern techniques. – 2. Reproductive technologies challenge the law. – 3. Cross-border cases and outstanding issues.

1. Ancient Aspirations and Modern Techniques

Probably, the wish to give a descendant to a deceased person who had not the possibility to procreate is as much ancient as humankind itself. Indeed, since very ancient times, different social practices and juridical tools have been utilized in order to fulfil such an objective, meeting at the same time other individual as well as societal relevant needs, according to the different specificities of human cultures worldwide. Here we can mention only a few examples.

The epics of ancient India show the importance and the high consideration given to the practice of *Niyoga*, the so-called "male surrogacy": For purely altruistic reasons a man impregnated a widow and then the new-born was legally deemed to be the deceased husband's son and heir, while the biological parent waived to each and every right towards the child and the woman[1].

[1] We can find references to this highly valued practice in the Vedic poems (*Mahabharata, Adi Parva*, 105): At these regards see G.H. SUTHERLAND, *Bija (seed) and Ksetra (field): Male surrogacy or niyoga in the Mahabharata*, in *Contribution to Indian Sociology*, 1990, 1, 77-103; S. SAHGAL, *Niyoga [Levirate]: Conflict Resolution to Bruised Masculinity in Early India*, in *International Journal of Social Science and Humanity*, 2016, 4, 303-308. It is possible to hypothesize that such an ancient tradition could have contributed to the contemporary quite positive approach towards assisted reproduction in India.

Many ancient peoples practiced Levirate, and among them also Jews who called it *Yibbum*, so that we can find references to it in Biblical and Talmudic sources. According to this institution, the deceased sonless husband's brother, or his nearest relative (in Hebrew *go'el*), had to marry the widow, and their first son was legally considered as the deceased's son and heir[2].

Still today marriage structures that resemble these ancient paradigms can be found among several African peoples, as documented also by anthropological research as well as by recent case-law[3].

With regard to Roman Law, we have to mention the institute of Testamentary Adoption: The adoptee was adopted as the legal son and heir in force of the provisions contained in the adopter's will, and so the adoption produced its legal effects only after the death of the adopter[4]. Moreover, in the Digest

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[2] In the Bible we find Onan, who is punished by God for having refused to perform his duty as *go'el* (see *Genesis*, 38, 8-10), Moses, who regulates the institution of *yibbum* (see *Deuteronomy*, 25, 5-10), and an application of it at the roots of the House of David (see *Ruth*, 4, 13-17). Indeed, the *go'el* does not need to perform a marriage ceremony because he is already bound to the widow by divine decree, and so they have just to cohabit, whilst a solemn rite, called *halizah*, is needed in order to avoid such legal effect: Therefore, some scholars have hypothesized that Levirate may derive from a prehistoric kind of adelphic polyandry, with more brothers actually sharing a wife, similar to the type of marriage still practiced in more recent times in Tibet and among some Indian as well as Amerindian peoples (see J.F. MCLENNAN, *The Levirate and Polyandry*, in *The Fortnightly Revue*, 1877, 694-707; A. LESSER, Levirate and fraternal polyandry among the Pawnees, in Man, 1930, 98-101; J.N. LAMBERT, *Aspects de la civilisation à l'âge du fratriarcat. Étude d'histoire juridique et religieuse comparée*, Alger, 1958; G. FRANCIOSI, *Clan gentilizio e strutture monogamiche. Contributo alla storia della famiglia romana*, I, Naples, 1978, 231; M.B. EMENEAU, B.A. VAN NOOTEN, *The Young Wife and Her Husband's Brother: Ṛgveda 10.40.2 and 10.85.44*, in *Journal of the American Oriental Soc*iety, 1991, 481-494). Anyway, an effect of Levirate could be the practice of actual polygyny, because if the *go'el* was already married he had the duty to receive the widow as a second wife. Maybe also the first Christians, being Jews, practised Levirate, but in the Fourth Century it was prohibited by the Roman Emperors Constantius and Constans, as well as by Canon Law (see C. CASTELLO, *Osservazioni sui divieti di matrimonio fra parenti e affini: raffronto fra concili della Chiesa e diritto romano*, in *Resoconti Istituto Lombardo*, 1939, 322-340; G. COLANTUONO, *Note sul canone 2 del concilio di Neocesarea: la proibizione delle seconde nozze fra cognati nella tarda antichità*, in *www.ledonline.it/rivistadirittoromano*, 2006; A. CUSMÀ PICCIONE, *Vincoli parentali e divieti matrimoniali: le innovazioni della legislazione del IV sec. d.C. alla luce del pensiero cristiano*, in *Annali del Seminario Giuridico dell'Università degli Studi di Palermo*, 2012, 189-278). On the other hand, Jews continued to practice it and, in the Talmud, the whole Book of *Yebamoth* is dedicated to this peculiar institution: Even in the Seventeenth Century the Sephardi Jews of Leghorn were legally authorised by the chiefs of their community, in force of the immunities granted by the Grand Duke of Tuscany, to practice polygamy without restrictions if it was needed in order to fulfil the duty of the go'el (see C. GALASSO, *«La moglie duplicata». Bigamia e levirato nella comunità ebraica di Livorno (secolo XVII)*, in *Trasgressioni. Seduzione, concubinato, adulterio, bigamia (XIV-XVIII secolo)*, edited by S. Seidel Menchi, D. Quaglioni, Bologna, 2004, 417-441).

[3] With regard to the practices of the Igbo in Nigeria and of the Nuer, Dinka and Atuot in South Sudan see: J.W. BURTON, *Ghost Marriage and the Cattle Trade among the Atuot of the Southern Sudan*, in *Africa*, 1978, 4, 398-405; U. EWELUKWA, *Posthumous Children, Hegemonic Human Rights and the Dilemma of Reform: Conversations Across Cultures*, in *Hastings Women's Law Journal*, 2008, 211-258. In South Africa the institution of *Ukungena* (meaning Levirate in isiZulu language) has been regulated by Section 1 of the KwaZulu Act on the Code of Zulu Law 16 of 1985, and by the Natal Code of Zulu Law R151 of 1987. A recent Italian judgement has granted humanitarian protection to a Nigerian widow who had to leave her country of origin in order not to be forced to marry her deceased husband's brother pursuant to the local customs (Cass., 24th November 2017, n. 28152, in Il Sole24Ore, 27th November 2017). On the other hand, among contemporary Jews the Levirate is almost, even if not completely, disappeared, and so performing *halizah* has become the common practice (see E. WESTREICH, *Levirate Marriage in the State of Israel: Ethnic Encounter and the Challenge of a Jewish State*, in *Israel Law Review*, 2003-2004, 427-500).

[4] Testamentary Adoption was practised in Hellenistic (see B.R. TRICK, *Abrahamic Descent, Testamentary Adoption, and the Law in Galatians. Differentiating Abraham's Sons, Seed, and Children of Promise*, Leiden, 2016) as well as in Roman times, and then resurfaced in modern France with the Napoleonic Civil Code of 1804 (see G. BONILINI, *Sulla adozione per testamento*, in *Trattato di diritto delle successioni e donazioni*, II, Milan, 2009, 381-389).

we can find many references to the inheritance law issues posed by natural posthumous procreation, i.e. childbirth following the death of a parent during pregnancy[5].

In our contemporary societies the above-mentioned wish can be granted through assisted reproductive technologies, that have rendered possible not just a merely legal and fictitious posthumous procreation, but also the creation of a biological link with the deceased person.

The diffusion of cryopreserved gametes storage, for health-related or for other social reasons, make possible the utilize of such gametes by the surviving spouse or partner after the death of the other one[6]. Of course, a widow, or anyway a female survivor, can be fertilized with the cryopreserved spermatozoa of a deceased man, but we have to consider also that, when gestational surrogacy is available, even a widower, or however a male survivor, can fertilize the cryopreserved oocytes of a deceased woman and implant the resulting embryos into the womb of a surrogate[7]. And even if both the providers of cryopreserved gametes are dead, other persons, and in particular the parents of the deceased, can utilize such gametes in order to procreate grandchildren, also in this case recurring to surrogacy[8].

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[5] The succession of posthumous children was a very complicated issue for the Roman lawyers (see U. ROBBE, *I postumi nella successione testamentaria romana*, Milan, 1937; F. LAMBERTI, *Studi sui postumi nell'esperienza giuridica romana*, Naples, 2001; G. COPPOLA BISAZZA, *La capacità di succedere dei concepiti post mortem patris: una questione antica*, in *Scritti in onore di G. Silvestri*, Turin, 2016, 647 et seq.). In the most part of the cases the predeceased parent was of course the father, but the ancient sources deal also with children extracted from a dead pregnant mother (see M. BETTINI, *Non nato da donna. La nascita di Cesare e il parto cesareo nella cultura antica*, in *Index*, 2012, 211 et seq.).

[6] P. MANTEGAZZA, *Fisiologia sullo sperma umano*, in *Rendiconti Reale Istituto Lombardo*, 3, 1866, 183, was probably the first one who proposed to store the sperm of the soldiers in order to make possible the procreation of biological descendants for the fallen heroes. One hundred years later such a proposal was implemented with the semen of the first astronauts, because of the fear that their reproductive capacities could be undermined by cosmic radiations (see W.B. LEACH, *Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent*, in *American Bar Association Journal*, 1962, 942). Nowadays the cryopreservation of soldiers' gametes is a current practice in the U.S.A. Army (see M. DOUCETTPERRY, *To Be Continued: A Look at Posthumous Reproduction as It Relates to Today's Military*, in *The Army Lawyer*, 2008, 1), but is utilized also for different purposes, e.g. by oncological patients or by persons who just wish to delay parenthood for professional, or other, reasons (see L. MARTINELLI & AL., *Social egg freezing: a reproductive chance or smoke and mirrors?*, in *Croatian Medical Journal*, 2015, 387). In all the mentioned cases, if the soldier comes back home, or the patient recovers or the professional reaches his/her carrier goals, with undermined reproductive capacities, because of the exposition to biological weapons or to chemotherapy or simply because of the age, he/she can use the stored gametes, but if the soldier falls in action, or the patient does not overcome the cancer or the professional dies for any reason, such gametes can be utilized by his/her surviving partner in a posthumous assisted procreation.

[7] For the account of some Israeli cases see R. LANDAU, *Posthumous sperm retrieval for the purpose of later insemination or IVF in Israel: An ethical and psychosocial critique*, in *Human Reproduction*, 2004, 9, 1952–1956; R.L. FISCHBACH, J.D. LOIKE, *Postmortem fatherhood: life after life*, in *The Lancet*, 28th June 2008, 2166-2167; J. CLARKE, *Dying to be Mommy: Using Intentional Parenthood* as *a Proxy for Consent in Posthumous Egg Retrieval Cases*, in *Michigan State Law Review*, 2012, 1331 et seq.; Y. HASHILONI-DOLEV, S. SCHICKTANZ, *A cross-cultural analysis of posthumous reproduction: The significance of the gender and margins-of-life perspectives*, in *Reproductive BioMedicine and Society Online*, 2017, 4, 21–32. Scholars have also discussed the hypothesis of a posthumous use of preserved ovarian tissue (see A.O. AFFDAL, V. RAVITSKY, *Parents' posthumous use of daughter's ovarian tissue: Ethical dimensions*, in *Bioethics*, 2019, 1, 82-90).

[8] In other Israeli cases a conflict arose between the parents of the deceased soldiers, who wished to utilize their gametes for a posthumous procreation, and their widows, or surviving partners, who opposed or anyway did not want to participate: Two judgements issued in 2016 recognized an existing right to procreate that applies also to posthumous fertilization, but stated that only the spouse or partner of the deceased is entitled to decide on its implementation, thus stimulating a widespread debate in the public where also the biblical precedents of Levirate were echoed (see A. WESTREICH, *Assisted*

Moreover, also when gametes were not stored, new possibilities of posthumous procreation are determined by technical developments. If an embryo was produced through in vitro fertilization when both the parents were alive, he/she can be implanted in the surviving mother if the father is died, or in a surrogate if the mother is died[9]. And, even if there are no gametes nor embryos that have been cryopreserved, it is possible to retrieve both male and female gametes from a corpse, within a few hours after the death, in order to fertilize them for the purpose of a posthumous procreation[10].
From a merely technical point of view all these applications of the reproductive biotechnologies are today feasible and do not pose particular problems, but their legal regimes, and more generally speaking the juridical evaluation of their consequences, may widely vary in the different regulative frameworks provided by different legal orders.

2. Reproductive Technologies Challenge the Law

Reproduction In Israel: Law, Religion, And Culture, Leiden, 2018; A. WESTREICH, *Present day posthumous reproduction and traditional levirate marriage: two types of interactions*, in *Journal of Law and the Biosciences*, 2019, 1-27). Moreover, the lawyer and activist I. Rosenblum proposes a new legal scheme that has been used in a growing number of cases, the so called "biological will": A testator can leave his gametes to a single woman who wishes to become a mother, so that she can fulfil her desire and the new-born is not the child of an anonymous gametes donator but knows about his/her origins and enjoys a relationship with his/her grandparents, i.e. the testator's parents (see *https://biologicalwill.com/*).

[9] Many international newspapers have reported the story of Tiantian, a Chinese baby whose parents died in a car accident four years before his birth in 2017 from a surrogate: In fact, his four grandparents, after a complicate and unprecedented legal battle, have won the custody of the frozen embryos left by the deceased couple and then, given that surrogacy is illegal in China, have found a surrogate in Laos (see *https://www.theguardian.com/world/2018/apr/12/baby-is-born-inchina-four-years-after-parents-died-in-car-crash*). In many other cases, cryopreserved Chinese embryos are being implanted by their parents, or by the surviving one, because the abolition of the one-child policy in 2015 has now made legal a further implantation (see, e.g., *www.scmcom/news/china/society/article/1927598/older-chinese-women-seek-help-realise-dream-secondchild*).

[10] Supreme Court of Western Australia, 2nd January 2013, ex parte C, authorized a posthumous retrieval of gametes for procreative purposes. Such cases of sudden deaths, without the expression of any will by the deceased persons with regard to the posthumous use of gametes, are very problematic (see S. SIMANA, *Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent?*, in *Journal of Law and the Biosciences*, 2018, 2, 329–354). Given that, according to the prevailing opinion among medical doctors, the posthumous retrieval has to be performed within 36 to 72 hours after the death, it is quite rare that the involved parties have the possibility to bring such cases to the attention of a judge, but sometimes it happens. In a very recent case, the Chinese-American parents of a Westpoint cadet, who was declared brain dead on 27th February 2019 due the consequences of a ski accident but is kept alive via life support because for the purposes of organ donation, have had therefore the time to demand the judicial authorization of a sperm retrieval in order to procreate a male grandchild that would represent the only possibility to preserve their name and lineage, also because of the consequences of the Chinese one-child policy on the rest of their extended family in the homeland (see *https://www.documentcloud.org/documents/5766488-Zhu-Petition.html*): The hearing has been scheduled on 21st March 2019, and, in its decision dated 16th May 2019, the Supreme Court of the State of New York has authorized the sperm retrieval (see *https://www.documentcloud.org/documents/6018186-Peter-Zhu-Sperm-Retrieval-Decision.html*). On the other hand, according to the guidelines approved by the American Society for Reproductive Medicine, without a written consent of the deceased posthumous reproduction is possible only at the request of the surviving spouse or partner (see *Posthumous retrieval and use of gametes or embryos: an Ethics Committee opinion*, in *Fertility and Sterility*, 1st July 2018, 45-49).

In some countries, such as the USA or Israel, quite all the mentioned possibilities are allowed and there is a wide experience of their practice, in the general framework of a liberal approach towards reproductive autonomy, or also because of a positive evaluation of such techniques from an ethical and religious viewpoint[11].

That is why these legal orders in the last decades have developed a lot of interesting case-law with regard to the new legal issues raised by the consequences of posthumous assisted reproduction.

The first famous American precedent dates back to the early Nineties. A wealthy Californian professional, who committed suicide, in his will had bequeathed his cryopreserved semen as a legacy to his extramarital lover and appointed as his universal heir the child that she would have to procreate using the bequeathed semen in a *post mortem* fertilisation. In order not to be disinherited, the children born from the deceased's marriage challenged the legitimacy of such a will, but they lost the case because it was judged to be valid and effective[12]. In many other cases American judges have had to decide if the person born from a *post mortem* fertilisation could be considered as legitimate heir of the deceased, and/ or as beneficiary of a family trust for the descendants, as entitled to survivors' pensions, etc. In fact, even if the practise is allowed, its legal consequences are uncertain, because, of course, in the most part of the cases an inheritance law elaborated when such situations were unconceivable does not provide specific solutions for these problems, and so the related issues can become highly controversial precisely because of the diffusion of the recourse to techniques[13].

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[11] In fact, the USA are the most renowned example of a liberal approach towards reproductive autonomy, while in Israel the prevailing religious tradition, of course the Jewish one, has a positive view of assisted reproduction. According to the conclusions of the opinion adopted on 4th June1997 by the Committee on Jewish Law and Standards of the Rabbinical Assembly: «It is permissible to employ a surrogate, whether gestational or ovum, to overcome infertility and to serve as a surrogate. A man fulfills the mandate of procreation in having a child with a surrogate». Even the recent Law passed on 18th July 2018 by the Knesset, in accordance with the conservative views of the orthodox and ultra-orthodox parties, and notwithstanding the amendment proposed by the rightist but secular Likud Party of the Prime Minister B. Netanyahu, has excluded gay couples from surrogacy, but has not opposed surrogacy in itself. Of course, fertility and population growth are not only a matter of religion and culture in a country inhabited by a people survived to genocide and surrounded by numerous and heavily populated enemies. Moreover, *post mortem* fertilisation for parents of fallen soldiers in order to procreate grandchildren may be seen as a sort of compensation that the State owes to them for the death of their children due to mandatory conscription (V. RAVITSKY, Y. BOKEK-COHEN, *"Life after Death": The Israeli Approach to Posthumous Reproduction*, in *Bioethics and Biopolitics in Israel: Socio-legal, Political, and Empirical Analysis*, edited by H. Boas, Y. Hashiloni-Dolev, N. Davidovitch, D. Filc, S. Lavi, Cambridge, 2018, 202-220.

[12] We refer to California 2nd District Court Appeal, 17th June 1993, *Hecht vs. Kane, 20 Cal.Rptr.2d 275*. See G.E. BAILEY, *An analytical framework for resolving the issues raised by the interaction between reproductive technology and the law of inheritance*, in *De Paul Law Review*, 1998, 743- 781; S.C. STEVENSON-POPP, *"I Have Loved You in My Dreams": Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, in *Catholic University Law Review*, 2003, 3, 727-760.

[13] With regard to survivors' pensions see Superior Court of New Jersey, 2000, *In re Estate of Kolacy, 753 A.2d 1257*; United States District Court for the District of Massachusetts, 2002, *Woodward vs. Commissioner of Social Security, 760 N.E.2d 257*; United States Court of Appeal for the 9th Circuit, 14th December 2004, *Gillett-Netting v. Barnhart*; Supreme Court of New Hampshire, 2007, *Khabbaz vs. Commissioner – Social Security Administration, 930 A.2d 1180*; Supreme Court of the United States, 21st May 2012, *Astrue vs. Capato*. With regard to family trusts see Surrogate's Court – New York County, 2007, *In the Matter of Martin B., 841 N.Y.S.2d 207*. Some States, such as California or Louisiana, have adopted specific regulation at these regards, while in other States the legal debate is open: See M.K. ZAGO, *Second Class Children: The Intestate Inheritance Rights Denied to Posthumously Conceived Children and How Legislative Reform and Estate Planning Techniques Can Create Equality*, in *Law School Student Scholarship*, *Seton Hall University*, 2014, paper

On the other hand, throughout Europe more restrictive approaches prevail. However, different States provide different regulations, because there is no harmonization at all in such matters, nor at a European Union Law level nor at a European Convention on Human Rights level. Here we will consider some solutions adopted by different EU Member States that we can consider as highly representatives of the strong diversity of the possible concrete outcomes.

Germany and France, when drafting their first comprehensive regulations of assisted reproductive technologies in the early Nineties, prohibited posthumous assisted reproduction in general terms[14].

More recently, also the Italian statutory law on medically assisted reproductive technologies has explicitly forbidden *post mortem* fertilisation of gametes[15], but some trial judges have therefore considered the different hypothesis of posthumous embryo implantation to be licit[16].

Spain has a more liberal legislative approach towards assisted reproductive technologies. However, even if posthumous assisted reproduction is not always prohibited, there are more restrictions than in the mentioned cases of the USA or Israel. In fact, *post mortem* fertilisation is possible only if the deceased father has consented and the gametes are used within twelve months after his death[17], while

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609; J. MATYSIK, *Recent Developments: Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After Astrue v. Capato*, in *Berkeley Journal of Gender, Law & Justice*, 2013, 269 et seq.; A. STEWART ELLIS, *Inheritance Rights of Posthumously Conceived Children in Texas*, in *St. Mary's Law Journal*, 2012, 413 et seq.; D.D. WILLIAMS, *Over My Dead Body: The Legal Nightmare and Medical Phenomenon of Posthumous Conception Through Postmortem Sperm Retrieval*, in *Campbell Law Review*, 2012, 181 et seq.; I.S. COOPER, R.M. HARPER, *Life After Death: The Authority of Estate Fiduciaries to Dispose of Decedents' Reproductive Matter*, in *Touro Law Review*, 2010, 649 et seq.; B.C. CARPENTER, A *Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, in *Cornell Journal of Law and Public Policy*, 2011, 347 et seq.; K.E. NAGUIT, *The Inadequacies of Missouri Intestacy Law: Addressing the Rights of Posthumously Conceived Children*, in *Missouri Law Review*, 2009, 889; C. KINDREGAN JR, *Dead Dads: Thawing an Heir from the Freezer*, in *William Mitchell Law Review*, 2009, 433 et seq.

[14] See, respectively, *Embryonenschutzgesetz* (Law for the Protection of the Embryo), 13th December 1990, § 4, with regard to Germany, and Loi 29th July 1994, n. 654, with regard to France. In the latter country, such a regulation was enacted also as an answer to the harsh debates that followed the *Parpalaix* case of 1984. A quite similar prohibition is provided also by article 3, paragraph 4, of the Swiss *Embryonenschutzgesetz.*

[15] We refer to article 5 of the Legge 19th February 2004, n. 40. The rationale of such prohibition has to be found in the protection of the child's interest to have two, and not just one, supportive parents (see M. RIZZUTI, *Le esclusioni soggettive dalla procreazione assistita nell'odierno contesto ordinamentale*, in *La comunità familiare tra autonomia e riforme*, edited by D. Carusi, Rimini, 2019, 173 et seq).

[16] See Trib. Bologna, 16th January 2015, in *Famiglia e diritto*, 2015, 488, with comment by A. Scalera, and also in *Corriere giuridico*, 2015, 933, with comment by L. Attademo. A similar decision has been adopted by the neighbouring Tribunal of Reggio Emilia in the same year 2015. Moreover, in the past, when Legge 19th February 2004, n. 40, art. 5, was not in force, an analogous approach had been endorsed also by Trib. Palermo, 8th January 1999, in Fam. e dir., 1999, 52, with comment by M. Dogliotti.

[17] We refer to article 9 of the Ley, 26th May 2006, n. 14: If the mentioned legal requirements are satisfied, posthumous assisted procreation «*producirá los efectos legales que se derivan de la filiación matrimonial*» (meaning: «will produce the same legal effects of filiation in the wedlock»), while, if the predeceased father has not duly consented, «*No podrá determinarse legalmente la filiación ni reconocerse efecto o relación jurídica alguna*» (meaning: «it will not be possible to establish a legal relationship of filiation nor any other legally relevant relationship»). With regard to the deadline of twelve months, Juzgado de Primera Instancia nº 41 de Barcelona, 13th February 2017, n. 678/16-4, has specified that the treatment of posthumous fertilization has to be started within the said deadline but can be continued even after (the author wishes to thank Abg.da Sonia Álvarez, practising lawyer in Barcelona, for the knowledge of this case). With regard to the formalities of the deceased's consent, which can be expressed also in the advance healthcare directives, see F. RAMÓN FERNÁNDEZ, *Reflexiones acerca del documento indubitado en la fecundación "post mortem"*, in *Actualidad Jurídica Iberoamericana*, 2018, n. 9, 454-471.

oocytes can never be used after the death of the mother because surrogacy is always illicit. The retrieval of gametes from a corpse is forbidden too.

The situation in Greece is quite similar, but there are more specific formal requirements: The deceased father's consent to the use of his gametes in a *post mortem* fertilisation has to be declared in a will drafted by a notary, whilst nor a holographic will nor any other document would be adequate for this purpose[18].

3. Cross-Border Cases and Outstanding Issues

Of course, in a framework of free circulation granted by EU Law, and, in more general terms, of ever-increasing mobility and globalization[19], the mentioned differences in regulating posthumous assisted reproduction can prompt people to realize abroad what is forbidden by their domestic laws, through the so called "procreative tourism". Thus, also with regard to this kind of assisted reproductive technology the emerging legal issues are quite often related with transnational cases.

German judges have recognized a widow as the legal owner of the cryopreserved ootids, i.e. oocytes that were injected with her deceased husband's semen when he was alive[20], and therefore she had the possibility to bring such ootids abroad, in order to have them implanted in her uterus.

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[18] See article 1457 of the *Αστικός Κώδικας* (Civil Code): Posthumous assisted reproduction can be authorised by a judge only if the deceased husband was affected by an illness undermining his fertility as well as endangering his life, and if he has consented in a "*συμβολαιογραφικό έγγραφο*" (notarial deed). However, recently a Greek trial judge has authorised posthumous assisted reproduction even if the deceased's consent to it had been declared in a merely holographic will (Πρωτοδικεία των Αθηνών, n. 5146 of 2007, in *Εφαρμογές Αστικού Δικαίου*, 2010, 940), but the legal scholars have criticized the decision, opining that in such a sensitive matter statutory provisions have to be interpreted strictly (see D. PAPADOPOULOU KLAMARIS, *Post mortem artificial fertilization and surrogacy in practice*, in *Culture and Research*, 2016, 5, 81-90). However an even wider interpretation has been endorsed by another very recent judicial decision, simply presuming consent from gametes' cryopreservation (see *https://www.in.gr/2019/01/28/greece/naiapo-efeteio-se-metathanatia-texniti-gonimopoiisi-xoris-ypografitou-eklipontos/*). With specific regard to successions law, article 1711 of the *Αστικός Κώδικας* explicitly states that persons born from "*μεταθανάτια τεχνητή γονιμοποίηση*" (posthumous assisted reproduction) are endowed with the right to inherit from the predeceased parent.

[19] Of course, these phenomena are not only intra-European: England and Wales Court of Appeal – Civil Division, 30th June 2016, *Mr. & Mrs. M. vs. HFEA*, [2016] EWCA Civ 611, has authorized a mother to export the oocytes of her predeceased daughter to the USA in order to realize a posthumous procreation, through the fertilisation of such oocytes with the sperm of an anonymous donor and then the implantation of the resulting embryo in her own womb, whilst at the domestic level only the posthumous utilize of the semen of a deceased man was permitted pursuant to the Human Fertilisation and Embryology (Deceased Fathers) Act 2003, after the strong debates connected to the Blood case of 1997 (see B. SIMPSON, *Making 'Bad' Deaths 'Good': The Kinship Consequences of Posthumous Conception*, in *The Journal of the Royal Anthropological Institute*, 2001, 1, 1-18; G. GIAIMO, *Il consenso inespresso ad esser genitore. Riflessioni comparatistiche*, in *Dir. fam.*, 2011, 2, 855 et seq.). In another case reported by international media, a British couple has illegally exported the sperm of their predeceased son in order to procreate a nephew in California (see: *https://www.timesofisrael.com/jewish-doctoruses-sperm-taken-3-days-after-mans-death-to-give-him-heir/*).

[20] We refer to Oberlandesgericht Rostock, 7th May 2010, in *Zeitschrift für das gesamte Familienrecht*, 2010, 1117: See M. KRÜGER, *The Prohibition of Post-mortem Fertilization, Legal Situation in Germany and European Convention on Human Rights*, in *Revue international de droit pénal*, 2011, 1, 41-64, for further references and for some critical remarks. Moreover, such a case deals with ootids and so involves the complex, from the legal as well as biological viewpoint, issue of the definition of the embryo and of its distinction from the different preembryonic stages: See J. FINDLAY & AL.,

The French judges in a first case have authorized the Spanish widow of a deceased Italian resident to export his cryopreserved gametes to her country, where *post mortem* fertilisation is licit[21]. Then another decision has authorized also a French widow to do the same, regardless of her nationality and so of the lack of any specific link with a legal order allowing posthumous assisted reproduction, but just in order to protect her fundamental human rights to private and family life[22].

The legal arguments are very different, being grounded on property law in the German case and on human rights in the French one, but the concrete outcomes are quite similar: Even if *post mortem* fertilisation is prohibited by domestic legislation, a widow is allowed to practise it abroad. On the other hand, an Italian judge has denied to a widow any right on her deceased husband's cryopreserved gametes, and has stated that the latter's holographic will, explicitly authorizing a *post mortem* fertilisation to be realized abroad, was void, and so deprived of legal effects, because of its contrast with statutory provisions as well as with public morals[23]. Such cases have important implications not only from the viewpoint of bio-law, but also from that of inheritance law. These implications have to be discussed in the light of the relevant provisions of EU Regulation on international successions[24].

First of all, we may assume that the mentioned Italian widow, or any other person in a similar situation, finds a way to bring her husband's gametes to Spain. If the will authorizing *post mortem* fertilization abroad is really void, as the said Italian judge has opined, could it be possible to use such a will in Spain as a valid proof of the deceased's consent, as required by Spanish law? According to article 24 of the Regulation in such a case the law applicable to the will's substantial validity is the

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Human Embryo: A Biological Definition, in *Human Reproduction*, 2007, 905 et seq., and M. RIZZUTI, *Il problema di definire la vita nascente*, in *Le definizioni nel diritto*, edited by F. Cortese, M. Tomasi, Trento-Naples, 2016, 247-265.

[21] Conseil d'État, 31st May 2016, n. 396848, Gonzalez-Gomez. See D. GIRARD, *Le contrôle concret de conventionnalité de la loi enfin admis par le juge administratif des référés*, in *Revue générale du droit on line*, 2016, n. 24295.

[22] Tribunal Administratif de Rennes, 11th October 2016, n. 1604451. As already the *Conseil d'État* had done, also the Administrative Tribunal of Rennes made express reference to the European Convention on Human Rights, with particular regard to its article 8, concerning the right to the respect for private and family life. On the other hand, the Administrative Tribunal of Toulouse rejected a quite similar demand of another French widow, who wished to conserve her deceased husband's gametes waiting for a possible change in the domestic legislation (see *https://www.actualitesdudroit.fr/browse/civil/personnes-et-famille-patrimoine/2883/insemination-postmortem-autorisation-a-rennes-refus-a-toulouse*).

[23] The decision has been issued by the Tribunal of Florence in May 2017, and has never been published in legal journals, but the author has knowledge about the case thanks to Dr. Gianni Baldini, practising lawyer in Florence and President of A.M.I. Toscana. In general terms, from an Italian law viewpoint, it is possible to consider gametes as things and so object of disposition
by will, e.g. in order to earmark them to heterologous donation or also to scientific research (see M. RIZZUTI, *Diritto successorio e procreazione assistita*, in *Biolaw Journal*, 2015, 3, 29-48), whilst with regard to embryos it would not be possible because they are considered as legal subjects, even if in a very peculiar and limited sense (see S. LANDINI, M. RIZZUTI, J. BASSI, N. RUMINE, *Brevi riflessioni sulla soggettività. Giurisprudenza e prassi*, in *Ianus*, 2015, 12, 115-143), but the main problem is raised by the contrast of such a disposition with the specific statutory prohibition against *post mortem* fertilisation.

[24] Of course, we refer to Regulation EU 650/2012 of the European Parliament and of the Council of 4th July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

Italian one[25], and therefore also in Spain the will should have to be considered as void and deprived of legal effects. On the other hand, a Spanish judge could state that the fundamental reproductive rights of the woman have to necessarily prevail and that the infringement of such a right would be manifestly incompatible with the public policy of the forum, so that the application of Italian law should be refused in accordance with article 35 of the Regulation[26].

Moreover, we have to take into consideration the ordinary developments of the above-mentioned transnational cases. After a post mortem fertilisation realized abroad, e.g. in Spain or Greece, probably the new-born child will go back father's assets. Could he/she be considered as a legitimate heir?

In the framework of legal orders where posthumous assisted reproduction is forbidden, and is moreover labelled as contrasting with public morals, as in the mentioned Italian decision, possibly it would be considered as manifestly incompatible with the public policy of the forum, and so the recognition of a filiation grounded on it could be accordingly denied. And without a legally recognised relationship of filiation such a new-born person would not be considered as a legitimate heir of the deceased. On the other hand, an opposite evaluation could be reasonably based on the principles elaborated by European case-law with regard to other, and even more ethically sensitive, prohibitions in the matter of assisted reproductive technologies. In fact, with reference to gestational surrogacy, that is forbidden in the most part of Europe, the European Court of Human Rights has repeatedly decided that denying for public policy reasons the recognition of any legal relationship of filiation to a child born abroad from a surrogate would represent a violation of the human right to the respect of private and family life of the child himself[27]. In other words, we cannot punish the innocent child because of his illicit birth[28], and so the fundamental criterion of the child's best interests has to prevail against public policy. The same reasoning and argumentation should therefore be applied also with regard to a child born abroad from posthumous assisted reproduction[29].

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[25] According to article 24, paragraph 1, of the said Regulation, the admissibility and substantive validity of a disposition of property by testament is governed by the law which would have been applicable to the succession of the person who made the disposition if he/she had died on the day on which the disposition was made. In the discussed case there were no special connections with other legal orders nor choices of law, and so, according to the general rule provided by article 21 of the Regulation, the law applicable to such a succession would have been the law of the State in which the deceased had his habitual residence at the time of death, i.e. the Italian one.

[26] According to article 35 of the Regulation, the application of the otherwise applicable law may be refused only if such application turns out to be manifestly incompatible with the public policy (*ordre public*) of the forum.

[27] See European Court of Human Rights, 26th June 2014, *Mennesson c. France*, n. 65192/11; European Court of Human Rights, 26th June 2014, *Labassee c. France*, n. 65914/11; European Court of Human Rights, 21st July 2016, *Foulon & Bouvet c. France*, n. 9063/14 and n. 10410/14.

[28] This is the same reason why today also the recognition of children born from, e.g., adultery is admissible. It the past, legal mentality was strongly different and Emperor Justinian even explicitly declared that he had prohibited such a recognition in order to inflict a further pain to the guilty parents through the denial of a legal status for the children (see *Novella 74.6* of 4th June 538).

[29] See M. RIZZUTI, *Diritto successorio e procreazione assistita*, in *Biolaw Journal*, 2015, 3, 29- 48, and then Cass., 15th May 2019, n. 13000. The unacceptable, and quite paradoxical, alternative is well represented by a decision of the Russian

However, we have to carefully evaluate to which extent such an argument can be used against internal prohibitions and regulations in the matter of reproductive technologies. Let's consider some peculiar, but not unconceivable, circumstances that we could hypothesize with regard to the concerned cross-border situations. E.g. what if the testament consenting to *post mortem* fertilisation turns out to be false? And what if the gametes are even stolen[30] and brought to an extra-European country where consent is not legally required?

In such cases the recognition of a legal filiation, with all its inheritance law effects, probably would be not justifiable. Maybe it would be better to equate such a situation with a sort of (involuntary) heterologous fertilization with gamete "donation": Therefore, distinguishing these cases from the abovementioned ones, we should recognise to the child a fundamental right to know about his/her genetic origins[31], but not a full filiation status with all the resulting inheritance rights.

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authorities in a case of posthumous assisted reproduction: Given that the posthumous new-born has nor a father, who is predeceased, nor a mother, because the widow has recurred to surrogacy, he has no legal existence and his birth cannot be registered (see M. SABATELLO, *Posthumously Conceived Children: An International and Human Rights Perspective*, in *Journal of Law and Health*, 2014, 29 et seq.).

[30] This is not a mere hypothesis: Italian judges have sentenced a prominent gynaecologist and fertility doctor for robbery of oocytes (see Cass., 23rd September 2016, n. 39541, *Antinori*).

[31] In many countries such a right has been acknowledged also to the children born from assisted reproductive technologies by some recent legislative reforms (such as the *HFEA Disclosure of Donor Information Regulations 2004* in England; the *Lag 351:2006 om genetisk integritet* in Sweden; the *Gesetz zur Regelung des Rechts auf Kenntnis der Abstammung bei heterologer Verwendung von Samen*, 17th July 2017, in Germany), as well as by important judicial decisions (such as Corte cost., 10th June 2014, n. 162, in Italy; Bundesgerichtshof, 28th January 2015, *XII ZR 201/13*, in Germany; Tribunal Constitucional, 28th April 2018, n. 225, in Portugal), and it has been even enshrined in the revised article 119, paragraph 2, letter *g*, of the Swiss Constitution. See at these regards: G. CHIAPPETTA, *Anonimato e procreazione medicalmente assistita eterologa*, in *Studi in onore di U. Majello*, Napoli, 2005, 383 ss.; J. STOLL, *Swedish donor offspring and their legal right to information*, Uppsala, 2008; R.J. BLAUWHOFF, *Foundational facts, relative truths: a comparative law study on children's right to know their genetic origins*, Antwerp, 2009; M.A. DE LORENZI, V.B. PIÑERO, *Assisted human reproduction offspring and the fundamental right to identity: The recognition of the right to know one's origins under the European Convention of Human Rights*, in *Personalized Medicine*, 2009, 79-92; B. FEUILLET-LIGER, T. CALLUS, K. ORFALI (eds.), *Who is my Genetic Parent? Donor Anonymity and Assisted Reproduction: A Cross-Cultural Perspective*, Brussels, 2011; J. GUICHON, M. GIROUX, I. MITCHEL, T*he Right to Know One's Origins: Assisted Human Reproduction and the Best Interests of Children*; A. DIVER, *A Law of Blood-ties. The right to access genetic ancestry*, Cham, 2014; R. BRANDT, *Sperm, clinics and parenthood*, in *Bioethics*, 2016, 8, 618–627; R. BRANDT, *Mitochondrial donation and 'the right to know'*, in *Journal of Medical Ethics*, 19 August 2016; R. PANE, *Ancora sul diritto di conoscere le proprie origini*, in *Diritto delle successioni e della famiglia*, 2015, 435-455; D. ROSANI, *Il diritto a conoscere le proprie origini nella fecondazione eterologa: il caso italiano e l'esperienza estera*, in *Biolaw Journal*, 2016, 1, 211-239; M. RIZZUTI, *Trattamento dei dati sanitari e recenti sviluppi del diritto di famiglia*, in *Diritto e Salute. Rivista di sanità e responsabilità medica*, 2017, 2, 24-36; C. SÁNCHEZ HERNÁNDEZ, *Identidad genética y anonimato en la fertilización asistida*, in *Actualidad Jurídica Iberoamericana*, 2018, n. 8, 138-155; T.C. DE CAMPOS, C. MILO, *Mitochondrial Donations and the Right to Know and Trace One's Genetic Origins: An Ethical and Legal Challenge*, in *International Journal of Law, Policy and the Family*, 2018, 2, 170–183.