THE ISSUE OF CONSENT IN BIO-MEDICALLY ASSISTED REPRODUCTION PROCEDURES (THE CASE OF "EVANS V. THE UNITED KINGDOM")

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The article deals with medical law problems that can occur in the field of medical treatment of sub-fertility and infertility. As illustrated by a specific case, decided by the European Court of Human Rights in Strasbourg (Evans v. the United Kingdom), assisted procreation involves a number of moral, ethical and consequently legal dilemmas. Since the introduction of the modern in vitro fertilization procedures that allow extra-corporal fertilization and the preservation of embryos for the future implantation, the question arises concerning the time of completed fertilization for such an embryo. Is it the time when fertilization in vitro is finished, or the time when embryo that was fertilized in vitro is implanted into the woman's body? The answer to this question is decisive in cases when a couple, after the preservation of their embryos, divorce (separate) or do not agree on the question of the implementation of an embryo(s) into the wife's (partner's) body.

Key words: medical law, freedom of decision on childbirth, right to reproduce, bio-medically assisted procreation, informed consent, withdrawal of consent, divorce, legal and ethical status of embryo.

1. INTRODUCTION

We have recently been witness to rapid developments of science and scientific developments in numerous areas of human activities. A day hardly passes by

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without us learning about a new invention that will either facilitate our life, or make it more difficult, at least for the traditionalists among us, depending on individual attitudes. The scientific fields that stand out in several ways in this regard definitely include biomedicine. Biomedicine has made an enormous progress lately, which was completely unimaginable even a few decades ago. We can only guess how far the new discoveries in this field will take us. Could we soon become immortal or at least get close to that goal? Will we soon be able to prolong and maintain the quality of our life with the aid of new vital organs, which will replace the ailing and degenerated ones and will be provided by our cloned duplicate or will be grown in a laboratory from the omnipotent stem cells? Has man already been successfully cloned, following the success in cloning Dolly the sheep?

A lawyer obviously cannot answer the above mentioned and many other similar questions. Reading papers and different literature in the field also makes one wonder whether scientists themselves know the answers to such questions. We have frequently witnessed events when a publication describing revolutionary discoveries in the field was rejected; sometimes the sources which report such news are unreliable or do not provide scientific verification.[1] It is undoubtedly true that the development of biomedical science is very interesting for the general public, mainly because its findings cut deep and directly into the essence of humankind, its most intimate spheres, such as life and health, physical and mental integrity, reproductive freedom, right to privacy, personal dignity and identity of every individual.

2. LEGISLATION IN THE REPUBLIC OF SLOVENIA

The issue I will present in this paper is that of bio-medically assisted procreation procedure (hereinafter: BMAPP[2]) and is based on the freedom of decision

[1] Statements on cloned children have been distributed several years ago to various media by the Raelian religious community and their infertility expert Brigitte Boisselier (president of the Clonaid company), as well as the infamous Italian gynaecologist Severino Antinori.

[2] It is a term that has become commonplace in the field of reproductive medicine. It has to be stressed that not only medicine but also biology contributes to the success of procedures in the field. This is why we no longer use the term "medically assisted procreation" but "bio-medically assisted procreation".

on childbirth. The Constitution of the Republic of Slovenia[3] states in Article 55 that deciding on the birth of one's own children is free[4] and that the state has to guarantee the possibilities for exercising this freedom and provide for the conditions to enable the parents to decide to have children. In line with the authentic interpretation by the Constitutional Commission the following rights are derived from this freedom: the right to discover and treat reduced fertility or infertility, the right to prevent conception and the right to artificial abortion for women.[5]

2.1. The right to discover and treat reduced fertility or infertility

Because the right to discovery and treatment of reduced fertility or infertility cannot be ensured in any other way than with the help of the health service, the state is obliged to provide for its functioning. The state is also obliged to pass adequate legislation which lays down in detail the manner of exercising this constitutional right.

By the year of 2000, all the questions from the field of health measures in guaranteeing the right to free decision-making on bearing children in the Republic of Slovenia were governed by the Health Measures in Exercising Freedom of Choice in Childbearing Act.[6] In 2000, a new act was passed solely in the field of discovering and treating infertility. This Act derogated from the

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[3] OG RS NOs 33I/1991-I, 42/1997, 66/2000, 24/2003, 69/2004, 69/2004, 69/2004, 68/2006.

[4] Seen from the viewpoint of the topic of the paper – infertility and medical measures to treat it - it is rather unacceptable that the Constitution speaks of "his/her own" children. As the Constitution refers to the freedom of choice, a question can be posited whether a human who cannot be a (genetic) parent due to infertility, can at all have the right to have a child with the aid of donated reproductive cells. To be sure, it has to be taken into consideration that the aim of this constitutional provision is to enable the fulfilment of a person's desire to have a child. This does not necessary entail genetic parenthood; social parenthood can achieve the same purpose.

[5] See Draft of the Constitution of the Republic of Slovenia (annex), explanation of Article 55 of the Constitution by the constitutional commission, Poročevalec skupščine RS, No 1/92, 17 January 1992, p 23. On the latter rights see Zupančič, K., Pravna ureditev prekinitve nosečnosti (Legal Provisions on Pregnancy Termination), in: Polajnar Pavčnik A., (ed), Wedam Lukić D., (ed), Pravo in medicina, Cankarjeva založba, 1989, p 195 - 214.

[6] OG SRS No 11/1977, 42/1986, OG RS No 29/1995, 70/2000.

relevant provisions of the above mentioned Act. The other two rights, which are derived from the constitutional freedom, are still governed by the old Act. The new Act, which was in a relatively short time since its adoption already submitted to a referendum and an intensive general public debate,[7] is entitled the Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act (hereinafter: the Act).[8]

2.1.1. Core provisions of the Act

The Act first regulates the treatment of infertility. It deals with procedures to determine the causes of infertility or reduced fertility and the elimination of such causes by professional counselling, medications and surgery. According to the Act, treatment also includes the removal and preservation of reproductive cells of men and women facing the possibility of becoming infertile. The Act does not include more detailed provisions on treatment, because this is neither possible nor required. The issue is about expert medical questions which are governed by deontological principles.

Types of bio-medically assisted procreation procedures are based on the definition of infertility treatment. The Act defines the BMAPP as the implementation of biomedical procedures that lead to pregnancy in ways other than having sexual intercourse. The BMAPP mainly include: fertilisation outside of a woman's body, i.e. the introduction of sperm cells into a woman's reproductive organs and the introduction of egg cells together with sperm cells into a woman's reproductive organs; and *in-vitro* fertilisation, which involves the joining of egg and sperm cells outside a woman's body (in a glass container) and the introduction of fertilised egg cells or embryos in the early stage of development into the reproductive organs of a woman. The list of procedures is not exhaustive, which is indicated by the use of "mainly". This means that the Act does not exclude other procedures that are being or will be developed

[7] For more detail see Žnidaršič V., Oploditev z biomedicinsko pomočjo (Assisted Reproduction), Pravna praksa, year 20, No 18, p 9 – 11 and Zupančič V. K., Spočetje z biomedicinsko pomočjo in pravo (Assisted Conception and the Law), Pravna praksa, year 20, No, 18, p 5 – 9 and Zupančič, K., Zanemarjeni otrok: spočetje z biomedicinskimi postopki in pravo (Neglected Child: Assisted Conception and the Law), Delo, 26 May 2001, year 43, No 119, p 14 – 15.

[8] OG RS No 70/2000.

by biomedical science if it considers them acceptable. All BMAPP can only be carried out in order to achieve pregnancy and give birth to a child and for no other purposes.

The Act introduces the principle that an infertile couple must first undergo classical infertility treatment methods; i.e. counselling, medications and surgical procedures. Only if these prove inadequate, can BMAPP be used. BMAPP are usually homologous, meaning that reproductive cells of the couple undergoing treatment are used. Only in exceptional cases, when findings of the medical science and practice show beyond doubt that homologous procedure would not be successful for an individual couple, the s. c. heterologous BMAPP can be used. This is a procedure where a reproductive cell by a donor of either sex can be used. The latter is exceptionally allowed in cases of an extremely severe hereditary disease.

Donorship is not solely limited to man in the Republic of Slovenia (as it is in several European legislations, such as Austria, Germany and Norway[9]). This is mainly so because donating an egg cell is the only possible way to allow an infertile woman to give birth to a desired child. On the other hand (with the same BMAPP) the use of both – the sperm cells and the egg cells from the donors at the same time – is prohibited. It is also forbidden to use a donated embryo, i.e. to implant an embryo into a woman's body that was created from the reproductive cells of the male and female donors (in relation to the woman who will get the implanted embryo). The assisted reproduction procedure in such a way ensures that the child is a genetic offspring of at least one partner in the couple undergoing treatment. It is moreover forbidden to use a mixture of female and male reproductive cells as this does not follow nature; a child's (genetic) father or mother are unknown and no data are available that would be important for the health of the child which could be provided in case of medical necessity.

Only heterosexual couples are entitled to use BMAPP: a woman and a man who are married to each other or are cohabiting.[10] The Act provides for com-

[9] For more detail refer to Žnidaršič, V., Oploditev z biomedicinsko pomočjo, Primerjalnopravni prikaz, mednarodnopravni akti, (Assisted Reproduction in Comparative Law, International Acts), in: Polajnar Pavčnik A., (ed), Wedam Lukić D., (ed), Pravo in medicina, Cankarjeva založba, 1989, p 215 – 226.

[10] Cohabitation should not only be dealt with in the sense of the descriptive definition from Article 12 of the Marriage and Family Relations Act, OG RS No 69/2004-UPB1, 101/2007, 122/2007. Assistance should also be given to a woman and man who claim

plete anonymity of donors of reproductive cells, in general as in the relation to children. [11] The child thus cannot learn the identity of the male or female donor and is only entitled to learn such data about the donor that are important for his/her health (to diagnose a child's disease, for treatment). Such data are available for health reasons if the child is capable of judgement and at least 15 years old.[12] The Act allows the medical professionals and other professionals in the field of assisted reproduction to object and not cooperate in those procedures from conscientious reasons: the professional personnel are not under obligation to carry out BMAPP or take part in them. The Act expressly prohibits assisted

to be living in cohabitation. Such an assurance should prove enough for the doctor from whom it cannot be expected to try and see whether the couple is telling the truth. A very important indicator is that a man wants to have a baby with the woman and has carried out all the necessary tests and medical procedures with the woman and went through unsuccessful (and usually long-lasting) treatment. BMAPP as a rule should not be carried out prior to the completion of such procedures.

11 There are various views on whether a child should be told about the identity of his real (genetic) parents. If an Act would allow a child conceived through assisted reproduction procedures to be told about the identity of his/her genetic parents (the donor of the sperm or ovary cell), the genetic parents, who had no desire to establish a parenting attitude at conception and live their own personal and family lives where there is no space for this child, could be placed in an awkward position. Social parents who were given a chance to get a child through donorship (exercise of the right to free decision-making on childbirth!) can demand the child to be theirs alone on the basis of their right to privacy and family life. By uncovering the donor the relation between the child and the social parents could be disturbed, which is not in the child's interest. On the other hand, the opposite view (that the child should be told about the identity of the sperm or ovary cell donor) is based on the child's right to personal dignity (Article 24 of the Slovenian Constitution) as the basis of the child's right to personal identity, necessary for development and formation of the child's personality. The child who does not have the chance to be told the identity of his genetic parents is claimed to be experiencing identity crises, and be discriminated with regard to other children. Moreover, there is a chance that a child could marry a close relative.

12 In 2005 The United Kingdom switched from a system that guaranteed anonymity of the reproductive cells donors to a system which allows children to learn of the identity of the donor under certain conditions. For more detailed treatment refer to: http://www.hfea.gov.uk/en, 25 March 2008. Also refer to Kirilova Eriksson M., Reproductive Freedom In the Context of International Human Rights and Humanitarian Law, Martinus Nijhoff Publishers, The Hague, 2000, p 199 – 201 and Robertson J. A., Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction, v: Steinbock, B., (ed.), Legal and Ethical Issues in Human Reproduction, Ashgate, Darthmouth, 2001, p 79 – 82.

reproduction procedures for the purpose of realisation of the agreements on surrogate motherhood.[13]

3. CONSENSUS FOR THE ASSISTED REPRODUCTION PROCEDURE

The issue of consensus for the BMAPP is expressly laid down in the Act.[14] The Act states that the procedure can only be carried out on the basis of a written consent by the spouses or cohabiting partners. Before the spouses or cohabiting partners consent to the BMAPP in writing, the doctor must explain the procedure, the success rate, potential consequences and hazards of the procedure for the woman, man and child. The doctor also has to counsel and inform the couple of the reasons for which their personal data will be collected and processed and explain that data are protected as a professional secret. If necessary, the doctor directs the spouses or cohabiting partners to a psychological-social counselling on the planed BMAPP.

The doctor must also explain the rules on the preservation of reproductive cells and embryos to the spouses or cohabiting partners as well as ask about their wishes regarding the duration of the preservation and their decisions on possible unused embryos. The doctor must present other possibilities to the spouses or cohabiting partners which could solve or bypass the reason for their infertility, including such methods that are not used by the doctor's medical facility. The doctor must mention non-medical choices such as adoption or abandoning the treatment. The written consent must be provided by the spouses or cohabiting partners for every individual BMAPP.

I will deal here with the issue of consent, which is encountered in the area of assisted reproduction when dealing with BMAPP that involve the s. c. stored

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[13] The notion of "surrogate motherhood" in its broadest sense includes all cases in which a woman binds herself by a contract to bear and give birth to a child against payment or for free and to deliver a child for good to the contracting party after birth. For more detailed treatment refer to Žnidaršič, V., Surogatno materinstvo – pravni (in etični) vidik oploditve z biomedicinsko pomočjo, (Surrogate Motherhood: Legal (and Ethical) Aspects of Assisted Reproduction) in: Lobnikar, B., (ed), Žurej, J., (ed), Raziskovalno delo podiplomskih študentov Slovenije, Družboslovje in humanistika, Ljubljana, Društvo mladih raziskovalcev Slovenije, 2000, p 45 – 55.

[14] For a comparative law review refer to De Cruz P., Comparative Healthcare Law, Cavendish Publishing, London, 2001, p 323 – 356.

embryos. These are embryos that were not implanted into the woman's body after fertilisation but rather stored for possible future needs, either because of the possibility of an unsuccessful BMAPP or subsequently expressed desire by the couple for another child.

According to the Slovenian legislation early embryos must be stored by specially certified BMAPP centres. The centres must abide by current discoveries of the medical science and established medical practice. The embryos are kept for the time that is specified by the woman and man undergoing BMAPP, for a period not exceeding five years. If the spouses or cohabiting partners cannot agree on the time of keeping, the decision is made by the national BMAPP commission. After the above mentioned deadlines expire, the embryos must be left to die. Embryos in their early stage are not on disposal either of the persons from whom they originate or other persons. The centre for BMAPP must not hand them out to anyone. The Act also prevents agency from collecting, keeping and using embryos in the early stages of development. Trading with embryos is strictly prohibited.

We will now present a concrete case-law example and focus on the issue of what happens if one of the spouses does not want the embryos to be kept while the other insists that this be done, or what happens if a woman demands that a preserved (frozen) embryo is implanted despite her husband's or partner's disapproval.

3.1. Evans v. the United Kingdom

The case has made headlines in England as well as in the world. Evans v. the United Kingdom case was decided by the European Court of Human Rights in Strasbourg. The case revolved around the issue of keeping frozen embryos in cases when the partners separate or divorce and there is no longer the consensus for continuing the BMAPP and also not for the implantation of the embryo(s) into the woman's (ex wife's, ex partner's) body.

The facts of the case are as follows:[15] In 2000 the Evanses began infertility treatment at a clinic in the United Kingdom. Health checks have found Mrs. Evans to

[15] Summary taken from the ruling in the Case of Evans v. The United Kingdom, dated 7 March 2006, published at EURO IUS-INFO, European Court of Human Rights, http://www.ius-software.si, 29 March 2008.

be inflicted with pre-cancerous formations on both ovaries so the doctors proposed that egg cells be extracted, Mrs. Evans to be operated on and later a BMAPP would be executed with the fertilised egg cells or the embryo that would develop from them. Freezing the egg cells and sperm cells separately was not possible. When the clinic informed the couple on the course of the BMAPP, it also stated that both partners have the right to withdraw consent at any time prior to the embryo being implanted into Mrs. Evans's body. Mr. Evans consented in writing to freezing the embryos thus created for a period of ten years, even in the case of his death or loss of capability of discernment.

Mrs. Evans's egg cells were extracted during the procedure, fertilised with Mr. Evans's sperm and six embryos had formed which were then frozen. The wife then undertook treatment where her ovaries were removed. The couple was told that they could continue with the BMAPP only two years after the completed surgery. But this did not happen as the couple divorced after two years and Mr. Evans withdrew his consent for the procedure to continue.

In line with the English legislation in the field, the *Human Fertilization and Embryology Act 1990,*[16] the clinic should have destroyed the embryos, but Mrs. Evans sued her husband to restore his previous consent. She was unsuccessful at all stages of the court proceedings in the UK as the courts kept stressing that the aim of the English act was to ensure a continuous consent by both partners – from the start of the treatment to the moment the embryo is implanted into the body. Mrs. Evans then filed a suit on the European Court of Human Rights in Strasbourg. She built her case mainly on the following human rights and freedoms:

a) Frozen embryos have the right to life protected by law (Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[17] (hereinafter: the Convention);
b) English legislation, which in such cases states that the frozen embryos should be destroyed, is contrary to the right to respect for private and family life (Article 8 of the Convention);
c) Such legislation goes against the principle of prohibition of discrimination (Article 14 of the Convention).

[16] Refer to http://www.opsi.gov.uk/Acts/acts1990, 28 March 2008.

[17] European Convention on Human Rights, refer to OG RS (13 June 1994) MP, No 7 – 41/1994 (RS 33/1994).

The court in Strasbourg also decided against the plaintiff and ruled that the English legislation did not contravene the said human rights and fundamental freedoms.

The court based its ruling on the following main reasons:

a) The court ruled that there was no violation of Article 2 of the Convention as in the absence of consensus on when human life begins the issue of when the right to life begins comes under the auspices of national legislations (also in the case of abortion). The English law does not protect the right to life of an embryo.
b) Regarding the violation of the right to private and family life, the court stressed that the phrase "the right to privacy and family life" is a very broad notion; an individual's "private life" includes, inter alia, different aspects of an individual's physical and mental identity, together with the individual's right to autonomy, personal development and establishment and development of relationships with other people; this also includes the right of both partners to freely decide on whether to have or not to have children."
c) The court failed to share the plaintiff's view that a woman with fertility problems who is dependent on the aid of doctors (through IVF) was discriminated against if compared with a woman who can get pregnant by sexual intercourse; Mrs. Evans on the other hand stated that she (and women in a similar position) depended on the donor of the seed who can prevent the embryo to be implanted, while a woman, who conceived in the normal way, once the fertilisation took place, can freely decide on her fate and the fate of the child; the court ascertained that such differentiation was underlined by objective facts in the said case.

The court was of the opinion that provision of Article 8 of the Convention gives the right to respect decisions of both parties, one that wants to be a parent and the other that does not. Because there is no international consensus regarding the use of BMAPP and legislations in individual countries differ to a large extent, the court ruled that individual states hold discretion rights regarding the legislation in this area. The United Kingdom regulated the issue in the way it did[18] and nothing would be amiss if it regulated it differently. The court also emphasised the fact that both parties were informed of the way in which consent could be withdrawn before starting the BMAPP.[19]

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[18] See also Grubb, A., (ed), Principles of Medical Law, Second Edition, Oxford University Press, 2004, p 700.

[19] In more detail in Wicks, E., Human Rights and Healthcare, Hart Publishing, Oxford, 2007, p 167 – 169.

Regardless of the ruling, I feel it is proper to point to dissenting opinions, written by two judges, who disagreed with the ruling stating that there was no violation of Article 8 of the Convention in the case.

While the two dissenters agreed that both the man and the woman hold independent rights to free decision-making regarding their reproduction, the case in point shows that the absolute power of a man to withdraw consent takes away the woman's autonomy in deciding on her genetic material. The two judges said that the state should provide for exceptions from the clearly stated rule in such exceptional cases. Such rules are unable to consider the specific social and psychological aspects in concrete cases, which is what prompted the judges to declare the need for a specific approach in this type of special cases. A very careful weighing of rights is necessary: while the woman is deprived of any chance to give birth to her own child, the man still has the chance to satisfy his need for fatherhood.

The judges believe that the correct approach would be the following: the interests of the party who withdraws consent for BMAPP and wants to have the embryos destroyed should prevail unless the other party has no other means to have a genetically-related child and has no children at all and does not intend to have recourse to a surrogate mother in the process of implantation.

Such an approach would, the two judges said, strike a fair balance between public and private interests, as well as between conflicting individual rights themselves.

Following the plaintiff's request, the Evans case was also decided by the Grand Chamber of the European Court of Human Rights. The decision to send the case to the Grand Chamber was taken by five judges of the Grand Chamber who decided on the basis of Article 43 of the Convention that this was an important issue regarding the interpretation or use of the Convention and this was also an issue of general importance. The Grand Chamber passed its ruling on 10 April 2007, which ran largely along the same lines as the court's first ruling.[20] I would like to stress that the judges were unanimous in deciding that there was no violation of Article 2 of the Convention and ruled with 13 votes to 4 that no violation of articles 8 and 14 of the Convention took place. Three judges meanwhile wrote their joint dissenting opinion.[21]

[20] Refer to Case of Evans v. The United Kingdom from 10 April 2007, published at EURO IUS-INFO, European Court of Human Rights, http://www.ius-software.si, 29 March 2008.

[21] For more details refer to the quoted ruling, p 18 – 20.

3.1.1. Commentary to the Evans case

The dilemma, triggered by "Evans v. the United Kingdom" is quite extensive and complex. We can say it has been present ever since the option of *in-vitro* fertilisation (IVF) was presented in connection with possibility of freezing of the embryos. This is where the discrepancy between the situation at the time of the fertilisation and the situation that exists at the moment of implantation into the woman's body appeared. Meanwhile, as the above mentioned case shows, a couple can separate, a partner can die or merely withdraw his/her consent, etc. The woman could die as well, which could pose the question of whether the embryo could be implanted into the body of another woman.

Some believe that open dilemmas merely concern the question of whether IVF is treated as a single or a dual act. According to the single act interpretation, the fertilisation procedure is completed when an embryo is implanted into the woman's body. On the other hand, according to the dual act interpretation there are two phases in the procedure: the IVF is performed first and then the resulting embryo is inserted into the woman's body in phase two.

The first interpretation says that IVF is only completed with the implantation of the fertilised egg, meaning that the BMAPP cannot be carried out if marriage was terminated or the consent was withdrawn prior to that. The second interpretation meanwhile holds that fertilisation has already been completed during the marriage (when the consent was still in place) and the implantation is merely the realisation of the performed fertilisation.

Despite the existence of many different positions on the question, we can see that theory and case-law are more in favour of taking a stricter position in such cases. If we compare IVF procedures to normal ways of getting pregnant (and the aim is to make such procedures resemble the normal ones to the greatest extent possible), we can see that there is no dual act there. It is true, however, that the provision on the possibility of withdrawing consent loses some of its weight if it cannot be exercised when fertilisation occurred, but implantation was not carried out.

Comparative law deals with this question in very different ways.[22] Legislation in Denmark, France, the Netherlands, Greece and Switzerland expressly state the partner's right to withdraw consent at any time before the embryo is implanted into the woman's body. Similar practice is also carried out in Germany, Belgium, Finland, Iceland, Sweden, Turkey and the United Kingdom.

[22] For a comparative law review refer to the above-quoted ruling, dated 7 March 2006.

Hungary employs a different solution, where in such a case a woman can proceed with a BMAPP regardless of divorce or her husband's death, unless the couple has agreed otherwise in writing. The husband's consent to BMAPP can only be revoked up to the fertilisation in Austria, Estonia and Italy, allowing the woman to freely decide on her course of action after that.[23]

The USA does not have a federal law governing the issue. Since only a few states have introduced laws concerning this issue, it has been left to courts to determine how the issue should be resolved. On a case-by-case basis, the courts took different positions. It seems, however, that the position that the will of the person who does not want to become a parent prevails. A court in the state of Massachusetts ruled in the *AZ v. BZ* case[24] that the agreement, concluded between the spouses that leaned towards giving the wife the right to the embryos in case of divorce should not be enforced if opposed later by the husband. The so-called forced procreation is not a field amenable to judicial enforcement, or, as we would put it, this is not a right that could be freely disposed of in such a way. The freedom of personal choice in matters of marriage and family life should always prevail.

The Israeli Supreme Court accepted also an interesting ruling in the *Nachmani v Nachmani*,[25] case, when a childless Israeli couple decided to undergo IVF and later enter into a contract with a surrogate mother, because the wife's health was impaired to such a degree that she was not be able to carry and deliver a child. The couple separated after the embryo was frozen and before the surrogate mother in California was contracted. The husband began to oppose the use of the embryos as he had found another woman and was expecting a child with her. The wife, however, wanted to go on with the procedure. The Israeli Supreme Court decided, with seven votes to four, in favour of the wife. Each of the judges wrote a separate opinion. The majority of judges stated that the woman's interests, the desire to have a child and in particular her lack of alternatives to achieve genetic parenthood outweighed those of the husband who did not want to be a father.

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[23] For a more detailed overview of individual national legislations dealing with assisted reproduction, see also Meulders – Klein, M. T., Deech, R., Vlaardingerbroek, P., (ed), Biomedicine, the Family and Human Rights, Kluwer Law International, The Hague, 2002, pp. 479 – 578.

[24] *Ibidem.*

[25] *Ibidem.*

4. CONCLUSION

We can finally ask the question of what a Slovenian court would decide if faced with such a case. Considering the valid Infertility Treatment and Procedures of Biomedically-Assisted Procreation Act, the ruling would not present significant legally-technical problems. The Act expressly states in Article 23 that either of the spouses or cohabiting partners can withdraw consent or renounce BMAPP until the sperm, eggs cells or embryos are implanted into a woman's body. The centre must write down the revoking decision and issue a certificate if asked to do so by one of the spouses of cohabiting partners. The doctor must make sure that consent is not revoked before implanting the embryos.

I believe that such a solution is correct and wise as it prevents a wide range of dilemmas and second thoughts triggered by the so-called "forced procreation". The above mentioned forceful nature of procreation is clearly stated by Mr. Johnston Evans, the defendant in the presented Evans case, who said that if the events had taken a different course and the man had a testicle surgery that would render him infertile, nobody could force a woman to have an embryo implanted, carry the foetus to term and deliver a child. In such a case, he said, gender equality should apply and they should not be treated differently.

I am convinced that the situation of a man and woman cannot be completely equalled in all segments of reproductive freedom. This is why I have to agree with the decision of the European Court of Human Rights as a lawyer, although maybe with a heavy heart as a human being. The decision is cruel regarding its consequences – i.e. that Mrs Evans will never be able to have a genetic offspring - but in my view it is the only correct and legally founded one. If we crossed the boundary of what we define as free and informed consent to a certain medical procedure, especially in cases with such far-reaching consequences as a birth of a new child, we would create a very dangerous precedent.

The arguments of the dissenting judges are easily understandable if observed through the prism of humanity, but do not stand against a founded legal evaluation. One of the arguments, presented by the proponents of "full" equality between man and women as regards their reproductive rights, is that the presented solution goes against the fact that a man cannot prevent the child from being born in cases of normal (unassisted) conception. The argument is of course out of place and it is a classic case of simplifying complex issues. The

reason why a man cannot prevent the child from being born if conceived in a natural way (through sexual intercourse) is that such an act would mean an encroachment into the bodily integrity of a woman in the form of an abortion. It does not mean that men have less rights women regarding the decision on a future child or reproductive freedom, it only takes into consideration the simple biological fact that a future child or an embryo develops inside its mother's body. This gives the woman a certain priority in exercising her own rights in comparison with those of the father.

In cases of BMAPP, this imbalance in exercising reproductive rights is diminished.[26] This is why I believe that in such cases the exercise of procreative rights of man and woman should be as balanced as possible. To be sure, this can only be achieved up to a point when this is possible, i.e. up to the implantation of the embryo into the woman's body.

In the Evans case the European Court of Human Rights made a difficult decision, balancing extremely important and highly protected interests. I believe that it made the right decision by supporting the basic principle of providing (informed) consent for any medical procedure.

Sažetak

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PITANJE SUGLASNOSTI U POSTUPCIMA BIOMEDICINSKI POMOGNUTE OPLODNJE (PREDMET "EVANS v. UJEDINJENO KRALJEVSTVO")

U posljednje smo vrijeme suočeni s brzim razvojem znanosti i sa znanstvenim otkrićima, među ostalim, i na području biomedicinske znanosti. Najnovije tehnike i postupci na području medicinski potpomognute oplodnje obećavaju gotovo nemoguće, primjerice, jamče da uz pomoć kloniranja svatko može postati biološki roditelj svojoj

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[26] Compare to Wicks, E., Human Rights and Healthcare, Hart Publishing, Oxford, 2007, p 169.

željenoj djeci. Nekada nepojmljiv razvoj s druge strane donosi i mnoštvo dvojbi i otvorenih pitanja. Moramo biti svjesni, povijest bi nam pri tome morala služiti kao dobra učiteljica, da samo znanstveni napredak, bez moralne i etičke osnove, ne donosi nužno samo dobre i korisne rezultate. Suprotno, uz određene uvjete, može se preinačiti čak u štetnu praksu, koja u traženju uvijek novih znanstvenih otkrića krši čovjekova temeljna ljudska prava i slobode.

Na području tzv. prokreativne slobode, koje poseban aspekt, utvrđivanje i liječenje neplodnosti i smanjenje plodnosti, je predmet ove rasprave, moralna i etička pravila moraju biti još u toliko većoj mjeri saveznik i suputnik svih suradnika u tim postupcima. Navedeni su postupci umnogome posebni zbog činjenice rođenja djeteta, dakle novoga ljudskog bića. Njegovo se rođenje ne događa prirodnim putem, nego pomoću različitih biomedicinskih metoda. Zakonodavac se treba zalagati za to da se moralno-etičko i konzekventno i pravno osjetljivo područje regulira na takav način da se napredak znanosti i tehnologije zrcali u pozitivnom doprinosu čovječanstvu.

Dvojba, na koju upozoravam u ovom djelu, odnosi se na biomedicinski potpomognutu oplodnju. Posebice su problematični postupci koji omogućuju oplodnju izvan ljudskog tijela, tzv. IVF postupci. Pomoću tih postupka uvelike se povećava uspješnost, a posljedica toga je rađanje većeg broja željene djece. Istodobno, te tehnike otvaraju mnoga teška pitanja: na primjer koliko embrija smijemo kreirati izvan majčina tijela? Moramo li sve tako nastale embrije unijeti u majčino tijelo ili ih možemo sačuvati (zamrznuti) za kasniju upotrebu? Što činiti ako embriji, iz različitih razloga, poslije ne mogu biti upotrijebljeni? Smijemo li ih darivati drugome paru, trebaju li služiti za znanstvena istraživanja ili ih trebamo pustiti umrijeti? To su samo neka od mnoštva pitanja koja zakonodavac mora riješiti na tome području. U ovom djelu je, na temelju posebnog primjera iz engleske sudske prakse, koja je dobila epilog i na Europskom sudu za ljudska prava u Strassbourgu, predstavljena dvojba – što učiniti kada se partneri, koji imaju u postupku IVF pohranjene embrije, o provođenju medicinski potpomognute oplodnje više ne usuglašavaju? Čije pravo prevlada? Pravo muškoga, čije su spolne stanice bile upotrijebljene za oplodnju izvan majčina tijela, koji ne želi dijete i odriče se suglasnosti za završetak postupka, odnosno unosa pohranjenog embrija u tijelo žene, ili pravo žene, koja želi imati dijete i konkretan je postupak za nju jedini mogući način da postane biološki roditelj? Primjer "Evans v The United Kingdom" donosi s moralno-etičkog stajališta možda teško prihvatljivo rješenje, a istodobno jedino pravno pravilno.

Ključne riječi: medicinsko pravo, sloboda odlučivanja o rađanju djece, pravo na reprodukciju, biomedicinski potpomognuta oplodnja, informirana suglasnost, povlačenje suglasnosti, razvod braka, pravni i etički status embrija.

Zusammenfassung

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DIE ZUSTIMMUNGSFRAGE BEI BIOMEDIZINISCH ASSISTIERTEN REPRODUKTIONSVERFAHREN (DER FALL "EVANS GEGEN DAS VEREINIGTE KÖNIGREICH")

In letzter Zeit sehen wir uns einer sprunghaften Entwicklung von Forschung und wissenschaftlichen Entdeckungen gegenüber, unter anderem im Bereich der biomedizinischen Wissenschaft. Die neuesten technischen Verfahren im Bereich der medizinisch assistierten Befruchtung versprechen das nahezu Unmögliche, dass nämlich mit Hilfe der Klontechnik praktisch jedermann biologischer Vater oder Mutter seines Wunschkindes werden kann. Diese einst unvorstellbare Entwicklung bringt andererseits eine Vielzahl von Dilemmata und offenen Fragen mit sich. Wir sollten uns dessen bewusst sein, dass der reine wissenschaftliche Fortschritt ohne moralische und ethische Grundlagen nicht zwangsläufig gute und nützliche Ergebnisse zeitigt, wobei uns die Geschichte eine gute Lehrerin sein kann. Er kann sich sogar ganz gegensätzlich unter bestimmten Voraussetzungen in eine schadvolle Praxis verwandeln, die auf der ständigen Suche nach neuen wissenschaftliche Entdeckungen die Grundrechte und áfreiheiten des Menschen verletzt.

Auf dem Gebiet der so genannten prokreativen Freiheit, deren besonderer Aspekt, nämlich die Feststellung und Behandlung der Unfruchtbarkeit und beschränkten Fruchtbarkeit, Gegenstand dieser Erörterung ist, müssen moralische und ethische Regeln umso stärker als Verbündete und Wegbegleiter aller an diesen Verfahren Beteiligten fungieren. Die erwähnten Verfahren sind in hohem Maße spezifisch, weil sie zur Geburt eines Kindes führen, also eines neuen menschlichen Wesens. Seine Geburt kommt nicht auf natürlichem Wege zustande, sondern mit Hilfe unterschiedlicher biomedizinischer Methoden. Der Gesetzgeber ist es, der dafür sorgen muss, diesen moralisch-ethisch und folglich auch rechtlich heiklen Bereich so zu regeln, dass sich der wissenschaftliche und technologische Fortschritt in einem positiven Beitrag zur Menschheit niederschlägt.

Das Dilemma, auf das ich in diesem Teil hinweise, bezieht sich auf die biomedizinisch assistierte Befruchtung. Besonders problematisch sind jene Verfahren, die die Befruchtung außerhalb des menschlichen Körpers ermöglichen, die so genannten IVF-Verfahren. Sie erhöhen den Erfolg erheblich und führen zu einer größeren Anzahl von Wunschkinderge-

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burten. Auf der anderen Seite werfen diese Techniken viele schwere Fragen auf: etwa wie viele Embryonen wir außerhalb des Mutterleibes schaffen dürfen? Müssen alle auf diese Weise entstandenen Embryonen in den Mutterleib implantiert werden, oder können wir sie für den späteren Gebrauch aufbewahren (einfrieren)? Was, wenn die Embryonen aus unterschiedlichen Gründen später nicht verwendet werden können? Darf man sie einem anderen Paar schenken oder zu Forschungszwecken verwenden, oder lassen wir sie sterben? Dies sind nur einige einer Vielzahl von Fragen, die der Gesetzgeber auf diesem Gebiet zu klären hat. In diesem Teil wird anhand eines besonderen Beispiels aus der englischen Rechtsprechung, das auch ein Nachspiel beim Europäischen Gerichtshof für Menschenrechte in Straßburg hatte, das Dilemma behandelt, was zu tun ist, wenn Partner, deren Embryonen im IVF-Verfahren aufbewahrt wurden, über die Durchführung der medizinisch assistierten Befruchtung nicht mehr übereinstimmen. Wessen Recht überwiegt? Das Recht des Mannes, dessen Keimzellen für die Befruchtung außerhalb des Mutterleibs verwendet wurden, der das Kind nicht will und die Zustimmung zur Vollendung des Verfahrens beziehungsweise zur Einpflanzung des aufbewahrten Embryos in den Körper der Frau verweigert, oder das Recht der Frau, die ein Kind will und für die das betreffende Verfahren die einzige Möglichkeit darstellt, eine biologische Mutter zu werden? Das Beispiel "Evans gegen das Vereinigte Königreich" mag vom moralisch-ethischen Standpunkt aus vielleicht eine schwer annehmbare Lösung darstellen und ist doch rechtlich die einzig richtige.

Schlüsselwörter: Medizinrecht, freie Entscheidung, Kinder zu gebären, Recht auf Reproduktion, biomedizinisch assistierte Befruchtung, aufgeklärte Zustimmung, Widerruf der Zustimmung, Ehescheidung, rechtlicher und ethischer Status des Embryos.