

Filiation derived from assisted reproduction

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Coordinator



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Spanish Regulation

- Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida. (Assisted Reproduction Law)
- Spain is quite open when it comes to admitting different forms of assisted reproduction. For example: heterologous fertilization, gamete donations, cryopreservation and not only for infertile couples, but for single women or homosexual couples.
- **Regarding to filiation, art. 7.1 says:** «The affiliation of those born with assisted reproduction techniques will be regulated by civil laws, except for the specifications established in the following three articles». (The three exceptions are: «legal determination of filiation, posthumous fertilization and surrogate motherhood). Then, it continues saying: «In no case, the registration in the Civil Registry will reflect data from the nature of the generation».
- That is quite important, because this law is not creating new parentage determination titles, which are still based on the biological truth.

Assisted Reproduction: Heterosexual couples

- Depending on the familiar situation of the woman, the filiation rules are different.
- In the case of a married heterosexual couple, there is a presumption of filiation that the children the wife has during the marriage are from her husband, **art. 116 Civil Code**. Because of that, the consent of the husband is needed when his wife starts the treatment. Once they have agreed, it is impossible to refuse the filiation, art. 8.1 (Assisted Reproduction Law).
- When it comes to non-married heterosexual couples, there is not a presumption, but her partner will be able to become the father of the child if he agree in a document before the treatment. Then, that document can be used as the «indubitable writing» according with the **art. 8.2 (Assisted Reproduction Law)** to start a proceeding in the Civil Registry.
- **The majority of the Spanish doctrine** considers that it is indifferent if the fecundation is homologous or heterologous, since **the filiation determined in those ways cannot be disputed** even though it does not match with the biological truth.

Assisted Reproduction: Homosexual couples

- In the case of homosexual couples of women, the question is how to determine the filiation of the non-pregnant, due to the fact that the pregnant always will be a mother (*Mater semper certa est*).
- Said that, there is a special rule in the **Assisted Reproduction Law (art. 7.3)**, which allows, as long as they were a married couple, «declare in accordance with the provisions of the Civil Registry Law that she consents to the filiation being determined in her favour with respect to the child born of her spouse».
- **The majority of Spanish doctrine** considers that the fact of non-requiring a proof about the assisted reproduction treatment is a heavy mistake. Because, it easily allows to avoid the law principles, so homosexual women can buy reproductive material online and do homemade inseminations.
- In fact, the jurisprudence has solved a case, in which the women had made a deal with one friend (he donated his sperm). At the end, he regretted it and filed a lawsuit claiming his parenthood. The court declared the contract nullity and determined the filiation in his favour. (**SAP Valencia (Sección 10ª), 27 noviembre 2017**)

Assisted Reproduction: Homosexual couples

- When it comes to non-married women, the Law does not include that possibility. However, the Supreme Court has admitted that situation using the institution of «state possession» (posesión de estado). To sum up, it means that acting like a father or a mother implies the parenthood.
- The first resolution was **STS 5 diciembre 2013**, and its argumentation was supported by the fact that the non-pregnant agreed the treatment before the clinic. The consent is: «of particular significance because it constitutes the free will and manifested by both litigants of the desire to be parents by express consent, to the point that in cases like this, such consent must be appreciated».
- The **STS Pleno, 15 enero 2014**, confirms that reasoning and declares: «Proven the common purpose of both women to resort to assisted reproduction technique, as well as, the existence of a subsequent family unit between the two partners and the biological child of one of them».
- Nevertheless, **part of the Spanish doctrine considers** that using the «state possession» is not correct, because this tool was thought to recognize biological parenthood (mainly in the past). And in these cases it is obvious the non-biological motherhood.

Surrogate Motherhood

- Regarding to surrogate motherhood, we have to say that it is an illegal practice in our country, but at the same time it is not punished or expressly prohibited. The Law simply does not recognize it, and the **art. 10 (Assisted Reproduction Law), says**: «The contract by which the pregnancy is agreed, with or without price, by a woman who renounces her maternal affiliation in favour of the contractor or a third party **will be null and void**» . Which implies that the substitute woman will be the mother.
- In spite of this situation, some people try to avoid the law going to other countries in which it is legal. One of the reasons why this happens is because, **the Instruction of the General Direction of Registries and Notaries, 5th October 2010, admits the registration in the Consular civil registry** of children born through surrogacy, when, at least, one of the applicants is Spanish and a judicial decision, issued in the country of origin, is presented to the person in charge of the Registry. (That happens when they go to USA or Canada).
- In other countries, like Russia, Georgia and Ukraine, there is not a judicial resolution, due to the law recognition of the surrogate motherhood. However, if the father is biological, he will be able to recognize the filiation in Spain. After that, his wife can adopt the child without the need of the administrative declaration of suitability.