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I. INTRODUCTION

The turn of the century is witnessing many "revolutions" which are attributable to the extremely rapid evolution of science and technology. The human brain, having found the ideal servant in computers, is able to produce impressive results in a much shorter time than ever before. One such "revolution" is the result of the astonishing developments in reproductive technology which take place in laboratories. It is no more an exaggeration to say that man has managed to direct the evolution of life. And while medicine and biotechnology are running at a high speed, the law crawls on all fours, sweating and struggling to catch up. Due to this scientific progress, new situations occur, and it is rather doubtful whether old legal rules can successfully regulate certain problems that were unimaginable in the past.

A considerable volume of legal writing, mostly originating from the United States, has been devoted to the legal issues raised by the progress of biotechnology in the fields of assisted reproduction[1] and surrogate motherhood.[2] Both represent contemporary developments in family building that depart from the models humanity has been experiencing through the ages. Their discussion usually covers several branches of substantive law, such as family law successions, constitutional law, human rights, and criminal law. So far, extremely little attention has been paid to the problems created by reproductive technologies in a world where the everyday private life of individuals, due to their mobility, may be linked with more than one jurisdiction. In other words, the issues related to the conflict of laws in this field have been more or less neglected.[3] But the simple fact that laws treating such matters differ from state to state or from country to country and that the presence of foreign elements may prevent the courts from applying their domestic rules,

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1. Weldon E. Hawins & James J. Dalessio, *The Ever-Widening Gap Between the Science of Artificial Reproductive Technology and the Laws Which Govern That Technology*, 48 DePaul L. Rev. 825 (1999); Gitlin et al., *Aquiring Children by Alternate (Non-adoption) Means*, Child Custody Litigation, Ch. 11, Illinois Institute for Continuing Legal Education, Feb. 1998; John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 Hastings L.J. 911 (1990); Roger J. Chin, *Assisted Reproductive Technologies Legal Issues in Procreation*, 8 Loy. Consumer L. Rep. (1996); Kathryn V. Lorio, *From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 La. L. Rev. 27 (1996).

2. Casey Chisick & Darren Bacons, *Not Just a Human Incubator: Legal Problems in Gestational Surrogate Motherhood*, 25 Ma. L. J. 49 (1997); Susan F. Appleton, *Surrogacy Agreements and the Conflict of Laws*, 1990 Wis. L. Rev. 399 (1990).

3. However, the analysis on conflicts problems and surrogate motherhood in Appleton, *supra* note 2.

makes such a discussion necessary. The variety and novelty of the problems that may occur render it fascinating.

This contribution is intended to serve as an incentive for further discussion. It will examine only a few problems of the general theory of conflict of laws, as it is understood in continental Europe, such as the incidental question, characterization, mandatory rules and public policy, as they may be utilized in assisted reproduction cases connected with more than one legal system. Actually, these problems are harder and of more importance than those belonging to the special part of conflicts: it is their solution, not always easy, that leads to the appropriate conflicts rule. Once there, one will deal with the rules for contracts (e.g., in case of a surrogate motherhood agreement), torts (e.g., in negligence for safekeeping frozen sperm or embryos), family issues (e.g., disavowal by father of child born after artificial insemination of mother) or succession (e.g., capacity of posthumously reproduced child to inherit). A brief outline of the usual methods of assisted reproductive technology as well as of surrogate motherhood, which is often linked with it, is necessary as a starting point.

II. ASSISTED REPRODUCTIVE TECHNOLOGIES

Due to infertility, many people are unable to fulfill their desire to produce offspring. Their growing numbers, combined with the solutions offered to them by biotechnology, have caused a considerable growth in the assisted reproductive technology market. More and more couples as well as single persons find the answer to their prayers in medical laboratories. The usual methods involved are (a) *artificial insemination*, (b) *in vitro fertilization*, often combined with *cryopreservation* and (c) *surrogate motherhood.*

Artificial insemination is one of the oldest methods of assisted reproduction. It is the method mimicking nature: a woman's ovum is fertilized by the artificial delivery of semen in her vagina or uterus. The semen may be that of her husband (homologous, AIH) or that of a donor (heterologous, AID), or a combination of the two (AIC). It may also be fresh or frozen. To this technique, one must add the gametes intrafallopian transfer (GIFT), where ova and sperm are placed together in the fallopian tube for fertilization.[4]

In vitro fertilization (IVF) is the medical procedure which involves mixing semen and ova in a test tube or petri dish. The preembryo that may be formed is transferred to the woman's womb or fallopian tube (ZIFT) or is frozen and stored to be implanted later. The gametes used may be those of the couple, but often either the ova or the sperm or both may be donated by third persons.[5] *Cryopreservation* is the process by which sperm or embryos are frozen and banked at very low temperatures for future use. It is quite often the complementary element of IVF.

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4. Christine A. Djalleta, *A Twinkle in a Decedent's Eye: Proposed Amendments to the Uniform Probate Code in Light of New Reproductive Technology*, 67 Temple L. Rev. 335, 337 (1996).

5. *See id* at 337-38.

To the above techniques one might add artificial procreation through *cloning*, effected by (a) the artificial division of the fertilized egg to more viable parts, (b) the removal of the nucleus from one embryo and the replacement of it with a nucleus from another embryo or person or (c) the removal of a DNA sample from a living or deceased person and its transplant into the nucleus of another egg or embryo. This technique, however, has only been experimental so far and has not been used for the creation of human beings. However, Britain has already granted a patent covering cloned early stage human embryos and the United States is assessing the situation.

The technique of surrogate embryo transfer (SET) which involves the removal of an embryo from a surrogate by uterine lavage and implantation in another woman's uterus should also be mentioned. It resembles the donation of ova, except that the egg is first fertilized in the donor's body, usually by artificial insemination.

A much debated way for a woman who cannot or does not want to gestate to become a mother is *surrogate motherhood.* Another woman offers to gestate the embryo produced either by IVF of the woman's egg using her husband's or a donor's sperm, or by artificial insemination. Sometimes the surrogate mother's motives may be clearly altruistic, as it happens between relatives, but the usual case involves paid surrogate motherhood.[6]

III. THE LEGAL ISSUES

Inevitably these techniques touch upon the delicate matters of human reproduction, human rights, personal relations, famil, property and successions. Each state or country may regulate such matters in a different way,[7] adopting a restrictive or hospitable attitude, or choose not to regulate them at all. The issues which may be raised belong to several areas of private and public law.

The technique which is less expected to give rise to problems is artificial insemination with fresh sperm. If the husband's sperm is used, medicine is only assisting by imitating nature and no more disputes can occur than those in regular fertilization, with the exception of tort claims for negligence on the part of the doctor or hospital. Theoretically, if a donor's sperm is used, a paternity claim might follow. But usually the donor is unknown and such claims are rare.

However, if the sperm is frozen several things may happen:

(a) The husband who has provided the sperm dies. His widow wants to be inseminated posthumously. Should a dead man become a father?

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6. Anita Stuhmkcke, *For Love or for Money: The Legal Regulation of Surrogate Motherhood*, Murdoch U. Electronic J. L., Vol. 3, No. 1 (1996); Expecting Trouble Surrogacy, Fetal Abuse, and New Reproductive Technologies (ed. P. Boling, 1995).

7. *See, e.g*, Frederique Dreifuss-Netter et al., *Adoption and Medically Assisted Procreation Under French Law*, 1996 St. Louis-Warsaw Transatlantic L.J. 93, or the English "Human Fertilization and Embryology Act 1990."

(b) The man dies and his last will contains a clause according to which his girlfriend is entitled to the frozen sperm if she wants to bear a posthumous child. Can the sperm be inherited?
(c) The sperm bank where a man has deposited his sperm to be kept frozen before he undergoes therapy which will leave him infertile destroys the sperm by negligence. Will the man, his wife, or both have a tort claim?
(d) A woman or her child seeks support from the man who has donated genetic material.

In IVF, where a considerable part of the process—including the critical point of fertilization—takes place outside the woman's body, various scenarios may appear:

(a) The married couple for its own reasons has the embryo frozen for future use. Soon thereafter they decide to divorce. They both want the embryo. Who has a stronger claim?
(b) If the father dies before the gestation and birth of the child, can the embryo inherit his property?
(c) Can the couple decide to abandon the embryo in the clinic where it has been kept frozen?
(d) Can the couple decide to donate or sell the embryo?
(e) If a donor's sperm fertilizes a donor's egg and the resulting embryo is implanted in another woman, will she be recognized as the mother of the child although she has not contributed any genetic material? Or, if the child dies in such a case, can the parents who did not provide any genetic material inherit?
(f) As the procedure is quite difficult, expensive and exhausting for the woman, doctors usually have more than one egg fertilized and some of the resulting embryos which will not be used may be cryopreserved in case they are needed later. If the parents are not interested in having other children, who decides the fate of the embryos?

In surrogate motherhood the issues vary:

(a) If the surrogate mother decides she wants to keep the baby, can the couple who made the surrogate agreement with her take the child?
(b) Vice versa, if the couple that was expecting to take the baby changes its mind and does not want it anymore, can the surrogate mother force them to take it?
(c) Is the surrogacy agreement sufficient to make the couple parents of the baby, or is it necessary to adopt the child?
(d) Can a child claim support from the surrogate mother?
(e) Can the couple assert a cause of action in case of wrongful death of the embryo if the surrogate mother decides to have an abortion? If the latter smokes, drinks, or takes drugs during pregnancy and the baby is born deformed or retarded, can the couple have a claim in tort against her?

(f) If a surrogate mother abducts the baby and takes it to another country to avoid the demands of the biological parents, is it an international child abduction within the scope of the relevant Hague Convention?

Of course, this enumeration of cases is not exhaustive, but it is enough to show the variety of legal issues a lawyer or a judge may be confronted with. All of them may be much more complicated if foreign elements are present, such as different domiciles, habitual residences, nationalities, different places where important steps are taken, place of the tort in another jurisdiction or foreign applicable law chosen by the parties. For example, in country A (the genetic mother's home), the gestational mother in a surrogacy agreement might be considered the legal mother, while in country B (the gestational mother's domicile) she might not. When this happens, conflict of laws has to provide solutions concerning jurisdiction, the applicable law and the recognition and enforcement of foreign judgments.

As in all conflicts cases when the applicable law has to be indicated, the first step consists of characterizing the issue.[8] In most of the above hypotheticals the basic issue and its characterization depend on the previous answer to an incidental/preliminary question.[9] For example, if the main problem is whether the frozen embryo of an English couple domiciled in England, which is banked in Belgium may inherit from its biological father and under what law, it is necessary to begin by examining the legal status of the embryo. Is it a human being,[10] a thing, or something else?[11] Can it have rights? Which law will determine whether it has capacity to inherit? Will the *lex successionis* apply to the incidental question as well?

Actually the status of the embryo is an incidental question of great importance in many main issues arising from artificial procreation, such as its capacity to inherit or be inherited, property matters or torts. Another significant incidental question is whether the provider of genetic material, or the woman who gestates an embryo without being biologically related to it, is the legal parent of a child in cases where the main question is custody, support or inheritance. The same applies to the issue of whether in surrogate motherhood situations the social parents are, for the same purposes, the legal parents of the child. Last but not least, the legal relationship of

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8. François Rigaux, La théorie des qualifications en droit international privé, (1956); Arthur H. Robertson, Characterization in the Conflict of Laws, (1940).

9. T. S. Schmidt, The Incidental Question in Private International Law, 305 (Recueil des Cours 1992 II). For incidents of status and the incidental question, see Symeon C. Symeonides et al., Conflict of Laws: American, Comparative, International 429 (1998).

10. Louisiana is the only state which protects the in vitro fertilized ovum as a "juridical person" with a separate legal identity and certain rights. *See* La. R.S. 9:124-27, 129 (1998).

11. For an extensive discussion on the various views, see Triber, *Growing Pains: Disputes Surrounding Human Reproductive Interests Stretch the Boundaries of Traditional Legal Concepts*, 1998 Seton Hall Legis. J. 103, 134 (1998); Brenda McGivern, *Bioethics and the Law: The Impact of the Genetic Technology on Prenatal Management*, E Law, Murdoch U. Electronic J.L., Vol. 2, No. 3, Dec. 1995); Jean-Christophe Galloux, *Le statut des gametes humains en droit français contemporain*, 1995 McGill L.J. 993, 1000. *See also* York v. York, 717 F. Supp. 421, 422 (E.D.Va. 1989), Davis v. Davis, 842 S.W.2d 588, 589 (Tenn. 1992), and Kass v. Kass, 235 A.2d 150 (N.Y. App. Div. 1997).

the child with its biological parents may be the incidental question of importance to the main issue of adoption of the child by them.

Traditionally, American conflicts writers are not particularly eager to discuss topics related to the general part of the field. Continental private international law theory has dealt extensively with the problem of the incidental question, but this does not apply to legislation or case law. Actually there is very little case law internationally to offer adequate guidance.

The proposed solutions vary. According to one opinion, the law applicable to the incidental question will be the appropriate conflicts rule of the forum.[12] According to another opinion, the same law which will be applied for the main issue will also govern the incidental question.[13] There is an intermediate view according to which the forum will select one or the other solution as it thinks fit for each individual case.[14]

The first opinion emphasizes that since *ex hypothesi* the incidental question is capable of arising in its own right or in other contexts than the one before the court and has conflicts rules of its own available for its determination, the court, should it apply a foreign conflict rule, might reach a decision contrary to its own conceptions of justice. The decision might also be different from what the court would have decided if the question had been presented to it in another form and not incidentally.

The second opinion leads to the application of the same law for both the main and the preliminary issue. It seems practical and efficient. But it is probably the third opinion which offers the most flexible answers by letting the court decide in each individual case the solution that serves its interests best.

When the incidental question concerns the legal status of the embryo, i.e. an issue which has been strongly debated, flexibility may lead to just results, although it is almost inevitably accompanied by legal uncertainty.

Characterization is a process which is present in the application of any legal rule. Fitting a factual situation into the appropriate rule of law requires its dressing with the appropriate legal garment, thus giving it its legal character. In conflict of laws the applicable law depends on the characterization of the issue. The latter is more complicated than characterization in domestic cases and thus, more difficult. In cases without foreign elements domestic law characterizes the issue, while in conflicts cases more laws are involved and, consequently, it has to be decided which one of them will be used for the characterization. The main possibilities offered are (a) the substantive law of the forum,[15] (b) the law

12. Walter Breslauer, The Private International Law of Succession in England, America and Germany 18 (1937).

13. *See* Robertson, *supra* note 8 at 566, 568. *See also* Schwebel v. Ungar, (1963) 42 D.L.R. 2d 622 (1964) 48 D.L.R.2d 644, Baindail v. Baindail, 122, 127 (1946).

14. A. E. Gotlieb, *The Incidental Question in Anglo-American Conflict of Laws*, 1955 Can. Bar. Rev. 523.

15. John H. Morris et al, The Conflict of Laws 418 (1993).

designated as applicable by the forum's conflicts rules[16] or (c) a combination of both.[17]

Characterization *lege causae* is not usually preferred; on the other hand, the prevailing method of characterizing a factual situation *lege fori* may not be a satisfactory solution in cases as the ones mentioned above, where very important issues related to the person and the family are at stake and the law, with which the situation is otherwise connected, might object to the outcome of the case due to its characterization. For example, in a surrogacy case, if the forum accepts the surrogacy agreement as creating the bonds of parentage, while the law of the country of the habitual residence of the family so created requires an adoption decree for the establishment of parentage, the child will be a stranger to the couple in the country where they live. Thus it is preferable to resort to a comparative characterization, i.e. to characterize the issue according to the *lex fori* but taking into consideration the characterizations provided by the other systems involved.[18] In artificial reproduction, issues of characterization may prove quite complicated and such a flexible approach seems more appropriate.

In all instances, however, when the choice of the applicable law in incidental questions or in the characterization of the issues affects the life of a child, it is preferable to allow the court to exercise its discretion in each individual case and to adopt flexible approaches, which usually serve better the interests of the child. This last criterion has been recognized as playing an important role in all family matters, domestic or international.[19] Also, it has to be remembered that quite often characterization has been used as an escape device, in order to reach satisfactory solutions by subjecting the facts of the case to a different conflicts rule.

IV. THE ROLE OF MANDATORY RULES OF THE FORUM AND OF PUBLIC POLICY

Artificial procreation is a matter which belongs to the sphere of private interests. Accordingly, the forum in a relevant conflicts case will proceed as with all other private international law cases, first characterizing the issues as described, then finding the appropriate conflicts rule and, finally, applying the law, domestic or foreign, that has been indicated. Nevertheless, sometimes the great importance of some issues to the legal order of the forum sets aside the familiar conflicts process and requires their direct subjection to mandatory rules of the forum.

This may be better described by an example: A man, father of two children, domiciled in country A, has his sperm cryopreserved in country B before he undergoes a major operation. Soon after the operation he dies. In his will there is a clause allowing his girlfriend to be artificially inseminated with that sperm in country B, if she wishes to have a child from him.[20] The clinic refuses to perform

16. *Re Maldonado*, at 223, 348-49 (1954).

17. *See* Morris, *supra* note 15, at 420.

18. Earnest Rabel, Das Problem der Qualifikation, RabelsZ 1929, p. 254.

19. *See, e.g.*, R. Walton, The Best Interests of the Child, 1976 B.J.S.W. 307.

20. Facts are similar to a California case, *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (1993), which, however, did not contain foreign elements, as well as a Louisiana case, *Hall v. Fertility Institute*

the insemination or give the girlfriend the sperm and she files a lawsuit in country B. The presence of foreign elements leads the court to the setting of the conflictual mechanism in motion. However country B has a strong policy against posthumous conception, considering it immoral and unethical. In fact it has passed a law prohibiting such a practice. Even if the court finds that the law of country A applies, and that the latter does not oppose posthumous conception, there is such a strong interest against the practice in its country that it will respect the prohibition provided by its own law[21] and will not consider at all its conflicts rules.[22]

The same result may be achieved by the public policy exception, if the court finds that the results produced by the application of the foreign law will violate its domestic sense of justice, some prevalent conception of good morals and deep rooted traditions that consider procreation an act reserved for people who are alive.[23] However the exception is the last resort, an after thought in the conflictual process. The basic difference between the invocation of a mandatory rule, not permitting the application of any other rule, domestic or foreign, and the public policy exception is that by the former system the protection of the forum's order is more effective and the relevant policy is manifested from the very beginning, while the latter intervenes only after the applicable law has been indicated and only if the court decides that its application will produce undesirable results.

Surrogate motherhood may also set in motion such protective mechanisms. As many legal systems oppose it, their courts will either resort to their own mandatory rules prohibiting the practice, if such rules exist, or find it contrary to their public policy.[24] Even if the parties in the surrogate agreement have chosen a permissive applicable law and notwithstanding the principle of respecting party autonomy in contracts, either a mandatory rule of the forum—if such a rule exists—or the intervention of public policy will bar the application of that law. A similar attitude may be expected as far as cloned human embryos are concerned.

One cannot conclude these observations without mentioning the role of forum shopping when some jurisdictions show an open-mindedness toward issues generated by artificial procreation and others adopt a negative attitude. Whenever permitted by the rules on jurisdiction, the interested parties may attempt to evade

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of New Orleans, 647 So. 2d 1348 (La. App. 4th Cir. 1994). *See also* the French case Parpalaix v. CECOS, Tri. Gr. Inst. Creteil, 1984, Gazette du Palais 1984, 11.

21. *See* L. C. Nolan, *Posthumous Conception: A Private or Public Matter?* 1997 BYU J. Pub. L. 1.

22. Phoncion Francescakis, Quelques precisions sur les "lois d'application immédiate et leurs rapports avec les règles de conflits de lois, Rev. Crit. 1966.1.

23. For a discussion on posthumous procreation *see* Anne R. Schiff, *Arising from the Dead: Challenges of Posthumous Procreation*, 75 N.C. L. Rev. 901 (1997). In the English case *R. v. Human Fertilisation and Embryology Authority, ex parte Blood*, (1997) 2 All E.R. 687, a woman was not allowed to conceive using her dead husband's sperm because there was no written consent of the deceased. However E.C. law allowed her to be treated in Belgium with her husband's sperm unless there were good public policy reasons for not allowing this to happen.

24. A usual argument is the refusal to treat the woman as a container or commodity. *See also* the public policy issue raised by the Louisiana law, La. R.S. 9:121-123 (1991), prohibiting the sale of human embryos, or that of posthumous conception.

the laws of the competent legal system by initiating proceedings before the courts of the permissive states/countries. But it must be remembered that, especially in international and not interstate conflicts, where clauses like full faith and credit are not applicable, a judgment rendered in another jurisdiction may not be recognized on grounds of public policy.

V. CONCLUSIONS

The above discussion has attempted to indicate some of the points of concern for the conflicts lawyer as regards the issues of artificial procreation. There is no doubt that there are many more and that they may multiply as biotechnology advances and each legal system adopts a different approach to the problems created. The varying levels of medical standards and achievements from country to country will generate another form of "medical tourism," thus giving rise to the conflicts issues. It would be desirable to have all such issues resolved internationally through uniform rules,[25] but the prospect of such a wide consensus is still remote.

25. An example of international efforts in this field is the Council of Europe's Bioethics Convention, signed in April 1997. *See* Eibe Riedel, *Global Responsibilities and Bioethics Reflections on the Council of Europe's Bioethics Convention*, 5 Ind. J. Global Legal Stud. 179 (1997).