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CONSTITUTIONAL-LEGAL DISPUTE ON POSTHUMOUS REPRODUCTION: PRESUMPTION OF CONSENT OR DISAGREEMENT?

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The subject. The article considers a constitutional-legal dispute on posthumous reproduction, which became the subject of consideration in the Constitutional Court of the Russian Federation in 2024. On February 11, 2025, the Constitutional Court of the Russian Federation issued a decision recognizing that norms of the legislation on social security are violated the Constitution of the Russian Federation. This decision gives rise to a number of new legal problems in the field of constitutional, civil, inheritance, medical law and social security law. At present, there is no legislative regulation of posthumous reproduction in the Russian Federation.

The purpose of the article:

– to establish the presence or absence of positive obligations of the state in relation to the somatic right to reproductive choice;

– to determine the presumption of consent or disagreement to posthumous reproduction;

– to propose possible measures to prevent constitutional conflicts related to posthumous reproduction.

The methodology of the study includes general scientific methods (analysis, synthesis, description) and legal methods, method of constitutional conflict diagnosis. In addition to this, historical method was also applicable. The article also uses a comparative legal method to analyze the legislation and practice of foreign countries such as the USA, France and Japan.

Main results. The author proposes to eliminate the legislative gap by establishing at the statutory level a presumption of consent or disagreement in accordance with the following legislative formulas:

– presumption of consent: posthumous reproduction using the sex cells (or embryos created with their help) of a deceased person is not permitted if the medical organization was informed at the time of using the relevant assisted reproductive technologies that the person, during his or her lifetime, declared his or her disagreement with the use of his or her sex cells (or embryos created with their help) for the purpose of procreation after death;

– presumption of disagreement: posthumous reproduction using the sex cells (or embryos created with their help) of a deceased person is permitted only if the medical organization has, at the time of using the relevant assisted reproductive technologies, a written expression of the person's will, given during his or her lifetime, of consent to the use of his or her sex cells (or embryos created with their help) after death for the purpose of procreation.

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1. Introduction. We have previously examined the constitutional-legal aspects of posthumous reproduction in the context of a dispute that became the subject of consideration by the Constitutional Court of the Russian Federation in 2024 [1]. On February 11, 2025, the Constitutional Court of the Russian Federation issued a ruling on this case, in which it found the contested provisions of Federal Law No. 400-FZ of December 28, 2013 "On Insurance Pensions"[1] to be inconsistent with the Constitution of the Russian Federation to the extent that, within the system of current legal regulation, they do not provide for the assignment of an insurance pension in the event of the loss of a breadwinner to a child conceived through assisted reproductive technologies (hereinafter referred to as ART) after the death of the spouse of the mother insured in the compulsory pension insurance system (who, during his lifetime, expressed the intention to have children using ART and in respect of whom paternity was subsequently established by court order) and, accordingly, born after three hundred days from the date of the father's death. The Constitutional Court of the Russian Federation also directed the federal legislator to make the necessary amendments to the current legal regulation [2].

Let's recap the circumstances of this case: in 2016, the applicant used her deceased husband's reproductive cells for in vitro fertilization. The cells were cryopreserved during the man's lifetime. As a result, more than 300 days after her husband's death, the woman gave birth to twins. The court confirmed the deceased husband's paternity, and the applicant then applied to the pension authority for a survivor's insurance pension, but her application was denied. According to the applicant, the contested provisions were inconsistent with the Russian Constitution, as they deprived children conceived through ART after the death of a parent of the right to receive a survivor's insurance pension.

In this article, we will examine and analyze the legal position of the Constitutional Court of the Russian Federation on this case and propose options for filling the resulting legislative gap.

2. Ratio decidenti in the case of posthumous reproduction.

Since posthumous (postmortal) reproduction is a relatively new phenomenon, even among other ART techniques, it raises a whole range of socio-economic, moral, ethical, and legal issues. The Constitutional Court of the Russian Federation more often deals with categories familiar and understandable to lawyers: property protection, liability for errors by public authorities, violation of political rights, increasing state fees when applying to the courts, citizenship, etc. The Constitutional Court of the Russian Federation has not issued decisions related to biomedical experimental research [2, p. 46]. Therefore, the decision requires scientific analysis, as this case resolved a legal issue in the area of social security, while giving rise to a number of other problems: from establishing the order of succession to the possibility of abuse of rights by a person with access to genetic material.

The key argument in the applicant's complaint, which the author reviewed while preparing the case report, was the claim of discrimination against children born through ART, which constituted a violation of Parts 1 and 2 of Article 19 of the Russian Constitution. However, the Constitutional Court of the Russian Federation, while finding the contested provisions to be inconsistent with Part 1 of Article 19 of the Russian Constitution, did not classify the situation as discrimination.

The key arguments of the Constitutional Court of the Russian Federation, in our opinion, were the following:

1. Russian lawmakers have still not fundamentally expressed a legal attitude towards post-mortem reproduction, and citizens are not deprived of the right to use this technology, since there are material and legal conditions for the use of this ART method;

[1] Collection of Legislation of the Russian Federation. 2013, No. 52 (Part I). Article 696.

[2] Resolution of the Constitutional Court of the Russian Federation of February 11, 2025 No. 6-P "On the case of verifying the constitutionality of parts 1 and 3 of Article 10 of the Federal Law "On Insurance Pensions" in connection with the complaint of citizen M.Yu. Shchanikova". Collected Legislation of the Russian Federation. 2025 No. 7. Article 694.

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2. the establishment of the fact of paternity cannot but give rise not only to the personal non-property rights of such children, but also, in particular, to the right to receive some kind of social security in connection with the absence of paternal care;

3. Social security in connection with the absence of parental care has an important socio-psychological significance for the child, since it confirms the presence of parents (one of them) in the past, who, although deceased, created the basis for his material well-being, which represents quasi-compensation for the absence of parental care, which is important not only for the maintenance of the child, but also for the development of his personality;

4. The family-legal relationship between the deceased spouse who donated biomaterial for cryopreservation and storage and the children born to his widow using ART, conceived after his death, means that such children should have the right to social security due to the absence of paternal care.

Thus, if an individual expressed the intention to have children using ART during his lifetime, and after his death the fact of paternity was established by a court, then there is a family-legal relationship recognized by the state, which gives rise to the provision of social security, and not the fact that such children are dependent on the deceased parent.

The fact that the district court established the deceased citizen's paternity in this dispute raises no questions—legislation and law enforcement practice do indeed permit this, based on the child's interests being paramount. Furthermore, this family legal relationship is based on a factual (familial) relationship.

However, as follows from the judicial decisions, none of the courts this week examined the question: did the deceased express his/her will to have children not only through ART, but also through the use of these technologies after his/her death? Courts of general jurisdiction have found that "the decision to conceive children is an independent expression of the will of M. Yu. Shchanikova " and that "the act of depositing biological material for storage cannot impose parental obligations to support minor children, as established by the Family Code of the Russian Federation, especially those of a deceased citizen [3]." We believe it is necessary to continue this line of reasoning with the following question: does the act of depositing biological material for storage indicate the individual's expressed intention to become a parent after his/her death? There is no definitive answer to this question in either Russian law or domestic law enforcement practice. However, there are individual decisions of courts of general jurisdiction that have carefully analyzed the consent to ART given by a deceased individual. For example, the Oktyabrsky District Court of Omsk refused to transfer the cryopreserved biological material of a deceased son to his parents because he had not explicitly consented to ART after his death [4]. In another case, the Odintsovo City Court of the Moscow Region concluded that, despite the deceased spouse's written consent that the right to dispose of the cryopreserved embryos would pass to the surviving spouse, reproductive rights to the embryo belong jointly to the persons who expressed their will to undergo ART. If they are unable to reach agreement, it must be assumed that a person cannot be forced to bear children or acquire parental rights and responsibilities [5]. Thus, the courts in question did not equate consent to cryopreservation with consent to posthumous reproduction, which is consistent with the principle of prioritizing the interests of the patient, even a deceased patient, when providing medical care (Article 6 of the Federal Law of November 21, 2011, No. 323-FZ "On the Fundamentals of Health Protection of Citizens in the Russian Federation" [6]). The position that *a person Not may* be *forced* to *give birth children* , for *acquisition*

[3] Appellate ruling of the Judicial Collegium for Civil Cases of the St. Petersburg City Court dated September 2, 2022, case No. 33-16982/2022 // URL: https://sankt-peterburgsky--spb.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=64772950&delo_id=5&new=5&text_number=1 (date accessed: September 20, 2024).

[4] Decision of the Oktyabrsky District Court of Omsk, Omsk Region, dated December 18, 2019, in case No. 2-3490/2019. SPS "Garant" (date of access: 02.05.2025).

[5] Decision of the Odintsovo City Court of the Moscow Region dated November 21, 2022 in case No. 2-12139/2022. SPS "Garant" (date of access: 02.05.2025).

[6] Collection of Legislation of the Russian Federation. 2011, No. 48. Article 6724.

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parental The rights and *obligations* are reflected in a number of decisions of courts of general jurisdiction in 2023-2024 [7]. There is no earlier judicial practice due to the novelty of the ART used and its increased accessibility in recent years.

At the same time, the Constitutional Court of the Russian Federation deemed it sufficient that an individual had expressed their intention to have children using ART during their lifetime. However, an intention expressed during their lifetime may be significantly altered if it is made during their lifetime but only in the event of their death. We believe that death, or the time of life and its finiteness, are serious circumstances influencing a person's choice of course of action [3, p. 42]. A clear example of a person being forced to decide what legally significant actions will occur after their death is the institution of a will.

According to published data, there were an average of 3.9 wills per 1,000 Russians in 2022. The situation varies by region: in the federal cities of Moscow, St. Petersburg, and Sevastopol, more than five wills were issued per 1,000 people, while in Tyva, Chechnya, and Ingushetia, the figure was less than one [8]. As this practice shows, most people are not prepared to consider the transfer of assets to future generations during their lifetime, due to a reluctance to think about death and the perception of having plenty of time [9]. The institution of wills falls under the realm of private law, which has prompted civil law scholars to study the legal institution of dispositions upon death (see, for example, [4; 5]).

3. Dispositions mortis causa in private law: in search of a legal analogy.

Since a gap has developed in public law regarding the implementation of somatic human rights in the context of posthumous reproduction, we turn to private law for a possible analogy. Thus, the only expression of the applicant's deceased spouse's will was to sign a contract for services with a medical clinic, which included a provision stipulating that in the event of the death of one spouse, the right to dispose of the cryopreserved biomaterial would transfer to the other spouse [10]. Thus, it was precisely the institutions of private law that were invoked to establish the actual will of the deceased—freedom of contract.

In civil law, there is a division of transactions into inter vivos (between living persons) and mortis causa (in case of death) [6, p. 182]. Public law does not operate with such a division in relation to the expressions of will of subjects-bearers of constitutional rights. S. Yu. Filippova in her work gives the following examples of instructions in case of death of a person in private law:

- will;
- the right of the only parent or both parents of a minor to designate a guardian or trustee for the child in the event of their simultaneous death;
- instructions regarding the burial conditions of one’s body;
- instructions regarding one’s body regarding the transplantation of organs and tissues (Article 8 of the Law of the Russian Federation of December 22, 1992 No. 4180–1 “On the transplantation of human organs and (or) tissues” [11](hereinafter referred to as the Law “On Transplantation”));
- orders for the publication of a work, for making changes to a work and its protection, etc. [7].

The legislation establishes a qualified form for the above orders, which must be written or even notarized and must take into account the fact of future death.

Historically, mortis causa orders existed in French civil law even before Napoleon's codification as an element of the "ancient law", and after the adoption of the Napoleonic Civil Code, strict requirements were introduced regarding the form

[7] Decision of the Lyublinsky District Court of Moscow dated November 24, 2023 in case No. 02-0846/2023; Decision of the Leninsky District Court of Orenburg, Orenburg Region dated May 17, 2024 in case No. 2-2237/2024; Decision of the Takhtamukaysky District Court of the Republic of Adygea dated July 3, 2023 in case No. 2-1440/2023. SPS "Garant" (date of access: 02.05.2025).

[8] How many Russians make wills. URL: https://journal.tinkoff.ru/nasledstvo-stat/ (date accessed: 09/07/2024).

[9] Molkova T., Domino I. Common misconceptions of testators and heirs. Advocate newspaper, No. 21, November 2023. P. 12-13.

[10] Clause 1.1 of the Resolution of the Constitutional Court of the Russian Federation of February 11, 2025 No. 6-P.

[11] Rossiyskaya Gazeta. 1993, No. 4.

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and evidence of mortis causa orders, and this legal tradition was subsequently adopted by other countries of continental Europe [8, p. 418].

Furthermore, in its subject matter, a directive regarding the use/non-use of a person's organs and tissues after death is comparable to a directive regarding posthumous reproduction—in a situation where a person's genetic material is also used after death. At first glance, these legal relationships have certain similarities, and therefore, a legal analogy may be possible here.

Article 8 of the Law "On Transplantation" establishes a presumption of consent for organ and/or tissue removal. According to this presumption, organ and/or tissue removal from a corpse for transplantation is not permitted if the medical organization is informed at the time of such removal that the person, their close relatives, or their legal representative, while alive, expressed their disagreement with the removal of their organs and/or tissues after death for transplantation to a recipient. After the death of a person, their absent will cannot be fulfilled by their close relatives. In this case, the presumption of consent is considered unavoidable and applies, meaning consent for transplantation is considered given.

As V.A. Goncharova notes, posthumous transplantation based on the presumption of consent has not yet found broad public support [9, p. 33].

According to the World Health Organization's Guiding Principles for Human Cell, Tissues, and Organ Transplantation[12] From an ethical perspective, patient consent is the cornerstone of all medical interventions. According to Guiding Principle No. 1 and its commentary, states, depending on their social, medical, and cultural traditions, determine the model of patient consent for transplantation from two basic models, known as "presumed consent" and "presumed non-consent." Presumption of consent ("unsolicited consent" or "presumed consent") means that unless explicitly expressed non-consent to tissue transplantation after death, the patient is presumed to consent to the removal and transplantation of their tissues after death. Presumption of non-consent, conversely, means that if a person has not expressly and unequivocally consented to the removal and transplantation of their organs, consent is presumed to be absent, and the removal and transplantation after death are not performed.

In its ruling on the high-profile case of Alina Sablina, the Constitutional Court of the Russian Federation indicated that Russian lawmakers had chosen the "presumption of consent" model. A prerequisite for the introduction of such a model into the legal field is the existence of a legislative act containing the formula of this presumption, published for public information and entered into force, thereby presuming that interested parties are aware of the current legal provisions. The court also noted that the decision on the choice of consent model is the prerogative of the federal legislator and does not fall within the jurisdiction of the Constitutional Court of the Russian Federation. This case sparked a broad academic debate about the adequacy of procedural guarantees for giving and receiving consent for organ transplantation (see, for example: [10–13]). The peculiarity of this case concerning posthumous transplantation was that the legislator established a specific presumption, whereas in the 2024 case concerning posthumous reproduction, the legislator had not yet made its choice.

4. Legitimate interests of the living and the dead.

As V.A. Goncharova notes, in the case of Alina Sablina, a conflict between private and public interests is evident, and the legislator's decision "in favor of the living," rather than "in favor of the dead," is based on the premise that the organs and tissues of the deceased can preserve the life of another person [9, p. 34]. In this situation, the dignity and inviolability of the body of the deceased seemingly lose their constitutional value. At the same time, recognition of the absolute nature of the right to respect for human dignity has long been beyond doubt in both the European legal and domestic constitutional value systems (see, for example, [14–17]).

[12] Approved at the Sixty-third session of the World Health Assembly in May 2010, resolution WHA63.22. URL : https://old.transpl.ru/files/npa/Guiding_PrinciplesTransplantation_WHA63.22ru.pdf (date accessed: 02.05.2025).

According to Article 21 of the Constitution of the Russian Federation, human dignity is protected by the state; no one may be subjected to medical, scientific, or other experiments without voluntary consent. Given that Russian law prohibits inappropriate treatment of the body of the deceased, it can be concluded that the state is obligated to treat not only living individuals but also deceased individuals with dignity. This conclusion is supported by the legal position of the Constitutional Court of the Russian Federation in the case regarding the constitutionality of Article 14.1 of the Federal Law "On Burial and Funeral Services," according to which the state, in protecting human dignity, is obligated not only to refrain from controlling or interfering with a person's private life, but also to guarantee a dignified attitude toward a person's memory, i.e., to ensure that a person's personal rights will be protected even after death, and that state bodies, officials, and private individuals will refrain from infringing upon them [13]. Thus, the Russian Federation has a positive obligation to create conditions that ensure that individuals can expect their dignity, integrity, and other personal rights, including the right to reproductive choice, to be protected even after death. In the absence of legislative regulation of posthumous reproduction and a choice of presumption of consent, it appears that these positive obligations are not being fully fulfilled.

5. Family relationships in posthumous reproduction.

In Russian constitutional law, family, motherhood, and childhood are viewed in a traditional, ancestral sense. It's safe to assume that in this understanding, familial and biological ties coincide, and that an individual who is a child's biological parent also enters into a family relationship with them that includes care, guardianship, upbringing, and maintenance of children. However, there are exceptions when familial and biological ties do not coincide: in cases of deprivation of parental rights, adoption, and so on. The US Supreme Court also noted this difference in family structure in the Capato case, stating that "a biological parent is not necessarily a child's legal parent [14]. "

In the case of posthumous reproduction, there is a biological "child-parent" relationship between the born child and the deceased, but no actual family relationship could have arisen between them. In this case, the general jurisdiction court established the legal family relationship by establishing paternity.

In the applicant's case, a family relationship between her deceased husband and the children they had conceived, including care, upbringing, and financial support, could not arise, as the children's father died two years before their birth. The Supreme Court of Japan reached a similar conclusion in a similar case in 2006, ruling that a legal parent-child relationship could not be established between a man and a child conceived and born by a woman as a result of ART performed after the man's death using his frozen genetic material, as the father lacks the ability to exercise parental authority over the child, nor can the child benefit from the father's custody, care, or support [15].

At the same time, foreign authors believe that posthumous reproduction presupposes the continuation of the traditional family structure of husband and wife, even if one of the participants in the relationship is no longer alive, noting that the understanding of family is transforming in modern society [18, p . 4]. The practice of Russian courts also indicates that there are no insurmountable obstacles to establishing family legal ties.

A literal adherence to the traditional, ancestral concept of family creates a serious risk to the interests of children born as a result of

[13] Resolution of the Constitutional Court of the Russian Federation of June 28, 2007 No. 8-P "On the case of reviewing the constitutionality of Article 14.1 of the Federal Law "On Burial and Funeral Services" and the Regulation on the burial of persons whose death occurred as a result of the suppression of a terrorist act they committed, in connection with the complaint of citizens K.I. Guziev and E.Kh. Karmova". Collection of Legislation of the Russian Federation. 2007. No. 27. Art . 3346.

[14] Astrue v. Capato. Supreme Court of the United States. May 21, 2012. URL: https://supreme.justia.com/cases/federal/us/566/541/ (access date: 05/02/2025).

[15] Minshu Vol. 60, No. 7. 2004 (Ju) 1748. URL: https://www.courts.go.jp/app/hanrei_en/detail?id=852 (accessed: 02.05.2025).

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posthumous reproduction. In our opinion, the risk of such a constitutional conflict can be minimized by establishing the fact of a person's will to become a parent after death. This will establish paternity or maternity for children, and the child will know who their parents are. This will not establish actual family ties in the form of care, upbringing, and maintenance of children, but it will demonstrate that the deceased considered the birth of children important, sought this, and had a corresponding legitimate interest. Such a will mortis causa , perhaps even more so than social support measures for the loss of a breadwinner, will serve as "quasi-compensation" for the absence of a de facto family connection. Thus, in English-language literature, there are references to the legally recognized interest of citizens in the genetic continuation of the family line ("the interest in genetic continuity" or " interest in procreation") (see, for example: [19–21]). The state, for its part, must respect such expression of will, since it falls within the scope of the constitutional right to reproductive choice.

Otherwise, by protecting the "interests of the living" and allowing posthumous reproduction by citizens who would only have wanted to become parents during their lifetime and who perhaps would not wish the same fate on their children—being born into a single-parent family after their death, with no way to establish actual family ties and intergenerational continuity, and burdened with doubts about whether the child was wanted, with the attendant serious psychological consequences [16]—the state disregards the personal rights of its deceased citizens, which, in our opinion, violates the fair constitutional balance. This also creates the risk of disputes between heirs born during the testator's lifetime and those born through posthumous reproduction. One of the most high-profile such cases involved the granting of inheritance rights to the daughter of journalist B. Rynska, who was born to a surrogate mother a year after the death of her husband, NTV founder and millionaire I. Malashenko. During Malashenko's lifetime, he had three children from a previous marriage. Embryos were created that were unclaimed, and his wife decided to "continue the fight for their child" after the biological father's death, and subsequently defend his inheritance rights. The Presnensky District Court of Moscow ruled that the child was the testator's daughter, conceived during his lifetime. The court did not examine the deceased husband's written consent for ART [22, p. 140].

It is necessary to agree with V.V. Dolinskaya that taking into account in legislation the consent of the testator to *the posthumous Reproduction* and restrictions on the period of conception of a child will ensure a balance of interests of all potential heirs, while preventing abuse of rights by persons who have the right to use the biomaterials of the deceased [23, pp. 16-17].

6. Conclusion.

We believe that in order to minimize the risks of constitutional conflicts (for more details see: [24]), it is necessary to adopt legislation regulating the use of ART with the establishment of a presumption of consent or disagreement to posthumous reproduction, by using one of the following legislative formulas:

- presumption of consent: posthumous reproduction using the germ cells (or embryos created with their help) of a deceased person is not permitted if the medical organization, at the time of using the relevant assisted reproductive technologies, was informed that the person, during his or her lifetime, declared his or her disagreement with the use of his or her germ cells (or embryos created with their help) for the purpose of procreation after death;

- presumption of disagreement: posthumous reproduction using the reproductive cells (or embryos created with their help) of a deceased person is permitted only if the medical organization has, at the time of application of the relevant assisted reproductive technologies, a written expression of the will of the person, given during life, of consent to the use of his or her reproductive cells (or embryos created with their help) after death for the purpose of procreation.

[16] Unwanted children. URL: https://www.hse.ru/ma/therapy/news/827059417.html (accessed: 02.05.2025).

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