CAN WE ALREADY DISPENSE WITH THE FATHER?

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1. Assisted reproduction in Brazil: post mortem insemination. 2. The family entities: the single-parent family. 3. Criteria for establishing paternity: can we already dispense with the father?

1. Assisted reproduction in Brazil: the state of the art. A wide-readership national newspaper reported, in November 2003, under the heading, "Israel releases use of dead men's semen - Widows may become pregnant", that Israel's chief attorney had determined that Israeli widows would be able to use the semen of their late husbands for artificial insemination. This deliberation prevents that the widows state a judicial battle to ensure the right to become pregnant by their deceased companies, even through the latter may not have given such authorization in their lifetime. According to the new rules, only if the man has left an explicit prohibition to such act that the widow will be prevented from performing post mortem fertilization.

According to the said report, Guido Pennings, member of the ethics commission of the European Embryology and Human Reproduction Society, declared that he knows of no other country, which allows a widow to use the semen of a dead man without prior written consent. The Brazilian law foresees such instance but does not impose any demand.

The fact, which occurred in Israel around two years ago, is quite opportune in opening debate on the issue. The legal dispositions found in Brazil lead to several questions. We aim, herein to broach one of these questions, brought about by the legal disposition which leads to the anguishing discussion of
interests involving three constitutional principles: a) the principle of human dignity; b) the principle of the best interest of the child and of the adolescent; and c) the principle of responsible paternity, which acts as foundation for family planning, also warranted by the Constitution of the Republic.

The assisted human reproduction techniques have long ceased to be, even in Brazil, an activity restricted to the field of research, and are deemed as common medical procedures in specialized clinics, with the National Policy for Full Awareness Toward Assisted Human Reproduction being currently in an inception stage

The theme has become a popular issue, having already been the subject of a television soap opera. The same television station reached high audience levels by bringing to discussion reproductive cloning, a matter which, it is important to highlight, is alien to the present text. Advertising is everywhere, in cities like Rio de Janeiro, even in the backs of buses, enticing people to make their dream of having a child come true. However, bearing a child by means of one of the assisted reproduction techniques is not as easy as it seems.

The matter is vast and complex, and need arises to delimit the field of these brief considerations: the artificial insemination of a married woman with the husband's semen when the latter has already passed away, a procedure which has been named "post mortem insemination". Excluded are the cases of termination of the marriage bond by separation in fact, judicial separation or divorce, or even of invalidity of the marriage, as well as the hypotheses of using the same procedure outside wedlock as, for example, by women living under common law marriages or those who are single.

The restriction is necessary, mainly, as the law has solely ruled the use of the techniques by married people, thereby bringing forth differentiated juridic effects.

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1 According to Ordinance nº 426, dated 03.22.05, by the Ministry of Health.
The law which envisages the possibility of artificial insemination after the death of the husband is no 10,406, dated January 10th, 2002, that is, the new Civil Code, effective as from January 11th, 2003. The new Civil Law has included among the children presumed to have been conceived in the span of the marriage: those begot by homologous artificial insemination, even when the husband has passed away; those begot, at any time in the case of excedentary embryos, stemming from homologous artificial conception and those begot by heterologous artificial insemination, as long as this has had previous authorization by the husband (art. 1,597, III, IV and V, respectively). These comprise the first legal dispositions sanctioned in Brazil on the issue, about which only the Federal Medicine Council had issued opinion (Resolution no 1,358/92).

Faithful to the initial proposal, the following reflections are restricted to the dispositions of article 1,597, III, of the Civil Code: children "beget by homologous artificial insemination, even though the husband may be deceased". No other disposition directly related to the subject is found in the Code, with the interpreter being compelled to review such dispositions in the light of constitutional guidelines.

Right at the beginning, we can see that the legislator used the expressions "artificial fecundation" (item III), "artificial conception" (item IV) and "artificial insemination" (item V). In view of the terminology imprecision, the Center for Judiciary Studies of the Federal Justice has approved understanding regarding the fact that such expressions should be interpreted as "assisted reproduction techniques", albeit not entailing the use of donated eggs and surrogate pregnancy².

The use of the semen or its disposal comprises a problem restricted to consent by the husband³ or by his family⁴. There are not, as far as we know,
any complications regarding the disposal of such material. However, in case of
death, its use for artificial insemination purposes, even by the wife, may meet with
obstacles on the part of the family, who "holds sway" over their dead, of which we
have the currently outmoded controversy brought about the law of transplants$^5$.  

However, regarding embryos, the problem has been plaguing the international community. The conception having been performed, the emerging of an embryo (or pre-embryo) raises intricate questions of an ethical, religious, sociological and juridic nature. Therefore, the analysis of such issue should be done separately.

The scope of the current issue being bound, as proposed, to homologous post mortem insemination, it is mandatory first to ask the motives for adopting the paternity assumption on the case, as the genetic paternity is warranted, thanks to the medical procedure itself.

The assisted human reproduction techniques challenge, to great length, the natural means and time terms for conception and gestation, taken as a basis for assumption reference. Regarding the procedures using fertilizing material from the couple, there should be no doubts as to the paternity, considering the biological links: there is medical assurance as to the paternity, except for, under evidence, the probability of fraud or error in the application of the technique. Thus, assumption shall bear little or no usefulness. If donor material is used, the legislator shall indicate to whom the paternity is assigned as it has been done (art. 1,597, V).

Actually, following the ascertaining of a genetic link through DNA Tests, the assumption takes on a secondary role. The Brazilian courts tend to

\[\text{that his sperm would be destroyed in case he died. (www.espacovital.com.br/asmaisnovas13112003g.htm, access on 11.13.03).}\]

$^4$ One should consider here the full concept of family, comprised of relatives up to the 4th degree. One should observe the arising of a family by wedlock (a restricted concept, comprising the father, the mother and the children), does not extinguish the link with the family of origin.

$^5$ For the purposes of Law 9,434, dated 02.04.97, the Transplant Law, blood, sperm and eggs are not comprised among the tissues referred by it. However, this law has undergone an important change (art. 4) on account of the post mortem disposal of tissues, organs and parts of the human body for transplant purposes, to link their removal to authorization by the family members listed thereat, under the argument that the latter had always been consulted even through there might have been express authorization by the donor.
assign paternity to the biological father, at times at the expense of the father recorded in the birth certificate or of the socioaffective father. It would be a simpler task if the legislator indicated the preferred criterion for determining paternity, allowing for better appreciation by the magistrate in each case. This, however, has not occurred, and the interpreter should seek for the objective of the law.

Nevertheless, legal assumption has been established, requiring a number of questions, as to the time of conception, although no doubts exist concerning the genetic link as pointed out.

According to the last part of item III, article 1,597, the offspring begot by homologous artificial insemination, "even through the husband may be deceased" are assumed as having been conceived in the span of the marriage. If conception takes place during the marriage span, the child will be born within the legal terms envisaged by the assumption, which take into consideration the normal (minimum and maximum) term of gestation.

The problem seems to dwell, thus, on the possibility of conception occurring, with the husband's semen, after the passing away of the latter and, as a consequence, birth may take place after the 300 days subsequent to the dissolution of the wedlock, the period during which the legal assumption remains valid. All evidence leads to the conclusion that the legislator's intention was to solve this problem, by including in the assumption even the children who may be born after the maximum gestation period, estimated by law at 300 days.

The assumption consists, therefore, in considering as conceived in the span of wedlock even the child known as conceived when the marriage link has already been terminated, on account of the death of the husband. The Civil Code, thus, admits that the woman may use the frozen semen of her deceased husband.

2. The familial entities: the monoparental family. The current Constitution of the Republic has innovated and revolutionized the foundations of
Family Law in Brazil by recognizing three familial entities: the one comprised by marriage, the one resulting from a stable union between man and woman and the community comprised by any of the parents and their descendants (art. 226, §§ 2, 3 and 4). The latter mode has been denominated monoparental family and has not yet received appropriate treatment on the part of interpreters, leading to doubts as to their exact understanding.

It is important to record, as from this point, that, notwithstanding the respectable opinions to the contrary, there is no type of hierarchy among the familial entities. The family, as expressed in the Constitution, comprises the basis of society and has special protection from the State. Any form of discrimination between the different familial modes should be rejected, the question remaining being how and to what extent should State protection be given.

This question bears an even more difficult answer in the case of monoparental families, as the legislator has not positioned himself as to its understanding. Should we include, thereat, only the "single" mothers (or fathers), a qualification which herein takes on the meaning of a person without a partner, for reasons which independ of his or her will, such as abandonment, separation, or death, or also those who find themselves in this qualification by their own option and who wish to have a child by what is popularly dubbed, in Brazil, as "independent production"? Are homosexuals who do not live with a companion also supported here?

One finds an interesting situation in the case of homosexuals. The justices in the State of Rio de Janeiro have reached an understanding that the sexual option of the interested party should not be a reason for restricting adoption, with, however, adoption by two same-sex persons not being admitted as, according to the law, nobody can be adopted by two persons, in except if the latter are husband and wife or if they live in a stable union, in which case the diversity of sexes is assumed. Albeit indirectly, a monoparental family in which the father or the mother is homosexual, has been admitted.
The local point of these considerations, however, comprise the monoparental families which are made up by the will of the father or the mother, by means of one of the assisted reproduction techniques, in the case under discussion, by the insemination of the widow with the frozen semen of the deceased husband.

3. Criteria for establishing paternity. For a latter understanding of the problem it is necessary to consider that, according to doctrine, there are three criteria for attributing paternity: the juridic criterion, by which the law establishes the link based on assumptions; the biological criterion, which focuses on the genetic link, which may be ascertained through DNA tests; and the socioaffective criterion, which the affective link between father and child prevails.

In case post mortem insemination is performed, the child's father shall be the late husband, by force of assumption of the abovementioned paternity. The civil law has adopted the juridic criterion to assign paternity to the offspring of married persons. However, no term was set for the use of the deceased husband's semen, which may bring forth several difficulties, especially of a practical nature. Until what time after death can the semen be utilized? How to act in case the estate of the late husband has already been shared? Is it reasonable to envisage a reserve of assets, on account of a mere possibility of the arising of an heir?\(^6\)

In this scenario, the late husband's will takes on capital important, and his has not been broached by the legislator. One of the possible guidelines is observing whatever has been set forth by the husband. There is no disposition on the topic in the current civil law\(^7\).

The omission is not a serious issue, as the performing of any of the assisted reproduction techniques depends on the learned consent of the parties

\(^6\) According to statement 267, approved in the abovementioned Civil Law Rounds, the equity or asset rights of a human being upon birth are submitted to the rules envisaged for petitioning to inheritance, being subject, therefore, to expiration.
involved, which should include the disposition of the criogenically-preserved material in case of divorce, serious disease or death of one or both partners. All doctors, therefore, bear great responsibility toward securing a written statement from the interested parties as, in view of the gap in the law regarding the issue, this affidavit may comprise the only revealing sign of will prior to death. The use of such statements as document proof, in case of litigation shall be of great value.

It is mandatory to remark that the dearth of this express statement does not allow for the handing over of the semen to the widow, to the family, or its use for any other purpose lest clinics, centers or services, which act likewise being deemed liable, naturally, claim by the party, which feels impaired. Strictly speaking, the same can be said regarding the disposal of the criogenically-preserved spermatozoids. All prior caution by the doctors is therefore warranted. in case of doubt or conflict it shall be wise to submit the issue to the judiciary.

There are, however, other questions. It seems reasonable that the woman provide continuity to the family project started by her husband, as long as the latter has authorized so in his lifetime. This understanding which is supported by the family planning right, which is guaranteed by the Constitution, does not take into consideration the rights of the child also ensured by the Constitution (art. 227), especially the right to family life.

The argument that the right to family planning may be exercised at any familial made and, therefore, in a monoparental family, is quite enticing. This argument is strengthened by the fact that a number of women lose their husbands while pregnant, by a natural cause. Likewise, adoption by one single person should be included.

It is basic to consider, for a better understanding of the effects of the inexistence of the father, the understanding of psychology under such problem, as the father is acknowledgedly important in the construction of the individuals

\( ^7 \) Art. 1,597, V, from the Civil Code, conditions the assumption of paternity to previous authorization by the husband only in case of heterologous artificial insemination.
psychich structure. As far as we know, thin gap may be filled in by another person who may exercise the role of father.

Strictly speaking the hypotheses are not identical: in the former conception occurred in his or her father's lifetime, the second when the husband has already passed away. On does not act about the paternity, as this is certain, independent of assumption by force of biological links but, about the convenience of promoting the birth of children generated after the death of their fathers. Will there be a difference between death and conception? Is the best interest of the child met? Which interest should prevail, the child's or the mother's?

This latter question has been posted in the cases of adoption. Notice that the adopted child has as father, an original family, it being possible to identify it and even know it. The secret on his or her existence has been condemned in view of the future shock of discovery. There are already court decisions allowing for the identification of the original family, with no change to the adoption link, which is irrevocable. As can be seen, the condition is not exactly the same as that of a child generated after the death of the father.

The understanding that the father's figure is much greater than that of a mere provides or breeder, has been consolidating on a timely bases. The purely juridic link, based on assumptions, structured on a system of striking equity assumptions, was replaced by the trend, currently standing, of the prevailing of the biological link.

We march, though certainly, toward the sense of giving priviledge to the affective link, which is established between the child and the one who performs the role of father. Only when right fully acknowledges, the role of the father in its complexity and which transcends, by far a biological link, there shall arise the effective possibility of meeting the child's interest in a much better manner.

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8 Jurisprudence review reveals a strong tendency to establish paternity based a the biological link, which can be ascertained through the DNA test, which can be found in the immutable decision by the STJ. We live under the DNA auspices.
The existence of a legal disposition establishing the assumed paternity, as per the conditions above, should not, by itself drive away the questioning on the legitimacy of post mortem insemination. There may be very diversified decisions in case of possible conflict.

There being a statement by the husband regarding the destination to be assigned to his semen in case of death, the referee may determine that the will of the deceased by complied with, whether towards destroying the material or allowing the insemination an equal alternative shall exist in the lack of such statement. We would not be surprised by a decision which would authorize insemination even in the face of contrary statement by the husband, by acknowledging the woman the right to fulfill the family plan started with the husband, it being fairer that she use her late husband's semen than the one from an unknown donor.

Likewise, if the wife has had her request refused by the clinic, for the delivery of her deceased husband's semen, the standing rule provides room for the judge to, by weighing the interests involved, refuse the woman's plea, by understanding that the best interest of the child should prevail, in the sense of his or her having a father, a principle found in article 227 of Federal Constitution, independently of the husband's will.

It is mandatory, anyway, to have in mind that the right to family planning bears as foundations the principle of human dignity and of responsible paternity. The married man who supplies spermatozoids for his wife's insemination or for in vitro fertilization, or else, authorization for the insemination of his wife with a donor's semen, presumably wishes the paternity which shall be assigned to him by law. The possibility of reversal of opinion in such cases should be regulated by law. In the absence of a rule on the matter, the assumption should prevail, in case insemination is successfully performed, based on the principle of the best, entirely prioritary, interest of the child and of the adolescent.

9 According to statement 256, approved in the abovementioned Civil Law Rounds, the possession of the state of child (socioaffective parenthood) comprises a mode of civil familial relationship.
What one finds is that the law has not made its orientation clear, indicating which interest should prevail. It is true that the constitutional norm (article 227) establishes as being the duty of the family, of society, and of the State ensuring to the child, with absolute priority, the rights which indicate, among them, the right to family living which should include in principle, all constitutionally recognized family activities.

However, situations have been emergency, demanding careful review of the interests involved. This review task is quite difficult as it involves, at any one time, the rights of men, women and children. If it is right that having a child is one of the most legitimate aspirations of the human being, it is no less right to say that the rights of the child have to be respected, especially that of having a child.

One should ask, however, what we should understand as family nowadays. Reproduction is not linked anymore to the existence of a couple. An individual may have children, by means of assisted reproduction techniques. A monoparental family is a fact. Its arisal may stem from chance, for example, upon the death of one of the members of the couple, or from will, which happens when a woman, man or a decides to have a child separately, whatever his or her sexual orientation may be. In both cases the child shall be deprived of one of his or her parents, generally of the father.

Post mortem insemination having been admitted by law, there is not, at first sight, a reason for not allowing an identical procedure, outside wedlock or a stable union, to be performed in the case of individuals lacking a companion, who desire to have a child under the argument that the right to family planning is ensured, not only to the couple but also to the man and to the woman.

This seems to be moment to reflect on the convenience of institutionalizing (or not), in an encompassing manner, the rising of monoparental family, as those, which appear with the birth of children generated after the father's death. Is the child's best interest met? Which interest should prevail, the child's or the parent's? In other words, can we already dispense with the father?

Rio, April 2005.