Assisted reproduction: a right of all. How to proceed with the registration of the child?

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Abstract

The assisted reproductive techniques (ART) applied in Brazil, in face of the lack of federal legislation, are based on ethical standards since 1992. The parties involved - doctor and patient -in an artificial conception process count on resolutions of the Conselho Federal de Medicina – CFM (Brazilian Federal Council of Medicine). Recently there were important innovations in the scope regarding who can perform ART and regarding the guiding norms, such as the new CFM Resolution 2,121/2015, as well as Provisions 21/2015- CGJ PE and CNJ 52/2016 concerning the registration of children generated by ART. The latter Provision requires the identification of donors of genetic material. Therefore, the aim of this paper is to present improvements to attend to the best interests of children born through ART and that of their parents, and equality among children when issuing birth certificates in Brazil, regardless of any lawsuit pertaining to a violation of medical confidentiality and the right to donor anonymity, as per the national provision.

Keywords: Reproductive techniques, assisted. Parenting-Reproductive behavior. Family planning (Public health). Family. Birth registration. Confidentiality. Embryo transfer-Fertilization in vitro.

Resumo

Reprodução assistida, direito de todos. E o registro do filho, como proceder?

Diante da falta de legislação federal, as técnicas reprodutivas assistidas (RA) aplicadas no Brasil são regidas desde 1992 por normas éticas, e as partes envolvidas em processo de procriação artificial contam com resoluções do Conselho Federal de Medicina (CFM). Recentemente houve importantes inovações quanto à abrangência de RA e quanto às normas orientadoras, a exemplo da nova Resolução CFM 2.121/2015 e dos Provimentos 21/2015-CGJ-PE e CNJ 52/2016 sobre o registro de crianças geradas por RA. Este último exige identificação dos doadores do material genético. Objetiva-se demonstrar avanços para atender ao melhor interesse das crianças havidas por RA e seus pais, e à igualdade entre filhos na emissão da certidão de registro civil em cartório no Brasil, independente de ação judicial, apontando violação do sigilo médico e do direito ao anonimato do doador no provimento nacional.

Palavras-chave: Técnicas reprodutivas assistidas. Poder familiar-Comportamento reprodutivo. Planejamento familiar. Família. Registro de nascimento. Confidencialidade. Transferência embrionária-Fertilização in vitro.

Resumen

Reproducción asistida, derecho de todos. ¿Y el registro del hijo? ¿Cómo proceder?

Las técnicas de reproducción asistida (RA) aplicadas en Brasil, ante la falta de una legislación federal, se rigen sobre la base de las normas éticas desde 1992. Las partes involucradas - médico y paciente – en un proceso de procreación artificial cuentan con las resoluciones del Consejo Federal de Medicina (CFM). Recientemente hubo importantes innovaciones en el ámbito de aplicación con respecto a quién puede realizar la RA y en cuanto a las normas orientadoras, tales como la nueva Resolución CFM 2.121/2015 y las Disposiciones 21/2015-FPG-PE y CNJ 52/2016, sobre el registro de niños generados por RA. Esta última Disposición exige la identificación de los donantes del material genético. Por lo tanto, el objetivo de este trabajo es presentar los nuevos avances para atender al interés superior de los niños producidos por RA y de sus padres, y la igualdad entre los hijos en la emisión de la certificación del registro civil en Brasil, independientemente de acciones judiciales, señalando la violación del secreto médico y del derecho al anonimato del donante en la disposición nacional.

Palabras clave: Técnicas reproductivas asistidas. Responsabilidad parental-Conducta reproductiva. Planificación familiar. Familia. Registro de nacimiento. Confidencialidad. Transferencia de embrión-Fertilización in vitro.

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Declaram não haver conflito de interesse.

Although many of their aspects are still considered controversial, assisted reproductive techniques (ART) have been used for decades. Some situations produce emphatic debate, such as the lack of a consolidated legal code regarding the issue, which would provide, for example, civil registration for the infants that are born as a result of ART procedures. This lack of a consolidated legal code occurs both in Brazil and around the world. Federal regulations regarding the issue do not even exist in Brazil. France, in 2014 - which is to say, very recently - was reprimanded by the Corte Europeia dos Direitos Humanos (European Court of Human Rights) (ECHR) for not recognizing, in terms of granting civil birth registration, children that, although they were the offspring of French parents, required the aid of a surrogate mother in order to be born, a procedure which occurs abroad, in the United States of America [1].

The right to filiation grants other rights that are inherent to human beings, especially concerning the right to dignity, an identity, succession, social security, nourishment and family ties, among others. The ECHR based its decision on the principles of the right to an identity and to inheritance to push for the acceptance, by France, of such civil registration procedures. In Brazil, ever since the 1988 [2] Constitution, discriminatory practices against offspring for any reason is prohibited, irrespective of: whether the child is considered legitimate or not, the circumstances of its conception, or whether or not it was adopted. These distinctions that once existed between children were superseded by the principle of equality; the adoption of biological or non-biological criteria were maintained [3], since socio-affective filiation is accepted.

Surrogate gestation as a means for profit is not mentioned in the ethical standards that govern assisted reproduction and the practice of its techniques in Brazil. The temporary donation of the uterus, which, hereafter in this paper, will be what is meant each time surrogate gestation is mentioned, is accepted, unless otherwise specified. Even temporary uterine donors should be a relative, up to the fourth degree, of the family of one of the biological parents, in an attempt to avoid purely financial motivation on the part of the donor.

Given the lack of federal legislation and considering the ethical standards regarding assisted reproduction that were published by the Conselho Federal de Medicina (Federal Council of Medicine) (CFM) in 2015, and by recommendation of the Conselho da Justiça Federal (Federal Council of Justice) (FCJ) and the Instituto Brasileiro de Direito de Família (Brazilian Institute for Family Rights) (BIFR), Provision 21/2015 [4] has been put forth by the Corregedoria Geral da Justiça do Estado de Pernambuco (Judicial Administrative Department of the State of Pernambuco). Published in November 2015, this provision regulates the civil birth registration procedure of ART offspring that belong to heterosexual and homosexual parents, permitting, as such, the existence of multiple parent types in the state. In light of the need to consolidate the new rules regarding the issuance of civil birth registration to the children of hetero and same-sex partners within the territory of Brazil, in March of 2016, the Corregedoria Nacional de Justiça (Brazilian National Judicial Administrative Department) enacted Provision 52/2016 [5].

As a result, considering the guarantee that was established by the ethical standards for the civil registration of children by their genetic parents in surrogate gestation cases in Brazil, and in light of the new regulations that have been put forth by the provisions concerning filiation and birth registration, the regulatory advances that benefit families that have had to turn to ART procedures in the country become quite evident. However, the national provision compromises the right to professional confidentiality of the medical professional, as well as the right to anonymity of the donor of genetic material.

Multiple parent types and assisted reproduction

Society undergoes constant change, which means that laws and legal science must be adjusted accordingly. The right and concept of family has undergone various transformations over centuries, mainly regarding the rupture of paradigms that existed with respect to how human beings group themselves, or how they choose to constitute familial entities. Social acceptance of conjugal separation freed the path for concepts of familial nuclei that are composed not simply of "father, mother and children", which had been prevalent up to the end of the twentieth century. As such, various types of family nuclei have emerged, which consist of the successive links between one father, two fathers, or even two mothers. Same-sex partners have achieved wider acceptance as well, currently being considered to be a type of familial entity, against which discrimination due to the sexual orientation of the parents is prohibited.

Within Brazilian law, the 1988 [2] Constitution brought about new concepts involving the family,

defining it as the foundation of society and providing it with special protection under the State; moreover, the common-law marriage between man and woman also came to be viewed as a familial entity. A familial entity was conceptualized as a *community composed of whichever one of the parents and his descendants* [6], recognizing, as such, forms of familial nuclei other than those involving marriage. In addition, Article 226, paragraph 5, established equal rights and responsibilities for both spouses within a conjugal relationship. Subsequently, in 2011, the Supremo Tribunal Federal (Federal Supreme Court) (FSC) recognized same-sex partners as a familial entity [7].

Given the contemporaneity of these concepts of familial entities, the concept of multiple parent types emerges, which is the possibility, in legal terms, of a person having more than one father or mother registered civilly as their parent. It should be noted that, previously, the concept of filiation considered only biological relationships to be legitimate, i.e., only biological children of married parents were recognized by law. However, Article 227, paragraph six, of the Constitution made all offspring, biological or otherwise, having arisen or not from a married relationship, equal in terms of their rights, prohibiting any form of discrimination regarding the details of their origin.

In addition to this constitutional recognition, the principle of equality with respect to the right of filiation is also addressed in Article 1.596 of the Civil Code: *The children, born during their parents' wedlock or otherwise, or having been adopted, will have equal rights and privileges; any discriminatory designations with respect to filiation are hereby prohibited* [8]. According to Paulo Lôbo [9], *no interpretation of the regulations with respect to filiation shall be permitted that may betray any modicum of inequality in the treatment of offspring, irrespective of their origins, which dissolves any preferential legal provisions with respect to personal and patrimonial relationships between parents and their offspring, between siblings and in matters that concern familial ties*. It is possible to note that both the Constitution[2] and the Civil Code [8] describe a single concept of what constitutes filiation, thereby renouncing the concepts of legitimate, illegitimate, adoptive, adulterine and natural filiation [3].

The multiplicity of accepted familial entities allows for the constitution of nuclei with more than one parental or maternal figure, not necessarily biological, but affective. Examples of these types of families are those that are formed by people that already had children that have united with others that also may or may not have children (that are in hetero or same-sex relationships); single women and men that had children via ART, adoption or by natural means, in addition to other configurations. This bond may bring about a desire within these individuals to express their affection more formally, in other words, to register their child with other fathers or mothers, giving rise to a situation of multiple parents in terms of filiation.

Therefore, socio-affective filiation *is defined as that which consists of a relationship between father and child, mother and child, or between parents and offspring where no biological bond is required between them* [10]. This concept is clearly linked to the constitutionally established principle of affectivity, according to Paulo Luiz Netto Lôbo as quoted by Cristiano Cassettari[11]. Therefore, social development, as it is linked to the right to human dignity and equality, to the constitution of a family in any of its diverse forms, to the right to affective relationships and to familial planning, allows people, in the exercise of their free-will, to choose between any of the existing possibilities, including the manner, the timing and the familial configuration; to choose to have children without being discriminated against, to have these children recognized legally, to pass their legacy onto them, their backgrounds and even their personal belongings and wealth.

New CFM resolution regarding assisted reproduction

Since 1992, the CFM began to establish regulations regarding ART. The first was put forth almost one decade after the birth of the first Brazilian test tube baby [12]. After having published its first resolution regarding AR [13], the CFM stipulated that human infertility is a health issue and that people that have to deal with it would like to be able to resolve the situation. The CFM also considered that medical science could provide solutions for infertility, especially through the practice of ART, which, to be engaged in, must adhere to certain bioethical principles. This resolution established general principles that stipulated that ART would play an auxiliary *role in solving human infertility issues* [13], with the intention of contributing to the process of procreation in case other methods were unsuccessful.

Changes were made to CFM Resolution 2.013/2013 [14] as a result of Ação Direta de Inconstitucionalidade 4.277 – ADI 4.277 (Direct Unconstitutionality Action No. 4.277) (DUA) 4.277)

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and Arguição de Descumprimento de Preceito Fundamental 132 - ADPF 132 (Accusation of Breach of Fundamental Precept No. 132 - ABFP 132), which were examined by the Supremo Tribunal Federal (Federal Supreme Court)[7] in 2011, when a consensus of Supreme Court magistrates recognized and qualified the common-law same-sex relationship as a familial entity. In terms of new concepts, the aforementioned resolution allows individuals that are in same-sex relationships, as well as single individuals, to solicit and participate in ART procedures, while also recognizing the medical professional's right to refuse his or her participation in such activities. Assisted reproduction techniques with respect to female same-sex relationships, in addition to other aspects, were also influential in the passing of new CFM Resolution 2.121/2015[15].

Ethical standards have always been careful to clarify which patient could be subjected to ART (*firstly, any capable woman*, subsequently, *every capable person*), even in the case of shared gestation in a female same-sex relationship in which infertility is not an issue. The current content of the aforementioned ethical standards evolved as a result of a gradual improvement of the preceding normative regulations, all of which culminated in CFM Resolution 2.121/2015[15], which encompasses all capable people, whether he or she be single or in hetero or same-sex relationships. Homosexual couples encounter natural barriers in terms of reproduction; therefore, it is the job of science to help these individuals and allow them to have the same opportunities in terms of forming a family. It is also the job of the legal system to provide legal safeguards for these couples, ensuring that the formation of these families does not occur only by means of the adoption of orphan children – albeit a venerable act – so that these couples can have their own biological children. Based on the current ethical standards regarding the subject matter, it is evident that these couples currently have more access to assisted reproductive procedures.

Maternal biparental (bimaternity) situations occur precisely when the law allows for a child to be civilly registered by two mothers[16]. In principle, female same-sex couples that undertook ART procedures used sperm from an anonymous male donor, but this changed with CFM Resolution 2.121/2015. Now it is possible to use material from a woman and implant it in her partner, which would, therefore, make it feasible to register the couples' offspring under two mothers, since the two of them shared in the child's pregnancy[15]. Considering these changes with respect to who can benefit from ART procedures and the majority decision of the Brazilian Supreme Court concerning what constitutes a familial entity, the last step was to develop regulations regarding the civil registration of the children that were born out of these procedures. This guarantee of genetic parents being able to register their children civilly is provided by the CFM Resolution.

Filiation and civil birth registration rights

According to the third principle of the *Declaração dos Direito da Criança (Declaration of Children's Rights)*, *from birth, every child has the right to a name and a nationality*[17]. Registro Civil de Nascimento (Civil Birth Registration) is a fundamental right and guarantees one's right to an identity, since the birth certificate is what formalizes, legally speaking, the existence of a person. In addition, it is an essential document for anyone to participate in the activities of civil life. The terms of article 5, section LXXVI, subsection "a" of the Constitution guarantee that a person's first civil birth registration is free of charge[2]. Parents have 15 days to register their child, *which can be extended to up to three months for children that are born in locations that are more than 30 kilometers from a notary office*[18].

Since long ago, in order for an individual to be registered civilly, it was necessary for he or she to be named by a heterosexual couple, or at least a mother. Homo-parental filiation was not permitted in society for quite some time. However, these precepts endured changes in order to adapt to new realities.

The right to homo-parental filiation emerged with the right to adoption. However, the right was not fully granted since, according to Cassettari[19], adoptions were only allowed individually, by only one of the partners. After all, in light of the existence of prejudice, any attempt at joint adoption would have to overcome issues to achieve approval.

In 2006, the Tribunal de Justiça do Rio Grande do Sul (Rio Grande do Sul Justice Tribunal) *was the first to allow homosexual couples to engage in joint adoption*[19]. From that point forward, other homosexual couples submitted legal petitions requesting the right to joint filiation, especially since these children are exposed to maternal or paternal relationships with the partner(s) of his adoptive father or mother. One must not forget that filiation implies the enforcement of rights and responsibilities regarding alimony, social security and inheritance, in

addition to being tacitly related to affection, which is the most important aspect in this regard.

In May of 2011, the STF [7] recognized common-law marriages of same-sex couples when it approved DUA 4.277 and ABFP 132. Based on article 3, section IV of the Constitution [2], Ayres Britto, Supreme Court justice at the time, explained that any type of *legal inequality* with respect to a person as a result of their sex, unless otherwise specified, is an affront to the Constitution and constitutes a discriminatory act that is prohibited by that document [7].

The need to resort to the use of surrogate gestation, which is common in ART, is an important factor in terms of the issue of the right to filiation and the registration of the unborn child. To preclude that the temporary uterine donor or her spouse or partner should come to demand any right to filiation of the child, the resolutions presented a series of requirements. Among them are: the requirement that the donor and one of the genetic parents be relatives, in order to avoid profit or commercial motives; the requirement that an informed consent form be signed establishing the nature of the child's filiation; and, in the case of a donor that is married or in a common-law relationship, approval of the spouse or partner is required regarding the temporary donation of the uterus, which recognizes the absence of any right over the child. The guarantee of the civil registration of the child by the genetic parents should be expressly documented during the pregnancy, considering the temporary donation of the uterus during the surrogate gestation period.

Among the documents required are the identification documentation and authorizations of the donors and recipients, which must be kept confidential by the pregnancy clinics, health centers or health services that aid in the donation process. The Código Civil (Civil Code [8] has not exhaustively regulated ART; however, in accordance with the interpretation of articles 1.593 and 1.597, in addition to recognizing the natural and civil parenthood that arises from kinship or from some other origin with respect to filiation, the Code considers that offspring conceived by ART procedures during marriage are also kin.

As mentioned, in Brazil, surrogate gestation is allowed by ethical norms, provided no profit or commercial motives are involved and excluding any and all right on the part of the donor in terms of the child's filiation [15]. However, this issue is highly controversial. In France, for example, temporary uterine donation is not allowed and is considered a criminal act and an affront to public order. The French Civil Code, which is based on the internal Law of Bioethics, considers null any form of agreement or convention with respect to surrogate gestation [20]. Based on this prohibition, France does not grant filiation to children that were born from surrogate gestation that took place in other countries; the objective being to dissuade the French population from engaging in such activity. However, a French couple decided to resort to ART, undertaking surrogate gestation procedures in the state of California, making sure to comply with each of the local legal provisions, and gave birth to two little girls. Once back in France, they requested civil registration for their two daughters, which had been denied [20]. The couple appealed the decision, and the trial's proceedings came to be divided into two perspectives: 1) *The violation of respecting the sanctity of family life*, where it was judged that the French government committed no violations; 2) *the violation of the respect for the children's right to privacy*. In consideration of the best interests and the children's right to an identity, the State had to recognize their filiation. It should be noted that this decision did not engender any changes in French legislation regarding this subject matter, which could bring about future legal proceedings[1].

In Brazil, under the current CFM Resolution [15], doubts emerged concerning how the Birth Registration of children belonging to same-sex couples would be dealt with, i.e., if the judiciary would have to intervene or if the process of registration could be undertaken directly at an appropriate notary office. With respect to a female same-sex couple, notary offices registered the ART child in the name of the mother that gave birth to it, making it the responsibility of the other mother to initiate the process of adopting that child. In terms of male same-sex couples, both parents would have to initiate an adoption process. This represented the legalization of ART and the right to filiation.

Conveniently, considering the innovations brought about by the CFM's resolution [15], the Conselho de Justiça Federal (Federal Council of Justice) promoted the VII Jornada de Direito Civil (VII Civil Law Seminar) and approved Declaration 608, which states: *The registration of children, whose birth required the use of assisted reproduction techniques, of same-sex parents may be performed directly at the Civil Registration Notary Office, which obviates the requirement of a legal proceeding, in the terms of the local Judicial Administration Department. Section of the legislation: articles 1.593 and 1.596 of the Código Civil (Civil Code), Volume IV* [21]. Similarly,

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the Tenth Brazilian Family Law Seminar, which was organized by BIFR and held in October of 2015, issued Declaration 12: *The registration of children, whose birth required the use of assisted reproduction techniques, who belong to same-sex couples, can be performed directly at a Cartório do Registro Civil (Civil Registration Notary Office*[22]. Afterwards, provisions arose that regulated the registration of these children at such notary offices.

Provisions concerning filiation in cases of assisted reproduction

Even without considering for the parents, of any nature or classification, the right to register their children, the right to an origin, name, nationality, identity, civil registration, filiation and equality is inherent to each child and does not tolerate any form of discrimination. Children also have the right to special protection in order to develop fully as a human being, having legally guaranteed access to conditions of liberty and dignity. It is the responsibility of sovereign states to establish laws, standards and other sufficient means by which to guarantee these rights as consideration for the greater interest that is represented by the child[17]. It is the responsibility of society as a whole, including the Government and the family, to protect the rights of children (and adolescents).

According to article 3, section 1 of the *Convenção sobre os Direitos da Criança*[23] (*Convention on Children's Rights*), *all initiatives with respect to children, which are instated by public or private institutions for social well-being, courts, administrative authorities or legislative bodies, must first consider the best interests of the child*. As a result, considering the multiplicity of familial entities that are possible in Brazilian society, the laws and ethical standards must constantly be adjusted accordingly.

Beginning with the recognition, in 2011, of same-sex relationships as a familial entity,[7] it quickly became apparent that the provisions that regulated correlated issues required several changes, as was the case with the ethical standards regarding ART and the imminent need to regulate birth registrations. Provision 54/2014 was issued[24] by the Corregedoria Geral de Justiça do estado do Mato Grosso (Judicial Administration Department of the State of Mato Grosso), which governed homo-parental birth registration in that State. The provision took into account constitutional precepts concerning the equality between offspring and the broad conception of the family, in addition to the principle of affectivity and the dignity of the human being. Furthermore, the provision proposed other basic fundamentals that corroborate the right to homo-parental filiation, stating that the fact of having two mothers or fathers cannot preclude the civil registration of a child. This provision therefore determined that:

the registration of birth that arises from homo-parental conditions, biological means or by adoption, shall be recorded in Volume A, in accordance with the law, with respect to what is most relevant, making adjustments so that the names of the fathers or the mothers are mentioned, in addition to his or her respective grandparents, without making the distinction of whether they are paternal or maternal, and without taking into account the following fundamental documents: I – live birth certificate – LBC; II – marriage certificate, the conversion of a common-law marriage into marriage or a document of recognition of common law marriage[24].

The provision also states that, with respect to biological homo-parental situations, the following will also be required: I – a notarized consent form, issued by a public or private institution; II - a document from the human reproduction center. In addition, when there is a case of homo-parental adoption, the court order that requested the change in the birth certificate will also be required[24]. *As previously mentioned, CFM Resolution 2.121/2015*[15] *legally allowed shared gestation within female same-sex relationships where neither partner is infertile. Based on that, the Corregedoria Geral de Justiça de Pernambuco (Judicial Administrative Department of the State of Pernambuco) approved the appeal against the lower court ruling by putting forth Provision 21/2015, which governs the procedures required to register the birth of children that required assisted reproduction techniques, by hetero or same-sex couples, providing for multiple parent types, within the state of Pernambuco, and sets out other provisions*[25]*:*

The provision instituted measures that aimed to reduce bureaucracy during civil registration proceedings and serves, for the first time, to deregulate the cases of assisted reproduction, when judicial intervention was required for civil registration, especially in light of the innumerable cases of surrogate gestation (gestation by a third party) or with respect to attempts at parenthood by same-sex couples[26].

This provision[25] highlights multiple parent types in article 1, for it allows for parental duplicity as well

as fatherhood or motherhood by persons of the same gender, considering that Law 6.015/1973[18] does not prohibit that a child's birth certificate state two fathers or two mothers. In addition, it considers the *clause "other origin" with respect to civil kinship, as proven by parental socio-affection, as set forth by article 1.593, in the conclusion of the Código Civil (Civil Code)* [25]. With respect to the documentation required to submit the birth certificate, article 2 of this provision requires:

a Live Birth Certificate – LBC; a declaration from the reproductive clinic, from the health center or from the center for human reproduction, signed by its director and/or by the doctor in attendance (whose signature has been authenticated by a public notary) who performed the assisted reproduction techniques, listing the use of RMA techniques and its recipients; Original birth certificate or authenticated copy, in the case of single fathers or mothers, in addition to a public identification document with a picture of the declarant(s); A marriage certificate, original or authenticated copy, that has been issued for at least 90 days, or a certificate stating the conversion of a common-law marriage into an official marriage, issued for at least 90 days, or a document of recognition of a common-law marriage [25].

As mentioned previously, the provision also addresses birth registration in the case of surrogate gestation, stating that a declaration set forth by the medical professionals that performed the assisted reproduction techniques, in accordance with article 2, paragraph 1 of the provision, must register the proceedings. And furthermore, the declaration should state that the parturient is a temporary uterine donor, and must include a document that proves that the spouse or partner authorized the execution of the procedure [25].

The provision states that, in cases of *post-mortem* assisted reproduction births, in addition to the criteria that have already been established, a notarized declaration or document of authorization for the use of the biological material of the deceased, must also be submitted. Should doubts arise about how to proceed, the Juiz Registral (Civil Registration Judge) is qualified to resolve them, upon consulting the Ministerial Body, within the time period of up to ten days [25]. This provision aimed to provide guidelines for civil registration notary offices in order for them to issue documents to register assisted reproduction births, to provide more *safety, speed of issuance and efficiency during the registration process in an effort to contribute, in legal terms, to the scientific evolution of reproductive rights* [26].

Considering that the provisions mentioned above regulate civil registration proceedings only within the states in which they were published, the Corregedoria Nacional de Justiça, do Conselho Nacional de Justiça (CNJ) (National Judicial Administrative Department of the National Council of Justice NCJ) published Provision 52 [5], on 14 March 2016, which standardized assisted birth registration throughout all of Brazil, in addition to the issuance of the respective birth certificate, for the children of hetero and same-sex couples. The Corregedoria Nacional de Justiça (National Judicial Administrative Department) is the body of the NCJ that overlooks the proper management of legal services, having the power to supervise services that were provided by notary public offices of its Member-States. NCJ Provision 52/2016 [5] establishes that the registration of children that were born through the aid of assisted reproductive techniques, belonging to hetero or same-sex couples, does not require judicial pre-authorization, in accordance with current laws; the documentation required by this provision must be submitted upon registration of the child. In the case of the children of same-sex couples, the civil registration process *must be adapted in order for the names of the parents to appear on the document, without there being any distinction with respect to the nature of the fathers or mothers* [5].

The provision also states, in accordance with article 1, paragraph 1, that during the child's registration process, one or both of the parents may be present, when the parents are married or live together as a common-law couple, independent of whether they are hetero or same-sex. Article 2 of the provision states:

The following documents must be submitted during civil birth registration proceedings and for the issuance of birth certificates:

I – live birth certificate – LBC;

II – a notarized declaration of the technical director of the birth clinic or center or human reproduction service where the assisted reproduction procedures were executed, stating the technique that was employed and the name of the donor, including an overall record of the donor's clinical information and phenotypic characteristics, in addition to the names of the individual's beneficiaries;

III – a marriage certificate, certificate stating the conversion of a common-law marriage into an official marriage, document of recognition of a common law marriage or legal statement in which the couple's common-law marriage was recognized.

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§ 1º In cases of voluntary donation of gametes or surrogate gestation, the following documents must also be submitted:

I – the donor consent form, issued by a public body, that expressly authorizes the civil registration of the birth of the child that will be born if the name that will appear on the birth certificate is that of a third party;

II – the approval form, issued by a public body, of the spouse or of he or she that lives in a common-law marriage with the donor, expressly authorizing the assisted reproduction procedure that shall be undertaken;

III – the consent form, issued by a public body, of the spouse or partner of the beneficiary or recipient of the assisted reproduction procedures, expressly authorizing the execution of the procedure.

§ 2º In cases of surrogate gestation, the name of the parturient, which is listed on the live birth certificate - LBC - shall not appear on the birth certificate [5].

Regarding *post-mortem* assisted reproduction, this provision establishes the requirement of providing the documentation that is specified above, in addition to a *document of authorization, issued and signed beforehand and issued by a public agency, from the deceased for the use of his or her preserved biological material*. The provision also states that *information regarding biological ancestry will not affect the recognition of kinship and of the respective legal ties between the donor and the offspring that is the result of assisted reproduction* [5]. It should be noted that no significant difference exists between the provision that was put forth in the state of Pernambuco and that which was put forth nationally; however, in addition to the latter having regulated the registration of births for all of the notary offices across the country, it also prohibits the refusal of such registration by these offices. Another salient point is that the national provision does not specifically address multiple parent types (parental duplicity); however, it does address the issue indirectly by mentioning the registration of children of hetero and same-sex couples that were born through the aid of assisted reproduction techniques.

As such, as of March 2016, the issuance of birth certificates for children whose births were aided by ART that belong to hetero or same-sex couples is no longer an issue that parents have to face in any of the notary offices in the country. In addition to easing the worry among parents, the provision reduces the workload of the judiciary system, eliminating the need for legal proceedings that authorize the civil registration of these children. As a result, the regulation represents a significant advance not only in terms of the right to filiation but also in the exercise of the principles of equality, affectivity, family planning, the dignity of human beings, the best interests of the child, and, mainly, with respect to the recognition of the various types of familial entity that are addressed in the constitution.

Birth certificate of children that are born with the aid of ART

Despite the mention of the apparent advantages that are proposed by NCJ Provision 52/2016, the regulation does not provide safeguards for confidentiality between doctor and donor. Upon requiring, in section II of article 2, a statement from the *technical director of the birth clinic or center or human reproduction service where the assisted reproduction procedures were performed, also stating the technique that was employed, in addition to the name of the donor* [5], the principles of confidentiality and anonymity that are inherent to the practice of medicine have been breached. Confidentiality within the doctor-patient relationship is not a new requirement, since the history of this relationship has been marked by discretion between both parties. According to the Hippocratic Oath, *that which I have seen or heard, during the exercise of my profession or otherwise, that I am not obligated to divulge, I will maintain completely confidential* [27].

In each of the CFM resolutions that concern ART, the civil identity of the donor of gametes and embryos is protected, as well as that of the recipients, except in special cases, this information is supplied and kept under the professional confidentiality of the doctors [15]. Professional confidentiality is protected under article 154 of the Código Penal (Penal Code), which allows for the detention of any professional, which has knowledge of confidential information pertaining to third parties, that divulges this information without just cause, possibly causing damages to said third party [28]. It should be noted that, as regards the doctor-patient relationship, confidentiality is the right of the patient, linked, as such, to his right to privacy, integrity and honor. The doctor has the responsibility to not violate this pact of confidentiality without authorization [29], since, in accordance with article 73 of the Código de Ética Médica (Code of Medical Ethics - CME), the medical professional is prohibited from *revealing a fact that he has come to know due to the exercise of*

his profession, unless he has just motivation, a legal obligation or written authorization from the patient to do so [30].

Brauner, quoted by Morales, states that *the identity of the donor may only be revealed in cases of medical emergency, such as, for example, in situations where the person must obtain genetic information that is mandatory to maintaining his or her health, or upon the utilization of gametes that have genetic defects* [31]. Therefore, NCJ Provision 52/2016 [5], when it requires, in article 2, subsection II, the name(s) of the donor(s), is in direct violation of the principle of the anonymous donor, of he or she that does not wish to supply identification of the material that was donated in the case of heterologous assisted reproduction. At the same time, it places the doctor in a delicate situation, because if he complies with what is stated in the provision, he will be in breach of the CME [30] and of the very recommendations found in the ART resolution that is currently in effect.

The provision did not justify the need to reveal the name(s) of the donor(s) of genetic material to validate the birth registration, since the filiation should be registered by the parents of the child, irrespective of the origin of the genetic material. According to França, *moral or social interests can be accepted as just cause for not complying with the regulation, provided that the motives that are presented are, in fact, capable of legitimizing such a violation* [32]. It is not possible to find any just cause in the provision to maintain the requirement. The legal defense for the maintenance of genetic identify is founded on...

the fundamental principle of the dignity of the human being, which is set forth in article 1, section III of the Federal Constitution of 1988, as one of the fundamental principles of the Federative Republic of Brazil, which establishes the right to biological and personal identity. Impeding one's right to gain knowledge of his own genetic origins constitutes a violation of the principle of dignity of the human being; the psychological necessity of having knowledge of one's own biological background must, therefore, be respected [33].

Another principle that is included in the right to have knowledge of one's genetic identity is the right to personality, which *is the underpinning of all other rights, such as: the dignity of the human being, life, health, liberty, equality, affectivity and the inviolability of personal privacy* [34].

On the other hand, before presenting the counterpoint to this provision, it should be noted that this paper does not aim to evaluate if a person who has the genes of an anonymous donor via heterologous assisted reproduction does or does not have the right to gain knowledge of his genetic background, since, to do so, a set of conditions would have to be considered. The debate concerns the requirement, set forth by the provision, that the donor's name be provided for the child's, whose birth was assisted, civil registration, as well as the violation of the principle of medical confidentiality and the privacy of the donor. Not only ethical standards, but also the federal legislation, establish penalties for he who disrespects the mandatory nature of the guardian of confidentiality as a consequence of his profession. In accordance with the bioethical principle of the autonomy of the patient, the decision of the patient should be respected, in which it is the doctor's responsibility to consider this decision and safeguard it unless the patient authorizes its divulgence.

The right to privacy, which is integral to the right to personality, is addressed in the Constitution in article 5, subsection X, and states that *one's privacy, personal life, honor and image must not be violated, guaranteeing, as such, the right to compensation for property or moral damages that arise from this violation* [2]. Furthermore, within article 21 of the Código Civil (Civil Code) that is in effect, the Code states that *the private life of the natural person cannot be violated, and the judge, upon request from the interested party, will adopt the necessary measures to prohibit or impede acts that are in violation of this regulation* [8].

The obligatory nature imposed by the provision of the need for a document stating the identity of the donor of genetic material of a child that was born through assisted reproductive techniques violates the constitutional guarantee of anonymous donors, which could require compensation from the parties that perpetrated the breach of anonymity. In addition, such a breach would result in disciplinary and criminal punishment for the breach of professional confidentiality, in addition to the legal insecurity of the doctor-patient relationship. The donor donates the genetic material in and of his or her own volition to help families that suffer from reproductive challenges, demanding only that his or her anonymity be maintained in return. Such a provision would be a setback in terms of heterologous ART since it violates the donor that wishes to remain anonymous.

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Final considerations

Filiation is a right that is inherent to human beings, as is the right to the concept of having an origin, a nationality and an identity. It is the first step in the legal realm in order for people to be identified as beings that have rights and responsibilities that are recognized in society. The principle of familial planning maintains that families should be free from any coercion or imposition in terms of their constitution.

In accordance with what was mentioned throughout this paper, currently, a multitude of family entities exist, and the desire to have children can be common to all of them. As such, countries should offer measures that guarantee the best interests of children, and even when regulatory differences exist or prohibitions regarding the use of certain techniques to assist in human reproduction, these best interests should still be considered.

The evolution of science demands the constant adaptation of legal, ethical and moral concepts within society, which is illustrated by the regulations and laws that aim to govern assisted reproduction techniques, which are becoming more important in the constitution of contemporary families. Under such circumstances, in which ART become more commonplace within Brazilian society, medical ethical standards have and continue to play a pivotal role in the face of the absence of federal laws regarding ART in the country.

Similarly, Provision 52/2016[5] of the Corregedoria Nacional de Justiça (National Judicial Administrative Department) aims to reduce bureaucracy and deregulate the registration of children whose births have been assisted that belong to hetero and homosexual couples, seeking to relieve them of drawn out legal proceedings to achieve the civil registration of their children. The provision offers clear and inclusive rules that facilitate the issuance of the civil registration documentation. However, it is not a substitute for federal regulations regarding ART.

Based on what was presented, therefore, the authors believe that the Judicial Branch should develop regulations regarding this subject matter, which has, currently, become fundamental to the formation of the Brazilian families that have to resort to assisted reproductive techniques. It should also be noted that, should this provision serve as a basis for the consolidation of national laws regarding the issue, the requirements for revealing the identities of the donors upon civilly registering the child or children should be rethought, since it threatens not only the principle of medical confidentiality, but also that of the privacy of the donor, which are both constitutionally guaranteed.

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Participation of the authors.
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