



**WYDZIAŁ PRAWA  
i ADMINISTRACJI**

Uniwersytet Łódzki

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### **Summary**

**Embryo's legal status in the pre-implantation phase  
from civil law perspective**

***(Sytuacja cywilnoprawna embrionu w fazie przedimplantacyjnej)***

The PhD dissertation prepared  
in the Department of Civil Law  
under the supervision of  
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## SUMMARY

In this doctoral dissertation, the author focuses on aspects of the civil law protection of the conceived child (*nasciturus*), which is provided to the child in specific private law provisions. The main aim of the dissertation is to answer the question whether a child conceived *in vitro* is entitled to rights, for example the right to inheritance or claims for damages, the source of which goes back to the pre-implantation phase on the same legal basis as they belong to a child conceived *in utero*. Other selected issues concerning embryo's legal status in the pre-implantation phase from civil law perspective are also addressed, particularly in the context of the regulations of the Polish Act of 25 June 2015 on the treatment of infertility.

The PhD thesis has been divided into six substantive chapters. The first one deals with general issues related to the *nasciturus*, how its civil law situation is explained in doctrine and judicature, whether it is entitled to subjectivity or legal capacity in the context of Article 8 of the Civil Code (including what relation these concepts have to each other) and which private law provisions protect it and to what extent. The considerations concern whether the conceived child can be an heir as well as a legatee (Article 927 § 2 of the Civil Code and Article 972 of the Civil Code), the possibility of acknowledging the paternity of the conceived child (Article 75 § 1 of the Civil Code), the maintenance costs of the conceived child (Article 142 of the Civil Code.), *curator ventris* (Article 182 of the Civil Code), the *nasciturus'* claim for compensation for damage suffered before birth (Article 446<sup>1</sup> of the Civil Code), the *nasciturus'* claims for damages under Article 446 § 2-4 of the Civil Code and Article 446<sup>2</sup> of the Civil Code, and the admissibility of making a donation to the *nasciturus*. In addition, concepts explaining the legal situation of the *nasciturus* are presented.

The second chapter deals in its first part with *strictly* medical issues. It discusses the prenatal development of the human being in the light of medicine, the issue of fertilization (including *in vitro* fertilization) in the context of embryology and modern methods of medically assisted procreation (MAP). In the second part of the chapter, the author explains how the development of MAP affects the concept of the *nasciturus*. Further, the problems of establishing the civil legal status of an embryo in the pre-implantation phase in the context of medicine are indicated, in particular: the controversy of determining when conception occurs in the application of MAP (whether from *in vitro* fertilization or implantation of the embryo), the genetic criterion is

approximated as justification for taking the moment of fertilization as the beginning of the development of the conceived child, the question of the legal status of the embryo in the pre-implantation phase (whether it is a person, a thing, an 'interim category') and, furthermore, can it be equated with the traditional concept of the *nasciturus* and the question of who has the right to "dispose" of embryos.

The third chapter presents the status of the embryo in existing international standards and comparative legal issues, including which models of MAP regulation can be distinguished in other legislations. This is followed by a broader analysis of the MAP regulation of one selected European country, Spain.

The fourth chapter analyses the Polish Act of 25 June 2015 on infertility treatment. Indeed, in the light of the development of technologies enabling the creation of an *in vitro* embryo, the contemporary discussion of the *nasciturus* is incomplete without an analysis of national legislation on MAP. For this reason, in this chapter an analysis is made of selected issues of the Polish Act on the treatment of infertility, in particular: embryo cryopreservation, *post mortem* fertilization and implantation, the numerous prohibitions aimed at protecting and respecting embryos, the conditions for the admissibility of embryo implantation and the subjective restrictions on the use of MAP, in particular the problem of embryos created from the ova of single women prior to the entry into force of the Infertility Treatment Act, embryo storage contract, preimplantation diagnosis, the institution of embryo donation, the register of donors of germ cells and embryos, and the issue of donor anonymity and the child's right to know the biological truth.

The fifth chapter contains considerations on the civil law protection of the *nasciturus* and the situation of the embryo in the pre-implantation phase under Polish law. The status of the *embryo* residing *ex utero* in the context of the constitutional principle of human dignity is also discussed. In addition, a review of civil law doctrine on the civil law status of the *nasciturus* in the pre-implantation phase is made. It is also discussed whether the notions of the embryo in the pre-implantation phase and the *nasciturus* can be placed on an equal footing and what their significance is in the light of the legal protection afforded to the conceived child in particular provisions of the Civil Code and the Family and Guardianship Code.

The sixth chapter presents the results of an analysis of the files of seven court cases in which

the family court has cognition under the Infertility Treatment Act. These cases relate to an application for consent to embryo transfer in the absence of the consent of the man from whose germ cells the embryo was created. From the analysis of the cases, interesting conclusions arise in the context of the legal status of embryos awaiting transfer and the practical problems that the courts must face when deciding these types of cases. An analysis clearly shows that the courts treat embryos as conceived child and, when granting or rejecting the application, are guided above all by the overriding principle on which family law is based, which is the 'best interests of the child'.

Following the analysis, the author concludes that the decisive moment for the creation of the *nasciturus* and the rights associated with it is the moment of fertilization (*in vitro* or *in vivo*). Already at that time, a subject of law is created which, in the event of successful transfer into the woman's body and birth, will definitively acquire rights whose origin goes back to the pre-implantation phase, whether these be rights to inheritance from the deceased father or claims for damages. This ensures effective protection of the rights of embryos in the pre-implantation phase, and, on the basis of international standards and Polish law, there are no grounds for differentiating the civil and legal situation of the embryo depending on which stage of development it is in, pre- or post-implantation. This thesis is even more justified after the entry into force of the Polish Act on the treatment of infertility. Furthermore, the very fact that, in the absence of the man's consent to the transfer of the embryo, it is the family court that has the cognition to give the consent to the continuation of the MAP procedure, shows that such an embryo is treated in the category of a child that can be born, not a 'thing' or the 'interim category', that can be disposed as an object.

The views according to which conception in the case of *in vitro* fertilization does not occur until after implantation of the embryo into the woman's body, and therefore only from that point onwards can one speak of a *nasciturus* are downright anachronistic. The arguments invoked in support of this position are purely pragmatic. However, this is completely detached from currently available medical knowledge, the development of MAP technology and irreconcilable with the guiding principle of the 'best interests of the child'. The example of the Spanish regulation perfectly illustrates how dangerous and inadvisable it is to artificially introduce a distinction between embryos that are already *in utero* and those that are in the pre-implantation phase and to call them pre-embryos. However, even with this regulation, Spanish doctrine and jurisprudence protect the *nasciturus* conceived *in vitro* and take the view that it is entitled to

rights whose origin goes back to the pre-implantation stage on the same legal basis as those belonging to the child conceived *in utero*. This is all the more apparent from the Polish legislation, where the legislator in no way distinguishes between the embryo and the pre-embryo. What is common to both legal orders, however, is that the source of all the rights of the *nasciturus*, including under civil law, whether their origin goes back to the pre- or post-implantation phase, is human dignity, constitutionally guaranteed. This is an interesting observation in the context of the completely different abortion policy under Polish and Spanish law. The author concludes that wherever child-related issues are analyzed, including in the context of private law, any analysis and interpretation must first and foremost take into account the 'best interests of the child' in the broadest possible sense.

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