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Relationships between parents and children and the child's affiliation in the provisions of the family codes in the former and contemporary Republic of Poland

Contemporary legislation which regards the legal relations between parents and children has been undergoing transformation. At the beginning of the People's Republic of Poland the legislation regarding the regulations was unified during the years 1945-1946, then there were codifications from 1950 and 1964 and the law amendments from 1975 and 2008. Moral and customary elements were particularly significant in the family law as they exerted crucial influence on the contents of the regulations. It should be emphasised that Father Michal Sopoćko devoted a lot of his work and attention to these very regulations. Contemporarily we cannot disregard the whole range of nuances of the term "contemporary family". This term significantly differs from the meaning which functioned in the period of creating the Family and Guardianship Code from 1964. In that period the concept of the family was based on the foundation of marriage. Currently the alternative forms of family life are being developed and civil unions are becoming more and more popular. Thus the family outside marriage is also recognized in different relationships.

Key words: Father Michał Sopoćko's teaching, family, child, child's affiliation, child's welfare, mother, father, family law.

Introduction

Polish family law contained in the Family and Guardianship Code was transformed in the People's Republic of Poland in the 1930s,

including the unification from the years 1945-1946, subsequent codifications in 1950 and 1964 and amendments from 1975 and 2008.

The unification was performed as a part of the unification of the civil law because there were no plans with regard to the divisions in the family law legislation. The unification was conducted through the introduction of four executive orders, that is:

- Marriage law (executive order from September 25th 1945),
- Family law (executive order from January 22nd 1946),
- Guardianship law (executive order from May 14th 1946),
- Marital property law (executive order from May 29th 1946).

While introducing the executive orders, the legislator used the projects of the family law prepared by the Codification Commission in the years 1931- 1937. The authors of the executive order from 1946 used the wide range of the projects of the law on relations between parents and children written by Professor St. Gołąb of Jagiellonian University[1].

The unified family law withdrew the religious nature of marriage, which thus remained solely secular and based on the principle of equality of the duties and rights of the spouses in their mutual relations. The unification executive orders partially eliminated the discrimination of an illegitimate child, whose father was recognized by the court. The child was only entitled to maintenance payments, however, he or she would not have any other rights which resulted from the kinship in relation to the father or his family. The regulations concerned the contractual form of adoption and the adoption of persons of legal age.

The executive orders were considered inadequate to the needs of the society who was building socialism and to the principles of the new regime. This resulted in merging the executive orders in the Family Code in 1950 which was genuinely a socialist code, as it was emphasised – it was the first such code of the Polish People's Republic. It implemented the Soviet doctrine of the family law, as a branch separated from the civil law. However, it was unreasonably laconic, which resulted from the difference of opinions of the Polish and Czechoslovakian lawyers who were working on it. It consisted of 93 articles of law instead of the 246 unification articles. However, the solutions which broaden the protection of the child's interests, the equal rights of an illegitimate and

[1] J. S. Piątowski in *System Prawa rodzinnego i opiekuńczego* (Warszawa: 1985), 8, more on the subject see P. Fiedorczyk, *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945-1964)* (Białystok: 2014), 601 and next., ibidem: *Projekt Kodeksu rodzinnego na tle wcześniejszych polskich projektów prawa rodzinnego w ostatnim stuleciu,* in: *O potrzebie nowego Kodeksu Rodzinnego i jego podstawach aksjologicznych w 30 Rocznicę uchwalenia Konwencji o prawach dziecka*, ed. S.L. Stadniczenko, M. Michalak (Toruń: 2019), 169 and next.

of a legitimate child, allowing for adoption only of minors, replacing the contracting form of adoption with the court's decision and introduction of the regime of statutory community, deserve approval. The negative aspect concerned the submission of the existing marriages to the new statutory regime. While among the advantages there was the possibility to formulate the solutions through judicial decisions. And thus the gaps in the code were completed with the guidelines of the judicial system, with the resolutions of the whole Civil Division and with the resolutions prepared by 7 judges[2].

The subsequent codification actions in the discussed issues, which also concern the Family and Guardianship Code from 1964, were prepared by the Codification Commission established in 1956 to develop the Civil Code of the Polish People's Republic. The family law was contained in book IV of the Code. However, in the end the Commission excluded the family law from the Civil Code in 1960 and put it into a separate act as the Family and Guardianship Code[3].

In order to characterize the family law in the Polish People's Republic we could quote Professor T. Smyczyński, according to whom "in the Polish People's Republic the family law was never infused with the communist ideology, neither in its interpretation nor in the application by courts, and apart from occasional cases, it never served the communist authorities as a weapon in the fight for the new society. Both the family (parents), and the judiciaries deciding on family matters, remained significantly independent"[4].

The presented reflection provides the basis for the thesis that moral and customary elements exerted influence on the contents of the regulations contained in that law. These elements regulate the formation of the relationships between parents and children, the rights and duties of spouses, the circumstances of the disintegration of marriage. The relation between the family law and morality originates in the historical development of the institutions of marriage and the family. It should be noticed that the legislator, while entering the sphere of rights and duties in marriage, does it with moderation and introduces the changes only when he thinks it is necessary from the point of view concerning the customary model of the family. Interfering into the family relations

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2 J.S. Piątowski, *System Prawa rodzinnego i opiekuńczego* (Warszawa: 1985), 8 and next., P. Fiedorczyk, *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945-1964)* (Białystok: 2014), 698-714.

3 J. Winiarz, "Socjalistyczne Prawo rodzinne PRL", *Studia Prawnicze* 1974: 92-97.

4 See T. Smyczyński, "Kierunki reformy kodeksu rodzinnego i opiekuńczego", *Kwartalnik Prawa Prywatnego* 1999, nr 2: 299.

and the paternal authority (items 109-112) is an exception. Namely, he does it only when he gets to know from any possible source that the children in the family are suffering.

The regulations of the family law developed and implemented fundamental principles concerning family relations based on the standards of the Family Law from 1950 and on the Family and Guardianship Law from 1964, and are expressed in the Constitution of the Polish People's Republic from 1952 (art. 5 pkt. 7. art. 67 section 2, art. 78, 79, 82 section 1). Legislative extracting of the family law in these codes does not authorise the conclusion that it constitutes a separate branch of the Polish law system.

The extracting resulted in the fact that the Family and Guardianship Law should be treated as *lex specialis* with regard to the Civil Code. I share the opinion of Prof. P. Fiedorczyk, that it is worth to consider a more proper title for the Family and Guardianship Law from 1964 and to break with any connection with Stalinism[5].

The Family and Guardianship Law constitutes a part of the Civil Law with particular features for this field of regulations. It reinforces the fundamental principles concerning marriage and established family, which were indicated in the Constitution of the Republic of Poland from 1997.

Generally speaking, it can be claimed that the Family and Guardianship Code is a fundamental legal act which regulates the relationship within the care and guardianship. This code was subjected to a greater revision with the Act from December 19th 1975 (Journal of Laws Nr 45, item 234) and with the Act from November 6th 2008 (Journal of Laws Nr 220, item 1431).

The regulations of the Family and Guardianship Code which refer to the legal situation of the child and to the relationship between parents and children were not submitted to the amendments of the Family Code before the introduced Act from November 6th 2008 amending the Act – The Family and Guardianship Law and some other Acts (Journal of Laws Nr 220, item 1431). **This amendment comprised the regulations which regard the child's affiliation, parental authority, contact between parents and the child, maintenance of the relations between parents and children, custody of the child.** The need for the change resulted from the international agreements ratified by Poland, from the provisions of the Constitution of the republic of Poland and from the submitted postulates *de lege ferenda,* in the legal doctrine

[5] P. Fiedorczyk, *Projekt Kodeksu rodzinnego na tle wcześniejszych polskich projektów prawa rodzinnego w ostatnim stuleniu...*, 169 and next.

and in the jurisprudence and in the statements of the Commissioner for Human Rights and the Ombudsman for Children.

Relationships between parents and children

The Family and Guardianship Code regulates the relationships between parents and children in Chapter II in art. 87-113 of Family and Guardianship Code, the title of which is specific because the regulation of these relationships is broader and it comprises:

1) the child's descent from his parents (art. 62-86);
2) adoption (art. 114-127);
3) the maintenance obligation between parents and children (art. 114-127);
4) the obligation for mutual support of parents and children (art. 87-91);
5) the child's family name which remains in close relations with the surname of the parents (art. 88-90);
6) the personal contact of children and parents (art. 113).

The regulations in this chapter are appropriately applicable for the relationship between a minor child and people who take care of the child and his or her assets as a substitute for the parents. By explicit provisions, it occurs in case of the care exercised by a guardian or by the foster family (art. 109 and 146) and without any explicit statutory regulation – e.g. in case of upbringing the child by a stepfather or a stepmother.

Regulating the relations between parents and children in Chapter II, the Family and Guardianship Code does not define the term "the family". While using this term in other regulation, it regards only the spouses and their children. Furthermore, the obligation of maintaining the family, defined in art. 27 of FGC concerns the family of the spouses. And although it favours the family based on marriage, it rightly equates the position of the legitimate children with the illegitimate ones'. It is obvious that there is an integral relationship between marriage and the family. The unity of spouses is aimed at the family and constitutes it. "The family" is usually created through contracting marriage. It consists of parents and children. Being the foundation of the family community, marriage maintains it identity[6]. However, the parents are connected with the child by the family and legal relationship, regardless of the fact whether they are married. According to J. Smyczyński, the Family and Guardianship Code does

[6] See J. Szymczak, "Definicje rodziny", *Studia nad Rodziną*" 2002, vol. 2: 11.

not exclude an informal family. A non-matrimonial family is also under the protection of the Republic of Poland, which is expressed in art. 18 of the Constitution.

We cannot miss the ambiguity of the term of "contemporary family" because this concept significantly differs from the one which was functioning in the time of creating the Family and Guardianship Code from 1964 that is in totally different social, economic and political relations. In that period the concept of the family was mainly based on the foundation of marriage. Currently the new alternative forms of family life are developing and cohabitation, that is an informal relationship, is becoming more and more popular. Thus the family outside of marriage is created also as other relationships. If parents are not formally married but they are connected with a bond of cohabitation and the common household just like in case of married couples, and the children are brought up in the common household with the parents, analogically such relationships should also be submitted to the regulations of the Code and the principles concerning the family.[7]

The regulations of the Family and Guardianship Code do not contain the definition of the child. **The legal definition of the child** in contained in art. 2 paragraph 1 of the Act from January 6th 2000 on the Ombudsman for Children (consolidated text Journal of Laws from 2020 item 141), according to which: "as defined in the Act, the child is a human being from conception to maturity". While according to the Convention on the Rights of a Child art. 1: "a **child** means every human being below the age of eighteen years, unless when under the law applicable to the child, the maturity was attained earlier".

The wording of Art. 87 of FGC was assigned by the amendment from November 6th 2008 and it has been applied since June 13th 2009. This provision, just like the previous one, regulates the personal relationships of parents and children and the change in the wording consists in extending these relationships with the duty of the mutual respect by parents and children and with the introduction of the order to respect the child's dignity. In the previous legal status it had a pedagogical value and not the normative one. The fact that the legislator did not include any condition for the parents to fulfil, indicates that it concerns all parents, regardless of the fact whether they are married or whether they remain in the cohabitation or whether they exercise

[7] See more T. Smyczyński, *Prawo rodzinne i stosunki rodzinnoprawne,* in: *System Prawa Prywatnego,* vol. 11, 52 and next.

parental custody or are deprived of it and whether the child lives with the parents[8].

Art. 87 – as opposite to the regulations on the parental responsibility which mainly concern the minor children – does not regulate the duration of the duties contained in it. However, the source of this relationship is the biological bond between the parties of these responsibilities, it is obvious that these responsibilities in relations to a child appear at the moment of conception, and between the child and the parents – depending on the age and the degree of discernment. They expire at the moment of death of the parents or of the children.

The concept of the mutual respect and support between the parents and the children is general as much as very inclusive, which allowed for inclusion of various forms of respect and the means to help properly for the life conditions of the person whom it regards and who needs the help. Although the duties described in art. 87 are not to be directly executed, the respect for the child's dignity constitutes one of the criteria of the evaluation of proper exercising the parental responsibility. Generally speaking, the mutual support can be expressed as:

a) material aid,
b) psychological and moral support in suffering, sickness or disability,
c) intellectual aid when taking important decisions or settling important life matters,
d) physical aid with performing certain activities.

The mutuality of support consists in the fact that both parents and children are obliged to provide support in the broader sense and at the same time they are entitled to it. However, as opposed to the mutual obligations which have their source in the legal actions, the mutual obligations do not have to be objectively equivalent nor equal. The moral pattern of the mutual support assumes that it should be totally selfless. Therefore, the doctrinal view which assumes that when one of the subjects described in art. 87 does not perform the indicated duties described in this regulation, the other party is not released from this obligation, is accurate.

As far as the mutual relations between parents and children are concerned, it is worth to emphasise **the Supreme Court's resolution from November 22nd 2017, III CZP 78/17 (Jurisprudence of the Supreme Court 2018/5/51) which states that in case of a conflict between the**

[8] See J. Ignatowicz, *Kodeks rodzinny i opiekuńczy*, comments and editing of K. Pietrzykowski (Warszawa: 2012), 3rd issue, 837; H. Ciepła, *Kodeks rodzinny i opiekuńczy*, *Komentarz* (Warszawa: 2009), 717 and next.; G. Jędrejek, *Kodeks Rodzinny i Opiekuńczy – Komentarze praktyczne* (Warszawa: 2017), 693.

child's rights and the rights of others, including the parents – the child's welfare predominates.

Art. 91, which is addressed to the children who live with their parents, and which determines the way how the children should support the parents, remains in the direct connection with art. 87. Art. 87, as a general norm, is supposed to prevent the legal gaps in regulating various relations between parents and children[9].

From the point of view of the subject matter and the aim of the regulation, the general regulations in the mentioned chapter (art. 87-91) can be divided into two groups:

The first one with art. 87 and 91, devoted to the personal relations between parents and children, however, art. 87 generally regulates the duty of the mutual respect and support and art. 91 determines this duty as a responsibility towards the child.

These regulations aim to protect the relations from wicked conduct of both parties which can weaken the existing bond between them. The instrument for the protection is contained in the precepts defined in these regulations. This model of conduct originates in our cultural circle, supported with the moral standards in behaviour which results from the sense of a special spiritual and emotional bond which naturally connects parents and children. It is significant that although the legislator granted this behaviour a normative demand and called it a commitment, he did not predict sanctions for any violation of these standards, believing that the responsibilities provided for by the law must not be enforced or legally executed.

The second group contains art. 88-90, which regulate the issue of the child's surname. In this case the aim of the regulation is to form one of the elements of the civil status namely the child's surname, according to the natural condition which results from the parental relationship, which indicates that the child comes from a certain parent or family. These regulations, as opposed to the ones from the first group, are characterized by a far-reaching interference of the legislator which aims at determining the events and circumstances regulating the child's surname and at establishing the principle that the child shall bear the surname of his or her father. The exception to this rule, which consists in the possibility to name the child according to the will of the involved parties, is acceptable.

As a rule, the change in the conditions which led to establishing the child's surname causes the change of the acquired surname, although

[9] See J. Ignatowicz, *System prawa rodzinnego i opiekuńczego*, vol. I (Wrocław: 1985), 787.

the act clearly does not determine it. In particular the annulment of the recognition of paternity of a child, overthrowing the sentence of paternity or denial of paternity result in the fact that the child loses the obtained surname of the father and returns to his previous surname. Only the parents' divorce or the annulment of their marriage does not cause the change of the child's surname because these decisions of the court do not overthrow the paternity of the mother's husband[10].

The comparison of art. 87 to art. 92-112[2] and art. 128 results in the conclusion that the duty of the mutual respect and support mentioned in art. 87, it becomes valid in the sphere of such relations between the parents and children which are not subjected to the regulation on the basis of the laws on parental authority (art. 92-113) and of the maintenance obligation between parents and children (art. 128).

In practice the respect and support for the parents from their children will take place when the children are adult, however, also the minor children are obliged to help to the best of their abilities in case when the parents are sick, when the case can be dealt with by the child and when the obligation is not subjected to the duty resulting from art. 91 § 2.

The characteristic feature of the legal regulation contained in art. 87 is that in the majority of responsibilities which result from it cannot be enforced by any direct or even indirect sanction. They can only be implemented with the warranties from beyond the legal sphere, namely in the mutual affection which usually connects parents and children. It is therefore of educational nature[11].

On the basis of the law in art. 87 we can deduce that there is no legal foundation for the claim, however, it seems that the regulation originates from the moral standards, it could be used in the legal proceedings as a means in the defence of the sued parents or children, in support of the allegation that the counterclaim is contradictory on the basis of art. 5 of c.c.

The child's affiliation

Among the relations between parents and children regulated in Chapter II of the Family and Guardianship Code there is also the child's affiliation regulated in art. 62-86 (of chapter I).

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10 J. Ignatowicz, *Kodeks rodzinny i opiekuńczy z komentarzem* (Warszawa: 1990), 398.

11 B. Dobrzański, *Kodeks...*, 630, J. Ignatowicz, *Kodeks rodzinny i opiekuńczy...*, 837 and next

The regulations of the family law did not directly regulate the claim to determine or deny maternity. In 1974 J. Gwiazdomorski[12] found the lack of regulations in this sphere as loophole in the family code. Furthermore, J. Pietrzykowski[13] emphasised that this loophole resulted in the fact that practice and science, upon the impossibility to avoid recognition of such cases, fulfilled this loophole. The permissibility of such a negative or positive counterclaim was based on art. 86 FGC, which anticipated "the claim to determine or deny the child's affiliation", assuming that the child's affiliation also refers to being born from a specific woman, that is the child's mother; or based on art.189 of the Civil Procedure Rules which assumed: "the claim to establish in the court the existence or non-existence of the legal relationship when the party has a legitimate interest in it."

The lack of this regulation and the possibility of contemporary medicine which would allow for fertilization and conception outside the woman's body, carrying the pregnancy to term by another woman than the egg donor, caused conflicts concerning the fact who is the actual mother of the child. The development of medicine made it possible to separate **genetic parentage from biological parentage**, that is: a woman can give birth to a child who genetically comes from another woman. Meanwhile, giving birth to a child is a legal event which not only creates a legal and family relation between the mother and the child but also directly influences the establishment of paternity. Therefore, we can claim that maternity is primary in relation to paternity. In other words, maternity is the material and the legal premise of paternity. Denying maternity undermines the already recognized paternity[14].

Therefore, it is justified that the amendment from November 6th 2008 introduced art. 61^9 constituting that "The mother of the child is the woman who gave birth to the child" to the Family and Guardianship Code. This regulation clearly defines who the child's mother is. The regulation is compatible with Convention on the legal status of an illegitimate child written in Strasburg on October 15th 1975 (Journal of Laws from 1999, Nr 79, item 888), in which art. 2 states that the parentage of an illegitimate child is determined on the basis of the fact

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12 J. Gwiazdomorski, *System prawa rodzinnego i opiekuńczego* (Wrocław: 1985), vol. 1, 625.

13 See. J. Pietrzykowski, *Kodeks rodzinny i opiekuńczy z komentarzem* (Warszawa: 1973), 367.

14 See J. Ignaczewski, *Kodeks rodzinny i opiekuńczy, Komentarz* (Warszwa: 2010), 450.

of birth. Introducing art. 61^9 FGC mainly aims at settling which of the mothers is the child's mother in the light of the law[15].

Determination of maternity

The lack of regulations in the sphere of establishment of maternity, until the amendment from November 6th 2008 came into force till June 13th 2009, did not prevent in filing claims to determine maternity before the court. The admissibility of it was found in art. 86 of FGC or in art. 189 of the Code of Civil Procedure. Since June 13th 2009 the material and legal basis to recognize maternity is contained in **art. 61^9 which states that "The mother of the child is the woman who gave birth to the child".**

However, the birth certificate is still the exclusive evidence of the events which it proves, that is also the evidence of the fact that the indicated woman gave birth to a certain child (art. 3 civil status certificate – further c.s.c). According to this regulation *expressis verbis*, maternity is based on the fact of giving birth to a child. The fact of giving birth to the child is, therefore, the only necessary and sufficient premise of maternity meant as a legal institution. The incompatibility of the act of the civil status with the truth can only be proven in court which does not determine its procedure. On the basis of art. 3 c.s.c. it is necessary to separate the procedure of the process and the non-litigious proceedings for the investigation non-compliance with the birth certificate. If the child's affiliation is to be confirmed or denied or the paternity is to be confirmed or denied because of various reasons, it is proper to introduce the judicial process. Only on the basis of the sentence given in the judicial process can the act of the civil status be changed in the form of an additional reference.

According to the Supreme Court in the order from March 26th 1992 (I CRN 20/92, OSA 1993, Nr 2, item 2), on the basis of 30 c.s.c. the act of the civil status can be overturned only when it violates the truth of the so called basic events, which create the civil status and which result in the preparation of the act (e.g. the fact of the child's birth). If the person who reports the birth of a child in the registry office after a considerable period and is not able to provide a medical certificate form of reporting the birth of a child, it is not acceptable to prepare an act of the birth of a child in the ordinary course of proceedings

[15] See more M. Kosek, in: W. Stojanowska, M. Kosek, *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 r. i 10 czerwca 2010 r. Analiza – wykładnia – komentarz*, ed. W. Stojanowska (Warszawa: 2011), 100 and next; G. Jędrejek, op. cit., 570 and next.

provided for in the regulations of c.s.c. after carrying out the investigation procedure. In such a situation it is justified to determine the contents of the birth certificate according to art. 32 point 2 and art. 33 c.s.c. only by the court in non-litigious proceedings, upon request of the interested party or of the prosecutor. This kind of procedure must not be conducted by the head of the civil status office because he or she is not properly qualified for that (see decision of the Supreme Court from September 3rd 1997, III KKO 5/97, OSNP 1998, Nr 14, item 441, but currently art. 40 c.s.c.).

Foster maternity

The problem of **the agreement for the foster maternity** has not been solved in practice. We should be acceded to the opinion in the doctrine according to which such an agreement is absolutely invalid. The authors of dissertations concerning this issue drew attention to the complications which could appear when the mother is married and her husband is not the biological father of her child. The presumption of the child's affiliation with the mother's husband is applied, which can be overthrown in the process of paternity denial. After the paternity denial, the biological father of the child can recognize the child or file a civil suit to determine the paternity. The mother who concluded an agreement for the foster maternity can be married to the child's biological father.[16] In case of the agreement for the so called foster maternity, the regulations of the civil code which concern legal acts and

[16] H. Pietrzak, *Archaizm i nieskuteczność prawa wobec surogatek*, in: *Ars boni et aequi. Księga pamiątkowa dedykowana księdzu profesorowi Remigiuszowi Sobańskiemu z okazji osiemdziesiątej rocznicy urodzin*, ed. J. Wroceński, H. Pietrzak (Warszawa: 2010), 770 and next; K. Bagan-Kurluta, *Mater certa est. Rozważania nad trzema koncepcjami macierzyństwa*, in: *Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi*, ed. J. Pisuliński, M. Pecyna, M. Podrecka (Warszawa: 2013), 679-680; E. Raczek, "Nowelizacja kodeksu rodzinnego i opiekuńczego. Rozdział I. Pochodzenie dziecka (JL 2008. Nr 220, item 1431) – uwagi biegłego genetyka sądowego", *Archiwum Medycyny Sądowej i Kryminologii* 2009/2: 134, which indicated the fallacy of the solution which assumed the maternity of the woman who gave birth to the child because such a regulation violates the child's dignity because the child is not able to get to know his or her genetic origin and, moreover, according to the author, such a regulation discriminates women and causes that the evidence from the DNA test in cases for the denial of maternity become ineffective. In the current legal status a person who was born as a result of the medically assisted procreation procedure, and as a result of donation other than her partner's, of reproductive cells or donation of the embryo, is entitled to get to know the information which concerns the donor after reaching adulthood.

in particular art. 58 c.c., which introduces the sanction of the absolute invalidity towards actions contrary to the act or which aim at circumventing the act (art. 58 § 1 c.c.), as well as the act contradictory to the principles of social coexistence (art. 58 § 2 c.c.), can be applied. Every legal action which concerns **the child's affiliation** is absolutely void if it is contradictory to the regulations of the Family and Guardianship Code which regulate this issue as they are absolutely mandatory (*ius cogens*). This observation causes that there is no need for any further analysis of subsequent reasons for the invalidity of the legal action e.g. because of the defects of the declaration of will.[17]

Determination of paternity

According to art. 72. § 1 if there is no presumption that the mother's husband is the child's father or when the presumption was denied, determination of paternity can be established either through recognition of paternity or by order of the court.

§ 2. Determination of paternity cannot be established if there is a court case to determine paternity.

From the wording of the provision of art. 72 § 1 of FGC we can deduce that determination of paternity can be established only when the child was born out of wedlock and as a result, the rebuttable presumption from **art. 62 § 1 of FGC** is not valid or the presumption was overthrown in the process of paternity denial. According to art. 62 § 3 of FGC the presumptions which concern the child's affiliation from the mother's husband can be overthrown only as a result of the suit to deny the paternity. Therefore, it is unacceptable to determine paternity of the child who was born in the marriage before the denial of presumption art. 62 § 1 of FGC by way of litigation to deny paternity. If the child was born in marriage, determination of paternity can be established only after validation of the verdict which confirms denial of paternity.[18] According to the thesis of the sentence of the Supreme Court from March 24th 1997, I CKU 18/97 (unpublished), it is unacceptable to determine paternity if there is presumption that the child's father is the child's mother's husband. Similarly, on the basis of art. 42 § 1 of FC from 1950, it was assumed that the presumption of the child's affiliation from the mother's husband can be overthrown only by way of litigation to deny paternity and only in case of taking into account such litigation with

[17] See G. Jędrejek, *Kodeks rodzinny i opiekuńczy,* op. cit., 571 and next.

[18] See the Supreme Court's verdict from May 24th 1966, III CR 91/66, LEX nr 490.

a valid sentence, it is possible to determine paternity in court.[19] An exceptional situation will occur if the paternity was recognized (the child was recognized) in the period of the presumption of the child's affinity from the mother's husband if the husband was presumed dead at the moment when such presumption was impossible. In that case, as it was indicated by the Supreme Court in the order from October 28th 1980, III CRN 216/80, LEX nr 2591, recognition of the child becomes valid ("comes into force").

Before the evoked act from November 6th 2008 amending the act – the Family and Guardianship Code act and some other acts, the jurisprudence of the Supreme Court assumed that **recognizing the child constitutes an act of the dual nature**, which contains both the elements of the legal action (declaration of intent) as well as the act of knowledge (the recognition of facts)[20]. In the explanatory statement of the verdict from August 15th 1967, II CR 152/67 (OSNC 1968, nr 4, item 69, LEX nr 651), the Supreme Court indicted that "recognition of the child is a one-sided declaration of intent, that is a declaration which is not made for another person". In the explanatory statement of the verdict from January 7th 2005, IV CK 405/04 (LEX nr 177265), the Supreme Court stated that: "The declaration of the recognition of a child belongs to the one-sided legal actions and its content expresses the state of intention and knowledge of the recognizing person". The notion of the **dualistic nature of recognizing the child** was also predominant in the doctrine. According to K. Piasecki the element of intention which consists in the intention to cause certain legal effects, which is based on the knowledge of the recognizing person about the actual relationship which connect him with the recognized[21].

The proper interpretation of art. 72 § 2 of FGC leads to the conclusion that the legislator's intention was to prevent the recognition of paternity of a different man than the plaintiff, either on the side of the plaintiff or of the defendant. However, drafting of this legal provision does not fulfil the goal. It is wrongly edited and it should be expounded

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19 See the indications of the Supreme Court from December 6th 1952, C. 166/52, OSN 1953, nr 2, item 31) and G. Jędrejek, *Kodeks rodzinny i opiekuńczy, komentarz* (Warszawa: 2019).

20 See: the Supreme Court's verdict from May 15th 1967, I CR 5/67, LEX nr 6160 and from July 5th 1968, II CR 164/68, OSNCP 1969, nr 3, item 55; the Supreme Court's verdict from December 10th 1999, II CKN 1037/99, LEX nr 39832; the act of 7 judges from October 6th 1969, III CZP 25/69, OSNC 1970, nr 5, item 75, LEX nr 994.

21 See K. Piasecki, in: *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Piasecki (Warszawa: 2006), 563, and G. Jędrejek. op. cit., 627.

in such a way that it concerns inadmissibility of paternity recognition by another man than the plaintiff. It happens in practice that the mother does not allow for determining paternity by the biological father and he files a lawsuit to determine paternity, and the mother goes to the registry office or to the family court with another chosen man and there she confirms the latter's declaration of recognizing paternity.

In order to prevent such practice it is necessary to oblige the head of the registry office or of the family court to take a declaration of recognizing paternity and from the mother – the declaration that there is no conducted procedure to determine paternity. This obligation for the heads of the registry office can be drawn from art. 73 § 3 of FGC, which states that the head refuses to take declarations necessary for recognizing paternity, if the recognition is unacceptable. In the light of these deliberations a practical problem occurred: can the verdict which determines paternity enter into force and does it have any legal force despite the obstacle mentioned above. The act of recognizing paternity is invalid in this situation and it does not cause any legal effects. This opinion was confirmed by the Supreme Court in the verdict from February 7th 1948 (C. III 1741/47, *LexPolonica* nr 413305, OSN 1948, item 12).

Paternity denial

According to art. 69 § 1 of FGC the mother can file a lawsuit to deny paternity of her husband within a year from the day when she got to know that he is not the child's father, however, no later than the moment when the child becomes adult. The mother should file a lawsuit to deny paternity against her husband and her child and if the husband is dead – against the child. The regulation ensures equal treatment of the possibility to deny paternity to both the husband of the child's mother and to the mother in case of the complete incapacitation or if there are reasons for such incapacitation. It strengthens the protection of the mother's interest before expiration of the period when she can file the lawsuit.[22]

According to art. 70. § 1. of **FGC** the child after reaching the legal age may have an action to deny paternity within a year from the day when he or she got to know that he or she did not come from the mother's husband. If the child got to know about it before he or she became of legal age, the deadline to have the action to deny paternity is counted from the day of his or her 18th birthday.

[22] See H. Ciepła, *Nowelizacje*..., 36, G. Jędrejek, op. cit., 624.

The child should file the lawsuit against the mother and the mother's husband and of the mother is dead – against her husband. If the mother's husband is dead – the lawsuit should be against the curator appointed by the Guardianship Court. The regulations of art. 64 and 65 are applied respectively.

The wording of this regulation was granted with the act from May 16th 2019 (JL item 2089) as a result of the verdict of the Constitutional Court from May 16th 2018 SK 18/17 OTK-A 2018/25 which stated that the previous paragraph 1 in terms that it sets the time limit to file the lawsuit to deny paternity of the mother's husband regardless of the date of obtaining information by the adult child about the fact the he or she does not come from the mother's husband, is inconsistent with art. 30 with regard to art. 47 with regard to art. 31 of paragraph 3 of the Constitution of the Republic of Poland.

This regulation grants the child the authority protecting him or her in case of his or her complete incapacitation or when there are reasons for such incapacitation after the child becomes of age like the one in art. 64 and 65 which concerns the husband of the child's mother[23].

Another important information to be noticed concerns the conditions for the permissibility to deny paternity after the child's death.

According to art. 70[1]. § 1. denial of paternity is not permissible after the child's death unless the child died after initiation of the proceedings. In case of the child's death, after the child had brought the legal action to deny paternity, the child's descendants can claim their rights.

This regulation is valid since December 4th 2013. The previous art. 71 of FGC which excluded the permissibility of paternity denial after the child's death was invalidated with the verdict of the Supreme Court from November 26th 2013 because it was unconstitutional.

According to the laws in force since December 4th 2013 it is the rule, like previously, to counterclaim the suit to deny paternity after the child's death. However, denial of paternity is permissible when the child died after the initiation of the proceedings. If in the course of the proceeding the child was the plaintiff in the process to deny paternity, this paternity can only be claimed by his descendants when the claim was taken into account and the court can decide whether the child comes from his mother's husband[24]. Analogically, the results can be similar when the child was presumed dead or his death was determined by the court.

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[23] See G. Jędrejek, op. cit., 624.

[24] See K. Pietrzykowski, *Kodeks rodzinny i opiekuńczy comment 7 edited* (Warszawa: 2021), 686.

Among the case which are of interest for us, the most interesting one is the following case:

Under the German occupation when the Nazis were conducting the pacification of the Zamość region, the spouses Anna and Karol Lis adopted a homeless boy who was reported to the register office as a twin of their own child born on December 16th 1942 with their daughter Zofia.

The foster child was treated like their own son without any differentiation between him and the daughter. The fact of adopting the child was kept a secret even before their closest relations. The boy was brought up in the house of the spouses as their son, he treated them like his biological parents and Zofia as his biological sister. The spouses loved their son like their own child and after her husband's death Anna Lis still loved the son dearly. The boy considered Anna's house as his own, he visited her a few times a week, depending on the period. Anna's maternal feelings for Leon were expressed by the fact that she divided her mansion in Gdańsk and gave each half to each child – ½ to the son and the other ½ to her daughter Zofia.

Filing the lawsuit to deny maternity Anna Lis asked for justifying her claim, did not provide any reasons. She stated that when "her foster son" (the defendant) was placed in a reformatory, he visited her and the house. In court the defendant stated that even in case of maternity denial, he will always be considering the plaintiff to be his mother.

The plaintiff still had maternal feelings towards the defendant – although his behaviour, especially the unwillingness to learn, was upsetting for her. The defendant let the foster mother down probably during his adolescence period, which later resulted in his change of the surname, however, currently, after reaching maturity, he still wants to be acknowledged as the plaintiff's son, which he confirmed in his testimony.

The plaintiff who filed the lawsuit was guided by the reasons only known to her but, taking into account her explanations, we can take it for granted that she as not going to do any harm the defendant, even in the moral sense. She did not realize that in case of the counterclaim being upheld, the defendant would remain a man without a family name, deprived of the birth certificate. As his parents are unknown, it would be necessary to apply art. 42 the law on the civil status documents, according to the plaintiff's testimony. The sister got to know about the actual condition of the case only after the mother had filed the lawsuit.

Taking into account all these arrangements, the Regional Court emphasised that according to the established jurisprudence in the cases concerning the state law, art. 3 p.o.p.c. (currently art. 5 c.c.) and that in these cases the claims cannot be dismissed with the reference to the violations of the rules of social coexistence. Despite that the Regional Court dismissed the claim because of the following reasons:

"The process for maternity denial is the establishing process (art. 189 of FGC), in which the complainant has to indicate the legal interest in establishing the legal relations or the law. The Regional Court has not noticed such an interest on the side of the plaintiff.

In this case the interests of the two parties are not opposite, but, on the contrary, they are convergent. The plaintiff still had maternal feelings towards the defendant – although his behaviour, especially the unwillingness to learn, was upsetting for her.

The opinion of the Regional Court that the plaintiff has no legal interest in bringing the lawsuit for denying maternity is certainly without merit. Such counterclaim is aimed at determining that there is not parental relations between the plaintiff and the defendant, therefore, it concerns, among others, the marital status of the plaintiff. Thus the verdict of the court, which takes into account such a claim, directly regards the sphere of the plaintiff's interest which is – according to the perpetuated view of the doctrine – means that the plaintiff has a legal interest in to achieve such settlement.

The claim of the Court of First Instance that the plaintiff does not realize the essence and the results of the process which she had initiated is totally optional. It is contradicted by the clear part of the lawsuit as well as by the consequent attitude of the plaintiff in the course of the legal proceedings, including the content of the revision which she filed. This rule results from the strictly personal ground of these issues, for the necessity to provide stabilization and peace to the family, which excludes the right to intervene to too greater number of people, especially to those who are marked only with the property interest in questioning the family composition and who do it out of the practical reasons which are contradictory to the engagement into the cases for the civil status rights.

This regulation is still valid under the under the regulation of the Family and Guardianship Code. No regulation of this Code indicates that the legislator was going to regulate the issue of participation in the cases concerning the civil status in a way different from the usual. In particular the Family and Guardianship Code, not regulating – similarly to the previous code – the authority of claiming or denying

maternity and leaving this issue to the doctrine and judicature, expressed the view that there is no need to depart from the previously applied practice in this matter.

In these circumstances – against the notion of revision – the opinion of the Regional Court concerning the lack of the active authority of the plaintiff for the lawsuit to deny maternity is accurate. The claim of the court of cassation that this case does not aim at denying maternity but rather at "establishing the legal relations on the grounds of art. 189 of FGC ", proves that the plaintiff inadequately understood this legal situation. The possibility of claiming or denying maternity comes from art. 189 of FGC, however, as opposed to the regular establishment of the legal relations, it is strictly limited to certain people who can become the parties in the process for determining the existence or non-existence of maternity (the verdict of the Supreme Court **SN1966-06-14, I CR 161/66**, LEX nr 6004).

Among the discussed issues the following court decisions deserve particular attention. The analysis should begin with the permissibility to apply art. 5 c.c. in the cases for the laws of the civil status. Dismissing of the prosecutor's claim in the case for the law of the civil status with regard to the principles of the social coexistence – the problem of permissibility to apply art. 5 c.c. in the cases for the laws of the civil status is connected with the resolution of the conflict between the basic rules of the law, mainly the principle of truth (which used to be called the principle of the objective truth) and the policy of the child's welfare and family protection. Such a legal conflict appears when the application of the mentioned principles result in the opposite conclusions which concern the way of resolution of a certain case. The principle of truth results from art. 3 of FGC and means that the court's decision should be consistent with the actual state of affairs. The principle of truth is the supreme legal principle which aims at ensuring compliance of the legal relations of maternity and paternity with the corresponding biological relations. It should be noticed that the legislator ensures the primacy of the child's welfare and the principle of protection of the family over the principle of the truth, introducing numerous limitations in the sphere of filing the counterclaim to deny maternity or paternity and determining ineffectiveness of recognizing paternity (previously: cancellation of recognition of a child). However, in the situation when the legal relation which result from the act of the civil register is not reflected in the actual condition (biological), and the applied counterclaim was brought in the proper time and by an empowered person, the principles of the child's welfare and the

protection of the family do not establish a normative ground to dismiss the claim in the case for the law of the civil status. Such a possibility is caused by the principles of the social coexistence in art. 5 c.c., with regard to among others the child's welfare and protection of the family **(the verdict of the Supreme Court from January 15th 2021 IV CSKP 28/21, (OSNC 2022/4/41).**

The next verdict of the court which takes into account the counterclaim of the woman to deny her maternity mainly concerns the law of the civil status of the plaintiff. This means that she has the legal interest in obtaining such a verdict **(the verdict of the Supreme Court from 1966-01-22 I CR 312/65, OSNC 1966/7-8/136).**

It should also be noticed that the principle that the counterclaim for the law of the civil status can be filed only by the person who is directly and personally interested as a result of this process, unless the particular regulation provides otherwise, is still valid under the rule of the Family and Guardianship Code. In particular, the person who is interested in e.g. denying maternity only due to the relating assets, does not possess the legal standing (the verdict of the Supreme Court from **2011-10-19, II CSK 87/11,** LEX nr 1027165).

In the case for denying maternity, the social interest expressed in the postulate of establishing the valid record of the events which are documented in the acts of the civil status is superior in relation to the child's interest. It is not taken into account due to the mentioned reason, art. 5 c.c. **(the verdict of the Supreme Court from 1967-02-27. II CR 470/66** OSNC 1967/9/167

In the case of filing a lawsuit by the prosecutor in order to deny paternity on the basis of art. 86 of FGC due to the impossibility to be claimed by the child's father (art. 63 of FGC), the court investigates whether it was based on the child's welfare or on the protection of the social interest **(the verdict of the Supreme Court from December 6th 2019 V CSK 471/18, OSNC 2020/7-8/67).**

In the process to deny paternity in which the proof from the examination of DNA cannot be conducted because the mother does not allow for taking the child's blood or her own blood, the presumption derived on the basis of art. 233 § 2 of FGC could become a premise to overthrow the presumption derived from art. 62 § 1 of FGC if, at the same time, it justified the request that other man's paternity is more likely **(the verdict of the Supreme Court from December 29th 1977, LEX nr 8045).**

The general clause on the family welfare and the child's welfare belongs to the principles of the social coexistence the legal violation of which can lead to its absolute invalidity (art. 58 § 2 c.c.). According to art. 140 c.c. the principles of the social coexistence constitute the inner determinant for the content of the right of ownership, they indicate its limits. Due to the fact that deposition of a thing which consists in conclusion of a contract of donation belongs to the content of the property right, the indicated limitation also concerns this legal action. Furthermore, the contract of donation which leads to the violation of the family or the child's welfare can be considered absolutely invalid (art. 58 § 2 c.c. **(- the verdict of the Supreme Court from September 29th 2020 I NSNc 42/20, OSNKN 2021/1/3).**

The right to respect the family life. The prohibition of surrogacy. Refusal to recognize the parental bond between the spouses and the child born through surrogacy, VALDÍS FJÖLNISDÓTTIR AND OTHERS v. ISLAND – The verdict of the European Court of Human Rights LEX nr 3174865 – the verdict from May 18th 2021. The Tribunal of the Human Rights stated that settling that case on the basis of art. 8 of the Convention, requires taking into account a range of factors in order to determine the scope of participation for the state. When the case concerns a particularly important aspect of existence or a person's identity, the limitation to the state's actions will be determined. However, where there is no agreement between the states of the European Union, either with regard to the relative importance of the subject's interest or with regard to the means of the subject's protection, especially when the case regards the sensitive moral or ethical issues, the scope of the state's involvement will be broader. The state is usually privileged when it comes to its participation, however, if the state is forced to balance the competing private interests and the public interest or the statutory interests. The Tribunal indicates that the actual participation in the family life of the three complainants should not be influenced by the sued state. On the contrary, the sued state took measures aimed at the third compliant (the child born in the USA from a surrogate mother) to ensure his right to be brought up in the foster family of the first or the second complainant, and the possibility of a shared adoption was available for the first and second compliant until their divorce. From the moment of the divorce, the sued state concluded an agreement with the first compliant in order to make him or her a foster parent (for the third compliant), with reservation of the further equal guardian rights with regard to the child of the second

complainant. Thus the sued state took the measures in order to make sure that the three complainants could participate in their family life despite the lack of recognition of the parental bond (between the first and the second compliant), and despite the divorce between the two. Despite the Tribunal's claims that the lack of recognition of the parental bond influenced the family of the complainants, the further participation in the family life was also guaranteed by transformation of the foster care (over the third compliant) into the permanent guardianship and it must be acknowledged that this measure significantly diminished the insecurity and anxiety of the complainants.

Moreover, it should be stated that the sued state granted the citizenship to the third complainant (the child who was born abroad from the surrogate mother) by way of the direct act of parliament which resulted in regulating and protection of the residence and the civil rights of the child in the sued state. In fact the practical obstacles on the way to participate the family life, which resulted from the lack of recognition of the family bond (between the first two complainants and the child), seem to be limited. The final resolution, which is the object of this assessment, is the verdict of the Supreme Court of Island from March 30th 2017 by the power of which the Supreme Court dismissed the application of the complainants in the repealing of the registration of the parental bond and obliging the head of the Civil Status Office to register the third complainant as the son of the first and second complainants. Before pronouncing the verdict by the Supreme Court and after the divorce decree, the first and the second complainant withdrew their applications for adoption of the third complainant and the application for adoption was not the object of the legal proceeding. Thus the final resolution in the field of the law of the first and second complainant was not settled. Therefore, the Tribunal's resolution will only be limited to the extent concerning the registration of the family bond, which was the object of the legal procedure and which was finally settled by the verdict of the Supreme Court of Island from March 30th 2017. The reservation of the government, according to which the complainants did not exhaust the range of legal remedies available in the state law, must be dismissed.

However, according to the government's claim, either the first or the second complainant can still apply for the adoption of the third complainant, either individually or with their new spouse. However, it should be taken into account that only one of the complainants will be allowed to adopt the child the Tribunal takes into account this possibility in the holistic assessment of the necessity for interference,

especially in the sphere of the regulations from art. 8 which the child is entitled to as the third complainant.

Taking into account the lack of the practical obstacles on the way of respecting the family life, and the steps taken by the sued state in order to regulate and protect the bond of the complainants, the Tribunal states that the lack of recognition of the formal parental bond, confirmed by the verdict of the Supreme Court, preserved the proper balance between the right of the complainants to participate in their family life and the public interest which the state is to protect through the ban on surrogacy. Thus the state acted within the limits of recognition which it is entitled to in such cases. The art 8 of the Convention was not violated with regard to the rights of the complainants.

9. / 25358/12, The right to respect the private life. Refusal to recognize the relationship between the prospective parents and the child born through surrogacy. Giving the child born through surrogacy under the custody of an institution, PARADISO I CAMPANELLI v. ITALY – The verdict of the European Court of Human Rights

LEX nr 2192506 – the verdict from January 24th 2017.

The actual circumstances concern the ethically sensitive issues – adoption, obtaining the right for the foster care, medically assisted procreation and surrogacy – with regard to which the state are not limited. According to the arguments given by the domestic public authorities, it should be indicated that they particularly referred to two kinds of arguments: state authorities mainly meant the illegal steps taken by complainants [the complainants made a legal agreement for surrogacy in Russia where their child was born, as the child was registered in Russia and then brought to Italy] and secondly, the necessity to take special measures towards the child who was regarded to be abandoned in the meaning of provisions of the domestic act of adoption. The Tribunal does not doubt that the reasons given by domestic courts are relevant. They are directly connected with the aim of preventing violation of the order and with protecting children – and not only with regard to the child whom this case concerns, but also with regard to children generally – taking into account the state prerogative regarding determining affiliation on the way of fostering and with regard to the ban [introduced in Italy] of certain techniques of medically assisted procreation. The Grand Board concluded that the facts concerning this case should not be involved into the range of family life but only into the range of private life. Thus this case will not be considered from the point of view of the family protection but

rather from the point of view of the rights of complainants with respect to their private life, with regard to their interest regarding the right to the personal development through their relationship with the child. The Tribunal indicated that the reasons presented by the domestic courts which focused on the child's situation and the illegal acts of the complainants were sufficient.

It is therefore necessary to investigate whether the measures were proportionate to the implemented authorised aim, especially whether domestic courts which acted within the broad limits of recognition to which they were entitled, preserved the equitable balance between the completing private and public interests.

Domestic courts paid a lot of attention to the non-compliance of the domestic adoption legislation by the complainants and to the fact that the complainants were subjected to the assisted procreation methods abroad even though the procedure is banned in Italy [this regards surrogacy]. In the domestic procedures, the courts which were focused on the absolute necessity to take urgent measures [towards the child who was considered abandoned], did not deal with the public interest issues which constituted a part of the case and they did not directly address the sensitive ethical issues which constituted the background of the legal regulations which were violated by the complainants.

In the legal procedure before the Tribunal, the sued government indicated that according to Italian legislation, the affinity can be determined either through the biological bonds or through adoption in accordance to the existing legislation. The government argued that making this choice, the legislator aimed at protection of the child's proper rights, which is required by art. 3 of the Convention on the Rights of the Child. Therefore, the Tribunal states that through banning private adoptions based on agreements between private individuals and through limitations on the rights of adoptive parents to bring minor foreigners to Italy in the cases in which the regulations concerning inter-state adoptions were observed, the Italian legislator aims at protecting the rights of children from any illegal practice a part of which concerns human trafficking.

Moreover, the government referred to the argument according to which the decisions taken by the court banned surrogacy [surrogate motherhood] in Italian legislation. Such a solution [surrogacy] concerns sensitive ethical issues which cannot be agreed upon by the parties of this litigation. Through the ban on surrogacy, Italy stated that such a ban realizes the public interest concerning protection of women and children – the potential victims of these ethically

problematic issues. Such a policy is considered to be particularly important especially when – as the gorvernment indicated – the case regards conventional agreements concerning surrogacy. This basic public interest is also meaningful with regard to the measures taken by the state to discourage the citizens to go abroad to undertake the illegal practices which are banned in their own country.

Summing up, the main aim of the domestic courts was to prevent the illegal practices. Taking this into account the Tribunal states that the legal regulations which were violated by the complainants and the measures which were taken in response to their proceeding, were serving to protect very important public interests.

As for the private interests in this case, it concerns, on the one hand, the interest of the child and, on the other hand, the interests of the complainants.

With regard to the child's interest, it must be indicated that the domestic court regarded the fact that there was no biological bond between the complainants and the child and the court stated that it was necessary to find a proper couple who would take care of the child as soon as possible. Bearing in mind the child's age (it was a toddler) and a short period of time spent with the complainants [eight months], the court agreed with the opinion of a psychologist (presented by the complainants) which stated that the separation from the complainants would result in the disastrous consequences for the child.

And as far the complainants' interest regarding the bond with the child was concerned, the domestic court indicated the lack of supporting evidence to their claim that they had given to a clinic in Russia (the one where the medical procedures of assisted procreation took place) some genetic material of the second complainant. Moreover, after obtaining the consent for international adoption, the complainants violated the domestic adoption legislation bringing the child to Italy without the consent of a proper national authority that is the national commission for the international adoption. Taking this into account, the domestic court expressed the concern that the child could have been a victim of the parents' narcissistic desires and a means to solve an individual problem (of one of the complainants) or the couple's mutual problems. Further on, the court stated that the behaviour of the complainants cast a shadow on the authenticity of their feelings and educational abilities, and expressed doubts whether the complainants "were capable of any human feelings which are necessary to adopt a child and raise it as one's own".

This case differs from the cases which concerned separating a child from the parents, as separation, as a rule, is a means used only in case when the physical or mental integration of the child is threatened. On the contrary, the Tribunal does not regard that domestic courts are required to give priority to the aim of protecting the bond between the complainants and the child. The courts would rather make a difficult choice between allowing the complainants to continue their relations with the child, thus legalizing the situation created by the complainants through the accomplished acts, which was contradictory to the legislation, and taking the proper measures to provide the proper family for the child according to the legal adoption procedure. The Tribunal indicated that public interests of this case were very important. Moreover, the Tribunal stated that the justification provided by Italian courts with regard to the child's interest was by no means automatic or stereotypical. Analysing this particular situation of the child, the courts considered it to be proper to place the child in a proper family who would adopt it, and they examined the influence of this separation from the complainants on the child. The courts stated that this separation would not cause any serious or irreversible damage to the child. Italian courts devoted very little time to the interest of the complainants in their further bond development with the child and the results of such a hasty separation on their private lives. This condition must however be perceived in the context of the illegal proceeding of the complainants and the fact that their relationship with the child was uncertain from the moment when they decided to live in Italy with their child. This relationship became even weaker when, after taking the DNA test, when it turned out that there was no biological affiliation between the second complainant and the child. As for the complainants' argument that the courts did not examine the possibility of using alternative methods instead of the immediate and irreversible separation with the child, it must be noticed that the complainants addressed the domestic court in order to place the child with them until the moment of its adoption. According to the Tribunal, it must be taken into account that this procedure was urgent. Any means which would prolong the child's stay by the complainants, such as placing the child under their temporary care, would have predetermined the result of this case.

Moreover, apart from the illegal proceeding of the complainants, the government indicated that the complainants were too old to adopt the child legally (which concerned the difference of age between the adoptive parents and the child), envisaged in the domestic law

in the regulations of the adoption regulations, that is the difference of 45 years of one parent and 55 years of the other adoptive parent. The Tribunal indicates that the law allows courts to refrain from the regulations concerning the age difference. In circumstances of this act the courts should not be criticised for not taking this possibility into account.

The Tribunal does not disregard the influence of the immediate and irreversible separation with the child which must have been exerted on the lives of the complainants. However, even though the Convention does not recognize the right to parenthood, the Tribunal cannot ignore the difficult emotions which accompany the people whose need to become parents has not and cannot be satisfied. However, the public interests involved in the case predominated the result of the case, while the interests of the complainants and their personal development in the relationship with the child were of minor importance. Giving the consent for the child's stay at the complainants' house, with the possible outcome of them becoming adoptive parents, would mean legalization of the circumstances caused by the complainants who violated important regulations of the Italian legislation. The Tribunal concludes that Italian courts, after determining that the child will not be significantly and irreversibly hurt as a result of the separation, preserved the righteous balance between various interests present in this case, maintaining proper margin of discretion available in this case. Thus the art 8 of the Convention was not violated.

In conclusion, it is worth to mention the Project of the Family Code developed by the Commission by the Ombudsman for the Rights of Children in the years 2015-2018, which awaits the legislative. The project defines the basic concepts of the family law (family, child, child's welfare, family autonomy) and the regulations of the family law which had not been previously defined by the legislator. The project contains a range of the provisions of the Convention on the Rights of the Child and from the legal international acts

Conclusion

The Family and Guardianship Code is the fundamental legal act which regulates the legal relations in the family and the relations regarding care and guardianship. The Code was subjected to further novelization with the act from December 19th 1975 (Dz.U. Nr 45, item 234) and with the act from November 6th 2008 (Dz.U. Nr 220, poz. 1431).

The amendment of the Code from 2008 regarded the regulations which referred to the child's affiliation, parental authority, the contacts between parents and children, maintenance relations between parents and children, foster care over the child. The need for changes resulted from the contents of international agreements ratified by Poland, from the provisions of the Polish Constitution and the submitted demands *de lege ferenda,* both in the legal doctrine and in jurisprudence and in the speeches of the Ombudsman for the Rights of Children and the Commissioner for Civil Rights. The issues of the relations between parents is the object of case law also in other countries and of the European Court of Human Rights (LEX nr 2192506 – verdict from January 24th 2017). The relationship between the family law and ethics results from the historical development of the institutions. It is therefore worth mentioning here the significance of the scientific legacy of Father Michał Sopoćko. The values which he proclaimed are universal in nature, and they are particularly up-to-date in the difficult contemporary times. It should be indicated that the Polish legislator, while going beyond the sphere of marital rights and obligations, does it moderately and intrudes only when it is necessary due to the perspective of the family designated by the state. While any interference into the family relationships of parental authority (art.109 -112) is an exception. The legislator does only when he learns from whatever source that the children in the family are being harmed

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