

THEMIS COMPETITION 2016
SEMI FINAL B: INTERNATIONAL JUDICIAL COOPERATION IN CIVIL MATTERS –
EUROPEAN FAMILY LAW

**BIOLOGICAL VERSUS SOCIAL PATERNITY – WHOSE BENEFIT
DROOPS THE SCALES?**

Paper prepared by team Lithuania:

Vaida Baumilė

Giedrė Norvilienė

Ernestas Šukys

Introduction

Different societies living in different conditions created different kinship and family structures with different rules for determining children's parentage. The concept of family and family members in societies where life was based on tribalism was not limited to the concept of the nuclear family. In social systems such as *Eskimo kinship* or *Hawaiian kinship*, family members extended far beyond those in the nuclear family. For example, a child's father was, in the social sense, considered to be all of the brothers of the child's biological father – uncles, in European terms¹, i.e. the brothers of the child's biological father had the same rights and obligations as the biological (real) father himself, and all of these fathers were, from the child's point of view, considered equally "real" and significant fathers.

In the European context, the concept of the nuclear family, where a family consists of the father (husband), his wife and their children, began to dominate in ancient Greece and Rome. A child born to the wife of a married man was considered this man's child, i.e. the rule of *pater est quem nuptiae demonstrant* (hereinafter – the rule of *pater est*) was formed, whereby every child born within wedlock is the legitimate child of the mother's spouse. This doctrine became a part of the legal system of all European countries. However, the *pater est* rule does not answer all of the questions which arise in today's postmodern society related to the establishment of parentage: how should a situation be assessed if the mother's spouse is not the child's biological father? Should the mother's partner (who is not her husband) automatically be recognised as the child's father on the basis of *pater est* rule? Who, in the event of a dispute, should be given priority in becoming the child's legal father: the mother's husband/partner who is not the child's biological father, or the child's biological father?

According to Julie Shapiro, the concept of paternity is a historically and culturally variable phenomenon². She stresses, that technology has lessened – and in some cases even done away with – the importance of the genetic bond between the father and the child. The existence of a genetic bond is not sufficient in order to establish who the child's father is, and this fact alone no longer guarantees the father's status, so taking cultural and technological changes into account, it is crucial that new concepts be consolidated as well³. Authors Dana Shawn Matta and Carmen Knudson-Martin agree with this, claiming that fatherhood is a socially constructed notion, the perception of which arises through the assessment of economic and political structures that make up the foundation for families. Therefore, fatherhood is not an invariable category; its meaning varies in

¹ Marvin Harris. *Cultural Anthropology*, Harper Collins College Publishers, 1995, p. 85.

² Julie Shapiro. *Changing Ways, New Technologies and the Devaluation of the Genetic Connection to Children*. In *Family Law and Family Values*. Editor M. Maclean. Oxford; Portland: Hart Publishing, 2005, p. 82.

³ *Ibid*, p. 86, 90.

different times, contexts and households⁴. For all of these reasons, legal doctrine distinguishes not only biological paternity, but social paternity as well.

Talking about paternity in the context of European family law is not an easy challenge. In the European Union, which unites the majority of the European continent's countries, no regulation of substantive family law has been developed. The establishment of this regulation, in accordance with the Treaty on European Union and the principle of subsidiarity, is the internal matter of the countries' legal systems. It seems that in the short term it will not be otherwise, especially given the fact that some countries have clearly expressed that areas such as family law must be within the competence of the national regulator⁵.

Few efforts have been made thus far on the European level to harmonise an institution of parentage. The Commission on European Family Law has prepared as many as three documents for the harmonisation of separate family law institutions (Principles on Divorce and Maintenance Between Former Spouses, Principles on Parental Responsibilities, Principles on Property Relations between Spouses), but the topic of paternity has yet to be touched upon⁶.

In searching for common European standards for the establishment of parentage, the most has been accomplished thus far by the Council of Europe, within the framework of which the European Convention on the Legal Status of Children Born out of Wedlock⁷ was adopted in 1975, and the European Committee on Legal Co-operation (CDCJ) adopted the Council of Europe's "White Paper" on principles concerning the establishment and legal consequences of parentage⁸ at its 79th plenary meeting on 11-14 May 2004. However, the most important legal instrument in terms of discussion is undoubtedly considered to be the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) and the practical application of Article 8 thereof developed by the European Court of Human Rights (hereinafter – ECtHR or the Court).

In responding to the questions posed, we will therefore base our paper specifically on the jurisprudence of the Court, the legal interpretation in which we consider to be of equal importance to all European countries. In this paper, we will attempt to reveal, in the context of the Convention and its practical application, the diversity of the concept of paternity, its ambiguity, and the relationship of social and biological paternity, and to explain what legal advantages are being

⁴ Dana Shawn Matta, Carmen Knudson-Martin. *Father Responsibility: Couple Processes and the Co-construction of Fatherhood*. Family process, 2006, Vol. 45, No.1, p.20.

⁵ For example, on 30 June 2009, the German Federal Constitutional Court delivered its judgment on the compatibility of the Treaty of Lisbon with the German Basic Law in which it clearly stated, *inter alia*, that family law is one of the "elements which must be reserved to the State". See Judgment of 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, available in German at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html

⁶ <http://ceflonline.net/principles/>

⁷ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680076da4>

⁸ http://www.coe.int/t/dghl/standardsetting/family/CJ-FA_2006_4e%20Revised%20White%20Paper.pdf

sought after in realising a child's right to know who his or her parents are, and what the balance is of protecting the rights and interests of the child's biological father and social father.

To introduce the aforementioned problematic aspects – case story. One young woman gave birth to a son, and her husband was named as the father on the child's birth certificate. However, the woman already knew that the child's real (biological) father was not her spouse, but another man from the company where she worked – she was the secretary, and he was the director.

After the child was born, the woman left her spouse and began living with a new man, caring for the child together. The woman applied to the court for a divorce, and her spouse applied for the visitation schedule to be established. However, the woman indicated that her spouse is not the child's biological father, so he does not have the right to visitation. At the same time, the woman's partner claimed for annulment of the paternity and for naming him as a father of the child, but upon DNA examination, it was revealed that he is not the child's biological father. In order to ensure the child's right to know his father, the woman suggested that the biological father of the child – the director of the company – recognise paternity voluntarily, but he refused. In this way, court proceedings were initiated to resolve a dispute regarding the establishment of parentage.

Which of the abovementioned men (the husband, the director, or the new partner) should be recognised as the child's father? Could all three men lay claim to status as the child's father?

1. Diversity in the concepts of paternity

The fragility of the modern family as well as the diversity of concepts of marriage and family and modern reproductive technologies have a significant impact on the change of the concept of paternity. These social factors must be addressed by the law, according to which it is now recognised that biological paternity is no longer the only type of fatherhood, and alongside it another form of fatherhood – social paternity – is becoming more and more significant. Therefore, in resolving the question of paternity, the problem is arising frequently regarding which of the aforementioned types of paternity should be given priority in order to maintain balance between the interests of the fathers (both biological and social) and the children without deviating from the principle of the best interests of the child.

1.1. The traditional (biological) concept of paternity

The traditional or biological concept of paternity states that a child's father is a person to whom the child is related by blood (genetically). According to this concept of paternity, fatherhood is recognised based on a blood relationship and a child's father is specifically considered to be his or her biological father. Biological parentage becomes a legal fact which gives the biological parents the rights and obligations established by law. Biological paternity is significant not only in defining the rights and obligations of the biological father in respect to the child, but also in ensuring the child's right to know his or her parents (Article 7 of the Convention on the Rights of the Child), the right to preserve his or her identity (Article 8 of the Convention on the Rights of the Child), and the right of the child and the biological parents to respect for their private and family life (Article 8 of the Convention: "Right to respect for private and family life").

The European Court of Human Rights also stressed the importance of biological paternity in *Keegan v. Ireland*⁹. In this case, the ECtHR ruled that the right to respect for family life provided for in Article 8 of the Convention also includes relations between the child and the biological father, who, although not married to the child's mother, did live with her for a long time, planning both the pregnancy and their future life together. It was established that the man lived with the woman out of wedlock when the woman found out that she was pregnant. The couple planned to get married, but they broke up before the child was born. After the child was born, it was placed for adoption by the mother without the applicant's knowledge or consent. Once he found out about this, the applicant applied to the national court, requesting that he be recognised as the child's guardian, but the Supreme Court of Ireland held that the wishes of the biological father should not take precedence if the child's adoptive parents – with whom, in this case, the child had already been living for over a year – can ensure the child's well-being. The ECtHR pointed out that in this case, the mere fact that Ireland's legal framework provides the right to decide on adoption without the knowledge or consent of the real (biological) father, regardless of the fact that the father and mother broke up before the child was born, constitute grounds to assert that the applicant's right to respect for family life was violated¹⁰.

It follows that biological paternity is a value that requires legal protection and regulatory clarity, at least to the extent of biological father's right to be involved in decisions concerning the parentage of a new born child. On the other hand, it does not mean that biological fathers must be automatically provided with other rights concerning the child: for example national law must not

⁹ *Keegan v. Ireland* // Appl. No. 16969/90.

¹⁰ The essential problem was that Irish law permitted the child to be placed for adoption shortly after her birth without the applicant's knowledge or consent. The placement not only jeopardised the applicant's ties with the child, but also set in motion a process which was likely to prove irreversible, thereby putting the applicant at a significant disadvantage in his contest with the prospective adopters for the custody of the child.

automatically treat them as exercising the right of child's custody in terms of EU instruments. The European Court of Justice has left it to the Member States to determine from which point biological fathers acquire certain rights that can be defended in court with the help of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility (Brussels II bis): in a preliminary ruling of the European Court of Justice of 5 October 2010 on *J. McB. v L. E.*¹¹, the Court stated the Regulation No 2201/2003 must be interpreted as not precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court with jurisdiction awarding such rights to him, on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that regulation. This decision shows that the European Court of Justice is not inclined to overemphasise biological paternity and gives Member States considerable freedom of estimation.

1.2. The concept of social paternity

The understanding of fatherhood based solely on biological paternity can cause serious problems. For example, modern reproductive technology means that a child's father may be unknown in general. In addition, children are often looked after and brought up by a person who is not the biological father or mother, i.e. guardians carry out the function of the child's mother and father. For psychological reasons, children also often consider someone other than their biological father to be their father (e.g. the mother divorces the biological father and remarries, and the child considers the stepfather to be his or her father, since he is the only father he or she knows).

This means that paternity can be more broadly understood and defined as being a father and performing the duties of the father (parents). In accordance with this provision and taking the abovementioned circumstances into account, it becomes clear that paternity can be understood not only as a biological category, but as a social category as well. A situation where a man other than the biological father is bringing up a child, i.e. carrying out all of the paternal rights and duties, is understood as social paternity, and the man is called the social father. Thus, a social father can be regarded as the person who actually performs the functions of the father, rather than the person who contributed to the creation of the baby¹².

¹¹ <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-400/10>

¹² Jonathan Herring. *Family Law*, Harlow, Longman, 2001, p. 264.

The European Court of Human Rights came out in favour of the status of social father in its judgement of 16 July 2015 on *Nazarenko v. Russia*¹³. According to data of the case, custody of the applicant's 8-year-old child (girl) in the divorce case, given the child's age and sex, was given to her mother, despite the child's wish to live with the father. In addition, a DNA test disclosed that the child's biological father was not the applicant (i.e. the father who brought her up – the social father) so the applicant's paternity was terminated, his name was removed from the child's birth certificate and the child's name was even changed. Due to these circumstances, the father who had raised the child until his paternal rights were terminated was entirely excluded from the child's life. It was acknowledged by decisions of the domestic courts of the Russian Federation based on the provisions of national law that the social father does not have the right to make demands related to his, as a father, duties and rights with respect to the child.

The applicant (the social father) applied to the ECtHR claiming a breach of Article 8 of the Convention. The Court ruled that a person who had brought up a child for some time as his own should not be excluded from the child's life after it has been revealed that this person is not the child's biological father unless there are reasons relating to the child's best interests to do so. The ECtHR indicated that no circumstances had been established in the present case which would suggest that further interaction between the child and the social father would be detrimental to the child. Thus, a breach of Article 8 of the Convention was established.

In summary, one could say that biological paternity cannot be considered the only type of paternity or the only value worth legal protection. Paternal identity derives not only from an individual characteristic, but from the mutual relationship between the child and the father himself, and especially from the central place of this relationship in the child's life.

2. The concept of legal paternity, its presumption and the position of the biological father

In this section we will discuss three universal methods for establishing a legal father-child relationship (paternity): presumption of paternity based on the rule of *pater est*, voluntary recognition of paternity and the establishment of paternity by court order.

As was already mentioned in the introduction to this paper, the ancient Roman law principle of *pater est quem nuptiae demonstrant* is used in the legal systems of many European countries as a basis for determining parentage. According to this principle, every child born within wedlock is the legitimate child of the mother's spouse. In the cultural context of Europe, this principle was also strengthened by canon law, according to which only a woman's husband was

¹³ *Nazarenko v. Russia* // Appl. No. 39438/13.

considered to be the father of a child born. Parentage is usually recorded regardless of the will of the mother or her husband, without any additional requirements. Although such rule could be considered controversial, it is an important basis in order to ensure that a child is not left without a father, as well as not to raise the issue of paternity each time a new baby is born.

The importance of the *pater est* rule has also been recognised by the European Court of Human Rights which, in *Berrehab v Netherlands*, stated that in the case of marriage, based on the concept of family life established in Article 8 of the Convention, a child born in such a union is *ipso jure* part of the relationship; therefore, the very fact of the child's birth leads to the conclusion that certain bonds exist between the child and the parents which constitute "family life", even when the parents do not live together¹⁴.

On the other hand, marital presumption of paternity, like many presumptions in civil law, can be rebutted (challenged). The right to dispute paternity is granted to both the father and other persons, if this is done with objectives compatible with the interests of the child. For example, in *Kroon and Others v. Netherlands*, the ECtHR acknowledged a breach of the Convention because the biological parents were prevented from disputing the registration of paternity made on the basis of the marriage of the child's mother and her ex-husband¹⁵. Thus, in making a ruling on a specific case related to the question of paternity, the court must always keep in mind that law is the search for justice and good, and the legitimate and justified interests of all persons in the case must be evaluated. In another case - *Mizzi v. Malta* - a rule was formed that the child's legal father (spouse) also has the procedural opportunity to deny his paternity¹⁶. Under the circumstances of the case, the applicant's wife became pregnant with their child in 1966, and the next year the couple broke up. In accordance with Maltese law, the applicant was automatically considered (recognised) to be the child's father and was registered as the natural father. On the initiative of the applicant, a DNA test was carried out which established that he was not the real father of the child. The applicant tried unsuccessfully to bring civil proceedings in Malta to repudiate marital presumption of paternity. The applicant submitted a petition to the European Court of Human Rights on the grounds that his right to dispute paternity was not sufficiently ensured in national law, because there was a six-month time limit established for this procedure, and there was thus disproportionate interference with his right for respect of private and family life. The ECtHR noted that the procedure for disputing the presumption of paternity established by Maltese law was too radical and not necessary in a democratic society, and the fact that the applicant was not once allowed to disclaim paternity was not proportionate. It was also ruled that the right of the child to enjoy the "social reality" of being the daughter of the applicant did not outweigh the applicant's legitimate interest of having at

¹⁴ *Berrehab v. Netherlands* // Appl. No. 10730/84.

¹⁵ *Kroon and Others v. Netherlands* // Appl. No. 18535/91.

¹⁶ *Mizzi v. Malta* // Appl. No. 26000/02.

least one occasion to dispute his paternity. The Court held that the balance between the common interest of protecting the legal certainty of the family relationship and the applicant's interest not to be the father was established incorrectly.

Another universal method of establishing paternity that is used in European legal systems is the **voluntary recognition of paternity**. A man who considers himself to be the father of a child and would like to obtain parental legal status is given the opportunity to do so if the child's mother agrees. Any restrictions on this right in the practice of the European Court of Human Rights are met with considerable criticism. For example, the ECtHR maintained this opinion in *Kruškovic v. Croatia*¹⁷, where the applicant submitted a petition on the grounds that he had been denied his right, as the biological father, to be registered as the father of his child born out of wedlock. Prior to the birth of his daughter (in 2007), the applicant was divested of his legal capacity by a decision of the court (in 2003) due to an addiction to drugs, and upon establishing these circumstances, registration of the applicant as the child's father was annulled for this reason. The ECtHR ruled that the Republic of Croatia, by ignoring, for no apparent reason, the applicant's request regarding the recognition and registration of his biological paternity, for two and half years (from submission of the application to register paternity to the judicial recognition of paternity), failed to guarantee the applicant's right to respect for his private and family life. In this situation, the Court concluded that the applicant's vital interest in registering his biological paternity, which is related to his private life and the child's right to know her parentage, was not ensured.

In cases where paternity is not established on the basis of the *pater est* principle and there is no voluntary application for recognition of paternity from a man who considers himself to be the child's father or there is such an application to which the mother of the child objects, paternity can be established by a third method – **court order**. According to Janis Vebers, the establishment of paternity by court order means the forced implementation of the right of a child born out of wedlock to a father¹⁸. In this case, states are given the positive obligation of ensuring the fair hearing of such disputes, including speedy proceedings and the opportunity to base one's claims on scientific measured (DNA tests).

In the *Mikulic v. Croatia* case, the ECtHR noted that a person's aspirations to establish paternity must also be protected in cases where paternity cannot be determined by DNA tests¹⁹. In this case, the applicant M. Mikulic was born out of wedlock in 1996. On 30 January 1997, she and her mother filed a paternity suit against H. P. before Zagreb Municipal Court. After three-and-a-half years, the court concluded that H. P. was the applicant's father. It based its conclusion on the testimony of the applicant's mother and on the fact that H.P. had been avoiding DNA tests. On

¹⁷ *Kruškovic v. Croatia* // Appl. No. 46185/08.

¹⁸ Веберс Я. Правосубъектность граждан в советском гражданском и семейном праве, Рига, 1976, р. 195.

¹⁹ *Mikulic v. Croatia* // Appl. No. 53176/99.

appeal by H. P. the County Court quashed the first-instance judgment, finding that H. P.'s paternity could not be established primarily on the basis of his avoidance of DNA tests.

ECtHR considered that people in the applicant's situation had a vital interest, protected by the Convention, in receiving the information necessary to uncover the truth about an important aspect of their personal identity. Furthermore, in determining an application to have paternity established, the courts were required to have regard to the basic principle of the child's interests. ECtHR found that the procedure available did not strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her supposed father not to undergo DNA tests. Accordingly, the inefficiency of the courts had left the applicant in a state of prolonged uncertainty as to her personal identity. There had, consequently, been a violation of Article 8.

In deciding on the rights and legitimate interests of a child's mother, who is directly related to assurance of the child's welfare, the European Court of Human Rights, in its judgement of 7 May 2009 on *Kalacheva v. Russia*, indicated that establishment of paternity of the applicant's daughter is a matter related to the "private life" of the applicant, and the applicant undoubtedly bears full responsibility for her minor daughter. Establishment of the natural father, apart from its financial and emotional purposes, may also be important regarding the applicant's social image, her family medical history and the rights and duties between the biological mother, biological father and the child concerned²⁰. This case concerned a situation in which the applicant had given birth in 2003 to "a child born out of wedlock". The applicant started proceedings against a Mr A, with whom she had had a relationship, in order to establish that he was the father of the child and to be able to claim child maintenance. The domestic court of the Russian Federation ordered a DNA test to be carried out by a specialised state institution. The test established that it was 99.9 per cent certain that A was the father of the child. Nevertheless, the domestic court rejected the applicant's claims, because the evidence had been obtained in breach of procedures: instructions for performing the test had not been properly followed, which gave rise to doubt that the blood used for the DNA test was indeed Mr A's.

The ECtHR ruled that a DNA test is the only scientific method to objectively answer the question of establishing paternity, and the probative value of this test clearly outweighs (is more important than) the probative value of other evidence. In this case, the applicant indicated that she and Mr A had concealed their relationship, so a DNA test was the only persuasive evidence of the disputed paternity. The Court noted that a clear answer on the establishment of paternity of the applicant's child was necessary to ensure the best interests of the child. The domestic courts, by declaring the first DNA test unreliable and not ordering a repeat (additional) test to be performed,

²⁰ *Kalacheva v. Russia* // Appl. No. 3451/05.

failed to strike a fair balance between the competing interests of the parties, and by failing to take measures (by not ordering a second DNA test) for establishment of the child's biological father, did not take the best interests of the child into account.

The ECtHR also ruled that the establishment of paternity is important not only in order to protect the interests of the child, but also because it is linked to the private life of the applicant (the child's mother) and takes the interests of the third part of the father-child relationship, i.e. the child's mother, into account. Furthermore, upon acknowledging that the circumstances of the case required that the child's biological father be established, the Court formulated a rule that it is specifically the duty of the state (court) to undertake, if there is a need, all possible measures to determine the fact of paternity.

In conclusion it should be said that legal paternity occurs on the basis set by law, and the legal father is the person whom the law recognises as the father, even though this may not correspond to biological reality. For example, the law, in accordance with the presumption of paternity, may recognise the mother's husband as the child's legal father, even though the child was conceived prior to their marriage and the real biological father of the child is another person (i.e. not the mother's husband) or might not even be known, as in the case of a one-night stand.

3. The biological and social paternity relationship problem

It is evident that the concepts of biological and social paternity are distinguished, but in reality, they often come along the same lines. The first regulatory issue that arises is whether the child's birth records should reflect biological or social reality. In addressing this problem, the main "key" is application of the principle of the best interests of the child (Convention on the Rights of the Child, Article 3, Part 1). On the other hand, this principle cannot absolutely deny protection of the legitimate interests and expectations of both the biological and social fathers.

3.1. Ensuring the child's interest to a stable family environment

It has been noted that the *pater est* rule cannot in itself deny the biological father of the right to dispute the paternity of the spouse of the child's mother and to be himself recognised as the legal father of the child. Exclusion of such possibility can be considered as a violation of the child's right to know his/her parents and lack of respect of the biological father's right to family life (Article 8 of the Convention), therefore, that may be justified only by very weighty reasons (*Kroon and Others v. the Netherlands*). Usually, such reasons imply the necessity to ensure a stable family environment for the child.

The ECtHR notes that, with a view to securing legal certainty and security of family relationships, the states justifiably apply a general presumption according to which a married man is regarded as the father of his wife's children and this presumption can be disregarded only if there are very weighty reasons. This position has been formulated by the court in the case *Nylund v. Finland*. The Court dismissed the petition of the biological father of the child where he contended that the Finnish laws prohibiting, if there was no consent of the child's mother, the disputing of the child's paternity established for the spouse of the child's mother under the presumption of their marriage, were in breach of the rights of individuals under Articles 8 and 14 of the Convention. The applicant claimed that an absolute right enjoyed by the child's mother to decide on the issue of the child's paternity violated the principle of objective non-discrimination (Article 14 of the Convention) in conjunction with the right to respect for family life (Article 8 of the Convention). The applicant contended in this case that such values as equality of sexes and the protection of the biological parent-child relationship outweighed the need to defend the social institution of family. The Court did not accept such reasoning and noted that in this case the applicant and the child had not been linked by any emotional ties making it fully justifiable that the domestic courts gave greater weight to the interests of the child and the family in which it lived than to the interest of the applicant in obtaining determination of a biological fact. Moreover, the Court pointed out that the establishment of biological paternity would not, as such, create any rights or obligations for those concerned. It also referred to the disturbance such an examination would cause to the family relationships in the child's family²¹.

Thus, it should be concluded that ECtHR, recognising the importance of the social importance of paternity, has reinforced the rule that the child's biological father can dispute the paternity of the child born in wedlock only when there are sufficient reasons and only in the cases when that has an impact on the legal relationship between him and the child. It follows from the circumstances indicated above that the presumption based on the *pater est* rule ensures legal certainty and security in family relations and the presumption can be disregarded only in specific exceptional circumstances related to the ensuring of the child's interests and well-being.

3.2. Significance of determination of the child's emotional, psychological and other close mutual relationship with its biological and social parent

In terms of biological paternity *versus* social paternity, the child's biological origin from one parent or both parents at times becomes less important than the psycho-emotional relationship between the child and the parent and the nature of that relationship. One of the cases where the

²¹ Nylund v. Finland // Appl. No. 27110/95.

ECtHR dealt with the issue of biological and social paternity was the case *Soderback v. Sweden*²². In this case, similarly to the above-mentioned decision in *Keegan v. Ireland*, the Court was called upon to decide the issue of biological and social paternity in the case of an adoption. The applicant in this case was the biological father of the child, who had never lived either with the child or with its mother. Eight years after the child's birth, the child's mother got married to another man and terminated the relations between the applicant and her daughter, which had anyway been only fragmentary. The applicant later applied to social institutions requesting to ensure him an opportunity to communicate with the child. Almost at the same time, the spouse of the child's mother applied to court regarding adoption. Although the applicant did not agree, that was not an obstacle for the child's adoption under the Swedish law. The Swedish court found that the adoption was in the best interests of the child in this case and granted the application of the spouse of the child's mother concerning adoption. The applicant contended that he had definitively lost all relations with the child as a result of such decision of the Swedish institution and submitted a petition to the European Court of Human Rights.

The ECtHR dismissed the applicant's petition concerning a violation of his right as guaranteed in Article 8 of the Convention and held that the adoption was granted in accordance with the law, pursuing legitimate goals in order to protect the child's rights and freedoms. Having regard to the weak and irregular relationship between the child and her biological parent (due to the father's fault), the Court has held that the effects of the above-referred decision did not amount to a disproportionate interference into the applicant's right to family life. Moreover, the Court considered the relationship the child had with her step-father as a significant circumstance: the child had been living with her mother since her birth and with her adoptive father since she was eight months old. The step-father had taken part in the care of the girl, who regarded him as her father. Thus, in this judgment, differently to the judgment rendered in the case *Keegan*, the Court has showed a clear difference between the protection granted by the Convention to biological paternity, which has not become social paternity without any fault of the biological father (*Keegan*), and biological paternity, which has not 'grown' into social paternity due to the fault of the biological father in particular (*Soderback*). Moreover, it is obvious that the Court's judgments on the scope of rights of the biological father attach much weight on the criterion of a newly developed relationship of the child with his/her social parent.

In judgments of 22 March 2012 in *Ahrens v. Germany*²³ and *Kautzor v. Germany*²⁴ concerning the issue of the relationship between biological and social paternity, the European Court of Human Rights has hardened its position towards biological parents who do not have any actual

²² *Soderback v. Sweden* // Appl. No. 33124/96.

²³ *Ahrens v. Germany* // Appl. No. 45071/09.

²⁴ *Kautzor v. Germany* // Appl. No. 23338/09.

relationship with their children. The cases concerned the German courts' refusal to allow two men to respectively challenge another man's paternity, in one case of the applicant's biological daughter, in the other case of the applicant's presumed biological daughter.

The ECtHR held that the rights of the biological father to the respect for his private family life had not been violated, because, differently to the relationship of the social father of the child, there had never been any close personal relationship between the applicants and the children. The Court noted that while it was in the applicants' interest to establish an important aspect of their private lives and have it legally recognised, the German courts' decisions had aimed to comply with the legislature's will to give precedence to an existing family relationship between the respective child and her legal father, who provided parental care on a daily basis.

The latter judgements raises some doubts because the biological and presumed biological father, in fact, sought rights to the child from the birth, however, were prevented from that. The access to the child was also actually impossible due to the ongoing lengthy proceedings during which a strong relationship between the children and her social and legal fathers has naturally developed. Therefore, it should be questioned whether the rights and legitimate interests of the biological fathers have not been violated in this specific case by preventing them from the exercise of their paternity rights. This could, presumably, also depend on the biological father's behaviour during the time period from the break-up of the relationship with the mother until birth-giving and later, as well as on the circumstances related to the mother's position concerning the opportunity of the biological father to take care of and have access to the child. The Court considered the child's interests as a higher value which needs higher protection than the interests of the biological father. However, the issue of the relationship between biological and social paternity cannot be analysed one-sidedly, i.e. only from the perspective of the child's interest to have a stable family environment. Although the child's interests should take precedence in all issues related to it, they may not override the rights and legitimate interests of other persons concerned, first of all, of the parents (both biological and social).

3.3. Significance of the overriding principle of protection and defence of the child's rights

Decisions on paternity must take into consideration the fact that a record in the birth documents of the child can have different legal consequences related not only to the obligation to maintain minor children, if such an obligation is provided for under the domestic law, but also to the law of succession and other legal aspects. Therefore, it is necessary to follow the principle of the best interests of the child, bearing in mind that this does not imply full denial of the rights of the

biological father, in particular in the cases when there is no close social relationship between the father and the child.

In the cases when a record about the father in the birth certificate of the child is merely formal and close parental relationship between the person recorded as the father in the birth certificate and the child do not exist in reality, this can entail serious negative legal effects to persons, therefore, it is important to identify in each case the relationship between the child and the father and assess not only the child's relation with the father but also the father's relation with the child, and his attitude to the child; a variety of objective factors should be taken into account, including the intentions of the father (for example, whether the father is involved in bringing up of the child, whether he provides maintenance, how his relationship with the child has changed after the divorce, is it possible to state that he considers himself as the child's father and acknowledges his paternity, whether he introduces himself to third persons as the child's father, etc.).

These considerations are well illustrated by the judgment of the European Court of Human Rights in the case *Mandet v. France*²⁵ concerning the quashing of the paternity established by voluntary acknowledgement made by the mother's husband (the mother, the mother's spouse and the child are the applicants) at the request of the child's biological father. At the time the child was born, the mother and her spouse were divorced, and the child was registered under the mother's name. Later the applicant (who was not the biological father of the child) recognised the child's paternity and after a while the applicants remarried. The biological father of the child applied to the national courts challenging the recognition of the applicant's paternity. The courts satisfied this request.

The ECtHR noted that by quashing the legal parent-child relationship between the applicant and the child, the domestic courts had changed, from a legal viewpoint, an important element of the family structure, replacing it with another legal father-child relationship and that amounted to an interference with the child's right to respect for his private and his family life. The Court agreed that interference had been in accordance with the provisions of national legal acts and had the aim of protecting the rights of others (of the biological father). In assessing whether the interference was 'necessary in a democratic society', the ECtHR reminded about the overriding principle of the best interests of the child. The Court noted in this context that the domestic courts had done everything to involve the child in the proceedings (appointed an *ad hoc* guardian to represent the child's interests in the proceedings, although she had been unable to meet the child because the applicants had left the country); the Court of Cassation had examined the question of the child's right to be heard in the proceedings and had held that this right had been respected (the child had been informed of the proceedings and knew that his paternity was being challenged, he

²⁵ *Mandet v. France* // Appl. No. 30955/12.

had sent letters to the judges in which he expressed his wish not to change his surname and to retain his legal parent-child relationship with the applicant). The position of the ECtHR was that the domestic courts had duly placed child's best interests at the heart of their considerations and held that, although the child considered that the applicant was his father, his interests lay primarily in knowing the truth about his origins; the domestic courts only held that the best interests of the child did not necessarily lie where the child perceived them (in maintaining the parent-child relationship as established and in preserving emotional stability), but rather in ascertaining his real paternity. The Court held that the decisions of the domestic courts did not amount to unduly favouring of the biological father's interests over those of the child – the interests of the child and his biological father partly overlapped. Moreover, by conferring parental responsibility to the mother and resuming the use of the mother's surname for the child, the domestic courts had not prevented the child from continuing to live as part of the applicant's family, as desired by the child. It has been held that there had been no violation of Article 8 of the Convention.

It follows from above considerations that, while making decisions regarding the relationship of biological and social paternity, the best interests of the child shall be a primary consideration. The decisions should be such as to ensure the best interests of the child and, at the same time, not to undermine the interests of the biological and social parents with whom the child has a strong social–emotional relationship.

Conclusions

European family law, responding to the changes in the lifestyle of modern society and in the notion of a family, interprets the concept of paternity broadly. The following main categories of the concept of paternity may be distinguished: (1) biological paternity (the person who is linked with the child by bloodline is recognised as the parent of the child); and (2) social paternity (the person who actually takes care, nurtures and brings up the child and who has a strong psychological relationship with the child is recognised as the parent of the child).

There are three universal methods for establishing a legal father-child relationship (paternity): (1) presumption of paternity based on the rule of *pater est*, that ensures the certainty and safety of legal family relationship and, therefore, it may be undermined only when there are serious grounds; (2) voluntary recognition of paternity; (3) the establishment of paternity by court order.

In decisions concerning the relationship between biological and social paternity, none of these categories can undermine in absolute terms the ensuring of the rights and legitimate interests of the parent, however, when determining to whom of the parents (to biological or social) priority should be attributed, the best interests of the child shall be a primary consideration (Article 3(1) of

the Convention on the Rights of the Child). It requires due consideration of the entirety of the child's interests rather than any of the elements of their contents. Decisions in the disputes concerning children should seek to find balance between the interests of the children and their parents and in all cases the guiding principle should be that the child's rights may not be enforced against his/her interest; when determining the contents of the child's interests, objective criteria should be taken into consideration, because parents understand the child's interests differently, depending on their own attitudes, thus, when there is an issue of biological and social paternity, the court should ascertain the interests of a specific child.

The issue of paternity may not be reduced to the establishment of a biological reality, i.e. whether there is bloodline between the father and the child. Such proceedings should pay heed to the principle of priority protection of the child's interests and, where there the relationship of biological and social paternity is at stake, a decision most in line with the child's interest should be made. What is more, decisions in the cases where paternity is challenged should aim at securing legal certainty and security of family relationships, therefore, it is justified to apply a general presumption according to which a married man is regarded as the father of his wife's children and this presumption can be disregarded only if there are very weighty reasons. The court must find the right balance between the interests of the person who challenges paternity, the family and the public in each specific case concerning the challenging of paternity and shall always consider the best interests of the child.

Thus support should be expressed to the case law of the European Court of Human Rights where priority is attached to the interests of the child and of the family where he/she lives.