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THE CONCEPT OF MARITAL PATERNITY PRESUMPTION IN MODERN FAMILY LAW

ABSTRACT: This paper deals with positive domestic and comparative international laws on establishing and contesting the marital presumption of paternity. It is evident that these rules derive from the provisions that regulate marriage. What makes them complex and diverse is that in certain legal systems the moments from which the presumption of paternity of the mother's spouse begins and ends are determined differently in relation to the moment of conclusion of marriage and the cause of termination of marriage. The aim of this paper is to point out different possibilities when stipulating the rules on establishing and contesting marital presumption of paternity and how each of these possibilities reflects on the modern concept of parenting and the child's right to know his or her origin. It is from this point of view that the relevant norms of domestic family legislation have been valued.

KEY WORDS: marital paternity presumption, determination of marital paternity, contesting marital paternity, paternity lawsuit.

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1. Introduction

Regardless of the fact that growing autonomy of will has caused the number of cohabiting partnerships and cohabiting parents to rise, marriage and married parents, as more traditional terms, still have not lost their significance. However, even these traditional concepts cannot resist the effect of many social changes, but, in fact, follow their dynamic. Consequently, the marital presumption of paternity is a current issue and subject of interest for many family law experts. Establishing and contesting marital presumption of paternity depends on the preference of the legislature in relation to the moment of conclusion of marriage and the ways the marriage was terminated, but also on the legislator's position regarding the predominance of biological or social components of parenting. These are precisely the segments of marital paternity presumption that require special attention nowadays.

This paper explores the provisions of domestic Family law (Official Gazette of the Republic of Serbia, number 18/2005, 72/2011- state act and 6/2015) which prescribe the conditions for establishing and contesting marital paternity presumption. In addition to this, the paper offers the most valuable examples of practice of the European Court of Human Rights and decisions proposed in the draft version of the Civil Code of the Republic of Serbia (Accessed 5 February 202, www.paragraf.rs/nacrti_i_predlozi/260615-nacrt_gradjanskog_zakonika). By engaging in comparative analysis of complementary international legal norms, the paper indicates differences in contemporary understanding of the marital paternity presumption and lists both common and preferable directions of development of this mechanism. This analysis encompasses some European laws with a very long tradition, as well as those laws with which Serbian legal system is historically linked: German, French, Montenegrin and Croatian.

This paper uses mostly normative methodology, comparative methodology and a case study methodology. The aim is to indicate changes in the concept of marital paternity presumption in modern Family Law and to evaluate these changes from the aspect of positive domestic legal norms and *de lege ferenda*. The paper is structured around the discussion about the concept of marital presumption of paternity

and the conditions for establishing and contesting marital paternity presumption, from both the material and the procedural aspect. Our conclusions on the marital presumption of paternity in domestic and international laws are drawn in the final section of the paper.

2. The concept of marital paternity presumption in domestic and comparative law

Marital presumption of paternity is an element of the family status of a child that is not a completely independent concept, considering that it is determined through other facts, such as maternity and marriage with the child's mother. The legal definition in Serbian Family Law is: the husband of the child's mother shall be considered the father of the child born in marriage¹⁷. The existence of marriage is enough by itself, there is no need for spouses to live together (Ponjavić, 2006, p.255)¹⁸. In specific cases, marital presumption of paternity exists, even though marriage is terminated. Namely, if a child is born within 300 days after the termination of marriage, if the marriage was terminated due to death of the mother's spouse, provided that the mother had not concluded another marriage in the meantime, the deceased spouse of the mother will be considered the father of the child. If, however, that marriage was followed by another one, the father of the child will be the mother's spouse from the subsequent marriage. If a child is born after the termination of marriage by a divorce or an annulment, regardless of any time limits, the marital presumption of paternity of the former spouse will not be established (Article 45 of the Family Law). The reasoning behind this dual-mode approach lies in the presumption that the quality of marital relationship before the termination of marriage by the death of the spouse/father is good, and that the quality of relationship before the termination of marriage by a divorce, or an annulment, is poor, which makes conceiving a child very difficult. In any case, what should be kept in mind is that paternity based on the stated rules is

¹⁷ At the time of Roman law: *Pater is est quem nuptiae demonstrant*.

¹⁸ In order for paternity to be legally recognized in any case, including this one, it has to be registered at the Register of Births.

considered a legal presumption, therefore it is allowed to contest the paternity of the man to whom the legal norm points.

For the purpose of easier analysis, foreign laws which are the subject of this research, can be divided into two basic groups, based on the cause of termination of marriage and its effect on the marital presumption of paternity. The first group is made up of Montenegrin and Croatian laws while the second group consists of German and French laws.

Under Montenegrin law, namely, the (marital) father of the child is considered to be not only the spouse of the child's mother but also the former spouse, regardless of the fact that the marriage was terminated due to his death or by a divorce or an annulment, provided that the child was born within 300 days after the termination of marriage and that the mother had not concluded another marriage in the meantime. The former spouse of the child's mother will, in fact, be considered the father only if the paternity of the new spouse is successfully disproved (Article 97 of the Family Law of Montenegro (Official Gazette of the Republic of Montenegro No. 1/2007, Official Gazette of the Republic of Montenegro No. 53/2016 and 76/20))¹⁹. Evidently this is a rule formulated in the best interests of the child so that in any moment he/she has a determined paternity. Montenegrin law contains a specific provision which prescribes that a child born in a common law marriage shall be considered born within marriage if his/her parents subsequently enter into a marriage (Article 98 FLM). This provision seems a bit archaic bearing in mind that children are nowadays granted full equality regardless of the marital status of their parents.

Under Croatian law, just like under Montenegrin law, we talk about marital presumption of paternity when the child is born within marriage, or within 300 days after its termination in any way. If within those 300 days after the termination of marriage the mother concludes a new marriage, the current spouse will be considered the father of the child. However, Croatian legislators have paid special attention to the specifics of this life situation, which is why they have allowed the possibility of establishing the presumption of paternity in favour of another man, who would acknowledge paternity with the prior consent of the child's moth-

¹⁹ Hereafter FLM

er and her spouse (Article 61 of the Family Act (NN 103/15, accessed 10 February 2021, <https://www.zakon.hr/z/88/Obiteljski-zakon>)²⁰).

Under German law, as mentioned earlier, the difference is made between the situation in which the child was born after the death of the mother's former spouse and the one in which the child was born after a divorce or an annulment of the marriage. With that in mind, if the child is born within 300 days of the termination of marriage due to the death of the spouse, on the condition that the mother did not conclude a new marriage, the new spouse will be considered the father of the child (§ 1592 German Civil Code *Deutsches Bürgerliches, Gesetzbuch*, accessed 15 February 2021, http://www.gesetze-im-internet.de/englisch_bgb/²¹). German legislators also paid special attention to the interests of the child so that whenever there is even a slight possibility that a person is indeed the father of the child, the presumption of paternity applies, hence the provision stating that in case of contesting and disproving the paternity of the new spouse, the paternity of the former spouse will be established (§ 1593 BGB).

The presumption of marital paternity under French law is shaped in a more creative way, so that a marital child is considered the one that was born within marriage (Art. 312 Code civil, accessed 15 February 2021, https://www.trans-lex.org/601101/_/french-civil-code-2016/)²². Taking into account the possible length of pregnancy, it is considered that the child is conceived in the period between 300 and 180 days prior to its birth (Art. 311 CC). If, however, the child was born after 300 days since the initiation of divorce proceedings, the presumption of marital paternity will not be valid. The same goes if the child is born within 180 days after the petition for divorce was dismissed, or after the reconciliation of the spouses. However, if the paternity of another man is not determined, and there are presumptions, like the behavior of spouses, which indicate that the mother's spouse is the child's father, he will enjoy such status (Art. 313 of CC). The presumption of marital

²⁰ Hereafter FAC

²¹ Hereafter BGB

²² Hereafter CC

paternity will have no legal effect when the man married to the child's mother is not registered as a father in the public register nor does he enjoy obvious parental status in relation to the child (Art. 314 of CC). The consequence of contesting this presumption is the possibility of establishing marital paternity by decision of court (Art. 315 of CC). We can conclude here that French legislators have made special efforts trying to adapt their legal norms on marital paternity presumption to various life situations.

3. Marital paternity dispute

3.1. Domestic law

As we already mentioned, paternity based on the marriage with the child's mother represents a rebuttable legal presumption, so it is allowed to dispute it, i.e. to point out that the child's father is not the person referred to by the legal norm, but someone else. Given that this is an extremely sensitive sphere in which the interests of the child, the mother, the presumed and the biological father are intertwined, the possibilities for challenging paternity are not the same everywhere. Thus, in some legal systems it is the social component that prevails, while in others the biological component of parenting is the one that counts. Literature review also shows opposing viewpoints on this topic. Some authors believe that the lack of special conditions for challenging marital presumption of paternity by a man who considers himself a biological father of the child is better suited for contemporary society and modern family law (Kovaček Stanić, 2013). On the other hand, there are those who believe that the basic condition for contesting paternity in this case should be the expressed intention of the said person to take care of the child as a father (Novaković, 2017). The author of this paper is a supporter of the initially stated position and advocates a synthesized concept of fatherhood (without its separation into the social and biological father), which in turn is limited by the prescribed conditions for its establishing and contesting. In addition, we would hereby like to stress the practice of the European Court of Human Rights, which has on several occasions had the opportunity to make decisions on this issue. Name-

ly, in the case *Mandet v. France*²³ the court pointed out that it is in the child's interest to know his origin, and that the integrity of the established family relations can be protected by the decision to entrust the child to the mother, as the biological parent who has already been taking care of him and by granting the child the right to maintain a relationship with the man who he has considered his father. Also, two decades earlier, in the case of *Kroon and Others v. the Netherlands*²⁴, the ECHR stated that the presumption of marital paternity cannot be viewed as an abstract category, when it does not actually serve anyone's interests, and especially not the interests of the child. The court in Strasbourg pointed out that family life begins at the moment of the child's birth and that the domestic authorities should pay due attention to establishing a legal relationship between the child and his parents as soon as possible.

Under Serbian law, a lawsuit to contest paternity can be initiated by the child, the mother, mother's spouse i.e. the man who is considered to be the father, and the man who claims to be the father of the child. Special rules apply in cases when a presumed father initiates a paternity dispute. Namely, in this case, the claimant contests the paternity of a man registered in the birth register as the child's father while at the same time trying to convince the court that he in fact is the father of the child (Article 56 of the Family Law). This rule is completely justified, since it is never in the interest of the child to break the continuity of established legal paternity, regardless of whether the legal situation corresponds to biological facts or not. Moreover, in the absence of this rule, one would have to raise the issue of legal interest in challenging paternity by a man who has no desire to take on parental duties and responsibilities. A child is the only subject who has the right to action to establish or contest paternity regardless of any time limit (Article 251, paragraph 1 and Article 252, paragraph 1 of the Family Law). For other persons, the subjective time limit of one year applies, i.e. the objective time limit of ten years from the birth of the child (Article 252, paragraphs 2, 3, 4 and 5 of the Family Law). According to the proposal from the provision contained in Article 2501 of the draft version, there is a possibility of abolishing

²³ Case 30955/12 [2016].

²⁴ Case 00018535/91 [1994].

time limits for initiating litigation of this type by every person involved in it. I do not support this approach, since I believe that it is not in the interest of legal certainty.

3.2 Comparative law

The provisions of Montenegrin law do not differ significantly from the Serbian ones. However, unlike the Serbian law, the Montenegrin law, prescribes that the right of a child to file action for determining paternity is limited in time, since it can be exercised until the child reaches the age of 23. The time limits within which other authorized persons can take appropriate action are also shorter compared to Serbian law. Thus, the mother can initiate this paternity lawsuit within only six months of the child's birth, the man who claims to be the father of the child is given a year to do the same, and the mother's husband can file a complaint for denying paternity within six months from the day he learns that he is not the father, but not after the child reaches 5 years of age (Articles 109, 113 and 115 of the FLM).

Compared to the laws analyzed so far, Croatian law contains one novelty, and it is reflected in the reduced number of subjects entitled to challenge marital paternity presumption. Namely, this group of subjects consists of a child, a mother and her husband (Article 79, paragraph 1 of the FAC). A man who considers himself the father of the child is left out because his paternity, as already mentioned, can be based on confession, with the consent of the mother and her husband, or it can be established through a paternity case, in the absence of such consents. The time limit within which a child can initiate a paternity lawsuit to challenge marital presumption of paternity is limited under Croatian law, just like under Montenegrin law, and it expires when the child reaches the age of 25. The mother can exercise the same right within a period of six months from the birth of the child, while her spouse can do the same within a subjective period of the same length, which is limited by an objective period, i.e. when child reaches 7 years of age (Articles 400, 401 and 404 of the FAC).

German laws on challenging marital presumption of paternity deserve special attention. Namely, the persons entitled to challenge extramarital paternity are a child, a mother, her spouse and a man who claims to be the father of the child. Special rules apply to the last person mentioned, as he will be able to take appropriate action only if he declares under oath that he maintained intimate relationship with the child's mother during the critical period, and if no strong family ties have been built between the child and the man registered as the father. These ties will be deemed to exist if this person has exercised parental rights and duties towards the child during the critical period (§ 1600, point 1, 2 and 4 of the BGB). Under German law, a subjective time limit for initiating this litigation is two years, with certain privileges allowed when the person bringing a lawsuit is a child or a person deprived of legal capacity (§1600b BGB). Given the narrowed down possibilities for challenging marital presumption of paternity under German law, it is not surprising that these rules have also been the subject of examination by the European Court of Human Rights. Firstly, I would like to single out a negative decision of this court rendered in the case of *Fröhlich v. Germany*²⁵. The applicant, as the biological father, requested protection before this Court because domestic courts had refused to grant him permission to challenge the marital paternity of the girl conceived during his extramarital relationship with the child's mother, who was at the time married to another man. His intention was to rebut the marital presumption of paternity and establish his paternity so that he can take care of his daughter. His request to maintain contact with the girl was rejected, because his paternity had not been established earlier, which was not possible due to the existence of strong family ties between the girl and her legal father. In explaining the reasoning behind the decision, the domestic court stated that challenging the marital paternity would jeopardise the child's best interests, because it might cause the child's nuclear family to break up. It is for this reason that the ECHR found that the applicant's request was manifestly unfounded. However, the application filed in *Schneider v. Germany*²⁶, had a somewhat differ-

²⁵ Case 16741/2016 [2019].

²⁶ Case 61595/2015 [2018].

ent outcome. Compared to the previously analyzed court decision, the difference is that the domestic court did not examine at all whether it was in the child's best interest to maintain contact with the man who claimed to be the child's father since it was not even established that the applicant was the child's biological father. On the other hand, the ECHR particularly valued the fact that the applicant and the child's mother had been cohabiting for some time, that he had cared for her and the child during her pregnancy and that he had initiated appropriate proceedings shortly after the child's birth. The same reasoning of the court was applied in the earlier case of *Anayo v. Germany*²⁷. This time again the Court stressed the importance of examining the best interests of the child in specific circumstances, and particularly emphasized the importance of the fact, that the applicant, being the biological father, had not been able to care for the twins he considered his children, for reasons that cannot be attributable to the applicant. i.e. due to the opposition from the children's mother and her husband - the legal father. The Court emphasized that German domestic courts must examine in each case whether it is in the best interests of the child to maintain contact with the potential biological father, who in this particular case, according to German laws, was not allowed to challenge the marital presumption of paternity first and then proceed to establish his paternity of children.

Under French law, a group of persons who are entitled to initiate litigation to challenge paternity is determined very widely. In principle, paternity can be challenged by a child, a mother, a presumed father and a man who considers himself a father (Article 333 § 1 CC). If the father-child relationship, established by signing the birth register, also exists in reality, this right can be exercised within five years from the moment when it ceased to be obvious that a certain man is the child's father. However, if the legal father has exercised parental rights and duties towards the child for a period longer than five years from the birth of the child, his status cannot be disputed. If the father-child relationship is based only on registration in the public records but does not exist in reality, paternity can be disputed by all interested persons, within ten years from the moment of its establishment (Article 334, paragraph 1 of the CC). If the paternal status is obviously stated in the certificate

²⁷ Case 20578/2007 [2010].

issued by the competent authority in the prescribed procedure, it can be revoked within five years from the date of issuance of such a document (Article 335 of the CC). It is especially important to mention the authority of the public prosecutor to challenge paternity in case of suspicion that the situation from the public records is untrue, i.e. that the law has been circumvented (Article 336 of the CC).

4. Conclusion

The importance of researching domestic and comparative laws on marital presumption of paternity is based on the fact that differences between them can be significant and as such can affect the exercise of a large number of rights and duties in the field of family law. There is a direct connection between these laws and a large number of children's rights, including the right to know the origin, which is why special attention should be paid to their formulation and possible changes.

Analyzing domestic and relevant foreign laws, I have found that the most significant differences in the concept of marital paternity presumption are manifested in the way in which it is formed and in the conditions for disputing it. Namely, the presumption of marital paternity also applies for a period of time after the termination of the marriage, but not all the causes of such an outcome are equally important everywhere. Thus, in some legal systems, there is a difference between the termination of marriage against the will of the spouses, i.e. the death of the spouse and its termination by a divorce or an annulment. There is no such difference in other legislations, in which the regime of marital paternity is unique in that sense. In addition, in some legislations the conditions for challenging marital paternity presumption are construed very liberally, while others value the strength of family ties between the child and the presumed father as well as the reasons why the biological father had not been taking care of the child. Procedurally, the biggest difference between the analyzed domestic and comparative laws is reflected in the group of persons entitled to challenge marital presumption of paternity and the time limits within which they can initiate a paternity lawsuit to challenge marital paternity.

After considering all the differences, I hereby conclude that domestic legal provisions on marital paternity presumption are in accordance with modern family law and that they aim to strike a balance between the interests of the child and the interests of the child's biological parents. In that sense, I support the marital presumption of paternity established when the child is born within the prescribed period after the death of the male spouse, but not after a divorce or an annulment of marriage, precisely because of the presumed different nature of marital relations prior to the termination of marriage. I also believe that it is in the best interest of the child to know the truth about his/her origin and that, for this reason, but also for the purpose of protecting the biological father's interests, the conditions for contesting marital paternity should be set without specific restrictions. In the end, I am of the opinion that subjective and objective time limits by which entitled persons can challenge marital paternity presumption in court, and especially the unlimited right of the child to take such action, contribute to the same goal.

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