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KONCEPT BRAČNOG OČINSTVA U SAVREMENOM PORODIČNOM PRAVU

REZIME: Predmet ovog istraživanja jesu pozitivna domaća i upored-nopravna pravila o nastanku i prestanku dejstva pretpostavke bračnog očinstva. Očigledno je da su ona oblikovana u sadejstvu sa normama kojima je uređena bračna zajednica. Složenim i raznovrsnim čini ih to što su u pojedinim pravima momenti od kojih pretpostavka o očinstvu majčinog supružnika počinje i prestaje da važi različito određeni u odnosu na trenutak zasnivanja braka i način njegovog prestanka. Cilj je bio da se ukaže na različite mogućnosti prilikom stipulisanja pravila o utvrđivanju i osporavanju bračnog očinstva i na to kako se svaka od tih mogućnosti odražava na savremeno shvatanje roditeljstva i pravo deteta da zna svoje poreklo. Upravo sa tog stanovišta ocenjivane su i odgovarajuće norme domaćeg porodičnog zakonodavstva.

KLJUČNE REČI: bračno očinstvo, utvrđivanje bračnog očinstva, osporavanje bračnog očinstva, paternitetske parnice.

1. Uvod

Bez obzira na to što je jačanje autonomije volje uslovalo porast broja vanbračnih zajednica i slučajeva zasnivanja porodice unutar njih, brak i roditeljstvo zasnovano na njemu, kao mnogo tradicionalniji pojmovi, još uvek nisu izgubili na značaju. Međutim, ni oni ne odolevaju

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uticaju brojnih društvenih promena, već, naprotiv, prate njihovu dinamiku. Zbog toga su pravila o bračnom očinstvu aktuelna i predmet interesovanja brojnih stručnjaka. U svakom slučaju, uspostavljanje i pobijanje pretpostavke o bračnom očinstvu zavise od opredeljenja konkretnog zakonodavca u pogledu njene povezanosti sa trenutkom zaključenja i načinima prestanka braka, kao i od njegovog načelnog stava o pretežnijem uticaju biološke ili socijalne komponente roditeljstva. To su upravo oni segmenti bračnog očinstva koji iziskuju da mu se u sadašnjem vremenu posveti naročita pažnja.

U ovom radu istraživane su odredbe domaćeg Porodičnog zakona („Sl. glasnik RS”, br. 18/2005, 72/2011 – dr. zakon i 6/2015²) kojima su propisani uslovi za zasnivanje i osporavanje bračnog očinstva, a na odgovarajućim mestima je ukazano na najznačajnije primere prakse Evropskog suda za ljudska prava³ i rešenja predložena u nacrtu budućeg Građanskog zakonika Republike Srbije (Preuzeto 05. februara 2021. sa www.paragraf.rs/nacrti_i_predlozi/260615-nacrt_gradjanskog_zakonika⁴). Poređenjem sa komplementarnim uporednopravnim normama, ukazano je na razlike u savremenom poimanju bračnog očinstva i izloženi su opšti i poželjni pravci razvoja ovog instituta. Ovom analizom su obuhvaćena neka od evropskih prava sa najdužom tradicijom i ona sa kojima je domaće pravo istorijski povezano: nemačko, francusko, crnogorsko i hrvatsko.

U radu su pretežno korišćeni normativni, komparativni i metod analize slučaja. Cilj je bio da se ukaže na promene u konceptu bračnog očinstva u savremenom porodičnom pravu i da se one ocene s aspekta pozitivnih domaćih normi i *de lege ferenda*. Struktura rada podrazumeva razmatranje pojma bračnog očinstva, uslova za njegovo uspostavljanje i njegovo osporavanje sa materijalnog i procesnog aspekta. Konačno viđenje pravila o bračnom očinstvu u domaćem pravu i analizovanim stranim pravima sumarno je izloženo u zaključku rada.

² U daljem tekstu PZ.

³ U daljem tekstu ESLJP.

⁴ U daljem tekstu Prednacrt.

2. Pojam bračnog očinstva u domaćem i uporednom pravu

Bračno očinstvo jeste element porodičnog statusa deteta koji nije potpuno samostalan pojam budući da se određuje posredstvom drugih činjenica – materinstva i braka sa detetovom majkom. Zakonska definicija u srpskom pravu glasi – Ocem se smatra muž majke deteta⁵. Dovoljno je samo postojanje braka, ne zahteva se i zajednički život supružnika (Ponjavić, 2006: 255).⁶ U određenim slučajevima će postojati bračno očinstvo, iako je brak, zapravo, prestao. Naime, ukoliko je dete rođeno u roku od trista dana od prestanka braka smrću majčinog muža, pod uslovom da ona u tom periodu nije zaključila novi brak, ocem će se smatrati preminuli supružnik. Ukoliko je za tim brakom usledio novi, ocem deteta će se smatrati majčin muž iz tog braka. Ukoliko je dete rođeno nakon prestanka braka razvodom ili poništenjem, bez obzira u kom roku je do toga došlo, neće biti uspostavljeno bračno očinstvo bivšeg supružnika (čl. 45 PZ-a). Razlog ovog podvojenog režima leži u pretpostavci da su bračni odnosi pre prestanka braka smrću muža-oca bili dobri, a da su pre razvoda, odnosno poništenja, bili poremećeni, tako da u takvim uslovima nije moglo doći do začeća deteta. U svakom slučaju, treba imati u vidu da očinstvo zanovano na navedenim pravilima predstavlja pravnu pretpostavku, tako da je dozvoljeno dokazivati da muškarac na koga ukazuje pravna norma zapravo nije otac.

Strana prava koja su predmet ovog istraživanja mogu se podeliti, radi lakšeg proučavanja, u dve osnovne grupe prema kriterijumu uticaja uzroka prestanka braka na dejstvo pretpostavke bračnog očinstva. Prvu čine crnogorsko i hrvatsko pravo, a drugu nemačko i francusko.

Naime, u crnogorskom pravu se (bračnim) ocem deteta smatra ne samo muž majke već i bivši muž, bez obzira da li je brak prestao njegovom smrću ili pak razvodom ili poništenjem, pod uslovom da je dete rođeno u roku od trista dana od tog momenta i da majka po prestanku ovog braka nije zaključila novi. Bivši majčin supružnik će se, ipak, smatrati ocem ukoliko uspešno bude osporeno očinstvo novog bračnog partnera (čl. 97 Porodičnog zakona Crne Gore [„Sl. list RCG”, br. 1/2007

⁵ U doba važenja rimskog prava: *Pater is est quem nuptiae demonstrant*.

⁶ Činjenica očinstva u svakom slučaju, pa i u ovom, da bi proizvela pravno dejstvo, mora biti upisana u matičnu knjigu rođenih za dete.

i „Sl. list RCG”, br. 53/2016 i 76/20]⁷). Očigledno je reč o pravilu formulisanom u interesu deteta da u svakom trenutku ima utvrđeno očinstvo. Crnogorsko pravo sadrži i specifično pravilo po kome će i dete koje bi se inače smatralo vanbračnim, ipak, imati status bračnog ukoliko njegovi roditelji naknadno zaključe brak (čl. 98 PZ CG). Čini se da je reč o pomalo arhaičnom pravilu, koje u današnjim uslovima potpune izjednačenosti bračne i vanbračne dece nije od naročitog značaja.

U hrvatskom pravu, poput crnogorskog, reč je o bračnom očinstvu kada je dete rođeno u toku trajanja braka, ali i u roku od trista dana od njegovog prestanka na bilo koji način. Ukoliko u tom roku od trista dana od prestanka braka smrću muža majka zaključi novi brak, ocem će se smatrati muž iz tog braka. Međutim, hrvatski zakonodavac je posebno vodio računa o specifičnosti ove životne situacije, pa je dopustio mogućnost konstituisanja pretpostavke očinstva u korist drugog muškarca, koji bi uz saglasnost majke i njenog muža priznao očinstvo (Čl. 61 Obiteljskog zakona [NN 103/15, preuzeto 10. februara 2021. sa <https://www.zakon.hr/z/88/Obiteljski-zakon>]⁸).

U nemačkom pravu, kao što je nagovešteno, izražena je razlika između situacije u kojoj je dete rođeno nakon smrti bivšeg majčinog muža i one u kojoj je do rođenja došlo nakon razvoda ili poništenja braka. S tim u vezi, ukoliko je dete rođeno u roku od trista dana od prestanka braka smrću muža, pod uobičajenim uslovom da majka u međuvremenu nije zaključila nov brak, ocem deteta će se smatrati nov muž (§ 1592 Nemačkog građanskog zakonika [Deutsches Bürgerliches Gesetzbuch], preuzeto 15. februara 2021. sa http://www.gesetze-im-internet.de/englisch_bgb/⁹). I nemački zakonodavac je posebnu pažnju posvetio interesu deteta da, kad god je to moguće, dejstvuje pretpostavka očinstva lica za koje postoji makar minimalni stepen verovatnoće da zaista jeste otac, pa važi pravilo da će u slučaju osporavanja očinstva novog muža, biti uspostavljeno očinstvo bivšeg muža (§ 1593 BGB-a).

Pretpostavka bračnog očinstva je u francuskom pravu oblikovana na kreativniji način, pa se bračnim smatra dete bilo začeto bilo

⁷ U daljem tekstu PZ CG.

⁸ U daljem tekstu OZ RH.

⁹ U daljem tekstu BGB.

rođeno u toku trajanja braka (čl. 312 Code civil, preuzeto 15. februara 2021. sa https://www.trans-lex.org/601101/_/french-civil-code-2016/¹⁰). Prema postojećim naučnim saznanjima o mogućem trajanju trudnoće, smatra se da je dete začeto u periodu od trista do sto osamdeset dana pre njegovog rođenja (čl. 311 CC-a). Ukoliko je dete rođeno u roku dužem od trista dana od pokretanja parnice za rastavu supružnika ili za razvod braka, pretpostavka bračnog očinstva neće važiti. Isto važi i ukoliko je dete rođeno u roku kraćem od sto osamdeset dana od odbacivanja tužbe u ovim parnicama, odnosno od pomirenja supružnika. Ipak, ukoliko nije utvrđeno očinstvo drugog muškarca, a postoje činjenice, poput uzajmanog ponašanja, koje ukazuju na to da je očigledno da je majčin muž detetov otac, on će uživati takav status (čl. 313 CC-a). Pretpostavka bračnog očinstva neće proizvoditi dejstvo kada muškarac na koga brak sa detetovom majkom ukazuje nije upisan kao otac u javni registar niti uživa očigledan roditeljski status u odnosu na dete (čl. 314 CC-a). Posledica pravila o derogiranju ove pretpostavke sastoji se u mogućnosti utvrđivanja bračnog očinstva sudskim putem (čl. 315 CC-a). Zaključuje se da je francuski zakonodavac uložio posebne napore nastojeći da pravne norme o bračnom očinstvu prilagodi raznim životnim situacijama.

3. Oспорavanje bračnog očinstva

3.1. Domaće pravo

Kao što smo već napomenuli, očinstvo zasnovano na braku sa detetovom majkom predstavlja oborivu pravnu pretpostavku, pa je dopušteno njegovo osporavanje, tj. ukazivanje na to da detetov otac nije ono lice na koje upućuje pravna norma, već neko drugo. S obzirom na to da je reč o izuzetno osetljivoj sferi u kojoj se prepliću interesi deteta, majke, pretpostavljenog i biološkog oca, mogućnosti za njegovo osporavanje nisu svuda iste. Tako negde preovlađuje socijalna komponenta roditeljstva, a negde biološka. U literaturi ima suprotnih stavova, pa pojedini autori smatraju da je nepostojanje posebnih uslova za osporavanje bračnog očinstva od strane muškarca koji sebe smatra biološkim ocem

¹⁰ U daljem tekstu CC.

u duhu savremenog porodičnog prava (Kovaček Stanić, 2013). S druge strane su oni koji smatraju da osnovni uslov za osporavanje očinstva u ovom slučaju treba da bude izražena namera pomenutog lica da se o detetu stara u svemu kao otac (Novaković, 2017). Autor ovog rada je pristalica prvobitno izloženog stanovišta i zalaže se za jedinstveni pojam očinstva (bez njegovog rastavljanja na socijalni i biološki element), koji je omeđen propisanim uslovima za njegovo uspostavljanje i osporavanje. U prilog tome, ukazuje se i na praksu Evropskog suda za ljudska prava koji je u više navrata bio u prilici da se izjašnjava o ovom pitanju. Naime, ovaj sud je u predmetu *Mandet v. France*¹¹ istakao da je u interesu deteta da zna svoje poreklo, a da se integritet uspostavljenih porodičnih odnosa može zaštititi odlukom o poveri deteta na staranje majci, kao biološkom roditelju koji se i do tada starao o njemu, i kroz pravo na održavanje ličnih odnosa između deteta i muškarca koga je ono do tada smatralo ocem. Takođe, čitave dve decenije ranije, u predmetu *Kroon and Others v. Netherlands*¹², ESLJP je naveo da se pretpostavka bračnog očinstva ne može posmatrati apstraktno kada ona, zapravo, ne služi ničijim interesima, a naročito ne detetovim. Sud u Strazburu je istakao da porodični život nastaje već u momentu rođenja deteta i da domaći organi treba da posvete dužnu pažnju uspostavljanju pravne veze između deteta i njegovih roditelja čim to postane moguće.

U srpskom pravu, parnicu za osporavanje očinstva mogu pokrenuti dete, majka, njen muž, tj. muškarac koji se smatra ocem, i muškarac koji ističe činjenicu svog očinstva. Za muškarca koji sebe smatra ocem, kao tužioca, važe posebna pravila. Naime, neophodno je da on u istoj parnici u kojoj osporava očinstvo muškarca upisanog u matičnu knjigu rođenih zahteva da se utvrdi da je on otac (čl. 56 PZ-a). Ovo pravilo je sasvim opravdano jer, u svakom slučaju, nije u interesu deteta da dođe do prekida kontinuiteta u pogledu utvrđenog očinstva nad njim, bez obzira na to da li je pravno stanje podudarno biološkim činjenicama ili ne. Osim toga, u odsustvu ovog pravila bilo bi racionalno postaviti pitanje pravnog interesa za osporavanje očinstva od strane muškarca koji nema želju da preuzme roditeljsku ulogu. Dete je jedini subjekt koji

¹¹ Case 30955/12 [2016].

¹² Case 00018535/91 [1994].

parnicu za osporavanje očinstva može pokrenuti bez obzira na bilo koji rok (čl. 251 st. 1 i čl. 252 st. 1 PZ-a). Za ostala lica važi subjektivni rok od godinu dana, odnosno objektivni rok od deset godina, računajući od rođenja deteta (čl. 252 st. 2, 3, 4 i 5 PZ-a). Prema predlogu iz odredbe sadržane u čl. 2501 Prednacrtu, postoji mogućnost ukidanja rokova za pokretanje parnica ove vrste od strane svih aktivno legitimisanih subjekata. Ovakav pristup ne podržavam, jer smatram da nije u interesu pravne izvesnosti.

3.2. Uporedno pravo

Pravila crnogorskog prava ne odudaraju značajnije od srpskih. Međutim, za razliku od srpskog prava, u crnogorskom pravo deteta na osporavanje bračnog očinstva jeste vremenski ograničeno, budući da se može vršiti do navršene dvadeset treće godine života. Rokovi u kojima druga ovlašćena lica mogu preduzeti odgovarajuću radnju takođe su kraći u poređenju sa srpskim pravom. Tako majka može pokrenuti ovu paternitetsku parnicu u roku od svega šest meseci od rođenja deteta, muškarac koji sebe smatra ocem u dvostruko dužem roku, a majčin muž u roku od šest meseci od saznanja da nije otac, ali ne i nakon navršene detetove pete godine života (čl. 109, 113 i 115 PZ CG).

Hrvatsko pravo sadrži jednu novinu, u odnosu na do sada analizovana prava, a ona se ogleda u suženom krugu aktivno legitimisanih subjekata za osporavanje bračnog očinstva. Naime, ovaj krug čine dete, majka i njen muž (čl. 79 st. 1 OZ RH). Muškarac koji sebe smatra ocem izostavljen je jer se njegovo očinstvo, kao što je već napomenuto, može zasnovati priznanjem, uz saglasnost majke i njenog muža, odnosno u sudskom postupku, u odsustvu ovih saglasnosti. Poput crnogorskog prava, i u hrvatskom je rok u kome dete može pokrenuti paternitetsku parnicu za osporavanje bračnog očinstva ograničen, ističe navršavanjem dvadeset pete godine života. Majka isto ovlašćenje može vršiti u kratkom roku od šest meseci od rođenja deteta, a njen muž u subjektivnom roku iste dužine, koji je omeđen objektivnim rokom, tj. navršenom detetovom sedmom godinom života (čl. 400, 401 i 404 OZ RH).

Nemačka pravila o osporavanju bračnog očinstva zaslužuju naročitu pažnju. Naime, ovlašćena lica za osporavanje vanbračnog očin-

stva jesu dete, majka, njen muž i muškarac koji sebe smatra ocem. Za ovo poslednje lice važe posebna pravila, pa će ono moći da preduzme odgovarajuću radnju samo ukoliko pod zakletvom izjavi da je u kritičnom periodu održavalo intimne odnose sa detetovom majkom i ukoliko između deteta i muškarca koji je upisan kao otac nisu izgrađene čvrste porodične veze. Smatraće se da ove veze postoje ako je ovo lice u kritičnom periodu vršilo roditeljska prava i dužnosti prema detetu (§1600 st. 1, 2 i 4 BGB-a). U nemačkom pravu važi subjektivni rok od dve godine za pokretanje ove parnice, s određenim privilegijama kada su u pitanju dete i lice lišeno poslovne sposobnosti (§1600b BGB-a). S obzirom na sužene mogućnosti za osporavanje bračnog očinstva u nemačkom pravu, ne iznenađuje činjenica da su ova pravila bila predmet razmatranja i od strane Evropskog suda za ljudska prava. Izdvajam najpre negativnu odluku ovog suda donetu u predmetu *Fröhlich v. Germany*¹³. Podnosilac predstavke, kao biološki otac, zatražio je zaštitu pred ovim sudom jer mu domaći sudovi nisu uslišili zahtev za osporavanje bračnog očinstva nad devojčicom koja je začeta u toku njegove vanbračne veze sa njenom majkom, koja je istovremeno bila u braku sa drugim muškarcem. Njegova namera je bila da se nakon osporavanja bračnog očinstva i utvrđivanja vanbračnog stara o svojoj ćerki. Odbijen je njegov zahtev za ostvarivanje kontakata sa devojčicom jer prethodno nije utvrđeno njegovo očinstvo, što i nije bilo moguće zbog postojanja čvrstih veza između nje i njenog zakonskog oca. Domaći sud je u obrazloženju svoje odluke naveo da osporavanje bračnog očinstva ne bi bilo u najboljem interesu deteta jer bi dovelo do narušavanja postojećih porodičnih odnosa. Upravo je iz tog razloga i ESLJP procenio da je podnosiočeva predstavka neosnovana. Ipak, drugačiji ishod je imala predstavka podneta u predmetu *Schneider v. Germany*¹⁴. U poređenju sa prethodno analizovanom odlukom suda, razlika je postojala u tome što domaći sud uopšte nije ocenjivao da li je u interesu deteta da održava kontakte sa muškarcem za koga je postojala sumnja da je njegov biološki otac. Osim toga, ESLJP je posebno cenio to što su podnosilac i detetova majka bili u određenom periodu u zajednici, da je on u toku njene trudnoće ispoljavao brigu za nju i dete i

¹³ Case 16741/2016 [2019].

¹⁴ Case 61595/2015 [2018].

da je u kratkom roku nakon rođenja deteta pokrenuo odgovarajući postupak. Istovetno obrazloženje suda je prethodilo u predmetu *Anayo v. Germany*¹⁵. Sud je i tada ukazao na značaj procenjivanja najboljeg interesa deteta u konkretnim okolnostima i naročito istakao uticaj činjenice da biološki otac – podnosilac predstavke – nije bio u mogućnosti da se stara o blizancima koje je smatrao svojom decom iz razloga koji mu se nisu mogli pripisati u krivicu, tj. usled protivljenja njihove majke i njenog muža – pretpostavljenog oca. Naglašeno je da nemački sudovi moraju procenjivati u svakom slučaju da li je u interesu deteta da održava lične odnose sa potencijalnim biološkim ocem, koji u konkretnim okolnostima, prema nemačkim pravilima, nije mogao da sudskim putem najpre ospori postojeće bračno očinstvo, a potom zahteva utvrđivanje svog očinstva.

U francuskom pravu je krug aktivno legitimisanih subjekata za pokretanje parnice za osporavanje očinstva određen najšire moguće. Načelno, očinstvo mogu osporavati dete, majka, pretpostavljeni otac i muškarac koji sebe smatra ocem (čl. 333 st. 1 CC-a). Ukoliko odnos između oca i deteta, uspostavljen upisom u javni registar, postoji i u realnosti, ovo pravo se može ostvariti u roku od pet godina od kad je prestalo da bude očigledno da je određeni muškarac detetov otac. Međutim, ako je zakonski otac vršio roditeljska prava i dužnosti prema detetu u periodu dužem od pet godina od rođenja deteta, njegov status se ne može osporavati. Ako je pak odnos oca i deteta zasnovan samo na upisu u javnu evidenciju i u realnosti zapravo ne postoji, očinstvo mogu osporavati sva zainteresovana lica i to u roku od deset godina od trenutka njegovog uspostavljanja (čl. 334 st. 1 CC-a). Ukoliko je očigledan očinski status konstatovan u potvrdi izdatoj od strane nadležnog organa u propisanom postupku, isti može biti opovrgnut u roku od pet godina od izdavanja takve isprave (čl. 335 CC-a). Naročito je važno ovlašćenje javnog tužioca da osporava očinstvo u slučaju sumnje da je stanje iz javne evidencije neistinito, odnosno da je došlo do izigravanja zakona (čl. 336 CC-a).

¹⁵ Case 20578/2007 [2010].

4. Zaključak

Značaj istraživanja domaćih i uporednopravnih pravila o bračnom očinstvu proizlazi iz činjenice da razlike među njima mogu biti znatne i da kao takve utiču na ostvarivanje velikog broja prava i dužnosti iz domena porodičnog prava. Između njih i velikog broja prava deteta, među kojima je i pravo na saznanje porekla, postoji direktna veza i zbog toga treba posvetiti posebnu pažnju njihovom formulisanju i eventualnim izmenama.

Analizujući domaće pravo i relevantna strana prava, ustanovila sam da se najznačajnije razlike u konceptu bračnog očinstva ispoljavaju u načinu na koji je oblikovana pretpostavka bračnog očinstva i u uslovima za njegovo osporavanje. Naime, pretpostavka bračnog očinstva dejstvuje i u određenom periodu nakon prestanka braka, ali nemaju svuda svi uzroci takvog njegovog ishoda podjednak značaj. Tako u pojedinim porecima postoji razlika između prestanka braka protivno volji supružnika, tj. smrću muža i njegovog okončanja razvodom ili poništenjem. U drugim zakonodavstvima ove razlike nema, već je režim bračnog očinstva u tom smislu jedinstven. Osim toga, u pojedinim pravima su uslovi za osporavanje bračnog očinstva izuzetno liberalno stipulisani, dok se u drugima vodi računa o čvrstini porodičnih veza između deteta i pretpostavljenog oca i razlozima zbog kojih se biološki otac nije starao o detetu. Na procesnom terenu, najveća razlika između analizovanih domaćih i uporednopravnih normi ogleda se u krugu aktivno legitimisanih subjekata i rokovima u kojima oni mogu pokrenuti paternitetsku parnicu za osporavanje bračnog očinstva.

Nakon sagledavanja svih izloženih razlika, zaključila sam da su domaća pravila o bračnom očinstvu u duhu savremenog porodičnog prava i da je njima ostvarena ravnoteža između interesa deteta, ali i njegovih pretpostavljenih, odnosno bioloških roditelja. U tom smislu, podržavam uspostavljanje bračnog očinstva rođenjem deteta u propisanom roku nakon smrti muškog supružnika, ali ne i nakon razvoda ili poništenja braka, upravo zbog pretpostavljene različite prirode supružničkih odnosa pre nastanka ovih događaja. Smatram takođe da je u interesu deteta spoznavanje istine o njegovom poreklu i da iz tog razloga, ali i sa stanovišta interesa biološkog oca, uslovi za osporavanje

bračnog očinstva treba da budu postavljeni bez posebnih ograničenja. Mišljenja sam, najzad, da istom cilju doprinose i subjektivni i objektivni rokovi odgovarajuće dužine u kojima ovlašćena lica mogu sudskim putem osporavati bračno očinstvo, a naročito vremenski neograničeno pravo deteta za preduzimanje takve radnje.

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THE CONCEPT OF MARITAL PATERNITY IN MODERN FAMILY LAW

SUMMARY: The subject of this research are positive domestic and comparative rules on the constitution and termination of the presumption of marital paternity. It is obvious that they are related with the norms that regulate the marriage. What makes them complex and diverse is that in certain legislations 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 foundation and the cause of termination of marriage. The goal was to point out the different possibilities when stipulating the rules on establishing and disputing marital paternity and how each of these possibilities reflects on the modern concept of parenthood 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, determination of marital paternity, contestation of marital paternity, paternity lawsuit.

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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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