

ly recognizable, but allowing for deciding on the fate of the body by the deceased person in advance, as well as allowing for manipulation and sale of remains/relics or products after being depersonalized. Public law legislation should thereby explicitly allow for various types of manipulation with dead bodies (freezing, processing) while observing the necessary standards of piety. The public and private law regulation should hence be closely interconnected in order to guarantee the respect for human dignity of the deceased persons.

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### **SOME ISSUES OF RECOGNITION AND CONTESTING PATERNITY IN UKRAINE**

In Ukraine and abroad there is a number of scientific achievements about the minors' rights to be juridically protected, and they are generally related with researching the study of Family Law and due to determining the child's family rights, and also defining the sense and nature of a child's personal moral and property family rights. When regarding procedural forms to protect these rights, procedural peculiarities of the case to be prepared and to be heard at litigations that can arise because of family relations with minors, especially in the cases of defining paternity, in the study of civil Procedural and Family Law in Ukraine these aspects of the problem remained unnoticed by the scientists.

In my mind, the most correct opinion is of the authors who consider it possible to recognize minors as equal participants in a civil process as one of the parties, and it's not contrary to the Procedural law. In civil proceedings, they often define the range of stakeholders rather incorrectly. As a result, this can cause unreasonable contracting or expanding their legal status, as well as causeless and illegal judgement in a civil case. That's why quite important phase of civil proceedings is the judge's identification of the individuals, which are eligible to participate in the case, and the individuals, which due to the law are entitled to apply to the courts.

Abusing a civil trial is an act of implementing such constitutional right as the right to be protected in the courts (Article 55, Constitution of Ukraine) and the right to apply for protection in the courts confirmed in Article 3 in Civil Procedural Code of Ukraine.

In the cases about paternity recognition and due to the Article 128, Ch. 3 in Family Code of Ukraine the right to apply to the courts is given to mother; a child's custodian/fiduciary; an individual who brings up a child; adult child and also an individual who considers to be a child's father.

At first sight, the list of individuals, which are eligible to bring a suit in the court concerning paternity recognition, doesn't cause any comments, but these individuals' procedural positions remain controversial. In this situation explained in Article 128, Ch. 3 in the Family Code of Ukraine there is no clear understanding which of the individuals applying to the court is a litigant.

The discussions keep going on this matter in legal literature. There are some scientists who consider mother and a child<sup>1</sup> to be litigants in the cases about paternity recognition, but there are others who consider a child only<sup>2</sup>. There is another group of scientists whose opinion is about any stakeholder<sup>3</sup> to be a litigant. In the theory of civil Procedural Law the parties are different by a specific feature, that is a substantive relation between them. In the case of paternity recognition such relation is confirmed only between a child and his/her father, as the sense of paternity decision means to confirm if there is substantive relations between a child and his/her blood mother and father or there is not such. Meanwhile, when defining the issue about paternity in the courts between a minor and his/her likely father there isn't any legal relationship, but there can be substantive relations between them only after the claim for paternity recognition is satisfied by the court.

The persons participating in proceedings, are granted with a separate legal interest, aimed at resolving the substantive dispute between the parties, the civil procedural legal entities who are implementing the principle of adversarial civil proceedings, in the court may commit certain procedural steps when protecting under the proceedings their rights, freedoms and interests or in cases confirmed by the law the rights, freedoms and interests of others. Being legally enrolled to the range of stakeholders, the persons participating in the proceed-

<sup>1</sup> V. Koshkin, *Judicial confirmation of paternity [Sudiebnoye ustanovlenii otsovstva]*, Sverdlovsk 1972, p. 27.

<sup>2</sup> M. Materova, *Judicial trial of paternity's confirmation [Sudiebnoye razsmotreniye ob ustanovlenii otsovstva]*, Moscow 1982, p. 68.

<sup>3</sup> Ibidem.

ings and notifying a specific type of civil proceedings are characterized by: 1) the presence of personal legal interest in the results of reviewing and resolving the civil cases aimed to resolve the substantive dispute between the parties; 2) providing actions aimed at the origin, evolution and termination of civil proceedings (procedural actions)<sup>4</sup>.

The range of stakeholders participating in cases in the proceedings is formed by: 1) the parties (litigant and defendant); 2) the third parties (claiming personal demands of the dispute and do not claim personal demands of the dispute); 3) the bodies and individuals who have the legal right to protect the rights, freedoms and interests of others; 4) representatives of the two and third parties and bodies and individuals who have the legal right to protect the rights, freedoms and interests of others<sup>5</sup>.

Based on the judicial practice, most claims for paternity recognition are sued by mothers. Mother, when bringing a suit for paternity recognition or denying the claim of the person considering to be the child's father, acts as the child's legal representative, defending his/her interests and providing his/her subjective rights. Meanwhile, she acts by her own interests, applying for father's part in bringing up and supporting the child, but this interest is naturally indirect.

In our opinion, the right to sue belongs exclusively to the child as the claim for paternity recognition concerns to establish legal relationship between a child born out of wedlock and her supposed father. Here the child should be considered as a potential litigant in the case of paternity recognition. Procedural litigant, who always acts in the child's interests, can be mother; guardian, trustee; a person who support and bring up the child; a person who considers himself a father. The aim of the latter's participation in the process is to protect personal moral and property rights and interests of the child who is not able to defend their interests him/herself.

Due to Article 128, Ch. 3 in the Family Law of Ukraine the child himself may bring a suit, but only being of age. But the question arise

<sup>4</sup> S. Bychkova, *Participation of the prosecutor in the protection of civil rights by a court // Problems of realization and protection of civil rights [Problemy zdiysnennia ta zahystu subyektiv tsyvilnyh prav]: collection of papers*, Kyiv 2013, p. 103-104.

<sup>5</sup> S. Bychkova, *Civil procedural legal status of persons involved in the case of action proceedings [Tsyvilniy protsesualniy pravoviy status osib, yaki berut' uchast' u spravah pozovno-go provadzennia]*, Kyiv 2011, p. 37.

why the legislator determines only the adult child to be able to appeal to the court.

Based on the traditional view on the child's legal status, the protection of the violated rights and interests is assigned to the legal representatives (parents, adoptive parents, guardians, trustees). However, the statements in Art. 27-1 in Civil Procedural Code of Ukraine basely confirm that minors are fully legal participants in civil procedure and are given both general procedural and special rights and duties. This approach is conditioned by national legislators because of Ukraine's accession to the European Convention in 1996 about implementing the Children's Rights that determine the possibility for the minors to be judicially protected in the courts.

Being a minor the individual can personally provide his/her civil procedural rights and do his/her duties in the court in the cases concerning the relationship in which he/she participates personally (Art. 29 in Civil Procedural Code of Ukraine). That is, such a person possessing legal backgrounds can be a subject to civil legal proceedings. But the court may ask the legal representative of a minor to the case (Ch. 2, Art. 29, Ch. 2, Art. 39 in Civil Procedural Code of Ukraine). This statement proves that minors aged from 14 to 18, defined the subjects of family relations (due to Article 18 of the Family Code) may personally protect their family rights, freedoms and interests in the court. Besides, in the case of underage person's marriage, he/she acquires civil procedural capacity since marriage (Ch. 3, Art. 29 in Civil Procedural Code of Ukraine, Art. 34 in Civil Code). The underage person granted the full civil capacity can acquire civil procedural capacity in the order prescribed by Art. 242-245 in Civil Procedure Code and Art. 35 in the Family Code (... underage person who is registered as the mother or father of the child).

On Kondratieva's L.A. opinion, minor's right to be judicially protected is a subjective right guaranteed by the Constitution of Ukraine and belonged to the minor to protect his/her violated rights, freedoms and interests in civil proceedings. A minor may provide the right to be judicially protected directly in the cases arising from family relationships, in the matter of being at the age of 14<sup>6</sup>. Also, the scientist

<sup>6</sup> L. Kondratieva, *Judicial protection of minors in civil proceedings of Ukraine [Sudoviy zahyst nepovnoletnih osib u tsyvilnomu protsesi Ukrainy]*, Kyiv 2006, p. 14.

motivates the conclusion about the person who has not gained the adult age and defined the subject of fourteen in family relationships, when applying to the court he/she is an individual subject of civil legal proceedings and should have the procedural rights and legal duties of the parties in full.

Taking comparison with the legislation in neighboring countries, Russian Federation as an example, only the adult child may bring a suit in the case of paternity recognition, as well as in Ukraine. At the same time in some US states, a child up 14 may initiate such process.

In the given context and based on the Art. 18 in the Family Code of Ukraine, the child up 14 may personally apply to the court to protect his/her rights (family) or interest in the matter of their violation, rejection and contestation in order to protect the child's rights and interests in family and civil legal proceedings, we propose to amend the Ch. 3. Art. 128 in the Family Code and to replace the phrase "a child who has reached the full age" into "an underage child".

As for the problems of contesting paternity, nowadays civility study is enriching by scientific achievements, characterized by cross-sectional nature of institutions that attract jurists' attention. These research papers can include studies related to contesting paternity, which can be reviewed as both substantive law (family) and civil procedural law.

A number of studies described such issue as contesting paternity, including Yu.F. Bespalov, G.V. Bogdanova, T.P. Yevdokimova, N.M. Kostrova, Z.V. Romovska, S.Ya. Fursa etc.

It should be noted that according to the current Family Law of Ukraine that's the father's right to contest paternity what is registered in the Birth Record Book. He may do it in the way of bringing a suit in the court with asking to remove information about him as the child's father from the Birth Record Book.

Marital and Family Law, which had ruled before the Family Law of Ukraine became legal, stated that possibility to contrast paternity was restricted to the individual who was registered as the child's father, particularly the opportunity to refute the presumption of paternity at the child's birth in marriage. These restrictions were lied in the fact that, firstly, only the person registered as the child's father might contest paternity. Secondly, contesting paternity could be made only for one year since the person knew or should have become aware of the fact that he was recorded as the child's father.

The Family Code of Ukraine also sets certain limits of contesting paternity, but they are significantly expanded. In the Article 136 in the Family Code of Ukraine the time limits are set about possibility to contest paternity. Thus, contesting paternity is only possible after the baby is born and until he/she becomes full age. Contesting paternity can be provided during this time and only if the child is alive. The child's death prevents the registered person as a father from contesting paternity.

Previously existing Family Law, in our minds, radically restricted the rights of parents, predicting the deadline for bringing a suit to the court about contesting paternity.

According to Part. 1, Art. 56 in the Family Code of Soviet Ukrainian Republic, contesting paternity was limited to the term, that is one year from the date when the person was registered as the child's father, was or should have become aware of the registration of birth. In the Family Code of Ukraine there confirmed the statement about the man's asking to remove information about him as the child's father from the Birth Record Book. So, the time restriction for the claim is not taken.

By its legal nature, the claim about contesting paternity is a sort of protection of moral rights of individuals. Thereby, it is definitely to apply Art. 268 in the Civil Code of Ukraine, Ch. 1, Art. 20 and Ch. 6, Art. 136 in the Family Code of Ukraine, according to which time restrictions are not taken into consideration when requiring protection of moral rights and other intangible benefits. Thus, the request of contesting paternity can be applied at any time.

According to Kostrova's confirming "that it is possible when the mother's husband, who knew he was not the child's father, is not contesting to be the child's father for a long term, the child believes him to be his/her father, gets used to him, and for some reason many years later he decides to contest the matter. Thus, this can damage the child's interests and stability of parental relations". Therefore, in the scientist's opinion, the context in Ch. 1, Article 56 in the Family Code of Soviet Ukrainian Republic about the year-term possibility to contest paternity from the moment when the person was or should have become aware of the record, is used to the child's interest<sup>7</sup>.

<sup>7</sup> Legal proceedings in family cases [Sudoproizvodstvo po semejnym dielam], Makhalka 1978, p. 24.

Let us not agree with Kostrova. Family Law is based on the principle of priority of the child's rights and interests, but it does not mean their exclusivity. Father's interests also need security and protection. Besides, it is unlikely for the man registered as the child's father, and who missed the deadline for filing a claim for contesting paternity will properly do his parental responsibilities and take care of the child. Fake enforced saving legal relationship between a man and a child, being registered as his/her father, is naturally useless.

As an additional argument we should quote the candidate of legal sciences G.V. Bogdanova: "Denying the time restrictions in a new Family Code of bringing claims proves not only once that the legislator departs from the theory of social paternity and his desire to give greater importance to blood, biological kinship". This suits to general direction of the Family Law ... so some scientists' propositions about the timing of contesting paternity are regarded as false<sup>8</sup>. The ability to satisfy the claims of contesting paternity by the law became dependent on what the reasons were and by what rules the registration of the child's father was made.

Contesting fatherhood (motherhood) is detecting to be the registered father (mother) of the child. Due to the Family Code of Ukraine, a person registered as the child's father has the right to contest his paternity, bringing a claim about removing information about him as a father from the Birth Record Book (Ch. 1, Art. 136 in the Family Code of Ukraine). The person who was registered as the child's father must legally prove the absence of blood relationship between him and the child whose father he was registered. However, detecting the blood kinship is not always a reason to contesting paternity. In some cases, a person registered as the child's father must also prove that at the time of registering the child's birth he did not know that he is not the child's father.

In particular, the person's demand registered as the child's father due to Ch. 5, Art. 136 in the Family Code of Ukraine can not be satisfied if at the time of registering this person was aware that he is not actually the child's father. Thus, a person having blood kinship with the

<sup>8</sup> G. Bogdanov, *Rights and duties of parents and children [Prava i obyazannosti roditeley i dietey]*, Moscow 2003, p. 112.

child loses the opportunity to prove this fact, because clearly knowing it, he still expressed his will and recognized paternity.

In paternity recognition the Birth Registration Office allows voluntarily recognize paternity on someone else's child. In this case, the principle of the formal origin of the child establishes, which according to the Family Law confirms the rule again that this person's demand to contest paternity can not be satisfied. The person may not be actual child's father, but can not deny this registration.

According to T.P. Evdokimov, such restricted opportunities for contesting paternity was established by the law in the child's interests and relates to the fact that if a person knew he was not the child's father, but nonetheless admit his paternity, he actually voluntarily set for himself parent's rights and responsibilities and in the future he may not refuse from them<sup>9</sup>. In my view, the establishment of such restrictions violate the parents' rights and interests.

Therefore, in my opinion, Ch. 5, Art. 136 in the Family Code of Ukraine should be followed with new paragraphs and quote it as follows: "The person's demands registered as the child's father about contesting paternity can be satisfied if at the time of registering paternity the person did not know that he was not the child's father".

In this context, it is worth considering the opinion of a Russian scientist Yu.F. Bespalov who focuses on the fact that contesting paternity can be regarded only if the court decides that at the time of registering paternity the person did not know that he was not the child's father<sup>10</sup>.

According to G. Bogdanova, "if in the trial there will a clash of interests of the two parents, one of which is blood related to the child, and the other is social related that is a clash of two concepts, the priority is given to the kinship".

To prove the above said, we can develop the following situation. A married child is supposed to have been conceived by another man. The mother's husband has no blood kinship with the child, but the mother's husband will be registered officially as the child's according to the presumption of paternity. The child's genetic father is supposed

<sup>9</sup> T. Yevdokimova, *Solution of 1 court disputes: manual for judges [Razresheniye sudom semeyno-pravovykh sporov]*, Moscow 2008, p. 272.

<sup>10</sup> Y. Bespalov, *Features of legal proceedings in the cases on protection of family rights of the child [Osobennosti razsmotreniya i razresheniya del o zashchitye semeynih prav rebionka]*, Moscow 2008, p. 376.

to appeal to the court for paternity recognition. About this situation A.M. Rabets made her suggestion: "The Court is obliged to define the paternity, if there is some evidence in the case to confirm with certainty the child's origin of the man who is not the mother's husband but the claimer of paternity recognition".

Reviewing the cases of contesting paternity one should bear in mind that according to Ch. 5, Art. 136 in the Family Code of Ukraine the litigant keeps the right to contest the registration (for example, if an application for paternity recognition was brought by threats, violence, or in a state where the litigant was not able to understand his actions or control them)<sup>11</sup>.

So today's existing regulatory restrictions on contesting by the man registered as the child's father ("social paternity") and the man who is actually the child's father (blood father) are negative legal phenomena, that can violate both the child's rights and just his/her parents' rights.

<sup>11</sup> A. Rabets, *Family Law [Semeynoye pravo]*, Belgorod 1998, p. 140.