DENIAL OF PATERNITY AND JUDICIAL DECISION-MAKING IN THE SLOVAK REPUBLIC

LA IMPUGNACIÓN DE PATERNIDAD Y LA PRÁCTICA DE ADJUDICACIÓN JUDICIAL EN LA REPÚBLICA ESLOVACA

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RESUMEN: "A mother always loves a child more than a father. She knows it's hers. Father is only assuming". The quote of the ancient Greek dramatist Menandros must be viewed with an open mind, without negative gender correlations. However, it still aptly reflects on the current legal status of paternity determination in the Slovak Republic based on three rebuttable presumptions. It is the possibility of refuting them that creates space for various life situations that may arise outside the framework of the current, relatively brief legal regulation of the denial of paternity in the Slovak Republic. Is Slovak legislation sufficient for the needs of the third millennium? The dynamics of the present time, the instability of partner relationships, the possibilities of artificial insemination and related issues of denial of paternity are the basis of the conducted research.

PALABRAS CLAVE: Determination of paternity; denial of paternity; the law of the Slovak Republic; limits of legislation; judicial decision-making; human rights; the best interest of the child.

ABSTRACT: *"Una madre siempre quiere más a un hijo que un padre. Ella sabe que es suyo. El padre sólo lo asume". La cita del antiguo dramaturgo griego Menandros debe considerarse con una mente abierta, sin correlaciones negativas de género. Sin embargo, sigue reflejando acertadamente la situación legal actual de la determinación de la paternidad en la República Eslovaca, basada en tres presunciones refutables. La posibilidad de refutarlas es lo que crea un espacio para diversas situaciones vitales que pueden surgir fuera del marco de la actual y relativamente breve regulación legal de la negación de la paternidad en la República Eslovaca. ¿Es la legislación eslovaca suficiente para las necesidades del tercer milenio? La dinámica de la época actual, la inestabilidad de las relaciones de pareja, las posibilidades de la inseminación artificial y las cuestiones relacionadas con la negación de la paternidad son la base de la investigación realizada.*

KEY WORDS: *Determinación de paternidad; impugnación de paternidad; derecho eslovaco; límites de la legislación; la práctica de adjudicación judicial; derechos fundamentales; interés superior del niño.*

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I. INTRODUCTION.

Relations between parents and children represent the basic pillar of family law regulation. For this reason, they should represent a high degree of certainty and stability. Family-law relations should also ensure the protection of basic human rights for all concerned persons, especially the right to respect for private and family life and the right of a child to know his or her origin. In family law relations, it is also necessary to take into account the interest of society as a whole in protecting the best interests of the child. The current Slovak legislation on the determination and denial of paternity is organized hierarchically in a way that favours the family founded by marriage. From a historical, but also a social point of view, the mentioned approach is not incorrect. However, it is necessary for the legislation to be sufficiently prepared for various life situations that may arise between persons. In the absence of explicit legal regulation, it is necessary for national courts to be able to approach such an interpretation that will correspond to the legitimate expectations of individuals and society. The article aims to identify those areas of the legal regulation of determining and denying paternity, the legal regulation of which is not clear or is completely absent and to analyse possible solutions to the deficiencies found.

II. DETERMINATION AND DENIAL OF PATERNITY IN THE SLOVAK REPUBLIC.

In the Slovak Republic, both the establishment and the denial of paternity are regulated in the second section of the first title, fourth part of Act 36/2005 Coll.

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on the Family (hereinafter referred to as the Family Act), entitled "Determination of Parentage and Adoption". This Act is the basic legal regulation governing the personal status of natural persons in the context of family law relations in the Slovak Republic. The Family Act regulates marriage, relations between parents and their children and other relatives, maintenance, adoption and contains legal rules on the determination of paternity. In relation to Act 40/1964 Coll., i.e. the Civil Code (hereinafter referred to as the Civil Code), it acts as lex specialis. The Family Act has been amended ten times since its adoption in 2005[1] , three of which in a more substantial manner[2] .

1. Determination of paternity.

In accordance with historical tradition, the concept of paternity establishment remained unchanged with the advent of the new Family Act in 2005. In the conditions of the Slovak Republic, it is a concept of three legal, rebuttable presumptions of paternity.[3] From the point of view of the systematisation of the legal regulation, it can be stated that the new regulation of each of the legal presumptions is particularly complex, which means that the act first contains a given presumption of paternity and then the conditions for its denial. The previous legislation[4] first provided the presumptions of establishment of paternity and only subsequently regulated their denial. These presumptions are rebuttable, admit proof to the contrary, and are constructed so that the legally determined paternity corresponds to the biological one and to typical life situations. The order of the conditions is strictly stated, and each successive presumption in the order can only be invoked if the previous presumption has not been invoked or rebutted. It means that in the conditions of the Slovak Republic, paternity can be established by only one of the three possible legal presumptions and there cannot be a situation where paternity is established by several presumptions at the same time. "This system was created in an era that was differently value-oriented. The highest priority was to legitimize the child and to try to secure for the child the status of a 'marital' child. Hence the extreme favouring of the mother's husband in the whole system of applying presumptions to establish paternity. The second problem is that since the three presumptions of paternity have been established, there have been medical advances that allow biological paternity to be established or ruled

1 Amendments: 297/2005 Coll. , 615/2006 Coll. , 201/2008 Coll. , 217/2010 Coll. , 290/2011 Coll. , 125/2013 Coll., 124/2015 Coll. , 175/2015 Coll. , 125/2016 Coll. , 2/2017 Coll.

2 The first time the Family Act was substantially amended in connection with the introduction of alternate personal care (Act No. 217/2010 Coll.), the second time by introducing the possibility to claim interest on the unpaid amount under the civil law (Act No. 125/2013 Coll.) and thirdly by enshrining the principle of the best interests of the child - a legislative and social elevation to a cardinal place in the systematics of the Family Act and the alignment of the condition of denial of paternity determined according to the first presumption of paternity with the ruling of the Constitutional Court of the Slovak Republic (ruling PL. ÚS 1/2010-57 of 20 April 2011, published under No. 290/2011 Coll.) (Act No. 175/2015 Coll.).

3 § 84 of the Family Act.

4 Act 94/1963 Coll.

out with almost 100% certainty for a child conceived naturally. In this state of the law, presumptions of paternity are hardly sustainable."[5] While it is undeniable that the Family Act has brought about some positive changes, it can be stated with certainty that it does not sufficiently reflect the current trends, needs and possibilities of contemporary European society.

The first presumption of paternity is the paternity of the mother's husband[6] and states that the mother's husband, even the former husband until the expiration of the three hundredth day after the dissolution of the marriage or its annulment, shall be presumed to be the father of the child. This presumption reflects the principle of protection of the family and marriage, one of the fundamental principles of the Family Act, on which the current Slovak family law is built.[7] It is an implementation of the Roman law principle "pater is est quem nuptiae demonstrant", for the application of this legal presumption the relevant and decisive fact is the birth of the child at the time determined by law, which implies that even if the child is born the day after the marriage, the husband of the mother is considered to be the father.[8] Other factors which would exclude the possibility of the husband being the father of the child have no bearing on the application of the presumption, but may be used as grounds for denying paternity. Provision of § 85 Section 2 of the Family Law adds that if a child is born to a remarried mother, the later husband shall be presumed to be the father, even if the child was born before the expiry of the 300th day after her earlier marriage was dissolved or declared void. This statutory provision thus clearly establishes the father of the child in order to avoid possible uncertainty in the determination of paternity. However, should paternity be denied by the mother's current husband, the child's father automatically becomes the child's mother's former husband, provided that the child was born within three hundred days of the dissolution of the marriage.

The second presumption is paternity determined by the parents affidavit.[9] This means that if paternity is not established by the presumption of paternity of the mother's husband, it may be established by a consensual declaration of both parents and the man whose paternity has been established by such a consensual declaration of the parents is deemed to be the father and thus also expresses the succession of the first and second presumptions. The second presumption is constructed in such a way that its application is not limited in time, so that it may be invoked at any time, unless the paternity is established by another man on the basis of the first or third presumption. The Family Act also allows paternity to be

5 Pavelková, B.: *Zákon o rodine, Komentár*, C.H.BECK, Bratislava, 2019, p. 526.

6 § 85-89 of the Family Act.

7 Bános, R., Košútová, M.: *Zákon o rodine – Veľký komentár*, Eurocodex, 2020, p. 320.

8 Burdová, K.: *Krívajúce rodičovstvo v slovenskom medzinárodnom práve súkromnom,* Univerzita Komenského v Bratislave, 2022, pp. 16-17.

9 § 90-93 of the Family Act.

recognised in respect of a child who has not yet been born but has already been conceived. Since there is no time limit as to when a declaration of consent may be made, it is not excluded that paternity may also be recognised in respect of a child of full age. The law sets time limits only for the denial of paternity, in this case three years from the date of recognition. In practice, the second presumption is used most often in the case of a child born to an unmarried mother, subsequently in the case where paternity has been successfully denied under the first presumption, but also in the case where the child is born after three hundred days have elapsed following the dissolution of the marriage or its annulment.

The third statutory presumption is paternity determined by court order[10], a concept based on a substantial period of time, where, if paternity has not been established by affirmative declaration of the parents, the child, the mother or the man claiming to be the father may petition the court to establish paternity, whereby a man who has had intercourse with the child's mother at a time not less than one hundred and eighty days nor more than three hundred days from the time of the child's birth shall be presumed to be the father, provided that his paternity is not excluded by compelling circumstances. This presumption shall apply where the first and, consequently, the second presumption have not been invoked or have been rebutted. This statutory presumption may be invoked only if an application is made to the court. The child, the child's mother and the man who claims to be the child's father have active legal standing to bring the action.

The application of this presumption is now more and more losing its original meaning, as the fact of "coitus" as a decisive event gives way to the biological certainty provided by DNA[11] analysis. All the tests used in the past, such as those in haematology, gynaecology (comparing the timing of coitus and childbirth) and sexology (ascertaining a man's ability to procreate), are now being replaced in practice by DNA analysis, which can confirm or exclude the paternity of a particular man with a very high degree of certainty. The court may impose participation in genetic tests as an obligation under the provisions of § 210 of the Code of Civil Procedure.[12] According to § 210, the potential father, as a party to the proceedings, may be ordered to appear before an expert, to produce the necessary things, to undergo a medical examination or a blood test, or to do or bear something if this is necessary for the purposes of the expert evidence. The court may enforce the obligation to cooperate by means of orderly fines or by bringing the person before it. What if the prospective father refuses to submit to DNA sampling on the grounds that such an act is an unjustified interference with his bodily integrity, right to life and health? In order to answer the fundamental question of whether

10 § 94-95 of the Family Act.

11 Deoxyribonucleic acid.

12 Pavelková, B.: *Zákon o rodine, Komentár*, cit., s. 559.

the restriction of one subject's fundamental right is a reasonable and necessary means of achieving the objective of protecting the fundamental rights of another (the child's right to private and family life under Article 8 ECHR[13], the right to know one's origins under Article 7 Section 1 CRC[14]), it is necessary to attempt, at a theoretical level, to carry out the basic steps of a constitutional enquiry. In the case of competing multiple fundamental rights, we apply the proportionality test, which consists of three basic steps. First, the objective of the interference with the fundamental right must be identified, which must be legitimate and lawful. The second step of the proportionality test is to carry out the necessity of the interference test, where it is necessary to assess whether it would not have been possible to use a means that would have been more benign in relation to the fundamental right in question to achieve the objective pursued. The third step is the so-called proportionality test in the narrower sense of the word. It is essentially a balancing of two competing rights or values and then giving preference to one of them, based on an assessment of the aspects of the particular case.

On the basis of the above, it is clear that the legal system of the Slovak Republic regulates the power of the court to enforce the provision of assistance to an expert for the purpose of a fair decision in the case. In the proceedings for the establishment of paternity, there is in principle no more lenient way of establishing paternity with a probability bordering on certainty. Other means of proof from which evidence for establishing paternity can be abstracted (questioning of the parties, witnesses, records of communications between the mother and the man, etc.) do not provide such a degree of certainty and stability in the final decision of the court. DNA analysis can be carried out with minimal interference with the physical integrity of the person, for example by swabbing the buccal mucosa of the oral cavity, which poses no health risk and is painless. For this reason and taking into account the protection of the fundamental rights of the child, this examination can be considered proportionate. The Constitutional Court of the Czech Republic also approached the issue of competing fundamental rights of the subjects in the same way at a time when the legal regulation of paternity establishment was similar to that in Slovakia.[15]

The filing of a petition by the child raises a bar of lis pendens for the mother or for the man who claims to be the father - which means that she cannot file her own petition against the same man. The reverse is also true - if the mother brings the action, the child cannot bring proceedings in the same case against the same man. If the third presumption of paternity were testified to by several men

13 European Convention on Human Rights.

14 Convention on the Rights of the Child.

15 See also: Judgment of the Constitutional Court of the Czech Republic of 28 February 2008, Case No. I. ÚS 987/07.

at the same time, it would be possible for the child to initiate proceedings for the establishment of paternity against one man and the mother against the other.[16]

2. Denial of paternity.

The Slovak Family Act defines legal presumptions for the determination of paternity as rebuttable, which means that under the conditions provided for by law, evidence to the contrary is admissible. The main purpose of this regulation is to reconcile legal and biological paternity. Only certain entities have standing and time limits are laid down for filing a petition for the denial of paternity. The nature of these time-limits is prescriptive, i.e. on their expiry the right is extinguished, and they cannot be waived or extended by the courts. The reason for these relatively strict conditions is the need for stability in family law relations. The proceedings for the denial of paternity are procedurally regulated in Act No 161/2015 Coll. (Civil Procedure Code). The proceedings are petition proceedings, i.e. they are always initiated only on the petition of actively legitimated persons, according to the Family Act. To clarify, it should be added that "a petition for the denial of paternity may only be filed against paternity established according to the first and second legal presumptions of paternity; a petition for the denial of paternity against paternity established by the third presumption, and thus by a court decision, is absolutely excluded.[17] Which also reinforces our conclusion as to the reasonableness of being able to compel the cooperation of the prospective father in providing assistance to an expert to conduct a DNA analysis.

A) Denial of paternity by the mother's husband.

According to the Family Law, only the husband and the mother of the child have the right to deny the paternity of the mother's husband. Both can do so within the three-year period, which, however, has a differently regulated start date. According to § 86 of the Family Act, the husband may, within three years from the date on which he becomes aware of facts which reasonably call into question the fact that he is the father of the child born to his wife, deny in court that he is the child's father. This is a subjective period, the beginning of which is linked to the husband's knowledge of the facts which reasonably call his paternity into question. The term "facts giving rise to a reasonable doubt that he is the father" may be understood to mean the degree of doubt at which the person entitled acquires the conviction that he is not the father of the child to such an extent that he is able to present that opinion publicly before third parties and to assert it directly in the court proceedings.[18] Such a fact is not necessarily a DNA

16 Pavelková, B.: *Zákon o rodine, Komentár*, cit., p. 558.

17 Bános, R., Košútová, M.: *Zákon o rodine – Veľký komentár*, cit., p. 337.

18 Judgment of the Regional Court in Trenčín, 4CoP/10/2020 of 29 April 2020.

test, which is in principle a certainty that he is or is not the father. For example, testimony from several people in the family, a renunciation by the mother or the biological father, etc., may be considered as such.

According to § 88 Section 2, the mother may also deny that her husband is the father of the child within three years of the child's birth, in which case the time limit is an objective one, determined by the birth of the child. Depending on whether the child was born before the one hundred and eightieth day after the marriage or between the one hundred and eightieth day after the marriage and the three hundredth days after the marriage has been dissolved or declared void. Under § 87 Section 3, if a child is born before the one hundred and eightieth day after the marriage, it shall be sufficient for the husband of the mother not to be deemed to be the father if he denies his paternity in court. This does not apply if the husband had intercourse with the mother of the child at a time from which less than one hundred and eighty days had elapsed before the birth of the child and more than three hundred days had elapsed, or if he knew at the time of the marriage that she was pregnant.[19] The second possibility is reflected in § 87 Section 1 of the Family Act, which states that if a child is born between the one hundred and eightieth day after the marriage was celebrated and the three hundredth day after the marriage has been dissolved or declared void, paternity may be denied only if it is excluded that the mother's husband could have been the father of the child. For this, it is necessary to prove in the proceedings that there was no coitus between the spouses at a material time or, if there was, that the child cannot be descended from the husband. At present, the quickest solution is to submit a private expert report to the court.

The possibility of artificial insemination - assisted reproduction is explicitly taken into account in only one provision of the Family Act and there is no law in Slovakia that would comprehensively address the issue of assisted reproduction. Within the Family Act, it is the provision of § 87 Section 2, which states that paternity of a child born between the one hundred and eighty-third day of the assisted reproduction procedure with the consent of the mother's husband may not be denied. It also adds, in the second sentence, that this is possible if it is proved that the mother of the child became pregnant otherwise.

The spouse's consent is a necessary attachment to the request for a medical procedure, which applies to all interventions of the procedure (if it consists of several interventions). The consent of the spouse is revocable or may be terminated by the dissolution of the marriage. If a woman has been artificially inseminated without her husband's consent, the presumption of paternity of the mother's husband

19 The burden of proof in this case is on the mother, who, in order to reverse the denial of paternity by her husband, must prove either that the father of the child had sex with her at the time decisive for the birth of the child, or that he knew she was pregnant when the marriage was contracted.

may be rebutted on the ground that the substantive conditions have not been fulfilled. Conversely, if the consent of the husband to the assisted reproduction procedure has been validly given and the woman has become pregnant, it is not possible for the husband to deny his paternity. It is legally irrelevant whether the woman was inseminated with her husband's sperm or with another man's sperm (i.e. whether the insemination was homologous or heterologous). A woman is presumed to have become pregnant by assisted reproduction if the child is born between the 100th and 300th day after the assisted reproduction procedure. Under the provisions of § 87 Section 2, in fine, the husband of the mother may deny his paternity of the child if it is proved that the mother became pregnant otherwise than through the assisted reproduction procedure. In such a case, the three-year subjective time limit set out in § 86 Section 1 of the Family Act applies to the denial of paternity. However, it is not sufficient to prove that the woman had intercourse with another man or men at the time decisive for the birth of the child, but it must also be proved that the impregnation was not carried out by means of an insemination procedure to which the husband gave his consent. The establishment of paternity against the sperm donor himself is excluded in order to protect his anonymity. The man had no wish to procreate a particular child. If, after the assisted reproduction procedure had been carried out, the marriage had been dissolved by divorce, the husband who had consented to the procedure would still have been considered the father of the child, since the child would have been born within three hundred days of the assisted reproduction procedure and also within three hundred days of the dissolution of the marriage. The only exception would be if the woman remarried before the birth of the child. In that case, the later husband would be considered the father of the child, despite the fact that he himself did not consent to the assisted reproduction procedure (§ 85 Section 2 of the Family Act).[20]

B) Denial of paternity established by a declaration of consent of the parents.

Even if paternity has been established by a declaration of consent of the parents, a situation may arise where one of the parties decides to deny paternity. Since presumptions of paternity are constructed as rebuttable, it is possible to deny paternity established by the parents' affirmative declaration. To do so, it is necessary to prove circumstances which exclude the paternity of the man who made the declaration of paternity. Both the man whose paternity has been established by a declaration of consent and the mother of the child have active legal standing. The time limit shall be three years and shall run from the date on which paternity is thus established. Where the establishment of paternity is in respect of a child who has not been born but has been conceived, the period shall

20 Pavelková, B.: *Zákon o rodine, Komentár*, cit. , p. 540.

not expire before the expiry of three years from the birth of the child.[21] It should be noted that, while the application of the second presumption of paternity is not limited by time limits, the denial of paternity established on the basis of the second presumption is limited by a period of three years running from the date of the establishment of paternity, that is to say, the affirmative declaration by both parents of the acknowledgement of paternity. It follows from the above that, according to the currently applicable regulation in the Slovak Republic, the time limit for the denial of paternity under the first and second presumption of paternity to the established father runs differently and is not logically consistent as a whole. Denial under the first statutory presumption allows a father to deny paternity within three years from the date on which he became aware of facts reasonably doubting that he is the father of a child born to his wife, to deny it in court, whereas, in the case of the second presumption, he may deny paternity before a court within three years of the date of its establishment only if it is excluded that he could be the father of the child, that is to say, if he later becomes aware of facts justifying the presumption that he is not the father of the child, he does not have an explicit legal remedy available to him to defend himself. It is necessary to distinguish from the denial of paternity itself the situation where the declaration by one of the parents did not satisfy the legal requirements of a valid legal act.

C) Denial of paternity at the request of the child.

The institute of denial of paternity at the request of the child[22] was introduced into the Slovak legal system by the Family Act in 2005, replacing the previous legislation which authorized the Attorney General to file a petition.[23] By granting active legitimacy to file a petition for the denial of paternity, Slovak family law has strengthened its private law character.

The process of denying paternity at the request of the child is the same for the first and the second presumption. First of all, the child must file a petition for the initiation of proceedings for the admissibility of the petition for the denial of paternity. If the child is a minor, he or she is represented in the proceedings by a conflict guardian. The court shall, in principle, grant the application for the admissibility of the denial of paternity if this is necessary in the interests of the child. Once the court has made a final decision on the admissibility of the application for the denial of paternity, the second stage of the paternity proceedings is the application for the denial of paternity itself, in which evidence is taken as to the existence of a biological relationship between the child and the designated father. The application for the denial of paternity lodged by the child is not limited by

21 § 93 of the Family Act.

22 § 96 of the Family Act.

23 Act 94/1963 Coll. § 62.

the time-limit for the denial of paternity. For that reason, the proceedings may take place even after the child has reached the age of majority. However, it is a prerequisite that at least one of the parents is living.

One of the essential legal requirements for the denial of paternity at the request of the child is the best interests of the child. In this case, as in any other proceeding involving a minor, there is no legal definition or other specificity as to when it is in the best interests of the child to allow a petition to disestablish paternity to be filed. We can help ourselves by a demonstrative, non-hierarchical enumeration of the criteria for assessing the best interests contained in Article 5 of the Family Law. In the context of the denial of paternity, it is important to take into account, in particular, the protection of the child's dignity as well as the child's mental, physical and emotional development, the threat to the child's development by interfering with the child's dignity and the threat to the child's development by interfering with the mental, physical and emotional integrity of a person close to the child, the conditions for preserving the child's identity and for the development of the child's abilities and aptitudes, and the conditions for the formation and development of relational ties with both parents, siblings and other close persons.[24] The individual circumstances of a particular minor in relation to legal and biological paternity must be taken into account in order to ensure the abovementioned criteria. In principle, denial of paternity is necessary in the interests of the child, particularly in those cases where a biological father has appeared in the child's life who is interested in exercising his right to parental education and care. The court must then address the issue of the conflict between biological and social, legal paternity. If the court concludes that the potential denial of paternity will have a positive impact on the child's development and thus ensure the protection of the child's best interests, it will then decide whether the application for the denial of paternity itself is admissible. A situation may arise where the application for the admissibility of the denial of paternity is brought by a child of full age. In principle, this does not fundamentally change the view of the statutory presumption of an assessment of the best interests of the child. Of course, in such a case, it will be assessed in particular from the point of view of the interrelationship of the subjects involved and the protection of their fundamental rights (in particular the right to protection of private and family life, the right of the child to know his or her origins, etc.). The criterion of the child's proper development will take a back seat to the fact that, in the case of a child of full age, the essential stages of his or her development are presumed to have been completed to the extent that the child is perceived as a weaker subject of legal relations.

24 Luprichová, P.: Najlepší záujem dieťaťa – efektívny nástroj ochrany maloletého dieťaťa?", *Bratislavské právnické fórum 2015*. Univerzita Komenského v Bratislave, Bratislava, 2015. p. 164.

A child may not bring an action to deny paternity if it has been established on the basis of a third presumption. In such a case, the final decision of the court cannot be challenged by an application for the denial of paternity.

III. DENIAL OF PATERNITY – ISSUES AND JUDICIAL DECISION-MAKING.

A number of different life situations require legislation which, unless it provides a specific regulation, allows a logical interpretation by the courts. In the Slovak law, court precedents are not a formal source of law. However, the decision-making practice of the courts is relevant source of the interpretation of legal norms. It represents a basis for decision-making in similar cases, and even decisions are not legally binding, the relevant legal professions refer to them. The constitutional court has a special place in the Slovak judicial system The constitutional court is authorized to decide on the conformity of laws with the constitution, constitutional laws and international treaties to which the National Council of the Slovak Republic has expressed its assent and which were ratified and promulgated in the manner laid down by a law. If the Constitutional Court declares in its decision that there is an inconformity between the mentioned legal regulations, the respective regulations, their parts, or some of their provisions shall lose effectiveness and the relevant authorities shall be obliged to harmonize them. If they do not do so within six months from the promulgation of the decision of the Constitutional Court, these legal regulations or their parts shall lose validity. In this way, the Constitutional Court participates in such legislation that respects the human rights and basic legal principles. The general courts have the task of providing such an interpretation of legal regulations that is not only legal, but also ensures a righteous arrangement of relations between the participants. This part of the article analyses the mentioned judicial decision-making practice of determining and denying paternity.

1. Denial of Paternity Established on the Basis of the First Presumption of Paternity, Issues and Judicial Decision-Making.

In this section, we will present the most famous case where the unsatisfactory legislation in the context of denial under the first presumption of paternity ended up in the Constitutional Court of the Slovak Republic and how the case law of the Constitutional Court played a key role in the amendment of the Family Act. We will also consider the implications of the new first presumption regulation and some of its current shortcomings. Secondly, we will look at the courts' decision-making in the field of assisted reproduction, which in the conditions of the Slovak legislation, in the context of the first presumption of paternity, is based on the analogy of the law.

A) The statutory period for the denial of paternity.

In the first case, it is an amendment of the original provisions of § 86 of the Family Act on the basis of the case law of the Constitutional Court. The essential point is Section 1 of § 86, which originally stated that a husband may, within three years of the date on which he learns that his wife has given birth to a child, deny in court that he is the child's father. This provision appears problematic even at first sight, since it could easily have happened that the father may or may not have felt any reason to doubt and subsequently investigate whether he is indeed the biological father of the child during the subjective period laid down by law for the denial of paternity. We would describe the starting point of this case as follows. A man was determined paternity on the basis of a first presumption of paternity attesting to the mother's husband[25] to a child born in 1992. In 2006, he learned from expert testimony using DNA testing that he was not the child's father. At that time, he no longer had any legal means at his disposal to deny his paternity. Despite this initial state of affairs, he decided to bring an action to deny paternity. The first instance court dismissed the action on the ground of the extinction of his right to bring the action. On appeal, the proceedings were stayed by the Court of Appeal, which brought an application to the Constitutional Court for proceedings to determine the compatibility of the relevant provisions[26] , deriving the period of denial from the husband's knowledge of the child's birth, with Articles 6 Section 1 and 8 Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (further as "Convention").

On 20 April 2011, the Constitutional Court of the Slovak Republic ruled that the provision of § 86 Section 1 of the Family Act, which states that a husband may, within three years from the date on which he learns that his wife has given birth to a child, deny in court that he is the child's father, is incompatible with Article 6 Section 1 and Article 8 Section 1 of the Convention.

In its reasoning, the Constitutional Court states that the European Court of Human Rights applies Article 8 of the Convention differently to cases of the father knowingly establishing the relationship between the father and the child, or the legal father's failure to deny paternity within the statutory period of denial, despite the legal father's knowledge that he is not the biological father of the child, or if he has doubts about this fact, on the one hand. On the other hand, cases where the legal father was not aware that he was not the biological father during the period for denying paternity and therefore denies paternity only after that period has expired. The relevant fact for the application of the Convention is

25 § 51 Section 1 of the Family Act No. 94/1963 Coll.

26 § 57 Section 1 of the Family Act No. 94/1963 Coll. in force until 31 March 2005 and § 86 Section 1 in conjunction with § 96 of Act No. 36/2005 Coll. on the Family in force since 1 April 2005.

the moment when the legal father becomes aware of the inconsistency between biological and legal paternity or of the facts disputing his paternity. It is only then that the legal father, whose paternity has been established by a legal presumption of paternity, can make a conscious decision whether he wishes to continue the legal relationship already established with the child and to bear the resulting responsibilities associated with his parental rights and obligations, or to resort to legal means to eliminate the inconsistency between the legal and biological paternity.[27]

The Constitutional Court of the Slovak Republic further stated that the time limit for filing a contestation action established by the legislation is not contrary to the above-mentioned articles of the Convention, however, the definition of this time limit and the conditions for its running must adequately respect the rights of all persons involved in these legal relations. In order to balance all the interests involved in the settlement of the legal relations relating to legal paternity, account must be taken, in particular, of the time when the period of estoppel begins to run, which must take account of the time at which the legal father became aware of the facts disputing his paternity. The fact that the legislation provides for the period of disownment to begin to run from the moment when the mother's husband became aware of the birth of the child disproportionately weakens his interests.

In the event of a declaration of non-compliance, the Slovak Parliament was obliged, in accordance with Article 125 Section 3 of the Constitution of the Slovak Republic, to bring the above provisions into conformity with Article 6 Section 1 and Article 8 Section 1 of the Convention within six months of the promulgation of this judgment in the Collection of Laws of the Slovak Republic. As this was not done, the contested provision lost its validity and a legislative vacuum was created in the case of paternity denial, which lasted until 2016, when Amendment 175/2015 Coll. became effective. It follows from the above that the case law of the Constitutional Court played a significant role in the adoption of this amendment, which is also stated in the explanatory memorandum to the amendment. During the period of this legislative vacuum, further problems arose as a consequence of the unspecified time limit for the denial of paternity under the first statutory presumption. As an example, the child's inability to claim by petition the denial of paternity under § 96 of the Family Law Act, since the father, as the mother's husband, could not let the unstated time limit expire.[28]

As we shall see below, even the current amended version is not without problems and brings with it similar challenges. The logical inconsistency between the provisions of § 86 Section 1 of the Family Act, where the three-year period

27 Decision of the Constitutional Court of the Slovak Republic, PL. ÚS 1/2010-57 of 20 April 2011.

28 Due to the repeal of § 86 Section 1 of the Family Act by the Constitutional Court.

for denying paternity begins for the man - the husband from the day he became aware of the facts reasonably questioning that he is the father of the child and the provisions of § 93 Section 1 of the Family Act, where a man whose paternity was determined by the consent of the parents, can deny paternity before the court within three years from the date of its determination, only if it is excluded that he could be the father of the child. Thus, the first of the time limits is dependent on the husband's knowledge of the facts which reasonably call his paternity into question, while the second is firmly dependent on the man's having made a consensual declaration, without admitting that he might in the future acquire a doubt as to his paternity.

Another possible problem can be seen in the provisions of § 86 Section 1 in conjunction with § 96 of the Family Act (denial of paternity at the child's request), where the latter provision states that if it is necessary in the child's interest, the court may, at the child's request, decide on the admissibility of the denial of paternity if the time limit set for the child's parents to deny paternity has expired. However, it is under § 86 Section 1 that the time limit is subjective, i.e. when the parent has become aware of facts which cast reasonable doubt on his being the father of the child. The very fact that the father has a subjective period brings with it the possibility that it may never expire (for example, he dies and it can no longer be proved that he acquired reasonable doubt about his paternity at some time during his lifetime) and, at the same time, when the mother's objective period expires (she will not be entitled to bring an action for denial), the child will not be entitled to bring an action for denial because the father, as the other parent, has not been subject to the subjective period (because it has not even begun to run).

B) Denial of paternity of a man who has given his consent to assisted reproduction.

The issue of assisted reproduction is not explicitly regulated in the Slovak Family Act and the only direct reference is found in § 87 Section 2, i.e. in the framework of the presumption belonging to mother's husband. However, assisted reproduction is a very specific method of procreation and it requires a deviation from the standard general conditions for denial of paternity. As there is no legal regulation of assisted reproduction by unmarried parents, the courts must look for the closest possible legal standard in terms of the content of the regulation. At present, even unmarried parties to assisted reproduction are in the same position in terms of the Family Law as if they were married. This is possible despite the fact that Slovak law does not recognize the institution of cohabitation.[29]

29 Dufalová, L., Čipková, T., Burdová, K.: „Legal consequences of marriage and cohabitation under the Slovak Law", *Actualidad Jurídica Iberoamericana*, 2019, no. 11, p. 150.

Certain basic legal issues in the field of assisted reproduction are regulated by the binding measure of the Ministry of Health of the Slovak Socialist Republic No 24/1983 of 10 October 1983 on the regulation of conditions for artificial insemination, published in the Bulletin of the Ministry of Health of the Slovak Socialist Republic, which is a subordinate norm to Act No 20/1966 Coll. on the care of the health of the people, which has been repealed, and thus, from the point of view of legal theory, the measure itself has also lost its force. That measure allows artificial insemination only for married couples, but in Slovakia assisted reproduction clinics also provide services to unmarried couples, probably on the basis of the ineffectiveness of that measure and also in the light of the Transplantation Act No 317/2016 Coll., which states in § 2 Section 12 that partner donation for the purposes of that Act is the donation of reproductive human cells between a man and a woman who declare that they are in an intimate physical relationship. Assisted reproduction is currently considered to be the provision of health care and therefore Act No 576/2004 Coll. on health care and other related regulations also apply to these procedures.[30] The legal regulation of assisted reproduction in the Slovak Republic is scattered in more recent legislation with the force of law, but the regulation is neither comprehensive nor clear.

It can be said that the rapidly developing fields of biomedicine and genetics are constantly bringing new elements into the field of family law, raising new questions and demanding new solutions. It is customary to say that "the law generally lags behind technical progress"[31] and in principle can only follow it, but the speed at which it does and can do so depends on a variety of factors, most noteworthy of all is the willingness and political will to address such electorally sensitive issues. So far, however, that political will has not happened in Slovakia. Therefore, in problematic factual situations, the court must deal with the interpretation of the lack of legislation by analogy and by reference to fundamental legal principles.

This lack of more detailed legal regulation of assisted reproduction has been addressed by the Slovak courts in the recent period.[32] Since 2013, the partner and the spouse were living in a civil partnership, so they were not married. The woman became pregnant after an assisted reproduction procedure performed in the Czech Republic, with sperm provided by an anonymous donor. The legal father was not the biological father of the minor and that fact was neither disputed nor contested in the proceedings. It was also established that both parents had given their consent to the artificial insemination, and that the consent included an instruction on the legal consequences of the artificial insemination. The consent of the partner was not withdrawn and had the necessary formalities, therefore it was

30 Dufalová, L.: *Surogačné materstvo,* Wolters Kluwer, 2020, p. 62.

31 Cirák, J. et al.: *Rodinné právo*, Heuréka, Šamorín, 2008, p. 94.

32 Judgment of the Supreme Court of the Slovak Republic of 27 January 2022 Case No. 5Cdo 121/2021.

valid. As part of the informed consent, the parties submitted to the legal regime in the Czech Republic. It was understood that they would become the parents of the child after the birth of the child. In the Czech Republic, the man who consented to assisted reproduction would ultimately be presumed to be the father of the child in accordance with § 778 of Act No. 89/2012 Coll. of the Czech Civil Code. However, the child was born in the territory of the Slovak Republic, where the legal system does not contemplate such a situation and the first presumption of paternity in the case of assisted reproduction is testified to only by the husband of the mother, not by the second husband. Since the parties were not married, for administrative reasons, paternity was established by the second presumption of paternity, a declaration of consent. After disagreements in their partnership, the mother decided to file a petition to deny paternity. She derived the possibility of denying paternity from the provisions applicable to the denial of paternity under the second presumption of paternity.

The court of first instance rejected the claimant's application, since in the court's opinion, when assessing the denial of paternity, it was necessary to apply by analogy the provision of § 87 Section 2 of the Family Act, i.e. the denial of paternity according to the first presumption, which is the only one that speaks of the possibility of denying paternity after the assisted reproduction procedure has been carried out on the woman, namely the wife. In this respect, the Family Law excludes the right to deny paternity if the husband has given his consent to the artificial insemination of his wife, the consent being stored in the medical records. The evidence showed that both parents had given such consent and that they had been advised of the legal consequences of artificial insemination. The court further stated that if all the conditions are met, based on the presumed will of the spouses or partners who have taken such a step, as well as the need to stabilize the legal status of such a child, the law does not allow to deny the paternity of the spouse or partner to such a child as an exception to the general right of denial. In the case of heterologous insemination[33] it is irrelevant that the husband/partner of the mother did not conceive the child, it can only be proved that she became pregnant otherwise than after the assisted reproduction procedure. The Court of First Instance also emphasised the need to protect the interests of the child.[34]

The Court of Appeal upheld the judgment of the Court of First Instance against the applicant's appeal.[35] The Court of Appeal agreed with the first instance decision and held that assisted reproduction is a highly specific case of procreation which naturally requires a departure from the general conditions for the denial of paternity under § 93 of the Family Act. In the present case, it is not possible for

33 Sperm from an unknown donor.

34 Judgment of the Prešov District Court of 13 July 2020, No. 29Pc/11/2020-48.

35 Judgment of the Regional Court of Prešov of 30 March 2021, Case No. 24CoP/151/2020.

the child to have a biological father entered on the birth certificate, as the very nature of assisted reproduction, based on the use of the biological material of a third party - an anonymous man - precludes it. At the same time, the Court of Appeal stated that due to the absence of legal regulation of assisted reproduction of unmarried parents, the Court of First Instance correctly looked for the closest legal norm in terms of the content of the regulation, i.e. in § 87 Section 2 of the Family Act.

Against the judgment of the Court of Appeal, the petitioner appealed to the Supreme Court, where she also defined the legal issue which, in her opinion, should be addressed in the present case, namely "whether the analogy legis can be applied to cases of denial of paternity in assisted reproduction IVF[36] from an anonymous donor of germ cells and the statutory provision regulating the denial of paternity in the case of the mother's husband (§ 87 Section 2 of the Family Act), when they are not spouses, can be followed".

This legal issue, defined on the basis of the Court of Appeal's reasoning, has not been resolved in the Supreme Court's decision-making practice until then. Given that the Supreme Court's reasoning has a direct impact on judicial lawmaking in the Slovak Republic, we present some of the most important arguments of the Supreme Court. At the outset, the question arises whether a simple grammatical interpretation in the application of the law does not cause an unjustified differentiation, which would be contrary to the principle of the uncontroversial nature of the legal order and the principle of equality, while these principles are precisely the legitimate reason for the creation of law by analogy legis, whereby the judge still remains on the ground of the applicable law and only proceeds from the presumption of a rational legislator.[37] It is clear that if the protection afforded to the paternity of a man who has consented to an assisted reproduction procedure is dependent on the circumstance of whether that man is the husband of the mother or not, this is a violation of the principles of equality and the non-arbitrariness of the legal order. In the opinion of the Supreme Court, the Family Act, in the provisions of § 87 Section 2, in essence provides for another presumption of paternity "sui generis", whereby the husband of the woman who has undergone the assisted reproduction procedure is deemed to be the father of the child born within a specified period of time of the assisted reproduction procedure, and it does not matter whether he is also the biological father, what matters is that he consented to the procedure, and the only way of denying the

36 In vitro fertilization.

37 For example, according to the resolution of the Supreme Court of the Slovak Republic, Case No. 6Cdo/137/2010, the court's obligation to find the law does not only mean to search for direct and explicit instructions in the statutory text, but also the obligation to ascertain and formulate what is the specific right, even where the interpretation of abstract norms or norms that are unclear or legislatively imprecise is involved.

paternity thus established lies in the possibility of proving that the conception took place in a different way. Thus, this is a case where the law purposely creates legal paternity on the basis that a certain man formed a couple with a woman and consented to her artificial insemination with the sperm of an anonymous donor.

Since the subject of the proceedings was the denial of paternity to a minor child, it was equally important to take into account the interests of the child and to analyse whether, if the application were granted, his fundamental rights and freedoms protected by the Constitution of the Slovak Republic (Article 41 Section 3), the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union and the Convention on the Rights of the Child would not be violated. It was also necessary to consider whether, if the application were granted, the minor might also be subject to unequal treatment, since, because of the possibility of denying paternity after an assisted reproduction procedure, the Family Act does not provide for equal conditions for children whose parents are married and whose parents are not married. Thus, an unmarried father and his child could be discriminated against in cases of assisted reproduction, since it would be incomparably easier to deprive an unmarried father of his paternity and thus deprive the child of its father. Here, we note once again that in this case the mother sought to deny paternity to a man who, as her partner, had consented to the assisted reproductive procedure.

The Supreme Court also upheld the reasoning of the trial and appellate courts, which found a gap in the law that they chose to close through the application of analogy legis. In so doing, it stated that if it were established that there was a conscious gap in the law, the limit of the lex lata would be clearly established and the analogy legis would not be applicable to the present case. He also pointed out that this was not the case in the present case, since it was clear that the legislator had not taken into account the future possibilities of assisted reproduction for unmarried couples when drafting the law.

The father's consent to assisted reproduction shall supersede the biological link between father and child, and all biological family contexts shall apply to such a link. The anonymity and rights of the donor of the biological material must also be respected.

The Supreme Court found possible discrimination on the basis of birth (child of unmarried parents) or on the basis of other status (spouse/partner), and thus the possibility of considering the unconstitutionality of the Family Law. In the present case, however, the Supreme Court could not use its jurisdiction to initiate proceedings on the constitutionality of the Family Act, since the Constitutional Court could not find the Family Act unconstitutional in the proceedings in question, since in this case it is the absence of the legislation itself that is unconstitutional. It

also stated that such a fact could not go unnoticed by the general court under the Constitution and that it was therefore obliged to resolve it by analogy legis. On the basis of the above, the Supreme Court held as follows: "A man's consent to an assisted reproduction procedure is a legal fact which establishes his paternity of the child born after a successful procedure, instead of the biological relationship between the father and the child. An analogous application of the provisions of § 87 Section 2 of the Family Act to cases of denial of paternity established by a declaration of consent pursuant to § 90 and § 91 of the Family Act following an assisted reproduction procedure with the consent of a man who is not the husband of the mother is permissible." [38]

We fully agree with the Supreme Court's decision and its reasoning, as we also stated in the previous section that the Family Act should not contain provisions that treat similar factual situations differently. For example, merely on the basis of whether or not the persons are married. This is particularly so in the context of preserving all the related rights and obligations of those persons and their equitable position in a particular family law relationship. In the same way, this should not be the case with children, depending on whether or not they come from a marital or extra-marital union or whether or not their conception was carried out through assisted reproduction. Of course, equally important is the protection of family relations, security, stability and the proper development of the child and its material needs. The parties to family law relationships must be held responsible for their actions, regardless of any change in circumstances over time. At the same time, the interest of the minor child as the weaker subject of these relationships must always be taken into account.

2. Denial of Paternity Established on the Basis of the Second Presumption of Paternity, Issues and Judicial Decision-Making.

According to the above mentioned, only three particular persons have active legitimacy to bring an action to deny paternity determined by a consent declaration. Designated father, mother and, after the expiration of the parents' denial period, the child. A man who claims to be the biological father of a child does have legitimacy to bring an action to determine paternity. However, if paternity is determined in relation to another man, paternity of this man must first be denied. Only after the court's decision on denial of paternity is valid, the court can act on paternity determination. For this reason, the possibilities of the biological father in terms of claiming his parental status and related rights are limited.

38 Judgment of the Supreme Court of the Slovak Republic of 27 January 2022, Case No. 5Cdo 121/2021, which was also published in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic under No. 8/2022.

There is a case study in which the mother knows that the man with whom she declares to be the father of the child is not, in fact, the biological father. Theoretically, even this man has this knowledge. The mother and the registered father are partners and have decided to raise the child together despite the absence of a biological relation between the registered father and the child.

The theory of family law contains the thesis that the parents' consensual declaration is made up of two unilateral legal acts of mother and man, which result in the determination of paternity and in the creation of a family law relationship between the father and the child. Undoubtedly, these declarations meet the characteristics of § 34 of the Civil Code, according to which a legal act is "an expression of the will leading, in particular, to the creation, alteration or extinction of those rights or obligations associated with such expression under the law". If the consent declaration consists of two unilateral legal acts, then it is appropriate to consider whether the defects of these legal acts can be sanctioned by invalidity according to the general provisions of the Civil Code. According to § 110 of the Family Act: "If this Act does not provide otherwise, the provisions of the Civil Code shall apply". The law allows the subsidiary application of the provisions of the Civil Code to those aspects of family law relations that are not specifically regulated by the Family Law. In the case of the paternity determination, which is based on the theory of three rebuttable presumptions, the Family Act also directly regulates the possibility of disproving the status of determined paternity, namely through a special institution of denial of paternity. For this reason, it could appear that it is not permissible to intervene in designated paternity in any other way than by denying paternity, as a special legal institute regulated by the Family Act. However, it is necessary to look again at the individual protected interests and their proportional protection. In the case when the mother makes a consensual declaration with a man whom she knows is not the father of the child, this is undoubtedly an action that should not be protected by law, especially if it violates the biological father's rights, especially his right to respect for a private and family life.[39] Likewise, a child, in most cases a minor, is thus deprived of the opportunity to know his origin[40], his biological father, and to create an emotional relationship with him. In this way, the right to parental care[41] is also denied to both mentioned persons. The absent family law regulation of the possibility of the biological father to bring an action to deny the designated paternity can thus be supplemented by a general regulation of the Civil Code.

According to § 39 of the Civil Code: "A legal act is invalid if the content or the purpose thereof violates or evades the law or is inconsistent with good morals." In

39 Article 8 of the European Convention on Human Rights.

40 Article 7 Section 1 of the Convention on the Rights of the Child.

41 Article 41 Section 4 of the Constitution of the Slovak Republic.

these cases, it is an absolute invalidity, which means that anyone could initiate court proceedings. The biological father is therefore entitled to bring the action for the invalidity of the consensual declaration made by the mother and a man different from the biological father. If it is proven in the proceedings that the mother and not biological father made a consensual declaration even though they knew that the biological father is another man, this action can be described as inconsistent with good morals. At the same time, it is also possible to consider evades the law, when because of the consensual declaration it is impossible for the biological father to bring the action to determine his paternity. The possibility of judging the validity of the consensual declaration is not a question which could be solve as a preliminary in the proceedings of the paternity determination. The paternity can be determining by the court only when there is no father designated by one of the presumption or if previous paternity was denied.[42] Nevertheless, if there is a conflict between the legal and biological fatherhood, the possibility of correcting such status should not be absent in the legislation.

On the basis of the above mentioned, the decision-making practice of the Slovak Republic concluded that the Slovak law does not exclude the possibility for the person who claims to be the biological father of a minor child to bring the action for invalidity of the parents' consensual declaration. In the proceedings, the best interest of the minor child shall be a primary consideration and as a general interest shall be protected.[43]

Of course, there may be situations where both individual and general interests are on the side of maintaining designated paternity, even if it does not correspond to biological reality. For example, if positive strong relationship bonds have been formed between the designated father and the child. In this case, denying of paternity would be contrary to the best interests of the child and would be a disproportionate interference with the established social parenting.[44] It means, that the remaining individual interest of the biological father will not obtain legal protection consisting in the determination of his paternity.

Despite the possibility of biological father to bring an action for the invalidity of consensual declaration, he should also be able to bring an action to deny paternity in order to ensure the proper protection of the rights of the biological father. The right of denial of the putative biological father is not an exception in the conditions of the member states of the Council of Europe. Most states allow the putative

42 Judgment of the Supreme Court of the Slovak Republic of 22 June 2016, Case No. 5Cdo 492/2015.

43 Judgment of the Supreme Court of the Slovak Republic of 31 October 2022, Case No. 6 Cdo 224/2016, which was also published in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic under No. 68/2018.

44 Judgement of the European Court of Human Rights Ahrens v. Germany of 24 September 2012, Application No. 45071/09.

biological father to deny paternity determined by a consensual declaration, even if the legal father lived with the child in a social family relationship. The ECtHR[45] gives member states a wider degree of discretion in this matter, with regard to questions related to legal status of persons. The possibility of presumed biological father to bring an action to deny paternity is at the discretion of the member state.[46] Besides that, the Slovak law should be amended. In order to avoid the possible abuse of denying of paternity by presumed biological father, we would suggest two separate proceedings, just as it is when the action is brought by the child. However, the difference would be that a man who claims to be the child's biological father would not have to wait for the parents' denial periods to expire. This will ensure that he can start raising his child as soon as possible. In the first proceedings it would be examined whether the denial is necessary in the interests of the child. If the court were to come to the opinion that it was, a procedure to deny paternity would follow, in which DNA analysis would already have a fundamental role. Under the current legislation, in which possibility to bring an action to deny paternity by presumed biological father is not regulated, we agree with the above-mentioned interpretation allowing the defence of the biological father, consisting in bringing an action for the invalidity of the consensual declaration.

3. Denial of Paternity Established on the Basis of the Third Presumption of Paternity, Issues and Judicial Decision-Making.

As follows from the theoretical introduction, the Slovak law does not allow the denial of paternity determined by the third presumption. It is based on the nature of proceedings to determine paternity. In this procedure, the court determines, but at the same time denies, whether the man who is a party to the procedure is the father of the child or not. In the proceedings, the court applies the investigative principle and conducts all the evidence from which the question of paternity of the child can be concluded with certainty. If paternity is determined on the basis of a valid court decision, it creates a res judicata, so the established family law relationship is considered stable and legally certain.

The rigid legislation has already caused a problem. A woman after the sexual relationship with Mr. Paulík brought the action to determine his paternity. In the paternity proceedings, which took place in 1970, Mr. Paulík denied throughout that he could be the father.[47] During the proceedings, the court heard several witnesses, studied extensive documentary evidence, took into account the results of the blood test, known as the so-called a biological-hereditary examination and a

45 European Court of Human Rights.

46 Králičková, Z.: "§ 779 Druhá domněnka založená souhlasným prohlášením", in AA.VV.: *Občanský zákoník II. Rodinné právo* (§ 655–975), C. H. Beck, Praha, 2020, pp. 512 - 520.

47 Judgement of the European Court of Human Rights Paulík v. Slovakia of 10 January 2007, Application No. 10699/05.

report prepared by an expert in the field of sexology. On the basis of the obtained evidence, the court considered that the legal prerequisites for determining paternity had been proven. The court evaluated that Mr. Paulík had intercourse with the mother at the relevant time and there were no important grounds to rebut the presumption. Based on the legally binding decision of the court, the intended father paid maintenance, but he never had contact with the child, the daughter, because the mother was opposed to such contact. The daughter only found out about her father's existence when she got her first identity card. They met for the first time shortly before she graduated from high school. Subsequently, they began to build their family relationship, the father supported his daughter financially even after she got married and started a family. At the same time, they created an emotional bond. In 2004, Mr. Paulík had an argument with the daughter because of financial support and as the result of this argument she proposed that the issue of the applicant's paternity be retested. Based on this, the father, mother and daughter voluntarily submitted to a DNA blood test, which revealed that he is not the daughter's biological father.

Mr. Paulík subsequently tried to deny his paternity. He requested the Attorney General's Office, which stated that the court's decision determining his paternity is res judicata and that the prosecutor's office had no jurisdiction to bring an action for judicial review. Mr. Paulík wrote also to the Chairman of the National Council of the Slovak Republic and the Chairman of the Constitutional Law Committee to adopt the necessary legislative measures in order to reconcile the legal status with the biological reality and thus ensure the effective protection of his rights. He was not successful here either.

Although there had been advances in the methods of establishing paternity and the new evidence that Mr. Paulík is not the father, he had no remedy, ordinary or extraordinary, which would have enabled him under the Family Act or the Civil Procedure Code to reconcile the legal situation with biological reality. For this reason, he lodged a complaint with the Constitutional Court of the Slovak Republic against the prosecutor's office and the National Council. Mr. Paulík stated that the state authorities did not take adequate positive measures to protect his rights. The state authorities leave in force a condition that does not correspond to biological reality and creates a family-law bond between persons with legal consequences, even if the participants in this relationship know that they are not blood relatives and do not want to continue in this relationship. The Constitutional Court rejected the complaint, on the grounds that the prosecutor's office did not make a mistake and the complainant should have turned himself to the general courts, which could provide him protection. By not doing so, he did not exhaust the available remedies and his complaint is therefore inadmissible. It is important to add that the Slovak law did not regulate any substantive or procedural possibility

to change the status of determined paternity by the third presumption. Mr. Paulík therefore lodged an application with the European Court of Human Rights, mainly because of the non-fulfillment of the positive obligation of the Slovak Republic to respect his private and family life according to Art. 8 of the Convention by the fact that the national law does not grant him the legal measures of protection by which he could deny his paternity in accordance with new scientific methods and especially established biological reality.

The ECtHR found a violation of Art. 8 of the Convention by the fact "that a fair balance has not been struck between the interests of the applicant and those of society and that there has, in consequence, been a failure in the domestic legal system to secure to the applicant respect for his private life." Nevertheless, in this case, due to the impossibility of denying paternity, the complainant faces inconveniences in his personal and professional life (data on his paternity are contained in various public documents, his medical records and employment files, there is a potential possibility of adjustment of maintenance obligations towards relatives by the daughter, inheritance claims, etc.). His individual interest is thus disturbed and it also had implications for his social identity in a broader sense. In relation to the general interest of society, it should be noted that the complainant's alleged daughter was almost 40 years old, has her own family and is not dependent on the complainant for maintenance. The general interest in protecting her rights has lost much of its importance at this stage compared to when she was a minor child. Moreover, she was the one who initiated the DNA test and stated that she had no objection to the complainant denying paternity. Therefore, the absence of a procedure to reconcile the legal status with the biological reality seems to go against the wishes of the persons concerned and does not really benefit anyone.

At the same time, the ECtHR stated that in connection with Art. 8 of the Convention there was also a violation of the prohibition of discrimination according to Art. 14 of the Convention. The discrimination lies in the fact that paternity according to the first and second presumption could be challenged in a court through the institution of denial of paternity. The Court admits that the "legitimate interest" in maintaining legal certainty in family relationships and in protecting the interests of the child can justify a difference in treatment of persons interested in denying paternity, based on whether paternity was presumed, or was determined by a decision that became final and legally binding. "However, the pursuit of this interest in the present case produced the result that, while the applicant did not have any procedure by which he could challenge the declaration of his paternity, other parties in an analogous situation did." In the light of the above mentioned, the Court came to the conclusion that there was no reasonable relationship of

proportionality between the aim sought to be realised and the absolute means employed in the pursuit of it.[48]

Subsequently, after the ECtHR's decision, Mr. Paulík could file an extraordinary remedy, an action for reopen of the civil proceedings for determining paternity. Just in reflection on the proceedings in the case of Paulík v. Slovakia, the procedural regulation, Civil Procedure Code, was amended. In § 228 sec. 1 letter d) stated: "A final judgment may be contested by the participant by a reopening of proceedings petition if the European Court of Human Rights has decided or come to the conclusion in its judgment that the basic human rights or freedoms of the participant in the proceedings had been breached by the decision of the court, or proceedings that had preceded that decision and serious consequences of such breaching had not been removed by the subsequently awarded reasonable financial compensation."

Although the above mentioned legislation addressed the situation of persons who were successful with their complaint at the ECtHR, it was not preventive and required a time- and financially demanding process of exhausting national measures of protection and subsequent successful proceedings before the ECtHR. The current procedural regulation eliminated this deficiency, when in the amended procedural regulation, the Civil Procedure Code, in § 397 letter a); § 404 letter b) states: "An action for retrial is admissible against a final judgment, if there are facts, decisions or evidence relating to the parties and the subject of the original proceedings, which the person who filed the action for retrial could not have used in the original proceedings through no fault of his own, if they can lead to a more favourable decision for him or her in the matter, while the new evidence is related to new scientific methods that could not be used in the original proceedings"[49].

The Slovak republic did reflect on situations where it is necessary to deal with outdated scientific methods that could have caused incorrect decisions regarding the determination of parentage. However, the question of the discriminatory nature of such legislation, within which it is not possible to bring an action to deny paternity determined on the basis of the third presumption, still remains unresolved. It is possible to assume that even in the context of the case of Paulík v. Slovakia, a potential plaintiff who bring an action to deny paternity determined by a third presumption and final court decision could be successful in proceedings before national courts if he proves that there are legitimate individual and general interests in denying his paternity in the context of the protection of the fundamental rights of interested parties.

48 Judgement of the European Court of Human Rights Paulík v. Slovakia of 10 January 2007, Application No. 10699/05.

49 Števček, Marek. § 404 Prípustnosť žaloby na obnovu konania po uplynutí troch rokov od právoplatnosti rozhodnutia. In: AA.VV. *Civilný sporový poriadok*. C. H. Beck, Praha, 2016, pp. 1334 - 1335.

IV. CONCLUSION.

The article analyses the current legal regulation of determining and denying paternity in the Slovak Republic, synthesizes its deficiency and presents potential solutions of its negative aspects. Slovak legislation does not always reflect the needs of the present time, especially in the scope of assisted reproduction, or the possibility of reconciling the legal and biological father. The absent legal norms are complemented by the decision-making practice of the courts and the application of a teleological interpretation aimed at protecting the basic rights of interested parties. Especially in recent years, it can be seen that the dynamics of social relations require more and more flexibility in the interpretation of legal regulations, which corresponds to the legitimate expectations of individuals, but also of society as a whole. In the Slovak Republic there is a lack of a legislative initiative for amending such a legislation in which every party of the family law relationships will have the same opportunity to protect their rights, regardless of the assumption based on which paternity was determined, whether it is a married or unmarried couple, a legal or biological father. However, positive efforts and results in this direction can be seen in the decision-making practise of the Slovak courts, which correctly fills the gaps in the laws.

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