

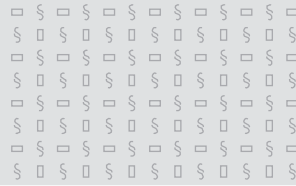


MASARYK UNIVERSITY
FACULTY OF LAW

CZECH FAMILY LAW

FILIATION
DETERMINATION OF PARENTHOOD

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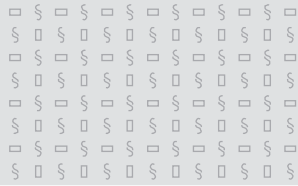
BIOLOGICAL, SOCIAL AND LEGAL ASPECTS

- HARMONY: idealistic approach
- DISHARMONY: national laws +
 - the UN CONVENTION ON THE RIGHTS OF THE CHILD (1989)
 - the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
 - Article 8:
„Everybody has the right to respect for his private and family life ... “
 - THE CHILD HAS THE RIGHT TO KNOW HIS/HER ORIGIN AND THE RIGHT TO FAMILY LIFE WITH HIS/HER PARENTS
 - THE PARENTS (each of them) HAVE THE RIGHT TO PRIVATE AND FAMILY LIFE



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WHO IS THE CHILD'S MOTHER?



MATER SEMPER IN IURE CERTA EST

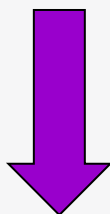
ROMAN LAW RULE

Julius Paulus
2./3. century



THE CONCEPTION OF STATUS LAW IN EUROPE

- France (1804), Italy, Luxemburg, Belgium:



- *recognition* of the child born out of the wedlock by the mother

- Austria (1811), Germany, Czech republic, Slovakia:



- blood/nature tie - mother is certain by the child's birth



EUROPEAN COURT OF HUMAN RIGHTS

- THE RIGHT OF THE MOTHER TO ESTABLISH THE STATUS MOTHER-CHILD, including property aspects

- Marckx v Belgium (1979)
establishment of affiliation had effect only between mother and the child, a child did not become a member of the mother's family



breach of Art. 8

„family life“ includes at least the ties between near relatives (grandparents and grandchildren)

- THE RIGHT OF THE CHILD TO GET TO KNOW HIS/HER ORIGIN

- Odièvre v France (2003)

the mother requested that the child's birth be kept secret

later:

- the child wanted to know circumstances, information about natural family, personal history, *not establish relationship!*
- the mother wanted to remain secret (no social, no legal, just biological tie) - private life



no violation of Art. 8



Czech family law de lege lata (AF: 50a)

THE RULE:

„The woman who bore a child is the child's mother“

PROBLEMS weakening the roman law rule

- the child births with the secret motherhood
(Act No. 422/2004 Coll.)
- baby-boxes
(reality)



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QUESTA PI PER QUATTRO SECOLI
FINO AL 1875
LA RUOTA DEGLI INNOCENTI
SEGRETTO RIFUGIO DI PALERMO E DI COLLE
ALLE QUALI PERSEI E SOTTERRANEE
QUELLA PARTA CHE NOS SEPERA DENTE



QUESTA FU PER QUATTRO SECOLI
FINO AL 1875

LA RUOTA DEGLI INNOCENTI
SEGRETO RIFUGIO DI MISERIE E DI COLP
ALLE QUALI PERPETUA SOCCORRE
QUELLA CARITÀ CHE NON SERRA PORTE



REALITY IN THE CZECH REPUBLIC

for details see www.statim.cz (25. 1. 2009)





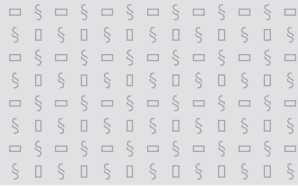
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WHO IS THE CHILD'S FATHER?



MATER SEMPER IN IURE CERTA EST, PATER INCERTUS

ROMAN LAW RULE



THE CONCEPTION OF STATUS LAW IN EUROPE

- tradition: conception of three legal presumptions based on probability (presumptions)
- inovation: certainty based on DNA?



EUROPEAN COURT OF HUMAN RIGHTS

■ Keegan v Ireland (1994)

*the child was born out of marriage, but there was informal long lasting relationship!
mother left the father and gave the child for adoption*

violation of Art. 8

■ Paulík v Slovakia (2006)

*fathership established by the court decision in 70's - res iudicata
discrepancy between legal position and biological reality (DNA)*

„The lack of procedure for bringing the legal position into line with biological reality flies in the face of the wishes of those concerned and does not in fact benefit anyone“

violation of Art. 8

■ Kňákal v the Czech Republic(2007)

acknowledgment of paternity by a man, who knew before the child's birth that he was not her biological father

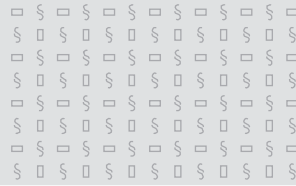
no violation of Art. 8

■ Kroon and others v the Netherlands (94)

child was born into marriage, mother „lived“ with another men + other children of his

„The respect for family life requires that biological reality prevail over a legal presumption“

violation of Art. 8



Czech family law *de lege lata*: the first presumption

- marriage - ex lege:

§ 51 (1): „If the child was born during the period from entrance into the marriage to the lapse of the three hundredth day after the extinction of the marriage or after declaration of its invalidity, the mother's spouse is presumed to be the father“

- the right to deny the presumption:

§ 57 (1): „The husband may deny his fatherhood before court within six months from the day when he learnt of the fact that his wife bore a child“,

§ 59 (2): „Within six months from the child's birth, also the mother may deny that her husband is father of her child.“

child: NO



Czech family law *de lege lata*: the second presumption

- mutual consent - declaration

§ 52(1): „Otherwise, the presumption of fatherhood shall point to the man whose fatherhood was determined by a consent declaration of parents done before the register office or before court.“

- the right to deny the presumption:

§ 61 (1): The man whose fatherhood was determined by the consent declaration of parents may deny his fatherhood before court only if it is excluded that he could be the father and only within six months from the day when the fatherhood was determined in this way; this period shall not elapse before the lapse of six months from the child's birth.

(2): Also the mother may deny within the same period that the man whose fatherhood was determined by a consent declaration of parents is the father.“

Child: NO



Czech family law *de lege lata*: the third presumption

- sexual intercourse
- § 54: „(1) Unless the fatherhood was determined according to the previous paragraphs, the child, the mother or the man claiming himself to be the father may ask the court to determine the fatherhood.
(2) The presumption of fatherhood shall point to the man who had sexual intercourse with the child's mother at the moment from that no less than one hundred and eighty and no more that three hundred days elapsed to the child's birth, unless his fatherhood is excluded by significant circumstances.“



MODEL FAMILY CODE

(Schwenzer, I., Antwerpen/Oxford: Intersentia, 2006)

- INTENTIONAL PARENTAGE (not relevant, whether there is marriage or cohabitation or not):
„Legal parent is the person who, with the consent of the birth mother, intentionally assumed parentage for the child“
- COURT DETERMINATION/ADJUDICATION:
„Legal parent is the person determined by judicial adjudication to be the genetic parent of the child“
- *Czech Constitutional Court*
decision from 28. 2. 2008, I ÚS 987/07 - AF: „archaic“