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NOTIONS AND CONCEPTS IN FAMILY LAW. DISCREPANCY BETWEEN POLISH FAMILY LAW AND SOCIAL REALITY

Abstract. Modern times are an arena for two opposing trends: the liberalization of mores and laws, and the distancing of changes and adoption of a conservative position against those that occur. Polish family law clearly fails to keep pace with the changes taking place and does not perceive new phenomena. Is this an intentional act of the legislator leading to the preservation of traditional values, or the expression of disapproval and belief in the transitoriness of new phenomena? It comes together with the introduction of new terminology or new interpretations of already existing concepts. Hence the meaning of some of the current concepts in everyday language differs significantly from their meaning arising from legal instruments. The article is an attempt to deal with this problem.

Keywords: Family law, legal definitions, family, mother, father, the best interest of a child.

Essential notions of the Family Law

Modern times constitute an arena for cultural transformation that involve relations of a family nature. They are based on other than the earlier perception of individuals who could be considered “closest persons” and for this reason could be called family members. That means, firstly, a departure from the model of a large family, which includes spouses, their children, as well as grandparents, uncles and aunts – in the direction of the so-called nuclear family consisting only of parents (spouses) and their children. Secondly, it means extension of the circle of persons constituting the nuclear family – with partners from unions that are not marriages in the traditional sense. The influence on changes in the understanding of the family also arises from the development of medical science, especially in the field

of artificial procreation. Following it, was an ability to “manipulate” kinship with the use of fertilized cells of donors, whose identification may be impossible or difficult to establish, but also use of the opportunity to replace women – carriers of pregnancy. According to American doctrine and practice, the most significant determinants of contemporary family relations are now: 1) an extremely large number of children in foster and kinship care, 2) advances in medical technology leading to extraordinary situations being treated as commonplace, 3) rise in divorce rates providing a rise in numbers of stepparents and so called blended families, 4) increasing number of singles and same-sex couples willing to be parents through assisted reproduction or adoption (Wald, 2006–2007: 380, 381). From the perspective of Polish reality it is difficult to assess the influence of all four determinants on changing social perceptions of the family, but a role in this matter should be attributed at least to the second and the last of them. It seems that a lot of Poles would have signed up to the American thesis: “surrogacy is fast becoming one of the most traditional of the “nontraditional” ways of conceiving a child” (Wald, 2006–2007: 384), wishing to treat it as a proclamation of an opportunity for their own future procreation.

The importance of changes should indeed be judged from the perspective of their impact on family law. Traditionally, it regulates relations within marriage, understood as a union of man and woman and kinship – with special emphasis on parent–child relations. In the sphere of interest of family law there is a formal relationship between man and woman, and a relation between parent and child based on kinship. What then, is the connection between other types of relations or other relations existing in social life and family law? What importance, from the point of view of family law, has giving relations specific names or notions, and even defining them? The simplest answer to both questions would be: none. However, it seems that despite the great rigor of family law, some of the connections exist, and that a certain significance of naming new social phenomena can also be noted (see: Scherpe, 2016; Fiedorczyk, 2012: 357–371).

Family

Although family law regulates the issues of family life, it has not been defined by it. It also does not define marriage (only determining its conclusion) or paternity (it contains only presumptions concerning the mother’s husband or a male having sexual intercourse with the mother of a child at a certain time).

Based on Article 1 of the Polish Family and Guardianship Code, we can formulate and interpret the notion of marriage as the union of man and woman (because union other than marriage could not be concluded, and also because any other union could not be concluded as marriage), which is strongly supported by the constitutional regulation contained in Article 18 of the Polish Constitution of 1997, formed as a kind of support for the concept of marriage as the existing concept – occurring for thousands of years in European legal culture (Safjan, Bosek, 2016: 478). However, defining the father as the mother’s husband or just a person participating with her in the act of procreation could be obviously insulting to some individuals and not reflective of the bond between parent and child.

In the light of the twentieth century sociological definition of Z. Bauman, originating in the 60s, a family is a socially-approved form of permanent coexistence, composed of individuals connected by what the prevailing social custom considers blood relationship, marriage or adoption, residing under the same roof. It means that it consists of individuals – members – co-operating with each other within a socially recognized internal division of roles, including the most important – giving birth to, maintaining and upbringing children. One can name them using terms associated with the socially recognized method of measuring kinship and origin (Bauman, 1962: 250).

In this definition great importance was attached to the social recognition or the social acceptance of certain conditionality or roles performed in the family. Can it be said that family law to the same extent as sociology avails a social existence, function or perception of family? If the prevailing social custom recognizes a certain relation as blood relationship or marriage, then should the law be adjusted to social expectations, or just uphold traditional values, not having regard to changing reality? Should it, for example, encompass so-called queer family law, meaning “law that supports the establishment and maintenance of queer-families, which include families of lesbian, gay, bisexual, and transgender people as well as families of heterosexuals that do not fit comfortably within the common contours of the nuclear family” (Shapiro, 2011–2012: 510)?

Considerations concerning the legislator’s definitional intentions relating to the notion of family can be started from attempting to identify individuals who are members of this fundamental cell of society. It is an uncomplicated task, possible to be completed based on analysis of the provisions of the Family and Guardianship Code. Reconstruction of the composition of family can also be held on the basis of the position of doctrine which, although fairly consistently assumes to restrict the use of the notion of

the family to the spouses and their (common or not) children (Winiarz, 1986: 436–439; Walaszek, 1970: 279; Grzybowski, 1980: 11; Smyczyński, 2001: 4; Garlicki, 2003: 3, 4). However, among the criteria of belonging to the family, it locates (in addition to kinship, marriage, adoption, affinity and foster family) remaining in the same household (Wiśniowska, 1990: 360; Bagan-Kurluta, 2009: 330). Social perception of a partner as a family member is not confirmed by the provisions of family law, but living together and a bond in the form of a common household may already be a contribution to the treatment of such individual as a part of the family. It means that a cohabitant can be treated as a family member not by reason of ties linking him with the other person and her offspring, but due to living in a common household with them. If the couple are not married and do not live together then they will not be recognized and treated as members of the same family, despite the different types of bonds existing between them. A married couple, on the other hand, will remain a married couple and members of the same family, even if they live separately. W. Borysiak, commenting in 2016 on Article 18 of the Constitution, states that any regulation which permits a formal registration of relationship/union other than marriage would be incompatible with the constitutional regulation (Safjan, Bosek, 2016: 485). Trying, on the basis of the voices of doctrine and case law, to give shape to this as yet undefined family, he indicates that: 1) this notion is directly connected with the word “give birth”, hence the justification for the use of the name to denote a group of people created by the birth, and therefore including the parents and their child or children (Decision of the Constitutional Tribunal dated 12 April 2011), 2) membership in the family is acquired by birth or establishing a family relationship on a different legal basis, 3) it is a complex social reality which is the sum of the relations mainly between the parents and children (Decision of the Constitutional Tribunal dated 28 May 1997), 4) a family is linked to a marriage, and its existence presupposes the existence of children (Safjan, Bosek, 2016: 487).

It follows that the foundation of the family is marriage and its main function is procreation. Manifesting the weight of common origin or blood ties, however, may lead to producing unintended consequences, including the removal from the circle of family members of children who were born in the aftermath of artificial procreation, and whose genetic parents are the donors of the ovum and sperm. And, paradoxically, the fact of being a member of the family does not prejudice that his legal situation would be governed by the provisions of family law, because “the family as a group of individuals linked by bond based on origin, exists independently of whether

the law regulates it” (Safjan, Bosek, 2016: 487), which can also be addressed to persons whose ties do not arise from a common origin.

Mother

The notion adopted for the identification of the person with the most fundamental importance for the child and then for an adult, is in fact ambiguous, although its legal definition was introduced in Polish family law. Thus, in some situations, we cannot reliably answer the question: who is the mother of the child or at least we have doubts.

Reliability of the response will require research into the facts and the law, and then it may turn out that our belief about the actual origin of the child from the woman is not reflected by the rules governing motherhood. According to the Roman maxim *mater semper certa est*, mother was the woman who gave birth to a child, because the fact of birth (easy to demonstrate and prove) testified to kinship. Taking into account modern terminology, today such a woman could be called: the biological mother (a term which once meant kinship, now represents rather a woman who carries the pregnancy and gives birth to a child), gestational mother (a term meaning carrier/bearer of pregnancy) and genetic mother (a woman linked by genetic kinship with a child – related to it by genes). With great success one could also assign her the title of social and legal mother, in the context of the existence of three types of parenthood: legal, genetic and social, of which the first represents motherhood in the legal sense, including assigning the role of the mother (parent), the next – the origin of the genetic material, the last refers to the actual exercise of the function of the mother (parent) in the life and upbringing of the child (Re G, Residence: Same-sex partner). There are at least four types of parenthood in the biological sense which are discussed in the literature: genetic – resulting from the genetic origin of the child, coital, as a consequence of sexual activity and a connection of sperm and ovum, gestational (carrying a pregnancy) and postnatal, resulting from raising a child after its birth (Herring, 2007: 307; Johnson, 1999: 47–57). In the light of the Dictionary of the Polish language the word “mother” means a woman who gives birth to a child and usually rears it (<http://sjp.pwn.pl/sjp/matka;2481829.html>), in the view of Black’s Law Dictionary (<http://thelawdictionary.org/mother/>): a woman who has borne a child; a female parent; correlative to a “son” or “daughter” (having a mutual or reciprocal relation, in such sense that the existence of one necessarily implies the existence of the other), the

term may also include a woman who is pregnant (*Howard v. People*). Due to the availability of replacing a woman in becoming pregnant and giving birth to a child, the notions determining the persons who participate in such a transaction also appeared: the surrogate mother and the intended mother. The pivotal role in pursuing surrogate motherhood in some cases may also be played by the donor of an ovum, which, despite the fact that the donor often remains anonymous, she is the genetic mother of the child. Besides, in connection with completely different circumstances in the child's life, we meet the terms: foster mother and adoptive mother.

One observation emerges from reflections on this tangle of titles and definitions: although in modern times, most of the relations between a woman and a child can be reduced to the traditional Roman formula, beyond the pale of it there are cases in which individual functions of motherhood are distributed to several women. Assuming that the genetic relatedness is the sole determinant of motherhood, no other circumstance or function performed by the woman should have significance in terms of treating her as the child's mother. The same applies to adoption of the biological/gestational relationship, reduced to wearing pregnancy and child birth, as the sole determinant of being a mother. In the Polish regulation of motherhood, included in the Family and Guardianship Code, just this last determinant has been adopted, unfortunately not giving a chance to verify the existence of a genetic kinship between mother and the child (Krekora-Zajac, 2014: 129–147).

Social demand for the services of surrogate mothers has not found favor with the legislator, who, while introducing the Act of 25 June 2015 on infertility treatment, omitted the issue completely and, judging by Article 5.2. of the act – he even sought to eliminate it. Under this provision, the procedure of artificial procreation is the final alternative after at least 12 months of other infertility treatment. Surrogate motherhood itself comes down to the fact that the woman, who under no circumstances can be infertile, gives birth of a child to the other woman, man or a couple. Where the child is genetically related to her, it is called traditional surrogacy. As a rule, however, the child is not related to the surrogate mother, and its birth results from a connection of genetic material of the intended parents or of one of them and a donor or of two donors. In the light of the Act, judging by the wording of Article 5.2., a couple, suffering for a long time due to infertility may undergo the treatment of artificial procreation. In this formula, there is no place for the surrogate mother, unless you assume that Article. 5.2. refers only to one person of the pair trying to have a baby. However, a whole set of criminal provisions and provisions imposing administrative fines relat-

ing to any commercial aspect of surrogacy, seems to express the legislator's intention clearly and obviously.

Father

This term should mean only one man who is genetically related to the child. Historically, certainty of kinship was significant mainly due to property relations and the transition of property from father to son, after the death of the former. Consequent to the previous regulation, the current provisions generally describe a man genetically related to a child as his father, optionally or additionally a man fulfilling those statutory conditions of fatherhood or presumed fatherhood, finally – a man who is a father in the light of the rules governing artificial procreation, if they exist (Herring, 2007: 310; Bagan-Kurluta, 2012: 174). The application of genetic criterion is evident here, and also evident is the giving of exceptional approval for shaping fatherhood differently, and from the will of the alleged father using other than genetics criterion, i.e. the criterion of intent to have a child, only while applying the procedure of artificial procreation. This manner of establishing fatherhood follows from the provisions of the Family and Guardianship Code.

Shaping parenthood in this way fundamentally differs from the establishment of motherhood – and therefore the use of the biological criterion (birth), regardless of the genetic link between a woman and a child, and completely without regard to the intent of a woman. Paradoxically, however, it may appear that more likely in marital practice the genetic relatedness is more frequently a determinant of motherhood than of fatherhood. But coping with problems of criteria and determinants of parenthood is left to people who are not married.

The best interest/welfare of a child

One of the solutions applied to the establishment of parenthood is the application of the criterion or standard of the best interest of a child (or child welfare). The term “establishment of parenthood” in this context should be understood in two ways. Firstly, and what is predominantly applicable in the US, the standard of the welfare of the child can be treated as one of the criteria in deciding on parenthood (and therefore on motherhood or fatherhood), in addition to genetic, biological/gestational criterion and also

the criterion of intent to have and bear a child. The court, deciding on the parenthood, may decide that a so-called natural parent (mother, father) is someone unrelated to a child, like his father's wife. Polish family law, despite the fact that it is subordinated to application of the principle of the best interest of a child, does not provide for establishing the child's origin due to its welfare. However, it is possible and even necessary to take into account the standard when assigning a role of a parent to a certain person – apart from other criteria of establishing parenthood – biological in the mother's case and genetic in that of the father.

The problem with using the criterion in both cases, again is linked to the lack of definition of the term – “welfare of the child” or “best interest of a child”. While in the North American regulations there are relevant considerations/factors indicated to be applied while assessing the welfare of a child in a specific situation, in Poland for many years, there was discussion on the need to define the concept, strongly critical towards such undertakings. For example, subjecting the child to adoptive proceedings in Ontario, Canada, will involve taking into account the child's best interest, which in this case would mean taking into consideration those of the following circumstances of the case considered relevant: 1. The child's physical, mental and emotional needs. 2. The child's physical, mental and emotional level of development. 3. The child's cultural background. 4. The religious faith, if any, in which the child is being raised. 5. The importance for the child's development of a positive relationship with a parent and a secure place as a member of a family. 6. The child's relationships by blood or through an adoption order. 7. The importance of continuity in the child's care and possible effect on the child of disruption of that continuity. 8. The child's views and wishes, if they can be reasonable ascertained. 9. The effects on the child of delay in the disposition of the case. 10. Any other relevant circumstance (<https://www.ontario.ca/laws/statute/90c11#BK215>). According to Families (750 ILCS 46/) Illinois Parentage Act of 2015 (<http://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=075000460HArt%2E+6&ActID=3638&ChapterID=59&SeqStart=4300000&SeqEnd=6600000>), it is in the child's best interests to deny genetic testing, taking into account the following factors: a) the length of time between the current proceeding to adjudicate parentage and the time that the presumed, acknowledged, or adjudicated parent was placed on notice that he or she might not be the biological parent, b) the length of time during which the presumed, acknowledged, or adjudicated parent has assumed the role of parent of the child, c) the facts surrounding the presumed, acknowledged, or adjudicated parent's discovery of his or her possible non-parentage, d) the nature of the relationship

between the child and the presumed, acknowledged, or adjudicated parent, e) the age of the child, f) the harm that may result to the child if the presumed, acknowledged, or adjudicated parentage is successfully disproved, g) the nature of the relationship between the child and any alleged parent, h) the extent to which the passage of time reduces the chances of establishing the parentage of another person and a child support obligation in favor of the child, i) other factors that may affect the equities arising from the disruption of the parent–child relationship between the child and the presumed, acknowledged, or adjudicated parent or the chance of other harm to the child, and j) any other factors the court determines to be equitable. The most common factors prescribed in American state statutes for determination of best interest of a child are: 1) the emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers, 2) the capacity of the parents to provide a safe home and adequate food, clothing, and medical care, 3) the mental and physical health needs of the child, 4) the mental and physical health of the parents (Determining the Best Interest of the Child, 2012: 3). While, according to the case law, the best interests test is applied in the court to help the child become a well-integrated person who might reasonably be expected to be happy with life (Gostin, 200–2001: 436–448, *In Re Baby M*). Even before the statutory regulations on adoption or other matters essential for a child were adopted, the nineteenth-century American courts repeatedly referred to the issue of welfare of the child. From the judgments delivered between 1840 and 1850, one can extract certain principles of adjudication on matters concerning it: 1) children in the so-called “tender age” (up to 12 years), or in poor health should be placed under the care of women, 2) boys older than 11 years should remain under the care of fathers, 3) the court should take into account the emotional and sentimental ties connecting the child with the others, 4) the court should listen to the child and have regard to his opinion (Zainaldin, 1978–1979: 1072–1074).

In the Polish doctrine W. Stojanowska, while writing about the Convention on the Rights of the Child, emphasizes that the welfare of the child should be considered as a superior good in the application of any rule of law having connection with a situation of the child. According to her, the best safeguard of the welfare of the child is to provide a full and harmonious development of personality, implemented through upbringing in a family environment, in an atmosphere of happiness, love and understanding (Stojanowska, 1999: 83–84). Being a supporter of the concept of contextual defining, based on consideration of the meaning of the term used in the various regulations, she adopted that the term welfare of the child within the meaning of family

law represents the complex value of an intangible and material nature necessary for the proper physical and spiritual development of the child and to properly prepare him for work corresponding to his abilities, these values are determined by a variety of factors, the structure of which depends on the substance of the specific norm being used and the specific, currently existing situation of the child, assuming the convergence of so-understood welfare of the child with the public interest (Stojanowska, 1979: 23–27, Stojanowska, 1999: 98). According to other concepts: 1) the child's welfare is the set of values, both spiritual and material, which are necessary for: a) the child's proper physical development, b) the proper spiritual development of the child, also in both its aspect – intellectual and moral, c) soundly preparing the child to work for the good of society (Kołodziejski, 1965: 30), 2) the welfare of the child, seen as a general clause, introduced to the Family and Guardianship Code, refers in all matters of the child to moral values, precisely formulated in academic writings, and as one of the main principles of family law, determines the structure, content and functional operation of the rules of the Code, also it is a practical attempt to enforce the principle of subjectivity of the child in the concept of human rights (Balcerek, 1986: 97), 3) implementation of the welfare of the child will lead to achievement of the state of psychological, emotional, sentimental and material comfort by him, and it is carried out when it is possible for him to exercise his human rights (Bagan-Kurluta, 2009: 359–360), 4) the best-understood welfare of the child is the natural order of concern for the person immature and dependent on others, having him in mind (Smyczyński, 1999: 47). The courts repeatedly have tackled the issue of welfare of the child. Already in 1952 in the Guidelines on Justice and Judicial Practice (dated April 26, 1952), The Supreme Court held that the welfare of minors occupied in the social hierarchy of values an overriding position and was particularly protected. However, in the Directional Recommendations on Enhancing the Protection of the Family from 9 June 1976, the Supreme Court determined the understanding of welfare of the child and the related principle of the welfare of family in such a way that the protection of interests of the child was reflected in the legal provisions of law on marriage and the principle of welfare of the child adopted in family law meant that the interests of the child shall decide on matters of exercise of parental authority and custody, and also it indicated the direction that case law should take in family matters.

Because of its blanket nature, the notion of the welfare of the child is difficult to define. It is easier to treat it as a mechanism for protecting against objective treatment of the child in each individual case perhaps in a different way – depending on the circumstances.

Conclusions

Despite the rigor of family law and the legislator's unwillingness to provide changes, new phenomena and changed perception of the old institutions may be a starting point for new regulations in future. Lack of a legal definition sometimes may lead to more satisfactory outcomes of legal procedure, than the existence of one. The best interest of a child standard can be treated as a very useful instrument, especially when dealing with disputes concerning parenthood.

The Polish legislator has consistently failed to see social changes that could affect the making of family law more congruent to social needs. Whether this is due to lack of knowledge of the needs or an unwillingness to meet them, is unknown. Perhaps it results from the conviction of the necessity to maintain the traditional legal order forced by provisions of law – and thus to make the law an instrument of the protection of traditional values. Hence, reality differs somewhat from the legal model of the family.

It is not entirely clear who is part of the family and what the term “family” means. If we assume that being a member of the family does not prejudice extending the provisions of family law on him, it should be considered whether the defining of a family or appointing a circle of its members has any significance in terms of the law. Also, the socially accepted manner of treating persons from outside the family circle as family members has, in terms of designated law and the voices of doctrine, no relevance to family law.

The legislator has introduced two concepts that defined or semi-defined the issue. The meaning of marriage is clear, as the union of man and woman. This stems from Article 18 of the Constitution and the regulations contained in the Family and Guardianship Code. Equally obvious is the legal meaning of the term “mother”. In both cases, the question arises whether, if these meaning in social perception differ from the contents attributed to legal concepts should we consider the advisability of introducing changes in the law? The notion of father has been designed with presumptions – fatherhood remains dependent on motherhood, it is a derivative of it. However, if we do not know who in fact is the mother of the child, how can we say anything about fatherhood?

The welfare of the child does not have a legal definition and the law does not give guidance on the proceedings. When truly treating all the rules of family law relating to children as an expression of the implementation of welfare of the child principle, and application of a provision leads to a situation obviously contrary to the best interests of the child, is it possible

to waive the application of such provision? Considering it possible, the court for example deciding about motherhood of an individual (and therefore about the meaning of the notion “mother”, which in this context is unclear) would use the welfare of the child criterion (a blanket concept of vague meaning).

The term “best interests of the child” is unclear and if we were to interpret it, or any other such vague concept, with a second unclear, what results would ensue?

The application of this criterion could also lead to unusual effects, for example, the suggestion mentioned in academic writing to remove divorced judges from judging divorce cases in which the issue of the welfare of a child is investigated (Pankiewicz, Wszendybył, 2016: 130).

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