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Mater Sempre Certa Est – Should We Register Transsexual Woman-to-Man as a Father? Remarks on the ECHR Judgment O.H. and G.H. v. Germany

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Abstract: The study is designed as an in-depth interdisciplinary report of the case O.H. and G.H. against Germany, which was analyzed by the European Court of Human Rights in Strasbourg (ECHR). The authors explain why the best interest of the child should prevail over the interests of a trans man, who gave birth to a child and requests to be registered as the father of the child. One of the reasons is *mater semper certa est*, a universally known principle of Roman law stating that "the mother is always certain" and no counterevidence can be made against this principle. In this regard, the best interest of the child and the child's right to know his or her origin shall be observed. There are also several other life areas, that would be negatively impacted by breaking this principle.

1. Introduction

The Latin maxim *mater semper certa est* ("the mother is always certain") resolves the question of a child's relationship to his or her mother. It is a Roman

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law principle, which has the power of *praesumptio iuris et de iure* (literally: presumption of law and by law), stating that no counterevidence can be made against this principle.[1] Most of the world's legal systems accept it as it provides certainty that the mother of a child is conclusively established biologically, from the moment of birth, by the mother's role in the birth. The Roman law principle however does not stop at the mother and continues with *pater semper incertus est* ("the father is always uncertain") and e.g. the Czech law then sets three presumptions of paternity.[2] One is regulated by the law of *pater est, quem nuptiae demonstrant* ("the father is he to whom marriage points"). The same approach is adopted in the Slovak legal system.

The social relationship between a parent and child has its fundament in the biological consanguinity that exists between them. It is established by conception on the father's side and by giving birth to the child on the mother's side. It depends on whether the social convention admits such consanguinity also from the legal point of view, that is, whether it acknowledges the origin of the child from a certain mother and a certain father. Legal systems establish specific rules for such cases upon which maternity and paternity are determined.[3]

Older legal regulations emerged from the above-mentioned old Roman principle *mater sempre certa est*, which means that the woman who gives birth to a child is the child's mother (maternity is given by birth). The valid Slovak Family Act has preserved this construction,[4] and so did the Czech Family Act.[5] The birth of the child is not only a fact from which the origin of the child from a certain mother is being deduced but it also provides the basis for the legal relationship between the mother and the child with all legal consequences foreseen by legal regulations. Mutual rights and obligations between the mother and the child arise by the child's birth and

1 Aaron X. Fellmeth and Maurice Horwitz, *Praesumptio iuris (et de iure): Guide to Latin in International Law* (Oxford University Press, 2011).

2 Petr Novotný, Jitka Ivičičová, Ivana Syrůčková, and Pavlína Vondráčková, *Nový občanský zákoník: Rodinné právo*, 2nd ed. (Praha: Grada Publishing a.s., 2017).

3 Gabriela Kubíčková, "Substantive Civil Law," in *Občianske právo hmotné*, ed. Ján Lazar, 2nd ed. (Bratislava: Iuris Libri, 2018).

4 Zákon o rodine a o zmene a doplnení niektorých zákonov, February 11, 2005, Zákon č. 36/2005 Z. z.

5 Petr Novotný, *Nový občanský zákoník. Právo pro každého*, 1st ed. (Praha: Grada, 2014).

they cannot be disposed of and may not be waived. The legal bond between the mother and the child thus has its basis in their consanguine (biological) bond. Paternity of a certain man to a certain child is being deduced from the maternity of a certain woman to that child and her relation to a certain man as the genitor of the born child which means in fact that the father cannot be determined unless the mother of the child is determined.

There is no need to review genetics to determine maternity, as the origin of the child is a demonstrative objective reality (by virtue of the connection of the woman to the child through carrying the child and giving birth to the child). Meanwhile, in the case of paternity, there is no certainty that a specific man conceived a specific child and is thus that child's father (*pater incertus est*). The paternity of a man is determined by legal presumptions or must be determined by a court of law (presumption of paternity of the spouse and so on). These presumptions are construed in the way that the legally determined paternity corresponds to the biological paternity.

The purpose of the cited legal regulation is the protection of the best interest of the child defined by Article 3 of the Convention on the Rights of the Child[6] and the attempt to fulfil the child's right to family by assigning it immediately after birth a mother and father who will provide for the fulfilment of further rights, mainly the rights to parental upbringing and care.

In this article, we would like to explain why we fully agree with the decisions of the German Courts in the case, which concern the registration of O.H., a person who underwent female-to-male transition, under his former female first name as G.H.'s mother in the birth register.[7] This case was pending before the European Court of Human Rights (hereafter the "European Court" or ECHR) and the German Courts' decisions were subject to assessment before it.

6 United Nations, Convention on the Rights of the Child, 20 November 1989, General Assembly resolution 44/25.

7 ECtHR Judgment of 6 February 2019, Case O.H. and G.H. v. Germany, application no. 53568/18; 54941/18, hudoc.int.

2. The Case O.H. and G.H. against Germany before the European Court

According to the ECHR's review, O.H. changed his female forename to a male forename in 2010. In 2011 he changed his female registration to a male registration in the public records and subsequently, he became pregnant through self-insemination from an anonymous sperm donation. After having interrupted hormonal treatment related to gender reassignment, he gave birth to G.H. in 2013.[8] The applicants requested O.H. to be registered as the father of G.H. in the birth register.

In this case, the Berlin (Neuköln) authorities requested legal advice from the courts. Based on decisions of the Schöneberg District Court and appeal decisions of the Berlin Court of Appeal and the Federal Court of Justice, the Neuköln Registry Office registered O.H. under his former female forename as G.H.'s mother in the birth register. The applicant raised a subsequent complaint before the Federal Constitutional Court; however, it was unsuccessful.

The German courts maintained that a trans man who gave birth to a child after making the final decision to change gender is in the legal sense the mother of the child. He is registered in the child's birth records as well as in the child's birth certificate and the excerpts therefrom, if the data of the parents are listed therein, as the "mother" under his previous female name. The German Federal Court of Justice concluded that such an approach is not contrary to the German Constitution and maintained that the fundamental rights of the applicant as a transsexual person are not affected: his identity was changed and taken into account and the person's right to family was not violated. The right to protection of personality and to change of identity is limited in the legal system, for the sake of protecting the interests of other persons, for instance, a child. The fact that a person has reached a point where they feel the need to transition to a different sex may not influence the legal position of the child, which is guaranteed in the stable regulation of parenthood in the Civil Code. The German law of descent emerges, like in other legal systems, from the parenting or reproductive function of the family. Such function relates to the biological sex of the parent. In the view of the Federal Court, potential legal disputes

[8] Ibid.

concerning rather extraordinary cases of small groups of transsexual people should be settled upon the existing regulation of parenthood without amending the main fundament thereof.

According to the law, the mother is the woman who gave birth to the child, while the father is the man who had a certain relationship with the mother. The determination of maternity is important because the determination of paternity normally derives from it. The law reflects this fact and aims at attaining conformity between the biological and legal reality. The Federal Court ruled that the purpose of the legislation was to assign parents to children in a way that does not conflict with their biological conception in the form of double maternity or double paternity. The right of the child to know their origin must not be neglected either. The Federal Court also pointed to situations where the parent was reassigned to the former gender and, in this context, raised the question of stability for the child. According to the information in its possession, in the years 2011–2013 in Berlin, 10 transsexuals requested to be reassigned to their former gender.

These applicants complained before the European Court under Article 8 (Right to respect for private and family life), Article 14 (Prohibition of discrimination) in conjunction with Article 8, and Article 3 (Prohibition of torture) of the European Convention on Human Rights (hereafter the "Convention") of the fact that O.H. was not registered under his current forename and as G.H.'s father, but under his former female forename and as the child's mother.[9]

They complained of the fact that this registration fundamentally contradicted their perception of their relationship. Furthermore, they complained that the registration required both applicants to frequently disclose O.H.'s transsexuality. This case was communicated to the German Government on February 6, 2019.[10]

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9 Council of Europe, European Convention on Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

10 ECtHR Judgment of 6 February 2019, Case O.H. and G.H. v. Germany, application no. 53568/18 and 54941/18, accessed June 22, 2022, https://laweuro.com/?p=925.

3. Parent-Child Relationship, Identity of the Child, Legitimacy, and Necessity of State Intervention with Their Rights

The essence of the O.H. and G.H. case lies in the impossibility of registration of the applicant giving birth to the child as the father of the child on the child's birth certificate, objected to on the grounds of Article 8 and Article 14 in conjunction with Article 8 of the Convention against a violation of his rights by the fact that on the birth certificate he cannot be listed as the father of the child under his current name, but is forced to be registered as the child's mother under his former female name. Together with his child, they complained that such a record was in fundamental contravention of their perception of their mutual relationship and brought about the risk of disclosure of the applicant's transsexuality in everyday life.

Two interests collide in the present case: one is the interest of the transsexual parent wishing to create a family, respected by society, and wanting to live under his new name, corresponding to his gender of choice. The other is the best interest of the child who has the right to know his origin which is guaranteed by stable legal regulation of parenthood corresponding to the biological reality.

The European Court in its previous case law reiterated that the best interest of the child may prevail, depending on its nature and relevance, over the interest of the parent. The first and most important aspect of the case is the question of the right of the child to personal identity, family, and personal care and education by his or her parents. The question of parenthood belongs to serious legal questions because its legal regulation predisposes the personal status of the child, the personal status of the mother, and the personal status of the father. Through the parental relationship the child is, in a certain way, included also in the wider community and the entire society. A timely determination of the father and mother contributes to the stability and security of the parental relations. Also, in cases concerning the determination of parenthood and in the legal regulation of the relationship between parents and children, the best interests of the child shall be a primary consideration. The legal system traditionally protects the weaker party which in the case of parental legal relation is the child.

If the maternity of the woman in labor is doubted (the first applicant does not identify himself as a mother), there should be a legal situation of determination of paternity where the sperm donor would be considered

as the father in the first place, as he would be the biological originator of the child. In the case O.H. and G.H., the donor appears to be unknown but, in practice, there may be situations in which the child would be conceived naturally and the man conceiving it would apply for the recognition of his paternity. In such a case the courts would face the question of concurring paternity.

In general, it may be added that the legal systems of states, their judicial practice, and also the European Court's case law incline to recognize the biological reality.[11] In such a case where the court would most probably decide on the paternity of the originator of the sperm and the question of the position of the man who gave birth would not be resolved. With regard to the impossibility of "double paternity," one solution appears possible, which is the one preferred by the German authorities; namely, preserving his role as the mother. In the end, the fact remains that the applicant, by his pregnancy and giving birth to the child, manifested his female biological reality, corresponding in society with the role of the mother, even though he legally adopted the identity of a man.

Furthermore, the birth certificate of the child where the mother did not figure, and only the man who gave birth to the child would be listed as the father, without a mention of the donor of the sperm, would in the future disable the fulfilment of the right of the child to know his parents, granted by Article 7 of the Convention on the Rights of the Child.[12] As the European Court noted in the case Odièvre v. France, birth, and in particular the circumstances in which a child is born, form part of a child's, and subsequently an adult's private life guaranteed by Article 8 of the Convention.[13]

As in Mikulić v. Croatia,[14] and Gaskin v. the United Kingdom, no. 10454/83[15] the respect for private life requires that everyone should be able

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11 See: ECtHR Judgment of 14 January 2016, Case Mandet v. France, application no. 30955/12, hudoc.int.

12 UN General Assembly, Convention on the Rights of the Child, 20 November 1989.

13 ECtHR Judgment of 13 February 2003, Case Odièvre v. France, application no. 42326/98, hudoc.int.

14 ECtHR Judgment of 7 February 2002, Case Mikulić v. Croatia, application no. 53176/99, hudoc.int, § 53–54.

15 ECtHR Judgment of 7 July 1989, Case Gaskin v. the United Kingdom, application no. 10454/83, hudoc.int, § 36–37, 39.

to establish details of his or her identity as an individual human being and that an individual's entitlement to such information is of importance because of its formative implications for their personality, which includes obtaining information necessary to discover the truth concerning important aspects of one's personal identity, such as the identity of one's parents.[16]

While it may seem appropriate to arrange the family as designed by the parents while the child is minor, as the child grows older and reaches adulthood, his or her perception of rightness would manifest and thus transparency should be maintained and leave the possibility for the child to discover the truth about his or her origin. In the already mentioned case of Mandet v. France, the Court agreed with the conduct of the French authorities and wondered whether what seemed to be in the best interest of the child at the time of deliberations, would be so also in the future.[17]

According to the ECHR's decision, in this case, the domestic courts had not failed to attach decisive importance to the best interests of the child but instead maintained that those interests did not necessarily lie where the child perceived them (meaning in maintaining the parent-child relationship as established and in preserving emotional stability), but rather

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16 ECtHR Judgment of 7 February 2002, Case Mikulić v. Croatia, application no. 53176/99, hudoc.int; ECtHR Judgment of 7 July 1989, Case Gaskin v. the United Kingdom, application no. 10545/83, hudoc.int.

17 The first and second applicants were married for the first time in 1986. The third applicant was born after their divorce, in 1996. The following year, the child was recognized by the second applicant. The first and second applicants remarried in 2003. In 2005, the paternity was challenged by Mr Glouzmann, who claimed to be the biological father of the third applicant. The applicants moved to Dubai after the start of the proceedings, meaning that a DNA test could not be conducted. Nevertheless, the domestic court observed that the child had been born more than 300 days after the first and second applicants' separation. It regarded the refusal of the couple to take the child for a DNA test as an indication of their uncertainty concerning the second applicant's established paternity. The domestic court was convinced, after it had taken evidence from witnesses, that the first applicant and Mr Glouzmann had been having an intimate relationship at the time of the conception of the child and after the birth, and that the child had been known as their joint child. Therefore, the court, contrary to the expressed will of the child, annulled the first applicant's recognition of paternity, changed the child's name to the mother's surname and named Mr Glouzmann as the father. Mr Glouzmann was awarded contact rights, but the parental authority remained exclusively with Mrs Mandet. ECtHR Judgment of 14 January 2016, Case Mandet v. France, application no. 30955/12, hudoc.int.

in ascertaining the child's real paternity.[18] In their decisions, the courts did not unduly favor the interests of Mr Glouzmann over those of the child but held that their interests partly coincided.[19]

Because of the very fact that in real life children do not always accept the reality created for them by their parents (or people who are raising them up), for example, the Slovak legal system, as many others, establishes the rights of the child to deny paternity, setting up specific circumstance for such conduct, in particular "if such denial is in the interest of the child." The interest of the child must generally be seen in the removal of inconsistency between paternity determined by legal rules and biological paternity. The child may file for the denial of paternity if such paternity was determined by the first assumption (paternity of the mother's spouse) or the second assumption (concurrent declaration of parents), however not in case of the third assumption (when the court determines paternity emerging from the fact that the man had sexual intercourse with the mother at the decisive time and thus it is assumed that the court has already reviewed the facts in their entirety).

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18 Evelyn Merckx, "Mandet v. France: Child's "Duty" to Know Its Origins Prevails over Its Wish to Remain in the Dark," Strasbourg Observers, February 4, 2016, accessed June 22, 2022, https://strasbourgobservers.com/2016/02/04/mandet-v-france-childs-duty-to-know-its-origins-prevails-over-its-wish-to-remain-in-the-dark/.

19 See also: ECtHR Judgment of 2 June 2015, Case Canonne v. France, application no. 22037/13, hudoc.int: the Court found that an appropriate balance had been struck between the competing interests of the applicant's right and the (prevailing) right of the child – who was now an adult – to know his or her parentage (as a part of the child's right to respect for private life). The case of Godelli v. Italy (ECtHR Judgment of 25 September 2012, Godelli v. Italy, application no. 33783/09, hudoc.int.) concerned the confidentiality of information concerning a child's birth and the inability of a person abandoned by her mother to find out about her origins. The applicant maintained that she had suffered severe damage as a result of not knowing her personal history, having been unable to trace any of her roots while ensuring the protection of third-party interests. The Court ruled that there had been a violation of Article 8 (right to respect for private life) of the Convention, considering in particular that a fair balance had not been struck between the interests at stake since the Italian legislation, in cases where the mother had opted not to disclose her identity, did not allow a child who had not been formally recognized at birth and was subsequently adopted to request either non-identifying information about his or her origins or the disclosure of the birth mother's identity with the latter's consent (Canonne v. France, 2015).

A further significant aspect of the case to be considered is the truthfulness and completeness of data about the origin of an individual. Responsibility for their evidencing and storage is borne by the state, which provides for the respective keeping of birth records. The purpose of keeping birth records is to determine the identity of a person with certainty. There is no need to discuss the significance of such a measure for the functioning of the State, as that is self-evident, however it should not be forgotten that these records are in the end important for the individuals; whether in cases where they need to trace their roots or in case they are in a dispute with someone and the identity of the person needs to be established; the spectrum of possibilities is broad and the common people realize the true significance of these records only in extraordinary situations.

As we have already stated, we find it important that the adoption of a new role by persons who undergo a change of name and gender is facilitated, which entails enabling them to hide their original name and sex. For this purpose, diverse measures are taken (e.g. the issue of new ID documents, change of older certificates, diplomas, and birth registry numbers). The request for nondisclosure of the original name and gender is however not unlimited; it encounters limits where the public interest prevails in cases where for personal reasons or due to legal interest (as already stated above) such data must be disclosed even without the consent of the person concerned.

If the applicant objects to a potential disclosure of his or her transsexual identity in everyday life, it may be appropriate to regard this question not only on the theoretical level but also to consider it in practical terms. When does the parent submit the birth certificate of the child with complete data? We find that this is a relatively limited range of situations; i.e. when handling the passport (which is in the competence of the Ministry of Interior that keeps registers of birth and is *de facto* the office which should officially be aware of the change of gender of the given person, and may not use the information otherwise), at enrolment into a school (where the principal discharges transferred state powers and as such may not dispose of such information), when setting up a bank account for the child (all transsexual persons must announce the change of their identity to their bank, as well as to another person with whom they have a contractual – legal relationship, for instance, a loan agreement with the bank).

While considering practical situations when the child submits the birth certificate we should realize that this document will accompany him or her during his or her entire life; at marriage, at the registration of his or her children in the birth register, while requesting a residence permit in a foreign country, and so on. It is a fairly wide range of situations that his or her parent would prefer to avoid. Although we may hope that future generations will be tolerant, we assume that it is not right to put this burden on the child.

If we consider in what limited number of situations the parent will have to disclose his or her transition in real life and on the other hand the arguments in favor of a truthful record of facts in official records in the light of current legal regulations, we inevitably must arrive at the conclusion that the interest of the child prevails over the interest of the parent that lies in not being exposed to a risk of a potential disclosure of his or her transsexuality. Therefore, we need to insist on keeping the records that enable the child to exercise his or her right to know his or her origin, ensure protection from situations where the transsexuality of the child's parent could be disclosed and, last but not least, ensure protection of the public interest on the completeness and accuracy of records in the birth register and their testifying function.

4. Margin of Appreciation of the State

As was demonstrated in the previous lines, the case O.H. and G.H. doubtlessly gives rise to sensitive moral, legal, and social issues the Court or states have not needed to resolve by now. Those are legal consequences of the Court´s approach expressed in the case A.P., Garçon and Nicot v. France.[20] Therefore, they should be handled in a consistent manner and universally acceptable solutions need to be found. In this case, the European Court should not play an initiative-taking role but should afford states a wide space for free appreciation, even more so, if the best interests of children are at stake.

In an older judgment X., Y. and Z. v. the United Kingdom the European Court observed that there is no common European standard with regard

[20] ECtHR Judgment of 6 April 2017, Case A.P., Garçon and Nicot v. France, application nos. 79885/12, 52471/13 and 52596/13, hudoc.int.

to the granting of parental rights to transsexual persons, the State must therefore be afforded a wide margin of appreciation in this regard. The European Court has since then adopted several key decisions concerning parenthood where it sometimes preferred the wide margin of appreciation of the state and reduced it at other times.[21] As was stated in the case Mennsson v. France, its extent differs depending on the circumstances of the respective case. It had to ascertain whether there was a wider consensus of states within the Council of Europe and whether the fair balance had been struck between the interests of the state and those of the individuals.[22]

In the case of Ahrens v. Germany it was sufficient for the European Court that the "substantial minority" of nine States disables the presumed biological father to challenge the paternity of the legal father to arrive at the conclusion that there was accordingly no settled consensus between the states of the Council of Europe on this issue and the states thus enjoy a wide margin of appreciation as regards the rules on determination of a child's legal status.[23] It adopted a similar approach in the already mentioned cases Canonne v. France and Mandet v. France. The European Court's decision in the case of Odièvre v. France should also be mentioned (see above) where it stated that the state has not overstepped the margin of appreciation that it must be afforded in view of the complex and sensitive nature of the issue of access to information about one's origins, an issue that concerns the right to know one's personal history, the choices of the natural parents, the existing family ties and the adoptive parents.

Last but not least, also in its first Advisory Opinion of 10 April 2019 issued upon the request of the French Cassation Court in the case of legal admission of a parental relationship between a woman receiving her child upon surrogate agreement and this child, the Court commented that "the choice of means by which to permit recognition of the legal relationship

21 ECtHR Judgment of 22 April 1997, Case X, Y, Z v. The United Kingdom, application no. 21830/93, hudoc.int.

22 ECtHR Judgment of 26 June 2014, Case Mennesson v. France, application no. 65192/11, hudoc.int.

23 ECtHR Judgment of 22 March 2012, Case Ahrens v. Germany, application no. 45071/09, hudoc.int.

between the child and the intended parents falls within the states' margin of appreciation."[24]

Having regard to the above-mentioned arguments, we find that the examined question falls into the margin of appreciation of the state which should be wide in such cases. In our view, since sensitive moral and ethical questions are concerned, the domestic authorities are in a better position than the international court to assess the issue with regard to their direct and permanent contact with the situation in the specific field at the specific time and place.

It must be remembered that it is not only a sensitive question, about which opinions may differ and where the public opinion as well as the opinion of professionals will be formed only gradually according to what cases will occur in the future in the respective states, but also that the best interests of the child are at stake. Moreover, the public interest to which we have already pointed, and which shall prevail over the interest of the parent by which the fair balance is struck in the sense of Article 8, is at stake.

5. Third-Party Comments in the Proceedings before the European Court

In the proceedings before the European Court related to the case of O.H. and G.H. several Slovak institutions intervened, in addition to the Slovak Republic.

The Government of Slovakia in their intervention in the case O.H. and G.H. noted that German legislation corresponds to the rules applicable in Slovakia. They believed that the main objective must be the well-being of the child, whose birth creates reciprocal rights and obligations that cannot be set aside or waived. The Government of Slovakia explained that the law traditionally protects the weakest party, which in a parent-child relationship is usually the child, who must be protected against the disclosure of the transsexuality of one of his or her parents. They added that a birth certificate featuring no mother, but only a father who did not donate his sperm but who gave birth to the child, would not serve the child's right to know his or her parents, enshrined in Article 7 of the Convention on the Rights

[24] ECtHR Advisory opinion, in response to the request from the French Court of Cassation, 10 April 2019, no. P16–2018–001.

of the Child, nor the right to know one's origins as the European Court's case-law has defined it. The Government of Slovakia recalled that State authorities have the responsibility to ensure the accuracy and completeness of data entered in the birth register, which is important not only for the proper functioning of the state but also for individuals when a person's identity needs to be established. They further maintained that the occasions when a birth certificate must be presented are limited and in some cases involve requests addressed to administrative authorities, who in any case are already aware of the parent's transsexuality.

The other intervenor which was the Slovak Institute for Human Rights and Family Policy, emphasized that there is no consensus on sex and gender issues among the Contracting States, that there is no international law that the European Court could apply and interpret in the matter and that, therefore, it is up to state authorities to resolve these questions. Furthermore, the third-party intervenor pointed out that many countries have provided rules relating to a transition with the aim of alleviating the suffering of the people concerned. He also emphasized how important it is for children to know their biological parents, as was demonstrated by the experience of adopted children.

The Association of Slovak Family Law Judges observed in its intervention that the rules in Slovak law on the designation of the sex of a transgender parent correspond to those in German law. It wondered what would happen if the sperm donor wished to be listed as the "father" in the birth register. It further considered that, in a situation such as that of the presently considered cases, the interests of the parent and the child are divergent, and that the child should be represented by a neutral person. The child's interest would also consist in eliminating the discordance between legal parenthood and biological parenthood.

The Slovak Bishops' Conference in its intervention expressed its belief that the legal order and laws governing family relations are based on the family as a unit of human society that they intend to protect. The third-party intervenor maintained that no entry in a state register can change the objective reality. It deduced from this that a biological woman who has retained her feminine faculty of procreation and who gives birth to a child remains the mother of that child forever. The third-party intervenor declared that it is not possible to abolish or freely exchange the concepts of "mother"

and "father," while specifying that the notion of "mother" includes not only the woman who gave birth to a child, which reflects objective reality, but also includes the relationship between an adoptive mother and her adoptive child. It specified that, in the latter case, the child objectively has a biological mother but also a legal mother, who obtained this status for the well-being of the child. The third-party recalled that, from an objective point of view, it is impossible to have no biological mother, despite modern reproductive technologies, which should not be able to call into question the fundamental principles on which humanity has been based since its inception.

6. The Judgment of the European Court

The judgment of the European Court was delivered on April 4, 2023.[25] The European Court in its chamber judgement held, unanimously, that there had been no violation of Article 8 with argumentation which is consistent with the text provided above. The Court recalled that, while the purpose of Article 8 is essentially to protect the individual against arbitrary interference by public authorities, it does not merely require the State to refrain from such interference: in addition to this rather negative undertaking, there are positive obligations inherent in effective respect for private life. The boundary between positive and negative obligations of the state under Article 8 of the Convention does not lend itself to a precise definition, but the principles applicable in the case of the former are comparable to those valid for the latter. In determining whether an obligation, positive or negative, exists, account must be taken of the fair balance that needs to be struck between the general interest and the interests of the individual (see, among others, Söderman v. Sweden and X, Y and Z v. the United Kingdom). The European Court reiterated that the choice of the means calculated to secure compliance with Article 8 in the sphere of relations between individuals was in principle a matter that fell within the Contracting States' margin of appreciation. The ECHR also pointed to the fact that there may be only a limited number of situations that could lead to the revelation of the transgender identity of O.H. due to the presentation of the child's birth certificate to

[25] ECtHR Judgment of 6 February 2019, Case O.H. and G.H. v. Germany, application no. 53568/18; 54941/18, hudoc.int.

the child. Subsequently and having regard, on the one hand, to the fact that the first applicant was the parent of the second applicant had not in itself been called into question, to the limited number of scenarios which could lead, when the child's birth certificate was presented, to the disclosure of O.H.'s transgender identity and, on the other, to the wide margin of appreciation afforded to the respondent state, the European Court considered that the German courts had struck a fair balance between the rights of the first applicant (O.H.), the interests of the second applicant (G.H.), considerations concerning the child's welfare, and the public interests.

7. Discussion

As Ribar states, social science and medical research demonstrate conclusively that children who are raised by their biological married parents achieve better physical, cognitive, and emotional outcomes on average than children raised in other settings.[26] To this can be added a result of Yaffe's systematic review, in which she says that parenting is a broad construct that comprises stable and durable attitudes and behaviors regarding child-rearing, because mothers and fathers play different roles in the family. In her view, mothers as opposed to fathers, are perceived as more accepting, responsive, and supportive, as well as more behaviorally controlling, demanding, and autonomy-granting than fathers.[27]

To this can be added, that the healthy development of children requires stability and protection from the premature demands of the outside world, with gradual initiation (introduction to the world) according to age and innate predispositions. Such conditions are most fully provided by their own parents, if they are healthy and mature, take their parenting seriously, and devote themselves sufficiently (from the child's point of view, not the adult's) to their children. The described case is, therefore, open to debate also from a psychosocial perspective. Namely, one may ask the question whether the transgender mother is not subjecting the child to a form of discrimination and is indeed acting in the best interests of the child within

[26] David. C. Ribar,"Why Marriage Matters for Child Wellbeing," *The Future of Children* 25, no. 2 (2015): 11–27.

[27] Yosi Yaffe, "Systematic Review of the Differences between Mothers and Fathers in Parenting Styles and Practices," *Current Psychology* 42, (2020): 16011–24.

the meaning of longitudinally valid Principles 2 and 10 of the Declaration of the Rights of the

Child,[28] does not negatively influence the child's mental development, by insisting on being the father and not the biological mother to the child. We are not acquainted with full details of the family situation, yet, it would be interesting to have more information about the circumstances of the child's upbringing and the role of the biological parent/s to the child.

8. Conclusion

The purpose of the legal regulation is, however, to ensure that despite the transition of the parent, the concerned child is at all times assigned one father and one mother and that his or her biological parents remain also the legal parents. In this regard, the best interest of the child and the child's right to know his or her origin shall be observed. In practice, there may occur a situation where the child will not be conceived by an anonymous donor but naturally, whereas the existing legal regulation will not only be in the best interest of the child but also of the second parent who may request the determination of paternity and exercise rights and obligations towards his child. The mere fact that the applicant cannot be registered in the records as the father of the child does not significantly limit his right to family life.

It shall similarly be stressed that the public interest in the completeness and correctness of birth records includes also the interest of the child in the records in the registry being complete and correct. It must be necessarily concluded that in cases analogical to the one assessed here, which may in consequence of the European Court's judgment A.P., Garçon and Nicot v. France arise in the member states of the Council of Europe, the best interest of the child to know his or her origins and the public interest prevail over the right of the parent to legal admission of his or her sexual identity and thus in the existing legal regulations of the majority of member states of the Council of Europe a fair balance is being struck between the concurring interests. The actual legal state moreover falls within the wide margin of appreciation of the State which the European Court should leave to the states in sensitive moral and ethical questions such as these.

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[28] Deklarace práv dítěte, November 20, 1959, New York, accessed June 22, 2022, https://osn.cz/wp-content/uploads/2022/08/deklarace-prav-ditete.pdf.

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