

THE RIGHTS OF THE CHILD AT RISK

Zdeňka Králíčková*

ABSTRACT

Mainly thanks to the United Nations Convention on the Rights of the Child, its philosophy, ideas and principles, the Czech legal order was changed in early '90 and later on, in connection with the Civil Code in 2012. The child is no longer conceived as a passive object of his or her parents' activities, their parental responsibility, but as an active subject with legally guaranteed rights. However, not only 'law in books' is relevant. There is still 'bad practice' connected with anonymous or hidden child delivery, abandoning new born children in 'baby-boxes' and older children in institutional care, although the state has attempted remedies. Besides, the number of divorces has increased in the Czech Republic over the last couple of decades, while in the last few years there are more marriages, and the divorce rate is no longer so alarming. However, the statistics reveal that minor children have not been an 'obstacle' to a 'radical termination' of the matrimonial bond.

The article aims at finding an answer to the question whether abandoning an unregistered child or applying for hidden identity by his or her mother makes the 'way' of the child to a substitute family by adoption easier. Further, an attention is paid to surrogate motherhood. These topics are linked to the right of the child to know his or her origin. As the harmony between biological, social and legal parentage and the model of 'continuing' parenting are values, the well-balanced rights and duties of both the child parents and the best interest of the child are stressed. The final words are focused on alternative measures and interdisciplinary collaboration, besides public law instruments.

KEYWORDS

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* | Full Professor, Faculty of Law, Masaryk University in Brno, the Czech Republic, zdenka.kralickova@law.muni.cz.



1. Introduction

The United Nations Convention on the Rights of the Child—a Magna Carta of the rights of the child—has been a part of the legal order of the Czech Republic since 1991 (published under No 104/1991 Sb., hereinafter ‘CRC’). Thanks to this significant achievement, the Czech legal order had to be greatly adapted according to its philosophy, ideas, and principles in early 1990 and later, namely by passing the amendments to the old law, especially to the Act on Family from 1963 (Act No 94/1963 Sb. as amended by the Act No 91/1998 Sb.), and by adopting the public law called the Children Act (Act No 359/1999 Sb., on Socio-Legal Protection of Children).¹ However, substantial changes in this field were made in connection with the Civil Code in 2012 (Act No 89/2012 Sb., effective since January 1, 2014, hereinafter ‘CC’). The incorporation of family law into the main source of private law is significant.² The admission of the new concept of parental responsibility,³ conceived according to the international conventions and in harmony with the Principles of European Family Law by the Commission on European Family Law⁴ must be highlighted.⁵ In the light of this perception, the child is no longer conceived of as a passive object of their parents’ activities but as an active subject with legally guaranteed rights.

Moreover, thanks to the case law of the European Court of Human Rights and the Constitutional Court of the Czech Republic, much has already changed, from legislation to practice. First, it must be noted that the reason for removing a child from their family may no longer be the inadequate ‘housing conditions’ or ‘financial circumstances’ of the child’s parents. The Civil Code also states that the removal of a child from the family must be preceded by milder measures such as a warning to the parents or supervision of the family, including active social work. The removal must be taken as *ultima ratio* and realized only by the court.

Following long-standing criticisms of bad practice, the Czech legislator has attempted further remedies, in particular by trying to reduce the number of children in institutional care in favor of foster family care, e.g., even by financial support for foster care provided by the child’s grandparents. However, the main goal of the state’s pro-family policy is to gradually eliminate care for young children in nurseries and similar institutions.⁶

Besides, there have been social and economic changes in the Czech Republic, like everywhere else in Europe and in the world. There is no denying that those changes were all positive.

1 | Hrušáková and Westphalová, 2011.

2 | Králíčková, 2014a; Králíčková, 2021a.

3 | Králíčková, 2022.

4 | For details, Commission on European Family Law [Online]. Available at: www.ceflonline.net (Accessed: 20 July 2022).

5 | Králíčková, 2021b.

6 | Report on the Family from 2020 by the Ministry of Labour and Social Affairs [Online]. Available at: <https://www.mpsv.cz/documents/20142/225508/Zpr%C3%A1va+o+rodin%C4%9B+2020.pdf/c3bdc63d-9c95-497d-bded-6a15e9890abd> (Accessed: 20 July 2022).

According to the annual statistics, a very high number of children are born out of wedlock in the Czech Republic.⁷ In some cases this is planned, in others it is a 'misfortune of life.' It is a well-known fact that there has been an increase in cases where the child's father is not legally determined before the birth. Therefore, there are many 'fatherless' children, especially of mothers who have only basic education, who are on the edge of social exclusion, and at the poverty line. Unfortunately, social and other reasons sometimes lead single mothers to abandon their child and leave them in the 'baby-boxes',⁸ immediately after birth, or to signing an application for hidden birth in hospital under the law (for details, see below).

Without the determination of a mother-child status relationship, or in connection with its endangerment, it is absolutely difficult to establish the paternity and kinship of the child. A child whose civil status is in question, has no extended family, and cannot be in the care of their relatives, e.g., in foster care. The question is whether all these children from baby-boxes and hidden births manage to find substitute families through adoption. There is no solid research on this matter.

In addition to the low marriage rate, the number of divorces has paradoxically increased in the Czech Republic over the last couple of decades.⁹ In the long term, this is an undesirable phenomenon, although in the last few years, an increase in marriages has been observed and the divorce rate is no longer so alarming. However, statistics reveal that minor children have not been an 'obstacle' to a 'radical termination' of the matrimonial bond, which is why minor children cannot be effectively protected against the divorce of their parents. Moreover, divorce is no longer stigmatized, but is considered a dignified solution to a difficult life situation. It is therefore appropriate to look for new ways to resolve family law conflicts and crises, whether through mediation or interdisciplinary cooperation between the courts and other entities. Additionally, there is a need to support parents who agree on 'continuing' parenting and not persist with the models that the courts and society in general have established over the years. As a rule, the child's parents must be held accountable for what is in the best interests of their child.

It is no secret that there are some parents who have themselves lived in dismal, inadequate, or poor family circumstances or even in substitute care (home for children). They are sometimes unable or unwilling to provide a healthy and happy childhood to their children. Many cases of pathology—the above-mentioned abandonment or uncertain legal position of children from the very beginning, intended motherhood without a 'legal' father, instability of co-existence of married or *de facto* couples with minor children, sometimes even domestic violence and child abuse and neglect—impair the position of minor children both actually and legally in the Czech Republic. Even after the passage of the new Civil Code in 2012, the

7 | See Statistical Yearbook of the Czech Republic – 2021 [Online]. Available at: <https://www.czso.cz/csu/czso/statistical-yearbook-of-the-czech-republic-rtnih2q42g> (Accessed: 30 July 2022).

8 | For more BabyBox[Online]. Available at: <http://www.babybox.cz/> (Accessed: 15 July 2022).

9 | See Statistical Yearbook of the Czech Republic – 2021 [Online]. Available at: <https://www.czso.cz/csu/czso/statistical-yearbook-of-the-czech-republic-rtnih2q42g> (Accessed: 21 July 2022).

topic of the child's rights at risk has been and is still being worked on and remains relevant.¹⁰

The following lines aim at finding an answer to the question whether abandoning an unregistered child or applying for hidden identity by their mother makes the 'way' of the child to a substitute family by adoption easier. Further, attention is paid to surrogate motherhood. These topics are linked to the right of the child to know their origin. As the harmony between biological, social, and legal parentage and the model of 'continuing' parenting are valued, the well-balanced rights and duties of both the child's parents and the best interest of the child are stressed in parts devoted to this issue. The final words focus on offering alternative measures and interdisciplinary collaboration, besides public law instruments. It will be stressed that the child must be guaranteed the protection of their rights, including the right to preserve identity and family ties, where possible, and participatory rights.

2. On the rights of the unwanted, unregistered, and abandoned child to motherhood and family ties

2.1. According to the Convention on the Rights of the Child, every child has the right to be registered immediately after birth. This means that the book of births and the birth certificate must, as a matter of principle, indicate who the child's mother and father are (in addition to the date of birth, name, surname, sex, etc.). The child has the right to know their parents and be under their care, as far as possible.¹¹ The state must not create or blindly tolerate any obstacles that enable the separation of the child from their parents or relatives.¹² Care by relatives in the family environment should take place before adoption by foreigners or abroad.¹³ The principle of the best interest of the child should be applied when taking all the measures and shall be a primary consideration.¹⁴

In this relation, it is necessary to consider the status conception of motherhood in the Czech Republic. The ancient Roman law principle of *mater semper certa est*, respecting the incident of birth, has been traditionally considered the basis for creating the status relationship of mother-child, although it was expressly introduced into the Czech legal order only in 1998. The Civil Code from 2012 builds on this concept and explicitly states that 'the mother of the child is the woman who gave birth to the child'¹⁵.

2.2. It may be interesting to note that during the preparation of the Civil Code, the necessity of regulating surrogate motherhood was not originally discussed. The

10 | As for the problems and their solutions under previous legislation, see earlier Králíčková, 2014b.

11 | Article 7 Subsection 1 of CRC.

12 | Article 9 of CRC.

13 | Articles 20, 21 of CRC.

14 | Preamble, Article 3 Subsection 1 of CRC.

15 | Section 775 of CC.

aim of the drafters of the Civil Code was to follow the above-mentioned principle of the origin of the child from the mother who gave them birth and to expressly state that ‘an action of the genetic mother against the mother who gave birth to the child cannot be successful.’¹⁶ Nevertheless, this ‘addendum’ was deleted and a provision ‘against’ surrogacy was not included in the final version of the Civil Code. It is a pity that the ministerial team turned away from the original aim of the drafters and many co-operators did not deal with this issue in more detail, as was done in the Slovak Republic.¹⁷ However, the ‘prohibition’ of private law surrogacy agreements is derived from the general part of the Civil Code, which states that ‘stipulations contrary to good morals, public order, or the law concerning the status of persons, including the right to protection of personality, are prohibited’¹⁸.

It must be added that the term ‘surrogacy’ is recognized in the Civil Code. Additionally, this terminology was included in the government bill in spite of the express disagreement of many experts and main drafters. This terminology is used in the context of regulation of adoption. The Civil Code states that ‘adoption is excluded between persons related to each other in the direct line and between siblings. This does not apply in the case of surrogacy’¹⁹.

It is common knowledge that surrogacy occurs in the Czech Republic with the silence of the legislator. We emphasize that the special act makes it possible to carry out assisted reproduction only with an infertile couple.²⁰ Artificial insemination of a surrogate mother in health service provider facilities has thus been ruled out of law and must not be covered by the state health insurance system. Court practice shows that if there are informal private law surrogacy agreements among the relatives, conception usually takes place in the natural manner, which may sometimes disrupt a fragile family situation.

It is appropriate to ask how ‘intended’ parents can get an ordered child²¹? If we exclude an exchange of the identity cards of the ‘legal’ mother and the ‘intended’ mother, adoption is the only option. As mentioned above, the ‘legal’ mother of the child is the woman who—even if on order—gave birth to them.²² After giving birth, she may consent to the adoption of her child. Let us emphasize that due to international conventions the consent is only valid after the expiry of puerperium and may be withdrawn! For details, see below. If the promises on both sides are kept, a direct adoption without the necessity of procuring one may be implemented. However, if the mother who gave birth to the child fails to keep her promise to consent with the adoption and hand the child over to the ‘intended’ parents, the adoption does not take place, and if the ‘intended’ parents change their minds and refuse to adopt the child, their decision must be fully respected.

16 | See Eliáš and Zuklínová, 2001, p. 167.

17 | Section 83 of Act No 36/2005 Z. z., the Slovak Act on the Family. For more, see Pavelková, 2001, pp. 504 et seq.

18 | Section 1 Subsection 2 of CC.

19 | Section 804 of CC.

20 | Section 6 of Act No 373/2011 Sb., Act on Special Health Services.

21 | An ordered child is a child they wished and have asked the surrogate mother for, the child is the object of the contract.

22 | Section 775 of CC.

During the fairly long process of adoption, there can be a number of twists and turns and unexpected problems. However, there are no known 'cases of child litigation' from current court practice and no official statistics are available. If there was a 'dispute' over the child, the 'legal' mother of the child would be the woman who gave birth to the child, regardless of any egg or embryo donation, which is based in a standard situation on the anonymity of donors.

In summary, we hold the view that uncertainty for the 'surrogate' mother and the 'intended' mother constitutes uncertainty for the child from the very beginning. There is a trivialization of the fact that a 'legal' mother or a 'surrogate' mother is instrumentalized, that her womb is factually leased for considerable financial amounts, and that the human embryo is degraded to a mere subject-matter of a contract.

2.3. In the context of the issue of motherhood, it is worth mentioning the long-time criticism of the Czech Republic by the United Nations Committee on the Rights of the Child regarding the reality of baby-boxes.²³ Unfortunately, even some experts and the general public have tolerated the abandonment of unwanted babies in these places, referring to idealistic concepts aimed at preventing murders of newborns.²⁴

As already stressed in the introduction, there has been an increase in the number of private baby-boxes, i.e., places for putting away unwanted children at the premises of maternity hospitals established and financed by a private initiative, the foundation Statim, since 2005. The statistics from July 2022 indicate that there were 82 of them located throughout the country and 239 babies have already been left there.²⁵ It is crucial that children from the baby-boxes have a status similar to that of a 'found' child, even if the former is not legally regulated. The children from baby-boxes have neither mother nor father. Of course, the police have to search for the child's parents, as the child has the right—at least theoretically—to know their origin and identity. The search is usually fruitless. Nevertheless, in some cases mothers change their minds about abandoning their children and seek to have the children in their care and register them in the book of births.

As for adoption, the children from baby-boxes are 'legally' free and therefore immediately 'available' for adoption. However, the persons interested in adoption very often want information about them or their family medical histories. It is no secret that the state of health of these children is often problematic, as their mothers had to conceal their pregnancy by giving birth in secret places and under unsuitable conditions, by self-help, and so on.

To summarize, we may only add that in such cases the children cannot be denied the right to bring a status action for determining motherhood if they have any idea who their mother is. However, no such court cases are known to date.

2.4. As for the principal negative elements of the Czech legal order concerning motherhood, it is necessary to point out the special legal possibility pursuant to

23 | See Committee on the Rights of the Child reviews report of the Czech Republic [Online]. Available at: <https://www.ohchr.org/en/press-releases/2011/06/committee-rights-child-reviews-report-czech-republic> (Accessed: 15 July 2022).

24 | For the criticism see Zuklinová, 2005, pp. 250 et seq.

25 | See BabyBox [Online]. Available at: <http://www.babybox.cz/> (Accessed: 15 July 2022).

which the single adult mother with a permanent residence in the Czech Republic has a right to 'hide' her identity in connection with birth. This relatively simple 'way' to 'get rid of' a child was adopted at the initiative of a small group of MPs in 2004 without going through the standard legislative process (by Act No 422/2004 Sb.). Unfortunately, this conception was later taken over in 2011 by the Parliament.²⁶ According to the Act, the child whose mother wants her personal data not to be revealed at birth has a 'legal' mother, however, the child does not know her identity. The child may demand that 'an envelope with their mother's personal data' be opened, for example, in court proceedings on determining parenthood.²⁷

If the adoption of a child from a hidden birth is at issue, then the situation is more than precarious. We have to start with the fact that a child from the hidden birth has a 'legal' mother. It is crucial that the family of origin of a child enjoys increased protection, and adoption and other forms of an alternative family upbringing and substitute family care are really understood as subsidiary to care in the family of origin. Furthermore, according to the Civil Code, the 'legal' mother may only consent to the adoption of her newborn child after the expiry of puerperium. In practice, it often happens that mothers abandon their children after birth; they are not interested in the child and thus do not come to give their consent to adoption. If a 'legal' mother does not consent or is indifferent to the child's future, then the court decides that she 'is not interested,' as the law defines the unconcern with child, which is examined in the special procedure called proceedings on adoptability. The state authority can then start administrative proceedings on procuring the adoption of the child. For details, see below, 2.5.

In conclusion, we may only criticize the meanings of such haphazard and non-conceptual acts as creating a completely unsatisfactory state undermining pro-family conduct and disrupting the statutory law.²⁸

2.5. To complete the picture, some information about the adoption of minor children in general is discussed as follows. The Civil Code protects the mothers against impetuous or immature actions while also protecting their underage children or their right to live in their family of origin in harmony with the above-mentioned principles of the Convention on the rights of the child. We emphasize that the previous legal regulation and the current Civil Code also guarantee full protection to underage parents.²⁹ Therefore, it is expressly set down that the consent of a parent, or parents, is the fundamental requirement for adopting a child. However, the right to give consent to the adoption does not belong to the scope of parental responsibility.

The law distinguishes two types of consent, namely:

(a) direct consent, which is given by a 'legal' mother in court proceedings on adoption after the expiry of at least 6 weeks since the birth of the child³⁰ and by a

26 | Section 37 of Act No 372/2011 Sb., Act on Health Services.

27 | Section 783 of CC.

28 | See Hrušáková and Králíčková, 2005, pp. 53 et seq.

29 | Section 811 of CC; Králíčková, 2003.

30 | Cf. Section 813 the first sentence of CC.

'legal' father after the child's delivery (only if the fathership is legally established³¹); however, there is a possibility to withdraw consent within 3 months; direct consent is used in case of surrogacy or adoption by a step-parent, for instance;

(b) blank or indirect consent given by a 'legal' mother after the expiry of at least 6 weeks since the birth of the child and by a 'legal' father after the child's birth (if he is legally established), with the same possibility of withdrawal as above; then the administrative proceedings on procuring the adoption by the state may start; blank consent is used in the case of adoption by strangers.³²

As mentioned above, if 'legal' parents do not consent or are indifferent to the child's future, the court decides in the special procedure of proceedings on adoptability.³³ The participants in the proceedings on adoptability are the 'legal' parents and the child. If the court finds their unconcern (according to Sections 819 and 820 of CC), the child does not become 'legally' free, but adoptable. They may be put on the list of children eligible for adoption and an administrative body may start proceedings on procuring the adoption. Provided that suitable adopting parents are found for the child, the interested couple may ask for the child to be placed in obligatory preliminary care for at least six months.³⁴ If the care is 'successful,' the couple interested in adoption may file a motion with the court for the adoption of the child. Only the interested couple and the child will be participants in the proceedings on adoption. It is important that the child's parents no longer be participants in the proceedings, as the court had already decided their unconcern in the proceedings on adoptability.

In general, the legislation of both direct and indirect adoption of minor children regulates only full adoption in accordance with the principle of *adoptio naturam imitator*. The adopted child will become a member of the new adoptive family when the court decision becomes final. All ties to the family of origin cease, including maintenance obligations and any inheritance rights.³⁵ Registration in the book of births and issue of the new birth certificate is necessary. The child's surname is changed to the surname of the adoptive parents.

However, the myth of the anonymity of adoption is common knowledge, despite the fact that the special regulation provides that anyone affected by the registration and their family members has in principle the right to inspect not only the book of births, but also the collection of documents. In the case of adoption, the adoptive parents and, after the age of 12, the adoptee may consult the collection of documents, unless the court has decided to keep the adoption secret, in which case the adoptee may consult the collection of documents only after they have acquired full legal capacity.

In the event of hidden birth, after the age of 12, the child may consult the collection of documents kept for the registration of the birth of a child whose mother has requested that her person be kept 'secret' in connection with the birth.³⁶

31 | Section 813 the second sentence of CC.

32 | Králíčková, Hrušáková and Westphalová, 2022.

33 | Section 821 of CC.

34 | Sections 826 et seq. of CC.

35 | Sections 794 et seq. of CC.

36 | Section 8a of Act No 301/2000 Sb., Act on Vital Registers, Name and Surname.

3. On the rights of the child to fatherhood and family environment

3.1. As for paternity, current theory and practice do not often deal with the question whether insisting on strict statutory law based on traditions protects fatherhood, be it biological or social. Even less frequently is the question posed whether by insisting on the old conception, the rights and legally protected interests of the child are not infringed, especially the right of the child to know their origin. However, the legal concept of fatherhood in the Civil Code does not basically differ from the conception of earlier European regulations that established legal presumptions of paternity and were created at the time when the legitimacy of a child born out of wedlock was highly valued and when methods of assisted reproduction as well as paternity tests were at their beginnings. The rights of the child were taboo, as were human rights in general.

The legal regulation of the determination of fatherhood is based on three traditional legal presumptions based on likelihood.³⁷ There are not many innovations in the Civil Code in this respect, except those inspired by the case law of the European Court of Human Rights and the Constitutional Court of the Czech Republic. Regarding statutory law, the first presumption is in favor of the mother's husband, if the child is born out of wedlock or within 300 days since its termination.³⁸ The second presumption respects the autonomy of will of the child's parents and is in favor of the man who has stated, together with the child's mother, that he is the father of her child.³⁹ The third presumption is based on sexual intercourse in the critical period: The father of an unmarried woman's child is considered to be the man who had sex with her within the period of 160 days before the birth and not exceeding 300 days before the birth, unless his fatherhood is excluded for serious reasons.⁴⁰

Thanks to the jurisprudence of the European Court of Human Rights concerning Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Czech legal order enables putative parents to become 'legal' fathers even against the will of the child's mothers. Additionally, law gives the 'legal' fathers determined by the courts on the motion of the child's mothers against the men's will, in years when DNA testing was not available, the possibility to disprove their fathership.

Following the case of *Keegan vs. Ireland*,⁴¹ the lawmaker introduced in the year 1998, provisions aiming at strengthening the status of the man who thought himself to be the child's father even against the will of the mother who had given consent to the adoption of the child in the given case. The active legitimacy of the

37 | Sections 776–793 of CC.

38 | Section 776 of CC.

39 | Section 779 of CC.

40 | Section 783 of CC.

41 | ECHR, judgment from May 25, 1994, No 209.

putative father to bring an action for determining paternity was introduced, and in addition, the law then set forth that a child must not be adopted until the proceedings on determining paternity initiated by the putative father have finished. The current Civil Code, similarly, being built on this change, allows the father to petition the court to establish paternity⁴² with the provision that the child may not be adopted until paternity has been adjudicated.⁴³

In the case of men determined to be the 'legal' fathers of children according to the third presumption at a time when DNA tests were not available,⁴⁴ their situation was unresolved and unsustainable for years. This certainly had an indirect adverse impact on the children, whose legal status did not correspond to biological and social reality. Therefore, the findings in the case of *Novotný vs. Czech Republic*⁴⁵ were welcomed by the professional and lay public. The legislator was subsequently forced to enshrine the possibility of retrial, thus allowing these men to have their paternity annulled.⁴⁶ This remedied many 'wrongs' but also meant that now adult children can seek to establish paternity against men who fathered them. Additionally, this case law followed the previous conclusions expressed in the case *Paulík vs. Slovakia*,⁴⁷ especially the sentence as follows:

when denying paternity, the lack of a procedure for bringing the legal position into line with the biological reality flew in the face of the wishes of those concerned in the given case and did not in fact benefit anyone.

The case had a direct impact on Slovak procedural law as well, as the possibility of retrial was established.⁴⁸

To summarize, the changes in legal order mentioned above also strengthened the rights of the child to know their father, family of origin, and on so. Biological or genetic parenthood and social parenthood are of great importance for children as well, which is why it is necessary to respect the balance between legal, biological, and social parenthoods.⁴⁹

3.2. As regards the right of the child to know their origin, it is necessary to stress that a child may seek a determination of paternity under the third presumption at any time during their lifetime, even against the wishes of their 'legal' mother and putative father. In connection with the above, it should be emphasized that the child may do so only if they have no 'legal' father, i.e., if the line 'father' is blank on the birth certificate. This refers to a situation where the child has been born out of wedlock and paternity has not been voluntarily established by a

42 | Section 783 of CC.

43 | Section 830 of CC.

44 | Section 783 of CC.

45 | ECHR, judgment from June 7, 2018, No 16314/13.

46 | New Section 425a of Act No 292/2013 Sb., Act on Specific Civil Law Proceedings as amended by the Act No 296/2017 Sb.

47 | ECHR, judgment from October 10th, 2006, No 10699/05.

48 | New Section 228 Subsection 1-d of Act No 99/1963 Z.z., former Slovak Civil Procedural Code as amended by the Act No 341/2005 Z.z. ECHR from October 10th, 2006, No 10699/05.

49 | Králíčková, 2008.

consensual declaration of the child's parents under the second presumption, or the first or second presumption has been rebutted in court at the request of the child's parents.

Regarding negatives, the position of the child as a party in court proceedings for establishing or denying paternity is more or less formal. The fact that DNA tests are currently ordered as a rule in these proceedings and that the legal parentage determined by the court under the third presumption thus corresponds to the biological parentage is to the child's advantage. However, a child, whether minor or adult, has no right to 'oppose' the determination of paternity by a consensual declaration of will by their parents under the second presumption and thus prevent the establishment of a 'legal' status that would not correspond to biological and social reality.

To the above, it should be added that unfortunately, the child's right of denial of paternity 'disappeared' from the draft Civil Code even if the explanatory note expressly mentioned its establishment in connection with the intended subject-matter, principles, and the bases.⁵⁰ By preserving the legal situation based on the first and second presumptions, the lawgiver did not give the child a chance to realize their interests in finding out their origin and bringing their biological reality in line with the 'legal' status. We may imagine a situation where the interests of the mother, the father, and the child are mutually in conflict and it is necessary to look for a solution. The fact that the child cannot directly seek the denial of paternity impedes them from establishing a legal relationship with the man who conceived them and who would fulfill his role of social father if he had knowledge of his paternity.

The presumptions mentioned above and the periods of lapse for their denial primarily protect mothers, who usually know best who the fathers of their children are. The interests of the child may be in conflict with the interests of the mother. Thus, it cannot be said that by protecting mothers the law simultaneously protects the children.⁵¹

4. On the rights of the child to continuing care by separating parents

As mentioned above, many children are born out of wedlock in the Czech Republic and *de facto* units with minor children are very unstable, if the parents of such children have managed to establish cohabitation. In addition, many marriages of parents of minor children are in crisis and are moving toward separation

50 | Eliáš and Zuklínová, 2001, p. 168, where the authors state that the new legal regulation will be supplemented with 'the right of a major child to deny paternity (resulting from the right of a person to know their biological origin).'

51 | Králíčková, 2011.

and divorce. It is undoubtedly in the best interests of minor children that the breakdown of their parents' relationship should affect their circumstances as little as possible.

The child's right to both parents can be found in the Convention on the Rights of the Child. There is the recognition of the principle that both parents have common responsibilities for the upbringing and the development of the child enshrined there.⁵² It must be stressed that if the parenthood is legally established and both the parents are holders of parental responsibility and are allowed to exercise all the duties and rights belonging to its scope, then 'continuing' parenting should be the aim of the post-separation or post-divorce arrangement, and then it does not matter how the custody (personal care) be arranged. The parents must exercise the duties and rights arising from parental responsibility in accordance with the best interests of the child, their well-being, and with respect to their participatory rights.⁵³

Following extensive case law of the European Court of Human Rights, the Czech Constitutional Court has also held that a child has the right to qualitative equal care from both the parents if the child cannot live with them as before the breakdown of the family environment. It is not decisive that the Civil Code distinguishes between different forms of custody (personal care) for minor children when regulating joint custody, alternating custody, and exclusive custody. It was the Constitutional Court of the Czech Republic that stated in its jurisprudence that there are no established models for family life and therefore it is not possible to create and preserve them.⁵⁴ If both the parents of minor children are competent, interested in the care of their children, and able to reach an agreement, their arrangement should be respected. If the parents had demonstrated their parenting skills, then they should be trusted to be good parents even after their separation. It has also been ruled that alternating custody does not have to be balanced, as it is not the quantity but the quality of the time the minor child spends with each parent.⁵⁵ Most recently, it has been held that even greater distance between the new homes of the parents of minor children may not be an obstacle to alternating custody. After all, if contact (visiting rights) with the non-custodial parent were to take place, the child would have to travel the same distance.⁵⁶

However, regarding divorcing parents, the Civil Code provides the condition that if the married couple has minor children, the judgment on divorce must be preceded by the decision on the relation to the minors for the post-divorce period.⁵⁷ In the case of a post-divorce arrangement of the relationship of the agreed parents to the joint minor children, it is obligatory to approve an agreement on personal custody and maintenance, and optionally on visiting rights between the child and the non-custodial parent by the court.⁵⁸

52 | Article 18 of CRC.

53 | Šínová, Westphalová and Králíčková, 2016.

54 | Constitutional Court, judgement from January 20th, 2005, No II. ÚS 363/03.

55 | Constitutional Court, judgement from May 26th, 2014, No I. ÚS 2482/13.

56 | Constitutional Court, judgement from May 3rd, 2022, No I. ÚS 3065/21.

57 | Section 755 Subsection 3 of CC.

58 | Trávníček, 2015.

There is currently a proposal by a group of deputies in the Parliament of the Czech Republic regarding this issue in relation to the previous pending draft put forward before the last elections in 2021.⁵⁹ Its aim was to make the situation of divorcing parents of the minor child equal or at least similar to the position of the non-married parents of a minor child who separated without intervention by the state, thanks to a mutual non-formal agreement. The previous pending draft was based on the opinion that the parents of the minor child know their child very well and seek to follow the best interest of the child even when separating. Should the draft be passed, the divorce of a husband and a wife—who can agree on divorce, on the consequences of divorce for property and dwelling, and on the post-divorce arrangement regarding their minor children—would be amicable, smooth, and quick. The divorcing couple would have to submit to the judge only the common motion for granting the divorce, the property and dwelling contract, and the agreement on minor child regarding custody, maintenance, and, as the case may be, visiting rights. The judge dealing with the divorce would not have to approve either the property contract or the agreement on custody and maintenance toward the minor children. However, his proposal was not adopted. It would be bold to anticipate legislative developments in this parliamentary term, as there is no official governmental draft or statement. Some liberalization of divorce law is undoubtedly in order, but the fact that a minor child would not be a properly represented party in any proceedings can be considered a weak point of the proposal.

5. On the rights of the child and alternative forms of solution to family conflicts and public law protection

In family law matters, due to the usually very highly tense emotional environment, it is necessary not only to find ways to immediately resolve family conflicts by court decision, but also pay attention to preventive action in an effort to avoid their escalation and chaining. Emphasis must also be placed on promoting the responsibility of the minor child's parents and seeking to find means for them to resolve their conflicts themselves with respect to the best interests of the child and their participatory rights. As a rule, such support cannot be provided effectively enough by the court, as its main task is to decide the conflict authoritatively. However, it may be provided by third parties in out-of-court conflict resolution procedures, especially in cases of disagreement between the minor child's parents.

59 | The new proposal in the Parliament of the Czech Republic was lodged by only 22 deputies. For details, see the Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. 9, Draft No. 40/0. It was based on the concept of the previous one; for more, see the Parliament of the Czech Republic, Chamber of Deputies, Parliamentary term No. 8, Draft No. 899/0.

Mediation plays an important role in the out-of-court settlement of family disputes. The relatively recent adoption of a special law was therefore welcomed by professionals and the lay public (Act No 202/2012 Sb., on Mediation). The Mediation Act defines mediation as a procedure for resolving a conflict involving one or more mediators who promote communication between the persons in the conflict so as to help them reach a friendly solution to their conflict by concluding a mediation agreement. The Mediation Act also defines family mediation as activities aimed at resolving conflicts arising from family law by registered mediators specialized in this field.

For the effective resolution of family law matters, especially parental conflicts, there are also certain uncoded rules that are used in court proceedings and aim to end them quickly following current 'interdisciplinary cooperation,' with an emphasis on supporting parents to seek an amicable solution. One case of these rules is the Cochem practice.⁶⁰

Moreover, let us add that the private law provisions of the Civil Code are supplemented by public law regulation. As mentioned above, the key source of law is the Children Act.⁶¹ This piece of law is based on the public interest in the protection of children and on generally accepted values. It is universally acknowledged that the state has primarily a 'negative' obligation not to interfere in family life, but with due regard to the principle of the best interests of the child and their welfare, it is sometimes necessary to 'intervene' in very fragile family relationships. The case law of the European Court of Human Rights speaks about a 'positive' obligation to protect family life. It is then always necessary to respect the principle of proportionality of the aim and the means. In doing so, the state and its institutions must always proceed from less invasive interventions to more radical ones. Above all, everybody must respect the child's right to live with their parents (and *vice versa*) in the family of origin.⁶² Therefore, the child may be removed from the family environment only under the law, by competent authorities, and for a strictly necessary period. Unfortunately, beside the criticism of the Czech Republic by the United Nations Child Rights Committee regarding the reality of baby-boxes (see above), many critical words have also been expressed in relation to the overuse of institutional care.⁶³ As was stressed in the introduction, the main goal of the state's pro-family policy is to at least gradually eliminate care for young children

60 | For details see COCHEM.CZ [Online]. Available at: <https://www.cochem.cz/> (Accessed: 23 April 2022).

61 | Krausová and Novotná, 2006.

62 | For details see Králíčková, 2010, pp. 829–840.

63 | See UN Child Rights Committee issues findings on Czech Republic, Eswatini, Poland and Switzerland [Online]. Available at: <https://www.ohchr.org/en/press-releases/2021/09/un-child-rights-committee-issues-findings-czech-republic-eswatini-poland-and-switzerland> – Geneva – September 30, 2021 (Accessed: 15 July 2022). The Committee on the rights of the Child remained concerned about the high rates of institutionalization of children, particularly those with disabilities. It recommended that the State party adopt a comprehensive national policy to phase out institutionalization and support community or family-based options to take care of children in need, paying particular attention to children with disabilities, Roma children, and children under the age of three.

in nurseries and similar institutions and support foster care, even if by the child's close relatives.⁶⁴

6. Conclusion

As has been hinted above, a minor child is often endangered due to an objectively unfavorable situation and pathological conduct of their parents. The reality of surrogacy is a global problem that introduces a number of questions regarding status issues and creates considerable uncertainty for many children. As for the legalizing of hidden births by special act and tolerating the existence of baby-boxes, both possibilities give mothers rights regardless of their children's rights and legally protected interests. Fathers' rights are often omitted completely. The question arises whether the adoption of these children by strangers is always in the best interests of such children.

The situation of minors endangered by the conflicts of their parents creates a number of problems in practice as well. This benefits no one—especially the endangered minor children.

In view of the above, it should be noted that it is necessary to protect minor children because of their immaturity, sometimes even against their parents or their decisions.⁶⁵ Besides private law concepts, there are public law options that have generally been welcomed and present a relative novelty. In addition to a range of social benefits for single mothers, the legal order enables the courts and authority for the socio-legal protection of children to impose on the parents the duty to secure professional help or attend mediation. If the situation requires it, the authority may, and indeed must, submit an application to the court to take appropriate protective measures, and if the situation is serious, the court may, and indeed must, modify the scope of the parental responsibility of the parents.⁶⁶ In extreme cases, the court shall deprive the parents of parental responsibility⁶⁷ and even apply criminal law sanctions. If the child's health and life is in danger, the court also may, or must, order removal of the child from the parents and place them into some other form of substitute family care, preferable by close relatives, the child's grandparents or adult siblings, etc.⁶⁸

Contrarily, regarding separating and divorcing parents or parents of minor children who were initially in conflict, their voluntary agreement or an arrangement reached through mediation or interdisciplinary cooperation that respects the best interests of minor children is undoubtedly a great value to be encouraged

64 | Report on the Family from 2020 by the Ministry of Labour and Social Affairs [Online]. Available at: <https://www.mpsv.cz/documents/20142/225508/Zpr%C3%A1va+o+rodin%C4%9B+2020.pdf/c3bdc63d-9c95-497d-bded-6a15e9890abd> (Accessed: 20 July 2022).

65 | Hrušáková, 1993.

66 | Section 870 of CC.

67 | Section 871 of CC.

68 | See Radvanová, 2015.

and respected. The parents usually know very well what is best for their children.⁶⁹ It is up to them to decide how their minor children will be protected within exercise of the duties and rights pertaining to their parental responsibility with full respect for the rights, opinions, and wishes of their children. This approach shall also fulfill the main aim and purpose of the Convention on the Rights of the Child as expressed in the Preamble, and in particular in its key provision by the words that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration'.⁷⁰

69 | For more, see Králíčková, Hrušáková and Westphalová, 2020.

70 | Article 3 Subsection 1 of CRC.

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