

Private Law**Some Legal Aspects on Acquiring the Quality of Parenthood****Gabriela LUP AN¹**

Abstract: The quality of parenthood is the legal consequence of the manifestation of the procreation right, which is under the control of the individual will, but also the right to adopt, which after the exercise it submits the person to verification by the competent authorities on fulfilling the conditions of substance and the form provided by law. We decided upon a short analysis, based on the Civil Code provisions and other special laws, of the legal ways by which a person can acquire the quality of parenthood.

Keywords: filiation; presumption of paternity; adoption; medically assisted reproduction

1. About the Filiation Institution in General

In the absence of a legal definition offered by the new Civil Code adopted by Law no. 287 of 17 July 2009², the filiation is considered that natural fact turned into a legal fact, which is based on the connection between a child and his parents. The method or the legal ways by which one can become a parent, the mother or father of a certain child - are different, they are chosen, besides the intervention of nature, and the desire of the person concerned, the biological possibilities and why not the present and future material and financial availability. These legal ways are birth

¹ Associate Professor, PhD, "Danubius" University of Galati, 3 Galati Boulevard, 800654 Galati, Romania. Tel.: +40.372.361.102, fax: +40.372.361.290. Corresponding author: gabriela.lupsan@univ-danubius.ro.

²Republished under article 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Monitor of Romania, Part I, no. 409 of 10 June 2011. The new Civil Code was originally published in the Official Monitor of Romania, Part I, no. 511 of 24 July 2009, amended by Law no. 71/2011 and corrected in the Official Monitor of Romania, Part I, no. 427 of 17 June 2011 and in the Official Monitor of Romania, Part I, no. 489 of 8 July 2011. The new Civil Code came into force on 1 October 2011.

and procreation, adoption, to which we add the medically assisted reproduction techniques.

Viewed from the perspective of the child, filiation expresses for a person the quality of child of certain parents, while being perceived from the parent's view, the filiation indicates their correlative qualities of mother and father, called maternity and paternity. This relation between mother or father, on the one hand, and the child, on the other hand, is the direct result of the material fact of procreation, that is not at all related to marriage, to constant and permanent relations of the parents, to their coexistence.

Regarding *the way of establishing the natural filiation*, the Civil Code has taken the same different ways provided by the Family Code, as it came to establishing filiation towards the mother or establishing filiation towards the father and according to the category in which the child is in –during marriage or outside marriage. Natural filiation could result from two particular ways: *by voluntary recognition or forced recognition*.

It is well known that the birth of a child whether during marriage or outside marriage, motherhood is determined in the same legal ways –the acknowledging birth certificate, recognition or judgment, while fatherhood is acquired differently, namely: the application of presumption of paternity (article 414 of the Civil Code), for the first category of children, and recognition or the court order for the second (article 424 of the Civil Code).

For the child during marriage, the application of the presumption against mother's husband is right, there is the possibility that the mother's husband become the father of the child without knowing it. Although the biological father is actually another man, the child has established the filiation towards the mother's husband. We are in the presence of a legal fiction, a level reached through the game two factors, namely: firstly, it is based on the application of a legal presumption based on the fact that the mother of the child at the date of his birth or conception was a married woman (proven by the certificate of marriage and the legal presumption of the conception time), and secondly, the fact that during the legal period of conception she had an intimate relationship with a man, other than her husband.

Of course, the change of the situation inconsistent with the truth is achieved by the legal father promoting an action in court within three years from the date of knowing his filiation to the child during marriage.

For the child out of wedlock, the biological father has on hand two possibilities: either a statement of recognition (article 416 of the Civil Code), or he is called to court by the guardian of the child (article 425 of the Civil Code) as following a proof involving witnesses, forensic (the one with the highest probability of paternity is DNA expertise), documents that establish the filiation.

It is noted that the legislature intended that in the Civil Code to establish limitation periods larger than the old regulation (e.g. 3 years after birth, according to article 431 of the Civil Code to promote action in denying the paternity by the mother) or to declare the indefeasibility of some action in filiation matters during the child's life (e.g. article 427, article 433 paragraph 2 of the Civil Code), so as a child (themselves or by legal representative) would have the legal possibility to address the court in order to identify a particular person as being his parent.

It is required a note, namely: in the adoption matters by article 7 paragraph (4) of Law no. 273/2004 it has been provided the requirement of an DNA expertise for the child recognized by a married man, if his wife wishes to adopt the child. The purpose of administering the evidence means is not to circumvent the depositions of rather restrictive adoption procedure provided by law by the consent of the court of an adoption based on a fictitious paternity recognition. In other words, the quality of the father, acquired by the mere recognition made by administrative or notary way or within the process of establishing paternity, it may lose, as a result of the approach made by adoption, as the wife of this man would acquire motherhood.

In order to include in its content not only the natural and the adoptive filiation, but also the one resulting from medically assisted reproduction, we can define filiation as a legal bond between the child and his parents, resulting in birth, natural or artificial procreation, regardless of the origin of the genetic material, or on the basis of the adoption court order.

However, regardless the ways by which one becomes a parent, the parental authority content, as a set of rights and obligations regarding the person and the patrimony of the child are the same, with a few exceptions, which concern the adopted child and the one resulting from medically assisted reproduction.

2. Becoming a Parent through Adoption

The possibility of become a parent is offered also by the institution of adoption, leading to the full integration of the adopted child in the new family, sweeping

away any trace of biological filiation and therefore a natural kinship. If in the case of procreation there is no control of the state's institutions over the parent quality, in the adoption hypothesis, this control that goes until the decision (e.g. obtaining the certificate of adoptive person or family is only achieved after they are proven the material conditions, moral warranties and parenting skills of the applicant) resulting from the manner in which the contents of the Civil Code (articles 451-482) and Law no. 273/2004 on the adoption procedure governed by the substantive conditions of the adoption, on the one hand, and the consecration of the steps in procedure phase, listing the attributions of the court, a specialized public service and the Romanian Office for Adoptions.

If for the biological parent there is no impediment to acquire this quality by birth or procreation, in the adoption case, the legislator expressly provides situations that attract the impossibility of acquiring the quality of adoptive parent, namely: either a final conviction for certain crimes (offenses against the person or against the family committed by intention, for the crime of trafficking in persons and illicit drug trafficking and consumption) or a penalty of family law (it is about being deprived of the parental rights or the situation where a child of the person in question enjoys a measure special protection), or where the husband in question is mentally ill, he has a mental disability or he is in one of the above listed situations.

It can be said that, through adoption, the consent of the person (unmarried, regardless of sex, married or currently in a relationship of cohabitation for at least five years, during which, according to article 6 paragraph 1, letter C of Law no. 273/2004 on the adoption procedure, he participated in raising and educating the child) or persons who want to become parents so it starts the administrative procedure and also it completes the process.

Listing people which express their consent for adoption, the freedom of consent to adoption, the period during which it can express the consent to adoption, revocation of consent, express the consent to the natural parents only after they have been informed of the legal consequences that it has on the cessation of the filiation connection, parents refuse to give consent to the adoption of their minor child, the court intervention, are questions of law taken by the new civil Code from the special law, with some novelties that we wish to present in the following:

- the natural parents no longer consent to the adoption, if their child was initially adopted by a single or married person, and later the adopter husband wishes to achieve adoption as well (article 464 paragraph 3);

- maintaining the court's right of guardianship (provided in article 8 of Law no. 273/2004) to allow an adoption in the case where the parental or guardian express their refusal on the consent to adoption, if it is decided after complex evidentiary matters that such an attitude is abusive and contrary to the interests of the child.

Finally, we believe that the adoptive filiation responds primarily to an emotional reality in considering that the law sets artificially, but durable, a biological link between a child and a parent.

3. Becoming a Parent through Medically Assisted Reproduction

The desire of a person or a couple to have biological offspring has been the engine that was the basis for progress in medically assisted reproduction. In this area, the medicine outpaced the legal regulation, in the sense that, at first, there were the achievements of science and technology that created life, and then came the legislative regulation, and this is often incomplete.

Regarding the Romanian legislator, it gives to a person, without predicting whether a man or a woman, the opportunity to become a parent by using the techniques of medically assisted reproduction, but only limited to the situation where it is performed by a third party donor.

Punctually the provisions of article 441-447 of the Civil Code take into consideration the following aspects:

- lack of filiation between the child and a third party donor and therefore the inadmissible of an action for the donor's liability, according to article 441 paragraphs(1) and (2);
- have the right to medically assisted human reproduction with a third donor only a couple consisting of a man and a woman, without specifying explicitly whether married or not, or a single woman, according to article 441 paragraph 3. From the analysis of the legal provisions it results that they can resort to this technique also the unmarried persons, following the special law that provides the substantive conditions that need to be fulfilled, such as during cohabitation;
- substantive and formal conditions on the consent of those who are to become parents of a child conceived through medically assisted

reproduction techniques and the possibility of withdrawing it, and the remaining of the consent without effect(article 442);

- the inadmissibility of the action of consenting filiation of the child born through medically assisted human reproduction with a third donor, regardless of the status of the applicant;
- granting to the child born through medically assisted reproduction with a third party donor of the same legal status as that of a natural child. Thus, article 446 provides: *“The father has the same rights and obligations towards the child born by medically assisted reproduction with a third donor as compared to a child born through natural conception.”*
- Engaging liability of the man who refuses to acknowledge the paternity of the child to whom conceiving with a third donor he has consented according to the law. Although the legislator did not expressly provide what is this man’s liability to the child and to the mother, according to the analysis of the provisions of the law it results that it is about the obligation of compensation under article 428, the obligation to pay alimony (article 516), even moral damages.
- granting the confidentiality of information principle relating to medically assisted human reproduction caused the removing of the child's right to know his origin¹, proclaimed as an integral element of the right to free development of personality.²
- asking the judge to be the decisive factor, privacy and risk of causing serious harm to the health of the child conceived through medically assisted reproduction or his descendants³,article 445, paragraph 2 of the Civil Code authorizes the court trustee to transmit confidential information to the doctor or to the competent authorities.

¹ The child has the right to contest the paternity of the husband of the mother. Once such dispute is contested, nothing can preclude establishing the natural paternity towards the donor, with all its legal consequences, especially in terms of supporting, and if the doctor responsible for procreation has not properly prepared the documentation on the identity of the donor, the child may go to court against the doctor. These strict rules on the relationship between donor and child led in Germany to a considerable decrease in the number of donors. See (Frank, 1993, pp. 640-644; Furkel, 1997, p 93; Grote, 1999, p 94).

² Article 7, point 1 of the Convention on the Rights of the Child of 20 November 1989 (ratified by Romania, by Law no. 18/1990, published in the Official Monitor of Romania, Part I, no. 109 of 28 September 1990) provides that *“the child... has... as far as possible, the right to know his parents and be raised for by them.”*

³For an analysis *de lege lata* and *de lege ferenda* in the field see (Florian, 2006, pp. 633- 653)

If from the legal point of view the emergence of the so-called “test tube babies” was solved, it remains to be seen how will they be solved any medical problems and, especially, their psychological ones, when they understand how they came in this world. Hence the need for their parents to be prepared in order to support them and provide explanations.

4. Conclusions

The existence of a child in a couple's life - married or not - as well as the life of a person who intends to live alone, without partner, as *modus vivendi*, it insures the biological, cultural, economic, spiritual continuity, and why not even historical of the individual, family and society. The legislator shows his concern, interest in the appearance of a child by regulating ways of establishing filiation, by providing a rich content of rights and obligations of parental authority, by promoting and ensuring children's rights. Regarding parenthood, it was observed that it can be acquired in the cases expressly provided by law, sometimes completing some administrative, legal or medical, as appropriate procedures.

5. References

- Florian, E. (2006). Considera ii asupra filia iei în cadrul procrea iei medical asistate / Reflections on parenthood in the case of medically assisted procreation. *Revista de drept interna ional privat i drept privat comparat / Journal of private international law and comparative private law*.
- Frank, R. (1993). La signification differente attachée à la filiation par le sang en droit allemande et français de la famille / The different meaning attached to filiation by blood in German and French family law. *Revue internationale de droit comparé / International Journal of Comparative Law*, no 3, pp. 640-644.
- Furkel, F. (1997). Le droit à la connaissance de ses origines en Republique Federal d'Allemagne/The right to know their origins in Federal Republic of Germany. *Revue internationale de droit compare / International Journal of Comparative Law*, no 1, p. 93.
- Grote, R. (1999). Aspects juridiques de la bioéthique dans la legislation allemande / Legal aspects of bioethics in the German legislation. *Revue internationale de droit compare / International Journal of Comparative Law*, no 1, p. 94.