Recognition of paternity of a child who already has the legally established father

General remarks

Recognition of paternity, which is one of the ways of establishing paternity of a child born out of wedlock, is effected when the prerequisites of recognition are fulfilled, based on the provisions of the Family and Guardianship Code\(^1\). One of these prerequisites is the lack of legally established fatherhood of a child whose paternity is to be acknowledged.

This prerequisite results from the principle of indivisibility of the civil status. By establishing this rule, the legislator ensures uniformity of the legal relations between father and child. Recognition of paternity can take place only with respect to a child who does not have the legally established father\(^2\). Thus, it is inadmissible in the case of presumption of paternity by the mother’s husband or when paternity has been determined by the court. Furthermore, recognition of paternity is not admissible, either, when paternity has been established previously by acknowledgement\(^3\).

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Therefore, it is worth analysing the issue of recognition of paternity with respect to a child who already has the legally established father. This issue has not been discussed in detail in the legal doctrine so far, with respect to the current legal status after the change in the concept of acknowledgment of a child, and it is typically considered in a broader context of failure to fulfil the prerequisites for recognition.

Recognition of paternity of a child whose father has already been determined shall be analysed separately for each of the three ways of establishing paternity, specified in the Family and Guardianship Code. Such a division seems legitimate not only in terms of clarity of the discussion, but also owing to the considerable differences among presumption of paternity by the mother’s husband, recognition of paternity and judicial establishment of paternity.

It should be mentioned that, along with the regulations of the Family and Guardianship Code, the provisions of the Law on Civil Status Records are highly significant for our analysis, as well. The latter act contains the solutions which cannot be disregarded from the perspective of the discussed issues. An important novelty introduced by this act is the register of recognitions which plays a major role both for adherence to the rule of the civil status indivisibility and for effectiveness of statements on recognition of paternity, accepted by the registrar.

The principle of indivisibility of the civil status and recognition of paternity

Indivisibility is the basic feature of the civil status and means that “a person can only have one civil status, the same for all legal relations, e.g. a child cannot be considered to be a child of one man on one occasion and a child of a different man on another occasion.” In accordance with law, it is not possible to have

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4 The issue has been discussed with respect to the previous legal status by J. Preussner-Zamorska, Czy można mówić o nieważności uznania dziecka (uwagi na tle polskiego k.r.o.), “Studia Cywilistyczne” 1982, vol. 32, p. 115–144. The author regarded a situation when fatherhood was acknowledged even though paternity of the same child had already been determined as an example of the absolute invalidity of the acknowledgement.


two fathers at the same time, that is a child cannot be treated as descended from marriage and have the “legitimate” father on the basis of recognition. This principle is also referred to as the rule of motherhood of one woman and fatherhood of one man.

In the case of the relations between parents and children, the principle of the civil status indivisibility is expressed e.g. in art. 62 and 72 of the Family and Guardianship Code. From the juxtaposition of these regulations it follows that “one fatherhood excludes another” and, for instance, a child cannot simultaneously be descended from marriage and from a man who is not the mother’s husband. Thus, paternity can be established in another way when the fatherhood determined earlier has been questioned. As indicated by Anna Sylwestrzak, the grammatical interpretation of art. 72 of the Family and Guardianship Code, that is the use of a conjunction ‘or’, points to the fact that presumption of paternity by the mother’s husband, recognition of paternity and judicial establishment of paternity are separate and mutually excluding institutions.

The prerequisite of the lack of established paternity of a child with respect to whom recognition of paternity is to be effected, is classified in various ways among the prerequisites necessary to acknowledge paternity. Anna Sylwestrzak considers established maternity and non-established paternity to be the subject-related prerequisite concerning the child, determining the effectiveness of the recognition act. Tadeusz Smyczyński puts this prerequisite, as it were, “above” other prerequisites related to the features which refer directly to the people affected by the recognition act and the formal requirements for recognition of paternity. The Author emphasizes that the prerequisite of the lack of established

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10 Resolution of the Supreme Court of 18 January 2006, V CSK 108/05.
11 Ibidem.
14 A. Sylwestrzak, Uznanie ojcostwa w polskim prawie rodzinnym, “Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego” 2012, no. 1, p. 47.
paternity of another man has the central role here\textsuperscript{15}. On the other hand, Mirosław Nazar classifies the “paternity already established” as a negative prerequisite for recognition of paternity\textsuperscript{16}.

In the discussed context it is worth paying attention to great responsibility borne by the registrar at recognition of paternity\textsuperscript{17}. It is his or her duty to determine e.g. whether it can be presumed that a child is descended from the mother’s husband. A lack of or incorrect findings in this respect, for instance a mistake at calculation of the 300-day deadline after termination or annulment of marriage, within which presumption of paternity is still binding, would have far-reaching consequences, e.g. acceptance of statements on recognition of paternity with infringement of the civil status indivisibility rule. Thus, it is so important for registrars to be thoroughly familiar not only with laws relating to civil status records, preparation of a birth certificate in the case of recognition of paternity or amendments to such a certificate as a result of later recognition, but also with the regulations concerning descent of a child.

The major role of the registrar is confirmed by the wording itself of art. 73 § 3 of the Family and Guardianship Code. Pursuant to this provision, the registrar has a right and a duty to refuse to accept statements necessary for recognition of paternity if the recognition is inadmissible or if the registrar is in doubt over the descent of the child. On the other hand, acceptance of such statements, in spite of a duty to refuse to accept them in the two situations mentioned in this regulation, leads to divergent, albeit significant in both cases, legal consequences. In the latter case, failure to fulfil the aforementioned obligation shall result in a possible claim for ineffectiveness of recognition of paternity if the registrar’s doubt as to the child’s descent proves justified and the recognizer is actually not the child’s father. In the former case, the consequences of accepting an inadmissible statement on recognition of paternity are not directly specified in legal regulations and shall be discussed in the further part of the study.

In the context of the significant role of the registrar in recognition of paternity, we should not disregard the provisions of the law on civil status records, pertaining to the discussed issue. It is worth emphasizing that this legal act introduces a number of amendments to the previous procedure of accepting

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\textsuperscript{15} T. Smyczyński, \textit{Nowa konstrukcja normatywna}, p. 16.
\textsuperscript{16} J. Ignatowicz, M. Nazar, op. cit., p. 441.
\end{flushright}
statements necessary for recognition of paternity, taking into account the fact that the registrar is not only a passive recipient of statements related to the recognition but also evaluates its admissibility\textsuperscript{18}. The instruments which are supposed to prevent acceptance of defective statements on recognition of paternity include without doubt: the report on recognition of paternity containing the required data specified in the new act (art. 63 of the Law on Civil Status Records) and – which is an important novelty – establishment of the register of recognitions as part of the civil status records. The new register should contain information about accepted and rejected statements on recognition of paternity. According to the justification of the draft act, the register is supposed to be “a tool for registrars, used to find out whether statements necessary for recognition of paternity can be accepted”\textsuperscript{19}. The registrar who prepares the birth certificate of a child born from the mother who is not married would be able to check easily if paternity has been recognized\textsuperscript{20}. Consequently, it seems plausible to accept that the register of recognitions, introduced by the new act, is a means facilitating adherence to the principle of the civil status indivisibility.

Recognition of paternity of a child who is presumed to descend from the mother’s husband

If there is no presumption that the child’s father is the mother’s husband, or when this presumption has been rebutted, establishment of fatherhood can take place either through recognition of paternity or decision of the court. It means that it is inadmissible to establish paternity of a child, even if the child is actually descended from other man than the mother’s husband, unless the presumption of paternity by the mother’s husband is lawfully rebutted. Moreover, the presumption of paternity by the mother’s husband is not rebutted even by the longest period of the lack of conjugal life in the spouses’ marriage\textsuperscript{21}.

Recognition of paternity of a child in a situation when the child is presumed to descend from the mother’s husband is a particularly difficult case, but equally interesting. It is necessary to distinguish between two different situations here.

\textsuperscript{19} Ibidem.
\textsuperscript{20} Ibidem.
\textsuperscript{21} T. Smyczyński, Nowa konstrukcja normatywna, p. 16.
Firstly, such a recognition can occur when the biological father of the child is actually a man with respect to whom there is the binding presumption of the child’s descent from the mother’s husband. In such a case – which is obvious – the recognizer is a man from whom the child is not descended. In the second case, fatherhood of the child is also recognized despite the binding presumption of paternity by the mother’s husband, but the child is actually descended from the recognizer. Both situations can take place when, for instance, the child is born within 300 days since the decree of divorce came into effect, that is during the period in which the presumption of paternity is still binding. However, in the birth certificate of the child the mother’s husband has not been indicated as the child’s father by mistake, which enabled another man to recognize the child. It should be remembered that a birth certificate is not the source of the presumption and that the presumption of paternity by the mother’s husband shall be binding irrespective of the fact whether or not the child’s father is indicated in the certificate. Thus, it would be inaccurate to claim that the

22 B. Jaranowska emphasizes that the rule according to which the presumption pertains also to children born within 300 days from the termination or annulment of marriage, which precludes recognition of paternity in their case, is negatively perceived in practice, especially by people who want to register a child in accordance with the child’s biological descent and learn that it is not possible because it is the former husband who should be entered in the birth certificate as the child’s father. The author notes that the proceedings in divorce cases are often prolonged and the deadline of 300 days should be counted from the moment the divorce decree became final and binding. The only manner to omit a lengthy way encompassing: “termination of marriage – birth of the child and registration of birth with data of the former husband – denial of paternity at court – opportunity for recognition” is entering into another marriage by the mother; see: B. Jaranowska, Schematy postępowania przy rejestracji oświadczeń o uznaniu ojcostwa w systemie “Źródło”, “Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego” 2015, no. 2, p. 164.

23 Another case is mentioned by J. Ignatowicz. The author analyses a situation in which a man files a petition for establishment that he is not the father of a child even though his paternity has not been disclosed in the civil status records and the petition is filed because e.g. the child or the child’s mother are spreading rumours that the petitioner is the father. The author emphasizes that such a petition would not be granted, because the petitioner’s fatherhood has not been demonstrated, which is evidenced in the child’s birth certificate denying the petitioner’s paternity. Thus, the petitioner already has a document which he would like to obtain as a result of the proceedings for non-existence of paternity; see: J. Ignatowicz, Stan cywilny i jego ochrona, “Annales Universitatis Mariae Curie-Skłodowska. Sectio G. Ius” 1963, vol. 10, p. 157. However, as it has already been mentioned, presumption of paternity by the mother’s husband is binding irrespective of disclosure of fatherhood in the child’s birth certificate.
mother’s husband would become the father within the meaning of law only at the moment of disclosing his fatherhood in the child’s birth certificate\textsuperscript{24}.

With respect to the former situation, in the light of the current regulations concerning recognition of paternity, such a recognition is both non-existent and ineffective \textit{prima facie}. It is non-existent due to infringement of the principle of the civil status indivisibility and the lack of the prerequisite of not legally established fatherhood. On the other hand, its ineffectiveness results from the present regulation of this institution in which recognition of paternity is deemed ineffective on the basis of the fact that the child is not descended from the recognizer. The issue of solving this problem by judicial proceedings could be discussed here. In this case it would be possible to apply the construction of an alternative claim in which the petitioner would demand either establishment of non-existence of recognition of paternity or – in case of dismissal of action in this respect – establishment of ineffectiveness of the recognition\textsuperscript{25}. An alternative claim is presented in a lawsuit along with the main one, should the main claim be rejected, and it is examined and adjudicated by the court only after the main claim of the lawsuit has been dismissed\textsuperscript{26}. On the other hand, when the main claim is granted, the alternative claim is not examined at all\textsuperscript{27}. Such an object-related accumulation of the proceedings may lead to filing various claims, including a claim for establishment of existence or non-existence of an entitlement or a legal relation\textsuperscript{28}. The main condition for such an accumulation

\begin{thebibliography}{99}
\item Resolution of the Supreme Court of 15 January 1968, III CZP 85/67, OSNCP 1968/11/179. In accordance with the Resolution, “the due period for filing a lawsuit for denial of paternity by the mother’s husband commences on the day when he learned that his wife gave birth to a child, also in the case when the mother’s husband has not been disclosed as father in the child’s birth certificate”.
\item A similar situation gave grounds for the decision of the Supreme Court no. III CSK 196/16 of 12 May 2017. The petitioner demanded establishment that his statement on recognition of paternity is ineffective because the child was not descended from him. He also lodged an alternative claim, demanding establishment that he effectively evaded the consequences of the statement on recognition of paternity, and possibly the establishment that this statement was invalid pursuant to art. 58 of the Civil Code as a legal act aimed at circumvention of the adoption regulations.
\item Judgement of the Supreme Court of 31 January 1996, III CRN 58/95 (LEX no. 1112063).
\end{thebibliography}
is the sameness of the subjects and their status in the proceedings in each of
the claims submitted.29

However, it seems that even if such accumulation was possible from the
procedural point of view, this solution would raise objections anyway. If there
is no legal relation of fatherhood due to the lack of one of the necessary pre-
requisites of recognition, that is the lack of legally established paternity, it is
difficult to demand establishment of ineffectiveness of the recognition. In the
case of the recognition of paternity of a child who already has the legally esta-
lished father, i.e. when there is the presumption of the child’s descent from
marriage, establishment of ineffectiveness of such a recognition shall not be
justifiable.30 Only establishment of non-existence of recognition of paternity
shall be possible here.

The other case, where the child’s descent from the father is established
accurately but in defiance of law, seems to be even more interesting. Such
a recognition is non-existent, even though it is in accordance with the actual
biological origin of the child. When a necessary prerequisite is lacking, there
is not a legal event having legal consequences at all, even if the man is the
child’s biological father.31 If the child’s biological father, that is the man who
has recognized the child and has been disclosed as the father in the child’s birth
certificate, wishes to be regarded as the father by law despite presumption of
paternity by the mother’s husband, the road to this will be long and complicated.

Firstly, non-existence of the recognition would have to be established.
Another step, following the establishment of non-existence of the recognition,
would be to deny paternity by the mother’s husband. After the refutation of
the presumption of paternity by the mother’s husband, the guardianship court
can decide to draw up a new birth certificate for the child, pursuant to art.
67 section 1 of the Law on Civil Status Records.32 Then, the biological father
would have to acknowledge paternity again, in accordance with the provisions
of the Family and Guardianship Code. However, it should be noticed that the
child’s civil status specified in the birth certificate as a result of this long and
complicated procedure would be the same as before its application. Thus, it

29 Ibidem, p. 924.
32 More in: P.T. Kartasiński, Sporządzanie nowego aktu urodzenia dla dziecka, w przypa-
dku obalenia domniemania jego pochodzenia od męża matki. Uwagi na tle art. 67
ust. 1 ustawy z dnia 28 listopada 2014 r. – Prawo o aktach stanu cywilnego, “Metryka.
Studia z zakresu prawa osobowego i rejestracji stanu cywilnego” 2016, no. 1, p. 65–86.
seems that the most reasonable and the quickest solution would only be to deny paternity by the mother’s husband, without establishment of non-existence of the recognition of paternity. A similar opinion – though with respect to the need to correct the child’s birth certificate in order to disclose the mother’s husband in it before denial of paternity by the mother’s husband – has been expressed by the Supreme Court who claims that “it would be contrary to the economics of the proceedings and, in addition, incomprehensible for an average citizen if the petitioner was expected to apply for correction of the child’s birth certificate in order to be indicated as the father therein, when his lawsuit is based exactly on the statement that he is not the father. Therefore, it would be an incomprehensible paradox if the petitioner first had to act in a direction unfavourable to himself in order to achieve the desired goal”\(^{33}\). Similarly, in the situation analysed here it would be difficult to require that a man who has acknowledged fatherhood should claim its non-existence, that is should act in a direction unfavourable to him, just to recognize paternity again then. His “first” recognition of paternity, even though incorrect at a given moment from the legal perspective, reflects the actual state of affairs\(^{34}\). However, it should be emphasized that the above-mentioned thesis is not unquestionable and does not take into account a situation when the biological father who recognized paternity despite the binding presumption, requests establishment of its non-existence, or it is requested by other people who have legal interest in such establishment.

Recognition of paternity of a child whose father has already been established by recognition

It seems that the cases of recognition of paternity of a child who has already been recognized are relatively rare. Without doubt, such situations are prevented primarily by the correct drawing up of a recognition of paternity report by the registrar, preceded by exact determination of data necessary for preparation of the report. Such a report contains a statement of the recognizer that he does not know anything about recognition of paternity or refusal to recognize paternity, or about a pending case for establishment of paternity, and a statement of the child’s mother that there has been no recognition of paternity or denial to recognize paternity, and that there is no pending case for establishment

\(^{33}\) Resolution of the Supreme Court of 15 January 1968.

\(^{34}\) Ibidem.
of paternity (art. 63 section 2 item 6 of the Law on Civil Status Records). As indicated by its name, the register of recognitions, maintained within the civil status register, contains data pertaining to statements necessary for recognition of paternity and information about refusal of their acceptance, hence it is an instrument created specifically in order to prevent acceptance of statements on recognition of paternity with respect to a child whose fatherhood has already been recognized.

Nevertheless, in a situation when recognition of paternity pertains to a child whose descent from the father has already been established in this manner, the man who made the “second” recognition shall not be allowed to claim its ineffectiveness, even if he is not the biological father of the child. The observations from the previous part are valid also in this case. Legal consequences of his statement should be quashed through a lawsuit for establishment that the legal relation of paternity does not exist due to non-existence of recognition, based on art. 189 of the Civil Procedure Code.

However, there is a more complicated case in which this “second” recognition is consistent with the actual biological descent of the child. First of all, the coordination between the child’s biological descent and the legal origin would require establishment of non-existence of recognition of paternity carried out with infringement of the civil status indivisibility rule. Then, an authorized entity would have to file a lawsuit for establishment of ineffectiveness of the first recognition. In the current legal status, the lack of biological relations between the recognizer and the child is the basic (the only) prerequisite for ineffectiveness of recognition\(^\text{35}\). Only after the establishment of ineffectiveness of the first recognition, in connection with the lack of the determined descent of the child from the father, the man from whom the child is descended can make a statement on recognition of paternity. However, it seems that the remarks made in the previous part with respect to an analogous situation of the presumption of paternity by the mother’s husband remain valid here and it would be enough to determine ineffectiveness of the first recognition of paternity made with respect to the same child.

Recognition of paternity of a child whose father has already been established by court

Article 4 section 1 of the Law on Civil Status Records imposes a duty on courts to submit certified copies of final and binding decisions on the basis of which civil status records are drawn up or which affect the contents or validity of civil status records, along with the information about the date these decisions became final and binding – to registry offices, within 7 days from the day the decisions came into force. The aim of this regulation is to provide information to registrars about the date of judicial decisions becoming final and binding. As emphasized in the justification of the draft act, this date is of major significance to e.g. establishment of the child’s descent. This argumentation refers not only to the correct establishment of the presumption of paternity by the mother’s husband, for which it is necessary to know the date on which the decree on divorce or annulment of marriage came into force. The judicial establishment of paternity, which determines the civil status of the child, is also reflected in the child’s birth certificate.

On the date the judgement establishing paternity becomes final and binding, the child’s descent from the man indicated as the child’s father in the judgement becomes legally sanctioned. Thus, in accordance with the principle of civil status indivisibility, it is not possible to establish paternity of another man. Due to the fact that the judicial establishment of paternity is the most reliable way of determining the child’s descent from the father, recognition of paternity made after the judicial establishment of fatherhood shall be, as it seems, not only always inconsistent with law, but also contrary to the truth. Moreover, due to the fact that the principle of civil status indivisibility is infringed, the court should adjudicate non-existence of the legal relation of paternity established on the basis of such a recognition, at the request of a person who has legal interest in it.

Consequences of recognition of paternity of a child whose descent from father has already been established

The consequences of non-fulfilment of the prerequisites necessary for recognition of paternity are not specified directly in the provisions of the Family and Guardianship Code. In the doctrine there are divergent opinions on the consequences of such deficiencies. In general, opinions of particular authors

36 Justification of the draft act: Law on Civil Status Records (10 December 2017).
on specific consequences of the deficiencies indicated depend on treatment of recognition of paternity either as a declaration of will or a declaration of knowledge\textsuperscript{37}. However, it is also possible to observe certain divergences and inconsistencies here. It is worth noticing the terminological chaos in this respect. In the context of deficiencies occurring at recognition of paternity the following phrases are used: “inadmissible recognition”, “absolute invalidity of recognition of paternity”, “non-existent recognition”.

Krzysztof Pietrzykowski distinguishes between absolutely invalid and non-existent recognition of paternity (using the term of “recognition of a child”). The cases when fatherhood of another man has been determined previously on the basis of art. 62 or 72 of the Family and Guardianship Code are classified by the Author as the reasons for absolute invalidity of the recognition\textsuperscript{38}. On the other hand, in the case of non-existent recognition, not regulated by the act, general rules pertaining to non-existent legal actions shall be applicable. Hence, the following cases have been classified as the reasons for non-existent recognition: if the recognition is not comprehensible enough to understand its meaning even through interpretation; if it is a consequence of physical force; if it has not been made seriously\textsuperscript{39}. The Author notes that “the difference between absolutely invalid recognition and non-existent recognition consists in the fact that in the former case a declaration of will has been submitted but it is regarded by the act as invalid from the beginning due to factual or formal reasons, whereas in the latter case we cannot talk about a man making a declaration of will”\textsuperscript{40}. Slightly in advance, it should be noticed that the reasons for non-existent recognition, enumerated by the Author, are based on the assumption according to which recognition of paternity is a declaration of will. Only such behaviour which fulfils the conditions specified above can be regarded as a declaration of will (i.e. it is comprehensible enough to understand its meaning at least on the basis of interpretation, etc.)\textsuperscript{41}. Thus, the Author’s discussion of recognition

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\textsuperscript{39} Ibidem, p. 703.

\textsuperscript{40} Ibidem.

\textsuperscript{41} A. Wolter, J. Ignatowicz, K. Stefaniuk, op. cit., p. 256–257.
\end{footnotesize}
of paternity is based on the abrogated normative concept of recognition of paternity as a legal action\textsuperscript{42}.

Similarly, Jerzy Strzebinczyk notes that recognition of paternity can take place in practice, despite the fact that it was inadmissible in the circumstances of a given case. In the Author’s opinion, in such an event we should make use of the general constructs of civil law, of which the sanction of absolute invalidity, stipulated in art. 58 § 1 of the Civil Code, seems to be the most appropriate\textsuperscript{43}. However, this sanction should not be used directly but relevantly, with adjustment of the operational mechanism of this type of sanction. Such a sanction could not operate only by virtue of law, which any person concerned could refer to, but it would require judicial decision that recognition of paternity is invalid\textsuperscript{44}.

On the other hand, in the context of art. 72 of the Family and Guardianship Code, Barbara Trębska claims that a statement on recognition of paternity with respect to a child whose father has already been established does not have legal consequences and is absolutely invalid\textsuperscript{45}. What is interesting, while commenting on art. 78 of the Family and Guardianship Code, the Author notes that e.g. in the case of recognition of paternity where fatherhood has already been established by presumption or judicial establishment of paternity, “there is not a legal event with which the legislator associates the consequence of recognition of paternity and disclosure of this legal relation, even if the man is the biological father of the child. Then, legal consequences of the statements submitted should be quashed on the basis of art. 189 of the Civil Procedure Code by filing a lawsuit by an entity who has legal interest in demonstrating the lack of the legal relation of fatherhood”\textsuperscript{46}.

Among the issues concerning descent of a child, in which 16-year-old parents can file lawsuits on their own, Joanna Bodio mentions establishment


\textsuperscript{44} Ibidem.


\textsuperscript{46} Ibidem, p. 659.
of non-existence of a legal relation resulting from recognition of paternity in a situation of the so-called absolute invalidity of the recognition\textsuperscript{47}. It is worth mentioning that art. 453(1) of the Civil Procedure Code, which enumerates cases for establishment or denial of a child’s descent and for establishment of ineffectiveness of recognition of paternity, does not point to such a possibility directly, although we should accept the Author’s view that the people indicated will have the capacity to act in judicial proceedings also in these cases. Most of all, it is interesting that the Author, using the term: “establishment of non-existence of a legal relation resulting from recognition of paternity”, indicates however “absolute invalidity of recognition of paternity” as the basis of the claim concerned\textsuperscript{48}.

Helena Pietrzak points to the fact that a statement on recognition of paternity cannot be accepted if the child’s descent has already been established and no authorized entity has questioned it effectively\textsuperscript{49}. The Author mentions the discussed problem in the context of “bans on recognition”, but she does not specify the consequences of a recognition statement made in such a situation.

Tadeusz Smyczyński points to a certain similarity between the consequences of failure to fulfil the prerequisites necessary at recognition of paternity, including the prerequisite of lack of establishment of paternity by another man, and at entering into marriage\textsuperscript{50}. The author expresses an opinion that in the event of the lack of a prerequisite necessary for recognition of paternity, there is not a legal event whatsoever which would lead to recognition of paternity, even if the a man is the child’s biological father.\textsuperscript{51} In such a case, everyone who has legal interest in it can demand establishment that the legal relation of paternity does not exist\textsuperscript{52}. According to Wanda Stojanowska and Mirosław Kosek, such an approach to the consequences of non-fulfilment of the prerequisites necessary for recognition does not raise doubts and “best represents the legislator’s intent towards the discussed issue”\textsuperscript{53}. Moreover, the Authors indicate that “making statements necessary for recognition in the event of the lack of capacity to

\textsuperscript{47} J. Bodio, Zdolność do czynności prawnych a zdolność procesowa – na wybranych przykładach w sprawach z zakresu prawa osobowego i rodzinnego, “Studia Prawnicze” 2011, no. 2, p. 145.
\textsuperscript{48} Ibidem.
\textsuperscript{49} H. Pietrzak, Uznanie ojcostwa nowym sposobem ustalenia pochodzenia dziecka, “Prawo Kanoniczne” 2009, no. 3/4, p. 382.
\textsuperscript{50} T. Smyczyński, Prawo rodzinne i opiekuńcze, p. 197.
\textsuperscript{51} Ibidem.
\textsuperscript{52} Ibidem.
\textsuperscript{53} W. Stojanowska, M. Kosek, op. cit., p. 178.
perform legal acts or any of the necessary prerequisites for recognition causes non-existence of the recognition in the legal sense (in this case we can talk about *agnitio non existens*, similarly as in the case of *matrimonium non existens*)”

Likewise, Mirosław Nazar claims that “in the event of failure to fulfil the prerequisites constituting the legal act of recognition – an attempt at recognition of paternity can be described as non-existent recognition of paternity”

According to the Author, one of the reasons for non-existent recognition of paternity is the establishment of fatherhood on a different basis, already existing at the moment the statement on recognition is made.

Tadeusz Smyczyński, emphasizing that in the legal research it is not acceptable to ignore the norms of the statute law and to draw conclusions *contra legem*, even in the case of disapproving of the solutions introduced by the legislator, claims firmly that in the current legal status “absolute invalidity of recognition of fatherhood is out of the question” and this opinion seems to be right. Recognition of paternity in accordance with the literal wording of art. 73 § 1 of the Family and Guardianship Code, at fulfilment of other prerequisites, when a man declares he is the child’s father, should be regarded now as a declaration of knowledge. The Author notes that recognition of paternity, both currently and prior to the amendment, has not been a way of finding the father for a child born out of wedlock, but a way to establish fatherhood and thus the civil status of a child.

It seems that it would be difficult to identify here any elements of a declaration of will, which would enable us to treat recognition as a legal action. Therefore, in such an approach we cannot talk about absolutely invalid recognition, but only about non-existent recognition. Such a terminology is also used in this study.

Establishment of non-existence of paternity recognition on the basis of art. 189 of the Civil Procedure Code

Unlike the establishment of ineffectiveness of recognition of paternity, there are no regulations which would define exact bases for establishment of non-existence of recognition of paternity. Thus, assuming that recognition of paternity

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54 Ibidem, p. 179.
56 Ibidem, p. 450.
made without fulfilling the necessary prerequisites for recognition is non-existent recognition, poses a question which way would be suitable to claim non-existence of a legal family relation, based on non-existent recognition of paternity. The basis for such a claim would be art. 189 of the Civil Procedure Code\textsuperscript{59} which provides for a claim for establishment of existence or non-existence of a legal relation or a law. Hence, establishment of non-existence of recognition of paternity can take place in the litigation for establishment of non-existence of a legal relation of the civil status of paternity (art. 189 of the Civil Procedure Code)\textsuperscript{60}.

What is important, in order to grant a petition it is not enough to determine that a given legal relation exists or does not. A legal interest is necessary, as well. This is a condition in which “firstly, there is no other legal means with which the petitioner can achieve effective legal protection; secondly, a judicial decision issued pursuant to art. 189 of the Civil Procedure Code grants the petitioner such effective legal protection”\textsuperscript{61}. In such an approach, a claim for establishment of non-existence of recognition of paternity would be admissible only if there is no possibility to claim establishment of its ineffectiveness, that is in the cases when the child either is actually descended from the recognizer or the deadline for claiming ineffectiveness of the recognition has passed, and – apart from the lack of biological bonds – the necessary prerequisites for the recognition have been infringed\textsuperscript{62}, which, however, is dubious, as shown above.

Maciej Domański assumes that the petitioners in the case for establishment of non-existence of legal paternity as a result of the lack of recognition can be: the child, the child’s mother and the man who has been entered in the birth certificate as the child’s father\textsuperscript{63}. The Author notes that the entitlement of the biological father can raise doubts, as he has personal interest in establishment of non-existence of the legal relation of fatherhood, but this is not a direct interest. A consequence of such an approach is exclusion of the possibility to file a lawsuit by the biological father of the child\textsuperscript{64}. However, it seems that this

\textsuperscript{60} J. Ignatowicz, M. Nazar, op. cit., p. 450.
\textsuperscript{61} Judgment of the Appellate Court in Katowice of 13 March 2013, I ACa 78/13 (LEX no. 1307434).
\textsuperscript{63} M. Domański, op. cit., p. 1073.
\textsuperscript{64} Ibidem.
approach can be questioned. The discussed issue has been described correctly by the Regional Court in Toruń which has emphasized that through aiming at establishment of the child’s paternity, such a man wishes to protect his personal interest in the form of a bond with the child and all these rights and duties which fall under the notion of “exercising parental authority” as well as the right to have contact with the child. Furthermore, establishment of paternity is in the child’s best interest. A child has the right to know and be sure who is his or her father, and a petition for establishment of paternity also aims at protection of the child’s personal interest consisting in bonds with the biological father\textsuperscript{65}. Even though the abovementioned circumstances of the case pertained to recognition of paternity during the pending proceedings for establishment of fatherhood, this thesis can be applied analogously to the cases when recognition of paternity took place with respect to a child whose paternity has already been legally established.

Certainly, the aforesaid remarks concern a situation in which recognition of paternity of a child who already has the legally established father, is reflected in the child’s birth certificate. In the context of the elements of a legal event of recognition of paternity, T. Smyczyński notes that if the statement of the man from whom the child is descended and the statement of the child’s mother are made without participation either of the registrar or the guardianship court, they do not form an event which would lead to the desired legal consequences. For instance, making such statements on a social occasion does not result in recognition of paternity\textsuperscript{66}.

Conclusions

The multitude of issues connected with the analysis of recognition of paternity with respect to the child who already has the legally established father points to the complexity of this problem. Both terminology questions and the litigation-based resolution of this issue raise doubts.

It is worth remembering that a possibility itself of establishment of non-existence of recognition of paternity would raise special doubts in a situation when the child is actually descended from the man who made a statement on recognition of paternity. It is difficult to definitely accept that a claim for

\textsuperscript{65} Judgement of the Regional Court in Toruń of 6 February 2014, I C 2138/13.
\textsuperscript{66} T. Smyczyński, \textit{Nowa konstrukcja normatywna}, p. 15.
establishment of non-existence of recognition of paternity is inadmissible in such cases, although it is indicated in the doctrine that the lack of established fatherhood is one of the necessary prerequisites of recognition, and if one of the necessary prerequisites is lacking, there is no legal event causing legal consequences at all, even if the man is the biological father of the child. It is interesting that such a man is both entered in the child's birth certificate as the father and is the biological father of the child. From the formal perspective, he would be surely entitled on the former basis at least. However, we should not forget that the essence of the recognition lies in its voluntary character, and the biological father's intent to establish non-existence of recognition of paternity can indicate that he is not going to make statements necessary for the recognition. Such cases open the way for further discussion in which the principle of the child's best interest and stability of his or her civil status will surely be highlighted.

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Abstrakt
Uznanie ojcostwa dziecka, które ma już ojca prawnie ustalonego

Jedną z przesłanek uznania ojcostwa jest brak prawnego ustalenia ojcostwa dziecka, co do którego ma nastąpić uznanie ojcostwa. Wymóg ten jest konsekwencją zasady niepodzielności stanu cywilnego, która jest określana również jako zasada
Macierzyństwa jednej kobiety i ojcostwa jednego mężczyzny. Autorka poddaje analizie sytuację, w której uznanie ojcostwa zostało dokonane w stosunku do dziecka, które ma już ojca prawnie ustalonego. Rozważania zostały oparte nie tylko na przepisach Kodeksu rodzinnego i opiekuńczego, ale również Prawa o aktach stanu cywilnego. Odrębnej analizie zostały poddane przypadki uznania ojcostwa dziecka w przypadku obowiązywania domniemania pochodzenia dziecka od męża matki, wcześniej uznania ojcostwa i sądowego uznania ojcostwa. Autorka wskazuje również na skutki uznania ojcostwa z naruszeniem zasady niepodzielności stanu cywilnego i zagadnienia proceduralne związane z ustaleniem nieistnienia uznania ojcostwa na podstawie art. 189 Kodeksu postępowania cywilnego.

Słowa kluczowe: stan cywilny, dziecko, ojcostwo, małżeństwo, nieistniejące uznanie ojcostwa

Abstract
Recognition of paternity of a child who already has the legally established father

One of the prerequisites for recognition of paternity is the lack of the legally established fatherhood of the child whose paternity is to be recognized. This requirement is a consequence of the civil status indivisibility principle which is also defined as the rule of motherhood of one woman and fatherhood of one man. The author analyses the situation when recognition of paternity is made with respect to a child who already has the legally established father. The discussion has been based not only on the regulations of the Family and Guardianship Code, but also on the provisions of the Law on Civil Status Records. A separate analysis has been carried out with respect to the cases of recognition of paternity if there is the binding presumption of paternity by the mother's husband, earlier recognition of paternity and judicial recognition of paternity. Furthermore, the author points to the consequences of recognition of paternity with infringement of the civil status indivisibility principle and to the procedural issues connected with establishment of non-existence of recognition of paternity pursuant to art. 189 of the Civil Procedure Code.

Key words: civil status, child, paternity, marriage, non-existent recognition