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In the Best Interest of the Child – Contemporary Parenthood

Tatiana Tolstoy

1. Introduction

The purpose of this presentation is to briefly introduce the reader to my doctoral thesis. I am fairly new to my role as a doctoral student, but my contact with the Norma Research Programme started years ago when I began to work as a research assistant for Eva Ryrstedt, who is now my supervisor. Already in my examination thesis¹ I used the theory of law as normative patterns in a normative field for my analysis.

The theory and method of law as normative patterns in a normative field is likely also to form the basis of my doctoral research on legal parenthood. However, the first phase, among other things, is to systematise and structure the relevant material to detect the different normative positions. For this purpose I will use traditional legal-dogmatic method. In this context, I will also use a historical perspective to provide understanding of today's rules and how they have developed over time. Then, to deepen the study, I will add a comparative perspective to answer the question of on which ground or grounds legal parenthood should preferably rest. Comparison with other foreign legal systems concerning legal parenthood gives a very good understanding of how these systems have dealt with the issues concerned,

¹ Tolstoy Kongstad, T., *Mater semper certa est?, En diskussion kring moderskapspresumtionen i svensk rätt och behovet av lagreglering rörande rättsligt moderskap*, Examensarbete vid Juridiska Fakulteten vid Lunds universitet, 2003.

and could therefore be a starting point for how to deal – or not to deal – with these issues in the Swedish legal system.

In my work I introduce four different types or concepts of parenthood, which I find essential for the understanding of my field of research. The first is a *legal parent*, a person who is identified as a parent and has thus received legal status with consequent legal rights and obligations. The second is a *biological parent*, a woman who has gone through a pregnancy and then has given birth to the child, or a man who has contributed through his sperm to the child's nascency. The person who, through her eggs or his sperm, has contributed to the child's nascency is a *genetic parent*,² and fourth, the person who takes care of the child is a *social parent*.

2. Family in change

Today, the family, which in many ways is seen as the basis of society, takes new forms. The nuclear family is no longer the obvious way to live together; even if this is still seemingly standard, many people live in so-called post-nuclear families. In addition, the right for registered partners or homosexual spouses to be considered for adopting a child and the possibility for lesbian couples to access artificial insemination create new types of families. In today's biomedical world, there are opportunities to create new life through a variety of artificial methods, such as egg or sperm donation. Our formal family types are changing to keep pace with different medical developments, even if this change sometimes seems to be rather slow. The motives behind the changes are not the same. The desire to start a family is mainly based on the nature of our biological identity, our desire for the survival of mankind, and the individual sense of living. The manner of family formation has traditional overtones and is based on social beliefs and norms.³

² With this terminology, the genetically determined paternity will coincide with the biological.

³ SOU 1981:85, p. 97. Cf. also Bengtsson, B., in *SvJT* 1978, p.705 ff. and Ryrstedt, E., *Bodelning och bostad, Ekonomisk självständighet eller gemenskap*, Juristförlaget i Lund, Lund 1998, p. 383.

Other social phenomena are also creating new family ties. One example is the phenomenon of children coming to Sweden with so-called false parents. These 'parents' are adults who declare to the Swedish authorities that they are the biological parents of the children. The children are registered through national registration and the registration is then the basis for both guardianship and custody of the children.

3. Reflections on the presumptions of legal fatherhood and motherhood

Current Swedish law on parenthood is clearly characterised by historical and biological factors. The regulation is based on the idea that biological relationship constitutes the basis for legal parenthood. However, this perception does not always correspond with reality.

In Swedish law, there are rules for stipulation as well as for revocation of paternity. Fatherhood is determined either by a presumption of paternity, in which a married man is presumed to be the father of the child his wife is giving birth to, or by confirmation or decree. The presumption seems to be pragmatically justified – more often than not it will be correct. Not long ago, paternity determinations were difficult and the outcome unreliable. Today the situation is quite different. Not only is it possible to revoke paternity without limitation in time, but also to determine with great certainty the biologically-based paternity. This may result in a presumed father who suspects or knows that he is not the rightful father, being able to choose whether or not he wishes to remain in the role. The child may 'lose' the legal father at any time in life. This ability to rescind paternity weakens the child's right to a sustainable fatherhood.

However, the Swedish law lacks rules for establishment and revocation of motherhood, except for the determination of motherhood when a child is conceived through egg donation. The ancient Roman legal presumption *mater est quem gestatio demonstrat*, 'the mother is the one who gives birth to the child', is albeit still valid. The presumption means that motherhood is considered legally established through giving birth. The basis for the presumption is the Roman maxim, *mater semper certa est*, 'it is always clear who is the mother'.

These presumptions are based on the biological relationship forming the basis for legal parenthood. However, this is not always accurate. What is worse, sometimes the biological and genetic relationships come into conflict with each other. In Sweden, surrogacy is not allowed. Nevertheless, a woman or a couple may travel to a country where surrogacy is offered. This does lead to complications with which our legislation has difficulties. One case from the Supreme Court⁴ addresses this very issue. Swedish law identifies the surrogate mother (the biological mother) as the legal parent, as stated above. The social mother, who was also the genetic mother in this case, was refused on legal grounds (absence of consent) the right to adoption of the child. A case like this raises many questions, with a starting point in the best interest of the child. The answer lies in how legal parenthood is defined. However, it is uncertain how best to solve it.

From this perspective, the legislation on legal parenthood is obsolete. For the family to function, and ultimately, society as well, it is important that a modern regulatory framework in tune with current family formation patterns surrounds legal parenthood. It is also important to try to create conditions to make social parenthood sustainable.

4. Reflections on other legal constructions concerning fatherhood and motherhood

As stated above, another problem is the social phenomenon in which children come to Sweden with adults who, without a legitimate basis, are purporting to be the biological parents. The registration is then the basis for both guardianship and custody of the children. This in turn legitimises the ‘false parents’ as legal parents. It is usually only when anomalies in the family become known to social service professionals, that the ‘false parenthood’ is detected.

The lack of clear rules regarding revocation of motherhood can lead to uncertain lawsuits and numerous hardships for the concerned child. Adding to this problem, we have the phenomenon of so-called dumped kids (media

⁴ See NJA 2006 p. 505.

coined this term) – children who are left in their former home countries by the ‘false parents’. These parents, who are also guardians, then return to Sweden. The children, though, cannot come home on their own accord, since the guardian's signature is required in the passport applications.

In the event that two gay men choose to privately have children with two lesbian women, it is only the biological mother and father who are the legal parents of the child. However, it seems common that all four persons in these relationships conceive themselves as, and act like, parents. The child then *de facto* has two additional parents, being regarded as merely social parents. These social parents may eventually opt out of further contact with the child. Through this ‘right’, the child may ‘lose’ a parent according to that parent’s discretion. Similar problems may arise, for example in relation to step-parents in so-called post-nuclear families. The problem is further enhanced since in these cases, the social parent also does not have a given right to spend time with the child.

A lesbian couple can of course also choose to have a child through private donation, without having the intention that the biological father is going to take an active part in the child's life. Today, an adoption in relation to the woman not bearing the child, must take place for her to become a legal parent. Otherwise, the biological parents remain legal parents and the problem of social parenthood is the same as the one described above.

However, if the lesbian couple chooses instead to have a child through artificial insemination in the hospital, in the way approved by Swedish legislation, the child will have two legal mothers, subject to the other woman having given her consent to the procedure. In these cases, the situation is the same as for a woman living in a heterosexual relationship. The child has the right, however, in such a case to know the donor's identity. In addition to the biological mother, the other parent becomes both a legal and social parent, with the consent as a basis.

5. The need for regulation in accordance with the best interest of the child *and* today’s society

Society today is very different than it was at the time when most of our current legislation came into force. While the presumptions reflect the

nuclear family as a concept and a standard, as well as the traditional method of having children through sexual intercourse, the reality is different. Nuclear families are not as stable as they once were. Since medical technology has made it possible to easily ascertain blood relationships and create new life by artificial means, the legitimacy of the presumptions of parenthood must be questioned. As interpreted in the United Nations Children's convention, if the expression 'in the best interest of the child' shall have real value, children must have a viable right to ascertain their origin.

A key question in light of societal developments is whether the contents of the father and motherhood presumptions currently function in the reality in which they are to be applied. Furthermore, the content of the expression 'the best interest of the child' is to emanate from the child's needs rather than that of their parents and society. Today this is not always the case, nor is this the case in the above addressed issues. A subsequent question becomes this: on what grounds should legal parenthood exist? If parenthood is still wrongly established, the question is whose interest would be served if a revocation is permitted, and if a time limit for revocation shall be stipulated.

Another issue is how to balance the child's interest in knowing its origin and the interest of sustainable parenthood with the parents' rights and the interests of society. The so often important social parenthood can already be converted into legal parenthood through adoption. The adoption institute, however, is not adapted to the diversity of family types that exist today. The question is thus how legislation should be constructed to meet today's new technological and medical advances. Regarding social parenthood in general, the question is what constitutes it, and how it can be made more durable, without it being necessary to enter into legal parenthood.

The principle of the best interest of the child⁵ means that the child's perspective in various decisions relating to children should always be guaranteed. However, the content of the concept varies over time and from one society and culture to another. It also varies from one child to another,

⁵ Article 3 in the United Nations Children's convention.

but nonetheless there are certain fundamental rights which are universal and should be equal for all children worldwide⁶

According to article 7 of the Convention, a child has, to the greatest extent possible, the right to know who the parents are and to be cared for by these parents. This wording could imply a right for a child to know its genetic origin⁷. According to the Convention, a child also has the right to respect for its identity (article 8). This can be seen as clear support for the right to knowledge of origins, since this knowledge can be seen as a prerequisite for the individual's sense of identity⁸.

The child's right to a sustainable parenthood is primarily about the child's right to a sustainable *legal* parenthood. The regulation of legal parenthood is biologically based. It has a strong historical sense and the intent of the regulatory system has been that legal parenthood should be lifelong. However, it has been shown that this is not always the case; sometimes, legal parenthood is instead based on facts that can easily be removed, such as an incorrect presumption of paternity.

The actual custody will normally belong to the legal parents. The parental function is essential and disruption could harm the child. The parental functions may also be performed by any type of social parents. These are constituted mainly by factual conditions, for example in step-parenthood. In each case, the social parenthood may play a larger practical role in the child's everyday life than the legal parenthood. A certain degree of fragility still lies in the function of social parenthood. However, the social parenthood may become a legal parenthood, through adoption.

It is thus today particularly from a formal point of view, but also from a substantive one, primarily the legal parenthood that contains legal rights and obligations towards the child. The legal parenthood also holds, through its formal structure, a greater stability than the social parenthood.

⁶ See SOU 1997:116.

⁷ See Ryrstedt, E., in *SvJT* 2003.

⁸ See Singer, A., *Föräldraskap i rättslig belysning*, Iustus förlag, Uppsala 2000, p. 402 f.

6. Concluding remarks

All of the reasons mentioned here illustrate the need for regulation of legal parenthood that meets today's technological and medical development and clarifies who is to be regarded as a legal parent. In addition, adoption needs to better harmonise with societal development and children's needs. Revocation of parenthood has now taken on a new and different meaning in relation to the mother in particular, when it is questionable whether the thesis *mater semper certa est* is still tenable. New legislation will have to balance the child's right to know its origin and its right to a sustainable legal parenthood with parents' rights and the interests of society. The focus must always be on the best interest of the child. A thorough analysis also needs to be carried out of the facts that characterise social parenthood and how social parenthood – without turning into a legal parenthood – can be made more stable and thus may provide greater sustainability for the child. A basis for the changes mentioned above, is a discussion of the problems and an analysis of the factors that govern parenthood at the levels most important for the expression 'the best interest of the child'. In addition, the meaning of the concept 'the best interest of the child' needs to be further investigated.

The family is the foundation of society and the question of who really is and should be defined as a parent is important; it creates many new questions. For the family – in its currently disparate design – to function, and ultimately society as well, there must be clear rules on family structures. It is therefore essential that there is an appropriate regulatory framework surrounding legal parenthood.