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Z PROBLEMATYKI PRAWNEJ

Dr. Agnieszka Kwiecień-Madej
University of Wrocław
e-mail: agnieszka.kwiecien-madej@uwr.edu.pl
https://orcid.org/0000-0002-6123-1449

Several Remarks on the Parental Authority of the Father of a Conceived Child in the Polish Family Law

Kilka uwag o władzy rodzicielskiej ojca dziecka poczętego w polskim prawie rodzinnym

Summary

The issue of parenthood exercised during the prenatal phase of a child's life is currently gaining increasing prominence in fields such as psychology and prenatal pedagogy. Studies conducted within these disciplines indicate that bonds between the parents and the child are established even before birth, influencing the child's subsequent development and their relationship with their parents. Alongside societal changes, advancements in medical sciences also provide a significant impetus for research into the legal aspects of prenatal paternity. On the one hand, the range of practical situations in which decisions and actions regarding a conceived child are undertaken is constantly expanding; on the other hand, existing legal provisions do not explicitly designate the entity or entities authorised to make these decisions and take these actions. Although the prevailing view in legal doctrine is that parental authority commences at the birth of a child, it should be presumed that the parents of a child still in the prenatal period are entitled of some attributes of that authority. This follows from the perspective on the possibility of confirming parental legal bonds during the prenatal period.

Keywords: parenting; fatherhood; conceived child; parental authority

Streszczenie

Kwestia rodzicielstwa sprawowanego w prenatalnej fazie życia dziecka zyskuje obecnie coraz większe znaczenie w naukach takich jak psychologia i pedagogika prenatalna. Badania przeprowadzone na polu tych dyscyplin wskazują, że więzi między rodzicami a dzieckiem powstają jeszcze przed narodzinami, wpływając na późniejszy rozwój dziecka oraz jego relacje z rodzicami. W toku przemian społecznych, rozwój nauk medycznych stanowi istotny impuls do badań nad prawnymi aspektami ojcostwa prenatalnego. Stale bowiem rośnie zakres sytuacji, w których

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podejmowane są decyzje i działania dotyczące dziecka poczętego, obowiązujące przepisy prawne nie wskazują jednoznacznie podmiotu lub podmiotów uprawnionych do podejmowania tychże decyzji i działań. Mimo że w doktrynie prawa przeważa pogląd, iż władza rodzicielska powstaje z chwilą urodzenia się dziecka, należy przyjąć, że rodzicom dziecka będącego jeszcze w okresie prenatalnym również przysługują pewne atrybuty tej władzy. Wynika to z perspektywy dotyczącej możliwości potwierdzania więzi prawnorodzinnych w okresie prenatalnym.

Słowa kluczowe: rodzicielstwo; ojcostwo; dziecko poczęte; władza rodzicielska

Introduction

The parental authority of the father towards the conceived child[1] is a complex legal issue, necessitating an analysis of the conceived child's legal personality, its legal capacity, the legal means of establishing the paternity and their effectiveness during the child's the prenatal life. The importance of this topic is particularly evident in the need to determine who is entitled to make decisions about a child during their prenatal life. This necessity is underscored by the development of prenatal medicine and medically assisted reproductive techniques, which have contributed to a wider array of situations requiring the protection of the conceived child's interests. It should be noted that parents typically exercise particular care for the child's health and well-being, making it reasonable that the conceived child should also be entitled to some attributes of parental authority. Furthermore, the significance of social changes, which can be described as the pursuit of "active paternity" demonstrated by greater male involvement in the child's development and education from the earliest stage of life, cannot be overlooked.[2] These circumstances impact the legal situation of the father of

1 It should be noted that under the current legal regulations in Poland, there is a lack of terminological precision regarding the legal designations of a human being during the prenatal stage of life. Existing legislation includes terms such as 'pregnancy' (e.g., Articles 152 § 1–2 and 153 of the Criminal Code Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny [Criminal Code]: Dz. U. 1997 r. Nr 88, poz. 553), and 'conceived child' (e.g., Article 157a §§1–3 of the Criminal Code). Moreover, the legislator differentiates between categories such as a "conceived child capable of independent life outside the body of the pregnant woman" (Articles 152 § 3 and 153 § 2 of the Criminal Code) and a "child during delivery" (Article 149 of the Criminal Code). Similar inconsistencies can be observed in civil law. This lack of terminological uniformity gives rise to interpretative difficulties and further deepens the divergence of views in legal doctrine. In the following paper, the author uses the term 'conceived child,' which also appears in the provisions of the Family and Guardianship Code (Ustawa z dnia 25 lutego 1964 r. – Kodeks rodzinny i opiekuńczy: Dz. U. z 2020 r., poz. 1359, Articles 75 and 182, hereinafter referred to as K.r.o.).

2 A. Kwiecień-Madej, *Sytuacja prawna ojca dziecka poczętego w polskim prawie rodzinnym,* Warszawa 2021, pp. 21–26.

the conceived child, including parental authority, and should be reflected in applicable legal regulations.

1. Legal personality and legal capacity of the conceived child

The problem of the legal personality of the conceived child is one of the most complex in the field of Polish civil law. The dispute over the legal status of the *nasciturus* remains pertinent in legal scholarship and in social and political discourse. The sources of the legal personality of the conceived child are often sought in Article 30 of the Constitution of the Republic of Poland of 2 April 1997,[3] which articulates the principle of inviolability and respect for human dignity. The practical significance of the conceived child's legal personality, as interpreted by constitutional law, refers, *inter alia*, to their recognition as a patient with their own interests in numerous medico-legal situations (sometimes contrary to the mother's interests), to whom medical assistance is provided.[4] An example of this is Article 2(1) of the Act of 7 January 1993 on Family Planning, Protection of the Human Fetus and Conditions for the Termination of Pregnancy,[5] which obliges government authorities to provide prenatal care for the fetus. Consequently, it is necessary to identify the entity or entities authorised to represent the conceived child and protect their interests. Polish legislation is aware of the *curator ventris nomine*, a institution derived from Roman law, whose aim, in accordance with Article 182 of the Family and Guardianship Code (also referred to as K.r.o), is to safeguard the child's future rights. However, the aspect of protecting the health of the conceived child clearly indicates that, during the prenatal period of life, there may be situations in which decisions must be taken regarding their current interest, not merely their future rights should the child be born alive. In my opinion, granting parents of a child some attributes of parental authority can best serve these purposes.

The legal personality of the conceived child should be distinguished from the concept of legal capacity. Legal capacity is understood as the ability to be the subject of rights and obligations. In accordance with Article 8 of the Civil Code,[6] every person is entitled to it from the time of birth. *De lege lata*, there is no uniform doctrine regarding

3 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.: Dz. U. z 1997 r. Nr 78, poz. 483.

4 M. Gałązka, in: *Instytucje prawa medycznego*, eds. M. Safjan, L. Bosek, Warszawa 2018 (System Prawa Medycznego, vol. 1), pp. 544–545 (and the quoted literature).

5 Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, tekst jednolity: Dz. U. z 1993 r. Nr 17, poz. 78.

6 Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny: Dz. U. z 2022, poz. 1360.

the concept of the legal capacity of the conceived child. A convincing idea, accepted by the majority of legal doctrine, is that of the conditional legal capacity of the *nasciturus*,[7] which is limited to clearly regulated situations. These include, for example, conditional successions (Article 927[2] of the Civil Code), the ability to claim compensation for damage suffered before birth (Article 446^1 of the Civil Code), or the K.r.o. regulations concerning subsidiary issues and the claim of the mother of the conceived child against a man who is not her husband, whose paternity has been legitmized. In addition to the rules expressed *expressis verbis*, case law plays an important role in the development of the concept of the legal status of the *nasciturus*.[8] Thanks to its creative role, the catalogue of legal events in which relations between the father and the conceived child are important has been extended to include, *inter alia*, making a donation to the conceived child[9] and recognising the conceived child as a closest person,[10] thus enabling parents to claim compensation in connection with the death of the conceived child (Article 446^1 of the Civil Code). Such events constitute a significant argument for the effectiveness of the family relationship to a certain extent, even during the prenatal period.

2. Comments on the legal ways of determining a man's parentage of a conceived child

The dentification of specific individuals' parentage of a child determines the establishment of a legal relationship between them. This concept is defined in Article 61^7 of the Family and Guardianship Code. Paragraph 1 of this provision defines kinship by direct line and collateral line, stating that: "Relatives by direct line are those of whom one stems from the other. Relatives by collateral line are those who stem from a common

7 M. Pazdan, in: *Prawo cywilne – część ogólna*, ed. M. Safjan, Warszawa 2012 (System Prawa Prywatnego, vol. 1), p. 1055, section 16; Z. Radwański, A. Olejniczak, *Prawo cywilne*, Warszawa 2013, p. 150; M. Grudziński, in: *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. B. Dobrzański, J. Ignatowicz, Warszawa 1975, p. 894.

8 E.g. The explanatory statement of the Supreme Court of 4.4.1966, in which the Supreme Court had spoken in favour of treating a conceived child equally to a child born, if the areas of their rights overlap, Wyrok SN z 4 kwietnia 1966 r., II PR 139/66, "Orzecznictwo Sądów Polskich i Komisji Arbitrażowych [The Case Law of the Polish Courts and Arbitration Committees]," 1966, no. 12, item 279, p. 555.

9 Wyrok Naczelnego Sądu Administracyjnego z dnia 28 listopada 1985 r. [Judgement of the Supreme Administrative Court of 28 1985], sygn. III SA 1183/85, Legalis, No. 35782.

10 Wyrok Sądu Najwyższego z dnia 27 maja 2015 r. [Judgement of the Supreme Court of 13 May 2015], III CSK 284/16, http://www.sn.pl/sites/orzecznictwo/orzeczenia3/iii%20csk%20286-14-1.pdf [access: 13.08.2022].

ancestor and are not relatives by direct line." Meanwhile, paragraph 2 sets out how to determine the degree of kinship "by the number of births that caused the relationship." The legal relationship that directly links the mother and father to the child is referred to in the literature as the origin in a narrow sense.[11]

The arrangements for parental authority by the father of the conceived child require the presentation of legal methods of establishing the paternity in Polish law and a determination of the timeframe for their effectiveness. At this point, it should be noted that Polish family law provides for three ways of establishing the legal link of paternity. These include the presumption of the child's origin from the mother's husband (Article 62, K.r.o.), recognition of paternity (Article 75^1, K.r.o.), and judicial determination of paternity (Article 85, K.r.o.). Examination of the wording of Article 62, K.r.o., concerning the presumption of the child's origin from a marriage, indicates that this presumption is effective only from the date of the child's birth, which precludes the possibility of establishing the origin of a conceived child from a man. *De lege lata*, it is also unacceptable to establish the paternity of a conceived child by judicial determination, which does not imply that these two issues do not raise doubts in legal doctrine.[12]

The presumption of the child's origin from the mother's husband is derived from the Roman principle *pater est, quem nuptiae demonstrant*.[13] It is generally accepted by European legislation[14] and is based on life experience, conventional, and moral considerations, which allow us to assume as a common phenomenon that the father of a married woman's child is her husband.[15] The rationale behind this method of establishing legal ties of paternity was the limited possibilities of life sciences to unequivocally resolve the genetic origin of a human being.[16]

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11 M. Działyńska, *Pochodzenie dziecka od małżonków*, Poznań 1987, p. 3.

12 See e.g.: M. Domański, in: *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*, ed. K. Osajda, Warszawa 2017 (Komentarze Prawa Prywatnego, vol. 5), pp. 944, 1109–1111; J. Mazurkiewicz, *Ochrona dziecka poczętego w świetle kodeksu rodzinnego i opiekuńczego*, Wrocław 1985 (Acta Universitatis Wratislaviensis, no. 483).

13 T. Smyczyński, in: *Prawo rodzinne i opiekuńcze*, ed. T. Smyczyński, Warszawa 2011 (System Prawa Prywatnego, vol. 12), p. 97; B. Dobrzański, J. Ignatowicz (eds.), *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 1975, p. 474.

14 M. Domański, in: *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*, p. 931 (after: Longchamps de Berier, in: N. Dajczak, T. Giaro, F. Longchamps de Berier, *Prawo rzymskie*, Warszawa 2009, p. 207).

15 Cf. T. Smyczyński, in: *Prawo rodzinne i opiekuńcze*, ed. T. Smyczyński, p. 94; W. Stojanowska, *Ojcostwo biologiczne a ojcostwo prawne*, Warszawa 1985, p. 17.

16 Jan Gwiazdomorski has indicated that the impossibility of carrying out direct proof of fertilization and, consequently, of the conception of the child by a particular man, was the reason for the assumption of

The presumption in question is based on the assumption that 'if a child has been born during a marriage, or within three hundred days of its termination or annulment, the child shall be presumed to have come from the mother's husband. This presumption shall not apply if the child was born after three hundred days of the separation ruling' (Article 61 § 1, K.r.o.). This provision also provides for the assignment of paternity when a child has been born within three hundred days of the termination or annulment of the marriage but after the mother has concluded a second marriage. In the light of § 2, it is presumed that it stems from the second husband. However, this rule does not apply when the child was born following a medically assisted procreation procedure to which the mother's first husband has given his consent. Pursuant to Paragraph 3, the above claims can only be rebutted as a result of an action for the denial of paternity.

According to the view prevailing in the literature, the factual basis for the presumption referred to in Article 62, K.r.o., is the fact of the child's birth, not their conception.[17] The proponents of this view recognize that the relevance of this solution is based on the fact that birth is a certain event as to the date of its occurrence, while the date of conception is uncertain and its determination would be difficult.[18] More recent literature increasingly takes the view that the actual basis for presumption referred to in Article 62, K.r.o., is the conception of a child during the marriage or within the period of the presumption.[19] An important argument in favour of this position is the principle of equality of children, regardless of their origin. In view of the presumption of the child's origin from the mother's husband, it should have effects in the prenatal period to the same extent as in the case of the recognition of paternity. A different approach would lead to a situation in which a child born in a marriage would not obtain legal protection to the same extent as a child born outside of marriage, whose paternity status was established by recognition.

It should be pointed out that the recognition of the paternity of a child under Article 75^1 of the Family and Guardianship Code is currently the only explicitely provided means in family law for confirming the legal paternal link between a man and a conceiven child. The views expressed in the literature should be welcomed, according

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the paternity by the mother's husband in the Polish law. In view of the above, the fact that she was married to a particular man became a circumstance justifying the child's origin. So: J. Gwiazdomorski *Pochodzenie dziecka od męża matki*, "Studia Cywilistyczne," 28 (1977), p. 7.

17 This position was also taken by the Supreme Court in its judgment of 23 February 1972; Orzeczenie Sądu Najwyższego z dnia 23 lutego 1973 r., III CRN 401/72, "Głos Sądownictwa," 1974, No. 16, p. 2.

18 T. Smyczyński, in: *Prawo rodzinne i opiekuńcze*, ed. T. Smyczynski, p. 95.

19 K. Pietrzykowski, in: *Kodeks rodzinny i opiekuńczy Komentarz*, ed. K. Pietrzykowski, Warszawa 2018, p. 604; M. Domański, in: *Kodeks*, ed. K. Osajda, p. 944; J. Haberko, T. Sokołowski, in: *Kodeks rodzinny i opiekuńczy. Komentarz*, eds. H. Dolecki, T. Sokołowski, Warszawa 2013, p. 544.

to which the determination of legal paternity is to a certain extent effective from the time of recognition, i.e. the submission of statements necessary for recognition by the competent authority.[20] The effects arising from that date include the effectiveness of recognizing the paternity of the conceived child to the extent of non-proprietary effects of establishing kinship. At the same time, the recognition of paternity, as referred to in Article 75, K.r.o., results in conditional protection of the rights of the conceived child in relation to their legal personality, such as the right of inheritance after their father and his relatives.[21] Moreover, the recognition of paternity of a conceived child may be treated as a presumption of paternity within the meaning of Article 142 of the K.r.o., resulting in the possibility for the mother, even before childbirth, to request that the man provide an appropriate sum of money to cover the mother's maintenance costs for three months around the time of delivery, as well as the costs of maintaining the child during the first three months after birth.[22] Another consequence of the prenatal recognition of paternity, widely accepted in legal doctrine, is the inadmissibility of a subsequent recognition of paternity of the same child by another man.[23] It should therefore be agreed with the view expressed in more recent legal doctrine[24] that the act of recognition creates a specific "expectation" (*ekspektatywa*) of the determination of civil status and the emergence of civil status rights.

The last of the methods of establishing the legal ties of the paternity, as provided for in Polish family law, is its judicial determination based on the presumption of origin of a child outside marriage. In accordance with Article 85, K.r.o.,

> The father of a child is presumed to be the one who has been with the mother of the child no earlier than in the three hundredth and not later than in the one hundred and eightieth day before the birth of the child, or the one who was the donor of the reproductive cell in the case of a child born as a result of partner donation in a medically assisted procreation procedure.

In legal doctrine, the prevailing view was that it is not possible to establish paternity in this manner prior to the birth of the child. This position was based on the assumption that the conceived child may not be granted legal personality, or it is neither possible to precisely determine the moment of conception nor to provide reliable proof of

20 J. Mazurkiewicz, *Uznanie dziecka poczętego*, "Studia Prawnicze," 1975, no. 4, p. 86, https://doi.org/10.37232/sp.1975.4.3; E. Holewińska-Łapińska, *Uznanie dziecka według kodeksu rodzinnego i opiekuńczego*, Warszawa 1979, p. 70.

21 M. Domański, in: *Kodeks*, ed. K. Osaida, p. 1047.

22 A. Sylwestrzak, in: *Kodeks,* eds. H. Dolecki, T. Sokołowoski, p. 595.

23 A. Sylwestrzak, in: *Kodeks,* eds. H. Dolecki, T. Sokołowoski, p. 595.

24 M. Domański, in: *Kodeks*, ed. K. Osajda, p. 1047.

paternity before the child is born.[25] These arguments can no longer be regarded as valid in the light of the current state of the law and medical knowledge.

Firsty, it should be pointed out that the issue of the legal personality of the *nasciturus* is based on the legal system as a whole and is independent of the scope of its legal capacity. The starting point for this concept is the assumption that legal subjectivity is primary in relation to legal capacity, is inherently linked to being human, and on that basis is granted to the conceived child. A practical manifestation of the legal subjectivity of the unborn child, interpreted from the provisions of the Constitution, is the recognition of the unborn child in many medico-legal situations as a patient with their own interests (sometimes conflicting with those of the mother). An example of such regulation can be found in Article 2(1) of the Act on Family Planning, Protection of the Human Fetus and Conditions for the Termination of Pregnancy, which imposes an obligation on administrative authorities to ensure prenatal care for the fetus.

With regard to the argument concerning the limitations of evidence in court proceedings concerning the determination of paternity, it should be noted that the current state of medical knowledge makes it possible to ascertain with certainty whether the child originates from a given man, e.g., by carrying out a test of the fetal DNA isolated from the mother's serum, without exposing the pregnant woman and the fetus to the negative effects of the examination.[26] At the same time, it should be stressed that the determination of paternity still in the fetal life stage of a child is in the child's interest and in accordance with the child's well-being. It has a father determined from the beginning and can therefore profit from the right to alimony. Moreover, established and regulated ties from the beginning ensure the stabilization of family relations and the development of the relationship between the child and the parent.

Although the regulation of the legal situation of the child's father is not universally supported by the view represented by the majority of legal doctrine, which holds that the legal ties of parentage (both maternity and paternity) are effective only at the time of birth, this study demonstrates that the relationships existing between parents and the conceived child should be reflected in the effectiveness of the legal arrangements for determining the origin of the child already in the prenatal period. This is the starting point for defining the father's rights and responsibilities in relation to the conceived child.

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25 J. Gwiazdomorski, *Sądowe ustalenie ojcostwa*, Warszawa 1977, pp. 3–4; J. Dąbrowa *Dochodzenie roszczeń majątkowych związanych z ojcostwem*, "Zeszyty Naukowe Uniwersytetu Wrocławskiego," Seria A, Prawo, 3 (1958), no. 10, p. 224 and n.

26 N. Sochacki-Wójcicka, *NIPT – czyli badania wolnego płodowego DNA z krwi matki*, 27.02.2017, https://mamaginekolog.pl/nipt-czyli-badania-wolnego-plodowego-dna-z-krwi-matki [access: 23.08.2022].

3. The concept and the beginning of parental authority

With regard to the institution of parental authority, it should be pointed out that there is no legal definition in the Polish legal system. It is defined in the literature as:

> the whole of the obligations incumbent on parents, as well as the general power of parents to exercise their custody over a child and their property, while the child's well-being is considered to be the primary criterion for the content and the way in which parental authority it is exercised.[27]

In the light of Article 95 of the Family and Guardianship Code, the elements of parental authority are: care for the child, the child's property, and their representation by the parents. It should be stressed that the commencement of parental authority over a child has long been the subject of discussion in legal doctrine. The legislator does not resolve this issue, stating in Article 92, K.r.o., that the child remains under the parental authority until they reach legal age. Most often, the commencement of parental authority's effect is linked to the child's birth.[28] However, increasingly, the literature calls for the extension of parental authority's duration to the prenatal period too.[29] The following arguments in the literature reject the concept of prenatal parental authority: the possibility of abortion in the cases provided for by law;[30] and the institution of the *curator ventris nomine*, which, in accordance with Article 182, K.r.o., is intended to safeguard the child's future rights.

In Polish literature, Joanna Haberko[31] has polemicized with these arguments. Referring to the argument of legal abortion as an obstacle to parental authority, the author points out that, under the current rules on termination of pregnancy in Poland, no decision on abortion is taken either by the mother or by the parents. Therefore, it cannot be regarded as an exercise of the parental authority. This view is also supported by the provision of Article 4a(4) of the Act on Family Planning, Protection of the Human Foetus, and Conditions for the Admissibility of Abortion, which states

27 A.K. Bieliński, M. Pannert, *Prawo rodzinne*, Warszawa 2011, p. 189.

28 So: J. Ignaczewski, in: *Władza rodzicielska i kontakty z dzieckiem*, ed. J. Ignaczewski, Warszawa 2015, p. 39; J. Słyk, in: *Kodeks*, ed. K. Osaida, p. 1201; H. Ciepła, in: *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Piasecki, Warszawa 2011, p. 729.

29 Cf. B. Walaszek, *Zarys prawa rodzinnego i opiekuńczego*, Warszawa 1971, pp. 170, 241; Z. Czarnik, J. Gajda, *Ochrona prawna dziecka poczętego in vitro i pozostającego poza organizmem matki (uwagi de lege lata i de lege ferenda)*, "Nowe Prawo," 1990, no. 10–12, p. 113; J. Strzebinczyk, in: *System*, p. 245; J. Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych*, Warszawa 2010, p. 180.

30 T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warszawa 2018, p. 258.

31 J. Haberko, *Cywilnoprawna ochrona*, p. 180 and n.

that consent to such a procedure may also be given by the pregnant woman's legal representative.

Furthermore, she points out that the idea of protecting the interests of a conceived child through the institution of parental authority was represented in the former doctrine of Polish family law.[32] The focus was on the need to protect the child's "future rights," which, once the child is born, would translate into current rights and interests. However, in contemporary times, it is impossible to ignore that more and more everyday situations require decisions about an unborn child. The area of life and health protection is paramount. We are witnessing an enormous development of prenatal medicine. With advanced technologies, we can provide medical diagnostic and treatment for a conceived child. From a legal point of view, it is crucial to identify the legal entity who is authorised to decide on all these medical actions.

The parents of the conceived child appear to be the best representatives of the child's interests. They are not only emotionally involved in the pregnancy but also generally interested in the birth and well-being of the child. This seems to be a better solution than the somewhat artificial institution of the child's guardian under Article 182, K.r.o. It cannot be denied that this provision forms the legal basis for protecting the child's future rights, whereas in the case of prenatal treatment, protection of the child's current interest is required – protection of their health. It should therefore be stated that guardianship aimed at protecting the future rights of the unborn child may be applied subsidiarily when it is necessary to safeguard the child's interests due to the parents' lack of appropriate qualifications.[33]

This issue is also analyzed by Krystyna Gromek, who, in addition to the arguments cited above, emphasizes that there is no basis for assuming that Article 92 of the K.r.o. introduces any principle that parental authority arises only at the moment of the child's birth and not at the moment of conception. This provision refers to parental authority over every child, including the conceived child, since, according to the a *maiori ad minus* interpretation, he who is permitted to do more is certainly permitted to do less. If parents are vested with parental authority over all minor children, then they must all the more have such authority over some of them — including those who are only conceived — unless one assumes that a conceived child is not a human being. However,

32 B. Walaszek, *Zarys prawa rodzinnego*, pp. 170, 241.

33 J.M. Łukasiewicz, *Pokrewieństwo prawne nasciturusa – głos w dyskusji*, in: *Nasciturus pro iam nato habetur. O ochronę dziecka poczętego i jego matki*, eds. J. Mazurkiewicz, P. Mysiak, Wrocław 2017, pp. 134–145.

according to the author, this view is so archaic that it cannot withstand criticism in the 21st century.[34]

The view that parental authority is legally effective even during the period of prenatal life deserves approval. This means that being the parent of a conceived child entitles the pregnant woman, her husband, or partner who declared his/her paternity, to take decisions regarding child care.[35]

4. Persons entitled to exercise parental authority

The issue of the person entitled to exercise parental authority during the prenatal life of the child must also be resolved. There are two groups of views on this issue in the literature. According to the first view, only a pregnant woman should be entitled to make decisions about her child.[36] This seems obvious given the nature of pregnancy and the fact that any action concerning the conceived child affects the mother. On the other hand, it is argued that decisions concerning the unborn child are not only about the mother but also about other persons, such as the father and the child. Representatives of the doctrine opposing the granting of parental authority over the child solely to the mother claim that this would be similar to the ancient Roman institution of *patria potestas*, which gave the right to decide on the life and death of the child to the father.[37] I agree with the argument that emphasizes the importance of the pregnant woman's autonomy and her right to decide on her health, but also the risk of a conflict of interest between the mother and the child must not be overlooked.[38] Therefore, it is worth considering the idea that both parents could make decisions about their child. This type of representation could be based on principles similar to the representation of a minor child, which allows both parents to represent the child under their parental authority. Of course, it requires changes in legislation, justified by the particular situation of the conceived child, such as respect for the pregnant woman's principle of the autonomy. This authorization may be exercised by both parents who are married, on grounds of the effectiveness of the presumption of origin of a child born during marriage or within 300 days of the dissolution or annulment of the marriage with the mother's husband, as

34 K. Gromek, *Granice władzy rodzicielskiej*, "Monitor Prawniczy," 2021, no. 8, p. 432.

35 In social sciences, the need to give a pregnant woman the status of the mother and the man of the father is underlined. Cf. E. Lichtenberg-Kokoszka, *Ciąża zagadnieniem biomedycznym i psychopedagogicznym*, Kraków 2008, p. 13 (and the authors quoted).

36 T. Smyczyński, *Prawo rodzinne i opiekuńcze*, p. 259.

37 T. Sokołowski, in: *Kodeks*, eds. H. Dolecki, T. Sokołowski, p. 641.

38 J. Haberko, *Cywilnoprawna ochrona*, p. 131.

stated in Article 62 of the K.r.o. This construction may be useful for unmarried partners if the man recognizes his paternity before the birth of the child under Article 75^1, K.r.o. At the same time, the concerns expressed in the literature regarding the exercise of parental authority should be shared in the event of a conflict between spouses as to the child's origin, or where no recognition of paternity has occurred.[39]

5. The extent of parental authority over the conceived child

It is necessary to clarify the scope of parental authority in the context of the issue discussed. It is clear that, due to the situation of the human being in the prenatal period, they cannot defend their own rights. As indicated, the conceived child is entitled to rights based on legal capacity, such as the right to life, health, prenatal examinations and treatment, and the protection of the image based on the principles of protection of human dignity. It can be noted that, in the case of an unborn child, the extent of the situations in which the parental authority applies is limited, particularly to certain matters concerning care for the person and representation. In my opinion, the effective exercise of parental authority over a conceived child by the parents requires the creation of a new legal institution for prenatal responsibility, which can be based on the principles of parental authority over a minor child.

The elements of parental authority over a conceived child are primarily the personal efforts of the parents to ensure that the child has the right conditions for development. A large proportion of these, due to the nature of pregnancy, falls to the mother, i.e., providing a good diet, abstaining from the use of drugs, and caring for health. However, in this field too, the father can make personal efforts to relieve the mother in many of her current responsibilities and provide her other forms of support or contribute financially to the costs of pregnancy and childbirth.

An important manifestation of parental authority over the child is the ability to exercise custody of their person. The practical importance of giving parents certain attributes of parental authority over the conceived child is particularly significant in their decisions regarding the diagnostics and treatment of the fetus. It should be assumed that parents are the people most interested in the health of their child, and they should jointly decide on important issues regarding the child.

39 J. Haberko, *Cywilnoprawna ochrona*, p. 115.

Attention should be drawn here to the judgment of the Supreme Court of 27 November 2019,[40] in which it was held that the father of a conceived child has the right to accurate and reliable information about the child's health condition. The view expressed by the Supreme Court in this case deserves support—namely, that a literal interpretation of the term 'patient'[41] is not appropriate in situations involving a father who is present during childbirth. In such circumstances, the father also becomes a patient, to the extent that this is possible.

The Court emphasized the emotional experiences of the father related to both the successes and failures accompanying the birth of the child, which make it impossible to simply exclude him from the entire process. I believe this is an important ruling that highlights the significance of the father of the conceived child and his role as a parent. The Court underscored that "he undoubtedly has the same right to information about the condition of the fetus as the child's mother" and that he should also be informed about the mother's condition—unless she explicitly objects.

This allows for the conclusion that even in situations where the parents are not on good terms, the father's right to information about the child should not be diminished.

It is also appropriate to entrust the child's property, understood as safeguarding the conditional rights and claims of the conceived child, to the parents as legal representatives. The *curator ventris nomine* provided by the law to ensure the protection of children's rights in the future could only be applied to the safeguarding of property rights if the parents fail to fulfil their obligations correctly or the actual situation is characterized by a conflict of interest between parents and the child.

Conclusion

In light of the above observations, determining the initial moment at which parental authority arises constitutes a significant challenge in contemporary family law. Establishing a clear position in this regard is difficult, not only for axiological reasons but also due to the lack of alignment between existing legal provisions and the current state

40 Wyrok Sądu Najwyższego z dnia 27 listopada 2019 r. [Judgment of the Supreme Court of 27 November 2019], case no. II CSK 491/18, "Orzecznictwo Sądów Polskich," 2020, no. 12, item 98, p. 3.

41 The concept of a patient is defined in the Act of 6 November 2008 on the Rights of the Patient and the Patient Ombudsman (Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta, Dz. U. z 2024 r., poz. 581). According to Article 3[1][4], a patient is "a person who requests healthcare services or receives healthcare services provided by an entity or a person practicing a medical profession."

and capabilities of medical science, as well as the absence of synchronization among constitutional, civil, and criminal law regulations.

A fundamental issue preceding the exercise of parental authority by the father of a conceived child is the legal effectiveness of methods for establishing kinship in the prenatal period. As noted, prenatal fatherhood has not been comprehensively regulated by law. This issue is closely connected to the lack of a clear stance on the legal status of the conceived child and its legal subjectivity.[42] The controversy surrounding the issue of parental authority over the conceived child born arises, on the one hand, due to the absence of a clear decision by the legislator about the beginning of that power, and the existence, in the system of law, of the institution of the *curator ventris nomine* as being intended to protect the interests of the *nasciturus*. On the other hand, it stems from the specific nature of pregnancy and the need to ensure an adequate level of protection of the pregnant woman's rights. The position expressed in the literature, which suggests that it is appropriate to consider the interaction of both parents in the exercise of certain attributes of parental authority on matters relevant to the conceived child (e.g., decisions on diagnostic or fetal therapy). These should be implemented in a way that respects the principle of the child's wellbeing and the autonomy of the pregnant woman. This approach would promote the realisation of the two-parent model from the moment of conception, the realisation parental equality, and the development of parental attitudes and responsibility for the child in the man.

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42 J.M. Łukasiewicz, R. Łukasiewic, *Prawo rodzinne*, Warszawa 2021, p. 307.

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