



## **BALTIC JOURNAL OF LAW & POLITICS**

A Journal of Vytautas Magnus University

VOLUME 9, NUMBER 2 (2016)

ISSN 2029-0454



Cit.: *Baltic Journal of Law & Politics* 9:2 (2016): 23-42

<http://www.degruyter.com/view/j/bjlp>

DOI: 10.1515/bjlp-2016-0010

### **EUROPEAN DILEMMAS OF THE BIOLOGICAL VERSUS SOCIAL FATHER: THE CASE OF ESTONIA**

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Received: November 11, 2016; reviews: 2; accepted: December 12, 2016.

#### **ABSTRACT**

The current understandings and practices related to biological and social fatherhood raise a crucial legal question about which model of fatherhood determination should be adapted to contemporary society: the model of a biological or social father bearing the rights and obligations related to the child. The general ideologies of being a father and the application of different approaches have been analysed comparatively, also trying to provide the best legal policy to consider when interpreting the rules of parenthood in Estonian Family

Law Act and the Estonian legal practice. The paper considers the emerging legal concept of social fatherhood to be an inevitable prerequisite for protection of the interest of the child.

**KEYWORDS**

Biological father, legal father, social father, paternity, fatherhood.

## INTRODUCTION

In 2014 the Estonian Family Law Act was amended, providing a new rule that if a mother is married and gives birth to a child, then in the process of registering the birth of her child, the father of the child can become any other man than the mother's husband, without consent or even an obligation to inform the husband. This was a radical change for the Estonian family law, which has always followed the pattern of presumption of paternity of the husband of the mother. In the legislative process the amendment was presented as a tool to protect children who were born in ostensible marriages of a mother or in undivorced cross-border marriages, but no one has discussed what the legal or legal-sociological implications of such an amendment might mean in general for the ideology of paternity in the Estonian legal system. While long-lasting political disputes over same-gender partnership in Estonia took place, there were a lot of references to the need to protect traditional marriage. But on the matter of new paternity regulation, no one noticed or at least failed to mention anything in the legislative process or later in the media that the preclusion of the consent of the mother's husband can affect traditional marriage as well. Until this amendment, Estonian paternity law had been based on "marriage presumption" – i.e. the mother's husband has been presumed the biological father of the born child and any other possibility to be or become a father instead of a husband has been seen as exceptional to this primary principle.

Family law is very slow to change because of the traditional understandings of the family as a unit<sup>1</sup>; so the abovementioned amendment raises questions about the value of the predictability of a parent but also about the rights and interests of the child. For example, one can ask whether the previous values related to the presumption that a husband of the mother is a father of the child as a member of the family unit has suddenly lost its meaning. This leads to an additional question about the biological and social father in general, in trying to determine which should prevail in our society, i.e. what are those values in society today that lawyers and citizens can and/or should support: the biological or social connection to the child? Or, does the amendment mean that the traditional family with married parents (of a child) is not the preferred and more supported model of the family in Estonia any longer? Who best protects a child – the biological or social father?

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<sup>1</sup> Consisting of a man, woman and their children. See: George W. Dent Jr., "Traditional Marriage: Still Forth Defending," *BYU Journal of Public Law* Vol 18 (2) (2004); Jessica Feinberg, "Exposing the Traditional Marriage Agenda," *Northwestern Journal of Law & Social Policy* Vol 7(2) (2012); Lynn D. Wardle, "Children and the Future of Marriage," *Regent University Law Review* Vol 17 (2) (2004-2005); Courtney G. Joslin, "Protecting Children: Marriage, Gender, and Assisted Reproductive Technology," *The Dukeminier Awards – Best Sexual Orientation and Sexual Identity Law Review* Vol 10 (1) (2011).

These are only some of the questions which arise from the new Estonian paternity model and should have been discussed and answered in the legislative process. Unfortunately, they were not; or, at least, not as profoundly as they should have been. When the legislative process does not consider these principles then it will be the obligation of a court to decide which principle should be upheld. Legal practice all over the world shows that the decisions judges have made are very different, and often even contradictory in this matter. Without knowing the clear ideology of the state in this regard, it would be difficult for a judge to decide upon the existing rules for who is the father of the child. The situation becomes even more complicated when it is a cross-border legal case.

This article discusses which model of determining fatherhood is better suited for contemporary society: the model of a biological or social father; and which of them should be considered the legal father, with all the rights and obligations concerning the child. More specifically, general ideologies of being a father and their grounding application have been analysed based mainly on Estonian legal practice, trying to provide the best model to use when interpreting the rules of parenthood in the Estonian Family Law Act.

## 1. WHY ALL THIS MESS?

The law has historically relied on a biological construction of fatherhood which, during the development of society, was attached to the man's relationship to the child's mother (i.e. being a husband<sup>2</sup>)—expressed by the rule *pater est quem nuptiae demonstrant*. This meant that the biological father of the child was considered the husband of the mother. It is also clear that in the patriarchal family model the husband played the most important role and hence the children his wife gave birth to were his children regardless of who the biological father was. Traditional marriage in this context has been protected to keep family relations easy and clear<sup>3</sup>: husband and wife share a bed and hence the children born in this relationship are the children of a husband. The traditional bionormative family structure has undergone dramatic transformations<sup>4</sup>, raising sensitive and ethical questions<sup>5</sup>. According to Bakerm, "there is a growing consensus that family law as a

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<sup>2</sup> In some states this principle has been currently applied also to the partners or cohabitee of a mother.

<sup>3</sup> Jennifer Bryan, "Parenting Rights in California: Marriage v. Biology," *U. S. F. L. Rew* 47 (2012-2013): 576.

<sup>4</sup> Yehezkel Margalit, Orri Adam Levy, and John D. Loike, "The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood," *Harvard Journal of Law & Gender* 37 (2014): 109. See also Jens M. Scherpe, *Parentage and surrogacy in a European perspective. European Family Law. Family Law in a European Perspective III* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar Publishing, 2016): 242, 245.

<sup>5</sup> See Jens M Scherpe, *Organic European family law. The Present and Future of European Family Law IV* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar Publishing, 2016), 89.

discipline is shifting from a set of rules designed primarily to regulate sexual relationships between adults to set of rules designed to regulate parental relations between adults and children.”<sup>6</sup> This statement was made already a decade ago.

Current family models can consist of two mothers and a child or children or two fathers and a child or children with different legal or biological fathers, families, which have been broken down and children divided by the parents with different patterns, providing a child many (step)mothers, (step)fathers, brothers and sisters, grandfathers and grandmothers. Also assisted reproductive technologies, surrogacy, and reaching the point where a child can have even six parents,<sup>7</sup> etc., have created great complexity in family relations, thus creating confusion about the proper model for post-modern society.

Being a parent does not mean only a biological tie to the child but involves rights and obligations that a parent has. These include not only emotional ties, visiting rights and decision making rights, but also financial obligations. Actually, it seems that in practice the financial obligation has been the primary role in fatherhood disputes. In some states, including Estonia, maintenance obligation does not give a father the right to custody. Often mothers demand maintenance for a child but refuse the father visitation rights to the child. So, in both models (marital and/or biological presumption) a pattern for preventing financial social problems from a state can be noted. One assumes that even in a patriarchal system this probably was one of the reasons to oblige the husband and protect the wife; or, as some authors state, the child. Later, when the patriarchal system collapsed and traditional marriages began to “fade away,” the idea to put financial obligation related to a child on someone else instead of the state developed successfully as well. Fatherhood itself was treated as a tool for a state to bind someone financially responsible for a child – a model where every child must have a father – no matter whether a biological or just a social one.<sup>8</sup> Some states have established certain state units<sup>9</sup> to find out who the potential father could be, and in fact whether this man is actually the biological father or not does not matter; in some states the mother has the right to say who the father is, and in some states registering a birth and receiving certain state support has been made very

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<sup>6</sup> Katharine K. Baker, “Bionormativity and the Construction of Parenthood,” *Psychology and Feminist Legal Theory. Emory University of Law* (Dec. 1-2, 2006): 1.

<sup>7</sup> Yehezkel Margalit, Orri Adam Levy, and John D. Loike, *supra* note 4: 131.

<sup>8</sup> Kelly characterises the situation notably by describing the authority of the courts in Canada: “Courts can ostensibly ‘find’ fathers for children, whether for social or economic reasons.” The same idea can be applied in civil law countries for the legislative organs. Even more, to ‘have a father’ can be considered as an ‘economic interest’ of the child as the best interest of the child (Fiona Kelly, “Producing Paternity: The Role of Legal Fatherhood in Maintaining the Traditional Family,” *Can. J. Women & L.* 21 (2009): 321, 323).

<sup>9</sup> E.g. see about the practice in Portugal Ana Maria Brandão, Alessandra Faria, and Helena Machao, “The legal investigation of biological paternity in Portugal: Gendered roles and representations” (2012) // <http://hdl.handle.net/1822/23489>.

inconvenient for a single mother who does not provide the data of the father; in some countries a cohabitee of the mother of the child is automatically considered a father of the child.<sup>10</sup> There are examples in court practice where courts have "found" the father for a child<sup>11</sup>, though logical sense says that in those cases the father found is not a biological father or would never become a social father of the child<sup>12</sup>; so, the only reason for such policy seems to have been to share the economic burden with the state. It may also seem that the "biological truth" or genetic connection was replaced by the marriage act, as there were no means in the past to prove parenthood genetically. The technological era raises the question that, if parenthood becomes less binary and exclusive, can we assume that "it becomes less private and less biological as well?"<sup>13</sup>

Only a few states leave the question of whether a child must have a father or not to the parents themselves; Estonia is one such state.<sup>14</sup> Since 2010 the data of the father in registering a child into the Population Register has remained empty. However, this does not eliminate the question of the biological or social father. Also, in those cases when the data of the father in a register is empty there can be a man raising a child, supporting him/her financially and having an emotional tie with him/her. This man can be a social father on the one hand, and on the other hand can step out from the relationship with a child, e.g. in case of a break up with mother. Law does not provide any protection to the child in such a case where the social father wants to quit the relationship, either emotional or financial, with the child.

Besides the biological and social father, the legal literature uses the concepts of legal father, psychological father<sup>15</sup>, and functional father<sup>16</sup> to characterize the diversity of the concept of fatherhood.<sup>17</sup> The Legal father can be understood as a man carrying the rights and obligations derived from the law related to the child. There are positive and negative aspects for the biological father and social father

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<sup>10</sup> See more specific analysis about identifying a father: Claire Fenton-Glynn, "Investigation and determination. Identifying a father": 75; in: Claire Fenton-Glynn, ed., *Children's Rights in Intercountry Adoption. A European Perspective* (Cambridge-Antwerp-Portland: Intersentia, 2014).

<sup>11</sup> See Fiona Kelly, *supra* note 8: 325–328; June Carbone and Naomi Cahn, "Marriage, Parentage, and Child Support," *Family Law Quarterly* 45(2) (2011).

<sup>12</sup> See e.g. Fiona Kelly, *supra* note 8: 325–328; Kerry Abrams and R. Kent Piacenti, "Immigration's Family Values," *Virginia Law Review* 100(4) (2014): 636.

<sup>13</sup> Katherine K. Baker, *supra* note 6: 2–3.

<sup>14</sup> However, at the time of soviet occupation and some time after beginning of independence when the soviet family law rules preserved there was applied a phenomenon as 'paper father' in Estonian family law which meant that in the birth document a first name of the father of the child was written by the mother's saying and the family name of the child was mother's family name. This data meant that this child did not have a father. The idea was to show outside that in a socialist state there are no single mothers.

<sup>15</sup> See e.g. Eva Steiner, "The Tension Between Legal, Biological and Social Conceptions of Parenthood in English Law," Report to the XVIIth International Congress of Comparative Law (July 2006), *Electronic Journal of Comparative Law* 10.3: 9, fn. 30.

<sup>16</sup> Kerry Abrams and R. Kent Piacenti, *supra* note 12: 642.

<sup>17</sup> Even dual paternity can be found. See June Carbone and Naomi Cahn, *supra* note 11: 226.

models.<sup>18</sup> Abrams and Kent Piacenti, referring to Carbone and Cahn, divide states' ideology on fatherhood into three groups: supporting marriage relationship, biology, and the best interest<sup>19</sup> of the child as a functional approach, i.e. social fatherhood.<sup>20</sup> Similar to what Margalit, Levy, and Loike refer to as the five paradigms, scholars and courts have viewed legal parenthood in the context of advanced reproduction technology: genetics, intent, gestation, the marital presumption, and functionalism.<sup>21</sup> In most states the first principle still prevails in the legal acts – fatherhood based on marriage. And, as stated above, marriage should not prove whether the husband of the mother is the biological father of the child or not. According to Lafferriere, many legal issues are related to artificial reproductive techniques: "the issue at stake is the way in which fatherhood and motherhood are determined."<sup>22</sup> Assuming that "those involved with heterologous fertilization maintain that the child born as a result of the use of artificial procreation techniques should be considered to be the child of the people who requested the procedure, supposes an alteration of the fundamental principles underlying filial relationships."<sup>23</sup> Another complicated issue where the jurisdictions differ is so-called anonymous birth, which means that the child who is adopted is prevented from "learning his or her natural mother's identity."<sup>24</sup>

Singer writes that: "Nature can no longer be used as the sole normative source for rules concerning the establishment of legal parenthood in the post-modern society. Genetics is obviously not sufficient as a basis for the legal status as parents, clearly demonstrated by the use of different methods for assisted reproduction."<sup>25</sup> This is all true but even more, though reproduction technologies cause situations that would contradict the biological model because the cells are given and used anonymously<sup>26</sup> and with no rights and obligations concerning the child, the social development of society cannot be forgotten. Its elements, like individualism, involve the frequent and fast creation of new relationships and new family models, such as same-gender partnerships, which leave aside the

<sup>18</sup> See e.g. Gabriele Britz, "Biological and Social Parenthood": 174; in: Katharina Boele-Woelki, Nina Dethloff, and Werner Gephart, eds., *Family Law and Culture in Europe. Developments, Challenges and Opportunities* (Cambridge – Antwerp – Portland: Intersentia, 2014).

<sup>19</sup> However, the principle of best interest can be applied also for marriage and biology as well as will be discussed in this article.

<sup>20</sup> Kerry Abrams and R. Kent Piacenti, *supra* note 12: 643; referring to June Carbone and Naomi Cahn, *supra* note 11: 219, 220-221.

<sup>21</sup> See Yehezkel Margalit, Orri Adam Levy, and John D. Loike, *supra* note 4: 109-110.

<sup>22</sup> Jorge Nicolás Lafferriere, "Artificial Reproductive Techniques and Parenting: Trends and Paradoxes," *Intl. J. Jurisprudence Fam.* 2 (2011): 267.

<sup>23</sup> *Ibid.*

<sup>24</sup> Stefano Troiano, "Understanding and Redefining the Rationale of State Policies Allowing Anonymous Birth: A Difficult Balance Between Conflicting Interests," *Intl. J. Jurisprudence Fam.* 4 (2013): 177.

<sup>25</sup> Anna Singer, "The Right to the Child to Parents": 138; in: Katharina Boele-Woelki, Nina Dethloff, and Werner Gephart, eds., *Family Law and Culture* (Cambridge: Intersentia, 2014).

<sup>26</sup> On the contrary, see the discussions about the identified several biological parents and their legal status with children in Yehezkel Margalit, Orri Adam Levy, John D. Loike, *supra* note 4.

importance of the biological father concerning the rights and obligations. In several ECHR decisions it has been stated that "a mere biological relationship is insufficient"<sup>27</sup> and that "the best interest of the child can override those of the parent".<sup>28</sup> Duncan is calling for deconstruction of parenthood and defines the new era legal parenthood as "any adult, singly or in tandem with one or more others, whether married or unmarried, cohabiting or living alone, in a relationship with one or more persons of the same or opposite sex who has created or intentionally caused (in proximity with another human being or not), biologically or by contract, a child to exist and has acquired through those means or through other actions access to and/or control over the child."<sup>29</sup> Browne-Barbour, making solid references to the case-law of Europe and United States, defines this process of deconstruction as "disestablishment of paternity"<sup>30</sup>. It seems that we cannot even agree on how to describe the (legal) modification of parenthood in legal terms.

## 2. WHAT IS THE BEST MODEL FOR CONTEMPORARY SOCIETY?

Marriages often do not last and, if spouses do not legally finish their relationships before starting a new one, children are born to mothers who are still married to men who might not be biological fathers of the children. This and the general principle that in cases where the parents of the child are not married, the mother has the right to decide who is the father of her child, has caused discontent from the side of biological fathers. They argue that married and unmarried fathers are treated differently. So long as a non-married father has not acknowledged the child as his and the mother of the child has approved that, this man is "no one" to the child in the legal sense. Fenton-Glynn argues that this different treatment "reinforces the traditional conservative notion of what society considers a family, *should* be, namely two parents<sup>31</sup> joined in marriage, and punishes fathers who do not conform to this."<sup>32</sup> This discussion supports biological fatherhood instead of fatherhood based on marriage, but assuming this, one should notice that those

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<sup>27</sup> *Schneider v Germany*, ECtHR, 1988 (Claire Fenton-Glynn, *Children's Rights in Intercountry Adoption. A European Perspective* (Cambridge-Antwerp-Portland: Intersentia, 2014), 67); see also *Berrehab v Netherlands*, ECtHR, Appl No 10730/84, 1988; *Anayo v Germany*, ECtHR, Appl No 20578/07, 2011; *Rozanski v Poland*, ECtHR, Appl No 55339/00, 2006; *Elsholz v Germany*, ECtHR, Appl No 25735/94, 2000.

<sup>28</sup> *Johansen v Norway*, ECtHR, Appl No 17383/90, 1996.

<sup>29</sup> William C. Duncan, "Redefining Marriage, Redefining Parenthood," *Regent J.L. & Pub. Pol'y* 6 (2013-2014): 180.

<sup>30</sup> See: Vanessa S. Browne-Barbour, "'Mama's Baby, Papa's Maybe': Disestablishment of Paternity," *Akron L. Rev.* 48 (2015).

<sup>31</sup> E.g. German Constitutional Court has assumed that having at most two legal parents is the best interest of the child as too many participants in the relationship can cause contradictions (Gabriele Britz, *supra* note 18: 173).

<sup>32</sup> Claire Fenton-Glynn, "Consenting Adults: Giving and Receiving Consent to Adoption": 70; in: Claire Fenton-Glynn, ed., *Children's Rights in Intercountry Adoption. A European Perspective* (Cambridge-Antwerp-Portland: Intersentia, 2014).



biological fathers who cannot become fathers easily, want to be a social father to the child, which again supports the social fatherhood.

Strumpf (1986) characterises the situation related to societal changes as having "shaken the unshakeable."<sup>33</sup> He discusses the current legal context of surrogate motherhood and biological motherhood showing how unreasonable it is to support only one view of motherhood in this context. He states that "two significant presumptions infringe on surrogate motherhood: the presumption of biology and the presumption of legitimacy."<sup>34</sup> The same occurs in regards to paternity: the biological versus social father. The so-called "baby-boxes"<sup>35</sup> also show that in many states biological parentage has lost its importance.

In creating a policy on paternity matters it is accepted that the main principle to follow in this process is the child's interest. However, what is the best for a child is not always easy to determine as this can be different in every single case. When normally there is a mental concept of the child<sup>36</sup> then in too many cases children are born in relationships where a child is not expected. This, in turn, connects to the right of the individual to procreate and not to procreate<sup>37</sup>.

On one hand, the fact that a woman and a man exercise their right to have a child, this creation of a life will serve the best interest of the child<sup>38</sup>. On the other hand, in those cases when a woman gets pregnant after a single instance or occasional intercourse, then certainly there is no intent to procreate a child from the man's side and it can be discussed whether it is the best interest of the child to obligate such person to be a father, even a biological father.<sup>39</sup> Even more, the rights of the child can collide with the rights of the parent. Duggan describes filiation as:

A genetic bond existing between a child and his mother and father, who, in this context, are seen as providers of two unique genomes which at the moment of fertilisation gave beginning to the child's life. Secondly, filiation can be described as a legal relationship, by virtue of which certain individuals, who fulfill premises prescribed by the law, are deemed to be the child's parents and hence are capable of becoming depositaries of certain rights and duties towards each other and towards the child. These rights and duties flow from the abovementioned

<sup>33</sup> Andrea E. Strumpf, "Redefining Mother. A Legal Matrix for New Reproductive Technologies," *Yale L. J.* 96 (1986): 187.

<sup>34</sup> *Ibid.*: 190.

<sup>35</sup> Some states allow to leave a born child anonymously in the care of the state, e.g. Austria, Belgium, Germany etc. See Jens M. Scherpe, *supra* note 5: 101.

<sup>36</sup> Strumpf writes that "When the child's existence begins in the minds of the desiring parents, biological conception of the child declines in importance relative to psychological conception with respect to the full life of the child." See more specifically Andrea E. Strumpf, *supra* note 33: 196; see also Melanie B. Jacobs, "Intentional Parenthood Influence: Rethinking Procreative Autonomy and Federal Paternity Establishment Policy," *Journal of Gender, Social Policy & The Law* 20:3 (2012): 495.

<sup>37</sup> See *ibid.*: 492, 498.

<sup>38</sup> Yehezkel Margalit, Orri Adam Levy, and John D. Loike, *supra* note 4: 114.

<sup>39</sup> See Melanie B. Jacobs, *supra* note 36.

relationship and are not dependent upon existence of the actual genetic kinship.<sup>40</sup>

She also states that social filiation has been described as performing the caring role of the child.

With Lisbon Treaty the protection of the child was proclaimed as part of the Unions's objections enshrined in art 3 of the TEU.<sup>41</sup> Primary rights for a child are provided by the UN Convention on the Rights of the Child (CRC). Concerning fatherhood two rights are usually discussed: the right to a parent and the right to the child's identity. Article 7 of CRC states that a child has the right to know and be cared for by his/her parent. As the convention does not define the concept of "parent", some authors argue that it is not so clear whether provision means "biological parent" or "adoptive parent."<sup>42</sup> Additionally, participating states of the convention interpret this provision differently. Kelly states that "it can be argued that art 7 does not ensure a child's right to know and be cared for by his or her biological parents, but rather preserves the child's right to know and be cared for by those individuals who are actually parenting the child, whether biological or social."<sup>43</sup>

Article 8 of CRC refers in respect to the child's identity even as a fundamental right of respect for one's private life. Denying a child to his/her biological parent affects his/her identity, dignity, autonomy and liberty. Some authors have stated that to impede a child from knowing his or her parent can be discrimination against the child<sup>44</sup>. As noted above, the knowledge of one's origins can be essential to the healthy development of the child but does not ultimately demand that a biological father should be considered more important than a non-biological social father. Though art 8 of ECHR does not distinguish between the legitimate and illegitimate child, it would not be so easy to decide in this context what the best interests of the child are, with respect to the family life of both: a single mother and her child but also unwed father.<sup>45</sup>

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<sup>40</sup> Magdalena Duggan, "Mater Semper Certa Est, Sed Pater Incertus? Determining Filiation of Children Conceived via Assisted Reproductive Techniques: Comparative Characteristics and Vision for the Future," *Irish Journal of Legal Studies* 4(1) (2014); Shelly Ann Kamei, "Partitioning Paternity: The German Approach to Disjuncture Between Genetic and Legal Paternity with Implications for American Courts," *San Diego Int'l L. J.* 11 (2009-2010): 546.

<sup>41</sup> Frederik Swennen, "The changing concept of 'family' and challenges for family law in the Benelux countries": 15; in: Jens M. Scherpe, ed., *European Family Law. The Changing Concept of 'Family' and Challenges for Domestic Family Law II* (2016).

<sup>42</sup> E.g. UK interprets the term as persons who as a matter of natural law, are treated as parents. See Claire Fenton-Glynn, "Who am I? The Child's Right to Identity": 186; in: Claire Fenton-Glynn, ed., *Children's Rights in Intercountry Adoption. A European Perspective* (Cambridge- Antwerpen-Portland: Intersentia, 2014).

<sup>43</sup> Fiona Kelly, *supra* note 8: 340, fn. 83; see also Anna Singer, *supra* note 25: 139.

<sup>44</sup> Claire Fenton-Glynn, *supra* note 42: 191.

<sup>45</sup> Dagmar Coester-Waltjen, "The Impact of the ECHR and ECtHR on European family law": 84; in: Jens M. Scherpe, ed., *European Family Law. The Impact of Institutions and Organisations on European Family Law I* (Cheltenham, UK, Northampton, MA, USA: Edward Elgar Publishing, 2016).

The ECtHR has several times stated that the meaning of having family life with the child goes under article 8 of ECHR:<sup>46</sup> "a parent is a person who raises a child, a genetic link is not needed". Singer argues that in most cases ECHR "deals with the question of the right to become a legally recognised parent, not the child's right to have parents."<sup>47</sup> The dilemmas are often related to identifying parents as "father" and "mother". Thus, Attack, concluding about the prevailing trends in jurisprudence, states that "the law is increasingly seeking to limit state intervention in the family to the parent-child relationship, but is failing to strictly adhere to this without succumbing to endorsing restrictive gender conventions."<sup>48</sup> The development of this discussion is supported predominantly by feminist scholars who are trying to avoid "gendering" in parenthood.<sup>49</sup> However, an essential factor of biological fatherhood is a fact that cannot be denied. The question is rather the relevance of fatherhood in family relations.

Preferring a biological father can be grounded by the principle known already from the Bible that every person is responsible for his deeds.<sup>50</sup> But is it reasonable to follow this principle in all cases? When a man is a father for too many children with too many different women<sup>51</sup> or a child is born because of rape? Being a financial father usually means also the right of the father to be a social father. Establishing such a "fake" family cannot always be in the best interest of the child<sup>52</sup>. Also, in some states being a biological father gives a man a right to demand care from the grown-up child.<sup>53</sup>

Technological procreation has made pregnancy and birth of a child less "holy" and "mysterious" than it had been earlier, as technology allows for making more clear and planned choices to have a child. It can be that biological creation of the child is soon just one tool for having a child next to the technological procreation. A similar development can be seen as happening to traditional marriage, which, despite the attempt to prioritize, has lost its importance and is currently only one

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<sup>46</sup> See e.g. *Yousef vs Netherlands*, ECtHR, Appl No 33711/96, 2001; *Kroon and others vs the Netherlands*, ECtHR, Appl No 00018535/91, 1994; *Nylund vs Finland*, ECtHR, Appl No 27110/95, 1999.

<sup>47</sup> Shelly Ann Kamei, *supra* note 40: 546.

<sup>48</sup> Megan Attack, "Traditional and Functional Views of the Family in the Law," *North East Law Review* 56 (2016): 59.

<sup>49</sup> See, for example one of the best overviews: Susan B. Boyd, "Gendering Legal Parenthood: Bio-Genetic Ties, Intentionally and Responsibly," *Windsor Y.B. Access Just* 25 (2007).

<sup>50</sup> See Brandon James Hoover, "Establishing the Best Answer to Paternity Disestablishment," *Ohio Northern University Law Review* (2011): 164.

<sup>51</sup> Maillard points out in his article the examples from US legal practice calling them "serial fathers": 22 children by 14 women, 23 children by 17 women, 25 children by 18 women, 24 children by 11 woman (Kevin Noble Maillard, "Serial Paternity," *Mich. St. L. Rev.* (2013): 1370). Can such fathers be social fathers for all their children in sufficient and equal way? Also, thinking about the fulfilling the maintenance obligation for all children seems unrealistic.

<sup>52</sup> ECtHR has stated: "... there may exist valid reasons to deny an unmarried father participation in parental authority, as might be the case if arguments or lack of communications between the parents risk jeopardising the child's welfare (*Zaunegger vs Germany*, ECtHR, Appl No 22028/04, p 56.).

<sup>53</sup> E.g. in Estonia a child can become free from the obligation only when he/she proves that this man has not maintained him/her but one can assume that proving this is not an easy task.

type of family life next to all others. And, even more, development of reproductive technology can result in the situation where multiple parents can share a genetic link to the child<sup>54</sup>, and not only three but six or more parents. Undoubtedly this will reduce the importance of biological parenthood. Margalit, Levy, and Loike discuss that in such cases it would be complicated to determine "which of these individuals should be deemed the child's legal parents when no single party has a superior genetic claim to any other"<sup>55</sup> and state that all those six parties have equal parental rights as biological parents but "may have intended for two of biological parents to be primary parents, undertaking the bulk of the obligations and enjoying most of the benefits, while the other four would serve as secondary parents in a more limited social capacity."<sup>56</sup>

The child's interest must be reflected in the rules providing the establishment of legal fatherhood. From these norms one should reread how those interests are protected, covering financial, social, psychological, and physical, or whatever support. As these are the obligations a parent carries, it must be clear who is obliged or desires to fulfil them. In case there are too many parents raising a child, following their own "moral, cultural, or religious ideology"<sup>57</sup> can in fact seriously harm a child. In this respect it would be risky to provide many parents for a child.

Would it be fair to treat children born through technological procreation differently from those who are born through traditional, biological procreation? One must have a father, another must not? What if we assign another meaning to biological origins: a collection of genetical info, and leave this out from the list of presumptions entirely? Margalit, Levy, and Loike refer in their article to Haldare, who predicted already in 1924 that "by the year 2074 less than 30 per cent of children would be gestated by a woman".<sup>58</sup> However, the bigger the number of parties in a relationship the more complicated it will be to regulate this relationship. This allows for the claim that fewer parents are better for a child. Sometimes even two is too much<sup>59</sup>.

Additionally, in legal literature and policy documents it has been sometimes emphasized that the best family for a child is a mother and father of a different sex. The authors believe that in the context of the best interest of the child it is not relevant to highlight this traditional family model any more. A child needs a stable and caring environment in which to grow up, and non-biological or same-gender

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<sup>54</sup> See Yehezkel Margalit, Orri Adam Levy, John D. Loike, *supra* note 4: 129.

<sup>55</sup> *Ibid.*: 131.

<sup>56</sup> *Ibid.*: 135.

<sup>57</sup> *Ibid.*: 136.

<sup>58</sup> John B. S. Haldare, "Daedalus or Science and the Future", A Paper Read to the Heretics, Cambridge (Feb 4<sup>th</sup>, 1923): 63-67; in: Yehezkel Margalit, Orri Adam Levy, John D. Loike, *supra* note 4: 126.

<sup>59</sup> When considering the obligation to become a father for a child born from rape as an example.

parents can give a child the same quality in rearing. In this respect a social father can prevail over the biological one.

Biological father as a fact can be supported by the need of genetic data of the child: to diagnose or cure genetic diseases; to use cells of biological relative, make blood transformation or organ donor transplants, etc. Having an accurate data register of the child's parents, but separating biological origin from the rights and obligations, would facilitate the saving of human lives. However, such policy promotes the concept of social father again. Some may also pose the question as biological father vs social father, still emphasising that "the question should not be, does the absent unmarried father have too few rights, but does he have too few responsibilities?"<sup>60</sup>

Does the concept of the best interests of the child facilitate a satisfactory answer to the question? An obstacle here is that a child has many rights and choosing one of them means a decision about which right should prevail, leading to an unsolved discussion again – the choice has to be based on values, and if the values of the state are not clear, trouble will arise.

### 3. ANALYSING ESTONIAN REGULATION

The Estonian Family Law Act provides the following chief rules for paternity. The man by whom a child is conceived is the father of the child. It is deemed that a child is conceived by a man: 1) who is married to the mother of the child at the time of birth of the child<sup>61</sup>; 2) who has acknowledged his paternity<sup>62</sup>; or 3) whose paternity has been established by court<sup>63</sup>. A man who is married to the mother of a child has not been considered the father of the child if he has not conceived the child and: 1) the spouses have submitted a respective joint application to the vital statistics office; or 2) *another man has acknowledged his paternity*<sup>64, 65</sup>.

A father of the child should be his/her biological father. In a first order the biological<sup>66</sup> father was deemed a husband of the mother. And, when a husband of the mother is not a biological father, he could dispose of the father status only when he and his wife who must be concurrently the mother of this child have

<sup>60</sup> Ruth Deech, "The Unmarried Father and Human Rights," *Tolley's J. Child L.* 4 (1992): 8.

<sup>61</sup> This marital presumption has been considered as a most strongest presumptions in law, both in common law and civil law (see Jennifer Bryan, *supra* note 3: 572).

<sup>62</sup> Acknowledgement means that a father gives an application that he is a biological father of the child and mother of the child gives a consent to this application.

<sup>63</sup> A court will not identify a donor whose sperm has been used for artificial insemination as a father of a child.

<sup>64</sup> This is the abovementioned new provision.

<sup>65</sup> Also, if a child is born within three hundred days after termination of marriage, the man who was married to the mother of the child shall be the father of the child.

<sup>66</sup> In principle, biological father is a man whose paternity is certified by the medical procedure. However, the regulations of different states provide a principle that a child of the father is a man who has conceived a child consider biological paternity as the most important one.

submitted a joint application consisting a declaration that he is not a biological father of the child, otherwise he had become a father (considered as a biological father)<sup>67</sup>. Besides these rules there is now an easy solution for a mother not to bother her husband at all – just register the birth of the child with another man and a husband would not even know that he is not entered as a father into the child's birth data.

These norms in Estonian Family Law Act provide a "legal fiction of biological fatherhood"<sup>68</sup> because exceptions are based on biological parentage. And, the "authority to decide" has been left to the mother of the child. On the one hand this seems to be relevant – who else if not a woman should know who the father of the child is. But, on the other hand, this new regulation also supports the increase of unfinished legal relations. It is possible that by protecting a child a mother of the child would never care about the divorce with a man from the past. For example, a case where a woman with three (ostensible) marriages abroad and with no money to divorce gives birth to a child with a fourth man. This man could become a father through a court process based on his biological tie to the child but the state decided to facilitate the process: no need to divorce or get a declaration of not being a father of the child from the husband(s)<sup>69</sup> of the mother, but just the intent of the biological father and mothers' consent is enough. In the case in which a man is a biological father, the rights of the child seem to be protected according to Estonian model; when a woman is a person who has already had several ostensible marriages, it seems to be reasonable to ask whether this last is now an ostensible paternity case.

Also, in this case again the biological tie is not very important. In practice this child can be raised by a fifth man who acts as a social father even if the mother has three valid marriages and a fourth man, who is a father in the child's birth registry but is not his/her biological father. To make the situation more complicated, what if one of the mother's husbands turns to the court of his country of residence to state that the child is his because the child was born at the time of the marriage justifying the suit on the law of his country of residence.

Discussion in this article shows that there are many contradictory interpretations on parenthood. Also, the development of society has changed the previous understandings of who should be a father. One can also predict the changes that will follow. However, it can be stated that the concept of the social father has started to brush aside the concept of the biological father. Changes in

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<sup>67</sup> E.g. when a mother does not sign the joint application. Such husband can protect his rights by contestation of paternity within one year as of the date when the person entitled to contest paternity becomes aware of the circumstances which are the basis for contestation.

<sup>68</sup> See Fiona Kelly, *supra* note 8: 316.

<sup>69</sup> There can be problem to decide which husband of them three.

the Estonian legal regulations are still inclined to the biological fatherhood getting the support of the scholars who preach "constitutional duties of natural parent."<sup>70</sup> Even though the aim of the amendment described above intended to protect children born in an ostensible marriage of a mother or in undivorced cross-border marriages, this change has led to a preference for biological fatherhood. But, in the process when the biological tie has not been controlled through DNA-testing, the decision is made only on the basis of the statement of the mother of the child. In real life there are similar legal problems in Estonia about the biological and social fatherhood as in other states, but considering the court practice one can assume that biological fatherhood principles are preferred in decisions. Some authors state that also in Estonia the biological and social father should be given a new meaning: biological parentage should be a mere fact of biological ancestry, while a social father may act as a legal father with all the responsibilities and rights that it entails. That is, the intent of biological fatherhood should also be considered, but not being as significant of a factor as a social father.<sup>71</sup>

In Estonia there are no rules providing that in certain cases one cannot acknowledge fatherhood, e.g. in the context of teenage pregnancy or in a situation of rape, incest, or abuse.<sup>72</sup>

It seems that from the view of the state in Estonia the main concern related to parenthood is the financial obligation of the father. Because the father is considered to be a biological father, all the legal means are pointed towards determining biological fatherhood. As custody and maintenance obligations are treated separately, in the case when the father of a child loses custody, then care obligation still remains. This means that being a social father with emotional ties to a child is separated from the obligation to pay alimony to the child, e.g. if a biological father does not meet a child regularly or not at all but pays alimony, or differently, a non-biological father has an emotional tie with the child but has no obligation to pay any supplies for the child. Also, when biological fathers refuse to pay alimony it does not reduce their right to meet a child.

Similarly to other states, in Estonia the number of children born outside marriage of the parents is high. There exist non-traditional family models, and artificial insemination is allowed but in more restricted ways than in other states, surrogacy is not regulated or recognised. It is evident that the development of technology is many steps ahead of the legal regulations. Soon it will be common

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<sup>70</sup> See, for example, Andrea Mulligan, "Constitutional Parenthood in the Age of Assisted Reproduction," *Irish Jurist N. S.* 51 (2014).

<sup>71</sup> See Anna Singer, *supra* note 25: 147-148.

<sup>72</sup> Fiona Kelly, *supra* note 8: 339.



that a child is not a product of two married<sup>73</sup> parents but someone made of different cells, and the only reasonable solution is to give the rights and obligations concerning the child to the social father. That is, a social father should be a legal father.

It is evident that in a civil law legal system it is more complicated to determine and solve problems related to parenthood. As mentioned above, the best interests of the child should have been written in a legal act and it would be disputable whether at all and how much a judge can fail to follow a clearly written legal norm when deciding a case on the basis of child interests. The law should clearly establish what the "best interests" of the child are as well as the rules of interpretation for judges and the sanctions for failing to observe these rules if the court do so.

## CONCLUSIONS

Despite the rapid change in family relations caused by the rise of individualism, protection of children and human rights and the development of technology have promoted new principles which complicate the previously simple model of paternity, based on marriage and biology. Currently, it is not clear who should have rights and obligations towards the child: a biological father or social father, and what role a mother's husband plays in this. As family law has been very slow in following the steps of the changes in society, it is inevitable that the legal norms are outdated compared to the family relations existing today.

This article analysed the concept of fatherhood, discussing whether the biological or social father should carry the meaning of legal fatherhood. The discussion was based partly on the case of Estonian law which was amended precisely to address a changing society, but, as the authors stated, it further complicated the previous principles related to fatherhood, and this situation remain unresolved.

In short, too many rights collide in the question of who should be the legal father of a child; even based on the interests of the child it would not be easier to decide. Though it seems that almost every case needs an individual approach, we still conclude that the concept of the social father protects the interests of the child more effectively and is more suitable for the current social climate as well as for the near future, to be considered as legal fatherhood. The best interests of a child should become the central principle—it should not be forgotten, that "parenting is

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<sup>73</sup> Married to each other.



important because of its crucial importance in the life of a child”<sup>74</sup>.

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<sup>74</sup> Bonnie Steinbock, “Defining Parenthood,” *Int’l J. Child. Rts.* 13 (2005).

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