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TÍTULO: Procedimiento judicial para determinar el origen de los niños en la Federación Rusa.

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RESUMEN. La legislación que regula el certificado, el establecimiento y el concurso de origen de los niños exige estudio, reconsideración y mejora cuidadosa sobre la base del análisis de la legislación civil y familiar vigente de la Federación de Rusia, basándose en disposiciones teóricas dedicadas a la regulación legal del establecimiento de origen de los niños y el mecanismo de prueba de paternidad en un procedimiento judicial. La base metodológica se realizó mediante el método científico general (dialéctico) del conocimiento, métodos lógicos, comparativos y legales que permitieron considerar los problemas de la legislación familiar en el ámbito de la regulación legal de la prueba de paternidad en un procedimiento judicial y de impugnación de paternidad y maternidad en la Federación Rusa.

PALABRAS CLAVES: relación legal parental, derechos del niño, prueba de paternidad, concurso de maternidad y paternidad.

TITLE: Judicial procedure for determining the origin of children in the Russian Federation.

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ABSTRACT. The legislation that regulates the certificate, the establishment and the origin contest of the children requires study, reconsideration and careful improvement on the basis of the analysis of the current civil and family legislation of the Russian Federation, based on theoretical dispositions dedicated to the regulation of the establishment of origin of children and the mechanism of proof of paternity in a judicial proceeding. The methodological basis was made through the general scientific method (dialectic) of knowledge, logical, comparative and legal methods that allowed to consider the problems of family legislation in the field of legal regulation of paternity test in a legal proceeding and challenge of paternity and maternity in the Russian Federation.

KEY WORDS: parental legal relationship, rights of the child, paternity proof, contest of motherhood and paternity.

INTRODUCTION.

Paternity proof as the legal fact certified by authorized body generates not only the rights, but also need of execution by the father of the duties determined by the law appearing with the child's birth. Paternity proof in a judicial proceeding can somewhat be considered a measure of the state coercion. The purpose of such measure is compulsory realization of the rights of the child therefore the person recognized as the father in relation to the child has parental rights and duties.

As civil legal proceedings three legal facts can be established: first, paternity; secondly, paternity fact; thirdly, fact of recognition of paternity. In the last two cases special production takes place. The general feature of these facts is the lack of the opposite side in judicial proceedings, most often,

in connection with death. Usually, need of establishment of such facts arises at acceptance of inheritance, receiving pension payments, etc.

DEVELOPMENT.

The legislation of the Russian Federation provides several bases on which appeal to the court with the statement for paternity proof are possible.

First, marriage between the father and mother of the child is not registered and there is no joint statement of parents or the father about paternity proof submitted to body the Registry Office.

Secondly, non-receipt by the father of the child of consent of tutorship and guardianship authority to establishment of paternity concerning it in case of the death of mother and other circumstances listed in the Family code of the Russian Federation (further - the IC RF) provided that marriage between the father and mother of the child is not registered.

Establishment of the fact of recognition of paternity (i.e., the person recognized or recognizes himself as the father, but the state registration of paternity for one reason or another is not made), also demands existence of a certain set of the following circumstances:

First, lack of the state registration of marriage of the father and mother at the time of the child's birth.

Secondly, the death of the father of the child if he did not submit the application to body the Registry Office about voluntary recognition of paternity during lifetime.

Thirdly, existence of the authentic proofs which are obviously specifying that during lifetime the man recognized the paternity concerning the specific child. According to item 3 of the Resolution of the Plenum of the Supreme Court of the Russian Federation "About application of the legislation by vessels by hearing of cases, the children connected with establishment of origin" of May 16, 2017 No. 16 (further - No. 16 PPVS Russian Federation), this fact is established by court as special

production proceeding from comprehensively checked data, under a condition, lack of a dispute on the right.

We see that 50 IC RF point the Article to establishment in a judicial proceeding of several types of the legal facts connected with origin of the child from the particular person.

In legal community, the issue of refusal of the developed law-enforcement practice concerning establishment of the fact of fatherhood and the fact of recognition of paternity is discussed. It is offered to operate only with the term "fact of recognition of paternity", however such changes can entail serious consequences, up to full revision of legal bases for establishment of such legal fact as special legal proceedings.

Methods.

According to the Decree of Presidium of the Supreme Council of the USSR of July 8, 1944 paternity proof concerning the children born out of the registered marriage as in administrative and in a judicial proceeding was forbidden. Such ban was lifted with enforcement of Principles of the legislation of the USSR and federal republics about marriage and family of 1968.

In the IC RF only the fact of recognition of paternity is specified. Thus, now only the fact of lifetime recognition of paternity by the died person is subject to proof, and proofs of finding of the child in dependence are not required [Repina, E.A., 2017].

As for establishment of the fact of paternity in court, in PPVS Russian Federation No. 16 there is an explaining comment on the fact that the IC RF by analogy with the Code about marriage and family of RSFSR 1969 (further - MaFC), provides an opportunity to establish origin of the child from the face whose marriage with mother of the child is not registered. In case of the death of such person the court establishes paternity fact as special legal proceedings posthumously.

Establishment of such fact concerning the children who were born on March 1, 1996 is allowed and later, in this case existence of the proofs confirming kinship communication of the child and particular person is obligatory. In case of establishment of origin of the children who were born in the period from October 1, 1968 to March 1, 1996, in particular, of the fact of recognition of paternity, it is enough to court to bring evidence capable to confirm at least one of the conditions provided in Art. 48 of MaFC. Thus, for the correct settlement of disputes about paternity, it is necessary to consider features of the legal facts: fact of recognition of paternity and fact of paternity.

Results and Discussions.

The circumstances listed in the Art. 49 IC RF at which case of paternity proof is considered by court have essential differences from those that were provided by Art. 48 of MaFC. The analysis of the specified article showed that proofs not necessarily have to be formal. Circumstances which were considered by court by hearing of cases about paternity proof were provided in this norm. Among them, first, cohabitation and maintaining joint economy by parents of the child.

An important role in proof is played by participation of the alleged father in education or keeping of the child that acts as the second circumstance which is taken into account court by hearing of cases about paternity proof. Nevertheless, the law allows lack of simultaneous performance of conditions on education and keeping of the child. Thirdly, if the circumstances stated above are not revealed, the satisfaction of the claim is possible, only in case the evidence capable for certain is produced to confirm recognition by the person of the paternity. It is possible to refer to them personal correspondence, questionnaires, etc. Even if the court established one of MaFC of circumstances specified in Art. 48, it is not enough for indisputable confirmation of a family relation of the child and the particular person; therefore, the alleged father, acting as the defendant having the right to produce any evidence disproving his paternity.

The considered circumstances are applied to children whose birth is registered during the period till March 1, 1996, but they can be considered by court and at establishment of origin of the child from the specific father concerning the persons who were born after the specified date [Antokolskaya, M.V., 2016].

The modern family legislation does not contain a list of the circumstances which are considered court at paternity proof. The court establishes only the valid origin of the child.

In legal literature, it is possible to meet the scientific positions dictated by the purpose of protection of interests of the spouse of mother who is not the "biological" father of her child; for example, if the child is obviously conceived as a result of treason. For designation of the similar incidents demanding paternity presumption denial in legal proceedings it is offered to use the term "the compelled legal paternity" [Pauli E.E.Der, 2016, p. 90].

In the IC RF there is no special norm on establishment of motherhood in a judicial proceeding in this connection, a conclusion about that is fair, "that in this case application by analogy of norm on paternity proof" is possible [Levushkin A.N. 2011].

In literature it is noted that the Federal Law "About Acts of Civil Status" provides a possibility of establishment of motherhood in a judicial proceeding. According to item 4 of Art. 14 of the Federal Law in the absence of the bases for the state registration of the fact of the birth provided by the first paragraph of this article, the state registration of the fact of the birth of the child is made on the basis of the judgment about establishment of the fact of the birth of the child by this woman.

As writes A.A. Yeliseyeva, among lawyers there are two polar opinions. One consider that in this case establishment of motherhood is subject to proof as claim production, and only in the absence of a dispute on motherhood the court establishes the fact of the birth of the child by the specific woman - "motherhood fact" [Yeliseyeva, A.A., 2015].

Others claim that in the absence of the bases provided by Art. 14 of the Federal Law "the order of establishment of the fact of the birth is defined by hl. 28 Civil and procedural codes of the Russian Federation also belong to the category of cases of establishment of the related relations"; i.e., are considered as not claim, special production [The reference book on proof in civil legal proceedings, 2011].

It is represented that in relation to the considered article the last statement is correct.

Motherhood can be established in a judicial proceeding for the state registration of the fact of the birth of the child, for receiving a birth grant (when losing documents and impossibility of their restoration), etc. If by a mistake or as a result of abuse in the book of registration of births as mother of the child other woman was written down, the valid mother has the right to challenge this record, having filed the petition. The exception is made by cases when the child was given birth as a result of application of a method of implantation of an embryo, and the woman who gave birth to the child (substitute mother), agreed to record as the child's mother other woman is deprived of the right to challenge this record [Borisova, T. E., 2016].

Paternity proof as the legal fact generates need of execution of the duties established by the law connected with the child's birth. Owing to what, voluntary paternity proof by the persons who are not married to the child's mother is done rather seldom. In such cases establishment of origin of the child from a certain father is made, generally at appeal to the court by interested persons.

In a judicial proceeding, paternity can be established in two ways - paternity proof in claim production and paternity proof as special production.

Summarizing, interested persons can challenge record about the child's parents in the following cases: if the faces which are written down as mother and the father are married; if record about the father of the child was made on the basis of voluntary recognition of paternity, but there is no state registration of marriage of parents of the child; if in case of the death of mother, recognition its

incapacitated, impossibility of establishment of its location or in case of deprivation of its parental rights record about the father of the child who is not married to mother was made on the basis of his statement in body the Registry Office about voluntary recognition of the paternity with the consent of tutorship and guardianship authorities; when record about the father of the child was made on the basis of the judgment.

The law provides some restrictions in contest of paternity and motherhood. So, the requirement of the face which is written down by the child's father on the basis of a joint statement with mother, and in case of the death of mother, recognition its incapacitated, deprivations of the parental rights, impossibility of establishment of its location - on the basis of the statement of the father with the consent of tutorship and guardianship authorities (in the absence of consent - by a court decision) cannot be met if at the time of record this person knew that it actually is not a father.

If conception happened to use of auxiliary reproductive technologies (VTR), then spouses and also substitute mother the rights to refer to these circumstances at contest of paternity or motherhood are deprived. This norm is provided for cases when at application of VTR men's gametes of the donor are used. The spouse who agreed to the wife to application of this method at the time of registration of the child, certainly knows that it is not necessary the biological father to the child. The consent of the spouse to application of a method of artificial insemination reasonably is considered as the act of voluntary recognition of paternity, and therefore, subsequently it cannot be challenged.

The situation enshrined in item 3 of Art. 52 of SK is a special case of the general rule provided by item 2 of Art. 52 of SK, according to which the person knowing at the time of record that it is not a father of the child having no right to challenge subsequently paternity. Abroad, the matters are regulated differently; for example, Art. 311-320 of the Civil Code of France provide a possibility of contest of paternity [Corral, H.F., 2001].

Let's specify that the legislator on sense of the Art. 52 IC RF does not forbid challenging record about paternity due to the lack of biological communication between the father and the child, and forbids referring at the same time to the fact of application of VTR. That is, the bases for presentation of the claim for contest of paternity have to be others; for example, existence of proofs that the child was born not as a result of application of VTR, and as a result of treason of the spouse.

It is worth paying attention that p.1 the Art. 52 IC RF tell item 3 only about contest of paternity. Respectively, the woman who is not the actual mother of the child born as a result of application of the VTR methods does not lose the right for contest of motherhood. This norm does not consider a situation at which the VTR procedure is made with use of donor ova when the woman who gave birth to the child has with it no genetic linkage.

The current legislation does not forbid the spouse to refer at contest of motherhood to the fact of application of VTR at the child's birth. On it, at contest of motherhood the court can take into account any proofs which with reliability confirm impossibility of origin of the child from the claimant (the medical certificate about infertility, lack of reproductive organs, etc.). The substitute mother who gave the written consent to transfer after the child's birth to the persons who signed the contract with it loses the right to withdraw the consent further and also to challenge record of these persons as the child's parents.

The current legislation in item 2 of the p. 4 of the Art. of 51 IC RF, protecting the interests of substitute mother, grants it the right, to refuse transfer of the born child to genetic parents. The last, in this case, will not be able to challenge the parental rights of substitute mother and her spouse [Burmistrova, E.V., 2014]. Such position of the legislator creates two stubborn legal problems: protection of the rights of the spouse of substitute mother and genetic father of the child in case substitute mother decides to keep the child.

CONCLUSIONS.

Legal problems arise at establishment of origin of the children who were born at application of VTR outside the Russian Federation. In the legislation of the different states, at legal regulation of these relations various approaches are applied. Despite wide circulation in the world of substitute reproductive tourism, need of legal regulation of the relations on substitute reproductive tourism at the international level [Diel, A. 2014; 232].

Many states oppose development of the VRT methods. Some states, the members of the EU, just do not regulate this legal relationship [Cfr. Rubellin-Devichi J., 1996; P. 410].

According to the European scientists, the legal doctrine and the legislation regulating establishment of origin of children have to be based on the new concept of relationship [Andorno, R. 1007; P. 100]. The status of the parent first of all has to become now social, but not natural and biological though many methods and consequences of an auxiliary reproduction having relations to the concept and basic values of relationship are still ambiguously perceived by the European society. [Cfr. Cirillo F. 1998, P. 665].

In the center of the new concept of relationship intention of the person to become the parent with application of methods of an auxiliary reproduction is considered. Such intention is important aspect, first, to recognize paternity of the man who does not have genetic relationship with the child and, secondly, to establish paternity and motherhood of the persons which are the parties under the contract on surrogacy [Todorova, V. 2010; P. 10].

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BIBLIOGRAPHIC REFERENCES.

1. Antokolskaya M.V. Family law: Textbook / M.V. Antokolskaya. – 3 ed., revised and add. - M.: Norm: Research Center Infra-M, 2016. - Page 110-112.
2. Andorno R. La procreación asistida en el Derecho comparado', in R. Andorno et alt., El derecho frente a la procreación artificial, Depalma. B. Aires. 1007. P. 100.
3. Burmistrova E.V. Establishment of origin of children at application of artificial methods of a reproduction of the person / E.V. Burmistrova//the Family and housing law. - 2014. - No. 2 - Page 4 - 6.
4. Borisova T. E. Surrogacy in the Russian Federation: problems of the theory and practice: monograph. / T.E. Borisova. - M.: Norm, 2016. - Page 49-50.
5. Corral H.F. Filiation and assisted reproductive technology//Trabajo publicado en Revue Générale de Droit (U. de Ottawa). 2001. No 31. River 701-729.
6. Cfr. Rubellin-Devichi J. Droit de la Famille. Dalloz. 1996. No 1325. P. 410.
7. Cfr. Cirillo F. La fecondazione artificiale eterologa de il rapporto di paternità nella filiazione legittima de in quella natural. In Rivista di Diritto Civile. 1998. Vol. 44. P. 665.
8. Diel A. Leihmutterschaft und Reproduktions-tourismus. Frankfurt am Main Wolfgang Metzner: Verlag, 2014. 282 s.
9. Levushkin A.N. Questions of the theory and practice of paternity proof (motherhood) in a judicial proceeding by the legislation of the Russian Federation / A.N. Levushkin.//Lawyer. - 2011. - No. 9. - Page 24 - 25.
10. Pauli E.E.Der Sogenannte Biologische Vater: Ein Vergleich der Französischen Und Deutschen Rechtsentwicklung. Rechtsvergleichung und Rechtsvereinheitlichung 35. 2016. XXI.189p. (In Eng.).

11. Repina E.A. Establishment of the fact of recognition of paternity in a judicial proceeding / E.A. Repina//Science, education, society: tendencies and prospects of development https://elibrary.ru/item.asp?id=29286127 International science and practice conference. (May 27. 2017, Cheboksary) / Chuvash state university of I.N. Ulyanov. - Center of scientific cooperation Interaktiv plus. https://elibrary.ru/publisher_books.asp?publishid=11480 2017. - Page 256 - 259.
12. The reference book on proof in civil legal proceedings / I.V. Reshetnikova [etc.]. - 5th ed., rev. and add.. - M.: Norm, Infra-M, 2011.
13. Todorova V. Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of surrogacy agreements: What is the current situation in the MS? Need for EU action? Brussels, 2010. P. 10.
14. Yeliseyeva A.A. To a question of a legal process of establishment of motherhood in the Russian Federation / A.A. Yeliseyeva//the Family and housing law. - 2015. - No. 2. - Page 23 - 26.

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