WELLCHI NETWORK Workshop 2:
"Which are the provisions in Family Law that foster children's well-being and which kind of reforms should be envisaged in this respect"

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Prof. Dr. Tsanka Tsankova
Doctor of Legal Sciences
Sofia University "St. Kliment Ohridski"
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Children's Well-Being And Bulgarian Family Law

?. Introduction

The term "**well-being**" (well-being) is a legal concept in Bulgarian family law. Thus, for instance, Article 18 of the Family Code (FC) stipulates that spouses shall provide for the well-being of the family. Should we open the Dictionary of Bulgarian, we will find that the term "well-being" means *"a happy and peaceful life without financial hardships, good living status, but also a life related to success and fulfilment; welfare"* (A Dictionary of Bulgarian, BAS, 1977, vol. ?, p. 633). It is exactly in this broader living context in which we have to understand the situation to be assessed and provided to our children, providing care and undertaking measures in their interest. This concept is broader than the concept of welfare, which means "*good living status*, good fortune, and wealth" (Dictionary, p. 642). Definitely, children have to be provided with good living conditions, but this is not enough. Well-being has to be interpreted as the right of the child to a certain and growing living standard, but also as the provision of all conditions for his/her development as a person. This treatment is implicit in the regulation of the parents-children relations in the Bulgarian Family Code, and also in the Child Protection Act (CPA). They use some broader wordings to express the relation owed by the parents to the children and their responsibility for their welfare, for which the public and the state provide support (Articles 2, 4 and especially Article 5 of the FC; Article 1, Article 2, Article 3, item 3, Article 10, para 1 CPA). Well-being is the creating of a living environment for the normal physical, mental, moral and social development of children, as stated in Article 10, para 2, CPA.

3. The all-round approach and guidance for parental responsibility has been expressed in the Act by the much more frequent use of the term "protection", which also

has much richer implications. There is no general definition of the term "protection" in Bulgarian family law. In § 1, item 1 of the Supplementary Provision of the CPA, its normative content is identified as a "system of legal, administrative and other measures to guarantee the rights of each child". This definition does not cover everything, which a family can provide, but is restricted within the frame of action of the state child protection authorities under this Act and the institutions carrying out activities in the interest of children.

??. Legislation Review

1. The Republic of Bulgaria has a developed system of legislative regulations with regard to relations in the family and the care of children. It is founded on particular principles, expressly worded and reinforced in the regulations.

These principles have been defined immediately after 1944-1945. They acquired an overall effect and confirmation within the UN Declaration of Human Rights, as well as in other international treaties. These have been expressly mentioned in Article 3 of the Family Code. Some of them have been promoted as constitutional principles:

Protection of marriage and the family by the state and society;

Equality of persons (children) from the two sexes;

Equality of children born within and outside the marriage;

Equality of biological and adopted children;

Equal rights and responsibilities of men and women in marriage with regard to children;

Respect for the personality of each family member;

Care and support between family members.

Specific treatment of child protection is provided by the CPA. This law is the basis for deriving the key stipulation for the rearing of the child in a family environment According to Article § 1, item 2 of the Supplementary Provision of the CPA it covers both the family, the grandparents, the child's relations and the foster family, with which the child is placed (the placement is carried out by an administrative and judicial procedure).

2. The governing provisions for the development of family law in Bulgaria are Articles 14, 46 and 47 of the Constitution of the Republic of Bulgaria, which contain the following fundamental presumptions:

Protection of the family, motherhood and children, as well as protection of the persons left without the care of their relations;

The assignment of the rearing and education of the children until full age (18 years according to Article 1 of the Act on the Persons and the Family - APF), irrespective of their origin within or outside the family as the right and the responsibility of their parents;

Support by the state and special protection for mothers through social support;

Restriction or waiving of parental rights only under the terms and procedures stipulated by the law (the fully developed regulatory framework of parental rights waiving is contained in Article 74 et seq. of the FC, whereby specific provisions are set forth in the CPA).

These provisions have to be referred also to the provisions of the Constitution regarding marriage:

Recognition of the legal effect only of the mundane, non-religious marriage (the church rite bears no legal effect);

The voluntary nature of the marital union between a man and a woman.

The Constitution of the Republic of Bulgaria, pursuant to the latest revision, promulgated in the State Gazette, no. 18 of 25.02.2005 paves the way for the accelerated adoption of legislation, including with regard to settling family relations and providing better protection for children.

3. Family relations are settled by the Family Code, adopted in 1985.

It was revised in 1992 in order to be purged of all ideological suggestions, typical for the totalitarian regime in the settling of social relations. This also has its legal substantiation in § 3, para 1 and 2 of the Transitory and Conclusive Provisions of the Constitution. Under the new social conditions, reinstatement was made of the right to support for full-age schooling children by their parents, which was set forth in the first FC of 1968. The Family Code was also revised during 2003. A radical reform was carried out in the institute of adoption (SG, no. 63 of 2003). It aims at attaining compliance with the requirements of the Convention for the Protection of Children and Cooperation in respect of Inter-country Adoption, ratified by the Republic of Bulgaria, SG, no. 16 of 12/02/2002).

4. In 2000, the Child Protection Act was adopted (SG, no. 48 of 13.06.2000). The Act was revised and amended in 2003 (SG, no. 36 of 2003).

5. As early as 1991 the Republic of Bulgaria became a party to the Convention on the Rights of the Child (ratified by the Great National Assembly, Decision of the Great National Assembly dated 11.04.1991, SG, no. 32 of 1991, text, SG, no. 55/1991). This is a fact of key importance for the development of the legislation in the area of children's rights and the protection of their interests. Here we will also have to make reference to the Act on the Ratification of the Hague Convention on the Civil Aspects of International Child Abduction (SG, no. 20 of 2003), the Act on the Ratification of the Luxemburg Convention on the Exercise of Parental Rights and the Recovery of Parental Rights (SG, no. 21 of 2003) and the relevant revisions and amendments of the Civil Procedural Code ensuring the implementation of the provisions of the Conventions (SG, no. 84 of 23.09.2003).

These ratifications raised especially acutely the issue of drafting a new Family Code. The Draft was prepared by the Council of Ministers and adopted at the first reading by the 38th National Assembly in 1999. It was not placed on the legislative agenda of the 39th National Assembly. It only adopted an Act on the Revision and Amendment of the Family Code (the said revisions of adoption, as well as some new provisions regarding origin). It could be expected that a new Family Code will be adopted by the 40th National Assembly.

The National Assembly adopted on 22 March, 2005, at the first reading, a Draft of an International Private Law Code. In 1999, an Act on Civil Registration was adopted. This Act amends the multiply revised provisions of the Act on the Persons and the Family of 1949 with regard to the status of physical persons and contains regulations with regard to origin, adoption, marriage and permanent residence.

The Republic of Bulgaria has adopted an Act for Protection against Discrimination (SG, no. 86 of 30.09.2003). Recently, the National Assembly also adopted an Act for Protection Against Domestic Violence (SG, no. 17 of 2005).

This entire system of new laws to which we also have to refer the numerous acts of social legislation is intended to respond to new social realities and provide a better protection to children's fundamental rights. A greater parental responsibility is stipulated and, also, some more effective protection measures, a broader and better judicial defence.

From the procedural perspective, a worthy achievement of Bulgarian family law are the provisions of Article 15 of the CPA for the participation of children in al judicial and administrative proceedings affecting their rights and legal interests. The fully

developed legal regulation of the issue can very well be placed in the system for the protection of civil rights and demonstrates a high degree of public concern and effectiveness.

???. Future Legislation

1. As a rule, family law is a conservative element of the legislative system. The sharp, revolutionary changes are comparatively rare and are related to a specific social reconstruction. However, this does not exclude the changes in legal provisions, the establishment of new models of legislative regulation, including under the influence of the relations of possession and the recognition and establishment of fundamental rights. The recent decades saw an exceptional dynamism in the settling of family relations, which found an expression in the foundation of new principles, which the international community promotes as priorities and which have to be carried out within the current legislation of the states adopting them. For Bulgaria this is a way of responding to a social need and fulfilling its commitments with regard to the establishment and the development of the civil society.

2. The change in domestic family law does not call for a change in the principles of the Constitution of the Republic of Bulgaria which form the foundation of the Family Code. The very Constitution, however, which, now, with reference to Bulgaria's accession to the EU is the object of examination and revision, could state additional things with regard to family relations. It will affect the situation of children and will have an impact on the development of the legislation. In this respect, several ideas of new constitutional provisions could be discussed:

The entry of the right to marriage and family to each person. It has been expressly recognised by the European Convention on Human Rights and Fundamental Freedoms (Article 12).

In compliance with the Convention on the Rights of the Child, the text of Article 47 of the Constitution should stipulate not only the right and the obligation, but also the responsibility of the parents for the development of the children as free citizens in a free civil society.

In line with the Convention on the Rights of the Child (Article 7) and the fulfilment of the commitments of the Republic of Bulgaria as a party to this Convention, an insertion should be made of the right of each child to know their mother and father of origin and maintain contact with them. As early as 1968, the first Family Code expressly settled, by an avant-garde decision, the effect of the presumption of

fatherhood in the case of an in-vitro fertilisation with the use of another's genetic material. A new revision of Article 46 of the Constitution, which reflected the new perspective with regard to the possible subjects of marital law, as well as the form of the marriage (homosexual marriage; significance of religions marriage, etc.).

3. There are two challenges to family law. Response to them needs not necessarily be related to the adoption of a new Family Code. These challenges are:

The settling of a new type of property relations between the spouses – the establishment of a new regime of marital property management;

Recognition by law of cohabitation de facto and settling some of its effects.

4. It is necessary to make an overall reshaping of the property relations between the spouses.

5. In terms of the second aspect, a legal settling is required so as the legal settling would correspond to the factual. The number of actual cohabitations of a men and women is growing constantly. In 1989, the number of marriages was 63 263, in 1995, 36 795, in 2002 – 29 218. the children born outside marriage in 1995 constitute 25,8 per cent of all births, in 2002, 42,9 per cent, and currently, the rate is amounting to nearly 50 per cent.

During the time of the totalitarian regime, the attitude to cohabitation de facto was definitely negative, and criminal liability was stipulated in the case of abandoning the marital family (Article 180 Criminal Code, until 1991). After the political change of 1989, due to various objective social reasons, this phenomenon marked a boom, and it is also an expression of personal freedom in our society, a reaction to the isolated and limited life of the individual and readiness for choosing the alternative, readiness to exercise their right to choose in the settlement of their family. The cohabitation between a man and a woman is already the norm in social relations.

How will family law respond to this situation of growing factual habitation? It is not enough to declare tolerance to the individual's choice: cohabitation or marriage. Family law must recognise factual cohabitation as grounds for the origination of a family.

6. The setting up of a family through factual cohabitation has always called for the solving of two matters:

The first is: the admissibility for the existence of the non-marital spousal relationship.

It is solved based on social practice.

The second: settling the consequences of the established cohabitation de facto.

It may find solution only in the framework of law. It depends on the law, as to what legal consequences would be associated with the cohabitation de facto. These questions do not have reference to family law only, but, it is definitely expected to have a say on the matter.

Until recently, Bulgarian law had no legally established term for the cohabitation of a man and a woman as spouses. We can already say that, within a law, which can be relevant to the relations in the family, the term "factual spousal cohabitation" has been introduced. This is the Act for Protection Against Domestic Violence, which was adopted by the 39th National Assembly, SG, no. 17 of 2005.

For the needs of the law, it is necessary to provide substantiation and a definition of the cohabitation de facto, which would cover its substantial features. It has to read: "Cohabitation de factois a non-formal, voluntary, lasting personal union for the mutual life of a man and a woman, based on their free common will for cohabitation in a family communion as spouses."

The features identified in the definition shall form the foundation, which will provide the legal regulation of those consequences of cohabitation de facto, the regulation of which is perceived by legislators as appropriate and socially justifiable.

7. The areas in which the recognition of cohabitation de facto is important are:

Property relations – the right to property and the opportunity for each of the partners to use it;

The relations of the partners with third parties with regard to the maintenance and the provision of their mutual life;

The status of the children born to their parents in the cohabitation de facto in their best interest.

It has to be admitted that the partners in cohabitation de facto may use the general formulations of civil law for settling their relations, because these are options recognised for all citizens, irrespective of their marital status. Therefore, it is presumable that such a treatment is undisputable. However, here we face the serious problem: the opportunity of utilising freedom and contractual autonomy.

8. Cohabitation de facto poses a number of important questions with regard to the children born in a non-marital communion:

Origin

9. The issue raised most acutely and one predetermining the solution to other issues is that of the children's origin, and mostly, the identification of fatherhood.

What is the current situation?

Legal solutions have evolved significantly in the aspect of origin recognition from the father and the consistent enforcement of equality between children born inside and outside the marriage. Equality, irrespective of origin, is the achievement of the 20th century. With the Ordinance-Act on Marriage as of 12 May, 1945, the equality of children born in the marriage and outside the marriage has been recognised (Article 26, para 3). Equality has been codified in the three Bulgarian constitutions – of 1947, of 1971 and of 1991. On that foundation, all family laws – the APF of 1949, the FC of 1968 and the currently effective FC of 1985 provide for the freedom of establishing the origin and the equal rights of children.

Under the effective law, as well as pursuant to the preceding regulations, a child can be recognised as own, voluntarily, by each of the parents by an act of ownership. The ownership following the revision of the FC in 2003 was recognised for the subjective right of the parent. The origin from the father can be established by a judiciary procedure. The mother and the child have a right to file a claim (Article 41 FC). The fact of a child being born to the parents in cohabitation de facto, has no significant impact on the substance of the procedure. Cohabitation has not been assigned any special legal significance, and the plaintiff is not provided with relieves in proving the origin. Therefore, the ideas, which can be developed to respond to the interest of the child of having an established paternity, shall be reduced as a whole to the establishment of a simple procedure of origin identification.

Marriage only identifies the method for establishing fatherhood: this is the presumption under Article 32 of the FC. For children born outside the marriage, fatherhood can be established by ownership or a claim of fatherhood.

Parental Rights

In cohabitation de facto parents live together and by mutual consent decide on all matters regarding the upbringing of their children and exercise their parental rights only in their interest, as in marital communion (Article 71, para 1, FC). Upon the termination of such cohabitation, the problem arises as to where the children would live and who will exercise parental rights? However, in the effective law, there is no comprehensive treatment of parental rights exercise, as is the case of divorce treatment (Article 106, para 1 FC).

Provided this incompleteness of the regulations on the voluntary establishment of origin, both in theory, and in practice it is accepted in proceedings under Article 71, para 2 FC, Article 106 FC is applied, just as for the cases of judicial establishment of the origin from the mother or the father (Article 40 and 41 FC) the makes an express reference thereto. However, an express treatment is required, and this need is becoming more and more acute.

In case that any potential regulation assumes the idea of the admissibility of the partnership contract between the man and the woman, living in cohabitation de facto, it is possible to adopt a legal solution, allowing for the partners to settle the status of their children.

A specific issue arises: will it be possible for the voluntary statement made in the contract that the children's origin is from the partners in cohabitation, to be recognised as ownership and have the effect of ownership. Such clause *de lege lata* would have no legal meaning, but it has to be considered *de lege ferenda* whether this option would not best guarantee the interests of the children.

Support /Alimony

As far as children's support is concerned, the obligation of the parents and is not dependant on whether the parents are in marriage, whether they live separately, or are in factual cohabitation. Where there is no voluntary fulfilment of such obligation, the child, through their legal representative (if he/she is a minor) or through custodial assistance (if underage), may always claim that the parent is sued to pay the alimony. The collection of the alimony is ensured by a number of guarantees and privileges and the opportunity of carrying out a forceful execution. By the revision of the Civil Procedural Code, SG, no. 64 of 1999, which created a new Chapter Twelve "?" *Summary Proceedings,* in Article 126?, para 1, b. "e" the claims for alimony and its increase have been stated as summary proceedings. However, the substantive legal regulations of children support needs improvements. It is not merely inconsistent with the principles of family law set forth in the Constitution and the Family Code, but it is also in contradiction with Article 27 of the Convention on the Rights of the Child. The amount of the alimony has to be determined according to the child's needs and the parent's capacity, without being limited between a minimum and a maximum, as goes the current wording of Article 85 of the FC.

Currently, the Family Code is setting up a special regime of property disposition of persons underage, including the voidance of any free-of-charge or remedial

transactions for third party's debt (Article 73 FC), but these provisions do not correspond to the changed economic and social situation. At least, this general provision has to be amended by specific rules, broadening the legal capacity of underage persons in the area of property relations – for instance, those, related to the possession of a business.

In this context, the issue arises of the improvement of the institute of guardianship and custody. It has to be considered whether this is the best legal solution, and whether a return to a dualistic treatment – by the FC for the children, and by civil law for the distraint – would not be more appropriate. Reflections in this reference are motivated by the CPA.

This Act also makes us face the issue, as to which is the law to settle children's rights within the family. Currently, there is a gap and a transfer of Family Law in the CPA, whereby, the rights and the obligations of the parents "loose track" in the treatment of various administrative matters related to the functions of the child protection authorities.

10. An overall solution to the problem of origin as from the birth of the child is the establishment of a presumption of fatherhood in cohabitation de facto. Although quite delicate, such a legal solution would introduce clarity and definiteness in a child's situation. All cases of cohabitation de facto will be covered, including a void marriage. There are sufficient considerations and legal arguments.

The applicability of the remaining tools of family law for establishing the origin from the father shall not be an argument for establishing the presumption if we mean to protect the best interest of the child.

Similarly to the presumption for a marriage of the mother (Article 32 FC), this one, too, based on the cohabitation de facto, has to be refutable. The refutation of the presumption will depend on the person being designated by it as the father. The shift of the burden of proof shall relieve the establishment of fatherhood, as the plaintiff will establish only the cohabitation, which, in the case of cohabitation de facto is the case by definition. In the debate regarding fatherhood, the objection of *exeptio plurium concubentio* may be included, unlike the case of refuting the presumption of fatherhood by the mother's husband. This is because in the cohabitation de facto, the presumption shall be based on a factual and not a legal relation. This, however, allows for the presumption to have a stronger effect: the perspective of it as being refuted only for the cases of sufficient probability that the father of the child is another specific male, with

whom the mother had relations. This situation is going to be based on the realities of life, without the need for a formally concluded marriage. Two approaches can be applied for settling the argument.

Firstly, contesting by the presumed father through a judiciary procedure by filing a negative establishment claim, similarly to the situation currently effective for the mother's husband (Article 33, para 1 FC).

Or, secondly, an extra-judiciary contest, a unilateral free statement in writing to the authorised civil status officer, carried out within a short preclusive term. In this case, in order to preserve the civil status acquired by the child, the mother will have to file a positive establishment claim within a preclusive term also set forth by the law.

The initiative of judiciary contesting shall be provided to the presumed father, because the low owes special protection to children.

11. Another approach for settling the numerous matters raised by the cohabitation de facto, is the formulation in the FC of a general provision: "Factual cohabitation will bear legal implications in the situations set forth by the law". The reference legal regulation will identify the principle with the opportunity for flexible application. Then the creation of a presumption of fatherhood will be one of the cases set forth by the law.

All this does not mean the institutionalisation of factual cohabitation, not its transformation into another type of "matrimony" or a "mini-marriage". This is only a recognition of social reality, in reference to which the law has to state its clear positions. Positive solutions to this situation are available in the legislations of European states.

12. The resolution by the law of the most acute problem within cohabitation de facto – the origin of the children will have a positive impact for the life in the family community and will bring forth a radical change in family law.

Procedural Rights

13. An issue of future legislation shall be the better procedural provision for the rights of the child. Great expectations are being associated in this respect with the new Civil Procedural Code underway. It is necessary to provide a three-instance procedure, any time a child is a party to the case, for instance in adoption, support, etc. The provision of Article 15 of the CPA for participation in judiciary and administrative proceedings also has to be given a new treatment, guaranteeing in a greater extent the interest of children.