Trans parenthood – legal analysis

Forced divorce – legal provisions

Procedure of legal gender confirmation have been formed by the jurisprudence of the Supreme Court (SC). None of the formal requirements considering court procedure nor legal effects of gender confirmation do not stem from legal provisions, but from perpetuate court rulings.

Persons filing for gender confirmation with the court should be single. In theory, being married prevents the procedure form commencing. This stems from lack of provisions allowing concluding marriage between people of the same gender. Legal gender confirmation of a married person would lead to circumvention of the law. Ban of same gender relationships is derived straight form art. 1 of the Family and Guardianship Code (FGC) and art. 18 of the Constitution. Interpretations of art. 18 however vary and are a subject of lengthy disputes.

In practice, it is possible that a married person would not reveal their status before the court during gender confirmation procedure. In case of ruling in their favor a situation would occur that a person going through transition and their spouse will have the same gender markers. Law does not stipulate consequences of such situation. It surely does not constitute a ground for annulment of marriage in the understanding of FGC (art. 17), since it is not mentioned expertise vermis in aforementioned provisions. Theoretically – such a marriage could last. In practice however, if a married person with a judgment confirming their gender files for amendment of act of birth and issuing new documents by the Civil Registry Office, the officer will notify a prosecutor.

According to Code of Civil Procedure (CCP) (art. 7) a prosecutor can demand lunching a criminal procedure every time such a procedure is required, i.e. then rule of law requires it, unless certain provisions stipulate otherwise. Prosecutor is only prohibited to file for divorce. Thereby, prosecutors are not authorized to filed for divorce also in a case both spouses have the same gender marker. They can however resume a closed case on legal gender confirmation. As a result, a married person who obtained a legal

confirmation of their gender, risks a situation when a prosecutor will annul the whole procedure of gender confirmation. All the same, a trans person will find themselves in a situation when their marriage will still last, but their gender marker will not match their gender identity. A next attempt of gender confirmation will require a divorce.

To sum up, there is no provision in polish law, which would require a person filing for gender confirmation to be single. In practice however, trans persons are forced to divorce. Otherwise gender confirmation procedure will not end in their favor.

Divorce consequences for trans people as a specific group

Forcing trans persons to undergo divorce has effects in two major areas of life: financial and parental. Changes in parental authority are described further in point: „Trans parenting: risk of having parental rights or custody over children revoken; being a parent after transition, parent's gender after transition".

Divorce results in end of statutory joint property right of spouses. In practice the couple can either decide split their belongings by mutual consent or file for division of property by court. If spouses are forced to divorce due to a gender confirmation case of one of them and decide to still live together their property right will ex ledge convert into a voluntary joint property, which means that each of the spouses will be the owner of half of the assets.

Divorce also results in dissolvent of formal ties between the spouses. That is why, if the couple decides to still be together in an informal relationship, taking care of legal matters will be necessary. This means i.e. writing testaments (ex-spouse is formally a stranger), granting each other proxy to act on each other's behalf before public officers and third parties. Due to trans identity of one of the spouses and potential need to undergo invasive medical treatment, a special proxy for obtaining medical information should be granted.

To what extent are parents, spouses and children expected to participate in a legal gender recognition case

As a result of jurisprudence (f.e. judgment SN III CZP 118/95, judgment of Court of Appeals in Krakow, I Ca 276/04) a procedure has been established that gender confirmation is a contradictory proceeding, which means there are two parties with conflicting interest involved in it. Trans person filing for confirmation of their legal gender marker with their gender identity will always be the plaintiff. The second party (defendant) will be their parents. This stems soy from the Supreme Court's jurisprudence (judgement SN III CZP 118/95). This practice has been formed in the 90s and remains constant.

In the process a trans person sues their parents. There is no way around it according to law currently in force. Until both parents are alive both of them have to be sued, even if only one keeps contact with their child. According to some courts, even a fact that the parents lost their parental rights in the past, does not absolve the plaintiff from suing them, if they live. If one of the parent is dead, the second parent should be sued. In a situation when both parents are dead, a curator „for the dead" is appointed by the court (ex. Warsaw Court of Appeals, I Acz 1805/12) who takes the place of the parents and acts as a party to the dispute.

Obligation to sue the parents does not mean that they have to take active part in the proceedings. If they do not question their child's right to gender confirmation and they do not wish to take part in the proceedings, they can send a plea of consent and ask the court to proceed without their presence. That means agreeing to child's gender confirmation and lets court close the case without parent's presence.

As stressed earlier, a person filing for gender confirmation must be single. Therefore, there is no need for a spouse or an ex-spouse to take part in the case.

In 2013 the Supreme Court stated (judgement SN I CSK 146/13) that legal gender confirmation influences not only trans person relation with their parents (that is where obligation to sue the parents stems from) but also with their children. From that statement the Supreme Court a need for plaintiffs children to also sued in gender

confirmation case derives. It is a big shift in the jurisprudence and can potentially influence trans person who are parents. The need to sue a child would make the proceedings even more complicated, and in case of underage children a need to appoint a curator to represent them would occur, who could hinder or even block the proceedings completely, if they consider gender confirmation not to be in child's favor.

Participation of other family members in court proceedings in not mandatory.

Trans parenting: risk of having parental rights or custody over children revoken; being a parent after transition, parent's gender after transition

Parental rights

Parental rights and responsibilities constitute parental authority over a child. It encompasses, among others a duty of upbringing, legal representation, custody over a child and their belongings (art. 95 FGC). A child is under parents authority until they become an adult. According to art. 95 sec. 3 FGC parental authority must be carried out according to child's best interest and social interest.

Parental authority can be:
1) limited,
2) suspended by the court,
3) revoke.

An issue taken into account while deciding on divorce cases including children, but also in family and custody cases is child's best interest. Child's best interest is a universal interpretation clause, when applying family code provisions which regulate parent's and child's interactions. The jurisprudence states that best interest of a child means that their interest is protected in order to insure proper psychophysical and mental development.

1. Limitation of parental authority

Legal criterion for limiting parental authority is endangering child's interest by misuse of parental authority (art. 109 FGC). Limitation of parental authority consists i.e. of putting on certain duties or subjecting parental authority to constant court curator's surveillance.

Limitation of parental authority can occur in a case of:
– filing for it by one of the parents,
– filing for it by a person, who knows that a child is subject to harm due to improperly carried out parental authority (ex. in cases of justified assumptions of physical mistreatment, negligence or malnourishment of a child) lunching an ex officio procedure by the court.

A notion to limit parental authority can be filed i.e. by education facilities, police, social aid services, local government body or central government institution, or a facility having the child in its custody.

2. Suspension of parental authority

In case of transient obstacle in execution of parental authority, the custodian court can file for its suspension (art. 110 FGC).

3. Revocation of parental authority

The most common circumstances, which may lead to revocation of parental authority are:

– in a divorce decision – court deciding about parental authority over the spouse's common underage child, taking into account the spouses written agreement on execution of parental authority and keeping in contact with a child following the divorce, if it lies in child's interest. The court can entrust parental authority to one of the parent, limiting the other parent's authority to certain duties and rights, if it lies in the child's best interest. In specific situations the court can revoke parental authority of one of the parents.

– in any situation – when circumstances change, or if child's interest requires it, a custodian court can change the divorce decision in the scope of parental authority. In

this kind of situation court takes into account child’s situation, or previous way of executing parental authority; the court may restore parental authority, revoke or change the ruling on limiting or revoking it.

– in any situation – when child's best interest it at stake, when the custodian court finds it necessary and justified it can change or revoke any decision pending appeal in custody case – including cases on separation, annulment of marriage, confirmation of parenthood, even if the case was decided by a different court of different judges in the same court. Custodian court, based on art. 577 of Code of Civil Procedure can even change a decision of appellate court in custody cases, if facts of the case changed and best interest of a person whom the case concerns demands it (decision of Warsaw Court of Appeals, dated 6 November, 1972, case no III CRN 281/71)

According to art. 111 of FGC reasons to revoke parental authority are:

– permanent obstacle in executing parental authority (according to Supreme Court’s judgement dated 2 July, 2000, case no II CKN 960/00). A permanent obstacle should be understood as a set of circumstances that make parents unfit to have permanent parental authority over a child in a sense, that it cannot be determined how long they will be able to execute it, or at least, that they will not be able to execute it for a long time,

– misuse of parental authority (i.e. when due to lack of care, a child misbehaves in school and has bad notes, taking the child to live abroad against second parent’s will, moving in with a child and a new partner, if such a circumstance has bad influence on a child’s upbringing, repeatedly giving child alcohol),

– gross negligence of parental authority (i.e. complete break up of ties with a child, lack of interest in their future, breaking up ties with a child for several years, heavy drinking).

While assessing any of aforementioned grounds, the court should take into account an individual situation of a parent. It is said, that assessment of a parent should also entail any possibilities of bad influence on the process of child’s upbringing. In case the reason of revoking parental authority stopped, the custodian court can reinstate parental authority.

According to Supreme Court's jurisprudence „Revoking of parental authority is valid every time, when due to child's best interest, further execution of parental authority by the parents cannot be tolerated" (decision of 15 July, 1999, case no I CKN 341/99).

It is important to stress that apart from parental authority there is also a right to contact with a child (chapter 3 of FGC). Ways of regulating contact with children are based on parents mutual consent, child's best interest and taking into account child's reasonable requests.

Change of gender marker vs. parental authority

This issue in the context of trans persons is a difficult one, due to the fact, that majority of persons deciding to transition and legally change gender marker, did not have children.
(statistics for years 1991–2008)

plaintiffs parental status on the day of filing a claim	**trans (F/M)**	**trans (M/F)**
no children	98,1%	93,3%
only underage children	1,9%	5,0%
both underage and grownup children	0%	1,7%

In a publication where she analysis jurisprudence dated 1991–2008, the author points out that disclosing a fact of having children always make trans persons situation difficult, on the stage of diagnosis, as well as starting treatment, since it makes person's trans identity questionable and, due to ethical concerns and child's best interest, may cause denial (or postponing) of treatment which might person's body to change.

Issuing a judgment in case based on art. 189 of CCP does not infringe legal connections between the plaintiff and third parties (child, parents) born before the judgement is valid. After gender confirmation, parental rights and responsibilities derived from parental authority, contact with an underage child or maintenance duty are still existing and valid.

The sole fact of legal gender confirmation should not have any influence on the scope of parental authority, if none of the grounds for revoking parental authority set forth in FGC occur (but still, decision to start treatment is often postponed until children reach adulthood for fear of having parental rights revoked or limited). Since lack of a clear-cut definition of „child's best interest", it cannot be ruled out that trans diagnosis can influence court's decision in the scope of limitation, suspension, or revoking parent's parental authority.

Having in mind the differences in court's approach to proving „lasting affiliation with a certain gender", we can speculate that starting transition may influence the court's decision in the scope of parental rights.

It can be also presumed, that in a situation of divorce due to gender marker change procedure planned by of one of the partners, the child's place of residence would be the place of residence of the second parent, not the trans parent's place of residence.

European Court of Human Rights jurisprudence:
P.V. vs Spain (case no 35159/09, judgement of 30 November 2010)

The court did not find infringement of the European Convention of Human Rights in the scope of limiting contacts of the trans applicant with her son. The court stated that limitation of contact does not stem from discrimination based on trans identity of the applicant. This limitation was justified by fear for child's mental development and risk of emotional devastation, but not because their parent was transsexual. Temporary mental instability of the applicant was assessed.

Parent's gender after transition

Title II of FGC, chapter IA regulates relations between parents and children. Those relations are described unequivocally be the polish law. A parent can be either a mother or a father of a child. Moreover – only a woman can be a mother and only a man can be a father. Polish law does not really take into account situations when one or both parents change legal gender markers and how it influences their parenthood (also consequences it has for child's birth certificate). A child cannot have two mothers or two fathers. A situation can occur where a birth certificate of a child of unknown parents is issued. If

a civil servant cannot issue a birth certificate, they can file a notion to determine the content of such birth certificate by the court (art. 40, art. 54, Act of 28 November 2014 on Civil Records).

Since it is possible that a person who underwent gender market change based on a court ruling, while at the same time being biological able to have children, it the face of lack of specific legal provisions, a situation could occur, that in certain circumstances a trans person's parental status will not be recognized by the polish legal system and their situation will depend on a random decision of a court of civil servant.

Below, different situation are presented, where lack of specific provisions can cause difficulties in determining a trans person's parental status.

A first aspect of legally acknowledging trans person's parental status is, when a child is born after parent's gender marker change.

Different situations are possible:

1. A transman (F/M) with a legally confirmed gender and documents in accordance with his gender identity can become pregnant and give birth to a child (there is no need to have female genitalia removed in order to get a gender marker change).

2. Pregnancy is an outcome of a relation of a woman with a transwoman (M/F), who gets her gender confirmed before the child is born.

3. A woman gets pregnant while in a relationship with a transman (F/M).

Ad. 1

According to legal definition (art. 61(9) FGC) – „A mother is a woman who gave birth to a child". Polish law does not take into account a situation when a man gives birth. Information about a woman who gave birth is put down on a birth record (or stillbirth record) issued by a hospital. According to art. 54 of the Act on Civil Records a birth record holds mother's data, her social security number, place, date and hour of birth and sex of a child. The record is sent to a Civil Status Office. If a birthparent is not a woman, but a transman, it is entirely up to the medical personnel of the hospital if this

data will appear in the birth record.

Information about a birth of a child can be submitted by a mother or a father (if they have legal capacity or limited legal capacity and are over 16 years old). In other cases – it is done by a legal representative or a guardian of a mother.

A transman giving birth creates a situation when there is in fact no mother (according to legal understanding of this term).

A case like this happened in Poland. A transman (F/M) after legally changing his gender marker and name, but having female genitalia gave birth to a child. In a motion filed with a court, the civil servant stated that a man cannot be disclosed as a mother, even though he is the person who gave birth. The court ruled that a name of a birthparent before transition should be disclosed in the document, and the transman himself would appear as a father (although he was the one who gave birth). This was in accordance with his wish and Ombudspersons opinion. None the less, the prosecutor appealed the verdict and Court of Appeals changed the verdict, putting transman's name as a mother, and a random name as father's name. At the same time, the Court of Appeals stated that the district court should not create legal fiction by claiming that the mother of a child is unknown.

This exemplifies how much depends on courts and civil servants. Though there was theoretically no legal ground for a man to be the mother, the Court of Appeals ruled that this is the way a birth certificate should be issued.

The aforementioned rulings are precedent in polish jurisprudence.

Ad. 2

In such situation, according to the law, a mother is a woman who gave birth. However the question of fatherhood stays unsolved.

A transwoman cannot be the mothers spouse (it has been presented in point „Forced divorce – legal provisions”), so there is no assumption of fatherhood deriving form marriage.

A transwoman also cannot state her fatherhood before a civil servant (so there is no possibility of so called recognition of a child). If a woman gives birth and has no husband, and a transwoman cannot legally declare her fatherhood, the only possibility is to put down fictitious data of a father. In practice, the civil servant chooses a popular male name and adds mother's last name to it – which practically means that the father is unknown.

A lawsuit to legally confirm fatherhood can be only filed by a child, their mother or their father. A trans woman, who is a genetical parent of a child is not one of those persons, so she cannot file a lawsuit.

Parental status of a trans woman, who has genetical offspring, is not recognized by the polish law.

Ad. 3

In this kind of situation, assumption of fatherhood is derived from a fact that a man is mother’s husband. Transman will be than disclosed in an act of birth as a child’s father.

A second aspect of legal acknowledgement of trans parents is when persons who already have children transition, get court confirmation and new documents. Also data in their birth certificate change. In birth certificates of their children, however, data from before confirmation appear. Polish law does not anticipate a situation of amendment of a child’s act of birth due to parent’s transition. The child’s birth certificate will remain unchanged after their parents gender marker change. Therefor a transperson with relation to their kids has formally gender from before transition.

Access to public information

We have received information that Ministry of Justice does not gather data concerning dissolvent of marriage due to spouses trans identity. There are also no statistics on Ministry level concerning limiting or revoking of parental authority due to trans identity of a parent. Potentially only district courts could have this kind of knowledge or data. However, since there is over 300 district courts in Poland, without confirmation that those kind of data are gathered by those courts, no motion for access to public information was sent.