

Legal protection of nasciturus in Poland-selected issues

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ABSTRACT

The provisions of Polish private law do not contain any general regulation specifying a legal position of *nasciturus*. Such status quo of Polish legislation evokes debates, theoretical disputes and discrepancies in judicature with regard to the legal position of *nasciturus*. Judicature more and more often goes beyond the provisions granting *nasciturus* legal capacity only in the indicated scope by applying extensive interpretation.

The authors discussing judicature analyze the legal position of fetus in medical, inheritance, and insurance law, draw the conclusion that there is a strong need for introducing a general legal article which describes the legal protection of interests of fetus.

Key words: nasciturus, conceived child, legal protection of nasciturus, civile responsibility

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General comments about the legal position of *nasciturus* in Poland

The provisions of Polish private law do not contain any general regulation specifying a legal position of *nasciturus*. Such status quo of Polish legislation evokes debates, theoretical disputes and discrepancies in judicature with regard to the legal position of *nasciturus*. As this is a multilevel, not just solely legal, problem, debates and discussions have been practically carried on for years without a break. Apart from lawyers, representatives of different groups, environments and science such as physicians, philosophers, ethicists, clergy and politicians take a stand thereon.

It is sufficient to present just some selected aspects of this issue, which are apparent both in theory and court judgments, to illustrate complexity of this problem and dilemmas that arise in the process of application of currently valid legal regulations concerning a legal position of *nasciturus*.

Taking into account, most of all, a legal aspect of the analyzed issue, it should be emphasized that provisions of law referring to a fetus (a conceived child) are most frequently formulated according to one of the two methods. Both these methods presume protection and security of legal interests and effects of events occurring in the period when a child has already been conceived but not yet born. Sometimes these events may be sensed for life and have different influence upon, for instance, health, financial situation, personal life or professional career.

The first method is based on the Roman legal maxim: "*nasciturus pro iam nato habetur, quotiens de commodis eius agitur (quaeritur)*"[1]. Its essence involves granting a conceived child (fetus) **general legal capacity [2] provided it is born alive**. Such a solution has been adopted, e.g., in Austria, Switzerland, Czech Republic and Slovakia. These countries adopted conditional legal capacity without any reservation as to its content, or with generally determined limits (Austria).

The second method involves granting a child a possibility of acquiring only specified rights (or specified rights and duties), that is **granting legal capacity only in a restricted scope provided a child is born alive**. This method is applied by French, German and Polish law [3].

The application of one of these methods does not solve the problem. In Poland discussions thereon continue, whereas concepts and opinions multiply. What is more, there appear more and more issues connected with the main problem in different ways. What is specific about Poland is that opinions held by theoreticians of law on the legal position of a conceived child have always been and still are divided [4]. Some have claimed that a conceived child is not entitled even to conditional

legal capacity whereas the Civil Code provisions secure only their future interests. In accordance with this opinion, we may talk about a future natural person and their future rights [5].

There are more advocates to the attitude according to which *nasciturus* has conditional, or general [6] legal capacity, or capacity limited to a specified scope [7]. It should be mentioned here that a legal character of the condition in the discussed scope is also disputable.

Current legal regulations that are adopted in Poland, which are based on the second method, do not prove useful in practice, which is frequently indicated by court judgments. Theoretical differences remain unresolved whereas judicature more and more often goes beyond the provisions granting *nasciturus* legal capacity only in the indicated scope by applying extensive interpretation, thus attempting to mitigate negative effects of the existing status quo. It leads to gradual obliteration of differences between the first and the second methods of regulation in jurisdiction.

Nasciturus's legal capacity in the light of the content of art. 8 of the civil code

Fragmentary regulations in the scope of the legal situation of a conceived child do not stand the test of time. The apparent proof for this was the introduction of a new legal solution in Art. 8 of the Civil Code in 1993, and then withdrawing this regulation after a few years. Under Art. 6 of the Act of 7th January 1993 on Family Planning, Protection of the Human Fetus and Conditions for Permissibility of Abortion [8], Art. 8 § 2 of the Civil Code was added with the following reading: "A conceived child shall have legal capacity too, however, they shall acquire property rights and obligations provided they have been born alive". This provision was repealed in connection with the amendment to the above mentioned Act [9]. When § 2 of Art. 8 of the Civil Code was in force, a conceived child - *nasciturus*, also had legal capacity. This capacity was unconditional in the sphere of non-property rights whereas it was conditional in the scope of property rights and obligations. The provision of Art. 8 § 2 of the Civil Code introduced by the legislator made evaluation of the legal situation of a conceived child easier and led to better security of *nasciturus's* interests. (It seems it was rightly acknowledged that it was not a right place for a provision deciding whether it should refer to children conceived naturally or unnaturally as well).

A prompt return to the previous legal status limited only to the statement that "Every human being shall have legal capacity from the moment of birth" (Art. 8 § 1 of the Civil Code), may suggest legislator's indecision and probably

excessive vulnerability to different kinds of extralegal arguments.

After repealing § 2 of Art. 8 of the Civil Code, the possibility of *nasciturus* to conditionally become a subject of rights is admissible solely if it directly results from special provisions.

The consequences of repealing § 2 of Art. 8 of the Civil Code are clearly reflected in the following two distinct court judgments:

In its verdict of 29.05.1996 the Supreme Court ruled that the term “a person subject to repressions in Nazi concentration camps” [10] also refers to a conceived child if it has been born alive. The Court emphasized that extensive interpretation of the term “a person” according to this Act is also required for humane reasons as the Claimant was born as a weak and sickly child. For many years she was treated for, among the others, neurasthenic neurosis and general nervous breakdown, discopathy, malignant bone disease (she had two operations due to this), obtaining II group disability pension for general health condition. Such health condition of the Claimant was undeniably influenced by extremely harsh living conditions her mother had to endure in the Nazi concentration camp in Majdanek [11] in the first period of her pregnancy.

The second example is the judgment of Provincial Administrative Court issued on 27.10.2005, that is after repealing § 2 of Art. 8 of the Civil Code. The Court already adopted a completely distinct opinion thereon presuming that a possibility for *nasciturus* to conditionally become a subject of rights is admissible solely if it directly results from special provisions. The Act on pecuniary benefits that persons deported for forced labor and imprisoned in labor camps in III Reich and USSR [12] are entitled to, does not contain special provisions. Therefore the time of repressions cannot be counted from conception.

Even though the Court was guided by literal reading of the provisions, this judgment and rules that should be valid in the State of law can hardly be recognized fair and just.

Legal situation of nasciturus in the law of succession in the light of the constitution of the Republic of Poland

The literature frequently repeats the statement that special provisions clearly admit a conditional possibility of acquiring specified rights by *nasciturus*. The provision contained in the law of succession is frequently quoted as a leading example of such regulation. Article 972 § 2 of the Civil Code stipulates that a child that has already been conceived at the moment of the opening of succession may be a successor/heir if it is born alive. The child is also liable for inherited debts, and this is a liability from the succession (Art. 1030

of the Civil Code). It is worth considering whether the provision of Art. 972 § 2 of the Civil Code provides *nasciturus* with appropriate legal protection.

Some representatives of legal literature see the problem more radically and formulate a straightforward question whether *nasciturus*'s (a conceived child's but not yet born) legal protection exists in the light of the law of succession. They give a negative answer to this question [13]. Even though the legislator apparently perceives the subjectivity of succession by a conceived child by a legal regulation, granting *nasciturus* subjectivity in the scope of succession itself, without providing it with sufficient legal protection so that it might be born alive, is a significant legal loophole. R. Zdybel claims that the Act on Family Planning fails to protect *nasciturus* in this scope, but most of all, lack of correlation between constitutional solutions and ordinary acts is clearly apparent. The provision of Art. 38 of the Constitution of the Republic of Poland protects only the life of a human being whom a child becomes after being born and acquiring legal capacity. Apart from this regulation, there remains the term of “a child” (*nasciturus*) mentioned in the law of succession (Art. 927 of the Civil Code). Thus two terms appear here: of a born human being-child, and of a conceived child (*nasciturus*). Art. 38 of the Constitution of the Republic of Poland lacks clear determination of the moment from which a life of a human being is constitutionally protected, and whether these two terms are identical or distinct for the legislator [14].

Art. 446¹ of the Civil Code may also be analyzed in the context of Art. 38 of the Constitution of the Republic of Poland, according to which “as of the moment of birth a child may demand redress for damage suffered before birth”. It seems that the effect of this analysis may rise doubts similar to those presented above.

Controversies about the principle of redress for damage inflicted upon nasciturus

The provision of Art. 446¹ of the Civil Code refers to the so called prenatal damage, torts committed directly against *nasciturus* [15]. Pursuant to relevant provisions of the Civil Code, a person liable under tort inflicted upon *nasciturus* is obliged to redress property damage as well as pay pecuniary compensation for suffered wrong [16]. The scope of redress for the wrongs done on legally protected interests is regulated, most of all, by Articles 361 § 1, 363, 444, 445 § 1 of the Civil Code. Due to the subject suffering wrong, Art. 362 of the Civil Code, which concerns the possibility of lowering the obligation to redress damage due to a victim contributing to damage, shall not apply.

After birth a child may demand redress for damage suffered both during intrauterine life as

well as for harmful action causing damage that occurred even before conception [17]. In the light of currently valid legal regulations, a child has the right to demand redress for damage inflicted upon it by any individuals, including its mother [18].

It is worth noticing that the literature explicitly emphasizes that treating birth of a child that is unwanted and unaccepted by its family as a wrong should be excluded. It is not non-proprietary damage in the meaning of civil law [19]. Discussions about the concept of responsibility for “wrongful life” and “wrongful birth” have been carried on with different intensity. Court judgments provide relevant examples therein.

In the resolution of 22.02.2006 [20] the Supreme Court ruled that a subject responsible for unlawful prevention of abortion that was a result of rape whose perpetrator was not detected pays the child maintenance cost in the scope of the child’s justified needs which its mother, who personally endeavors to support and raise it, is not able to satisfy.

In this case, in consequence of a mistake made by a physician who wrongly established a week of the pregnancy which had been a result of a crime, i.e. as 14th week instead of 11th week, the mother was denied the right to abortion. The Supreme Court decided that due to the violation of the right to legal abortion (pregnancy was a result of rape), the woman (not the child) was entitled to compensation in the form of refund of expenses connected with her pregnancy and child delivery and loss of income in consequence of these events as well as refund of the child maintenance cost, but only this she was not able of satisfying herself. The Supreme Court adopted restriction of liability for damages in the scope of the child maintenance cost. The decision about decreased compensation was taken pursuant to the principle of equity the Court had referred to. The Court reasoned that at the moment of the child’s birth, “unwanted cost” before the child’s birth became “wanted cost” in the sense that when a mother decides to keep and raise a child she accepts to bear a part of the cost expressed by her personal endeavors to raise and support the child. Thus the physician should not be charged full child maintenance cost [21].

In another judgment of 13.10.2005 [22] the Supreme Court decided that the parents were actively legitimate to claim damages for financial wrong that covers increased cost of maintenance of the disabled child that was born in result of culpable violation of the right to family planning by physicians, that is Art. 4a par. 1 of the Act on Family Planning. In this case the mother was denied a referral for prenatal tests despite the fact the claimant’s pregnancy had been highly risked on account of occurrence of genetic disease as her older child suffered from a genetic defect of hypochondroplasia, which brings about different

kinds of bone dysplasia, in particular causing height deficiency and limbs deformity. It should be stressed that child’s mental development is correct.

The very fact of denying the claimant a referral for prenatal tests led to consequential inability to take a decision about abortion. At the same time, similar to previous case, the Supreme Court excluded the possibility of making a claim by the child emphasizing that there does not exist the right of a child not to be born, and the very fact of the child’s birth itself cannot be recognized as its harm. Simultaneously, in this case the Supreme Court made a controversial interpretation of one of legal prerequisites of abortion. Pursuant to Art. 4a par. 1 of the Act on Family Planning, abortion is possible solely if pregnancy is a threat to pregnant woman’s life or health, prenatal tests or other medical prerequisites indicate likelihood of severe and irreversible fetus impairment or incurable disease threatening its life, and when there is a reasonable suspicion that pregnancy is a result of an illegal act. *Nasciturus*’s protection is temporary. In case of pregnancy in effect of a crime abortion is possible unless pregnancy is more than 12 weeks. In cases connected with fetus impairment or a threat to mother’s life or health, it is a moment a fetus becomes capable of independent living outside its mother’s body. According to experts, it is a period between 24th and 28th week after conception. However, the above mentioned time caesura is very unclear and, as it appears, changeable and dependent on a level of modern and most advanced medical devices and apparatus a medical unit is equipped with.

According to the Supreme Court: “Provision of Art. 4a par. 1 does not make admissibility of abortion dependent on causes indicated therein inevitably on the basis of prenatal tests showing that a fetus suffers from a specified genetic defect. This provision makes abortion admissible when prenatal tests or **other medical prerequisites** indicate high likelihood of severe or irreversible fetus impairment”. Therefore full certainty as to fetus impairment is not necessary; **high likelihood** thereof which may also result from other than prenatal tests’ results medical prerequisites is sufficient [23].

It should be noticed that in the case discussed above the only medical prerequisite indicating probability of the fetus suffering from genetic disease was the fact the claimant’s older child was born with a similar disease. When the claimant became admitted to hospital the fetus had been developing properly and tests that were then carried out could not detect a possible fetus defect because, according to experts, this type of a defect may be diagnosed only after the lapse of 24th week of pregnancy, that is when a fetus is capable of independent living outside its mother’s body.

The Supreme Court's construction leads to too wide interpretation of the prerequisite legalizing abortion in the form of severe or irreversible fetus impairment if it is sufficient to prove probability of giving birth to a sick child on the basis of other medical prerequisites, such as family inquiry. It should be noticed that this direction of legal regulations' interpretation may lead to carrying out abortions for eugenic reasons. The Supreme Court's judgment is an expression of mentality accepting life only under certain conditions, rejecting handicap, disability or disease.

The above presented judgments confirm the thesis that in Polish law claims for wrongful life are not admitted, therefore damages resulting from a sole fact of birth itself cannot be claimed [24]. Thus a child may not claim damages for "unhappy existence" proving that its mother, in result of a culpable medical error (most frequently diagnostic), has been denied the right to abortion. On the other hand, parents may sue for wrongful birth in their favor due to violation of their right to family planning in the scope specified by the Act.

As far as claims based on the above grounds are concerned, opinions expressed by *M. Safian* [25] and *K. Mularski* [26] deserve particular attention. These authors accurately depict the problem and show the extent of aberration the adoption of such concepts leads to by claiming, among the others, that the acceptance of these concepts will result in promoting pro-eugenic attitudes in the society, social degradation of the disabled, and eventually, the need to establish a limit below which life ceases to be "fully human" or "worth living".

We may read in the Pope John Paul II's encyclical *Evangelium Vitae* that in generalized opinion attacks on *nasciturus*'s life tend no longer to be considered as "crimes"; paradoxically they assume the nature of "rights", to the point that the State is called upon to give them legal recognition and to make them available through the free services of health-care personnel. The Pope drew attention to dangers resulting from such an attitude. The right criterion of personal dignity - which demands respect, generosity and service - is replaced by the criterion of efficiency, functionality and usefulness: others are considered not for what they "are", but for what they "have, do and produce".

Legal position of nasciturus in case of death of a relative

A separate issue is redress for damage suffered by *nasciturus* in result of death of its relative that has occurred in consequence of an illegal act (Art. 446 § 2 and 3 of the Civil Code). Here the situation is more stable. The Supreme Court's judgment played an important role and had

significant impact on the direction of these provisions' interpretation. Already in 1952 this Court expressed a thesis according to which a conceived child that was born after its father's death who had died in result of an accident, is entitled to pension [27]. Similar to this, in its judgment of 1966 the Supreme Court awarded compensation in favor of a child that had been conceived already at the time of its father's death caused by an illegal act committed by a third party, and who was born alive [28].

It is worth reminding that on the ground of the provisions of Art. 446 § 2 and 3 of the Civil Code, rich court jurisdiction has grown up, which, despite lack of a general provision regulating a legal situation of *nasciturus*, provided it with claims for damages both in case of death of its relative (Art. 446 § 2 and 3 of the Civil Code) and in case of damage inflicted directly upon a conceived child. It is symptomatic that judicature of other countries which did not grant legal capacity to a conceived child has followed a similar direction [29].

Can we find many-year-efforts aimed at making a legal status of children born outside of a marriage equal to those born in a marriage complete? We should say yes. The law of succession may serve as a good example, as it contains no discrimination as far as appointment to inheritance is concerned. Unfortunately, in the Supreme Court's jurisdiction we may find examples proving that a fundamental principle of equality under the law is indeed violated. This problem arose when the Supreme Court ruled in the matter of benefits connected with industrial accidents. To show the essence of the problem it is necessary to, first of all, present the thesis of the Supreme Court's resolution that deserves full approval, and then move on to a completely different decision.

Namely, in the resolution adopted in 1987 the Supreme Court explicitly stated that "if a conceived child which is not yet born at the moment of its father's death caused by industrial accident or occupational disease is born alive, it shall acquire the right to one-off compensation (...)" [30]. It is an accurate and brave position as there is no general provision in Polish law which would equal conceived children with their alive siblings, at least in a situation favorable for them. In a different situation, children that are alive at the moment of their father's death would receive appropriate benefits whereas a child born after its father's death could be left without any means to live. We cannot omit here the assessment of the glossateur who regretfully claims that a vast majority of court judgments protecting just rights of *nasciturus* is issued only by the Supreme Court. *J. Mazurkiewicz* [31] emphasized that they were sometimes absolutely depressing cases such as, for instance, decisions of pension and court bodies preceding the Supreme Court's judgment of

3.11.1977 [32]. After previous rejections the child who had lived and survived its prenatal life and first few months after birth in a Nazi concentration camp was eventually granted the right to veteran pension.

The proceeding of Revenue Office and Tax Chamber in the matter of a level of donation tax also arose serious doubts. Rejecting the possibility of making donation in favor of a conceived child, these bodies presumed deliberate action of the parties aimed at unjustified avoidance of higher tax. Only the judgment of the Supreme Administrative Court finally solved the problem. After profound juridical arguments, the court accurately ruled that donation made in favor of a conceived child which is not yet born to secure its future interests is admissible, therefore it has impact upon a level of donation tax [33].

In another Supreme Court's judgment (rightly found to be harmful) it was stated, among the others, that a child of a deceased employee which was conceived but not yet born at the time of the employee's death is not entitled to benefits for industrial accidents and occupational disease [34]. It is worth adding that this child's parents lived in a common-law marriage whereas the deceased's paternity was established by court judgment. The Supreme Court's basic argument justifying the refusal to grant compensation was the statement that at the moment of the father's accident and death, the child did not meet conditions to receive family pension because it was not yet born when the employee died. Claiming that it is not the right place to decide about issues connected with the evaluation of a common-law marriage, it should be ascertained that irrespective of this assessment, the Supreme Court's position is harmful and arises different kinds of reservations.

At present, the issue of benefits for industrial accidents is regulated by the provisions of the Act of 30.10. 2002 [35]. Art. 13 thereof mentions "other children" as those entitled to the benefits. We should assume that it is helpful for juridical practice in the area of accident benefits that are rightful to children without threatening the principle adopted in labor law according to which ancillary application of civil law in the area of liability for damages for industrial accidents and occupational diseases is inadmissible.

CONCLUSIONS

All above examples seem to speak forcibly enough for the need to introduce a general provision in Polish law providing protection of *nasciturus*'s interests. The issue of the legal status of a conceived child carries several legal, ethical, philosophical, medical and numerous different problems that are difficult to resolve. A thought, which was once expressed by a renowned and highly esteemed philosopher L. Kołakowski [36],

should permeate all these areas. In his opinion, equality of human dignity and ensuing equality of rights and obligations is a requirement without which we would sink to barbarism. Without this requirement we could, e.g., acknowledge that other races or nations may be annihilated with impunity, or that the elderly and the disabled who are no benefit for the society may be killed, etc. Faith in this equality does not only protect our civilization but makes us human beings as well.

"Civil law must ensure that all members of society enjoy respect for certain fundamental rights which innately belong to the person, rights which every positive law must recognize and guarantee. First and fundamental among these is the inviolable right to life of every innocent human being".

John Paul II Evangelium Vita

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