Headnotes

to the judgment of the First Senate of 13 February 2007

– 1 BvR 421/05 –

1. **In order to put into effect the right of a legal father to know that his child is biologically his (Article 2.1 in conjunction with Article 1.1 of the Basic Law (*Grundgesetz* – GG)), the legislature must make available a suitable procedure solely to determine paternity.**

2. **It is in conformity with the Basic Law if the courts, on the ground of violation of the right to informational self-determination of the child involved, protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law, refuse to recognise as evidence secretly obtained genetic paternity test reports.**

FEDERAL CONSTITUTIONAL COURT

- 1 BvR 421/05 -

Pronounced
on
13 February 2007
Ms Achilles
Amtsinspektorin
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Mr. S[…],

- authorised representatives: Anwaltskanzlei Zuck,
Vaihinger Markt 3, 70563 Stuttgart -

against a) the judgment of the Federal Court of Justice (*Bundesgerichtshof* – BGH) of 12 January 2005 – XII ZR 227/03 –,

b) the judgment of the Celle Higher Regional Court (*Oberlandesgericht*) of 29 October 2003 – 15 UF 84/03 –,

c) the judgment of the Hildesheim Local Court (*Amtsgericht*) of 4 March 2003 – 37 F 37525/02 KI –.

the Federal Constitutional Court – First Senate –

with the participation of Justices

President Papier,

Steiner,

Hohmann-Dennhardt,

Hoffmann-Riem,

Bryde,

Gaier,

Eichberger,

Schluckebier

held on the basis of the oral hearing of 21 November 2006:

Judgment:

1. **In violation of Article 2.1 in conjunction with Article 1.1 of the Basic Law (*Grundgesetz* – GG), the legislature has failed to provide a procedure in a legal form which is capable of clarifying whether a child is the biological child of its legal father and in which solely this paternity can be confirmed or denied.**
2. **The legislature is instructed to make such an arrangement to determine whether or not a child is the biological child of its legal father by 31 March 2008.**
3. **Apart from this, the constitutional complaint is rejected as unfounded.**
4. **[…]**

Reasons :

A.

The constitutional complaint relates to whether it is possible to use as evidence in judicial proceedings contesting paternity a DNA test report to clarify paternity obtained secretly, without the consent of the child in question or its mother as its legal representative, and thus at the same time it relates to the question as to whether applicable law gives the legal father of a child an adequate possibility of obtaining knowledge and determining that a child is biologically his. 1

I.

1. § 1592 of the Civil Code (*Bürgerliches Gesetzbuch* – BGB) provides that the father of a child is either the man who at the date of the birth is married to the child's mother (no. 1) or the man who has acknowledged paternity (no. 2), and, finally, the man whose paternity has been judicially determined under § 1600d of the Civil Code or § 640h.2 of the Code of Civil Procedure (*Zivilprozessordnung* — ZPO) (no. 3). The acknowledgment of paternity requires the consent of the mother (§ 1595.1 of the Civil Code). 2

In the case of later doubts as to the paternity, § 1600.1 no. 1 of the Civil Code provides that in addition the man who has acknowledged paternity, and also the man 3

who, because of his marriage to the mother, is regarded as the legal father of the child she gives birth to, may contest the paternity before the Family Court. Under 1600b.1 of the Civil Code, the contestation must be made within a period of two years from the date when the man learns of circumstances that suggest he is not the father. At the commencement of the proceedings, the child is presumed to be the child of the man (§ 1600c.1 of the Civil Code). If it emerges in the proceedings contesting paternity that the man is not the biological father of the child in question, this is judicially established, with the legal consequence that he is no longer the legal father of the child (§ 1599.1 of the Civil Code). Applicable law does not provide for a procedure that serves solely to determine whether the child is the biological child of its legal father.

2. - 4. […] 4-10

II.

1. In 1994, shortly after the birth of the child that was later the defendant, the complainant effectively acknowledged his paternity of this child. He had sexual relations with the mother of the child throughout the statutory period of conception of the child, and after the birth of the child he lived with the child and the mother, who has sole custody of the child, in extramarital cohabitation until the beginning of 1997. […] 11

a) In the year 2002, the complainant, without the knowledge of the mother of the child, obtained a genetic diagnostic report from a private laboratory, based on test samples consisting of his saliva and a piece of chewing gum which he claimed the child had chewed. When the report confirmed that it was 100 % impossible for the donors of the two samples to be father and child, he again filed an action contesting paternity, relying on the results of this test. By the judgment of 4 March 2003 that is challenged in the present proceedings, the Family Court dismissed the suit. The court held that the action was unfounded, since the secretly ordered paternity test was unlawful by reason of grave violations of the child's right to informational self-determination and of the Federal Data Protection Act (*Bundesdatenschutzgesetz* — BDSG) and by reason of the infringement of the mother's right of custody, and that it could therefore not be used as evidence. The father's right to knowledge of the parentage of the child, according to the court, could not be regarded as prior-ranking as against the child's right to informational self-determination. […] 12

b) The Higher Regional Court dismissed the appeal against this in its judgment of 29 October 2003. The court stated in its grounds that the test results submitted were not suitable to raise doubts as to the complainant's paternity. Contrary to the Code of Practice for the Provision of Paternity Test Reports, it did not in any way determine the identity of the persons tested. As a result, it was not established whether the samples tested came from the parties of the original proceedings. In addition, a secretly obtained proof of paternity could not be used as evidence in court proceedings because it had been obtained in an unlawful manner. The court stated that a secret DNA 13

test violated the child's general right of personality in its manifestation as the right to informational self-determination, for the decision to disclose a person's genetic data could be made only by the person in question or, if the person did not yet have sufficient understanding and judgment, the person's parent who had custody. Against this constitutionally protected right of the child was the right of the father to knowledge of paternity. Weighing the protected interests of the parties did not result in the father's interests outweighing the interests of the child. In principle, a private paternity test was suitable to prove paternity. However, this did not apply if the origin of the samples tested was not unequivocally confirmed.

c) Finally, the Federal Court of Justice dismissed the appeal against this in its judgment of 12 January 2005. The refusal of the mother and legal representative of the child to consent subsequently to the DNA test report being obtained and to agree to it being used as evidence did not give rise, the court stated, to an initial suspicion that provided a sufficient cause of action for the proceedings contesting paternity. Nor was it an obstruction of the obtaining of evidence, for such conduct flowed from the child's right to informational self-determination. The court stated that this right would be eroded if such a refusal were to open an action contesting paternity with the result that the information that this fundamental right was intended to protect would then always have to be disclosed, against the will of the person affected, as part of a court's taking of evidence. *A fortiori*, the mother's refusal to consent subsequently to the use as evidence of information that had already been unlawfully obtained could not be deemed a circumstance that opened the action contesting paternity. If the law provided for an obligation to tolerate tests to determine paternity only subject to certain requirements, the mother's refusal could not be invoked to confirm that these requirements were satisfied. 14

The court held that submitting a secretly obtained DNA test report was also unsuitable to demonstrate circumstances that give rise to an initial suspicion. No importance therefore attached to the complainant's objection that the Higher Regional Court had neglected to take evidence as to whether one of the samples tested actually was from the child. Even if it was established that the DNA tested came from the parties, this report could not be relied on either as evidence or as the submission of a party in the action contesting paternity. The right of the child to know its parentage also included the right not to know it. The Higher Regional Court's decision stood up to an appeal on points of law when it weighed the interests with the result that the child's right to informational self-determination did not have to be given less weight than the father's interest in disproving his paternity. Every DNA test encroached upon the right of personality guaranteed by Article 2.1 in conjunction with Article 1.1 of the Basic Law in its manifestation as the right to informational self-determination. This right could be restricted only in the predominant interest of the general public and paying due regard to the principle of proportionality. The restriction was not permitted to apply further than was indispensable to protect the public interest. The protection of the fundamental right of every human being that in principle the examination of his 15

genome should be subject to his or her consent, the court stated, was also supported by Article 5 of the Universal Declaration on the Human Genome and Human Rights, Article II-68 of the draft Constitution for Europe, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and, insofar as it related to the child's rights, Article 8.1 and Article 16 of the UN Convention on the Rights of the Child.

This right must also be observed when evidence and findings were relied on in legal proceedings. For it was a constitutional requirement that the judge must examine whether the application of provisions of civil law affected fundamental rights in the individual case. If this occurred, he must interpret and apply these provisions in the light of the fundamental rights that were affected in their application. The right to informational self-determination of the child had to be weighed against a right of the father, similarly derived from the general right of personality, to knowledge of his own paternity, which was not to be treated as of higher value. This was shown even by the fact that the enforcement of this right in judicial proceedings contesting paternity was materially restricted by the statutory time-limit, whereas the child's right to refuse to permit its genetic data to be collected and relied on was not subject to any time bar. In addition, in the reform of the law on parent and child matters the legislature had decided against a right of the father to clarify the biological paternity of a child in every case. Furthermore, the right to knowledge of one's own paternity, even if it was to be treated as of equal value with the fundamental right of the child to know its own parentage, was not a right to obtain such knowledge. 16

2. In his constitutional complaint, the complainant challenges a violation of his general right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law. He submits that, ultimately, the Federal Court of Justice contents itself with the statement that the (non-) father's general right of personality is not prior-ranking as against the child's right to informational self-determination. According to the complainant, in its abstract discussion of the question of priority, the Federal Court of Justice failed to appreciate that the present case concerns a concrete conflict of fundamental rights, and that the fact that the two subjects of fundamental rights do not confront each other in isolation makes it more difficult for this conflict to be solved by way of practical concordance. For this reason, the courts should have clarified the question as to the priority of the fundamental-rights positions of the parties with regard to the individual case to be dealt with. This did not happen. […] 17

The complainant submits that the facts of the present individual case therefore support the conclusion that the secretly obtained paternity test should be used as evidence. He states that the legislature has neither created the possibility of obtaining knowledge as to the paternity of a child in a different way nor made arrangements as to how the fundamental-rights positions affected in such cases are to be weighed against each other in proceedings contesting paternity. The court rulings exploited the latitude for interpretation thus existing in a manner that is unacceptable to the complainant. With its strict requirements for the onus of presentation and the suffi- 18

ciency of the submissions on circumstances that give rise to doubts as to paternity, the decision of the Federal Court of Justice is not in keeping with the case-law of the European Court of Human Rights, because these requirements make it practically impossible for a father to have his paternity reviewed and to contest it. […]

III.

[…] 19-54

B.

The constitutional complaint is admissible and is well-founded to the extent that the legislature, in violation of Article 2.1 in conjunction with Article 1.1 of the Basic Law, has failed to provide a procedure in a legal form which is capable of clarifying whether a child is the biological child of its legal father and in which this paternity can be confirmed or denied without at the same time attaching consequences to this for the legal status of the child (I.). The proceedings for the contestation of paternity under §§ 1600 et seq. of the Civil Code are not a procedure that takes account in a constitutional manner of the father's right solely to knowledge that the child is his biological child (II.). 55

Apart from this, the constitutional complaint is unsuccessful. 56

The decisions that it challenges satisfy constitutional standards. It is in conformity with the constitution not to use as evidence in court proceedings contesting paternity the results of genetic paternity tests obtained secretly, that is, without the consent of the child or of its parent who has sole custody (III.). 57

I.

Article 2.1 in conjunction with Article 1.1 of the Basic Law guarantees, as a manifestation of the general right of personality, not only the right of a man to know the parentage of the child legally attributed to him, but also the possibility for him to realise this right. In violation of this fundamental right, the legislature has failed to create a statutory arrangement to determine that a child is the biological child of its legal father. 58

1. Under Article 2.1 in conjunction with Article 1.1 of the Basic Law, the right to the free development of one's personality and the obligation to respect and protect human dignity ensure that every individual has an independent area of private life, in which his or her individuality can be developed and preserved (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 35, 202 (220)). In this connection, the understanding and development of individuality are closely connected to the knowledge of their constitutive factors. These factors include parentage (see BVerfGE 79, 256 (268)). Parentage occupies a key position in the individual's consciousness for a person to find his or her individuality and for a person's self-perception and family relationship to others. The possibility 59

of entering into a relationship to others as an individual not only socially but also genealogically is therefore comprised in the protection of the right of personality and under Article 2.1 in conjunction with Article 1.1 of the Basic Law it creates a right of the child to know its own parentage, just as it grants a man the right to know whether a child is his biological child (see BVerfGE 108, 82 (105)). This relates both to the assumption of a man that he might be the biological father of a child that is legally not attributed to him and to the suspicion that a child might not be his biological child although the man is legally regarded and treated as the father of that child. Both interests affect the relationship in which a man enters to a child and its mother and the emotional and social relationships that he develops with them. The knowledge of the child's parentage also has a decisive influence on the self-perception of the man and on the role and manner he takes on towards the child and the mother.

2. The right of a man to know whether a child is his biological child also includes the right to be given the possibility of having his paternity of a child clarified and determined in a procedure. 60

a) Admittedly, the right of personality does not confer a right to obtain knowledge, but it does protect against the withholding of information that can be obtained (see BVerfGE 79, 256 (269)). This protection is only guaranteed if a procedure is made available that makes it possible for a man to have access to the information withheld from him that is necessary to know whether a child is his biological child. By reason of the present state of science, such information is contained in particular in the genetic substance of the child, which, when it is compared with the genetic data of the father by means of a DNA test, leads to confirmed knowledge as to whether the child is the biological child of the man. The genetic information from the child's genetic substance is therefore the key to the man's knowledge as to whether he is the father of the child. 61

b) However, the fundamental right to the free development of one's personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law, from which the right to knowledge and, connected with this, also to clarification and determination of parentage are derived, is not granted without limits. It may be exercised only within the constitutional order and is subject to legislative formulation, which only violates the fundamental right if the legislature, in drafting, pursues unconstitutional purposes or does not observe the principle of proportionality (see BVerfGE 79, 256 (269-270)). 62

A violation of the fundamental right to the free development of one's personality also occurs if the legislature fails to put into effect the fundamental right to knowledge of parentage in a procedure which is suitable for that purpose. The fundamental rights not only comprise defensive rights of the individual as against public authority, but at the same time are value decisions of the constitution which create duties of protection for the government institutions. The constitution states that such protection is its aim, but does not lay down its detailed implementation. This is the task of the government institutions responsible in each case; in carrying out their protective duties, they have a wide discretion (see BVerfGE 96, 56 (64)). But what is necessary is a form of pro- 63

tection that is appropriate when account is taken of other objects of legal protection which may conflict, and that is also effective (see BVerfGE 88, 203 (254)).

3. In violation of its duty to protect arising from Article 2.1 in conjunction with Article 1.1 of the Basic Law, the legislature has failed to make a form of procedure available by which the right to knowledge of paternity can be appropriately asserted and enforced. 64

a) A man who, in the case of doubts as to his paternity, wishes to clarify with regard to a child whether the child is his biological child, does have the possibility of obtaining a paternity test privately, with the consent of the child or of its mother who has custody, relying in part on genetic samples from the child, and in this way attaining knowledge as to paternity. However, this approach is solely dependent on the consent of others and is legally prohibited if the child or the mother refuse their consent. This results from the fact that to date the legislature has created no procedure in which the right to knowledge of parentage can be enforced. The de facto possibility of obtaining knowledge of biological paternity privately is not sufficient to furnish the man with the protection needed. This is apparent specifically in the case where the consent of the child or the mother to obtaining a paternity test is lacking. For a test obtained secretly by a man without their consent violates the child's right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law in its manifestation as the right to informational self-determination, and it also violates the mother's right of custody, protected by Article 6.2 of the Basic Law. 65

aa) The right to informational self-determination, included under Article 2.1 in conjunction with Article 1.1 of the Basic Law, protects the authority of an individual to decide, in principle, personally on the disclosure and use of that individual's personal data (see BVerfGE 65, 1 (43)). These data protected by fundamental rights also include data that contain information on genetic characteristics from which, when they are compared against the data of another person, conclusions can be drawn as to the person's parentage (see BVerfGE 103, 21 (32)). 66

But the right to informational self-determination is not guaranteed without limits either. In particular, the individual must accept restrictions of this right that are in the predominant interest of others or of the general public. Such restrictions require a statutory foundation from which the requirements and the scope of the restrictions follow and which complies with the principle of proportionality (see BVerfGE 65, 1 (44)). In this way, provisions of procedural law, such as § 372a of the Code of Civil Procedure (*Zivilprozessordnung* – ZPO), may lay down the requirements subject to which even sensitive data that are capable of giving information on a person's parentage must be disclosed by way of the release of the appropriate bodily samples as test samples if this, taking into account the fundamental rights of others, such as the right of the father in the present case to know of the paternity, is justified and not disproportionate. But the right to informational self-determination imposes a duty on the government institutions to give the individual protection against private third parties hav- 67

ing access to the data that characterise his or her individuality, without the person's knowledge and without the person's consent. In principle, this applies even if the purpose, the clarification of paternity, is supported by an interest in knowledge that is protected as a fundamental right. The conflict of fundamental rights that exists in such cases cannot be overcome by one of the subjects of fundamental rights as he or she thinks fit: it can only be solved by the legislature. A paternity test obtained secretly with the help of genetic samples is based on an unjustifiable violation of the right of the child affected to informational self-determination, against which the government institutions must offer protection.

bb) The mother with custody must also be protected against undesired access to the genetic substance of a child. Article 6.2 of the Basic Law guarantees the parents the right and the responsibility to care for their child. Parental custody also includes making the decision, in the interests of the child, as to whether a person may collect and analyse genetic data from a child. In order that the constitutionally required protection is given to the person with custody in this respect, the legal order may not tolerate that a secretly obtained paternity test serves to obtain knowledge of the parentage of a child. 68

b) However, the legal order must also make available a procedure to provide the possibility of determining paternity. The lack of such a procedure is not justified solely on the basis of fundamental-rights positions of the child or the mother. 69

aa) (1) In the present case it is not necessary to decide whether – as the Federal Court of Justice assumes – the child has a right not to know its own parentage. At all events, such a right would not justify withholding a form of procedure in which a man may obtain knowledge of the parentage of the child that has been legally attributed to him without this automatically leading to changes in the child's legal status. 70

It is certainly questionable whether such a right, as the negative complement of the right to knowledge of parentage, is comprised by the right to free development of the personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law. For unlike the positive knowledge of parentage, ignorance does not give the individual, when the individual receives the information, the possibility of placing himself or herself in relationship to concrete persons and discovering the personal family context in relation to which his or her own identity can align itself. In this respect, in the case of a procedure to clarify the parentage of a child, what is at issue is not the child's lack of knowledge of its parentage, but its possibly only supposed knowledge of the paternity of its legal father, which could be shaken by knowledge of its actual parentage. 71

But a right that protects an assumption that may be erroneous and preserves the child from a clarification of its actual parentage, even if it were included in the sphere of protection of the right of personality, would in principle be of less weight than the right to knowledge of parentage, because only the latter can ultimately make a long-term contribution to the finding of one's own identity both by the man and by the child. However, particular situations and phases of development in which a child finds itself 72

may in the individual case justify refraining for a limited period of time, by reason of particular endangerment of the child's welfare, from making available a procedure which may help enforce the man's right to knowledge that the child is his biological child.

(2) The child's right to informational self-determination is equally incapable of justifying withholding the knowledge of the child's paternity from its legal father in the long term. The right to informational self-determination protects the self-determined passing on and use of personal data. In the case of doubts as to the paternity, however, only these data, when compared with the genetic data of the legal father, may provide knowledge that the child is his biological child. Unrestricted protection of the genetic data of a child from the legal father would therefore at the same time mean for the father the withholding of the knowledge of his own data and often the impossibility of obtaining knowledge that the child is his biological child, for he cannot necessarily know whether the mother of the child also had sexual relations with other men during the time of conception. The father's justified interest in knowledge of the real parentage of the child is reinforced by the duties for the child that he has as the legal father. If the mother has sole custody of the child, she may also, exercising the child's right to informational self-determination, prevent the man from lawfully obtaining knowledge that the child is his biological child as long as there is no form of procedure available to the man that serves to clarify the parentage. 73

(3) Admittedly, the legislature is not under a duty always to make the legal recognition of parentage subject to the determination of the biological parents of the child in the individual case (see BVerfGE 108, 82 (100)). In view of the protection of family social relationships under Article 6.1 of the Basic Law and the protection of privacy under Article 2.1 of the Basic Law, it is sufficient to make conclusions as to the paternity of a child on the basis of particular factual circumstances and social situations, above all including an existing marriage, and to attribute legal parentage on the basis of this presumption, if this as a rule results in biological and legal parentage being united in one person (see BVerfGE 108, 82 (100) with reference to 79, 256 (267)). It is the consequence of these provisions on presumption passed by the legislature in § 1592 nos. 1 and 2 of the Civil Code, which are constitutionally unobjectionable, that they may lead to doubts as to the true paternity of a child. But if the legislature decides to follow this legal route of to a large extent not clarifying biological paternity but instead making presumptions, it must at the same time provide a procedure in which such doubts can be clarified in the individual case. The right of a man to know that a child is his biological child, contained in Article 2.1 in conjunction with Article 1.1 of the Basic Law, requires a procedure to be made available for such cases in which the paternity can be clarified without further legal consequences being inescapably attached. This also applies to a man who has acknowledged the paternity of a child. As long as the legislature has not made a procedure to clarify paternity available and does not in addition make the acknowledgment of paternity legally dependent on the proof that the child is the biological child of the person acknowledging paternity, a man may only 74

base his acknowledgment on his presumption, supported by statute, that he is the father of the child. In doing this, he has not forfeited his right to know that the child is his biological child if doubts later arise.

In making such a procedure for clarification and determination of paternity available, the legislature admittedly restricts the child's right to informational self-determination by granting the access to the child's genetic data that is necessarily entailed. But this is required by the protection that is also given to the man by Article 2.1 in conjunction with Article 1.1 of the Basic Law. Since these are data that may be related to those of the man who is the legal father of the child, the right of the child not to disclose these data is less worthy of protection than the right of the man. In this constellation of fundamental rights, the right of the legal father to know the paternity of the child must be given greater weight than the child's right to informational self-determination, *inter alia* because the legislature can only comply with its duty under Article 2.1 in conjunction with Article 1.1 of the Basic Law if it provides a procedure in which it can be clarified by comparing the genetic data of the child and the data of its legal father whether the child is really the biological child of the latter. 75

bb) Nor do fundamental rights of the mother run counter to the provision of a procedure to clarify and determine that a child is the biological child of the man that follows from the legal protection of the man's personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law. 76

It is true that the clarification of whether her child is the biological child of the man who is deemed to be its legal father also affects the mother's right of personality under Article 2.1 in conjunction with Article 1.1 of the Basic Law, which gives her the right to decide for herself whether she permits access to her privacy and her sexual life, and if so to whom and in what form (see BVerfGE 96, 56 (61)). However, this does not entail an impermissible encroachment upon the mother's inviolable sphere of private life. The encroachment has the primary goal of clarifying whether the child is the product of her relationship with its legal father, who in turn has a constitutionally protected right to know whether the child is the product of this relationship and is his biological child (see BVerfGE 96, 56 (61)). When the fundamental-rights positions that conflict in this case are weighed against each other, account must also be taken of the fact that the mother has already allowed the man access to her private sphere, has allowed him to share in her sexual life and as a result has helped create an interest of the man in knowing who is the biological father of her child. 77

cc) No other fundamental-rights positions of child and mother prevent the enforcement of the right of a man solely to knowledge as to whether a child is his biological child, in a procedure especially intended for this purpose. Even an interest on the part of the legislature in not wishing to disturb the family peace of the legally connected family with a procedure to clarify the paternity of a child does not justify withholding such a procedure, for only such a procedure protects and puts into effect the constitutionally guaranteed fundamental right of the father to the knowledge of the paternity. 78

In addition, the family peace may be disturbed by a legal father merely by doubts expressed by him as to the paternity of his child, long before a procedure that clarifies the doubted paternity.

II.

79 The proceedings contesting paternity under §§ 1600 et seq. of the Civil Code are not proceedings that constitutionally take into account the father's right solely to knowledge that the child is his biological child. Its goal and its requirements are not restricted to enforcing the right to knowledge of parentage under Article 2.1 in conjunction with Article 1.1 of the Basic Law, but serve to implement the precept contained in Article 6.2 sentence 1 of the Basic Law that if possible biological and legal paternity should be united in one person (see BVerfGE 108, 82 (104)). As a result, these proceedings go beyond the desire for knowledge of paternity and in addition impose excessive conditions on the obtaining of this knowledge; these conditions are not constitutionally necessary for a procedure directed solely to the determination of paternity.

80 1. The proceedings contesting paternity serve to unite the legal and biological paternity of a child and end the legal paternity if it transpires in the proceedings that the child is not the biological child of its legal father. In the proceedings contesting paternity, the clarification of paternity is merely a means to this end.

81 a) In this case, therefore, unlike the situation where solely knowledge of the parentage of a child is obtained, the interest of the legal father in having the paternity annulled if it transpires that he is not the biological father of the child, protected by Article 6.2 sentence 1 of the Basic Law, must be weighed against the interest of a child in maintaining its legal and social family attribution, which is protected by Article 6.1 of the Basic Law (see BVerfGE 38, 241 (251); 108, 82 (107-108)). This interest of the child carries great weight, for it is of decisive importance for the development of the child's personality to have a stable family framework in which it can feel that it belongs to a father and a mother. In addition, a successful contestation of paternity in which the child also loses in the legal father a person with responsibility and with a duty of maintenance towards it may have substantial effects on the circumstances of the child's life. This also affects the mother of the child, whose interest in the continuation of the family legal relationship is equally protected by Article 6.1 of the Basic Law (see BVerfGE 108, 82 (107)).

82 b) The legislature has attempted to achieve a balance between these conflicting fundamental-rights positions of father, child and mother by giving the father the possibility of initiating proceedings contesting paternity in order to safeguard his right, and if it is determined that the biological and legal father is not the same person, the legislature has not provided for a further necessity to weigh the father's rights against the interests of the mother and the child, but allows the fact that the biological and legal father are not the same person to be sufficient to end the legal bond between the child

and its current legal father. In contrast, the legislature has taken account of the interests in particular of the child and its mother in stability of the existing legal and social family attribution by making the contestation of paternity subject to special requirements. Thus, in § 1600b of the Civil Code the legislature provides that the contestation must take place within two years, starting at the date on which the legal father learns of the circumstances that argue against his paternity. In addition, in § 1600c of the Civil Code the legislature has created the presumption that the child is the biological child of the man whose paternity exists under § 1592 nos. 1 and 2 and § 1593 of the Civil Code, and in this way has given the legal father the onus of presentation in refuting this presumption. This balancing of interests by the legislature, which manifests itself in the procedural design of the action of contestation, is constitutionally unobjectionable. It takes equal account of both fundamental-rights positions, and its requirements for contesting paternity do not unreasonably encroach upon the father's right under Article 6.2 of the Basic Law to annul his legal paternity if the legal paternity and biological paternity do not coincide.

c) Nor are there constitutional objections to the interpretation in case-law of the requirements for contesting paternity. It is in conformity with the protection of the legal and social family organisation under Article 6.1 of the Basic Law and with the onus of presentation imposed by statute on the legal father who is contesting his paternity if case-law does not regard the mere statement of the legal father that he has doubts as to his paternity or is not the biological father of the child as sufficient for this, but requires him to set forth objective circumstances that give rise to doubts as to his paternity. Without such a de facto criterion, the time-limit for contestation of § 1600b of the Civil Code, which also serves the protection arising from Article 6.1 of the Basic Law, would be ineffective, for without objective circumstances of which the legal father has learned and on which he relies it is impossible to calculate on what date the two-year period within which the father may contest his paternity, which relates precisely to such circumstances, begins to run. If the mere statement that the father is not the biological father of the child were sufficient to satisfy the onus of presentation, the father would be at liberty to time his doubts in such a way that they always fell within the period for contestation. But in this case the balancing by the legislature of the interests of father, child and mother protected by fundamental rights would be one-sidedly shifted in favour of the father's interest in breaking the legal bond between himself and the child, neglecting in particular the interest of the child in maintaining its legal and social family ties. 83

On the other hand, however, the requirements for the onus of presentation of the legal father may also not be made too strict, in order that his interest in annulling his legal paternity if he is not the biological father may be adequately taken into account in the proceedings contesting paternity. He is therefore only to be required, as the Federal Court of Justice has stated in its case-law (see Federal Court of Justice, *Neue Juristische Wochenschrift* 1998, p. 2976 (2977)) to submit circumstances that make it appear not completely remote that not he but another may possibly be the biological 84

father of the child.

2. In judicial proceedings contesting paternity, after a contesting legal father has made submissions that satisfy the onus of presentation, the court begins the stage of taking evidence and obtaining a DNA report; in the course of this, it is also clarified and determined whether the child is the biological child of its legal father. But because of its further-reaching goal of legally separating the legal father from the child and the stricter procedural requirements that result from this, the proceedings contesting paternity do not do justice to the right of a man, protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law, to mere knowledge as to whether a child is his biological child. 85

a) In the case of doubts as to his paternity, the legal father will admittedly often have come to the decision that if it transpires that he is not the biological father of the child he will break the legal bond to the child. In these cases, the desire for knowledge of the biological paternity of the child coincides with the desire to end the legal bonds to the child, and therefore as a general rule the proceedings contesting paternity are the suitable route, and the route provided for him, to reach his goal of ending his legal paternity. But the desire of a legal father may also be solely directed to knowing whether the child is really his biological child, without at the same time wanting to give up his legal paternity. This may be because, although he wishes to have clarification as to the parentage of the child, he feels such a close personal connection with the child that even if he is not the biological father of the child he wants to remain its legal father. It is also possible that the legal father would first like to remove his doubts as to the paternity of the child in order that, when he knows the results of a test report to this effect, if this does not confirm that he is the biological father, he will then consider the situation and decide what legal consequences he will draw. 86

Proceedings contesting paternity which are directed to the goal of ending legal paternity are too broad and not appropriate for this relief sought, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law and which consists in the father obtaining, either solely or in the first instance, merely knowledge as to the parentage of the child whose legal father he is. It forces the legal father, if he pursues his interest in determining that the child is his biological child, at the same time also to take the risk of possibly losing his legal paternity or, if he does not wish to do this, to give up his desire to obtain knowledge of the child's paternity. This neither does justice to the father's interest in knowledge relating solely to the paternity, nor does it serve the interest of the child concerned in maintaining its legal relationship to its father. 87

b) The statutory requirements subject to which paternity can be contested are also disproportionate, in relation to a father's pursuit of the interest in obtaining knowledge of the paternity of his child. They are designed with regard to the protection to which the child and its mother are entitled with a view to the continuity of the legal and social family relationship with the father, which is endangered when paternity is contested. However, they do not need this protection of legal continuity where the only purpose 88

is to pursue the goal of obtaining certainty as to the child's paternity. In this case, there is no interest of the child and mother equally important and worthy of protection to be weighed against the father's right to knowledge of the paternity, and it would therefore not be justified to subject a procedure for clarification and determination of paternity to the same onus of presentation and time-limits as those for the proceedings contesting paternity. To make a procedure available, it would be sufficient in this case if the legal father submitted doubts as to whether the child is his biological child.

c) The requirements set out above apply to the legal father whose right to the determination of the paternity of the child legally attributed to him is the sole subject of the present proceedings. Insofar as the legislature makes available proceedings for the determination that a child is the biological child of a man who is not the legal father of the child but who assumes that he is the biological father of the child, it may impose stricter requirements on the basis that the child has not been legally attributed to the man. The man can be required to submit circumstances from which it appears possible that he might be the biological father of the child, in order to protect the child and the mother against the disclosure of personal data and of intimate events in proceedings that are initiated without cause by men to whom the mother and child stand in no legal or social relationship. 89

III.

By these standards, the decisions challenged by the constitutional complaint are constitutionally unobjectionable. In this respect, the constitutional complaint is unfounded. The unsatisfactory legal situation with regard to the interest of a man in obtaining, either solely or in the first instance, merely knowledge as to whether a child is his biological child, which is protected by Article 2.1 in conjunction with Article 1.1 of the Basic Law, cannot be compensated for by the proceedings contesting paternity which the complainant initiated and conducted. In their decisions, the courts interpreted constitutionally the statutory provisions on the contestation of paternity, which safeguard the fundamental rights of the father, the child and the mother, and in this interpretation they rightly refused to use as evidence a secretly obtained paternity test which the complainant submitted. 90

1. The proceedings contesting paternity under §§ 1600 et seq. of the Civil Code serve to terminate legal paternity. Even if the complainant challenged the fact that no procedure was available to him for prior clarification of the paternity of the child legally attributed to him and he therefore secretly, by way of a genetic paternity test report, obtained knowledge of this, he did nevertheless initiate proceedings contesting paternity with the aim of annulling his legal paternity. Consequently, the statutory provisions are to be applied to him that, as set out above, constitutionally balance the fundamental-rights positions affected in the contestation of paternity. The courts must observe these legal provisions, in particular those relating to the onus of presentation. They may not disregard them in order to satisfy the right to knowledge of paternity in proceedings that are directed not only to that knowledge, but also to the termination 91

of paternity. The interpretation and application of the statutory provisions on the proceedings contesting paternity in the challenged decisions are constitutionally unobjectionable. Apart from submitting the secret paternity test, all that the complainant stated before the non-constitutional courts to show his doubts as to his paternity was that it could be presumed from the refusal of mother and child to consent to the paternity report obtained that he was not the father of the child. The Federal Court of Justice rightly did not regard this as sufficient to satisfy the onus of presentation of § 1600b of the Civil Code.

2. It is in conformity with the constitution that the courts refused to use as evidence the genetic paternity test report secretly obtained by the complainant. 92

a) In judicial proceedings, the judge confronts the parties as a person exercising the sovereign power of the state. The judge is, therefore, under Article 1.3 of the Basic Law, bound to take account of the fundamental rights that are relevant in this connection in passing judgment and has a duty to structure the proceedings in accordance with the rule of law (see BVerfGE 52, 203 (207); 106, 28 (48-49)). From the principle of a state under the rule of law follows the duty to handle the law of evidence fairly, in particular the rules relating to the burden of proof (see BVerfGE 52, 131 (145)). In family-law proceedings, too, in which there is a dispute on the legal situations of the parties within a legal relationship governed by family law, the courts are in principle under a duty to take into account evidence or statements of a case submitted by the parties in order to maintain a functionally reliable administration of justice and to reach their decisions in a substantively correct manner. 93

The substantive fundamental rights such as Article 2.1 of the Basic Law may also give rise to requirements for judicial proceedings (see BVerfGE 101, 106 (122)) in connection with the disclosure and evaluation of personal data that are constitutionally protected against coming to the knowledge of third parties. The court must therefore examine whether the use of secretly obtained personal data on another person and of knowledge that is derived from these data is compatible with the general right of personality of the person affected (see BVerfGE 106, 28 (48)). When the interest in a functionally reliable administration of justice and the protection of the right to informational self-determination as flowing from the general right of personality are weighed against each other, the interest in the use of the data and information submitted is of greater weight only if further aspects extending beyond the mere interest in giving evidence apply and these show that, despite the encroachment upon the right of personality, the interest in the use of the data is in need of protection. The mere interest in securing an item of evidence for oneself is not sufficient for this (see BVerfGE 106, 28 (49-50)). 94

b) This was taken into account by the Federal Court of Justice and by the lower courts in their challenged decisions. In a manner that is constitutionally unobjectionable, they proceeded on the basis that the complainant's secret obtaining of genetic substance of the child, and thus the impermissible access to its personal data, sub- 95

stantially impaired the child's right to informational self-determination and that the use in the judicial proceedings of the information obtained from this constituted an encroachment on the right of personality of the child. On the other hand, the courts were rightly unable to identify a particular interest worthy of protection of the complainant that the report should be accepted for use in the proceedings, an interest that went beyond the interest in obtaining an item of evidence to show that he did not have paternity in the form of the report made secretly and without the consent of the child.

Nor does the circumstance that to date no procedure is available that makes it possible for a man to have the paternity of a child that is legally attributed to himself clarified and determined enable the court to recognise such an interest of the complainant that is particularly worthy of protection. Thus a man who wants to contest his legal paternity is not in a situation similar to a situation permitting self-defence that could justify the man, without the consent and knowledge of the child or its mother, in obtaining genetic data of the child and these data being used as evidence in family-court proceedings, in violation of the child's right of personality. As has been shown by the practice of the family courts over decades, the submission of a DNA test report is not the only possibility of satisfying the requirements for stating one's case in proceedings contesting paternity and of submitting circumstances that suggest it is not completely remote that the biological father of the child is not the man challenging paternity, but possibly another man. In this respect, the constitutional complaint is unfounded. 96

C.

I.

The legislature must create a procedural possibility that helps to realise the right to knowledge and determination of paternity under Article 2.1 in conjunction with Article 1.1 of the Basic Law, without tying this mandatorily to proceedings contesting paternity. The legislature has freedom of drafting with regard to the way in which it complies with this duty. Various routes are open to it in this connection. However, for the reasons set out under B.I.3.a) and B.III.2.b), the legislature may not permit secretly obtained genetic diagnostic paternity test reports to be introduced into proceedings contesting paternity nor make it possible for the courts to take account of these. 97

1. The legislature has more than one possibility of complying with its duty to protect. One possibility would be passing provisions that make the refusal of the child or its mother who has custody to consent to a genetic paternity test being obtained privately subject to review by the courts and that allow the court, by removing or transferring the authority to act for the child, to open the way for such a report to be prepared, as is provided by the Draft Act of the Government of the Free State of Bavaria. Using as evidence a report that had been prepared in this way would be constitutionally unobjectionable. In addition, there could be provision for independent separate proceedings or proceedings prior to the proceedings contesting paternity to clarify and deter- 98

mine paternity; in these proceedings, if the legal father stated that he had doubts that the child was his biological child, the court would be required to examine the case on the merits.

2. However, the legislature has a duty to ensure that in the proceedings contesting paternity the interest protected by Article 6.1 of the Basic Law, in particular the interest of the child in retaining its legal and social family attribution where appropriate, continues to be taken into account. Here too the legislature has discretion. For example, it can ensure that the knowledge of the legal father that he is not the biological father, which is now easier to obtain, does not immediately lead to the annulment of legal paternity in the proceedings contesting paternity, if, on account of the duration of the legal and social connection between the child and its legal father and the particular life situation and phase of development in which the child currently is, this would result in a substantial adverse effect on the welfare of the child. 99

II.

The legislature is instructed to pass procedural provisions that ensure that, by 31 March 2008, the legal situation is in conformity with the right to knowledge of paternity under Article 2.1 in conjunction with Article 1.1 of the Basic Law. Until these provisions come into force, there will only be the present possibility for the legal father to obtain knowledge of the paternity of a child within proceedings contesting paternity under §§ 1600 et seq. of the Civil Code. 100

III.

[…] 101-102

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Eichberger Schluckebier

Bundesverfassungsgericht, Urteil des Ersten Senats vom 13. Februar 2007 - 1 BvR 421/05

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