H e a d n o t e s

to the Judgment of the First Senate of 19 April 2016

– 1 BvR 3309/13 –

The general right of personality (Article 2(1) in conjunction with Article 1(1) of the Basic Law (*Grundgesetz* – GG)) does not require the legislature to provide, in addition to the procedure to establish paternity pursuant to § 1600d of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), for a separate procedure to determine parentage vis-à-vis a putative biological yet not legal father without changing the legal status of the persons involved (*rechtsfolgenlose Klärung der Abstammung*).

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 3309/13 –

Pronounced
on 19 April 2016
Kehrwecker
Amtsinspektor
as Registrar
of the Court Registry

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaint

of Ms. L...,

– authorised representative: Rechtsanwalt Paul Kreierhoff,
Flopsplatz 1, 46325 Borken -

against a) the order of the Hamm Higher Regional Court (*Oberlandesgericht*) of 23 October 2013 – II-12 UF 121/13 –,

b) the order of the Borken Local Court (*Amtsgericht*) of 8 May 2013 – 34 F 29/10 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Gaier,

Eichberger,

Schluckebier,

Masing,

Paulus,

Baer,

held on the basis of the oral hearing of 24 November 2015:

Judgment:

The constitutional complaint is rejected.

R e a s o n s:

A.

The constitutional complaint concerns the question whether a separate procedure to determine parentage without changing the legal status of the persons involved (*rechtsfolgenlose Klärung der Abstammung*) has to be made available on constitutional grounds vis-à-vis a putative yet not legal father, in addition to the procedure for establishing paternity pursuant to § 1600d of the Civil Code (*Bürgerliches Gesetzbuch* – BGB), which is aimed at establishing paternity as a legal status. The complainant seeks such a separate determination of her parentage and challenges court decisions that refused such determination. The complainant does not, however, seek the establishment of paternity as a legal status. 1

[Excerpt from the Press Release No. 18/2016 of 19 April 2016]

The complainant, who was born out of wedlock in 1950, assumes that the respondent in the initial proceedings (hereinafter: the respondent) is her biological father. In 1954, the complainant took legal action against the respondent, seeking “establishment of natural parentage” (“*Feststellung blutsmäßiger Abstammung*”) according to the law applicable at that time. The Regional Court’s (*Landgericht*) decision dismissing that action in 1955 became final. In 2009, the complainant requested the respondent to consent to a DNA test “to conclusively determine” paternity. The respondent, however, refused. Subsequently, in the initial proceedings, the complainant – relying on §°1598a BGB – requested the respondent to consent to a genetic parentage test and to acquiesce in the taking of a genetic sample appropriate for that test. §°1598a BGB provides such a right for the father, the mother, and the child within a legal family vis-à-vis the respective other two members of that family. According to the complainant, §°1598a BGB should be interpreted in conformity with the Basic Law and human rights (*verfassungs- und menschenrechtskonforme Auslegung*) in the sense that also the respondent, as the putative biological but not legal father, could be requested to participate in proceedings aimed at determining parentage without changing the legal status of the persons involved (*rechtsfolgenlose Abstammungsklärung*). The Local Court (*Amtsgericht*) held that provision to be inapplicable and rejected the complainant’s action. The complaint lodged against that decision before the Higher Regional Court (*Oberlandesgericht*) was unsuccessful.

[End of excerpt]

I.

1. a) Under the current legal situation, paternity can be established in court proceedings pursuant to § 1600d BGB. 2

[…] 3

§ 1600d BGB serves to attribute the biological father with the legal status of a father to a child that does not have a legal father – after the corresponding determination of biological parentage. On this occasion, the child is enabled to obtain certainty of whether the man it believes to be its biological father actually is the father. However, the procedure pursuant to § 1600d BGB does not provide for a separate determination of biological parentage without resulting in the corresponding legal status of a father. 4

b) § 1598a BGB allows for a separate examination of parentage in certain constellations. 5

[…] 6

Pursuant to this provision, for the purpose of the separate examination of their biological parentage without changing their legal status in that respect, the father, the mother and the child may require, vis-à-vis the other two respective family members, consent to a genetic parentage test and to acquiesce in the taking of a genetic sample appropriate for the test. The claim under § 1598a BGB was created as a result of the Federal Constitutional Court's decision of 13 February 2007 on secretly obtained paternity tests (Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 117, 202), and the legislature deliberately designed it with a low threshold. It is not subject to any further prerequisites other than the family relations mentioned therein (cf. *Bundestag* document, *Bundestagsdrucksache* – BTDrucks 16/6561, p. 12). The claim is of unlimited duration and does not require that an initial suspicion is set out. [...] 7

2. […] 8

3. […] 9-12

II.

In her constitutional complaint, the complainant asserts that she was denied the possibility of clarifying her descent without changing the legal status of the persons involved, in violation of her fundamental rights, for lack of an interpretation of § 1598a BGB in conformity with the Constitution. She claims a violation of her general right of personality under Art. 2(1) in conjunction with Art. 1(1), of Art. 20(3) GG as well as of Art. 8(1) of the European Convention on Human Rights (ECHR) because of disregarding the human right to respect for one's private life. [...] 13

[…] 14

III.

1. The Federal Ministry of Justice and Consumer Protection submitted a statement in these proceedings. It stated that § 1598a BGB is not applicable to the request for clarifying parentage vis-à-vis the putative biological yet not legal father. [...] 15

2. […] 16

3. […] 17

4. […] 18-26

B.

The constitutional complaint is admissible, but without merits. The challenged decisions do not violate the complainant's fundamental rights. 27

I.

The interpretation of § 1598a BGB by the Local Court (*Amtsgericht*) and the Higher Regional Court (*Oberlandesgericht*), according to which this provision does not grant the child a claim against the putative biological yet not legal father to obtain his consent to a genetic parentage test and to acquiesce in the taking of a suitable genetic sample for the test, is not objectionable under constitutional law. The broad interpretation of the provision in conformity with the Basic Law that is sought by the complainant is ruled out because it is not required under the Constitution that a separate procedure to clarify parentage is provided. 28

II.

The legal situation underlying the challenged decisions, which does not provide for such a claim to a separate examination of parentage under § 1598a BGB or elsewhere vis-à-vis the putative biological but not legal father, is compatible with the Basic Law. In particular, it does not violate a child's general right of personality that it is, under the current legal situation, able to establish its biological descent from a man whom it believes to be its biological father, but who is not legally attributed to the child as its father, against that man's will solely by way of formal establishment of legal paternity (§ 1600d BGB) but not in a separate procedure to examine parentage. 29

The question of whether it is possible or not to examine one's own descent from one's putative biological father is linked to the scope of protection of the general right of personality of the person seeking to clarify his or her parentage (1). This protection of the knowledge of one's own descent is not absolute, but, rather, has to be balanced against conflicting fundamental rights, to which end the legislature is equipped with a leeway to design (2). When designing the options for establishing parentage, the legislature, therefore, can and has to consider the fact that a claim to examine parentage affects different, conflicting fundamental rights (3). The legislature did not resolve the conflict of fundamental rights fully in favour or at the expense of one side 30

(4). The solution chosen is covered by the legislature's constitutional leeway to design – also in the light of the European Convention on Human Rights – although a different legislative solution is also conceivable under constitutional law (5).

1. The question of whether it is possible to determine one's own descent from the putative biological father is linked to the general right of personality that provides protection if available information on one's own descent is withheld. 31

a) Art. 2(1) GG grants every person the right to free development of his or her personality. In addition to the general freedom of action, this fundamental right includes the general right of personality (Art. 2(1) in conjunction with Art. 1(1) GG). [...] One of the purposes of the general right of personality is to ensure the basic conditions enabling individuals to develop and preserve their individuality autonomously (cf. BVerfGE 35, 202 <220>; 79, 256 <268>; 90, 263 <270>; 117, 202 <225>). However, the general right of personality only protects those elements of development of one's personality which – without already being covered by the specifically guaranteed freedoms under the Basic Law – are equal to the former in their constitutive importance for personality (cf. BVerfGE 79, 256 <268>; 99, 185 <193>; 120, 274 <303>; established case-law). Hence, it does not guarantee protection against everything that could impair, in one way or the other, the autonomous development of one's personality [...]. Protection of the general right of personality to close a legal loophole, however, applies where the autonomous development and preservation of personality is specifically at risk [...]. 32

b) The autonomous development and preservation of one's personality can be specifically at risk if available information about one's own biological descent is withheld (aa). Hence, the protection of knowledge about one's own descent is part of the general right of personality. While this – according to established case-law – does not include an entitlement to receive information on one's descent, it does require the state to provide protection if available information on one's descent is withheld (bb). 33

aa) The free development of one's personality can be specifically at risk if available information on one's own biological descent is withheld. 34

Knowledge of one's descent can be material to the development of one's personality. The possibility of relating to others as an individual not only socially but also genealogically can be pivotal in an individual's conscience in terms of discovering their individuality, for their self-perception and for their long-term family relationships with others. Vice versa, it can place a considerable burden on and unsettle a person if that person is unable to determine his or her own descent (cf. BVerfGE 79, 256 <268 and 269>; 90, 263 <270 and 271>; 96, 56 <63>; 117, 202 <225 and 226>). 35

Admittedly, based on the current status of knowledge, it is not possible to state with certainty how significant the challenged fact, i.e. the fact that the putative biological father refuses to contribute to the clarification of the complainant's parentage, is for the development of the complainant's personality. [...] 36

[...] [However], it appears plausible that withholding available information on a person's descent from him or her can specifically and adversely affect the autonomous development of his or her individuality, also in the constellation presently at issue. [...] 37

bb) While the general right of personality does not provide a claim to receive information, it does provide protection if available information on a person's descent is withheld from that person (cf. BVerfGE 79, 256 <268 and 269>; 90, 263 <270 and 271>; 96, 56 <63>). This protection of knowledge of one's own descent focuses on the state's constitutional obligation to take reasonable account of an individual's need for protection if available information about his or her descent is withheld when designing the legal relations between the parties concerned. Usually, it is not just the state as the only party bound directly by fundamental rights that prevents the parties concerned from obtaining information about their biological descent. Rather, private persons, as in the present case the complainant's putative biological father, refuse the necessary participation in examining a presumed parentage. The state is nonetheless called on to provide protection since the denied information about parentage can only be obtained with its assistance. If necessary, a procedure for clarification purposes has to be provided (cf. BVerfGE 117, 202 <227>). 38

2. Protection of knowledge of one's own descent is not absolute [...], rather, the underlying general right of personality has to be balanced against conflicting fundamental rights (see 3 below). The legislature has leeway in this respect (a). The Federal Constitutional Court's case-law handed down so far does not suggest that there is a specific legislative obligation to grant the child a separate claim for determining his or her descent vis-à-vis the putative biological father (b). 39

a) The Constitution restricts the legislature's leeway when designing private legal relations to the extent that the legislature has to respect the objective-legal contents of the Constitution as they are expressed, particularly, in fundamental rights, and has to contribute to their realisation (cf. BVerfGE 38, 241 <253>; established case-law). When designing private legal relations the legislature generally has a broad margin of appreciation and of assessment as well as a wide leeway to design. This applies in particular where conflicting fundamental rights have to be considered (cf. BVerfGE 96, 56 <64>; established case-law). In seeking to arrive at a fair balance between these interests, the legislature has to assess the situation, i.e. has to weigh the conflicting interests against one another and determine what degree of protection they require (cf. BVerfGE 97, 169 <176>). Specific regulatory obligations of the legislature deciding on private law matters can only exceptionally be derived from the Basic Law's fundamental rights (cf. BVerfGE 96, 56 <64>; established case-law). 40

b) With regard to knowledge of one's descent in particular, the Federal Constitutional Court imposed more specific regulatory obligations on the legislature. However, the case-law does not suggest that there is a specific legislative obligation to provide children with a separate claim to determine parentage vis-à-vis the putative biological father. 41

aa) […] 42

bb) […] 43

cc) […] 44

dd) In contrast the legal father generally has to be able to verify the biological descent of a child legally attributed to him. In 2007, the Federal Constitutional Court demanded that a separate procedure to establish parentage be made available. [...] As an exception, the legislature has no leeway in this respect (cf. BVerfGE 117, 202 <229 et seq.>). 45

[…] 46-47

ee) The Federal Constitutional Court, however, did not find that there was any legislative obligation to provide children with a separate claim to determine parentage vis-à-vis the putative biological yet not legal father. Insofar the legislature's leeway to design, which it requires in order to bring about an equitable balance of the conflicting fundamental rights, is not affected. 48

3. The regulatory scope for seeking legislative solutions by way of balancing of interests is determined by the right of the child already mentioned (1 above) and, additionally, by the conflicting fundamental rights of the persons who are adversely affected by a procedure for examining parentage. Such persons can be the child's mother (b aa below), the man who is obliged to contribute to the clarification of parentage, and the members of his legal or social family (b bb below) as well as members of the child's legal or social family (b cc below), especially the child's legal father (b dd below). The particularity characterising the legislative balancing of interests is that neither the legislature nor, in an individual case, the courts can predict with certainty the weight of the fundamental rights affected because contentious parentage matters are always uncertain before their formal clarification (a). 49

a) The questions of which fundamental rights and whose are affected by a determination of parentage conducted against the will of the putative biological father will depend on the specific circumstances of the individual case. In this respect, most impairments will be less severe if the man who is obliged to have parentage examined against his will is, in fact, the child's biological father than if this is not the case. Here again, the child's biological father and its mother, from the outset, require less protection in relation to the child's interests than third parties. Biological parents are responsible for the child's existence and, therefore, they generally have to subordinate their interests in maintaining secrecy to the child's interest in clarifying its parentage. This does not apply to third parties. 50

However, when seeking to reach a reasonable balance between fundamental rights, the legislature encounters the problem that, in contentious cases like those that are at issue here, it is impossible to say for certain whether a man is in fact the child's biological father before conducting the procedure to examine parentage. These proce- 51

dures are specifically aimed at removing this uncertainty. [...] However, the majority of impairments of fundamental rights resulting from a procedure to clarify parentage cannot be undone even if the outcome of the parentage tests is negative, nor will they resolve themselves (b aa und bb (1), (2), (3), (4) below). […] While this does not, under constitutional considerations, rule out the possibility that such a procedure is statutorily provided for, it may be taken into consideration by the legislature.

b) A putative biological father's obligation to participate in the clarification of parentage can adversely affect the fundamental rights of various persons, depending on the circumstances of the case. 52

aa) The examination of the actual biological paternity can indirectly affect the mother's rights of personality under Art. 2(1) in conjunction with Art. 1(1) GG, which, in its manifestation as a right to protection of her private and intimate sphere, entitles her not to disclose sexual relations, but to decide herself on whether, in what form and to whom she discloses her intimate sphere and sex life (cf. BVerfGE 96, 56 <61>; 117, 202 <233>; 138, 377 <387>). 53

Examining the biological paternity of a man who is not the legal father of a child might disclose a previously concealed sexual relationship between the mother and that man, and hence, highly intimate details of her private life. Admittedly, the mother's interest in not having to disclose this relationship would, from the outset, carry less weight compared to her child's interest in knowing its descent, if the child did in fact result from this sexual relationship. Yet, precisely this question is yet uncertain and is meant to be eliminated by the procedure sought. [...] 54

bb) Fundamental rights of the man whose biological paternity is to be examined against his will are always affected. 55

(1) A claim to examine parentage affects his right to informational self-determination under Art. 2(1) in conjunction with Art. 1(1) GG. The right protects the individual capacity to decide him- or herself on the disclosure and use of his or her personal data. Among this data protected by fundamental rights is data containing information about genetic features of a person that, when compared with the data of another person, allow drawing conclusions about his or her descent (cf. BVerfGE 117, 202 <228> with further references). This impairment could not be undone and would not resolve itself even if it were established that the man is not the biological father. 56

(2) In addition, the test required for examining parentage also involves an irreversible, yet minor interference with the right to physical integrity (Art. 2(2) GG) of the man obliged to participate in the proceedings. 57

(3) Furthermore, the man whose biological paternity is to be examined against his will is also entitled to the specifically protected right to respect for his private and intimate sphere, namely not to disclose sexual relations but to decide himself on whether, in what form and to whom he discloses his intimate sphere and sex life (aa above; cf. BVerfGE 138, 377 <387>). This right is affected by an enforced paternity 58

test because it irrefutably raises the possibility that he had a sexual relationship with the child's mother. A paternity test that reveals that the man is not the child's biological father does not automatically exclude the possibility of a sexual relationship with the mother as such a relationship might have existed nonetheless. Considering the child's interest in clarifying its descent, not only the mother's but also the man's interest in maintaining secrecy is less worthy of protection if he actually is the biological father of the child. [...]

(4) Furthermore, the determination of paternity can adversely affect the family life of the man obliged to cooperate and that of his family, as protected under Art. 6(1) GG. [...] This applies irrespective of whether or not the suspicion is confirmed by the paternity test, and it cannot be fully undone even if the result of the test is negative. Yet, the burden will arise in particular if paternity is actually proven in the procedure to clarify parentage (cf. BVerfGE, 138, 377 <393 and 394>). 59

(5) Enabling the separate determination of parentage between persons who are not linked by a legal parent-child relationship also entails the risk of "random" paternity tests initiated on a speculative basis [...]; hence, the fundamental rights of a large number of people could be adversely affected in the above-mentioned way. Determination pursuant to § 1598a BGB, i.e. within the legal family, does not entail this risk because the circle of entitled or obliged parties is limited to members of the legal family. However, this regulating effect cannot operate in situations like the one at hand in which persons that do not belong to the legal family are necessarily affected by being obliged to participate in the determination of parentage. 60

[…] 61

(6) Even if the fact of past sexual relations between the putative father and the mother of the child is known to those involved and their families, [...] the putative father's interest may be such that the child's biological descent is not established in further detail. [...] The fact that a man assumes that he is not a certain child's biological father can also influence his self-image (cf. vice versa regarding the positive assumption of a father-child relationship BVerfGE 117, 202 <226>). 62

cc) Ordering and performing a parentage test in order to determine biological paternity might also affect the family life of the members of the child's existing legal family, as protected under Art. 6(1) GG. [...] The [procedure] undermines the participants' certainty and trust in their family relationships. The burden mirrors the burden felt by the family of the putative biological father, and is caused by the mere possibility that a different man might be the biological father. The strain on family life is particularly severe if the procedure aimed at the clarification of parentage reveals that the child's legal father is not its biological father (cf. BVerfGE 135, 48 <86 and 87, para. 105 et seq.>; BVerfG, Order of the First Chamber of the First Senate of 19 November 2014 — 1 BvR 2843/14 —, juris, para. 8). It becomes more severe if the child is still a minor and in particular need of its family's protection. 63

It is true that excluding a procedure to examine parentage cannot prevent a child from becoming suspicious of a different man being its father, or from voicing that suspicion within the family. [...] Yet, it is likely to prevent the question of biological paternity from being taken beyond the family and debated before a state court. [...] 64

dd) After all, determination of parentage concerns the legal father's general right of personality, as the assumption to have a genealogical relationship with his child can have a pivotal role for his self-image (cf. BVerfGE 117, 202 <225 and 226>). 65

4. This conflict of fundamental rights under the law in force cannot be fully resolved, and the legislature has not decided on this conflict in favour or at the expense of solely one party. The legislature did not enable the child to initiate a procedure for a separate determination of parentage vis-à-vis a man not recognised as its legal father. Yet, the legislature made a procedure for establishing paternity available pursuant to § 1600d BGB. This procedure allows for determining incidentally parentage vis-à-vis the putative biological father; in case of a positive result of the procedure a legal father-child relationship is established, including all mutual rights and obligations this entails. 66

When the legislature introduced the statutory option of a separate determination of parentage within the legal family pursuant to § 1598a BGB in reaction to the Federal Constitutional Court's decision of 13 February 2007 on secretly obtained paternity tests (BVerfGE 117, 202), the legislature consciously continued to pursue the previous policy to only allow for the determination of descent in relation to a person not connected with the family if such determination aims to establish a legal parent-child responsibility (§ 1600d BGB) [...]. 67

Nor does the provision introduced in § 1686a BGB in implementation of the European Court of Human Rights' case-law represent a fundamental re-orientation (cf. European Court of Human Rights (ECtHR), Judgment of 21 December 2010 – no. 20578/07, Anayo v. Germany –, juris; Judgment of 15 September 2011 – no. 17080/07, Schneider v. Germany –, juris; Judgment of 22 March 2012 – no. 23338/09, Kautzor v. Germany –, juris; Judgment of 22 March 2012 – no. 45071/09, Ahrens v. Germany –, juris). According to that provision, it is possible to determine parentage incidentally (cf. § 167a(2) of the Act on Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (*Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit* – FamFG) if the putative biological father seeks contact with or information about the child, which can be deemed to reflect a wish to assume, to a certain degree, responsibility for the child's care and upbringing. 68

5. The decision not to permit a separate procedure to examine parentage vis-à-vis the putative biological father in addition to the establishment of paternity pursuant to § 1600d BGB did not exceed the legislature's leeway to design (a). Considering the European Convention on Human Rights and the case-law of the European Court of Human Rights as guidelines for interpretation does not lead to a different result (b). 69

a) The legislature's decision not to permit a separate procedure to examine parentage vis-à-vis the putative biological father in addition to the establishment of paternity pursuant to § 1600d BGB maintains the constitutional limits of permissible legislative design. It would be possible under constitutional law if the legislature provided for such a procedure. However, the child's general right of personality does not require the legislature to do so. Such proceedings could adversely affect numerous fundamental rights of the other parties concerned (3 above), varying in intensity depending on the legislative design. The legislature has to balance those fundamental rights against the constitutionally protected right to know of one's descent. The result of the necessary balancing test is not constitutionally pre-determined in one definite direction or another. 70

aa) On the one hand, the protection provided if available information on parentage is withheld can be of significant weight because in an individual case the inability to examine parentage vis-à-vis one's putative biological father can place a heavy burden on the person concerned (supra B II 1 b). However, a child who wants to clarify its descent from the man whom it assumes to be its biological father is not left without rights under the current legal situation because the child can request that the man's paternity be established pursuant to § 1600d BGB and thus incidentally determine his biological paternity. If the child has a legal father, this procedure to establish paternity vis-à-vis the putative biological father is, however, only possible under the condition that the child successfully contests the paternity of its legal father first (§ 1600d(1) BGB). […] 71

bb) On the other hand, the conflicting fundamental rights of others cannot generally be deemed to be less important than the protection of knowing one's descent. The solution chosen by the legislature not to permit a separate procedure to examine parentage of the putative biological but not legal father takes account of the fact that such a procedure may result in a negative finding, a possibility that cannot be ruled out due to the uncertainty of the biological paternity, and which would be the least favourable scenario in respect of the fundamental rights of the parties concerned. In such a case, investigating parentage would, on the one hand, not provide the child with the certainty sought about his or her biological descent, while, one the other hand, it would –to a large extent irreversibly – interfere with the fundamental rights of the other persons concerned.. [...] 72

b) This result does not change when the European Convention on Human Rights and the case-law of the European Court of Human Rights are taken into account, which are to serve as a guideline for the interpretation of the content and scope of fundamental rights (cf. BVerfGE 111, 307 <317>; 138, 296 <355 and 356, para. 149>). According to the case-law of the European Court of Human Rights the right to respect for private life pursuant to Art. 8(1) ECHR contains the right to identity, which includes the right to know one's parentage (cf. ECtHR, Judgment of 13 July 2006 – no. 58757/00, Jäggi v. Switzerland –, Zeitschrift für das gesamte Familienrecht – FamRZ 2006, p. 1354; Judgment of 16 June 2011 – no. 19535/08, Pascaud v. 73

France –, Neue Juristische Wochenschrift – NJW 2012, p. 2015 et seq., especially p. 2016 and 2017 para. 59). However, one cannot derive from the case-law of the ECtHR that there must be a possibility to clarify one's descent in a separate procedure in addition to the possibility of establishing paternity in legal terms.

In the Mikulic case (ECtHR, Judgment of 7 February 2002 – no. 53176/99, Mikulic v. Croatia –, especially para. 64), the court criticised that under Croatian law neither the genetic determination of parentage was possible nor were other means provided for establishing the factual prerequisites for the recognition of legal paternity by a court at the child's initiative. Hence, the proceedings did not concern the separate determination of biological paternity, but, rather, the legal establishment of paternity. 74

In the Odièvre case, the European Court of Human Rights held in connection with the French provisions on anonymous births (ECtHR, Judgment of 13 February 2003 – no. 42326/98, Odièvre v. France –, NJW 2003, p. 2145 et seq.) that the free development of one's personality includes the right to obtain necessary information about pivotal aspects of one's own identity or that of one's parents. However, this was related to documents of vital records that were in the possession of the authorities, and were being withheld. The court, however, ultimately approved of the non-disclosure provision since it provided for a possibility of disclosing the mother's identity with her consent. Correspondingly, in the Godelli case (ECtHR, Judgment of 25 September 2012 – no. 33783/09, Godelli v. Italy –, juris), the Court merely objected to the authorities' absolute refusal to provide the appellant insight into her personal descent without differentiating as to whether or not the mother continued to uphold her wish not to disclose her identity. [...] 75

As referenced by the complainant, the European Court of Human Rights held indeed that the interest of a person in establishing his or her parentage can, in an individual case, result in having to exhume the body of the deceased putative father (cf. ECtHR, Judgment of 13 July 2006 – no. 58757/00, Jäggi v. Switzerland –, FamRZ 2006, p. 1354 and 1355). However, that case constellation is different from the present situation in which the legislature has to balance interests because significant rights of privacy of a putative father who was still alive did not exclude the determination of parentage in that case. 76

The Pascaud case (ECtHR, Judgment of 16 June 2011 – no. 19535/08, Pascaud v. France –, NJW 2012, p. 2015 et seq., especially p. 2017 para. 68) also relates to a different legal issue. In that case, the court raised the objection that the appellant's descent from a man who had died in the meantime were not legally recognised although biological parentage had been established with 99.999% probability by a DNA analysis ordered by a court and although the deceased no longer had any family. The court's objection ultimately concerned the lack of a possibility to obtain legal recognition of paternity (relevant in inheritance matters), not the lack of a possibility of a separate procedure to examine parentage. 77

In legal disputes concerning the rights of a putative biological father the European 78

Court of Human Rights expressly held that the decision not to permit separate genetic testing in order to determine a child's descent without changing the child's legal status lies within the state's margin of appreciation (cf. ECtHR, Judgment of 22 March 2012 – no. 23338/09, Kautzor v. Germany –, juris, para. 78 et seq.).

Kirchhof Gaier Eichberger

Schluckebier Masing Paulus

Baer Britz

Bundesverfassungsgericht, Urteil des Ersten Senats vom 19. April 2016 - 1 BvR 3309/13

Zitiervorschlag BVerfG, Urteil des Ersten Senats vom 19. April 2016 - 1 BvR 3309/13 - Rn. (1 - 78), http://www.bverfg.de/e/rs20160419_1bvr330913en.html

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