



**IN THE NAME OF THE PEOPLE**

**In the proceedings  
on  
the constitutional complaint**

of Mr B...,

authorised representative: Rechtsanwalt Claudius Simon Brenneisen,  
Rödingsmarkt 52, 20459 Hamburg -

- against a) the Order of the Hanseatic Higher Regional Court (*Hanseatisches Oberlandesgericht*) of 1 November 2017 – 12 UF 82/17 –
- b) the Order of the Hamburg Local Court (*Amtsgericht*) of 16 March 2017 – 276 F 258/15 –,
- c) the Order of the Hanseatic Higher Regional Court of 30 December 2016 – 12 UF 135/16 –,
- d) the Order of the Hamburg Local Court of 21 June 2016 – 276 F 258/15 –

the Second Chamber of the First Senate of the Federal Constitutional Court with the participation of Justices

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decided unanimously on 25 September 2018

- 1. The Order of the Hamburg Local Court of 16 March 2017 – 276 F 258/15 - and the Order of the Hanseatic Higher Regional Court of 1 November 2017 – 12 UF 82/17 – violate the complainant’s fundamental right under Article 6(2) first sentence of the Basic Law (*Grundgesetz*).**

2. **The Order of the Hanseatic Higher Regional Court of 1 November 2017 – 12 UF 82/17 – is reversed. The matter is remanded to the Hanseatic Higher Regional Court for a new decision.**
3. **The Free and Hanseatic City of Hamburg must reimburse the complainant for necessary expenses.**

## **R e a s o n s :**

### **A.**

The constitutional complaint is directed against the rejection of an application to challenge paternity pursuant to § 1600(1) no. 2, (2) of the Civil Code (*Bürgerliches Gesetzbuch* – BGB). The complainant claims that his fundamental right as biological father under Art. 6(2) first sentence of the Basic Law (*Grundgesetz* – GG) has been violated. He claims that the recognition of paternity by the present husband of the children’s mother ruled out his possibility to obtain legal paternity for his two children, although he had lived with the children until he separated from their mother and had initiated court proceedings for establishing his paternity immediately after the separation, before another man had assumed the legal or social role of the father.

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### **I.**

Pursuant to § 1592 no. 2 BGB, no account is taken of whether court proceedings to establish paternity initiated by the biological father are already pending when deciding on the recognition of paternity. That is the legal background of this dispute. This means that the person recognising paternity is granted the status of legal parent even if the biological father, at the same time, attempts to obtain that status by way of court proceedings to establish paternity. The biological father cannot prevent the recognition of paternity by another man becoming effective even if all parties involved know that not the person recognising paternity but he himself is the biological father. Generally, recognition of paternity only requires the consent of the mother (§ 1595(1) BGB). As soon as the other man has obtained the status of legal father by recognition of paternity, it is ruled out that the biological father can have his paternity established by court order (§ 1600d(1) BGB). In such a case, the biological father can challenge paternity of the legal father pursuant to § 1600(1) no. 2 BGB and thus become the legal father himself. However, if the legal father, i.e. the person recognising paternity, has established a social and family relationship to the children, challenging his paternity pursuant to § 1600(2) is impossible. According to the challenged court decisions, this also applies if the biological father already initiated court proceedings for establishing his paternity at a point in time when a social and family relationship of the present legal father to the children had not yet existed.

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### **II.**

1. The complainant, who is a Spanish national, is the biological father of the children who were born in March 2008 and in February 2010. He was not married to the moth-

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er of the children. After the children were born, the family lived together partly in Germany and partly in Spain, where the complainant still lives. In November 2010, the mother met her present husband. Still in Spain, she and both children moved in with him in April 2011. In August 2011, the mother moved to Germany with the children and her present husband, where they live together to this day.

In April 2011, one day after the separation from the mother of their children, the complainant initiated proceedings for the establishment of paternity in Spain, which are apparently still pending. In February 2012, the Spanish court established the complainant's paternity at first instance. However, this decision establishing paternity was not upheld, because on 24 March 2014 the mother of the children filed a complaint against this decision, which was successful on procedural reasons. While the court proceedings for establishing the complainant's paternity continued in Spain, the new partner of the mother, with her consent, recognised paternity for the children pursuant to § 1592 no. 2 BGB in March 2014 in Germany.

2. In August 2015, the complainant initiated proceedings for challenging paternity pursuant to § 1600(1) no. 2 BGB in Germany, which are the subject of the case at hand.

a) By order of 16 March 2017, the Local Court (*Amtsgericht*) rejected the complainant's application. [...]

[...]

b) The Higher Regional Court (*Oberlandesgericht*) rejected the complaint of the complainant by order of 1 November 2017, referring to the order issued by the Local Court. [...]

### III.

With his constitutional complaint, the complainant claims a violation of his fundamental right under Art. 6(2) first sentence GG. The complainant argues that the Federal Constitutional Court held that it is not objectionable under constitutional law to exclude the alleged biological father from challenging paternity in order to protect the legal and social family, but that this does not apply if the efforts by the biological father to have his paternity recognised are frustrated (reference to the Order of the First Chamber of the First Senate of 24 February 2015 – 1 BvR 562/13 –, [www.bverfg.de](http://www.bverfg.de)). The complainant further argues that, contrary to the referenced case, he has constantly attempted to have his paternity established after he separated from the mother of their children and before her present husband recognised paternity. For this purpose, he has initiated legal proceedings for the establishment of his paternity in Spain.

### IV.

The Senate of the Free and Hanseatic City of Hamburg, the respondents in the initial proceedings, the youth welfare office (*Jugendamt*) involved in the initial proceed-

ings, the Hamburg Children and Youth Welfare Service (*Hamburger Kinder- und Jugendhilfe e.V.*) and the guardian ad litem (*Verfahrensbeiständin*) for the children in the initial proceedings were given the opportunity to submit statements.

The files of the initial proceedings were available to the Federal Constitutional Court. 15

## B.

The Chamber admits the constitutional complaint for decision and grants the relief sought pursuant to § 93c(1) first sentence in conjunction with § 93a(2) letter b of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). Admission of the constitutional complaint is appropriate to enforce the complainant's fundamental rights (§ 93a(2) letter b BVerfGG). The admissible constitutional complaint is manifestly well-founded. The constitutional issues determining the outcome of the constitutional complaint have already been decided by the Federal Constitutional Court (§ 93c(1) first sentence BVerfGG). 16

## I.

The challenged decisions violate the complainant's right under Art. 6(2) first sentence GG. 17

1. Art. 6(2) first sentence GG protects the interest of the biological father of a child to take the legal status of a father. The biological father must be granted access to a procedure which gives him the possibility to also obtain the status of legal father. Determining and establishing paternity is part of the procedural guarantee under Art. 6(2) first sentence GG (cf. fundamentally BVerfGE 108, 82 <104 and 105>). With respect to that, the current law of parentage provides for the right to challenge paternity granted to the biological father (§ 1600(1) no. 2 BGB) and the legal proceedings to establish his legal paternity (§ 1600d BGB). 18

The procedure to obtain the status of legal father must be sufficiently effective. Thus, if a biological father initiates court proceedings for establishing his paternity at a time when he fulfills the requirements for it, he may not be prevented from obtaining paternity in principle because another man recognises paternity while these court proceedings are still pending. In any event, this is the case, if at the time when the court proceedings to establish paternity were initiated by the biological father, a social and family relationship between the other man and the children had not yet existed and the biological father himself had already established a social and family relationship to his children. 19

In principle, it is not objectionable under constitutional law if the biological father is excluded from challenging paternity in order to protect an existing legal and social family (cf. BVerfGE 108, 82 <106 et seq.>; see also Federal Constitutional Court – BVerfG, Order of the First Chamber of the First Senate of 24 February 2015 – 1 BvR 562/13 –, [www.bverfg.de](http://www.bverfg.de), para. 7; Federal Court of Justice, *Bundesgerichtshof – BGH*, Order of 18 October 2017 – XII ZB 525/16 –, *juris*, para. 14 with further refer- 20

ences). This also applies to cases in which the biological father has established a social and family relationship to his child prior to and in the months after its birth (cf. BVerfGE 108, 82 <87 and 88, 90, 106, 109, 112 and 113.>; BVerfG, Order of the First Chamber of the First Senate of 4 December 2013 – 1 BvR 1154/10 –, [www.bverfg.de](http://www.bverfg.de), para. 5). Even if the biological father lived with his child for many years, legal paternity of another man can be upheld because of his social and family relationship to the child, if the biological father, even after he separated from the mother of the child, could have obtained legal paternity over many years, but did not obtain it because he failed to take the necessary steps incumbent upon him, although it is not apparent that he was prevented from taking them (cf. BVerfG, Order of the First Chamber of the First Senate of 24 February 2015 – 1 BvR 562/13 –, [www.bverfg.de](http://www.bverfg.de), para. 8).

However, the constitutionally required effectiveness of the procedure to obtain legal paternity is not ensured if the biological father – who already had established a social and family relationship to his children and who, by initiating court proceedings to establish paternity, did everything he could to be granted the position of legal and social father of his children that was at that time legally obtainable and not yet granted to another person – would have to stand by idly while, during the court proceedings to establish his paternity, he is definitively precluded from being granted the status of a parent because another man recognises paternity. In such a case, the biological father would have to face a race against time in which coincidences and the speed at which court decisions are taken would determine whether his paternity is established in due time or the mother takes the decisive steps with her new partner before that and thereby definitively precludes the biological father from obtaining paternity for his children. In principle, this cannot be expected from the biological father.

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Even if, at the time of the last oral hearing, the legal father has established a social and family relationship to the children, this does not justify *per se* that, under the given circumstances, the biological father is definitively precluded from obtaining the status of legal parent. Contrary to the view held by the family court, nothing different can be inferred from the case-law of the Federal Constitutional Court. In the quoted decision (BVerfG, Order of the First Chamber of the First Senate of 24 February 2015 – 1 BvR 562/13 –, [www.bverfg.de](http://www.bverfg.de), para. 8), the preclusion from challenging paternity was considered to be particularly justified under constitutional law because the biological father had failed to take the necessary steps in order to obtain legal paternity. Conversely, under the special circumstances of the case to be assessed here, where a biological father took every possible step to be recognised as legal father, at a time when legal paternity was obtainable for him, the interest in congruency between legal paternity and social and family relationship is generally not strong enough to justify the considerable hardship caused to the biological father by the definitive preclusion from obtaining legal paternity. The Local Court stated that it was the purpose of § 1600(2) BGB “to protect the existing family from having to disclose details of their private family life”. For the most part, this is inapplicable when biological paternity of the person challenging legal paternity is undisputed and the legal father only established

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a social and family relationship to the children long after they were born. As such, the fact that the present husband of the mother is not the biological father of her children is not an issue that must be protected from disclosure by the legal order. The Higher Regional Court held that it was the purpose of § 1600(2) BGB to protect the existing social family from impairments by the biological father after he obtained the status of legal parent by claiming his parental rights. Under the special circumstances of the present case, this purpose cannot outweigh the considerable hardship caused to the biological father by the preclusion from the establishment of paternity. To the extent that such an impairment by the biological father occurred, it must generally be addressed by the provisions on custody and visitation rights.

2. The challenged decisions do not meet the requirements of the complainant's parental rights under the Basic Law. Ultimately, they violate the right to have access to a sufficiently effective procedure to obtain legal paternity, which is protected by fundamental rights. 23

a) The interpretation of the legal bases by the courts did not lead to a sufficiently effective procedure to obtain legal paternity. The challenged decisions, even in view of the special circumstances of the present case, uphold the validity of the recognition of paternity on the one hand, and on the other hand, preclude the challenging of paternity pursuant to § 1600(2) BGB because a social and family relationship between the legal father and the children existed at the time of the last oral hearing. Therefore, the establishment of his legal paternity has become definitively impossible in the meantime due to the recognition of paternity by the husband of the children's mother although, in the case at issue, the complainant applied for establishment of paternity by a court at a point in time, when it was still legally possible and no other man had become the social father of his children. 24

b) There are no apparent reasons that can justify that the complainant alone must bear the risk that his efforts to obtain legal paternity fail. 25

aa) The complainant is not responsible for the fact that the establishment of his paternity by the court failed. 26

(1) The complainant is not responsible for the fact that, although he had already initiated the proceedings in April 2011, his paternity was not finally established by the Spanish court – which would have prevented recognition of paternity by the other man – before the present husband of the mother recognised paternity in 2014. 27

(2) Nor was the complainant in a position to prevent that, in the meantime, the children and the legal father established a social and family relationship, which, according to the view of the courts, is the reason why the legal paternity cannot be challenged based on § 1600(2) BGB. Ultimately, this also follows from the long duration of the legal proceedings for establishing paternity in Spain. In this case, there are no indications that the complainant could be responsible for this. 28

(3) Nor can it be blamed on the complainant himself that the recognition as the legal 29

father failed, based on the argument, suggested in the challenged decisions, that he first initiated legal proceedings to establish paternity in Spain and not in Germany. There is no need to decide whether the complainant would have been protected from the course the proceedings took in the present case had they been conducted before German courts. In any case, there is no factual reason to blame the complainant for having conducted the proceedings to establish paternity before the competent Spanish court. It might provide an explanation for this, but is irrelevant under constitutional-law aspects that, for the most part, the entire family life took place in Spain up to this point in time and that at the time the proceedings were initiated the children still lived in Spain with the mother and her new partner. It is not tenable to assume that the complainant accepted the risk that the establishment of paternity could fail because he initiated legal proceedings to establish paternity in Spain and not in Germany.

bb) Nor can it be assumed that, by way of exception and in deviation from the principles stated above, the congruency of legal paternity with the social and family relationship that existed at the time of the last oral hearing is of decisive importance in this case. Consistent with their legal assessment, the courts only generally stated the importance to protect the social and family relationship by referring to §1600(2) BGB without arguing on the basis of the specific circumstances of the present case that its protection is of particular importance here. Apart from that, there are no indications to this effect. In the initial proceedings, the guardian ad litem for the children stated, rather to the contrary, that, in this specific case, it would be beneficial for the children if the biological father was granted legal paternity.

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## II.

The challenged decisions violate the complainant's constitutionally protected parental rights for the above-stated reasons. It is for the regular courts to clarify whether this violation can be remedied by applying current law, for example, by interpreting the existing possibilities to challenge paternity in such a way that, even in the special situation of the case at hand, the biological father has access to a sufficiently effective procedure to obtain legal paternity. It cannot be inferred from the decision of the Federal Constitutional Court (Order of the First Chamber of the First Senate of 24 February 2015 – 1 BvR 562/13 –, [www.bverfg.de](http://www.bverfg.de), para. 10) that the time of the last oral hearing must constitutionally be the relevant point in time at which, pursuant to § 1600(3) first sentence BGB, the biological father is definitely precluded from challenging paternity due to the existence of a social and family relationship between the legal father and the child pursuant to § 1600(2) BGB.

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## III.

Only the Order of the Higher Regional Court of 1 November 2017 – 12 UF 82/17 – is reversed and the matter is remanded to the Higher Regional Court for a new decision (§ 95(2) BVerfGG) because it better serves the complainant. It is in his interest that a final decision in these proceedings is reached as soon as possible (cf. BVer-

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fGE 84, 1 <5>; 94, 372 <400>).

#### IV.

The decision on the reimbursement of the complainant's necessary expenses is based on § 34a(2) BVerfGG. 33

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**Bundesverfassungsgericht, Beschluss der 2. Kammer des Ersten Senats vom  
25. September 2018 - 1 BvR 2814/17**

**Zitiervorschlag** BVerfG, Beschluss der 2. Kammer des Ersten Senats vom 25. September 2018 - 1 BvR 2814/17 - Rn. (1 - 33), [http://www.bverfg.de/e/rk20180925\\_1bvr281417en.html](http://www.bverfg.de/e/rk20180925_1bvr281417en.html)

**ECLI** ECLI:DE:BVerfG:2018:rk20180925.1bvr281417