The Right to Biological Truth versus Stability of the Family

The Right to Biological Truth versus Stability of the Family

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This article reports on a 2019 Lithuanian case of disputed paternity. The judgment highlights the challenges of requiring deoxyribonucleic acid (DNA) testing of a family, where the infant is already part of an established family unit. The decision turned on the refusal of the putative parents to undergo imposed DNA testing. Ultimately, the Lithuanian Supreme Court (LSC) decided the matter according to the basis of the best interests of the child.

Keywords: *paternity; DNA testing; child's best interests*

INTRODUCTION

The balance between establishing biological parenthood, as compared to parenthood based on assumed obligations is a vexing one. Where paternity is an issue, there are two basic questions:

(1) When should a court order genetic tests?
(2) In determining paternity, what weight should be accorded to the results of genetic tests.

These questions are regulated in Continental systems by three sets of laws: family law, the law of civil procedure and laws relating to bioethics. A judge must always consider international human rights standards – at least to the extent that the decision, in a particular case, affects the right to a fair trial.[1]

On 8 May 2019, the Lithuanian Supreme Court (LSC) made a significant ruling concerning the right of a court to order deoxyribonucleic acid (DNA) testing in cases where the paternity of a child living with both parents was challenged by a man, who claimed to be the biological father of the child. The background to the case was as follows: in 2015 an unmarried woman, A, gave birth to a child. Her partner, B, assumed responsibility for the child, without formally acknowledging he was the biological father of the child. In 2018, C brought an action claiming he was the child's father. C's action was supported by evidence showing that, at the time of conception, he was in a relationship with A. B then formally acknowledged paternity of the child, acquiring the legal status of father of the child. C contested B's paternity. To support his claim, C sought an order for DNA testing to confirm his biological link with the child.

The Trial

A and B opposed DNA testing, raising the child's need for a stable and loving family relationship and their right to decide on any kind of testing of the child.

At first instance, the Court ordered DNA testing of the child take place. An order was made obliging A and B to take the child to a DNA laboratory on a specified date. They failed to do so. The Court imposed a fine on A for her failure to comply with the Court's order. A's appeal was dismissed by the appellate court.

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[1] See *European Convention on Human Rights* Art 6 (the right to a fair trial), *European Convention on Human Rights* Art 8 (the right to privacy and family life).

A then appealed the appellate decision to the LSC, arguing that DNA testing was a disproportionate encroachment on the child's bodily integrity as well as on the defendants' private and family life. She sought to quash all previous orders.

There were two questions for the LSC. First, should the Court order DNA testing? Second, could a court treat refusal to undergo testing as evidence that the male partner refusing testing was not the biological father of the child?

Analysis of the Case

In response to the first question, the LSC held that, in such cases, courts should not require DNA testing automatically, without prior consideration being given to the child's best interests. Prior to deciding on the need for DNA testing, the LSC decided a court must thoroughly assess whether the child's interest to know his/her biological origins, outweighs his/her interest, in preserving a stable family environment. If the Court finds that the child's, interest in preserving a stable family environment in any particular case, outweighs his/her interest in determining biological origins, the Court should not order the DNA testing and should dismiss the claim.

The LSC further noted that neither the provisions of the *Lithuania Code of Civil Procedure* (CCP), regulating affiliation and how paternity can be contested, nor the provisions of the CCP, regulating the peculiarities of handling of such cases, contain provisions that establish the possibility of compulsory DNA examination. The absence of such provisions is also highlighted in case law of the Court of Cassation.[2]

The LSC considered that the absence of specific coercive measures has a basis in the constitutional right to bodily integrity. Paragraph 1 of Art 2.25 of the CCP[3] provides for a broad definition of the right to bodily integrity – namely that no scientific, medical test or trial may be conducted without the will and free consent of the individual (or that individual's legal representatives in the case that the individual is not capable to decide for him/herself). According to procedural law,[4] the Court's order for DNA examination is not the subject of an independent appeal, and therefore becomes effective from the date of its adoption. The entry into force of a judicial decision, presupposes its binding effect[5] whereas the binding effect of a final judicial decision means that appropriate procedural coercive measures may be used to ensure its enforcement.

The fact of issuing an order, for DNA testing, creates a precedent for the use of procedural coercion against the child's parents. This would create the situation in which the parents have to choose between making compromises as to their child's bodily integrity and becoming the subject of coercion themselves. On the basis of these arguments, the LSC concluded that a DNA test, to determine the biological relationship between a child's possible parent and the child, should not be ordered if the child's parents refuse such testing. Such refusal, of itself, should not be regarded as an abuse of procedural rights.

Answering the second question – namely, could the Court treat such a refusal as a proof that the defendant (the legal father of the child) is not the biological father of the child, the LSC noted that such an option does not lie under the relevant statutory provisions. Paragraph 2, Art 3.148 of the *Civil Code of the Republic of Lithuania* (CC),[6] provides that, if the defendant refuses expert examination, the Court, having regard to the circumstances of the case, may treat such refusal as proof of the defendant's paternity of the child. This rule was originally created for the purposes of preventing men from abusing procedures which may result in establishing their legal ties with a child (therefore it is in the CC's chapter named

[2] LSC ruling of 22 June 2016 in the civil case No 3K-3-321-687/2016, [45]. Steering Committee for Human Rights. Council of Europe <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016809463e1>.

[3] *Civil Code of the Republic of Lithuania 2000* (Lithuania).

[4] *Code of Civil Procedure of the Republic of Lithuania 2002* (Lithuania).

[5] *Code of Civil Procedure of the Republic of Lithuania 2002* (Lithuania), Art 18.

[6] *Civil Code of the Republic of Lithuania 2000* (Lithuania).

"Paternal Affiliation", which is separate from the chapter "Contestation of Paternity") and is not relevant for disputes where more than one man seeks to be recognised as the legal father of the child.

The LSC noted that the European Court of Human Rights (ECHR) has stated that, "the lack of any procedural measure to compel the alleged father to comply with the Court order is only in conformity with the principle of proportionality if it provides alternative means enabling an independent authority to determine the paternity claim speedily".[7]

This rule was created in cases where the ECHR member countries were accused of failing to fulfil their positive obligation to provide efficient procedural means for determining paternity.[8] The same principle must be applied in cases where a man seeks to establish legal ties with his putative biological child, but this could not be achieved without prior denial of another man's legal status as a legal father of the child.

The LSC concluded that, if in a particular case the Court, after thorough evaluation of the child's interest in knowing his/her biological origins, concludes that this outweighs his/her interest in preserving stable family environment, but the legal parents of the child still refuse to bring the child (or child's samples) for DNA examination, such a refusal might be considered as an indirect proof of the lack of biological ties between the putative father and the child. After its assessment, in the light of the other evidence in the case, this might constitute a ground to satisfy the plaintiff's claim to contest paternity and establish genetic fatherhood.

In the case discussed in this article, the defendants A and B opposed DNA testing and there was no evidence of the lower court's attempt to evaluate the child's interests, prior to assignment for DNA testing. The LSC found that the lower court's order for DNA testing lacked a sound basis and consequently the Court had no right to impose a fine on A for her failure to bring the child to the DNA laboratory.

Two important matters should be taken into account when considering the LSC's ruling:

(1) According to Lithuanian law, legal paternity is the *only* fact, which determines rights and obligations towards the child: a man who appears on the child's birth certificate as the "father" is *automatically* allocated all the rights and duties toward the child.[9] Lithuanian law has no concept of "child custody rights", which are used in some other jurisdictions. Both legal parents have equal rights and duties, notwithstanding their marital status, the place of residence of the child and other considerations.
(2) The LSC has developed jurisprudence regarding social parentage that prevents men contesting legal paternity of a child by simply denying any biological link between them. The LSC strongly supports the view that the social link, between the father and the child (if appropriately confirmed), is a social value which should be protected, as long as it serves the child's best interests.

In practical terms it means, that in such cases, the legal father needs to be given careful consideration before refusing DNA testing, because, even if later he changes his mind, on being accepted as the legal father of that child, it might be "too late".

Discussion

This case resulted in the LSC determining the right of the courts to require DNA testing in cases of challenged paternity, when a child is in a stable family environment in which the man claiming paternity is not an integral member of that unit and the assumed (father) has accepted all the paternal obligations that fatherhood implies. It has prioritised the "best interests of the child" over those of the person claiming paternity and has determined that, in such cases, the Court should not automatically order DNA testing, unless it is in the child's best interests for paternity to be determined.

If the Court considers that preservation of a stable family environment outweighs the plaintiff's wish to establish a confirmed scientific, genetic link with the child, then it has the obligation to refuse such a claim and dismiss the request. Concurrent with this situation, the LSC also determined that the Court should not order DNA testing if the accepted parents of the child refuse it. Such a right of refusal constitutes

[7] *Mikulić v Croatia* (European Court of Human Rights, Application no 53176/99, 7 February 2002).

[8] *Mifsud v Malta* (European Court of Human Rights, Application no 62257/15, 29 January 2019).

[9] *Civil Code of the Republic of Lithuania 2000* (Lithuania).

part of the right to respect of private life (bodily integrity). Such refusal might provide indirect proof of the absence of biological ties between the accepted "father" and the child, which might serve as grounds to satisfy the plaintiff's claim of paternity, if the Court determines that the child's best interests are better addressed by establishing alternative paternity, rather than respecting familial stability.

In the case before the LSC, the defendants opposed the imposition of DNA testing. There was a lack of evidence to indicate that the Court of first instance had appropriately evaluated consideration of the child's best interest. On this basis, the LSC determined that the lower court could not require DNA testing or impose a penalty for failure to present for such testing. The decision reiterates the sanctity of the doctrine of "best interests" when deciding the fate of those incapable of self-determination. It emphasises the imperative of a stable family environment when considering "best interests" which override other considerations.