

Judgment of 28th April 2003, [K 18/02](#)
**LIMITING A FATHER’S ABILITY TO ESTABLISH
 PATERNITY OF AN ILLEGITIMATE CHILD**

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| Type of proceedings: Abstract review Initiator: Commissioner for Citizens’ Rights | Composition of Tribunal: 5-judge panel | Dissenting opinions: 0 |
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| Legal provisions under review | Basis of review |
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| Conditioning the effectiveness of a father’s voluntary acknowledgment of a child’s paternity on the mother’s consent [Family and Guardianship Code 1964: Article 77] Father’s inability to initiate an action to establish paternity [<i>Ibidem</i> : Article 84] | Principle of proportionality Right to court and prohibition on barring recourse to the courts in order to vindicate infringed rights and freedoms Requirement of a statutory basis and court judgment for withdrawing or limiting parental rights Protection of rights of a child [Constitution: Articles 31(3), 45(1), 48(2), 72(1), 77(2)] |

In principle, Polish family law determines paternity of a child on the basis of a legal presumption that the mother’s husband is the father (Article 62 § 1 of the Family and Guardianship Code 1964; hereinafter referred to as “the Code”). Where this presumption is inapplicable to a particular factual situation, or where the court has rebutted this presumption (having heard an action contesting paternity), paternity may be established either by judicial decision or by the father voluntarily acknowledging paternity by way of a unilateral declaration filed with the court or with the Chief of a Civil Status Office (cf. Articles 72-84 and 86 of the 1964 Code).

According to the first of the provisions challenged in this case – Article 77 of the Code – the possibility for a father to voluntarily acknowledge paternity of a child is limited, where the child is a minor, by the requirement that the child’s mother and, in certain situations, the child’s legal (statutory) representative consent to the acknowledgement of paternity.

Moreover, the possibility for a biological father’s paternity to be judicially determined was, prior to the change in law introduced by the judgment summarised herein, limited since a father was incapable of initiating an action to establish paternity. *Locus standi* in such cases was restricted to the following parties: the interested child and – until the child reached the age of majority – its mother (Article 84 of the Code, i.e. the second of the challenged provisions); and a public prosecutor (Article 86 of the Code). Judicial determination of the paternity of an illegitimate child is based on a statutory presumption contained in Article 86 of the Code, stating that the child’s father shall be presumed to be a man who had sexual intercourse with the child’s mother not earlier than on the 300th day and not later than on the 181st day prior to the child’s birth. This presumption may be rebutted by proof that it is not possible that the child is a biological descendant of that man, or that the mother had sexual intercourse, during the same time period, with another man whose paternity in the given circumstances is more probable.

Both of the aforementioned statutory limitations of the father's entitlements were challenged by the Commissioner for Citizens' Rights. The applicant alleged a violation of: the State's constitutional obligation to ensure protection of the rights of a child (Article 72(1)); constitutional guarantees of the right to court and judicial protection of infringed rights and freedoms (Article 45(1) and Article 77(2)) in conjunction with the principle of proportionality (Article 31(3)); and the requirement of a statutory basis and judicial decision for withdrawing or limiting parental rights.

RULING

1. Article 77 of the Family and Guardianship Code 1964 conforms to Article 72(1) first sentence of the Constitution and is not inconsistent with Articles 45(1), 48(2), 77(2) and 31(3) of the Constitution.

2. Article 84 of the Family and Guardianship Code:

a) does not conform to Article 45(1) and Article 77(2), as well as the first sentence of Article 72(2) read in conjunction with Article 31(3), of the Constitution insofar as it excludes the right of a man who is a child's biological father from initiating an action to establish paternity,

b) is not inconsistent with Article 48(2) of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The Constitution does not regulate the issue of establishing paternity (filiation) of an illegitimate child and leaves this matter to be regulated by ordinary statutes. Nevertheless, the constitutional principle of protecting a child's best interests (Article 72(1)) indicates preferences as to the manner in which filiation mechanisms should be shaped, so as to allow family relations to be determined in accordance with a child's real parentage. This is of fundamental importance in protecting a child's non-pecuniary interests (the right to one's own biological identity; the existence of a personal bond with their natural parent and their family) and the child's pecuniary interests (maintenance-related issues, inheritance). Such preference may be limited when protection of a child's best interests requires the preservation of stable family relations previously formed between a child and its legal parents.
2. The question of filiation is independent of the rights of parents, as regards taking care of a child and exercising parental authority.
3. It is justified to make the effectiveness of an acknowledgement of paternity conditional upon the mother's consent (Article 77 of the Code), since this issue directly interferes with the protected sphere of a woman's personal rights. Removing the consent requirement would create a situation whereby a man would be the sole person capable of bestowing personal rights connected with the establishment of civil status rights. In principle, there would be no way to assess whether a man's declaration conformed to reality. This would distort the nature of an acknowledgement of paternity as a legal institution requiring particularly careful consideration of the interests of those involved in shaping family relationships. Such an acknowledgement, which is a *sui generis* adoption, could result in filiative bonds being determined inconsistently with

adoption, could result in filiative bonds being determined inconsistently with biological realities and result in it being transformed into an instrument with which the person claiming paternity of the child may harass the child's mother.

4. The absence of judicial control over a mother's refusal to consent to an acknowledgement of paternity corresponds with the existence of another method for establishing paternity. The introduction of such control could lead to replacing the mother's consent with the consent of the guardianship court. This would undermine the very reason for the existence of the acknowledgement of paternity as a separate form of establishing paternity. It would be for that court to rule on the effectiveness of an acknowledgement of paternity, paying particular attention to evaluating whether a man's declaration conforms to biological realities. Such confusion of an acknowledgement of paternity with judicial determination of paternity could lead to consequences inconsistent with the best interests of a child and the family.
5. The omission of a child's father from the categories of subjects entitled to initiate an action for judicial determination of paternity (Article 84 of the Code) was dictated primarily by the intention to protect the personal rights of a child's mother. Establishing paternity of an illegitimate child requires proof of the basic foundations of the paternity presumption (i.e. the fact that the child's mother had sexual intercourse with the relevant man during the so-called period of conception – cf. Article 85 of the Code), which can be embarrassing for a woman and interfere with her privacy. Nevertheless, this argument is not entirely decisive as regards the appropriateness of the reviewed solution. In cases involving establishment of paternity, the protection of privacy should yield to the child's best interests concerning a correct establishment of paternity (cf. point 1 above), as well as the right of a child and a father to protection of family life (Article 47 of the Constitution) and the principle of equal treatment of the rights of both parents, which is an implication of the equal treatment of women and men (Article 33 of the Constitution).
6. The notion of a “case” in Article 45(1) of the Constitution (right to court) implies in particular the right of a father to initiate proceedings with regard to establishing civil status rights. This right is also protected by Article 77(2) of the Constitution, since the correct determination of a child's parentage has its basis in the Constitution (cf. point 1 above).
7. The right to family life of an illegitimate child's father is not absolute in nature. Limitations on a man's possibility to establish paternity would be permissible, in particular, in situations where criminal activities were carried out against the child's mother or where the determination of paternity would not lead *in casu* to the creation, between the man and the child, of emotional and personal relations typical for family bonds.
8. Furthermore, it is not *per se* impermissible to introduce limitations on the judicial determination of paternity where exercised by a person who is not the biological father for the purpose of harassing the child and its mother.

Provisions of the Constitution

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 33. 1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.
2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Art. 47. Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

Art. 48. [...] 2. Limitation or withdrawal of parental rights may be effected only in the instances specified by statute and only on the basis of a final court judgment.

Art. 72. 1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense.

Art. 77. [...] 2. Statutes shall not bar the recourse by any person to the courts in pursuit of claims alleging infringement of freedoms or rights.