

RECOGNITION OF PATERNITY OF CHILDREN BORN OUT OF WEDLOCK IN GERMANIC LAW

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When we ask the question who is the father of a child, there is a reply which is very well-known even if it is not very satisfying : pater semper incertus. In order to do away with this uncertainty, there are two possibilities : either you establish the genetic filiation by scientific means, or you believe the statement of a man who acknowledges that he is the father of the child.

The establishment of paternity by scientific methods is expensive. These days the risk of having to pay costs will be taken only by potential fathers who are certain that there is another man besides themselves who might be considered to be the father of the child. However, the fear of unnecessary expenditure seems to be less important than the changes which have come about in society. The parents of children have lasting relationships more often than in the past, and the recognition of the child by his or her father in those cases is obvious. This increasing frequency of voluntary recognitions is proved by statistics. The proportion of fathers who, according to the Agencies for the Protection of Young People (Jugendämter), voluntarily recognise their child and, in consequence, against whom no proceedings have to be brought in order to establish the paternity of a child born out of wedlock has increased from about 46% in 1969 to approximately 94% in 1995. Judicial establishment of the paternity of such a child has therefore become an exception. Today voluntary recognition is the rule.

Recognition of paternity has changed not only in the statistics, but also in its contents. In the original text of the BGB [Bürgerliches Gesetzbuch – German Civil Code] the father of a child born out of wedlock was not the man who had recognised the child but the real biological father. This system was described as the system of blood ties (Abstammungssystem) as opposed to the system of recognition (Anerkennungssystem) like the French system, for example. It was only the man who had really conceived the child who could be the father. In order to establish who the real father was, the law set up a presumption, namely that the father was presumed to be the man who was cohabiting with the mother during the period of conception. If the mother had had intercourse with several men during that period, the presumption fell. The presumed father had at his disposal in those cases what was known as the exceptio plurium.

Under this system, recognition of paternity played but a secondary role. It was not needed to establish parentage, its effect being merely to deprive its author of the possibility of relying on the exceptio plurium.

Under the original BGB rules, children born out of wedlock had no rights vis-à-vis their fathers, apart from a right to obtain maintenance. By virtue of the fiction contained in Article 1589 of the BGB, they were considered as not being bound by any parental tie to their father. If it was certain that the man in question had had intercourse with the mother during the period of conception, paternity was presumed. If he could not challenge this presumption, he was ordered to pay maintenance and was therefore described as the « paying » father (« Zahlvater »). The question

whether he was really the father of the child remained open. Establishment of paternity did not have effect erga omnes but only inter partes.

In order to establish a « paying » paternity, there was no obstacle ; even for children born as the result of adultery or incest, it was possible to look for the « paying » father.

That was the legal situation in Germany until the entry into force of the Act of 19 August 1969 on parentage of children born out of wedlock. Since that date we have the following solutions at our disposal : the paternal filiation of a child whose parents are not married is established either on the basis of recognition or on the basis of a court decision which will have effects for everyone. The Act of 16 December 1997 reforming the law on parentage (Kindschaftsrechtsreformgesetz), which has been in force since 1 July 1998, has not changed this principle. New Article 1592 BGB reads : « The father of the child is firstly the man who was married to the mother at the time of birth, secondly the man who has recognised his paternity, or thirdly the man whose paternity has been established by a court (on the conditions specified in Article 1600 d BGB) ».

This means that the linking of a child born out of wedlock to his father can be effected by two means only, either recognition, which is the rule (as we have already said), or establishment by a court, which is the exception. There is no third possibility, and enjoyment of a generally recognised status (« possession d'état ») has no legal effect under German law.

Thus, the nature of recognition has changed. Henceforth recognition makes it certain that its author is the father in legal terms and that the child is his. Recognition does not modify but only, as legal writers put it, confirms the status of the child. His or her status will be materialised but will not change. Recognition has a declarative and not a constitutive effect.

The legal nature of a recognition is that of a unilateral act which must be accepted. It takes effect because its results are desired. In other words, recognition produces effects even if its author is not really the father of a child. Even a man who deliberately makes a false recognition becomes the father of the child.

Any child can be the subject of a recognition, even one who was conceived as a result of adultery or incest, provided only that he or she does not already have a father. If a child is born during marriage, it is first of all the mother's husband who is the father. If another man wishes to recognise the child, the paternity of the husband must first be challenged. This challenge will take the form of proceedings to challenge paternity. And it is only when it is established by a definitive judgment in such proceedings that the mother's husband is not the father of the child that a third party can recognise his paternity.

There is only one exception to this rule. If the child is born whilst divorce proceedings are in progress and a third party recognises his paternity within a maximum of one year from the final divorce judgment, that third party is the father. In this particular case, therefore, the paternity of the mother's husband does not need to be challenged before the real father can recognise the child (Article 1599 para. 2 BGB).

If the child is born only after the mother's divorce is pronounced, the ex-husband will in any case not be considered as the father, even if the child was conceived before the divorce was pronounced. Conception during

marriage leads to the mother's husband being considered to be the father of the child only when the marriage is dissolved as a result of the death of one of the spouses (Article 1593 BGB).

As long as the mother's husband is considered to be the father of the child, the real father does not have the possibility of having his paternity established. The same is true when another man has already made a valid declaration of recognition of the child. The only persons who can challenge the paternity are the husband or the author of the recognition, whose paternity exists, the mother and the child (Article 1600 BGB). If an existing paternal filiation has not been challenged, the paternity of another man cannot be established.

Recognition of paternity has to comply with certain formalities. The law provides for an authentic form (Article 1597 para. 1 BGB), the persons entitled to receive this instrument being, in addition to notaries, the civil status registrars (Article 29 a para. 1 PStG [Personenstandsgesetz – Civil Status Act]) and the Agencies for the Protection of Young People (Jugendämter, Article 59 para. 1 n° 1 SGB VIII).

The consent of the mother is an additional condition for the recognition of paternity. The Act of 16 December 1997 reforming the law on parentage (Kindschaftsrechtsreformgesetz) introduced a change on this point. Until the entry into force of the new Act on 1 July 1998, it was the child who had to give his or her consent to recognition. The child was not represented by his mother but by the Agency for the Protection of Young People in its capacity as ex officio guardian. The objective was to avoid manifestly false recognitions or circumvention of the rules of adoption.

Since 1 July 1998, it is no longer necessary for the child to consent to the recognition ; however, the mother's consent is required, unless the child is no longer under his or her parents' guardianship, for example because he or she is an adult (Article 1595 BGB). On the one hand, to require the consent of the mother seems reasonable because it is she who knows best who is the father of the child. On the other hand, some people fear that the child's interest in recognition by the real father will not be sufficiently taken into consideration if his consent is dispensed with. On this point one can reply that, until now, the Agencies for the Protection of Young People have had few possibilities of preventing false recognitions. Thus the problem of circumvention of the rules on adoption still exists. A measure of protection is to be found only in the Act on adoption agencies (Adoptionsvermittlungsgesetz) which prohibits any intermediary operation whose goal would be for a man to recognise a child without actually being the father. This concerns above all cases where help is given to a man to recognise a child abroad, for example in South America, in breach of the adoption rules.

If the mother refuses to give her consent, nothing can replace it. However, she cannot object to the father's trying to have his paternity established by a court. The same applies when consent has been refused by a child who has attained his or her majority.

Consent has to comply with the same formalities as recognition (Article 1597 para. 1 BGB). As long as consent has not been given, there will be a waiting period. There will have been a recognition, but it will not yet produce any effects. If the author wishes to bring the waiting period to an end, he can withdraw the recognition after one year has elapsed (Article 1597 para. 3 BGB). The recognition will thus no longer be automatically null and void if consent is not given within a certain time-limit, as was the case until the entry into force of the Act reforming the law on parentage (Kindschaftsrechtsreformgesetz), but the author of the recognition will have the possibility of withdrawing it.

As regards the validity of a recognition, a distinction must be drawn between two types of situation : firstly, it can be claimed that the conditions laid down by law for the validity of a recognition have not been satisfied ; secondly, it can be claimed that the recognition is false and that its author is not the real father.

A claim that a condition of validity has not been satisfied can be made by any person who has an interest in doing so. Examples would be a case with a foreign element when it transpires that one of the conditions of validity under the applicable foreign law has not been fulfilled, or a case where a child has been recognised when paternity on the part of another man still existed. However, in these cases the law provides that these grounds of nullity may cease to apply : if five years have elapsed since its inscription in a German civil status register, the recognition will be valid even if the conditions prescribed by law have not been satisfied (Article 1598 para. 2 BGB).

If the recognition is valid but false, paternity can be challenged. Those who can institute proceedings for this purpose are, as we have already said, the father whose paternity exists by operation of law, the mother and the child. The time-limit is two years, with time starting to run from the moment when the person who can institute proceedings became aware of facts which raise doubts about paternity (Article 1600 b para. 1 of the BGB), but not before the birth of the child. For the child, time will not start to run before his coming of age nor before the moment when he becomes aware of facts that raise doubts about paternity (Article 1600 b para. 3 BGB).

In proceedings to contest a recognition, there is a presumption that its author is the father. The person challenging the recognition must adduce evidence that this is not really the case. Today such evidence nearly always takes the form of the establishment of the biological truth by scientific means.

If one wished to describe the current German law, one could say the following. We continue to be attached to the principle of blood ties, but recognition has become very important. The objective of the legal rules has always been to seek the real father. Of course, one cannot prevent false recognitions. Whilst they are not null and void, they do not bind the parties irrevocably. They can be challenged. The biological truth prevails over the parties' desires.