JUDGMENT NO. 133 YEAR 2021

In this case, the Court heard a referral order from the Court of Trento questioning the constitutionality of Article 263(3) of the Civil Code in light of Article 3 of the Constitution insofar as it provides that except in cases of impotence the 1-year time limit within which a person recognised as the father of a child can challenge paternity on the basis that it does not reflect the biological truth starts to run from when paternity was formally recognised rather than when he discovered that he was not in actual fact the biological father. Doubts as to constitutionality were also raised in light of Article 117 of the Constitution, in relation to Article 8 ECHR, with regard to the absolute 5-year time limit for challenging recognition of paternity running from the date that paternity was recorded on the birth certificate.

The Court held the first question concerning the 1-year time limit to be well founded. In particular, it held that the law unreasonably discriminates between a man who is able to prove that he is impotent and a man who, whilst not being impotent, discovers that he is not the biological father, in both instances more than one year after paternity was formally recognised. Unlike the former, the latter is unable to bring an action in such circumstances.

The Court also held that the challenged provision was unreasonable in making it more difficult for an unmarried father to avoid losing the right to challenge his recognition of paternity upon expiry of the 1-year period compared to the right granted to a married father under Article 244 of the Civil Code as regards the 1-year period for bringing an action to disavow paternity.

On the other hand, the Court held the second question concerning the 5-year time limit to be unfounded. The Court held that the passage of such a long period of time establishes a family bond. Accordingly, the fact of affording priority to the interest in stability of the established bond over the interest of determining the biological truth strikes a non-disproportionate balance between the competing interests. That said, the interest in determining the biological truth is not entirely ruled out after five years because at any time the child may bring an action challenging recognition of paternity given that there is no statute of limitations in that case.

[omitted]

THE CONSTITUTIONAL COURT

[omitted]

gives the following

JUDGMENT

in the proceedings concerning the constitutionality of Article 263(3) of the Civil Code, as amended by Article 28(1) of Legislative Decree No. 154 of 28 December 2013 (Revision of the provisions in force concerning filiation, pursuant to Article 2 of Law No. 219 of 2012), initiated by the Ordinary Court of Trento in the proceedings between B. Z., in his own right and in his capacity as the person exercising parental authority over M. Z., and R. C., with referral order of 30 June 2020, registered as No. 156 in the Register of Referral Orders 2020 and published in the Official Journal of the Republic No. 46, first special series 2020.

After hearing the Judge-Rapporteur Emanuela Navarretta in chambers on 12 May 2021;

after deliberations in chambers on 12 May 2021.

Conclusions on points of fact

[omitted]

Conclusions on points of law

1.– Within proceedings challenging recognition of paternity on the grounds that it did not reflect the biological truth, the Ordinary Court of Trento has raised a question concerning the constitutionality of Article 263(3) of the Civil Code, as amended by Article 28(1) of Legislative Decree No. 154 of 28 December 2013 (Revision of the provisions in force on filiation, pursuant to Article 2 of Law No. 219 of 2012), with reference to Articles 3, 76 and 117(1) of the Constitution, the latter in relation to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law No. 848 of 4 August 1955.

Article 263(3) of the Civil Code provides, in particular, that "[a] challenge by the person recognised as the father must be brought within a period of one year, running from the day on which the recognition is recorded on the birth certificate. If the person recognised as the father proves that he was unaware of his own impotence at the time of conception, the limitation period shall run from the day on which he became aware of it. By that same deadline, the mother who made the recognition shall be entitled to prove that she was unaware of the presumed father's impotence. The action may not however be brought more than five years after the recognition was recorded."

It is alleged that the paragraph in question is unconstitutional insofar as it does not allow the time limit for the person recognised as the father to commence proceedings to run from the date that he discovered that he is not the biological father.

The referring court therefore questions the rule which, for the person recognised as the father, provides that the 1-year limitation period starts to run from the mere discovery of impotence at the time of conception or, alternatively, from the recording of the recognition on the birth certificate. It also considers that the action should not be barred by the expiry of a limitation period, such as the 5-year one, which runs irrespective of knowledge of non-paternity.

[omitted]

5.– Turning now to the examination of the merits, at the outset it should be noted that the changes to Article 263 of the Civil Code, introduced by Legislative Decree No. 154 of 2013, have profoundly modified the previous rules as part of a legislative reform that, while maintaining the distinction between status actions, was informed by the objective of "eliminating all discrimination between children [...] in accordance with Article 30 of the Constitution" (Article 2(1) of Law No. 219 of 2012).

The previous system for challenging recognition of paternity on the grounds that it did not reflect the biological truth was entirely based on the value of establishing the truth. It has since been replaced by rules that have considerably strengthened the need for stability of the parent-child relationship and protection of the child.

The change in the legislation was then accompanied by a number of decisions of this Court, which took steps to clarify the necessity for the courts to have room to balance the interests involved. Article 263 of the Civil Code implies "the need to make a rational comparison of the interests at stake, in light of the actual situation of the persons involved", given that "the judgment that the court is required to exercise in these cases [must] take into account variables much more complex than the rigid alternative true or false (Judgment No. 272 of 2017)" (Judgment No. 127 of 2020).

It is against the background, therefore, of an action in which the court does not merely ascertain the biological truth, but balances the interests involved, that the

questions put by the referring court arise. The referring court doubts the constitutionality of the provisions laying down the dual limitation period through which Article 263(3) of the Civil Code filters the possibility for the person recognised as the biological father to rely in court on one of the interests involved in the balancing of interests, namely biological identity.

In particular, the referring court alleges violation of Articles 3, 76 and 117(1) of the Constitution, the latter in relation to Article 8 ECHR, as regards the provision governing the date from which the 1-year limitation period starts to run. It also alleges violation of Article 117(1) of the Constitution, in relation to the interposed provision referred to above, as regards the 5-year limitation period, which starts to run from the date on which the recognition is recorded and, therefore, irrespective of knowledge of non-paternity.

[omitted]

7.– Again in relation to the rules on when the 1-year limitation period for bringing action (Article 263(3), first part, of the Civil Code) starts to run for the person recognised as the biological father, the referring court raises further doubts of constitutionality with reference to Article 3 of the Constitution.

7.1. – The examination of those allegations requires, first of all, a reconstruction of how the challenged rule came into being. That rule provides that time starts to run as regards the 1-year limitation period for the person recognised as the biological father from his discovery of impotence at the time of conception. Such as the only alternative to making it start to run from the recording of the act of recognition.

The rules referred to have originated from a merely partial transfer of the rules laid down by the law for the disavowal of paternity of a child born in wedlock to actions challenging the recognition of paternity of children born out of wedlock. The former in turn have evolved through a process that has not been without hiccups, which it is worth briefly reviewing.

7.1.1.– In the past, with regard to proof of disavowal of paternity, the now-repealed Article 235 of the Civil Code allowed the married father to prove that he was not the biological father only after proving a series of facts capable of rebutting the then presumption of conception (non-cohabitation at that time, or, in the same period of time, impotence or adultery or concealment of pregnancy or birth). At that time this Court declared Article 244 of the Civil Code to be unconstitutional insofar as in regulating the 1-year limitation period for bringing an action it did not provide that it could also start to run from the discovery of adultery (Judgment No. 134 of 1985) and from knowledge of impotence (Judgment No. 170 of 1999). In this connection, this Court had noted "the unreasonable exclusion of the father's right to bring an action for disavowal in the event of discovery of adultery more than a year after the child's birth since the action would be futile" (Judgment No. 134 of 1985). It also contested the reasonableness of a provision denying the right to bring an action as regards a person who "had not been aware of a constituent element of the action itself" (Judgment No. 170 of 1999).

These judgments had realigned the rules on the running of time to make them consistent with the proof then required by Article 235 of the Civil Code. Then, this Court declared that the said provision was unconstitutional insofar as, for the purposes of the action for disavowal, it made the examination of the technical evidence of non-paternity conditional on the prior demonstration of further facts: specifically, proof of adultery. Indeed, with its Judgment No. 266 of 2006, this Court noted that "making access to technical evidence, which alone makes it possible to establish whether or not the child was born of the person considered to be the legitimate father, subject to prior proof of

adultery is, on the one hand, unreasonable, in view of the irrelevance of such proof for the purposes of granting the application on the merits; and, on the other hand, results in a substantial impediment to the exercise of the right of action guaranteed by Article 24 of the Constitution".

With the amendment introduced by Legislative Decree No. 154 of 2013, the rules governing proof of disavowal of paternity were brought into line with Judgment No. 266 of 2006. The legislative amendment eliminated the admissibility filter and repealed Article 235 of the Civil Code, which was replaced by the simple provision of Article 243-*bis*(2) of the Civil Code, according to which "the person bringing the action shall be entitled to prove that there is no child-parent relationship between the child and the presumed father". However, the new law governing proof did not affect the rules on the 1-year limitation period for bringing an action, which was adjusted solely to comply with what had been held in Judgments Nos. 170 of 1999 and 134 of 1985. Article 244 of the Civil Code provides that the 1-year limitation period starts to run for the father from the time of the birth of the child (or if not present at the time from the facts envisaged in Article 244(3) of the Civil Code). Alternatively, it runs from proof of knowledge of adultery or impotence at the time of conception. In essence, the previous reasons, which constituted the filter of admissibility, continue to have to be proven, if only to prevent the action from being time-barred.

7.1.2.– Turning now to the rules governing a challenge to the recognition of paternity of the child, it is clear that Article 263(3) of the Civil Code has taken as its model the rules laid down by Article 244 of the Civil Code. Accordingly, it has limited itself to considering only the discovery of impotence at the time of conception as the *dies a quo* alternative to the date on which the recognition is recorded.

In the light of that provision, the referring court questions the rule for not providing that the 1-year limitation period is to run from the time when the non-paternity is known, in all cases, irrespective of the cause on which it depends, raising a twofold doubt as to constitutionality, with reference to Article 3 of the Constitution.

On the one hand, the referring court notes the unreasonableness of the exclusive reference to the discovery of impotence, given that the father may well be unaware of (and have no reason to suspect) non-paternity, even in cases other than that mentioned. That complaint carries with it the doubt of an unreasonable difference in treatment between someone who can prove his impotence in order to avoid the action becoming time-barred and someone who does not suffer from that condition.

On the other hand, the referring court challenges the unreasonable difference in treatment compared with the rules on disavowal of paternity, which cover, in addition to the discovery of impotence, a wider range of facts, the demonstration of which triggers the date that the 1-year limitation period starts to run from.

7.2.– The questions are well founded.

7.2.1. – In the first respect, Article 263 of the Civil Code regulates any case of challenge on the grounds that the applicant is not in actual fact the biological father of the child. This provision covers both cases of recognition made in the knowledge of non-paternity (about which see Judgments Nos. 127 of 2020 and 272 of 2017) and cases in which the consent to recognition is based on the erroneous assumption of a biological link.

However, it is not unreasonable for the 1-year limitation period to run from the recording of recognition of paternity in the case of a person who does so in the knowledge that he is not the biological father. By contrast, it is clearly unreasonable to provide that

the limitation period starts to run from the recording of the recognition of paternity in the case of a person who is unaware that he is not the biological father, confining solely to cases of impotency the possibility of having the limitation period begin to run from the date of the discovery of non-paternity. The result is an unreasonable disparity in treatment between persons recognising paternity who can prove impotence and those recognising paternity who do not suffer from that condition but become aware that they are not in actual fact the biological father when the 1-year limitation period running from the date on which the recognition was recorded has expired.

The challenged provisions are thus contrary to what has been stated by this Court, which has held that it is unreasonable to allow the 1-year limitation period for bringing an action to challenge the parent-child relationship where the father was unaware of the facts to be proved (Judgments Nos. 170 of 1999 and 134 of 1985). When those judgments were handed down, the burden of proof that applied in actions for disavowal of paternity concerned facts such as adultery or impotence at the time of conception. However, the sole and exclusive fact to be proved in challenging recognition pursuant to Article 263(1) of the Civil Code is – and always had been even before the 2013 reform – mere biological non-paternity. It is, therefore, from the discovery of non-paternity that the 1-year limitation period must start to run for the person recognised as the biological father in order to avoid the unreasonableness of denying a right of recourse to someone who "had not been aware of a constituent element of the action itself" (Judgment No. 170 of 1999).

7.3.– The above shows that the challenged provision also entails an unreasonable disparity in treatment when comparing the rules laid down for the unmarried father who intends to rely on the biological truth by challenging recognition of paternity and those laid down for the married father who acts to disavow paternity.

The unmarried father can only prove impotence so as to make the 1-year limitation period run from a different starting point than the date on which the recognition is recorded. The married father can, however, also rely on other proof, including that of adultery, to circumvent the starting point, which otherwise runs from the birth.

The question of the constitutionality of Article 263(3) of the Civil Code is well founded insofar as it does not provide that the 1-year limitation period for the person recognised as the biological father starts to run from the mere discovery of non-paternity, which in itself encompasses any reason for it. This is also true, in the light of the above illustrated disparity in treatment, which ends up making a child-parent relationship arising out of wedlock more stable than that of a child conceived or born during marriage.

In this way, the unmarried father is assured rules on the 1-year limitation period for bringing proceedings that are similar in scope to those applicable to the married father, even though, in order to escape the expiry of the limitation period, he is required to prove individual reasons for suspecting or being sure of non-paternity, as set out in Article 244 (2) and (3) of the Civil Code.

Moreover, it is certainly not constitutionally binding to reproduce precisely in the rules governing a challenge to recognition of paternity the individual reasons laid down in Article 244 of the Civil Code for disavowal of paternity.

On the one hand, with regard to the latter action, the legislator decided to maintain, if only to prevent time-barring of the action, a burden of proof that with regard to the proof required for the disavowal of paternity Judgment No. 266 of 2006 had held to be unconstitutional. It is not by chance that the 2013 reform provided that the proof for an action for disavowal of paternity should be the mere demonstration of non-paternity (Article 243-*bis* of the Civil Code).

On the other hand, the maintenance of the reference to facts, which used to operate as a filter for the admissibility of the action, linked to the previous presumption of conception, reveals a logic that is completely alien to the challenge to recognition of paternity.

It seems decisive that the unreasonableness inherent in Article 263(3) of the Civil Code should be overcome, for the person recognised as the biological father, by coordinating the rules governing the running of time for the action and what has to be proved, which in actions challenging recognition of paternity is merely the demonstration of non-biological paternity.

7.4.– In conclusion, Article 263(3) of the Civil Code must be declared unconstitutional on the ground of conflict with Article 3 of the Constitution, insofar as it does not provide that for the recognised father the 1-year limitation period for bringing an action for challenging recognition of paternity runs from the day on which he became aware that he is not in actual fact the biological father.

The further question of constitutionality, raised with regard to Article 117(1) of the Constitution, in relation to the interposed rule in Article 8 ECHR, is absorbed by the above.

8.– On the other hand, the conflict with Article 117(1) of the Constitution, again in relation to the interposed rule in Article 8 ECHR, must be examined in relation to the 5-year limitation period in Article 263(3) of the Civil Code.

In the regulation of that period, time starts to run, hence barring the action, irrespective of whether the applicant was aware of his possible non-paternity. This would seem to evoke the established case-law of the ECtHR that, in fact, has censured certain mechanisms preventing actions to challenge the parent-child relationship where the party with standing is not responsible for inaction.

8.1.– The question is not well founded.

It is true that, in interpreting the right to respect for personal and family life, the ECtHR has held that rules providing that limitation periods for challenging a parent-child relationship start to run from the moment of the establishment of the relationship "rather than from the moment the applicant became aware that he might not be the father of the child" do not strike a proportionate balance between the relevant interests. This is what emerges from several precedents of the ECtHR (*Paulìk v. Slovakia* judgment of 10 January 2017 and *Shofman v. Russia* judgment of 24 February 2006), including the recent case *Doktorov v. Bulgaria* (judgment of 10 September 2018) cited by the referring court. In particular, with regard to the Bulgarian legislation at issue, the Court disputed the rigidity of the provisions that did not allow one to take into account individual circumstances of persons who, like the applicant, saw their action time-barred for reasons not attributable to them.

However, the above interpretation is inextricably linked to the legal systems involved in the cases brought before the ECtHR, which refer to periods (six months or one year) that are much shorter than the 5-year period provided for in the last part of Article 263(3) of the Civil Code.

Such a long lapse of time (five years from recognition) entrenches the family bond and shifts the axiological weight, in the balance struck by the rule, to the consolidation of the parent-child relationship in such a way as to justify the prevalence of that interest being resolved automatically by the legislation.

No allegation of non-proportionality can therefore be levelled – also in the coordination between the interpretation of Article 8 ECHR offered by the ECtHR and the

framework of constitutional principles – against the choice made by the legislator. Parliament, within its margin of appreciation, has decided to sacrifice the interest of the person recognised as the biological father to assert in court the biological identity in favour of the interest of the parent-child relationship consolidated after five years from when it first arose.

Lastly, it should be noted that the interest in asserting the biological truth is not entirely excluded from the proceedings since it may be asserted by the child for whom an action challenging recognition of paternity is not subject to any statute of limitations.

ON THESE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 263(3) of the Civil Code, as amended by Article 28(1) of Legislative Decree No. 154 of 28 December 2013 (Revision of the provisions in force concerning filiation, pursuant to Article 2 of Law No. 219 of 2012), is unconstitutional insofar as it does not provide that, for the person recognised as the biological father, the 1-year limitation period for bringing an action to challenge paternity starts to run from the day on which he discovered that he is not in actual fact the biological father;

declares unfounded the question of the constitutionality of Article 263(3) of the Civil Code, as amended by Article 28(1) of Legislative Decree No. 154 of 2013, insofar as it does not provide that, for the person recognised as the biological father, the 1-year limitation period for bringing an action to challenge paternity starts to run from the day on which he discovered that he is not in actual fact the biological father, raised with reference to Article 76 of the Constitution by the Ordinary Court of Trento in the referral order mentioned in the headnote;

declares unfounded the question of the constitutionality of Article 263(3) of the Civil Code, as amended by Article 28(1) of Legislative Decree No. 154 of 28 December 2013, insofar as it provides that "the action may not however be brought more than five years after the date on which recognition is recorded", raised with reference to Article 117(1) of the Constitution, in relation to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome on 4 November 1950, ratified and implemented by Law No. 848 of 4 August 1955, by the Ordinary Court of Trento in the referral order mentioned in the headnote.

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 12 May 2021.

Signed by: Giancarlo CORAGGIO, President
Emanuela Navarretta, Author of the Judgment