

# Supreme Court's DECISION

delivered in Stockholm on 12 December 2023

Case no.

Ö 93-23

## **PARTIES**

### **Appellant**

1. PL

2. SL

Counsel for 1 and 2: Attorney AK and lawyer MN

### **Respondent**

CS

Counsel: Attorney ASK and lawyer DB

## **THE MATTER**

Forensic DNA profiling of a deceased person to establish paternity

## **RULING APPEALED**

Decision of the Svea Court of Appeal of 22/12/2022 in case T 4914-22

## **THE SUPREME COURT'S RULING**

The Supreme Court rejects the appeal.

The Supreme Court's stay of execution of 4 January 2023 shall no longer apply.

It is for the Court of Appeal, during further proceedings there, to decide in the question of litigation costs in the Supreme Court.

## **CLAIMS IN THE SUPREME COURT**

PL and SL have claimed that the Supreme Court shall modify the Court of Appeal's decision and reject CS's request for forensic DNA profiling of a tissue sample from StL's remains.

CS has opposed modification of the Court of Appeal's decision.

The parties have requested payment of their costs of litigation.

## **REASONS FOR THE RULING**

### **Background**

1. CS was born in 1962, the legitimate child of GH and FS. GH and FS are deceased. CS claims that it is StL, and not FS, who is his biological father. StL died in 1996, and was survived by his children, PL and SL.
2. CS requested the District Court to declare that FS is not his father, and to establish that StL is his father instead. In support of his claim, CS invoked, among other things, diary entries left by his mother, a DNA genealogy from the company MyHeritage and interviews with genetic genealogist Peter Sjölund.

3. The District Court considered the evidence insufficient to support the conclusion that StL was CS's father and dismissed the claim.

4. CS has appealed the District Court's judgment, requesting the Court of Appeal to order a forensic DNA profile of tissue from StL. PL and SL have opposed the request. The Court of Appeal granted CS's request and ordered a forensic DNA profile using human biological material from the deceased StL.

5. The Supreme Court has decided that execution of the Court of Appeal's decision shall be stayed.

#### **At issue in the Supreme Court**

6. The question is when a forensic DNA profile of human biological material from a deceased person may be ordered to establish paternity.

#### **Act on forensic DNA profiling to establish paternity**

7. In cases regarding the establishment of the fact that a certain man, who, by virtue of marriage, is to be considered the father of a child, is not the father, or in cases regarding the establishment of paternity, the court may, at the request of one of the parties or when otherwise necessary, order a forensic DNA profile (see Section 2, first paragraph, of the Act on forensic DNA profiling to establish paternity, *Lagen, 1958:642, om rättsgenetisk undersökning vid utredning av faderskap*).

8. Where an action for the establishment of paternity concerns a deceased man, the court may, at the request of one of the parties or when otherwise necessary, order a forensic DNA profile using human biological material from the deceased. Such an order may be made only if there is reason to believe that the man has had sexual intercourse with the mother during the period of conception and if the reasons for this measure outweigh the intrusion or

detriment entailed by the measure in relation to the peace which should be accorded to the deceased as well as any other competing interest. (See Section 2, second paragraph.)

9. The court may only order a forensic DNA profile of tissue from a deceased person in the context of establishing paternity. The fact that this does not apply to actions seeking the annulment of paternity has been justified with reference to an established family's interest in stability and security, which militates against such an option (see Govt. bill 2020/21:176 p. 64).

### **Reason to believe that sexual intercourse has taken place**

10. The court's decision to order a forensic DNA profile thus presupposes, in the case of a deceased man, that there is reason to believe that he had sexual intercourse with the child's mother during the period of conception.

11. Reason to believe constitutes a low evidentiary requirement. It is generally sufficient for the party to present some evidence of factual circumstances indicating that sexual intercourse took place during the relevant period of time. Evidence which indirectly supports the fulfilment of the intercourse requirement may also be of importance in the court's evaluation of the evidence (cf., e.g., "Restaurang Silversand" NJA 1998 p. 184).

### **Weighing competing interests**

#### *Introduction*

12. Ordering a forensic DNA profile of a deceased person's human biological matter requires, secondly, that the reasons for this measure outweigh the intrusion or detriment entailed by the measure in relation to the peace which should be accorded to the deceased as well as any other

competing interest. The measure must therefore be shown to be proportionate upon consideration of the interests involved.

*Interest in establishing paternity*

13. The provision of the second paragraph of Section 2 was introduced by a legislative amendment in 2022. Technological advancements have made it possible for any human tissue to be used in DNA analysis. This new provision brings the legislation in line with technological developments and clarifies that forensic DNA profiling may also be carried out using tissue from a deceased person. The rationale is to strengthen the right of individuals to learn about their heritage and ensure the interests of individuals in establishing paternity. (cf. *ibid.* Govt. bill p. 57 et seq. and 61 as well as Chapters 2 and 3 of the Children and Parents Code)

14. This amendment is in line with precedent developed by the European Court of Human Rights based on the right to respect for private and family life under Article 8 of the European Convention on Human Rights (ECHR). States must provide effective means to investigate and establish paternity, even if the presumptive father does not participate in such an investigation or is deceased. Increasing emphasis has been placed on the right of children to their identity and heritage, and any restrictions imposed by domestic legislation must be proportionate. This protected interest of children is typically not considered to diminish with age and can thus encompass children who are now grown. (See, e.g., *Jäggi v. Switzerland*, no. 58757/00, §§ 37-40, ECHR 2006-X, *Pascaud v. France*, no. 19535/08, 16 June 2011 and *Boljević v. Serbia*, no. 47443/14, 16 June 2020. See also Hans Danelius et al., *Mänskliga rättigheter i europeisk praxis*, 6th ed. 2023 pp. 65 and 486 et seq.)

15. For children under the age of 18, the amendment also accords with the right to family and identity under the Convention on the Rights of the Child, in particular Articles 7 and 8.

16. Thus, when weighing other interests, an individual's interest in obtaining reliable facts about his identity and heritage must be granted strong legal protection, and the State has a far-reaching responsibility to ensure that the individual can obtain the necessary information. The applicant's interest thus constitutes an overriding reason for ordering a forensic DNA profile.

*Weighed against other interests*

17. The applicant's interest in learning about his heritage must be weighed against the intrusion or other detriment entailed by the measure in relation to the peace which should be accorded to the deceased as well as any other competing interest. The mere fact that relatives oppose a forensic DNA profile is not in itself sufficient to reject the applicant's request. Nor is it sufficient to refer solely to the fact that the man in question, without further explanation, indicated a reluctance to being subjected to such measures after his decease. Competing interests of a more specific nature must be shown. (cf. Govt. bill *ibid.* p. 92 and, e.g., *Jäggi v. Switzerland*, §§ 41-43, *Estate of Kresten Filtenborg Mortensen v. Denmark* (dec.), no. 1338/03, ECHR 2006-V and *Boljević v. Serbia*.)

18. Ethical, philosophical and religious aspects relating to the deceased and his or her relatives may give rise to such competing interests (cf. Govt. bill *ibid.* p. 92 and *Jäggi v. Switzerland*, § 41). While such aspects must be considered, it is important that the treatment of individual cases does not differ to a greater extent than is truly justified. The interest in knowing one's heritage should, as a general rule, be treated as equally as possible and carry the same

weight whether or not the presumed father is alive when the paternity issue is examined.

19. When weighing such interests, the measure to be applied in the individual case is often relevant. It follows from the principle of proportionality that excessively intrusive measures are not to be used. In this context, it may be noted that, upon reforming the 1958 Act, legislators considered granting the court the authority to order forensic DNA profiling for the next of kin of the deceased. This possibility was rejected, partly because forcing relatives to submit to a biopsy was considered more intrusive than examining tissue samples from the deceased. (See SOU 2018:68 p. 234 et seq., and *ibid.* Govt. bill p. 63)

20. When considering whether particular human biological matter of the deceased man, obtained, e.g., in a former residence, is to be subject to forensic DNA profiling, the interests of the child should prevail. The same should apply in cases where the deceased is yet unburied. In such situations, conducting a biopsy on a person's remains pursuant to DNA analysis often involves a relatively limited physical intrusion. Only a small amount of tissue is needed for forensic DNA profiling, and the requisite biopsy seldom has any effects on the body. (See Section 2, first paragraph of the Act on forensic DNA profiling to establish paternity and SOU 2018:68, p. 236)

21. The situation is different when the deceased man has been buried. If tissue samples are not otherwise available, the deceased's grave must be opened. In such cases, the interest of respect for the deceased, which includes being permitted to rest in peace, and the interests of relatives are more clearly brought to the fore. In such a situation, the facts in the case must clearly show that no other ways of obtaining information which can be used to determine paternity exist before the child's interests can prevail. If this is shown, only in

exceptional cases, and when supported by particularly strong reasons, can such competing interests rather prevail.

### **The assessment in this case**

#### *Reason to believe that sexual intercourse has taken place*

22. The first issue is whether there is any reason to believe that StL had sexual intercourse with CS's mother during the period of conception. As stated above, this evidentiary requirement is quite low.

23. In support of his claim that sexual intercourse did take place, CS has invoked, among other things, diary entries left by his mother, a DNA genealogy from the company MyHeritage and interviews with genetic genealogist Peter Sjölund.

24. The DNA genealogy, together with information provided by Peter Sjölund in interviews, provides strong support that StL is CS's father (cf. "Restaurang Silversand").

25. That being established, there is reason to believe that StL had sexual intercourse with CS's mother during the period of conception.

#### *Weighing of interests*

26. The issue is thus whether the reasons for carrying out forensic DNA profiling using tissue samples from StL outweigh the intrusion or detriment entailed by the measure in relation to the peace which should be accorded to the deceased as well as any other competing interest.

27. According to the appellants, no human biological matter of StL has been preserved. Furthermore, it appears that neither PL nor SL is willing to



assist in the forensic DNA profiling by providing their own samples for DNA analysis (cf. para. 19).

28. Thus, the only way to obtain information which can be used to establish the paternity of CS is to conduct a forensic DNA profile of StL's remains, entailing that his grave must be opened.

29. The appellants have objected to the opening of the grave, referring to the interest of permitting the deceased to rest in peace and the privacy of the deceased as well as their own strong ethical and emotional reasons for leaving StL's grave unopened. They have also questioned whether CS's request might be grounded in other motives beyond his interest in learning about his heritage.

30. This situation does not constitute an exceptional case in which the competing interests outweigh CS's interest in learning about his identity and heritage.

31. The appeal is therefore denied.

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Justices of the Supreme Court Gudmund Toijer, Agneta Bäcklund, Stefan Reimer, Christine Lager and Margareta Brattström (reporting Justice) participated in the ruling  
Judge referee: Mathilda Rydstern