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Inheritance and Family Law as Mirror of Changing Concepts of Family in German Society. The Right of the Illegitimate Child to Inherit from his Biological Parent

Introduction

The regulations concerning family and marriage in the beginning of the 19th century characterize the whole time period between 1900 until the 1960s. Their understanding of the terms marriage and family combines the concept of duty with the ideas of romanticism (namely that marriage and family are based on the love of the family members). Until the 1960s the position of the individual in society is defined by his belonging to a family. Illegitimate children who do not belong to an intact family carry a stigma that symbolizes the lack of affiliation of the illegitimate child in society. As the definition of the term family as defined around 1900 was not seriously questioned until the 1960s the family law of the Bürgerliche Gesetzbuch remained in great parts almost unaltered and in appliance until the Seventies. But then the new concepts of self-realization and self-fulfillment changed society and subsequently also the law. When it came to marriage the stress was now – similar to Romanticism – on the mutual love and affection of the family-members. In the perspective of the individual there was now much less room for regulations imposed on them by the state. These tendencies of deinstitutionalization and individualization concerning the marriage affects also the perception of family and the position of the illegitimate child: Was family formerly perceived as a close formation of people now family was and still is perceived as a cluster of bilateral relationships between persons connected by affection and biological kinship. This leads to the question: what legal regulations do apply to illegitimate children, have they changed accordingly to the changes in society.[1]

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[1] WAGENITZ, Thomas – BARTH, Thomas: Die Änderung der Familie als Aufgabe für den Gesetzgeber. *Fam*RZ (1996) 577., 578-581.

The change in society and the legal regulations concerning illegitimate children

The first point I want to address is the different legal situation in DDR and BRD before 1989.

One question thereby is easy to answer: The mother and her illegitimate child are always related to each other by law with all the consequences that family and inheritance law provide.

A different matter is the relation of the illegitimate child to his or her biological father, especially when it comes to inheritance.

The illegitimate child can only be heir to the father and his relations when the following requirements are met.

First requirement: In all cases it is necessary that the paternity is legally determined by a court or determined through the acknowledgement of the paternity by the father.

Second requirement: Equally difficult it is to determine which rules apply to the case in question. To answer this question one has to distinguish between different periods of time.

a) For successions that have taken place before the 1.7.1970 the law does not acknowledge a relationship between the illegitimate child and his father (§ 1589 Abs. 2 BGB). This legal regulation contradicted the constitutional obligation in Art. 6 Abs. 5 Grundgesetz to treat illegitimate and legitimate children as equals. The legislator therefore enacted the Gesetz über die rechtliche Stellung der nichtehelichen Kinder (NEhelG) with effect from 1.7.1970 which allowed illegitimate children to be heirs to their biological father.

But there was one exception. Art. 12 § 10 NEhelG decrees that all illegitimate children born before the first of July 1949 and therefore before the Grundgesetz with Art. 6 came into effect do not inherit after their biological fathers because for their cases the old regulations should continue.[2]

From the beginning it was questioned if this regulation was conform to the set of values laid down in the constitution. The Bundesverfassungsgericht (Federal Constitutional Court) had to decide this question more than once,[3] but decided in both cases that the Article was consistent with the constitution.

b) In the Deutsche Demokratische Republik (DDR) § 365 Zivilgesetzbuch (ZGB) came into effect on the 1.7.1976 and established the legal equality of the legitimate and illegitimate child when it came to succession without any exceptions.

c) The German reunification made it necessary to change the law to adapt it to the situation that two states with two different regulations of civil law should become one. There were established some transitional regulations that also concerned the rights of the illegitimate child in case of succession. According to those regulations the right to inherit depends for children born before the 1. Juli 1949 in East-Germany on the place of residence of the deceased father: Lived the father in the territory of the former DDR then the illegitimate child inherits like the legitimate child because then the law of East-Germany is applied; but when the father lived in the territory of West-Germany then the law of West-Germany is in force and because of Art. 12 § 10 NEhelG the child does not inherit.

d) Successions between the 1.4.1998 until the 28.5.2009: In 1997 the legislator initiated a general reform of the German family law which resulted in the Erbrechtsgleich-

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[2] WERNER, OLAF: *§ 1924*. In: Von Staudinger, Julius (eds.): BGB – 5. Buch. München, 2017. paragraph 5.

[3] Federal Constitutional Court, ruling of 8.12.1976 (1 BvR 810/70, BVerfGE (44) 1-37), ruling of 3.7.1996 (1 BvR 563/96, juris) and ruling of 18.11.1986 (1 BvR 1365/84, BVerfGE (74) 33-43)

stellungsgesetz dating from 16.12.1997. With this amending law all illegitimate children were considered legally equal in every aspect. Nevertheless, the exception of Art. 12 § 10 NEhelG remained in force as a transitional provision. The legislator justified this with the retroactivity – after that it is forbidden for a regulation to develop a retroactive effect.[4]

Court decisions

Many illegitimate children who were acknowledged by their father but were born before 1.7.1949 were not satisfied with the above described legal regulation and so their cases went to court. In the end the European Court of Human Rights had to decide in two cases, one judgment dating from 28.5.2009 (3545/04)[5] and another dating from 9.2.2017 (29762/10).[6]

a) In the case dating of 2009 the European Court of Human Rights had for the first time to decide if Art. 12 § 10 NEhelG was an offense against Art. 14 (equality) i.V.m. Art. 8 (family life) ECHR.

Therefore the court assessed the case under the following aspects: Art. 14 protects the citizens against any difference in treatment in comparable situations as long as there is no objective or reasonable justification for the difference in treatment. In the sense of Article 14 there can be a justification of unequal treatment when the treatment is based on a legitimate aim and when the instruments and resources used to reach the aim are in an appropriate relation to the aspired goal.[7]

In the opinion of the court the member states of the European Union attribute a high meaning to the question of the equal treatment of legitimate and illegitimate children. This derives from the European Convention dating from 1975 and concerning the legal status of the illegitimate child. Therefore the Bundesrepublik had to present very severe reasons for the unequal treatment of illegitimate children. The Bundesrepublik presented two arguments as where formulated by the Bundesverfassungsgericht (Federal Constitutional Court) in his ruling of 8.12.1976:[8] (1) it was correct to exclude children born before the 1. July 1949 from the succession because of the trust people put in the continuation of the legal exclusion of illegitimate children from the succession after their father and (2) the difficulties to prove the paternity in these circumstances.[9] Therefore the the court deemed that both arguments of the Federal Constitutional Court were no longer in keeping with time. Especially the German reunification had in the eyes of the court created a new situation and therefore also changes in German society. Therefore the court saw no

[4] LIEDER, Jan–BERNEITH, Daniel: Anmerkung zur Entscheidung des BGH vom 12.7.2017 (IV ZB 6/15). *Fam*RZ (2017) 1623.

[5] European Court of Human Rights, ruling of 28.5.2009 (3545/04, *Fam*RZ 2009, 1293-1294)

[6] European Court of Human Rights, ruling of 9.2.2017 (29762/10, *Fam*RZ 2017, 565-567)

[7] European Court of Human Rights, ruling of 28.5.2009 (3545/04, *Fam*RZ 2009, 1293-1294, see paragraph 45ff. and paragraph 69 ff. of the judgement)

[8] Federal Constitutional Court, ruling of 8.12.1976 (1 BvR 810/70, BVerfGE (44) 1-37) and ruling of 18.11.1986 (1 BvR 1365/84, BVerfGE (74) 33-43)

[9] European Court of Human Rights, ruling of 28.5.2009 (3545/04, *Fam*RZ 2009, 1293-1294, see paragraph 73 of the judgement)

justification for keeping Art. 12 § 10 NEhelG in effect. Rather the unequal treatment of children born before 1. July 1949 is an offence against Art. 14 i. V. m. Art. 8 ECHR.[10]

Decisions of the European Court of Human Rights unfold no direct binding effect for German courts. Therefore the courts of lower instances did not feel bound by the aforementioned decision but by the aforementioned decisions of the Bundesverfassungsgericht (Federal Constitutional Court) and therefore considered the legal situation as unchanged.[11] But there was a reaction from the legislator in 2011 – we will come back to this reaction in the conclusion.

b)As the law practice in Germany did not change another judgment of the European Court of Human Rights was sought after in 2017.[12]

In this judgment the court expressed its opinion that the interpretation of the Grundgesetz – in this case Art. 6 – must take the cultural and social changes in society in consideration. The argumentation of the Bundesrepublik relied still mainly on the protection of the trust people were putting into the continued validity of Art. 12 § 10 NEhelG. The European court denied that this trust could actually be still in existence after the European Courts judgments in previous cases, the changed European law and the strongly expressed goal of the European Union to eliminate all unequal treatment concerning illegitimate children. Even if the testator and his family should still firmly trust that the illegitimate child of the testator would not participate in the inheritance, their trust is in the eyes of the European Court of Human Rights not as worthy of protection as the goal to establish the equality of legitimate and illegitimate children. Therefore the court concluded that the continued application of Art. 12 § 10 NEhelG was still an offense against the human rights described in Art. 8 and Art. 14 ECHR.[13]

Conclusion

The reaction of the legislator to the aforementioned judgement of 2009 resulted 2011 in the Zweiten Gesetz zur erbrechtlichen Gleichstellung von nicht-ehelichen Kind which is in effect since 12.4.2011, which changed the NEhelG. The different treatment of legitimate and illegitimate children born before 1.7.1949 was terminated. But initially this termination was only the case for successions when the child had been born before July 1949 and the succession took place after 29.5.2009 – the date of the first ruling of the European Court for Human Rights, because the legislator insisted that only at this point in time the trust of the people in Art. 12 § 10 had ended. For all successions having taken place before 29.5.2009 the old regulation was still the law that was applied. After the judgment of the European Court of Human Rights in the year of 2017 it was not the legislator but the Bundesgerichtshof (Federal Court of Justice) that ended the unequal treatment of illegitimate children once and for all.[14] It did this by enhancing by teleological interpretation

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[10] European Court of Human Rights, ruling of 28.5.2009 (3545/04, *Fam*RZ 2009, 1293-1294, see paragraph 74 and 75 of the judgement)

[11] SCHÄFER, Joachim: Auswirkungen der Entscheidung des EGMR vom 28.05.2009 zur Diskriminierung nichtehelich geborener Kinder. *jurisPR-Fam*R 22 (2010) Anm. 2.

[12] European Court of Human Rights, ruling of 9.2.2017 (29762/10, *Fam*RZ 2017, 565-567)

[13] Ibid, see paragraphs 42-46 of the judgement.

[14] Federal Court of Justice (BGH), ruling of 12. 7.2017 (IV ZB 6/15, *Fam*RZ 2917, 1620-1623, see paragraphs 16ff. of the judgement); For more details see: LIEDER, Jan – BERNEITH, Daniel: Anmerkung zur Entscheidung des BGH vom 12.7.2017 (IV ZB 6/15). *Fam*RZ (2017) 1623.

the scope of application of the law dating from 2011, which could thanks to that new interpretation be now applied to all cases no matter if they dated before or after May 2009. So the combined effort of legislator, national and EU-courts and individuals acting according to changed moral values lead to a legal situation that was no longer an offense against the law of the European Union.

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(Summary)

The essay discusses the change in the codification and legal practice concerning the right of illegitimate children to be treated as heirs of their biological parents. It will describe the development of the legal situation concerning the status of illegitimate children before and after the reunification of Germany before giving an overview over the court rulings of the European Court of Human Rights dating from 28.05.2009 (3545/04) and 09.2.2017 (29762/10), in which the court decided that the legal provisions in united Germany's law had in both aforementioned cases not been compliant with the European Convention on Human Rights. Finally the solution to this problem found by the Federal Court of Justice (Bundesgerichtshof) will be presented.