Max Planck Institute
for Social Anthropology
Department 'Law & Anthropology'

The Role of Social Exclusion in Family Law Cases on the Determination of Biological Parenthood

Question(s) at stake:

In cases where an extramarital affair leads to uncertainty as to the biological parenthood of a child, whether and to what extent the possible consequences of the community's reaction are taken into account when determining whether a DNA test ought to take place.

Outcome of the ruling:

When determining whether a DNA test ought to take place, the best interests of the child have primary importance. Although in the present case the Court recognized the consequences the DNA test may have for the mother and her husband, particularly in relation to the community they are a part of, it was not substantiated with sufficiently concrete arguments that these consequences are so serious as to outweigh the interests of the minor and the man in knowing whether they are related.

Topic(s):

- Personal Status, Family and Inheritance

Keywords:

- Parenthood
- Determination of parenthood
- Biological, gestational, natural parenthood
- Children's rights
- Best interests of the child
- Parental rights
- Visiting rights

Tag(s):

- DNA-test
- Illegitimate child
- Indian community
- Right to know one's origins

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Court of Appeal Amsterdam, Judgement of 14 December 2021, ECLI:NL:GHAMS:2021:3973 (Uitspraak Gerechtshof Amsterdam 14 december 2021, ECLI:NL:GHAMS:2021:3973).

Link to the decision:

https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:GHAMS:2021:3973

ECLI:

ECLI:NL:GHAMS:2021:3973

Date:

14 December 2021

Jurisdiction / Court / Chamber:

Court of Appeal

Remedy / Procedural stage:

Second instance

Previous stages:

District Court Amsterdam 21 April 2021 (unpublished)

Subsequent stages:

- Supreme Court 31 March 2023, ECLI:NL:HR:2023:520

Branches / Areas of law:

Family law

Facts:

The mother and her husband, the applicants in the present case, were married in 2014 in India and have lived in the Netherlands since 2015. The mother gave birth to a child in 2020. Seeing as the mother had an extramarital relationship with another man (hereinafter referred to as: the man/defendant) at the time, she is unsure whether the man or her husband is the biological father of the child.

The man is the defendant in the present case. He has Dutch nationality. The mother, her husband, and the minor have Indian nationality and belong to the Tamil community, a population group in the South Indian state of Tamil Nadu.

The defendant requested a DNA test to determine whether he is the biological father of the child. For each day the mother and husband do not comply, he requests a penalty sum of €500, up to a maximum of €10,000. The District Court granted the request of the defendant, ordering a DNA test to take place. The mother and husband filed an appeal against this judgment at the Court of Appeal Amsterdam.

As for the balancing of interests when determining whether a DNA test ought to take place, the mother and husband argued that the District Court in the first instance erred in placing the defendant’s interests over the interests of the mother. They argue that the defendant can obtain visiting rights on the grounds of Art. 1:377a DCC even if his biological paternity is not established through a DNA test. The only matter at issue in that regard would therefore be whether a close personal relationship exists between the defendant and the minor. Additionally, the mother and her husband argue that no such relationship exists and that the District Court ruled without giving any reasons that there is a close

personal relationship. The mother disputes that she assumed that the defendant is the father of the minor.

Furthermore, the mother and husband argue that the Court did not give sufficient weight to the impact a DNA test will have on the family given their cultural background. Similar to the judgment of the District Court Gelderland of 29 January 2020 (ECLI:NL:RBGEL:2020:631), they argue that conducting a DNA test would potentially have a negative effect on the child's upbringing. Firstly, the defendant imposed himself on the mother and her family and friends, which led to a lot of stress. Secondly, the mother and husband fear the consequences of the reaction of the Tamil community which they are part of. Due to the extramarital affair of the mother with the defendant, the parents of the mother have cast her out. The mother and her husband fear that if the biological paternity of the defendant is established and he consequently has a right of access to the minor, the husband's parents will become aware of the situation and will also cast out the mother. Moreover, it is expected that when the biological paternity of the defendant is established and becomes known to the outside world, the marriage of the mother and her husband will break down. There will be severe pressure from the Tamil community with very serious consequences, seeing as adultery is severely punished within this community and is a ground for divorce. Additionally, the minor will be considered a bastard child within the Indian Tamil community if it turns out that the defendant is the biological father. An illegitimate child born of an extramarital relationship is still subjected to tremendous social and emotional deprivation. Lastly, the mother and her husband argue that a DNA test would be too great an intrusion into the family's privacy because it would severely disrupt the balance within the family in which the minor is being cared for and growing up. Referring to the judgment of the Court of Appeal Arnhem of 20 December 2012, they argue that the right of the minor to know from whom she descends should not be considered in this assessment.

In his defence, the man provides the following arguments. Firstly, he argues that the District Court was correct in considering that a DNA test should be ordered to determine whether or not he is the biological father of the minor. Namely, the

man has indicated that he would withdraw his request to establish a visitation arrangement with the child if he is found not to be the biological father of the minor. As such it is important to establish whether he is the biological father or not.

The man is convinced that he is the father: he paid for the baby clothing; the mother has always called him “daddy”; and on Father’s Day he received a present. Furthermore, according to the man, the District Court correctly put the minor’s best interests first, as it is in her interest to know who her biological father is. Referring to the ruling of the Supreme Court of 18 March 2016 (ECLI:NL:HR:2016:452), it follows from the right to private life, in particular the right to personal identity, that a child has the right to know whom he or she descends from. The man points to the 2016 Dutch Report Child and Parents in the 21st Century by the State Commission on Reassessment of Parenthood and believes that it is in the spirit of this report that this judgment should be made.

The defendant also argues that the woman cannot hide behind her cultural background; it had no influence whatsoever on the mother’s choice to have unprotected sexual intercourse with the man with whom she had an extramarital relationship. She should have known the consequences of her actions, including those within her community. The fact that the marriage between the mother and her husband will possibly break down as soon as a DNA test reveals that the man is the biological father should not be a reason not to order a DNA test.

Additionally, he argues that the idea that the establishment of biological paternity would be burdensome for the minor has not been substantiated. It is not apparent that she will be discriminated against because she was born from an extramarital relationship. The mother and her husband have lived in Europe for a long time and are thus open to other cultures and forms of lifestyles.

To conclude, the defendant believes that the District Court was correct in coming to the conclusion that there was a close personal relationship between him and the minor and that the mother and her husband have not shown this conclusion to be false. Furthermore, he believes that the District Court correctly came to the conclusion that a DNA test ought to take place to determine whether he is the

biological father.

Ruling:

The Appeal Court upheld the decision of the District Court, thereby granting the request by the man to order a DNA test to determine the biological father of the child.

The Court held that, on the grounds of Art. 8 ECHR and Art. 7 of the Convention on the Rights of the Child, a child has the right to know his biological parents. This right is however not an absolute right and may need to give way to the rights and freedoms of others if those rights outweigh it.

The Court ruled, in line with the District Court, that the DNA test is necessary in the interests of the minor. It considered that the man would only request a visitation arrangement pursuant to Art. 1:337a DCC if he proves to be the biological parent. Similar to the right of a child to know his or her biological parents, a person in close connection to a child has the right to access him or her pursuant to Art. 8 ECHR and Art. 1:377a (1) DCC. According to Dutch case law, a “close personal connection” corresponds to “family life” within the meaning of Art. 8 ECHR. A biological relation is one of the factors on the basis of which a close personal connection is deemed to exist. Besides this, other factors must justify the existence of a visitation arrangement. In the present case, the affectionate relationship between the mother and the man, the fact that they had unprotected sexual contact, and the man paying for baby clothing in addition to him having received a gift from the mother on Father’s Day constitute sufficient factors which, together with a biological relation, justify the existence of a visitation arrangement. The intensive contact between the defendant, the mother, and the minor furthermore makes it plausible that the defendant could be the biological father.

The Court took into consideration that a DNA test cannot take place at a later point in time, for example in a number of years when the minor is older, because there is a risk that the mother and her husband will disappear from view, as they have recently moved abroad and it is unclear to the defendant where they

currently live.

In view of all the circumstances of the case, the Court agreed with the District Court that the interest of the minor and the defendant in knowing whether they are related to each other outweighs the other interests at stake, including those of the mother and her husband.

Although the Court understood that a DNA test will be a major intrusion on the mother's and her husband's privacy, they have not substantiated with sufficiently concrete arguments that the consequences for the mother, her husband, and the minor will be so serious as to outweigh the interest of the minor and the man in knowing whether they are related. While the mother argued that she was cast out by her parents, this was refuted by the husband at the appeal hearing and the mother did not present further factual support for her contention. The man acknowledged at the hearing that the husband's parents are wealthy and prominent in the village and that the mother will be gossiped about if it becomes known that she has had an extramarital affair, but this too is not sufficient for a different judgment. The mother and her husband furthermore fear that their marriage will fail under pressure from the Tamil community and that the minor will be treated as a bastard child, with dire consequences. The husband indicated at the hearing that establishing his biological paternity will have much less far-reaching consequences than outlined by the mother and her husband. The Court is of the opinion that in the face of the husband's challenge, the mother and her husband have not concretely proven whether and to what extent their fears are actually justified in their case. The mother and husband have lived and worked in the Netherlands as expats since 2015. At the moment, it is not known where they live and whether there is a Tamil community there which they are part of. The Court therefore upheld the contested decision.

The Supreme Court later confirmed the ruling of the Court of Appeal. It did not explicitly have regard to the possible consequences of the community's reaction in its considerations (ECLI:NL:HR:2023:520).

Main quotations on cultural or religious diversity:

- “Similar to the district court, the court [of appeal] understands that a DNA test will be a major invasion of the mother’s and her husband’s privacy. However, they have not substantiated with sufficiently concrete arguments that the consequences for the mother, her husband, and [the minor] will be so serious as to outweigh the interest of [the minor] and the man in knowing whether they are related. While the mother has claimed that she was cast out by her parents, this was refuted by the husband at the appeal hearing and the mother did not present any further factual support for her claim. The man acknowledged at the hearing that the husband’s parents are wealthy and prominent in the village and that the mother will be gossiped about if it becomes known that she has had an extramarital affair, but this too is not sufficient for a different judgment. The mother and her husband further fear that their marriage will fail under pressure from the Tamil community and that [the minor] will be treated as a bastard child, with dire consequences. The man indicated at the hearing that establishing his biological paternity will have far less far-reaching consequences than outlined by the mother and her husband. The court is of the opinion that in the face of the man’s challenge, the mother and her husband have not concretely shown whether and to what extent their fears are actually justified in their case. In that regard, the court takes into account that they have lived and worked in the Netherlands as expats since 2015 and at present it is not known where they live and whether there is a Tamil community there of which they are a part.” (para. 5.8.)

Main legal texts quoted in the decision:

Domestic law

- Art. 1:200 (1) Dutch Civil Code
- Art. 1:377a (1) Dutch Civil Code

International legal instruments

- Art. 7 Convention on the Rights of the Child

- Art. 8 Convention on the Rights of the Child
- Art. 9 (3) Convention on the Rights of the Child
- Art. 8 European Convention on Human Rights
- Art. 24 (3) EU Charter of Fundamental Rights

Cases cited in the decision:

- District Court Gelderland 29 January 2020, ECLI:NL:RBGEL:2020:631
- Court of Appeal Arnhem-Leeuwarden 6 September 2016, ECLI:NL:GHAMS:2014:5046
- Court of Appeal Arnhem-Leeuwarden 14 January 2021, ECLI:NL:GHARL:2021:320
- Supreme Court 18 March 2016, ECLI:NL:HR:2016:452
- Prosecutor-General of the Supreme Court 24 September 2021, ECLI:NL:PHR:2021:919

Commentary

The Role of Social Exclusion in Family Law Cases on the Determination of Biological Parenthood

Honour-related violence is known in various communities, the spectrum of which includes various types of violence, including threat, assault, abduction, forced marriage, expulsion from the family or community, sexual violence, and honour killing (Reddy 2015: 28–29). Often, sexual behaviour is also regulated by honour. This may include conduct such as adultery, having an illegitimate child, or premarital sex. Behaviour which is not in line with these cultural rules may in turn lead to honour-related violence. Furthermore, besides the individual consequences, honour may appear as a group attribute regulating public conduct. Individual honour is for example usually subsumed into family and religious or caste community honour.

The applicants in the present case both have Indian nationality and belong to the Tamil community, a population group in the South Indian state of Tamil Nadu. It follows from the literature that within this community, adultery is severely

punished and is a ground for divorce. Additionally, illegitimate children are subject to tremendous social and emotional deprivation (Gorringe 2016). Similar cultural beliefs can be seen in a parentage case of the District Court of the Hague (15 December 2017, ECLI:NL:RBDHA:2017:14786). In Syrian culture, being pregnant whilst unmarried was deemed to be a great source of shame for the family, bearing both consequences and risks. In that particular case, the grandmother consequently pretended to be the mother of the child instead of the daughter to prevent the family from finding out.

As illustrated by the previous case, the code of behaviour of such communities may result in various conflicting interests. In the present case, the applicants argue that if the biological fatherhood of the man with whom the mother had an extramarital affair were to be established, the mother would be cast out from her community, in addition to the child being treated as a bastard child. These consequences had to be balanced by the Court of Appeal against the right to identity and family life of both the child and the potential biological father.

The child’s right to identity, to know who his biological parents are, is codified in Art. 8 ECHR, Art. 1:377a (1) of the Dutch Civil Code (DCC), Art. 9 (3) of the Convention on the Rights of the Child, as well as Art. 24(3) on the EU Charter on Fundamental Rights. At the same time, those with a close personal connection to a child have the right to access to the child on the basis of Art. 8 ECHR and Art. 1:377a (1) DCC. According to settled case law, the concept of “close personal connection” corresponds to the concept of family life as referred to in Art. 8 ECHR. One of the factors which may contribute to the existence of a “close personal connection” is biological kinship.

In its ruling, the Court of Appeal finds that it is in the best interests of the child for the DNA test to take place in light of its right to identity. In its consideration, the Court explicitly acknowledges the possible consequences the applicants may face at the hands of the community; however, it argues that they have not substantiated with sufficiently concrete arguments that these are of such a degree of seriousness as to outweigh the interest of the minor and man in knowing whether they are related. This is especially the case seeing as the

applicants had been living in the Netherlands since 2015 and it was not known whether there was a Tamil community there which they were a part of.

This shows that the burden of proof regarding these facts lay with the applicants in the present case. One may however wonder how such factual support may be provided. Seeing as the situation covers private matters, it is difficult to envisage what evidence would be deemed sufficient by the Court.

When looking at the role played by culture in this decision, one may also turn to the decision by the Court of Appeal Amsterdam in 2013 (ECLI:NL:GHAMS:2013:4638) where, in light of the fact that establishing the fatherhood of the child is very important within the Moroccan community, the Court ruled that a DNA test ought to take place, even though both parties agreed that the husband was the biological father of the minor.

On the other hand, primary attention continues to be paid to the interests of the child, as illustrated by the District Court Gelderland in 2020 (ECLI:NL:RBGEL:2020:631). Although in that case it was not established who the biological father of the child was, the Court held that a DNA test would be too great an intrusion into the family's privacy, as it would seriously disrupt the balance within the family in which the child is now cared for and growing up due to the consequences of the reaction of the mother's community.

Literature related to the main issue(s) at stake:

- Cooney, Mark. 2014. "Family Honours and Social Time". *The Sociological Review* 62 (2): 87–106.
- De Boer, J., W.D. Kolkman, and F.R. Salomons. 2020. *Mr. C Assers Handleiding tot de beoefening van het Nederlands Burgerlijk Recht. 1. Personen- en familierecht. Deel I. De persoon, afstamming en adoptie, gezag en omgang, levensonderhoud, bescherming van meerderjarigen*. Deventer: Wolters Kluwer, para. 153 Afstammingsinformatie.

- Forder, Caroline. 2020. “Kroniek van het personen- en familierecht”. *NJB* 2366 (33): 2734–2742.
- Gorringe, H. 2016. “Questions of Honour: Dalit Women Activists and the Rumour Mill in Tamil Nadu”. *Contemporary South Asia* 25 (3): 255–269.
- Reddy, Rupa. 2014. “Domestic Violence or Cultural Tradition? Approaches to ‘Honour Killing’ as Species and Subspecies in English Legal Practise”. In A.K. Gill, C. Strange, and K. Roberts (eds), *Honour Killing in Violence: Theory, Policy and Practise*. Hampshire: Palgrave Macmillan.

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