

# Recognition and Public Certification of German *Ipso Iure* Converted Pay Paternity Into Paternity With Civil Status Effects Does Not Violate Swiss *Ordre Public*

*This post has been written by Anna Bleichenbacher, MLaw, University of Basel, Nievergelt & Stoehr Law and Notary Office (Switzerland).*

The Swiss Federal Supreme Court (Bundesgericht) published a leading decision on recognition and public certification of foreign conversions of ancient law pay paternities (Zahlvaterschaften) into paternities with civil status effects on June 15<sup>th</sup>, 2023 (decision of Swiss Federal Supreme Court 5A\_81/2022 of May 12<sup>th</sup>, 2023).

Respondent in the present case was a German citizen, living in Germany (**respondent**). She was born out of wedlock in 1967 and acknowledged by her father (**father**) in the same year, both in Germany. The acknowledgement included only a pay paternity. A pay paternity was a legal institution with an obligation to pay maintenance. The pay paternity did not include a legal child relationship recorded in the civil register.

According to the German law on the legal status of children born out of wedlock of August 19<sup>th</sup>, 1969 (**law on children born out of wedlock**), a father who has acknowledged his obligation to pay maintenance for a child in a public deed or an enforceable debt certificate, is seen as a legal father to child, recorded in the civil register, after the enforcement of the law on children born out of wedlock. In short, Germany knows the *ipso iure* conversion of the pay paternity into the paternity with civil status effects.

Switzerland also knows the legal institution of the pay paternity. However, Swiss law did not provide for *ipso iure* conversion of the pay paternity into a paternity with civil status effects.

The respondent's father was a Swiss citizen, living in Switzerland. In 2016, he died, not only leaving behind the respondent, but also his wife and a common daughter (born in wedlock; **appellants**). In 2017, the respondent appealed to the Swiss civil status authorities, claiming the registration and public certification of the birth in Germany as well as the legal child relationship to the father. After exhaustion of the intra-cantonal appeal process, the appellants reach the Swiss Federal Supreme Court with two main arguments against the registration and public certification of the respondent's legal child relationship to the father:

### **(1) Applicability of the Swiss Federal Act on Private International Law (PILA) in the present case**

The PILA entered into force on January 1<sup>st</sup>, 1989. The appellants claimed that recognition and enforcement in the present case are governed by the respective law in force at the time of the respondent's birth in 1967. This would be the Federal Act on Civil Law Relations of Settled Persons and Residents of June 25<sup>th</sup>, 1891. The Swiss Federal Supreme Court made clear that the date of the foreign decision or other legal act (i.e. the acknowledgment of the child) is irrelevant. The time at which the question of recognition and enforcement arises is decisive.

Therefore, the PILA is applicable for the present case.

### **(2) Violation of the Swiss *Ordre Public* in case of recognition and public certification**

The PILA supports the recognition and enforcement of foreign decisions and other legal acts by the principle "*in favorem recognitionis*". A foreign child acknowledgment is recognized in Switzerland if it is valid in form and content in one of the jurisdictions named in Art. 73 para. 1 PILA. These include the state of the child's habitual residence, the child's state of citizenship or the state of domicile or of citizenship of the mother or the father.

As mentioned above, the legal child relationship between the respondent and the father is based on the acknowledgment of the father in 1967 and the *ipso iure*

conversion of the pay paternity into a paternity with civil status effects. The validity of this conversion in Germany has been proven by German civil status documents of the respondent.

Since Germany is a jurisdiction in the sense of Art. 73 para. 1 PILA, and the child acknowledgment is valid there, Switzerland will only refuse the recognition and public certification in case of violation of Swiss *Ordre Public*.

The Swiss Federal Supreme Court stated that, just because Swiss law does not provide for *ipso iure* conversion of the pay paternity, a German legal act on paternity valorization does not violate Swiss *Ordre Public*. This is mainly because both jurisdictions aim for a similar purpose, namely the equality of children born out of wedlock. In an *obiter dictum*, the Swiss Federal Supreme Court even doubts the conformity of Swiss regulation with fundamental rights.

In summary, the recognition and public certification of a German *ipso iure* converted pay paternity into a paternity with civil status effects does not violate the Swiss *Ordre Public*. In application of the PILA, Swiss civil status authorities are obliged to carry out the post-certification of such legal child relationship.