Special issue

New missing persons identification methods and paternity disputes

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ABSTRACT: The new DNA mapping methods may have a significant impact on paternity litigation, as they would enable the judicial contestation or the judicial establishment of a parental relationship even in cases where such disputes would have been theoretically possible, but hardly workable in practice, as the trial would have been entirely based on circumstantial evidence or, at most, on inaccurate, thus more challengeable, scientific evidence. The purpose of the present contribution is to assess the width of such impact, map the possible criticalities and provide some food for thought on the possible solutions.

KEYWORDS: DNA testing; right to personal identity; paternity disputes; evidentiary rules; proportionality and balancing

SUMMARY: 1. Setting the scene – 2. A preliminary question: can a paternity dispute be initiated if one of the parties involved is missing? – 3. The judicial power to order a DNA test on the missing person's relatives and the possible consequences of their refusal – 4. The right to consent or refuse the collection of DNA samples from the remains of missing persons and the possible conflicts of interests – 5. The controversial admissibility and probating value of DNA tests undertaken out-of-court.

1. Setting the scene

«Now tell me this and speak the truth (Goddess Athena addressing Telemachus), if you really are his son […]. And the wise Telemachus answered: […] my mother tells me of him, but I do not know. Nobody can be aware of his own origins alone»[1]. Like in this well-known fragment, just a drop in the literary ocean on the issue[2], the attribution of paternity is still surrounded by uncertainty, probably even more than in ancient times, given that the role of mothers and fathers is often performed by other figures, that in some cases even formally acquire parental responsibility on the child, the so-called "delegated parents" or "third parents", and the use of practices such as artificial insemination and surrogacy increases the complexity of biological ties[3].

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[1] HOMER, *Odyssey*, 206-207; 213-216, translation by the Authoress.

[2] See, e.g., the biblical tale of king Salomon and the disputed baby, or the archetypal image of the "dual mother" widespread both in literature and art: on this motive see, in particular, C.G. JUNG, *Collected Works of C. G. Jung*, 5. *Symbols of Transformation*, 2nd ed., Princeton, 1967, 306-393; and ID., *The dual mother role*, trans. by B.M. HINKLE, in C.G. JUNG, B.M. HINKLE (Trans.), *Psychology of the unconscious: A study of the transformations and symbolisms of the libido, A contribution to the history of the evolution of thought*, New York, 1925, 341-427.

[3] On tri-parenting see, e.g., from a European perspective, with reference to England and Wales, the Guidance published by the British Government *Understanding and dealing with issues relating to parental responsibility*,

In the case mentioned in the opening, such uncertainty was increased by the impossibility for the child to have a direct confrontation with his presumed father, as Ulysses was lost at sea. Nowadays the problem would be the same, as the fact that the presumed father or the presumed child is missing leads to the impossibility of taking one of the two DNA samples which need to be compared for ascertaining paternity. Yet, the outcome could be different thanks to the testing techniques on which the present research project and issue are focused: Telemachus could find out if Ulysses was his father even if this latter did not return from his odyssey or only his remains were returned.

In fact, on one side, the Single Nucleotide Polymorphism (SNP) method, which lies at the basis of the mentioned techniques, has improved the accuracy of the testing also when undertaken on body remains and even when those were damaged or ill preserved due to the passing of time or natural disasters; on the other side, the new panels of markers, processed with the help of Artificial Intelligence-based technologies, would increase the reliability of tests undertaken through the comparison of DNA samples collected from relatives of the missing person, rather than from this latter itself.

This may have a significant impact on paternity litigation, as it would enable the judicial contestation or the judicial establishment of a parental relationship even in cases where such disputes would have been theoretically possible, but hardly workable in practice, as the trial would have been entirely based on circumstantial evidence or, at most, on inaccurate, thus more challengeable, scientific evidence[4].

Namely, the DNA testing methods at issue may come into play in the following scenarios: 1) a person is missing and his son or daughter claims that he is not his/her biological father; 2) a person is missing and his wife claims that he is not the biological father of the child born in the wedlock; 3) a person is missing and his descendants or ascendants claim, on his behalf, that he is not the biological father of the child born in the wedlock; 4) a person is missing and another person claims that he is his/her biological father; 5) a person is missing and his/her spouse or his/her descendants claim that the man who was married with his/her mother at the time of his/her birth is not the biological father; 6) a person is missing and the man married to his/her mother at the time of the birth claims that he is not the biological father; 7) a person is missing and his/her mother claims that the man who was married to her at the time of the birth is not the biological father.

From such scenarios one could draw three variables: the quality of the person filing the claim (the child, the presumed father, the mother, their successors or representatives); the quality of the miss-

3 September 2018, available at https://www.gov.uk/government/publications/dealing-with-issues-relating-to-parental-responsibility/understanding-and-dealing-with-issues-relating-to-parental-responsibility; with reference to France, A. GOUTTENOIRE, *Autorité parentale*, in *Répertoire de droit civil Dalloz*, 2017, *passim*; and L. GEBLER, *La place des tiers dans la procedure d'assistance educative*, in *AJ Famille*, 2020, 477 ff.; from a comparative perspective, though more focused on the Dutch system, M.V. ANTOKOLSKAIA, W.M. SCHRAMA, K.R.S.D. BOELE-WOELKI, C.C.J.H. BIJLEVELD, C.G. JEPPESEN DE BOER, G. VAN ROSSUM, *Parental Responsibilities for More Than Two Parents: A Solution for Children with more than two parents? An empirical and comparative law research*, available at https://repository.wodc.nl/bitstream/handle/20.500.12832/2062/2348-summary_tcm28-73104.pdf?sequence=4&isAllowed=y; and, for a broader reflection from the standing point of the Italian system, A. CORDIANO, *Funzioni e ruoli genitoriali nelle famiglie allargate e ricomposte: una comparazione fra modelli normativi e alcune riflessioni evolutive*, in *Comp. dir. civ.*, 2012, 1-23.

[4] See L. COPPO, *Si può ottenere la dichiarazione giudiziale di paternità senza chiedere il DNA?*, in *Giur. it.*, 2014, 2148 ff.

ing person (the child or the presumed father); and the object of the claim (the contestation of paternity or its establishment). What is at stake, when the presumed father or the child are missing or dead, is clearly not the moral interest to the establishment or termination of the parental relationship and of parental responsibility, but a plurality of interests which differ, or at least are differently nuanced, depending on the mentioned variables.

In paternity contestation disputes, when the missing or dead person is the presumed father, the son or daughter may have the interest to file the application in order to find out his/her own origins and establish a parental relationship with the biological father; the mother may have the interest to file the application for enabling the acknowledgement of the paternity of her child by the biological father; the biological father could have the same interest, though, as will be clarified in the next section, he is not included by the civil code in the list of persons entitled to the claim; and the other presumed father's heirs (i.e. his other descendants, his ascendants and possibly his new spouse) may have the interest to file the application for excluding the disputed child from the range of legitimate heirs.

When the application is filed by others than the son or daughter, this latters' best interest varies from case to case: it could be the removal of the filiation status in sight of the establishment of the biological father's paternity or, at the opposite, the preservation of the disputed status, which means, in the case at issue, the inclusion in the range of the missing or dead father's legitimate heirs and maintenance of the family name. When the application is filed by the son or daughter, the mother may share the same interest or have the opposite interest to the maintenance of the *status quo*, for saving the marriage and concealing the fact that she had an extra-matrimonial intercourse at the time of the conception of the disputed child.

Harder to figure, most of all in practice, are the interests that may lead a father (or a mother) to contest the paternity of his missing or dead son or daughter. Before the 1975 family law reform and the evolution of case-law on the grounds for separation, the father could have the interest to contest paternity of the dead child to prove his wife's adultery and obtain fault-based separation, with the consequent exclusion of the post-separation or divorce maintenance obligation and of her main inheritance rights[5]. Nowadays, only moral reasons would be conceivable, but such reasons should be considered as sufficient grounds for a claim[6]. As to the missing son or daughter's heirs (others from the

[5] See the case decided by Trib. Biella, 17 June 1974, in *Giur. it*., 1975, I, 283, with a comment by M. SESTA, *Sul disconoscimento di paternità nei confronti del figlio nato morto*, where the wife of the presumed father, in order to claim full inheritance rights towards him, had adduced the birth of the dead child in the course of the separation to prove that the couple had reconciled.

[6] The question, though, has been far from uncontroversial, as the debate on the paternity contestation of the stillborn child shows. Some scholars have denied the admissibility of a paternity contestation addressed to a child who is dead immediately after birth, on the following grounds: the claim at issue requires the existence of a person provided with legal capacity; if no such person exists, there is no one to whom the law can refer the status of matrimonial child that paternity contestation aims to remove; the stillborn lacks such capacity, because he has never existed as a natural person. In this direction, see A. CICU, *La filiazione*, in *Tratt. dir. civ*. Vassalli, 3°, II, Torino, 1969, 104; M. STELLA RICHTER, V. SGROI, *Delle persone e della famiglia*, in *Commentario del codice civile*, Torino, 2°, 1967, 33, 9; G. AZZARITI, «*Disconoscimento (azione di)*», in *Nov. Dig. it.*, V, s.d., Torino, 1960, 1091 ff. As far as case-law is concerned, see Trib. Milano, 21 March 1946, in *Foro pad*., 1946, 565, with a comment by TALASSANO; Trib. Milano, 13 November 1952, in *Foro it*., 1953, I, 747, with observations by M. STEL-

mother and the father, i.e. the spouse or the descendants), they could have an interest in filing the paternity contestation application for moral reasons or, if the heir at issue is the spouse, for excluding the alleged father from the range of legitimate heirs.

In paternity establishment disputes, the missing father's child, the only one entitled by the Italian civil code to file the suit, may have the interest to know his/her own origins, the interest to be included in the range of heirs and the interest to claim for the compensation of the damage suffered for being deprived of a parental relationship, under art. 2059 cod. civ.[7]; the same is true for the missing child's heirs (i.e. his/her spouse or mother or descendants); the mother of the missing child may have the interest to intervene in the proceedings with the purpose of claiming from the biological father or his heirs the reimbursement of half what she has paid for the child's maintenance since the day of the birth[8]; the father of the missing child, as respondent, may have the interest to preserve his reputation and not to have additional heirs in sight of his future succession; the missing father's heirs, as respondents, may have the interest not to have their father's testament automatically revoked under art. 687 cod. civ. or to share inheritance with him/her, and not to compromise the father's reputation[9].

LA RICHTER; Trib. Trani, 17 August 1948, in *Corte Bari*, 1950, 156. The mentioned view is also upheld by Trib. Biella, 17 June 1974, above. Other scholars, instead, share the opinion that the claim is admissible and ground it on the following arguments: a) the stillborn child is not irrelevant for the law as the Italian legislation requires even for him/her the drafting of the birth certificate with the mention of the father's and the mother's name; b) the father may have an interest to remove the filiation status as it results from the birth certificate, if this latter status does not match with reality; c) given that the object of the claim is not the status of matrimonial child (*status legitimitatis*), but paternity in itself, the distinction between a child born alive and a stillborn should be irrelevant. In this direction, see C. FURNO, *Legittimazione a contraddire e interesse ad agire per disconoscimento di paternità*, in *Riv. dir. proc*., 1948, II, 186; and FUÀ, *Casi controversi di esperibilità dell'azione di disconoscimento di paternità*, in *Temi*, 1950, 264.

[7] See, for all, Cass., 10 April 2012, n. 5652, in *Corr. giur*., 2012, 1457 ff., with a comment by F. FORTE, *Il risarcimento del danno non patrimoniale da colposo ritardo nel riconoscimento della paternità naturale*.

[8] On the retrospective nature of the maintenance obligation, see, just to mention a recent judgment, Cass., 14 December 2016, n. 25735, in *CED Cassazione*. According to case-law, the acquisition of succession rights towards the biological father absorbs the child's right to claim maintenance from the other father's heirs for the period subsequent to the death (see Cass., 16 July 2005, n. 15100, *ivi*). Therefore, if the biological father was dead at the time when the paternity establishment application was lodged, his heirs only bear an obligation to pay the other child's parent, upon request of this latter, half of the amount of money spent for the child's maintenance since the day of the birth and up to the date of the biological father's death. Instead, when the biological father is alive at the time of the suit, the judgment ascertaining paternity, upon request of the claimant, orders him to pay maintenance not only retrospectively, i.e. since the day of the birth, but also *pro futuro*.

[9] Case-law is constant in holding the applicability of the revocation of the testament for supervening filiation also when such event does not depend upon the birth of a child after the *testamenti factio* or upon the subsequent acknowledgement of a child, but upon a judicial establishment of paternity occurred after the biological father's death. See, for all, Cass., 5 January 2018, n. 169, in *Corr. giur*., 2018, 15 ff., with a comment by C. CICERO and G. CARA, *Autonomia privata e sopravvenienza di figli. Il problema della revocazione dell'atto giuridico*; and in *Giur. it*., 2019, 53 ff., with observations by C. CICERO, *Revocazione del testamento – Il fondamento della revocazione testamentaria per sopravvenienza di figli*; and in *Fam. dir*., 2019, 295 ff., with a comment by F.S. MATTUCCI, *Revoca del testamento per sopravvenienza di figli e dichiarazione giudiziale di paternità o maternità*.

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2. A preliminary question: can a paternity dispute be initiated if one of the parties involved is missing?

Once the scene is set in its essential elements, time comes for details. Up to now we have talked about «missing» and deceased persons rather interchangeably, but, clearly, the two words entail significant differences both from a factual and from a legal viewpoint: according to the Italian civil code, the «missing» person is the one who has disappeared from the place of his/her last residence or domicile and there is no news of him/her (art. 48 cod. civ.); such person may be declared «absent» by the court, upon request of the persons listed in art. 49 cod. civ., if the last news dates back to two years earlier; the absent person may be declared «presumed dead» by the court, upon request of the persons listed in art. 58 cod. civ., when ten years have passed since the last news; and, finally, the person is declared dead when his vital functions have ceased.

The Italian civil code expressly permits paternity disputes when one of the parties of the claim – i.e. the alleged son/daughter, the mother or the alleged father – is deceased before filing the application. As far as paternity contestation is concerned, pursuant to art. 246 cod. civ., if the deceased person is the mother or the alleged father of the child whose paternity is disputed and the therein specified time-limit has not expired yet, the suit can be initiated by the descendants or ascendants, respectively within the same time-limit of six months and one year running from the day of the death; if the deceased person is the alleged son or daughter whose paternity is disputed, the suit can be initiated anytime by his/her spouse or descendants, within one year running from the date of the death.

As can be noticed, the civil code does not include in the range of the persons entitled to file the application the biological father of the child[10], not even in the case of death of the presumed father, despite the fact that, as anticipated, he may bear his own individual interest in challenging the filiation status of the disputed child to find out his own descent, which is part of his personal identity, and to

[10] Such exclusion of the biological father from the range of persons entitled to file the application and to intervene in the trial has always raised several doubts on the grounds of its compliance with the Italian Constitution, and now also with the European Convention on Human Rights (ECHR). In this direction, see, for scholarship, R. PANE, «Favor veritatis» *ed azione di disconoscimento di paternità*, in *Rass. dir. civ*., 1982, 71 ff., and S.A.R. GALLUZZO, *L'osservatorio comunitario*, nota a Corte europea dei diritti dell'uomo, Sez. I, 18 maggio 2006, n. 55339 (*Rozanski v. Poland*), in *Fam. Pers. Succ*., 2006, 1054; for case-law, Trib. Trani, 3 March 1983, in *Giur. it*., 1984, I, 166, with a comment by M.C. CAPURSO, *Figli concepiti da donna coniugata in conseguenza di separazione di fatto, contestazione della filiazione legittima, "favor veritatis"*; in *Giust. civ*., I, 1984, 2255, with a comment by G. FINOCCHIARO; and in *St. civ. it*., 1984, 655. The issue was so controversial that in 1991 it was referred to the Italian Constitutional Court: this latter was called upon to decide whether art. 244 cod. civ. is compliant with artt. 3 and 30 Cost., on the grounds that depriving him of the possibility to file the paternity contestation application amounts to unreasonable discrimination against the child's mother and infringes the principle of the equal distribution of parental rights and duties between the parents, regardless the fact that they are married. The Court (Corte Cost., 27 November 1991, n. 429, in *Giur. it*., I, 1992, 385) rejected the referral as inadmissible, on the grounds that the choice to extend the entitlement to the claim beyond the borders of the matrimonial family would be up to the legislator. Furthermore, the Court observed that the *favor veritatis* upheld by constant case-law is not absolute, but is subject to compliance with the *favor minoris*, i.e. with what is the best interest of the child.

acknowledge his own paternity[11]. Art. 244, line 9, cod. civ., though, entitles the public prosecutor to request the court the appointment of a special curator for filing an application in the child's interest, provided that this latter is a minor.

That has become, in practice, the escape rope for biological fathers willing to circumvent the gap in the entitlement: they report their paternity to the prosecutor, this latter requests the appointment of a special curator, and he files the paternity contestation application in the child's interest. But, as clarified by case-law, the resort to the mentioned strategy bears significant limits: it is practicable only when the son or daughter is minor; the biological father still has no right to be part of the trial; and the appointment of the special curator is subdued to a preliminary assessment of the child's best interest[12]. In the case on which this contribution is focused, the fact that the alleged father is missing, and therefore there is no way for the child to preserve a relationship with him, could be considered as an element in favour of the biological father's claim.

As far as paternity establishment disputes are concerned, art. 276 cod. civ. provides that, in case the presumed father is deceased, the son or daughter is entitled to file the claim for the judicial establishment of paternity against his heirs[13], or if there are none, against a curator appointed by the competent court, without any time-limit[14]. Moreover, art. 270 cod. civ. provides that, when the alleged son or daughter is deceased before filing the paternity establishment claim, this latter can be initiated by his/her descendants within the time-limit of two years running from the date of the death[15].

The mentioned regime can reasonably be extended to the case of «presumed death», given that, pursuant to art. 63 cod. civ., this latter produces the same effects of "real" death, save for the reversibility of such effects if the presumed dead person returns or proves to be alive. Instead, nothing is provided for the case in which the presumed father or the child are just «missing» or «absent». On

[11] Art. 253 cod. civ. prohibits the acknowledgement of paternity of a child who has the status of somebody else's legitimate child and case-law is firm in applying the rule strictly: just to mention one recent judgment, see Cass., 11 October 2021, n. 27560, in *CED Cassazione*, which held that the removal of the filiation status through a paternity contestation is a preliminary requirement for both acknowledgement of paternity and judicial establishment of it.

[12] See, for all, Cass., 6 April 1995, n. 4035, in *Giust. civ.*, I, 1995, 2401; and in *Dir. fam. pers.*, I, 1996, 896, with comments by L. NIVARRA, *Ancora su padre naturale ed azione di disconoscimento della paternità*; and by L. TOSTI, *Verità o menzogna nella vita del minore: così la Cassazione elude la soluzione del problema*.

[13] As recently clarified by the Italian Supreme Court, only the presumed father's direct heirs are entitled to be respondent in the paternity establishment claim, while the successors of his heirs and any other person alleging an individual interest in the claim are only entitled to third party intervention with the purpose of protecting such interests. See Cass., 7 December 2021, n. 38922, in *CED Cassazione*.

[14] On this provision and its application in the transition period after the 2012 reform of family law, see the clarifications made by Cass., 19 September 2014, n. 19790, in *CED Cassazione*. As to scholarship, see N. CIPRIANI, *La disciplina transitoria nella riforma della filiazione*, in R. PANE (ed.), *Il nuovo diritto di famiglia*, Napoli, 2015, 661 ff.

[15] It is interesting to remark that case-law has recently extended the conclusion to the establishment of maternity. Namely, Milan Court of Appeal (App. Milano, 3 June 2021, in *www. osservatoriofamiglia.it*) held that the claim for the establishment of maternity can be initiated even after the death of the mother and despite this latter's will to remain anonymous, on the grounds that, in that case, such right is weakened and therefore the child's right to discover his or her own origin must prevail in the balancing over the mother's relatives right to protect the social identity she has built during her life.

the issue there are no precedents in case-law, probably due to the mentioned difficulties related to the DNA test, but we could reasonably argue that the paternity contestation or establishment claim is admissible if the persons listed in art. 48 cod. civ., namely the alleged father's or alleged son/daughter's successors, have first applied for a court order appointing a curator of the missing person.

Therefore, *prima facie* we could conclude that, legally speaking, in paternity disputes the status of «absent» or «missing» or «presumed dead» or ascertained «dead» is relevant only with reference to the quality of the persons entitled to stand for that party in the claim: either the successors or a court-appointed curator. Though, a more in-depth analysis of the factual situation reveals some further differences that are likely to have an impact on the trial, namely from the viewpoint of evidence.

If the person continues to be factually "missing", in the sense that no remains are found, then the DNA test must be undertaken through the comparison between the son or daughter or father and the other missing person's relatives (case 1); if the corps of the missing person is found, then the DNA sample for the paternity test will be taken from it (case 2); if only some remains are found, like detached body parts or bones, as may happen especially in cases of fire, war or natural disasters, then the preliminary problem is to identify them, i.e. to relate them to a certain individual (case 3).

In this latter case, the DNA testing on the remains will primarily serve the purpose of providing hints on the missing person, such as his race, origin and main somatic features, in order to restrict the range of persons whose genetic sequencing can possibly match with this latter's.

This means that the DNA comparison between the presumed father and the son or daughter is undertaken in the first place outside the context of the paternity proceeding and for a different purpose than the ascertainment of the parental relationship. In such context, in other words, the lack or the existence of a biological relationship between the alleged father and the alleged son or daughter would be a completely accidental discovery, which may subsequently lead to a judicial claim for paternity contestation or establishment.

In this framework, case 1 raises the problems of whether the court has the power to order the DNA test on the missing person's relatives and whether the court is allowed to draw any procedural consequences from their possible refusal to undertake the test; case 2 raises the problems of identifying the persons who are entitled to consent the collection of the DNA sample from the dead body of the alleged father or child, solving the possible conflicts of interests among them and establishing the consequences to be drawn by their refusal to consent the test; case 3 raises the problems of ascertaining whether out-of-court DNA tests or samples collected in the course of other proceedings are admissible as evidence and what their probating value should be.

3. The judicial power to order a DNA test on the missing person's relatives and the possible consequences of their refusal

While for a long time, even after the development of genetic mapping, legislation and courts have been firm in placing on the claimant the burden of proving, at least indirectly, facts like the mother's adultery or the presumed father's impotence at the time of the conception or the replacement of the

child at the time of his/her birth[16], now the DNA findings are considered decisive[17], even in the absence of the abovementioned elements[18]. Therefore, it is now an *acquis* of paternity disputes that

[16] See, with reference to paternity establishment, App. Torino, 16 April 1930, in *Foro it*., 1931, I, 311, with a comment by F. CARNELUTTI; with reference to paternity contestation, Cass., 23 January 1984, n. 541, in *Giur. it*., I, 1984, 1079; and in *Giust. civ*., 1985, 734; Cass., 17 August 1998, n. 8087, in *Fam. dir*., 1998, 427, with a comment by V. CARBONE, *È preferibile un padre putativo a quello biologico?*; in *Giust. civ*., I, 1999, 486; Cass., 22 October 2002, n. 14887, in *Giust. civ*., I, 2002, 2739; in *Dir. giust*., 41, 2002, 39, with observations by G. GRASSI, *Disconoscimento della paternità e liceità delle prove ematologiche*; in *Familia*, 2003, 1103, with a comment by A. RENDA, *Provata la non paternità non può dirsi provato l'adulterio: "mulatto di Toscana" redivivus?*; in *Fam. dir*., 2003, 5, with a comment by V. CARBONE, *Il Dna che esclude la paternità biologica è anche "prova" dell'adulterio della moglie*; in *Riv. it. med. leg*., I, 2003, 173, with observations by A. ARSENI, M. PESARESI, A. TAGLIABRACCI, *Ammissibilità e rilevanza delle prove ematologiche nelle indagini di paternità*; and Cass., 25 February 2005, n. 4090, in *Guida al dir*., 2005, 26. The reason for such hierarchy between historical evidence and scientific evidence lied in the fact that the provisions on paternity contestation are drafted in such a way that the first type of evidence seems prejudicial to the second and in the fact that scientific evidence is collected through an order for physical examination, which bears narrow limits in the civil procedure code: see Cass., 27 July 1965, n. 1785, in *Foro it*., I, 1965, 1871, with a comment by R. ZACCARIA, *Sulla prova ematologica nel giudizio di disconoscimento della paternità*; and in *Giur. cost*., 1966, 1425, with a comment by A. BARBERA, *Aspetti della tutela della libertà personale nel processo civile (provvedimenti* ex *art. 118 c.p. e ricorso per Cassazione)*. For a divergent opinion, see Cass., 25 October 1979, n. 5593, in *Dir. fam*., I, 1980, 94; and Cass., 12 November 1984, n. 5687, in *Giust. civ*., I, 1985, 734, with a comment by A. FINOCCHIARO, *L'azione di disconoscimento di paternità e la prova dell'adulterio della moglie a mezzo degli esami ematologici e/o genetici*; and, as the first Italian judgment to have admitted that the DNA test can be used as evidence to establish paternity, Cass., 11 December 1980, n. 6400, in *Foro. it*., I, 1981, 719, with a comment by M. COMPORTI and P. MARTINI, *Il nuovo orientamento della Cassazione sulle prove del sangue e genetiche*; in *Giust. civ*., I, 1981, 6, with a comment by A. FINOCCHIARO, *Le prove ematologiche e genetiche quale mezzo per dimostrare la paternità*; in *Giur. it*., 1982, 737, with observations by C. DELITALA, *Le indagini ematologiche nella ricerca della paternità*. For further comments on the latter decision, see P. BENCIOLINI, *La svolta della Cassazione nell'ammissione delle prove biologiche per la ricerca della paternità*. *Rilievi medico legali*, in *Riv. dir. civ*., II, 1981, 49 ff.; and A. BELVEDERE and M. BELVEDERE, *Genetica e Costituzione nell'accertamento giudiziale della paternità*, nota a Cass. 10 gennaio 1981, n. 218, in *Giust. civ*., 1981, 2060 ff.

[17] See M. TARUFFO, *Verso la decisione giusta*, Torino, 2020, *passim*.

[18] The turning point can be identified with Cass. (ord.), 5 June 2004, n. 10742, in *Foro it*., I, 2004, 2726; in *Dir. giust*., 2004, 25, with a comment by G. GRASSI, *Filiazione, prevale il "senso comune"*; in *Dir. fam*., 2005, 482, with a comment by A. RENDA, *Troppo ardua la prova (diretta) dell'adulterio? La parola sull'art. 235, n. 3, c.c. passa alla Consulta*; in *Fam. dir*., 2004, 569, with observations by E. BOLONDI, *La prova dell'adulterio al vaglio della Corte costituzionale*; in *Nuova giur. civ. comm*., I, 2005, 457, with a comment by A. QUERCI, *Azione di disconoscimento di paternità e prove biologiche. Profili di incostituzionalità. La questione era stata sollevata anche da due Corti di merito, Trib. Rovigo, ord. 28 ottobre 2004 e App. Venezia, ord. 30 marzo 2005*; which referred the question at issue to the Constitutional Court: Corte cost., 6 July 2006, n. 266, in *Fam. pers. succ*., 2007, 628, with a comment by M.D. BEMBO, *Prova dell'adulterio e indagini ematogenetiche: la svolta della Consulta*; in *Fam. dir*., 2006, 461, with observations by E. BOLONDI, *L'azione di disconoscimento della paternità può essere accolta anche sulla base delle sole risultanze delle indagini genetiche o ematologiche*; and in *Familia*, with comments by E. CARBONE, *Disconoscimento di paternità: un'incisiva riforma orientata al* favor veritatis; and W. VIRGA, *Disconoscimento di paternità, prova dell'adulterio e test ematogenetico: tra* texne *e* diche *la Consulta opta per il giusto mezzo*. With the mentioned decision the Constitutional court held that former art. 235 cod. civ., concerning paternity contestation disputes, was inconsistent with the Constitution to the extent that it provided the prejudiciality of historical evidence. The decision was then upheld by subsequent case-law and extended to all the grounds for paternity contestation: Cass., 6 June 2008, n. 15088 e n. 15089, in *Fam. dir*., 2009, 153, with a comment by G. GRASSO, *Le prove genetiche ed ematologiche e l'interpretazione costituzionalmente orientata dell'azione di disconoscimento della paternità: verso un sistema unitario della prova?.* For more general reflections on the topic, see, *ex multis*, G. BISCONTINI, *Prove ematologiche e filiazione*, in *Rass. dir. civ*., 1993, 487

the court has the power to decide even *ex officio* the collection of DNA samples from the presumed father, the mother and the son or daughter, by means of an order for physical examination under art. 118 cod. proc. civ.[19], and the subsequent acknowledgement of the findings in the trial by means of an order for expert evidence[20].

After all, art. 269 cod. civ., even though only in the section on paternity establishment disputes, provides that paternity (and maternity) «can be proved by any means»[21]. Within the meaning of that expression we could reasonably include a DNA test undertaken through the comparison between the genetic data of the child with the ones of his/her presumed father's relatives rather than with the ones of the presumed father himself[22]. Nothing seems to advocate against this conclusion, especially in light of the new DNA mapping methods and mostly, though not exclusively, in case the presumed father is missing, no remains of him are found and no specimen of tissues taken from him when he was alive are available in any laboratory. Moreover, the undertaking of the DNA test on the presumed father's relatives could be helpful whenever he is alive and present but refuses to comply with the court order for the collection of blood samples.

In fact, neither the parties' application nor their consent is a preliminary requirement for the mentioned order, but this latter is not enforceable against them in case they refuse to comply with it, as can be drawn from a combined reading of art. 118, line 2, cod. proc. civ., and the provisions set out by the civil procedure code with reference to expert evidence[23]. This raises the problem of what probating value, if any, should be awarded to the non-compliance with the court order for physical examination.

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ff.; G. FERRANDO, *Prove genetiche, verità biologica e principio di verità nell'accertamento della filiazione*, in *Riv. trim. dir. proc. civ*., 1996, 725 ff.; E. CARBONE, *La prova scientifica negli accertamenti di filiazione*, nota a Cass. 3 aprile 2003, n. 5116, in *Familia*, 2004, 200 ff.; G. TUCCI, *Paternità biologica e paternità legale di fronte al DNA*, *ivi*, 2004, 453 ff.

[19] On the qualification of blood samples collection as a certain type of evidence, see F. CARNELUTTI, *Prova del sangue*, nota a Cass., 4 March 1960, n. 400, in *Riv. dir. proc*., 1961, 129 ff.; and F. MASTROPAOLO, *Prelievi del sangue a scopo probatorio e poteri del giudice*, in *Riv. it. medicina legale*, 1987, 1085 ff.

[20] See L. LOMBARDO, *Prova scientifica e osservanza del contraddittorio nel processo civile*, in *Riv. dir. proc*., 2002, 1083 ff.; and A. FIGONE, *Prelievo ematico, tutela della libertà individuale e rapporto di filiazione*, nota a Corte. Cost., 9 luglio 1996, n. 238, in *Fam. dir*, 1996, 422. As far as case-law is concerned, see, for all, Cass., 17 June 1992, n. 7465, in *CED Cassazione*; Cass., 22 July 2004, n. 1365, *ivi*; Cass., 24 March 2006, n. 6694, *ivi*; Cass., 2 July 2007, n. 14976, in *Nuova giur. civ. comm*., 2008, 21, with observations by G. FERRANDO, *Le prove biologiche nell'accertamento della filiazione*; Cass., 25 January 2008, n. 1738, in *Fam. dir*. 2008, 790 ff., with a comment by G. FERRANDO, *Prove storiche e prove scientifiche nell'accertamento della paternità naturale*; Cass., 30 May 2014, n. 12194, in *CED Cassazione*; and Cass., 15 June 2015, n. 12312, *ivi*. For more in-depth and updated reflections on the topic, see L. BALESTRA, *La dichiarazione giudiziale di paternità e maternità alla luce della riforma della filiazione*, in C.M. BIANCA (ed.), *La riforma della filiazione*, Padova, 2015, 560.

[21] See, just to mention the most recent decisions, Cass. (ord.), 5 June 2018, n. 14458, in *Quot. giur*., 2018; Cass., 19 July 2013, n. 17773, in *Foro it*., 2013, 3174; Cass., 19 November 2012, n. 20235, in *CED Cassazione*.

[22] This has been the case in Cass., 22 January 2014, n. 1279, in *CED Cassazione*.

[23] See V. CARBONE, *Prove genetiche: rifiuto equivale ad ammissione?*, nota a Cass., 24 febbraio 1997, n. 1661, in *Fam. dir*., 1997, 105. The reason lies in the fact that blood samples, even though scarcely intrusive, do amount to a medical treatment and are, therefore, generally subdued to the principle of free and informed consent. On this, see V. LANDI, *La disciplina del consenso al trattamento sanitario in alcuni ambiti specifici*, in U. RUFFULO (ed.), *La responsabilità medica*, Milano, 2005, 262 and 281.

According to almost unanimous case-law, courts have the power to draw from the refusal strings of evidence against the refuser under art. 116 cod. proc. civ. and assess them as «all other facts that tend to exclude paternity», in case of paternity contestation claims, or to affirm it, in case of paternity establishment claims[24]. This solution appears to be in line with the European trend[25].

In particular, the European Court of Human Rights, seized by a French citizen against the French Republic, found that the solution at stake does not violate art. 8 of the Convention[26]. The grounds for the decision were the following: the court power of constructing the refusal against the refuser was provided by the law (and more precisely, in that case, by former art. 340 *code civil*, art. 11 *code de procédure civil* and by case-law); it pursued a legitimate aim, i.e. the effective protection of the right to discover one's origin and the right to have one's filiation ascertained; and it was necessary in a democratic society, i.e. it was justified by a pressing social need and proportioned to the attainment of it, on the grounds that it stroke a reasonable balance between the right of the presumed father not to be subdued to a treatment without his consent and the interest of the disputed child[27].

Despite the European consensus, the solution at stake has raised several doubts among scholars[28]. The two main questions concern whether the refusal, alone, is sufficient ground for the court decision on paternity or it must be assessed together with other pieces of evidence; and whether there are some cases in which the refusal to undertake the test is justified and thus cannot be constructed against the refuser[29].

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[24] See, primarily, Corte Cost., 24 March 1986, n. 54, in *Gazzetta Ufficiale*, I Serie speciale, 26 marzo 1986, n. 12. Moreover, see Cass., 11 December 1980, n. 6400, above; Cass., 25 July 1992, n. 8976, in *Foro it*., I, 1993, 1176; Cass., 1 June 1990, n. 5156, in *Corr. giur*., 1990, 1134, with a comment by PROVENZALI; Cass., 23 January 1993, n. 791, in *Giur. it*., I, 1993, 1914; Cass., 28 June 1994, n. 6217, in *Foro it*., I, 1996, 251; Cass., 9 June 1995, n. 6550, in *Fam. dir*., 1995, 426, with a comment by V. CARBONE. For a comparative overview on the issue, see C. SCLAVI, *DNA-test come "scientific evidence": poteri del giudice e validità della prova. Rilievi comparatistici*, in *Riv. it. med. leg*., 1997, 654; A RIZZIERI, *La prova genetica del rapporto di filiazione: un breve esame comparatistico*, in *Studium iuris*, 2003, 132 ff.; with reference to the German system, R. FRANK, *Compulsory Physical Examinations for Establishing Parentage*, in *Int. J. Law Pol. Fam*., 1996, 205 ff.; and, with reference to the Northern Europe systems, A. RENDA, *Filiazione biologica, adottiva ed artificiale in Scandinavia. Sistema dell'accertamento e principio di verità*, in *Familia*, 2004, 369 ff.

[25] See, e.g., French case-law, namely, Cour de Cassation, 8 July 2020, 18-20.961, in *https://www.legifrance.gouv.fr/juri/id/JURITEXT000042128048/;* and the reference provided in nt. 26 below.

[26] ECHR, *Canonne v. France*, 22037/13, 2 June 2015.

[27] The same conclusion was reached in other cases. In ECHR, *Mikulić v. Croatia*, n. 53176/99, 7 February 2002; and in ECHR, *Ebru and Tayfun Engin Çolak v. Turkey*, n. 60176/00, 30 May 2006, the European Court of Human Rights found that the incapability of national jurisdictions to establish paternity due to the refusal of the presumed father to undertake the DNA test amounted to a violation of art. 8 ECHR. Although the Court agreed that the need to protect third parties could justify the unenforceability of the court order for physical examination against them, it held that such measure is proportioned and therefore consistent with the respect for private and family life imposed by the Convention only to the extent that there are other ways for the judge to make its decision on paternity.

[28] More widely, see F. DANOVI, *Il rifiuto della prova ematogenetica nell'azione per la dichiarazione giudiziale di paternità*, in *Riv. dir. proc*., 2021, 9.

[29] For an unconventional reflection on the topic from the viewpoint of the right to "informational self-determination", see A.P. SCARSO, *Raccolta di un campione biologico, violazione del diritto della personalità del minore e disconoscimento della paternità*, in *Fam. pers. succ*., 2007, 423. The Author draws his reflection from a judgment by the German Constitutional Court (BVG, 13 February 2007, in *Neue Jur. Wochenschr.*, 2007, 753),

As to the first question, the majority of case-law firmly holds that the refusal amounts to an irrefragable hint of paternity, when the refuser is the presumed father and the claim is paternity establishment, of non-paternity, when the refuser is the presumed father and the claim is paternity contestation; and that such hint can stand alone as the justification for the court's decision[30].

The mentioned opinion has been challenged only by few judgments, which held that the refusal to undertake the DNA test cannot be the only ground for decision but must concur with other circumstances and be assessed in combination with them[31]. In other words, the establishment or denial of paternity must result from a plurality of «serious, accurate and concurring» hints under art. 2729 cod. civ., pursuant the substantive rule according to which those latter are the requirements for hints to be qualified as evidence[32]. The same opinion can be read in the mentioned decision by the European Court of Human Rights, though just as an additional argument in support of the conclusion, where it observes that, however, the national courts did not ground their judgments on the sole refusal of the presumed father to undertake the DNA test, but on several other circumstances, namely the parties' declarations, documents and witnesses[33].

Despite being a minority opinion in Italian case-law, this latter appears to be the more accurate solution from a normative viewpoint: art. 116 cod. proc. civ. only provides the judge with the power of drawing from the refusal «strings of evidence»; strings of evidence are something less then evidence itself, they share the same value of hints; and, as specified, by virtue of art. 2729 cod. civ., hints can acquire a probating value only when they are multiple and they are «serious, accurate and concurring».

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which underlines that in paternity disputes the two scales of the balance are: 1) the right to biological identity, included in the right to understand and develop one's personality (*Verständnis und Entfaltung der Individualität*) and fundamental both for the search of selfness (*Individualitätsfindung*) and for self-awareness (*Selbstverständnis*); 2) the right to "informational self-determination (*informationelle Selbsbestimmung*), defined as the right of each individual to decide whether to become acquainted with certain personal data and how to use them.

[30] See, e.g., Cass., 11 December 1980, n. 6400, above; Cass., 29 December 1990, n. 12211, in *Corr. giur.*, 1991, 533 ff., with a comment by V. CARBONE; Cass., 28 June 1994, n. 6217, in *Foro it.*, I, 1996, 251 ff.; Cass., 24 February 1997, n. 1661, in *Fam. dir.*, 1997, 105 ff., with observations by V. CARBONE, *Prove genetiche: rifiuto equivale ad ammissione?*; Cass., 17 November 2000, n. 14910, in *Studium iuris*, 2002, 348 ff.; Cass., 29 November 2001, n. 15189, in *Fam. dir.*, 2002, 247 ff.; Cass., 17 February 2006, n. 3563, in *Fam. pers. succ.*, 2006, 557 ff.; Cass., 2 July 2007, n. 14976, above; Cass., 16 April 2008, n. 10007, in *Fam. pers. succ.*, 2009, 33 ff., with a comment by G. PALAZZOLO, *Accertamento dello* status *e interesse familiare alla successione*; Cass., 16 April 2008, n. 10051, in *Fam. dir.*, 2008, 896 ff., with a comment by S. TACCINI, *Accertamento della paternità a fini successori e comparazione genetica collaterale*; Cass., 13 November 2015, n. 23296, in *Giur. it.*, I, 2016, 1117 ff., with observations by A. RONCO, *Il rifiuto di sottoporsi all'esame del sangue può bastare per la dichiarazione giudiziale della paternità*; Cass., 21 December 2015, n. 25675, in *CED Cassazione*; Cass., 27 July 2017, n. 18626, *ivi*; Cass. (ord.), 8 November 2019, n. 28886, *ivi*; and even more recently Cass., 11 October 2021, n. 2756, *ivi*.

[31] Cass., 27 July 2007, n. 16752, in *Fam. dir.*, 2008, 251 ff., with a comment by C. VALENTE, *Il rifiuto del preteso padre di sottoporsi alla prova del Dna e l'interesse del minore a conoscere la propria ascendenza genetica*, in *Fam. dir.* 2008, 252 ff.; and Cass., 25 January 2008, 1738, above. This opinion is upheld by F. DANOVI, *Il rifiuto della prova ematogenetica nell'azione per la dichiarazione giudiziale di paternità*, above.

[32] On the requirements of presumption or circumstantial evidence, see Cass. (ord.), 3 February 2020, n. 2356, in *CED Cassazione*; Cass. (ord.), 12 April 2018, n. 9059, *ivi*; Cass. (ord.), 2 March 2017, n. 5374, *ivi*; and Cass., 26 August 2015, n. 17183, *ivi*.

[33] ECHR, *Canonne v. France*, above.

Besides, the mentioned solution seems to be the more reasonable, as, on one side, it places on the judge the burden of carefully assessing the merits of the refusal, and, on the other side, it prevents the risk of "explorative" decisions. Circumstantial evidence is admitted by the system when there are elements from which a certain fact can be inferentially drawn with a certain degree of certainty: there is no direct evidence of the fact to be proven, but the seriousness, accuracy and concurrence of circumstances lead to it with a high probability.

Art. 116 cod. proc. civ. applied to paternity disputes works when we assume that the presumed father refuses to undertake the test because he is aware of the outcome (or has a strong suspect) and prefers it to remain uncertain for the other parties. Whereas, if we assume that there are cases in which the presumed father refuses to undertake the test for reasons other than the awareness or the fear of the outcome, then we cannot draw from the refusal an automatic presumption of paternity or non-paternity.

The problem is even more complex when the presumed father is missing and therefore the DNA test is ordered to his relatives other than the disputed child and they refuse to comply. First of all, unlike the presumed father, they are not parties of the claim, and art. 116 cod. proc. civ. permits to draw strings of evidence from the refusal to undertake physical examination expressed by one of the parties. Given the exceptional nature of the mentioned provision, it should be considered non-extensible to other cases. Nevertheless, nothing prevents the application of art. 2729 cod. civ., so the judge may still draw from the refusal a hint that, read in combination with others, can lead to the presumption of paternity or non-paternity. The practical result is then the same as it would have been if art. 116 cod. proc. civ. was applied.

In this case it is even more crucial to underline that the judge can draw from the refusal alone not a presumption but just a hint. In fact, while the presumed father is likely to refuse the test because he is aware of the outcome and because he has a specific qualified interest in the claim, it is far from being a forgone conclusion that his relatives – who might also be distant relatives – know about the presumed father's paternity or non-paternity. That is because such fact, i.e. the circumstance that the mother of the disputed child had a sexual intercourse with another man at the time of conception or the circumstance that there had been no intercourse with the presumed father at that time, is in principle external to their sphere of knowledge. In light of that, it would be unreasonable to draw a presumption of paternity or non-paternity without investigating and weighing further elements.

To such conclusion one could object that not drawing evidence from the refusal of the presumed father's relatives to undertake the DNA test would mean leaving the other parties involved in the claim unprotected. The objection is not unfounded, as shown by courts practice: almost all available decisions have considered the refusal unjustified, even when confidentiality reasons were alleged[34], and

[34] The issue was raised namely with reference to the refusal for confidentiality reasons. See Cass., 7 November 2001, n. 13766, in *Fam. dir.*, 2002, 127, with a comment by A. FRASSINETTI, *Prova ematologica e tutela della riservatezza*. In the case decided by the court, which was a paternity establishment one, the alleged biological father justified his refusal on the grounds that the tribunal, in ordering the DNA test, should have provided for all the necessary measures to assure the confidentiality of the proceeding, under l. 675/1996, and request a prior opinion of the Privacy Authority on the processing of personal data. The Court held that the refusal was unjusti-

constructed it against the refuser, motivating the paternity establishment or denial on that exclusive ground[35].

That way, courts have ended up totally reversing the burden of proof, which should instead be upon the claimant, on the respondent father[36]. We could say that this latter bears the burden of undertaking the test or otherwise proving his paternity or non-paternity. *De facto*, whenever construction against the refuser is automatic rather than being the result of a careful assessment of all the circumstances of the case, it becomes a way of circumventing the non-enforceability of the DNA test, a way of undermining the free consent principle and making the test compulsory.

Theoretically, the above-illustrated objection can be rebutted by observing that paternity and non-paternity can be proven by all means of evidence, even presumptions or circumstantial evidence, so it would be enough for the claimant to provide hints of the disputed facts, which normally, given the quality of the persons entitled to the claim, fall within their sphere of knowledge. Courts would consider several elements as possible hints and apply the requirements set out by art. 2729 cod. civ. with a certain degree of flexibility[37]. Practically speaking, as remarked, whenever it is not possible to reach such threshold, courts would tend to place the risk of the lack of evidence on the respondent father.

4. The right to consent or refuse the collection of DNA samples on the remains of missing persons and the possible conflicts of interests

The refusal problem also occurs, with its own peculiarities, when the presumed father or the child are not simply missing but dead and their remains are found. Namely, the questions are whether the presumed father's or child's successors are entitled to exercise some kind of protection on the remains, in the name of a right to the physical or moral integrity of dead bodies, and whether such right should prevail over the son or daughter's right to discover his/her origins[38].

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fied, on the grounds that the judge had no obligation under data protection provisions and that the experts appointed by the judge are bound to confidentiality by their very professional qualification and role.

[35] See F. DANOVI, above, nt. 28. One rare exception has been the case in which the presumed father refused to undertake the test on the grounds that he was affected by a serious disease: Cass., 15 June 2015, n. 12312, in *CED Cassazione*, where the presumed father, who refused to undertake the test on the grounds that he was affected by a serious disease, died during the proceeding and his heirs consented to the collection of the blood samples from themselves as well as from their deceased father.

[36] This concern can be also read in F. DANOVI, above nt. 28, par. 7.

[37] See, for instance, Cass., 5 August 1997, n. 7193, in *Fam. dir.*, 1998, 35 ff., with a comment by M. CAMPUS, *Questioni in tema di prova della paternità naturale*; Cass., 21 February 2003, n. 2640, in *Dir. fam. pers.*, 2003, 62; Cass., 9 June 2005, n. 12166, in *CED Cassazione*, all of which, basically, to the purpose of paternity establishment were satisfied with the proof that the child was treated by his presumed biological father as if he was his "real" son (*tractatus*) and the proof that people from their entourage believed them to be father and son (*fama*), rather than requiring the direct proof of paternity. Such trend has been criticized by some scholars: see, in particular, V. CARBONE, *La paternità ... è una questione di logica*, nota a Cass. 30 gennaio 1985, n. 576, in *Corr. giur.*, 1985, 409 ff.; and M. DI NARDO, *L'accertamento giudiziale della filiazione naturale*, in G. COLLURA, L. LENTI, M. MANTOVANI (eds.), *La filiazione*, in *Tratt. dir fam*. Zatti, III, Milano, 2002, 408.

[38] A. BUSACCA, *Analisi genetiche su "parti staccate" del corpo umano ed accertamento della paternità naturale* post mortem, nota a Cass., 5 agosto 2008, n. 21128, in *Fam. dir.*, 2010, 1124.

As already pointed out, in civil proceedings the court order imposing the collection of DNA samples is unenforceable against living people, despite its very little intrusiveness, under the principle of free consent to medical treatment that can be derived from art. 32 Cost.; but nothing is provided by the legislation with reference to a possible authorization regime for the collection of the mentioned samples from dead bodies or remains.

As the national and supra-national debate on such delicate issue reveals, the possible options with reference to paternity disputes would be: 1) to hold that post-mortal collection of DNA samples is in principle permitted, as the Italian rules on police morgue permit the exhumation of corps when it is ordered by a court for reasons of investigations in the interest of justice[39]; 2) to hold that the presumed father is entitled to express an anticipated refusal to be exhumated and subject to the DNA test after his death, as an act of disposition on his body similar to the ones provided by legislation for the consent to organs and tissues explant; 3) to hold that, in the absence of such declaration of will, the exhumation and collection of the DNA sample is permitted only if the deceased person's family consents, as it is for organs and tissues explant; 4) to hold that a case-by-case balancing is needed between the interests at stake, given that they both enjoy constitutional protection[40].

This latter option, which is someway in-between and allows a more flexible approach, seems to be the one upheld by national courts[41] and by the European Court of Human Rights[42]. They both seem

[39] See arts. 83 and 89 D.P.R. 10 settembre 1990, n. 285, Approvazione del regolamento di polizia mortuaria. For further reflections, see R. IANNOTTA, *Polizia mortuaria*, in *Enc. giur*. Treccani, XXIII, Roma, 1990; and L. BALUCANI, *Polizia mortuaria*, in *Noviss. Dig. it*., Agg., V, Torino, 1984, 1072. Such legislation is also mentioned by Cass., 19 July 2012, n. 12549, in *CED Cassazione*, which denied the existence of a right of relatives on the deceased's corps on the basis of the fact that the rules at issue permit court orders investigations on dead bodies for reasons of justice without requiring the family's consent.

[40] For an overview of the debate, also from a comparative law perspective, see A. RENDA, *Ipotesi sul prelievo di DNA da defunto nei giudizi di stato*, in *Riv. dir. civ*., 2020, 807 ff.

[41] For a more in-depth case study, see, though not so recent, M. ROBLES, *Le prove ematologiche sul defunto tra verità storica e processo*, in *Giur. it*., 1998, 1313. The collection of blood samples from corps has been authorized, *ex multis*, by Cass., 16 April 2008, n. 10007, above; Cass., 27 January 1997, n. 807, in *Giust. civ*., 1997, 1276. From a comparative law perspective, see, as the leading case the French proceeding brought against the famous singer Yves Montand, in which the court held that the exhumation of the corps was legitimate even though the person, when still alive, had expressly refused to consent to undergo paternity investigations: App. Paris, 17 December 1998, in *Dir. fam. pers*., 2000, 112, with a comment by F. DANOVI, *Il caso Yves Montand, ovvero quando il defunto ha bisogno di un avvocato*. The case has been highly disputed, to the extent that the French legislator then amended the civil code expressly providing that in civil disputes whatever genetic identification requires the prior express consent of the person involved. Absent such consent, the mentioned identification is prohibited even after the person's death (art. 16-11, *alinéa* 5: «*En matière civile, [l'identification d'une personne par ses empreintes génétiques] ne peut être recherchée qu'en exécution d'une mesure d'instruction ordonnée par le juge saisi d'une action tendant soit à l'établissement ou la contestation d'un lien de filiation, soit à l'obtention ou la suppression de subsides. Le consentement de l'intéressé doit être préalablement et expressément recueilli. Sauf accord exprès de la personne manifesté de son vivant, aucune identification par empreintes génétiques ne peut être réalisée après sa mort*»). In 2011 the provision at issue was challenged through the referral to the French Constitutional Court, but this latter confirmed its compliance with the Constitution, despite the divergent opinion upheld by the European Court of Human Rights (see below). For a reflection on the mentioned decision, from the perspective of an Italian jurist, see D. PARIS, *Requiescant in pace. Amen? – Riflessioni sul rispetto dei morti come limite alla ricercar della paternità, a partire da una recente pronuncia del Conseil Constitutionnel*, in *Riv. telem. giur. ass. ital. cost*., 2, 2012.

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to converge in acknowledging that the deceased person's family has a non-patrimonial right on the dead body and holding that the right to discover one's own biological origin should prevail in the balancing test.

In particular, the European Court of Human Rights, called upon to decide the case of an aged man who had been denied by Swiss authorities the possibility of collecting DNA samples from the body of his presumed father in order to establish his paternity, noted that a fair balance should be struck between the presumed son or daughter's interest to establish the identity of his/her ascendants, which is a fundamental right protected by the Convention under art. 8, i.e. the respect of private and family life, as an essential component of the right to personal identity, on one side, and «the right of third parties to the inviolability of the deceased's body, the right to respect for the dead, and the public interest in preserving legal certainty», which can equally fall under art. 8 ECHR, on the other[43].

In the case at stake, what convinced the Court to strike the balance in favor of the right to personal identity of the presumed son were the little intrusiveness of the measures with reference to the physical integrity of the corps and the fact that the opposition of the deceased father's relatives was not grounded on specific philosophical or religious reasons, while the claimant had a genuine interest in discovering his own origin, to the extent that it had been attempting all his life to find a conclusive answer.

Reading the Court's reasoning *a contrario*, we can assume that the outcome of the balancing test could be different if the measures applied for were intrusive for the physical integrity of the dead body or if the deceased's family opposition to the exhumation and the taking of the DNA sample was justified on the grounds of religious or philosophical beliefs[44]. The issue, though, being rather delicate is far from uncontroversial, to the point that one of the judges of the case at issue, joined by another, expressed a dissenting opinion in which he claimed that due weigh should be given also to a genuine opposition «on the simple ground of violating the intimacy of the family, not to mention the integrity of their father's mortal remains»[45].

What seems certain is that adopting an extreme approach, like permitting or denying *tout court* the DNA test on the corps, would turn into an unconstitutional outcome, as underlined in 1996 by a first

[42] See, as one of the leading cases, ECHR, 13 July 2006, *Jäggi v. Switzerland*, application no. 58757/00, in *Dir. umani dir. int.*, 2006, 394.

[43] *Ibidem*. The Court added: «Although it is true that, as the Federal Court observed in its judgment, the applicant, now aged 67, has been able to develop his personality even in the absence of certainty as to the identity of his biological father, it must be admitted that an individual's interest in discovering his parentage does not disappear with age, quite the reverse. Moreover, the applicant has shown a genuine interest in ascertaining his father's identity, since he has tried throughout his life to obtain conclusive information on the subject. Such conduct implies mental and psychological suffering, even if this has not been medically attested».

[44] *Ibidem*, par. 41: «The Court notes that the Federal Court observed that the deceased's family had not cited any religious or philosophical grounds for opposing the taking of a DNA sample, a measure which is, moreover, relatively unintrusive. It should also be noted that it was thanks to the applicant that the lease on the deceased's tomb was renewed in 1997. Otherwise, the peace enjoyed by the deceased and the inviolability of his mortal remains would already have been disturbed at that time. In any event, the deceased's body will be exhumed when the current lease expires in 2016. The right to rest in peace therefore enjoys only temporary protection».

[45] Dissenting opinion of judge Hedigan, joined by judge Gyulumyan, in *Jäggi v. Switzerland*, above.

instance Italian court which referred the question to the Constitutional Court[46]: the first interpretation would be against arts. 2, 3, 13 and 32 Cost., on the grounds that it would discriminate in terms of protection dead people against living people, given that those latter are entitled to refuse the DNA collection; the second interpretation would be against arts. 3 and 30 Cost., on the ground that it would discriminate who claims the establishment or contestation of the paternity of a dead person against who claims the establishment or contestation of the paternity of a living person, as this latter has the chance of obtaining the person's consent.

Neither the European Court nor the national ones have been faced with the problem of a possible will of the presumed father, expressed when he was still alive, not to be subject to the collection of any samples or not to be exhumated after his death. According to some scholars, that would prevent the court from ordering the DNA sample collection and preclude the possibility of whatever balancing test, as only public policy reasons would justify the infringement of the person's anticipated will on the disposition of its own body, reasons that do not occur in paternity disputes[47].

The issue is complex and would require an *ad hoc* analysis far beyond the space limits of this contribution, but it nevertheless deserves some remarks. Assuming that the right to discover one's own origin is not a public order interest – which does not seem so uncontroversial –, the conclusion that the will expressed by the presumed father alive must be complied with appears to be inevitable. Such expression of will is equal to the refusal of the court order for physical examination, with the only differences that it has been expressed out-of-court and in a time when it was out-of-context.

The point is: are such differences so relevant as to preclude from treating the two situations equally? In other words, can the judge construe the anticipated refusal against the refuser, even if he is dead and represented in the trial by his successors? It would be reasonable, if not to answer yes, to conclude that the judge can assess the anticipated refusal in combination with the other circumstances of the case and draw from them, when serious, accurate and concurring, a presumption of paternity or non-paternity. Anticipated or not, a refusal directed not to exhumation in general but to the DNA test or paternity test specifically is unlikely to be without significance in relation to the presumed father's awareness of his paternity or non-paternity. Besides, the opposite view would leave the problem of the protection of the other parties involved open.

Up to now, the reflection has been focused on the case in which the undertaking of the DNA test inevitably requires the exhumation of the corps, thus raising the problem of the dead person's right to be let alone and rest in peace. As a conclusive remark, it should be noted that the mentioned problem does not arise in case the DNA test does not require the exhumation of the corps, because detached parts of the person's body that had been taken from him/her when he/she was alive, e.g. dur-

[46] The referring decision is Trib. Min. Salerno, 15 January 1996, in G.U. 2 ottobre 1996, n. 40, serie spec., 92; while the decision by the Constitutional Court is Corte. Cost. (ord.), 26 February 1998, n. 39, in *Giur. it*., I, 1998, 1318, con nota di M. ROBLES, *Le prove ematologiche su defunto: tra verità storica e processo*. According to the referring decision, in the absence of ad hoc legislative provisions on the consent to the collection of samples from corps, it would be inconsistent with the Constitution both to interpret arts. 269 cod. civ. and art. 118 cod. proc. civ. as permitting such collection in any case, and to interpret them as denying it in any case. The Constitutional Court held the inadmissibility of the referral, stating that the referred provisions can already be interpreted in a way which is consistent with the Constitution, thus avoiding taking a position on the issue.

[47] See, for all, A. RENDA, above, *passim*, also for further references.

ing surgery, are available as samples. In that case then, it can be reasonably argued that the court order of exhibition and expert evidence on the findings is enforceable without the need for the deceased person's family consent[48].

This conclusion has been upheld by the Italian Supreme Court, which, some years ago, clarified that the right to the physical integrity of dead bodies cannot be extended also to individual detached body parts (in the case at issue, a sample of lung tissue taken from the presumed father during a surgical treatment and preserved in formalin), due to the fact their separation from the rest of the body took place when the person to whom these latter belonged was still alive[49].

5. The controversial admissibility and probating value of DNA tests undertaken out-of-court

Time is now ripe to examine the last scenario depicted after setting the scene of the relationship between the new DNA testing methods and paternity disputes: the case in which the biological tie or the lack of it are discovered accidentally during the identification process of unidentified remains. Normally, the problems of DNA tests undertaken out-of-court concern the following aspects, respectively related to the admissibility of it as evidence and to its relevance and probating value: 1) the consent of the parties involved and their privacy in the sense of right to "informational self-determination", especially when the disputed child is a minor; 2) the possible conflict of interests arising when the disputed child is a minor and his or her consent needs to be expressed by the mother; 3) their confidential relationship with the laboratory; 4) the reliability of the collection process and findings interpretation; 5) the inevitable lack of fair trial safeguards in the formation of evidence[50].

[48] See, App. Napoli, 16 March 2017, in *www.osservatoriofamiglia.it*, which held that in paternity establishment disputes the court is entitled to ground the decision on expert evidence undertaken with DNA samples collected from the presumed father before he was buried following an order by the investigation judge issued without the need of the deceased person's family consent. The reason lies in the exceptional urgency deriving from the risk of the future impossibility or extreme difficulty of collecting the samples after the inhumation, given that the corps could be cremated or not identified or perished in such a way that the DNA would not be available.

[49] Cass., 5 August 2008, n. 21128, in *Fam. dir*., 2010, 1124, with a comment by A. BUSACCA, *Analisi genetiche su "parti staccate" del corpo umano ed accertamento della paternità naturale post mortem*. The facts of the case are the following: R.T. lodged an application for the paternity establishment in the interest of her son, G.T., against the presumed father, G.P., married with children and recently deceased. Florence Tribunal ordered the seizure of some biological samples taken from G.P. during a surgical treatment, with the purpose of collecting the DNA and comparing it with the child's one. The test undertaken on lung tissue preserved in formalin revealed a very high probability of match between G.P. and G.T., therefore the tribunal established paternity. G.P.'s spouse, mother of his two sons born in the wedlock, appealed against the mentioned decision on two grounds: the unlawfulness of the use of samples collected that way; and the fact that the samples were unreliable, as they were likely to be biologically altered by G.P.'s cancer. The Court rejected the appeal, and the Supreme Court confirmed such decision.

[50] Taking into account the mentioned concerns, some legal systems expressly prohibit out-of-court paternity tests: namely, art. 16-11 of the French civil code reads that in civil proceedings genetic identification is permitted only following a court order issued in a paternity contestation, paternity establishment or maintenance claim.

As to the problems concerning the admissibility of out-of-court DNA tests, existing case-law unanimously requires the consent of all the parties involved[51]. Namely, the Italian Supreme Court clarified that the processing of genetic personal data which are of a non-medical nature through the undertaking of a DNA test, for the purpose of assessing the grounds for a paternity contestation claim, not only requires the prior authorization by the Privacy Authority under art. 90 of *Decreto legislativo* 30 June 2003 n. 196, but also the consent of the parties involved[52]. In the case at stake, the presumed father hired an investigation agency who collected cigarette ends belonging to the disputed son and brought them, without either this latter's consent or any authorization by the Italian Data Protection Authority, to a laboratory in order to take DNA samples and compare them with those drawn from the other two children born in the second wedlock.

Given the type of claim – an opposition against the injunction to stop the genetic data processing issued by the Privacy Authority following while the paternity contestation dispute was pending – the mentioned judgment simply confirmed the illegitimacy of the unconsented collection of DNA samples, without specifying the procedural consequences of such illegitimacy from the evidentiary viewpoint.

The issue has instead been faced by a more recent and complex decision which, in a lengthy *obiter dictum*, confirmed for paternity disputes what case-law had already been established with reference to other proceedings[53]: pieces of evidence obtained in such a manner as to infringe the fundamental liberties granted to all individuals by the Constitution, such as personal freedom, the confidentiality of correspondence or the inviolability of domicile, cannot be admitted as sources of evidence, not even atypical[54].

More specifically, the infringement of the rules on data protection results into the illegitimate acquisition and the following inadmissibility as evidence of the pieces of information related to the quality of the natural person concerned, given the absolute prohibition of processing personal data collected in violation of the mentioned rules[55]. In the case at stake, in which the Tribunal had ordered the expert evidence on samples (slides of tissues) stored by the institutes where the presumed father had been previously hospitalized, the Supreme Court found no violation of the provisions on personal data processing, as the genetic data were collected and treated for reasons of justice by virtue of a court order.

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[51] See Cass., 13 September 2013, n. 21014, in *CED Cassazione*; Trib. Asti, 25 July 2017, n. 638, in *www.osservatoriofamiglia.it*; Cass., 5 May 2020, n. 8459, in *Fam. dir.*, 2021, 289, with a comment by L. LA BATTAGLIA, *Essere o non essere (padre): obblighi di informazione tra genitori e tutela risarcitoria*; and in *Studium juris*, 2021, 79; and in *Foro it.*, I, 2021, 244; Trib. Roma, 10 June 2020, n. 8359, in *www.osservatoriofamiglia.it*; Cass., 13 July 2020, n. 14916, in *CED Cassazione*; Trib. Bologna, 7 May 2021, in *www.osservatoriofamiglia.it*.

[52] Cass., 13 September 2013, n. 21014, in *Giur. it.*, 2014, 1367, with observations by S. LOIACONO, *Due questioni in tema di trattamento*; and in *Foro it.*, 2013, 3174; and in *Ragiusan*, 2013, 19; and in *Danno resp.*, 2014, 43, with a comment by F. AGNINO, *Nozione di dati genetici ed il decalogo di legittimità al loro trattamento*.

[53] See, *a contrario*, Cass., Sez. un., 12 February 2013, n. 3271, in *CED Cassazione*; and Cass., Sez. un., 12 June 2017, n. 14552, *ivi*, both of which held that the wiretappings undertaken in the course of different criminal proceedings, provided that they are admissible as evidence in disciplinary proceedings, provided that their undertaking was legitimate and compliant with constitutional and procedural rules.

[54] Cass., 5 May 2020, n. 8459, nt. 51 above.

[55] *Ibidem*.

In setting the mentioned principles courts have left aside paramount questions like who is entitled to consent on behalf of the disputed child and how the best interest of this latter, which might also be that of not knowing anything about the uncertainty of his/her status, could be properly safeguarded[56]. Scholarship is divided. One option could be to hold that out-of-court DNA tests are not permitted when the disputed child is a minor of age, but this would be hard to advocate in the absence of a specific legislative prohibition; another one could be to claim that the consent of both parents, on the child's behalf, would be enough to grant the legitimacy of the test[57]; and a third one could be to require that the minor consent is expressed by an *ad hoc* appointed curator under art. 320 cod. civ. in order to avoid a possible conflict of interest[58].

This latter option seems to be the most reasonable from a theoretical viewpoint, as not always the parents' interest match with the best interest of the child. While the parents who agree upon the test share the same interest to the ascertainment of the biological truth, each of them for their own motives, the child may carry the opposite interest to maintain his/her present status. As taught by case-law, neither the *favor veritatis* nor the *favor legitimitatis* are necessarily coincident with the *favor minoris*, and that is why this latter element needs to be carefully assessed by the court[59], also through the hearing of the child itself, whether capable of discernment[60]. But, in practice, the principle of subsidiarity of judicial intervention in family matters and the proximity of the parents to the child would lead to presume that they know what is best for him or her.

Compared to the above-illustrated cases, the scenario we are dealing with in this section bears some peculiarities: in fact, here, the request of the out-of-court DNA test does not come from the parties involved in the future dispute and we can figure that the consent to the test – assuming that it would be necessary, which can be seriously doubted given the public policy interest underlying the identification of missing persons – has been properly obtained by the competent authorities. The point is that such consent was given by the missing person's possible family for a purpose other than the challenging of paternity. In other words, consent is informed and free with reference to the purpose of the identification of the missing person, but not with reference to the purpose of paternity establishment or contestation.

At present, no Italian or European judgment on the issue can be found; but there is one by the German Constitutional Court, dating back to 2007, that casts light on an aspect which is worth assessing

[56] See E. PRANDINI, *Implicazioni giuridiche, giurisprudenziali e medico-legali delle prove biologiche in tema di ricerca della paternità*, in *Fam dir*., 1999, 199 and 297.

[57] In this direction, see M. SESTA, *La filiazione*, in *Tratt. dir. priv*. Bessone, IV, *Il diritto di famiglia*, 3, Torino, 1999, 48.

[58] See G. FERRANDO, *Prove genetiche, verità biologica e principio di responsabilità nell'accertamento della filiazione*, in *Riv. trim. dir. proc. civ*., 1996, 725. Some scholars even suggest that the parents who mutually agree to subdue the child to the DNA test should be sanctioned with the deprivation of parental responsibility (see D. RANALLETTA, E. LANDI, *Problemi giuridici e medico-legali nella ricerca biologica stragiudiziale di paternità sui minori legittimi e naturali*, in *Riv. it. med. leg*., X, 1988, 144 ff.), but this appears to be a far too extreme and disproportioned measure, mostly if one considers that arts. 330 ff. civil code are applied in practice to very severe cases in which the life and health of the minor is seriously at risk.

[59] For a recent contribution on the concept of "best interest of the child", see G. SICCHIERO, *La nozione di interesse del minore*, in *Fam. dir*., 2015, 72 ff. For a reflection on *favor veritatis*, see G. CHIAPPETTA, *Favor veritatis ed attribuzione dello status filiationis*, in *Actualidad Jur. Iberoam*., julio 2016, 145-186.

[60] See F. TOMMASEO, *Rappresentanza e difesa del minore nel processo civile*, in *Fam. dir*., 2007, 409 ff.

in investigating the problem of the informed consent to the paternity test[61]. In the case at issue, the Court acknowledged that the child is entitled to a right of "informational self-determination" (*informationelle Selbstbestimmung*), i.e. a right to decide whether he or she wants to be informed of a certain circumstance or prefers to remain unaware of it. From such acknowledgement the Court drew the conclusion that out-of-court DNA samples undertaken without the child's consent were inadmissible.

If we applied the conclusion to the case of the DNA test undertaken for purposes different than the paternity test, we should conclude that the automatic acquisition of the findings to the paternity dispute procedure would be and infringement of the right to the informational self-determination of the disputed child. He consented to the test because he wanted to discover the missing person's identity, not because he wanted to discover his origin.

But, then, what would the consequence be? Would this prevent the court from ordering the acquisition of the out-of-court findings or their admission in case they were offered as evidence by another party? Would this be assessed as a refusal to undertake the DNA test? Answering yes to both questions seem illogical in terms of procedural efficiency, as it would force the court to order a new physical exam on the parties involved which can result into another refusal, this time to be constructed against the refuser under art. 116 cod. civ.

Besides, the refusal of the parties to the very acquisition or admission of the out-of-court findings is different from the refusal to undertake the physical examination for the collection of the DNA samples. In this latter case the right to refuse is justified by the need to preserve the constitutional principle that nobody can be forced to undergo medical treatment without his or her consent; in the first case no such rationale occurs. At most the refusal to the admission or acquisition of the out-of-court findings can be qualified as a denial of consent to the processing of personal genetic data.

But, as already outlined, the Italian Supreme Court finds no breach of privacy when personal data have been lawfully collected and are processed by a judicial authority for reasons of justice[62]. As mentioned, the case in which the court held such principle was about a court order for the exhibition of lung tissues samples collected by the medical staff from the presumed father when he was hospitalized. The present case is similar to it: in both cases the samples were collected with the consent of the presumed father for other reasons and in a time when he was unaware of any paternity concern. Such similarity should reasonably justify an equal treatment.

Once the out-of-court collected samples or the out-of-court DNA findings admitted as a piece of evidence, we should face the problems related to their probating value. An analysis of case-law on the issue reveals that it is rather undisputed: according to the Italian Supreme Court, it falls within the margin of discretion of tribunals to assess the opportunity of renewing or integrating expert evidence on findings obtained out-of-court and this cannot be a ground for appeal unless specific shortcomings are alleged and a more in-depth exam is expressly required[63]. Only in this latter case the judge is bound to justify the refusal to proceed in that direction.

[61] BVG, 13 February 2007, above.

[62] Cass., 5 August 2008, n. 21128, above.

[63] See Cass., 13 July 2020, n. 14916, above. In that case the out-of-court expert evidence was challenged on the grounds that there had been no direct comparison between the son and the presumed father, as this latter had

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In the case at stake, the Supreme Court valued the following circumstances: the out-of-court expert evidence had been committed to a renown geneticist with the consent of all the parties involved; this latter had compared the son's DNA with that of the presumed father's closest relative in the male line; the findings revealed a probability of 97,386%, which was absolutely coherent with the fact that the claimant and the respondent were relatives, unilateral sibling brothers as born from the same father; a new expert evidence would have been unfounded from a scientifical viewpoint, as it required the comparison between a female DNA to ascertain a male DNA, and useless, as, at the time of the test, all parties had agreed upon the *an* of it; and the reliability of the expert to which the undertaking of the test had been committed.

The court's reasoning and the principle held appear to be reasonable as, on side, they enable the judge to avoid duplications which would clearly be against procedural efficiency, on the other side, they grant him/her enough margin of discretion to remedy the shortcomings of possible negligently conducted investigations.

not been exhumated, and that the comparison had been undertaken only with one of the two other children of the presumed father. Furthermore, see Trib. Bologna, 7 May 2021, above; Trib. Roma, 10 June 2020, above; and Trib. Asti, 25 July 2017, above.

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