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The Reevaluation of Paternity Presumptions in the Current Civil Code

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Abstract

The current Romanian Civil Code is characterized mainly by the fact that it is a monistic code, applicable to both civil and commercial relations, as well as to family law.

The filiation towards the father (the paternity) is one of the family law institutions, which gains a new configuration within the current regulation. In this respect, this study analyzes the presumptions applicable to paternity, some of them regarding marital paternity, while others envisage extra-marital paternity.

Thus, the marital paternity presumption is found in the new code in a simplified formula that unites under its legal protection both the children born in wedlock, as well as those conceived during marriage but born after the cancellation, dissolution or termination of marriage.

In addition, the current code establishes a new presumption of paternity – that of the child born out of wedlock, this presumption being designed to facilitate probation for establishing the paternity of the child born out of a marital relationship.

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1. Introductory Remarks

Family relations find their natural place within the new Civil Code (Law no.287/2009), as they are also regulated by other European Civil Codes and as they were otherwise regulated by the Romanian Civil Code of 1864 (Alexandru Ioan Cuza's Civil Code). From 1953 until the entry into force of the new Civil Code, family relations

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had been regulated by the Family Code (Law nr.4/1953). The current Civil Code reforms a series of family law institutions, including that of filiation.

Starting from the Latin adage *mater in iure semper certa est, filiatia fata de mama* it is a well-known fact that the filiation towards the mother is based on the fact of birth, which does not raise evidentiary difficulties. However, filiation towards the father is based on the fact of conception, which is more difficult to prove. The difficulty of proof lies in the fact that conception cannot be proved directly, evidence of circumstances connected with the fact of conception being necessary. Thus, in the case of the child born during marriage, the marriage of the parents must be proven, hence the paternity towards the husband of the mother, and, in the case of the child born out of wedlock, it is necessary to prove that the parents held intimate relations during the legal period of conception, circumstances that prove the paternity towards the unmarried father. Although the Romanian family law does not differentiate between the legal status of the child born during marriage and the legal status of the child born out of wedlock, the paternity of the child born during marriage is regulated separately from the paternity of the child born out of wedlock, since paternity is established differently in the two mentioned situations. Specifically, filiation towards the father of the child born during marriage is established by applying the legal presumption of paternity, while filiation towards the father of the child born out of wedlock is established by voluntary acknowledgement or by court decision. Unlike the previous regulation covered by the Family Code, the current Civil Code establishes both a presumption of paternity of the child born during marriage, as well as a new presumption of paternity in the case of children born out of wedlock, both of which we shall further analyze.

2. Regulation

The presumption of paternity of the child born during marriage, which we shall further refer to as paternity presumption, is regulated under Book II of the Civil Code, *On family*, Chapter II, *Filiation*, Section I, *Establishment of Filiation*, Paragraph 2, *Presumption of Paternity*, art. 414.

The presumption of paternity of the child born out of wedlock is regulated under Paragraph 4 *Filiation Proceedings* (of the above mentioned section), art. 426, as *presumption of filiation towards the presumed father*.

3. Presumption of Paternity

In the case of the child born during marriage, the previous Family Code established two categories of paternity presumptions. Thus, according to art. 53, paragraph (1), “the child born within wedlock has as father the mother’s husband”, this hypothesis being known as the legal presumption of paternity of the child born during marriage, and, according to art.53 paragraph (2), “the child born after the dissolution, annulment or termination of marriage has as father the former husband of the mother, provided that the child had been conceived during marriage and that the birth occurred before the mother has entered another marriage”, which represented the statutory presumption of paternity of the child born within wedlock.

The current regulation was simplified by the legislator, which brought together the two former statutory presumptions of paternity into a single one, establishing, under art. 414 of the Civil Code, that “the child conceived or born during marriage has as father the husband of the mother”. First of all, the current presumption of paternity covers the legal status of the child conceived and born within wedlock. It is not relevant whether the current husband of the mother was married to another woman at the time of conception or on the date the child was born, disregarding the principle of monogamy¹ (Florian, 2010). Secondly, this presumption refers to the child conceived before and born during marriage, regulating that the man that marries the pregnant woman is considered to be the father of that child, whose paternity he tacitly acknowledges, by concluding the marriage. Furthermore, this presumption includes the child conceived during the marriage, but born within 300 days from the termination,

¹ If one of the spouses is bigamous, the marriage is absolutely null; however, this sanction does not affect the children born during the annulled marriage, who will maintain the status of children born within wedlock, as an exception to the retroactive nature of the nullity of that marriage.

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