ON THE PRESUMPTION OF PATERNITY AND THE NEGATION OF PATERNITY

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Abstract

Paternity is the legal link between the father and the child and results from the fact that a man has conceived the child. Paternity may be either from marriage or from outside marriage. The filiation toward the father in marriage is determined by the effect of the presumption of paternity according to the law, and the paternity filiation toward the father outside the marriage is established, either by the recognition of the father or by the court. In the case of medically assisted human reproduction with a third-party donor, the filiation toward the father shall be based on the consent of the mother's spouse or concubine to be considered the child's father.

In the case of the child in marriage, the presumption of paternity is the only way of establishing the filiation toward the father and operates ope legis. If the mother's husband is impossible to be the father of the child, the paternity can be negated, but only by court.

Keywords: *filiation, paternity, paternity presumption, paternity negation, legal time of the child's conception, mother's husband*.

1. General considerations

In the specialized literature[1], filiation is defined as "biological and legal or only legal connection established between two persons by virtue of the concept and birth, i.e. the legal act of adoption and which generates between them certain non-patrimonial and patrimonial rights and obligations governed by special legal rules". In other words, filiation is the connection between the child and his/her parent. The filiation toward the mother (maternity) is based on the birth fact, and the filiation toward the father (paternity) is based on the fact of conception.

Starting from the above, we can say that the filiation toward the father (paternity) is the legal connection between the father and the child and results from the fact of child's conception by a man. Paternity may be either *from marriage* or *outside marriage*.

Ab initio, we underline that, unlike the establishment of filiation toward the mother, which is done according to the same rules, whether the child is born in or outside the marriage, the establishment of filiation toward the father is regulated differently by the Civil Code.

Thus, if the filiation toward the *father in marriage* is determined by the effect of the *presumption of paternity* according to the provisions of art. 408 par (2) Civ.C., the filiation toward the *father outside the marriage* is established, either by the *recognition of the father* or *by the court*, according to art. 408 par. (3) Civ.C.

But it is important to note that, as it has also been shown in the specialized literature, irrespective of[2]the manner in which the paternity relationship has been established, once paternity has been established, *children will benefit from the same legal situation*, without distinguishing as they are from marriage or from outside it, according to article 260 C.civ and Article 16(1) of the Constitution of Romania, where the *constitutional principle of equality of rights* is consecrated.

According to the provisions of Article 409 (1) C.civ, filiation shall be proved by *the birth document* drawn up in the civil status register and *the birth certificate* issued on the basis thereof, and in the case of the child from the marriage the proof shall be furnished by *the birth document* and *the marriage document* of the parents, entered in the civil status registers as well as the corresponding *civil status certificates* [Article 409(2) Civ.C.].

Therefore, it is noticed from those above-mentioned that in the case of the child in marriage, the *presumption of paternity* is the only way of establishing the filiation toward the father and operates *ope legis.* If the mother's husband is impossible to be the father of the child, the paternity can, on the grounds of art. 414 (2) Civ.C. be *negated*[3], but only *in court*.

2. Legal time of the child's conception

Although for the time being, *the date of conception of a child* cannot be determined with certainty, it is particularly important both in the case of the establishment of paternity in the marriage and the paternity outside it[4].

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[1] Teodor Bodoașcă, *Dreptul familiei. Curs universitar,* Edition 3, reviewed and supplemented according to the New Civil Code, Editura Universul Juridic, Bucharest, 2015, p. 370.

[2] Emese Florian, *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filatia*, Edition 6, C.H. Beck Publishing House Bucharest, 2018, p. 397.

[3] According to Article 414(2) Civ.C., "Paternity may be negated, if it is impossible for the mother's husband to be the father of the child."

[4] Marieta Avram, *Drept civil. Familia,* 2nd issue, revised and supplemented, "Hamangiu" Publishing House, Bucharest, 2016, p. 388.

For these reasons, the law established *a presumption* determining *the legal time of the child's conception.* Thus, according to Article 412(1) Civ.C., the time interval between the three hundred and one hundred and eightieth day before the child's birth is the legal time of conception. It shall be calculated day by day. These two time limits have been established on a scientific medical basis, which in fact cover *the delayed birth* and *premature birth* of a child[5].

For example, in a case[6], the court stated that "the term is calculated on a day-by-day basis. It is 121 days, which means that the day of birth, which is the departure day of the term (*dies a quem*), is not taken into account, but the day of fulfillment is counted (*dies a quem*)". Therefore, the court specifies in the same case, "if the mother and the presumed father have maintained only one intimate report but it is proven that this one was within the child's conception period, the action in determining paternity is admissible."

It follows from the interpretation of the above that *the legal time of the child's conception* is a *legal concept* and can be defined as „the period of time during which the conception could have taken place, between the three hundred and one hundred and eightieth day before the birth of a child"[7]. *The legal time of conception* serves to determine the father of the child, whether a child born during the marriage or a child born outside it[8].

According to Article 412 par. (2) Civ.C. *scientific means of proof* of the conception of the child may be produced within a certain period of time within the period referred to in paragraph (1) or even outside that period. As noted, the specified article establishes *a presumption of legal time of conception*, which is a *mixed, intermediate, legal* presumption [9].

3. Presumption of paternity

3.1. Concept and basis of the presumption of paternity

As mentioned above, according to article 408(2) Civ.C., the filiation toward the father is established by the effect *of the presumption of paternity*. In other words, "the father is the one that the marriage shows" (*pater is est quem nuptiae demonstrant*). Therefore, by the effect of the legal presumption, the child is exempt from any other evidence relating to the filial relationship with his/her father[10].

Article 414(1) Civ.C. establishes the rule according to which the child born or conceived during the marriage has as his/her father the husband of the mother. Therefore, as stated in a case-law[11], "a recognition of paternity, which produces legal effects, cannot exist, the status of the child born during the marriage being determined by law". In other words, the paternity of these children cannot be established by voluntary recognition by the father.

In literature, *the presumption of paternity* was defined as "the legal means of establishing filiation toward the father, which indicates as the father of the child the husband of the mother from the marriage during which the fact of conception or birth took place, or[12] "the means provided by law of establishing the paternity of the child from the marriage according to which the mother's husband is the father of the child conceived and/or born of that marriage"[13].

Therefore, it follows from the interpretation of Article 414(1) Civ.C that the presumption of paternity is based on the fact of the child's conception during marriage or that of the child's birth during the mother's marriage[14]. In other words, as the courts have also ruled[15], "the presumption of paternity only works for children born or conceived during the marriage".

Therefore, "*the paternity* of the child outside the marriage cannot be established by extending this presumption to the intimate relationship between the mother of the child and another man outside the marriage"[16].

If the mother was married to a man at the time of the child's conception, and at the time of the child's birth the mother had entered into a new marriage, the presumption of paternity "operates in favor of the man in the subsequent marriage (the one who had the capacity of husband at the time of the child's birth)"[17].

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[5] Lucia Irinescu, *Curs de dreptul familiei,* Hamangiu Publishing House, Bucharest, 2015, p. 151.

[6] Bacău court of appeal, civil decision on.776 of August 14, 1996, in „Jurisprudența Curții de Apel Bacău", 1996, pp. 43-44, *apud* Lucia Irinescu, *Filiația față de tată. Practică judiciară,* EHamangiu Publishing House, Bucharest, 2007, p. 12, case 8.

[7] Bogdan Dumitru Moloman, *Dicționar de dreptul familiei,* Universul Juridic Publishing House, Bucharest, 2012, p. 324.

[8] Teodor Bodoașcă, *Opinii privind timpul legal al concepțiunii și prezumțiile de paternitate în statornicirea Codului civil*, in „Dreptul" no. 10/2014, pp. 39-51.

[9] Lucia Irinescu, *Filiația față de tată (Sheet no.22),* in Emese Florian, Marieta Avram (coord.), *Dreptul familiei. Fișe de drept civil*, Universul Juridic Publishing House, Bucharest, 2018, p. 175.

[10] Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *Tratat de drept civil român,* volumul I, Colecția Restitutio, All Beck Publishing House, Bucharest, 2002, p. 290.

[11] Tribunalul Suprem, decision no.755/1978, in „Revista română de drept" no. 11/1978, p. 62, *apud* Corneliu Turianu, *Dreptul familiei. Practică judiciară,* C.H. Beck Publishing House Bucharest, 2008, p. 257.

[12] Marieta Avram, *op. cit.* (2016), p. 389.

[13] Dan Lupașcu, Cristiana Mihaela Crăciunescu, *Dreptul familiei,* 4th edition, amended and updated, Universul Juridic Publishing House, Bucharest, 2021, p. 408.

[14] For nuances, see Teodor Bodoașcă, *Dreptul familiei* (2015), pp. 392-393.

[15] Iași Court of Appeal, Civil section, decision no. 1190 of October 27, 1998, in „Culegere de practică judiciară", 1999, pp. 78-79, *apud* Lucia Irinescu, *Filiația față de tată. Practică judiciară,* Hamangiu Publishing House, Bucharest, 2007, pp. 17-18, case 13.

[16] Suceava District Court, Section I Civil matters, civil decision no.451 of June 19, 2020, available on www.rolii.ro (accessed on 13.01.2021).

[17] *Idem*.

We should underline that, in the same case, the court stated that ”the presumption does not apply to children who are born out of the long-term relationship of parental cohabitation, even if the parents were married after the birth of the child”.

But, as I mentioned before, *the presumption of paternity is not absolute*, but is *a relative presumption*, which can be overturned by *any means of proof*, even if the mother and the biological father of the child admit that they are his/her parents. Therefore, from the legal nature point of view, the presumption of paternity *has a mixed character*[18], it being possible to be overturned by *way of legal action in negation of paternity* according to article 414 (2) Civ.C. and article 429-433 Civ.C. In this respect, in a case[19] judged under the auspices of the Family Code, which is now repealed, the court has indicated that ”the legal presumption of paternity, on the grounds of which the child born during the marriage has the mother’s husband as a father, can only be removed by an action of negation of paternity and not by the registration of the child at the civil status office in the name of the mother's concubine". In the same sense, in a recent case[20], the court underlined that ”the presumption of paternity takes effect irrespective of the child’s act of birth, which could show, for example, that the child’s father is someone else than the mother’s husband or that the child’s father is unknown. It was decided that the child born during the marriage benefits from a presumption of paternity, even if the father was not registered in the act of birth and did not bring the action in the negation of paternity”. For reason identity, it is stated in the same decision that, ”the child enjoys the presumption of paternity, even if the father was not registered in the act of birth, and the child conceived during the marriage but born after the marriage ceased or was dissolved, and his/her mother did not remarry before the date of birth. If the mother’s husband is not registered in the civil status register as the child’s father, an action may be brought to ascertain the applicability of the provisions of the New Civil Code, which provide for a presumption of paternity, and to ask for the rectification of the act of birth. This presumption creates in favor of the child a status of a child born by a married woman."

The presumption of paternity of the child conceived during the marriage is based on the *obligation of fidelity of the wife*, which is also the logical condition for the establishment of the presumption of paternity. In other words, the presumption of paternity is based on two ideas, namely: ”cohabitation of spouses and the conjugal faith of the wife”[21].

The court has a special and active role in removing the presumption of paternity. Thus, as it has also been shown in a decision of our supreme court[22], judged under the auspices of the Family Code, now repealed, "(...) the court is obliged to proposed all necessary evidence and also to exercise its active role, ordering *ex officio* the administration of evidence, in order to be able to form a certain conviction as to the fact subject to trial. The promotion of action in negation of paternity resulting in a change in the civil status of the child born during the marriage, on which it cannot be transacted, follows that, in the absence of any other evidence, the mere recognition of the defendant-mother, which may constitute an act of connivance between the parties concerned, is not producing any legal effects”.

3.2. Conditions for the application of the presumption of paternity

For the application of the presumption of paternity, a number of conditions must be fulfilled which, if satisfied, according to the provisions of article 414 (1) Civ.C., *the mother’s husband is presumed the father of the child born or conceived during the marriage*:

- determination of the filiation toward the mother, according to the law, which means that from a legal point of view, the determination of the paternity of the child from the marriage can only be made after the determination of filiation toward the mother (maternity);
- mother's marriage;
- conception or birth of the child during the marriage of his/her mother[23].

4. Negation of paternity

4.1. Concept and regulation

The negation of paternity aims to remove the presumption of paternity established by the law between man and child and serves the presumed father to remove from the family the child conceived by his wife from relations with another man[24]. In other words, the negation of paternity means denying it by means of legal proceedings, the aim being to overturn the presumptions of paternity[25].

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[18] About the mixed nature of the presumption of paternity, the Constitutional Court pronounced under the auspices of the Family Code, now repealed, by decision No 78/1995, published in the Official Gazette no. 294 of December 20, 1995.

[19] Supreme District Court, Decision No. 664/1977 in "Revista română de drept" no. 10/1977, p. 61, *apud* Corneliu Turianu, *op. cit.*, p. 259.

[20] Suceava District Court, 1st Section Civil matters, civil decision No. 451 of June 19, 2020, *op. cit.*

[21] Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *op. cit.*, p. 290.

[22] Supreme District Court, Decision no. 261/1988, in "Revista română de drept" no. 1/1989, p. 71, *apud* Corneliu Turianu, *op. cit.*, p. 240, where a note of the author can also be read.

[23] Marieta Avram, *op. cit.* (2016), p. 390.

[24] Constantin Hamangiu, I. Rosetti-Bălănescu, Alexandru Băicoianu, *op. cit.*, volume I, p. 296.

[25] For details see Bogdan Dumitru Moloman, *op. cit.* (2012), p. 32.

For example, in a case[26] concerning the negation of paternity, "the court has held that for the admission of an application in the negation of paternity lodged by the child's mother's husband (at the time of birth of the child, current, former husband), unequivocal circumstances must be established to demonstrate that it is impossible for him to be the father of the minor whose paternity is negated. From the evidence produced in the present case, the court has held that, in the context of the questioning taken on xxx, the defendant A.A. recognized that, prior to the beginning of her relationship with him, she was in a different relationship with a man at whom she actually lived in and that on xxx she moved to the claimant's home.

Witness B.B. stated that the defendant confessed to her about one and a half months after she moved to the claimant's home that she suspected that she was pregnant and that she conceived the child with the X.X. with whom she had a previous relationship. The witness also showed that the mother of the defendant also told her that she suspected the child born by her was not the claimant's. The witness also stated that the defendant hid the pregnancy for almost its entire duration, and shortly after she admitted being pregnant because the pregnancy could no longer be hidden, she also gave birth.

Witness C.C. stated that the parties met each other in August 2013 and in September 2013 the defendant moved to the claimant's home and that prior to her relationship with the claimant, the defendant had a relationship with another man, completed shortly before meeting the claimant. The witness also stated that the defendant hid the pregnancy and told her that she gave birth prematurely at 7 months, but the claimant told the witness that he suspected minor Y.Y. was not his child.

The witness D.D. stated that in early September 2013 the relationship of the parties started and in 2014 he learned that the claimant's mother went with the defendant to the family doctor because she felt sick and, on that occasion, the defendant was found to be pregnant and was to give birth in the immediately following period. The witness also showed that the claimant told him he suspected the child born by the defendant was not his own because he learned that, until a short time before the beginning of their relationship, the defendant was in a relationship with another man.

In that case, the DNA test was carried out by the Forensic Medicine Laboratory (...), in which the biological samples of both parties and those of the minor Y.Y. were analyzed and the result of this test concluded that the claimant was excluded from being the biological father of the child Y.Y. In view of the situation *de facto* presented, which resulted from the evidence produced in this case, the court considers that proof was made that it was impossible for the claimant to be the father of the minor Y.Y. (...)".

As we have already mentioned, the paternity of the child from marriage can only be removed by action in the negation of paternity[27]. In accordance with the provisions of article 429(1) Civ.C., the action in the negation of paternity may be started by the mother's husband, the mother, the biological father, as well as the child. The action in the negation of paternity may be started or, where appropriate, continued by their heirs, under the conditions provided for by law[28].

However, on the grounds of article 92(1) Civ.Proc.C., for the protection of the legitimate rights and interests of minors or of persons placed under a prohibition or of those missing, the prosecutor may also bring an action in the negation of paternity if necessary.

4.2. Limitation of the right of action

According to the provisions of Article 430(1) Civ.C., *the right to action of the mother's husband* is subject to a limitation period of three years, "which runs either from the date on which the husband knew that he was presumed as the child's father or from a later date, when he found that the presumption did not correspond to reality".

For example, in a case[29]the defendant negated the paternity of the minor M.M.D., born on October 26, 2006, and claimed he had no intimated relations with the mother of the minor in the last 21 years the court considered that in this case the limitation period started to run on the child's birth date and was obviously fulfilled until the action in negation of paternity was lodged. The court also states that "the security of family relations cannot be disturbed by ensuring that the action in negation of paternity can be carried out without a time limit and without justifying its start with a delay of almost 14 years. Even if the court would held that the defendant had not known the minor's birth at the time this occurred, according to the defendant's statement in the criminal case no. 3043/P/2015, he had knowledge of the minor's birth at the latest in summer 2007". Thus, the court will reject the claim made by the defendant for the negation o paternity as barred by the statute of limitation.

It should be underlined that, as also stipulated in paragraph 2 of article 430 Civ.c., the term does not run against the husband placed under a judicial prohibition, and he can make use of his right to an action in the negation of paternity within three years from the date of lifting of the prohibition. If the husband is placed

[26] Săveni law court, civil sentence no. 48 of February 3, 2020, available on https://www.jurisprudenta.com/jurisprudenta/speta-167ab1sj/ (accessed on January 14, 2021).

[27] The establishment of filiation, the negation of paternity or any other action concerning filiation is subject to the provisions of the Civil Code and produces the effects it provides only in the case of children born after its entry into force (see Article 47 of Law 71/2011).

[28] In the old regulation, according to Article 54(2), sentence I Civ.C., the action in the negation of paternity could only be started by the mother's husband. These provisions were declared unconstitutional by Decision no. 349 of December 19, 2001 of the Constitutional Court, published in Off.G. no. 240 of April 10, 2002.

[29] Petroşani Law court, civil sentence no.770 of June 17, 2020, available on www.rolii.ro (accessed on l3.01.2021).

under interdiction, the action may be started on his behalf by the guardian and, in the absence of the guardian, by a curator appointed by the court [Article 429(3) Civ.C.].

If the husband died before the expiry of the limitation period of 3 years without the action being started, it may be started by his heirs within one year of the date of death [art.430 par. (3) Civ.C.].

As we have already shown, the action in the negation of paternity can also be started by the mother. Thus, according to article 431(1) Civ.C., *the mother can start the action in the negation of paternity* within three years from the child's birth date. The mother may bring an action in the negation of paternity, as a claimant, against the husband/former husband, and if the latter is deceased, the action may be started, pursuant to article 429(4) Civ.C., against the heirs. If the inheritance is vacant, the art. 439 Civ.C. provides that the action may be brought against the commune, the city or, as the case may be, the municipality at the place of the opening of the estate, and the summoning in court of the waivers, if any, is mandatory.[30].

As for *the right of the child to start an action in the negation of paternity*, according to article 433(2) Civ.C., the right to action is not subject to prescription during the child's life. Thus, according to the provisions of article 433(1) Civ.C., the action in negation of paternity is brought by the child, during his/her minority, through his/her legal representative. The child may bring the action in negation of paternity against the alleged father (the husband of the mother or her former husband) or against his heirs [art.429 par.(4) Civ.C.]. If the inheritance is vacant, the action may be brought against the commune, the city or, as the case may be, the municipality at the place of the opening of the estate, the summoning in court of the denouncers, if any, being mandatory[31].

Finally, *the action in the negation of paternity can also be introduced by the alleged biological father*. Thus, according to article 432(1) Civ.C., "the action in negation of paternity introduced by the person claiming to be the biological father can only be allowed if he provides proof of his paternity toward the child". As it can be seen, the lawmaker established a special condition of admissibility of the action in the negation of paternity, in the sense that the alleged father must prove that he is the child's father and not the mother's husband or former husband. The right of action shall not be subject to prescription during the life of the biological father. After his death, the action may be brought by his heirs not later than one year after his death [art.432 par.(2) Civ.C.].

The establishment of the right of action of the alleged biological father, although considered to be an "avant-garde measure"[32], is regarded in the specialized literature[33] as "excessive and unjustified", and at the same time some reservations have been expressed, because in practice, it has been found that the interests of the child often do not match the interests of the alleged father.

4.3. Cases in which paternity may be negated

The law does not list the cases in which the husband of the mother may deny paternity, but merely states, in Article 414(2) Civ.C., the general rule according to which "*Paternity may be negated, if it is impossible for the mother's husband to be the father of the child"*. It is therefore up to the courts to decide on a case-by-case basis.

The concept of "impossible", regulated in Article 414(2) Civ.C., the courts have shown[34]that it means not only the physical or biological impossibility to procreate, but also objective situations or circumstances which make the child's conception impossible in the relations of the spouses, such as the absence of the husband from the country or other circumstances which prevented the existence of intimate relations between the spouses following conflicts which effectively led to the moral impossibility of cohabitation.

In a case[35], in the grounds of the petition for negation of paternity, the claimant showed that it was impossible for him to be the father of the minor because, at the time when the defendant found out that she was pregnant, he was on a mission to Afghanistan, so that, on the date when the child's conception should have taken place, he was not in the country. Thus, as the court found, "(...) the defendant-claimant shows that the claimant-defendant was on a mission to Afghanistan as of 05.09.2010, but before leaving, he insisted on conceiving a child. Thus, in July 2010, both parents carried out the blood tests necessary before a pregnancy and decided to conceive a child in the next fertile period.

The minor EMS was born on 18.05.2011, and according to the ultrasound and discharge note the pregnancy was 40 weeks, so the date of conception was 11.08.2010 when the defendant was in the country. The defendant-claimant also shows that when the claimant-defendant came to the country on a permission he

[30] For developments regarding the right of action of the mother of the child, see Emese Florian, *op. cit.* (2018), pp. 405-406; Cristina Nicolescu, *Dreptul familiei,* Solomon Publishing House, Bucharest, 2020, p. 401.

[31] For developments regarding the legal representation of the child, see Emese Florian, *op. cit*. (2018), pp. 406-407.

[32] Marieta Avram, *op. cit.* (2016), p. 402.

[33] For details see Emese Florian, *op. cit*., (2018), pp. 407-410; Cristina Nicolescu, *op. cit*. (2020), pp. 404-408.

[34] Supreme Court, decision no. 579/1985, in „Revista română de drept" no. 1/1986, p. 70, *apud* Corneliu Turianu, *op. cit.,* pp. 247-248, where an author's note can be read; Supreme Court, decision no. 24/1978, in Ioan G. Mihuță, *Repertoriu de practică judiciară în materie civilă a Tribunalului Suprem și a altor instanțe judecătorești pe anii 1975-1980,* Editura Științifică și Enciclopedică, Bucharest, 1982, p. 29; Supreme Court, decision no. 55/1978, in „Revista română de drept" no. 7/1978, p. 49, *apud* Corneliu Turianu, *op. cit.,* p. 254 and author's note.

[35] Law court district 3 Bucharest, Civil matters, civil sentence no. 17.717 of November 15, 2012, available at www.rolii.ro (accessed on 13.01.2020).

accompanied her to the regular medical visit to see the girl and also signed the contract on stem cell collection in the child's father section (...).

In the file, DNA forensic expertise was ordered, and its conclusions were that the SMA is the biological father of the SEM minor, with a probability of 99.99%. Therefore, in public session of 15.12. 2011, the claimant-defendant SMA asked the court to take note of his waiver at the judging of the petition in negation of paternity".

In another case[36], judged also under the auspices of the old rules in this field, the court underlined that "the mere circumstance that the spouses have lived separated in fact is not such as to lead to the conclusion that the mother's husband is the father of the child born during the marriage, if it turns out that their intimate relations continued during the period when they did not live together."

The courts[37] also considered that 'the mere recognition of the mother of the child that her husband is not the father of the child is not enough, so it is necessary to corroborate this with other means of proof showing that, during the child's conception period, the father was in impossibility to maintain intimate relations with his wife." In another case[38] in which from the marriage of the parties and during the marriage a minor resulted, born on 26.10.2010, the court found that "the birth certificate of the girl shows the filiation toward both parents. Being a minor born during the marriage, filiation is determined on the basis of the presumption of paternity of the spouses.

In the meantime, the parties have separated, with a civil divorce sentence no 2963 of 7.12.2010, in action, with the claimant showing that he was separated *de facto* from his wife, the mother of the minor in question, and that it is impossible for him to be the father of the minor.

In the case, the defendant, by authentic notarial statement, no 250 of 15.02.2011, recognizes that the minor is not the daughter of her former husband, the defendant in question. The defendant also submits to the file a memo showing the status of *de facto* separation from her husband, the fact that the minor is not the child of the defendant and that the minor was registered with the filiation of the father - the mother's husband as at the date of birth she was married to the claimant.

The court, as compared to the positions of the two parties, considers that the minor in question is not the daughter of the claimant, which is why it will admit the action and establish this state of affairs, in relation to the provisions of Article 54 family code, and to the fact that any person interested may challenge the recognition of paternity where it does not correspond to the truth, and in the present case, by the defendant's position, this situation *de facto* has been established. Consequently, the court is to cease the effects of the civil divorce sentence no. 293/2010 in respect of the alimony for the minor I., born on 26.10.2010".

The proof that the mother's husband is not the father of the child can be made, as we mentioned before, by any means of proof. Thus, the judge, a decision of the Supreme Court specifies[39], "*has the duty to produce all proofs with a view to establishing the correct situation de facto, for the purpose of establishing by proofs whether or not the claimant is the father of the child*". In another case[40], the court considered that "the age of the pregnancy at the time of birth can also be determined by the length of the fetus, his/her weight, by the weight of the placenta, as well as by other morphological features. If in relation to these data, established for sure, it is established that it is impossible for the mother's husband to be the father of the child, the action in negation of paternity is to be allowed".

Also, a particular role in proving that the mother's husband is not the child's father is to carry out DNA-type forensic expertise, whereby, as a result of the establishment and comparison of the genetic profiles of the child and the mother's husband, to be proved that it is impossible for him to be the child's biological father[41]. In a particular case[42] where DNA expertise was ordered and carried out[43], the court considered that "DNA expertise is the most complete and most likely modality of genetic expertise, which in no way depends on the prior carrying out of serological or HLA experts examinations (human leukocyte antigen, n.a.). And this is because serological and HLA expertise are also methods of research of paternity or filiation in general, which, as the appellant misunderstood, do not present steps prior to the administration of the proof with DNA expertise. These expertises, serological, HLA and DNA, do not depend on each other, but they may, even if they are independent and may be carried out independently, be used successively to establish filiation and if the serological or HLA expertises are not conclusive, given their lower probability, one can resort to DNA expertise, which has a very high degree of

[36] Supreme District Court, Decision no.884/1976, în „Culegere de decizii", 1976, p. 172, *apud* Corneliu Turianu, *op.cit.*, p. 260.

[37] Supreme District Court, Decision no. 548/1981, "Revista română de drept" no. 12/1981, p. 102, *apud* Corneliu Turianu, *op. cit.*, p. 251.

[38] Moinești Law Court, civil sentence no. 638 of February 23, 2011, available at www.portal.just.ro (accessed on 13.01.2020).

[39] Supreme District Court, Civil Matters section, decision No 1501 of December 31, 1968, in „Culegere de decizii", 1968, p.62, *apud* Marieta Avram, *op.cit*., (2016), pp.394-395, footnote 5.

[40] Hunedoara county district court, civil decision no.1002 of October 9, 1980, in „Revista română de drept" no.4/1981, p.114, *apud* Marieta Avram, *op.cit.*, (2016), p.395, footnote 1.

[41] For details on the forensic expertise of the filiation – form of judicial expertise and legal grounds, see Ion Enescu, Moise Terbancea, *Bazele juridice și genetice ale expertizei medico-legale a filiației*, Medical Publishing House, Bucharest, 1990, pp. 115-134.

[42] Cluj Court of appeal, 1st section, Civil matters, decision no.378/2013, in „Curtea de Apel Cluj – Buletinul Jurisprudenței", 2013, I, p.251.

[43] For details on the genetic bases of the forensic expertise of the filiation, as well as on genes and genetics of populations, see Ion Enescu, Moses Terbancea, *op.cit.*, pp. 135-236.

probability and makes any other expertise on the matter superfluous".

In a case[44] in which the minor's mother refused to submit the minor to a specialized expert examination, the court considered that "it cannot be ignored that, although legally there was no pre-established hierarchy of means of proof, while remaining to the judge to judge in concrete terms the extent to which he can trust them, in a civil action such as the one of negation of paternity, scientific proofs, as the expertise to determine the likely date of conception, the serological and dermatoglific expertise can highlight more rigorously and with greater certainty elements that will allow judges to form conviction regarding the real situation *de facto*. Such scientific proofs, although useful, are not the only one that can be produced, and formation of judges' opinion can be done taking into account the whole evidence produced in the case. Moreover, it is not illegal to decide, when any proofs other than a forensic expertise has been proposed and produced that the mother's husband may not be the child's father, that the court should reject the proof with expertise, considering that there are no indications that such proofs are useful. It should also be noted that, where the producing of the proof with expertise necessarily involves the presence of the parties, such as in the case of serological and dermatoglific expertise, the law does not mean to give any particular value to the behavior of the party refusing to appear before the specialist laboratory or institute, as in the case of refusal of the party to reply to the questioning or to appear proposed and agreed questioning. In the absence of such a legal provision, the judge could only, beyond his/her own prerogatives, give, even with limited effects on the case judged, a certain value or significance of a party's refusal to allow forensic expertise to be carried out, but it remains the possibility of investigating the merits by other means of proof. Finally, although evidence of legal facts can in principle also be provided by presumptions, the basis for the solution of admitting an action in the negation of paternity solely on the mother's refusal to allow the forensic expertise to be carried out makes groundless the decision which would be given, for the law allows the judge to rely on the presumptions only when they have "a certain weight". But such a refusal of the mother could not be considered to permit such a serious conclusion as that her husband is not the father of the child, the interest to be protected-the one of the minor - requiring verifications and the producing of proofs that unequivocally makes the court's conclusion".

Finally, it should be noted that in a case where[45]an out-of-court expertise has been carried out, the court has indicated that "in settling the action in negation of paternity, the case cannot be settled on the basis of an out-of-court proof (DNA expertise carried out to challenge the recognition of paternity), what was not directly produced in the trial of negation of paternity".

5. Conclusions

Our study shows that the purpose of the action in negation of paternity is to remove the presumption of paternity established by the law between man and child and serves the presumed father to remove from the family the child conceived by his wife from relations with another man. In other words, the negation of paternity means denying it by legal action, with the aim of overturning the presumptions of paternity.

The Romanian law, respectively the Civil Code, does not list the cases in which the mother's husband can negate the paternity, but only lays down a general rule, with the courts having this extremely important duty, to decide on a case-by-case basis.

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