

## PROCEDURAL ASPECTS OF JUDICIAL PRACTICE IN MATTERS OF CONSANGUINITY IN LINEAL DESCENT

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**Abstract:** *There are cases when the filiation of a child born within marriage is contested. Such an appeal may seek to prove either that both the child's conception and birth occurred outside marriage, or that his parents were never married. In this situation, the child cannot benefit from the presumption of paternity, although some consequences arise. He will usually benefit from the ascertainment of a single affiliation, to the parent having set out to determine the lineage to the father, through legal proceedings, instituted to this purpose (in accordance with Art. 56 and 59 of the Family Code.)*

**Key words:** *consanguinity in lineal descent, presumption of paternity, filiation to the mother, filiation from the father.*

According to the Family Code, if, in the birth certificate, the father's name is registered as its own declaration, the child born out of wedlock remains fixed in this statement, which is worthy, as having been made under the testimony and with the assent of the civil service. The action of removing the child from the legal appearance of marriage results from the misapplication or misuse of the paternity presumptions – stipulated by the art. 53 paragraphs 1 and 2, and the Family Code – and it is called paternity action complaint. [1]

The Romanian Civil Code, issued and approved by the Government, in 1865, included the so-called legitimate action (Article 289) under which any interested person might request, by action or by way of exception, for the legal presumption of legitimacy to be removed, in case of the

legal presumption of paternity, unless the requirements of application were fulfilled.

Like any other parenthood-challenging action, the action of challenging the marriage-born child's paternity cannot be sued by any interested person, it is indefeasible and it can be substantiated by any evidence.

The action of paternity challenging should not be mistaken for paternity denial. The first action attempts to prove that the presumption of paternity, having been proved during the last action, cannot be applied if it tends to overthrow the presumption of paternity because it corresponds to reality. The presumption of paternity does not find its application if it is proved that the child's parents were never married or that the child was born either before marriage or after 300 days since the termination or dissolution of

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marriage, but it is impossible for the mother's husband to be the father.

Regarding the effects of this challenge a distinction is operated upon the way the birth was declared at the civil service: either status of the child's father or another person: in the first case, it retroactively acquires the quality of child born within the marriage and it becomes retroactive from the date of birth of the child out of wedlock, with paternity established, because the father submitted the declaration under Art. 57 C. fam., and he is worthy of the paternity recognition: in the second case, the child loses retroactive status of child born within marriage and becomes retroactive from the date of his birth, being considered child out of wedlock, with no established paternity, but he may possibly reacquire it, after the contestation, either by acknowledgement or by Court.

Within the action registered under no. 719 / 28 February 1986, in Medias Court, the plaintiff RV sued RI his wife, making a declaration and attempting to prove that he was not the father of the minor child born on 4 September 1983, during the marriage. The Medias Court upheld the action, having established through the Court order no. 957/30 April that the applicant was not the minor child's father, RD.

In order to pass this sentence, the Court based its decision on the defendant's declarations that the plaintiff was not the child's father, but another person; and also on the declaration of other witnesses, AC and IT, which also proved that the plaintiff found out only later that he was not the child's father but another person was whom the defendant had had relations with.

The sentence was appealed by P.G. on two grounds: firstly, no admitted evidence showed that the applicant was not the minor child's father RD and secondly, due to staleness the action was brought under

Article 55 of the Family Code, being therefore prescribed.

The Supreme Court upheld the appeal, overruled the first Court's sentence and sent the case back to Court, in order to check the alleged lateness of the Attorney General's plea.

Medias Court dismissed the denial of paternity made by RV, by accepting the plea of lateness; the right of action was barred by the term exceeding six months, stipulated in art.66 C. fam.

The same sentence found to be dismissed by the end of 14 December 1987 required assistance from BM - the person against whom R.I. brought up an action for establishing paternity - on the grounds that the action of paternity denial was

In connection with this case, two issues were related to this case: the admissibility of the intervention in a process of denial of paternity and the possibility of bringing the case within the action of paternity denial and of settling contradictory known problems.

Thus, the claim for intervention, in the first opinion, is considered the basis of art. 49 C. fam., which stipulates that "Everyone having a certain interest may intervene in a cause between two people. An interest in B.M. posited there was no doubt in his interest because he brought the action to establish paternity out of wedlock; after first denying the paternity, the Court admitted that the child was born in wedlock. Because the individual's civil status has special effects on social character, it cannot strictly be based on personal action for denial of paternity, to reject interference. This orientation has been considered and our Supreme Court, in its decision, stated: "... A person's marital status must meet the truth, the matter concerning the person's status being of particular interest with all its implications on economic and non-property relations, established within society, wherein he is

committed...". Therefore, the law stipulated by special regulation for any person, the right to challenge an acknowledgement which does not reflect reality. [2]

In this case, the intervener was the defendant in the case in which RI asked for his minor child's paternity to be acknowledged the child having been born during the marriage of the applicant. The defendant relied on a single reason: the limitation of action for denying the children's paternity born in wedlock more than three years back.

If the intervention in the denial of paternity action were not allowed, it could lead to chaotic situations since after many years a minor's civil status can be modified, and society could be powerless against breaches of law, not being able to settle the dispute since this is a purely personal.

In another opinion, it is considered that to take a decision in terms of the request for an application for intervention principal or accessory of , a third party, in the denial of paternity; considering that he would have an interest in denying paternity action, so as to eliminate the risk of being sued; in the case of the action for establishing paternity, there should be acted towards protecting some interests against immoral acts, contrary to law, and towards observing the ethical rules of social intercourse.

Such requests must be considered inadmissible solely because of personal action for denial of paternity.

In the action for denial of paternity, there is not solved the issue of paternity out of wedlock of a third person, therefore he has no personal interest to defend in the case in which he intervenes. and the law does not empower him to defend the mother and child, as long as the mother and child are bound in marriage to the alleged father, who is the this mother's husband. In relation to

the said RV's reinstatement, a first opinion is presented in this respect that action should be dismissed, on grounds of tardiness.

Thus, it was decided that the period of six months for bringing an action to establish paternity was a limitation period also according to the provisions of Art. 19 of the Decree 167/1958, concerning the reinstatement period, since, on one hand, given the reasons which determined the institution of reinstatement that cannot be limited exclusively in cases in cases pf personal non patrimonial actions.

Also, in another case, it was decided that, considering the particular nature of the action in establishing paternity and also the effect it seeks, i.e. child support, the possibility of reinstatement must be allowed.

The contrary opinion in this case contends that there is no reason to justify the application of Art. L9 from D. 167/1958.

The permission of a reinstatement in this matter on the grounds that the husband brought during the proceedings of paternity denial, more exactly having learnt later that his wife had been unfaithful would practically mean, that, no matter what time, if the wife stated that her husband was the father of the child born within wedlock, the latter term can be restored so as to bring the action for denying paternity – this being an unrealistic solution bearing multiple negative effects?

While agreeing with the final decision delivered by the first Court, according to which the action for denying paternity brought by RV was dismissed on grounds of lateness, I think the Supreme Court ought not to have dismissed the first decision, which had accepted the denial of paternity proceedings with reference to a new trial, nevertheless noticing that the right of action is prescribed to itself dismiss the action after it quashed the decision.

### Conclusion

The theory and likewise the adaptations to situations arising in practice prove to be very important for the correct determination of consanguinity in lineal descent, in other words, the correct filiation of the child born within marriage.

### Notes

1. Albu, I.: *Dreptul familiei*. Editura Didactică și Pedagogică Bucureşti. 1975.

2. Tribunalul Suprem, dec. Nr. 327/1982 in Culegere de decizii, 1982, p. 141.
3. See Court of Covasna County, dec. Civ. Nr. 53/1997 in RRD no. 10/1978, p. 55.

### References

1. Filipescu, I.: *Tratat de dreptul familiei*. Bucureşti: Editura ALL, 1988.
2. Florian, E.: *Dreptul familiei*. Bucureşti: Editura CH Beck, 2006.
3. Codul Familiei Român adnotat, Legislația familiei, Ediție îngrijită de Florin Ciutacu, Editura Sigma, 2000.