THE 17TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Legal Presumptions of Paternity

Carmen Ion[1]

Abstract: We chose legal presumptions of paternity as the topic, expressing our conviction that we will be able to contribute to the understanding of this institution. The present study aims to carry out an analysis of the types of presumptions, effects, paternity conflicts and normative solutions. In any situation, for the child born during the marriage, the establishment of parentage to the father facilitated by the legal presumptions of paternity, enshrined in art. para. (1) Article 414 CNCiv. which takes over the normative content of art. 53 para. (1) and partially para. (2) Family Code. The conclusion that emerges is that what we have proposed is to highlight some aspects regarding the notion of the legal presumption of paternity. In this context, we will emphasize some peculiarities regarding the parentage towards the father, the parentage towards the mother, about the legal time of conception, about the child conceived or born during the mother's marriage and the jurisprudence in the matter.

Keywords: Filiation; legal presumptions of paternity; filiation toward the mother; filiation toward the father; reproof; legal time of conception; paternity tagade

Introduction

In this article will be analyzed the legal presumptions of paternity, paternity conflicts as well as normative solutions. In the doctrine “paragraph (1) and art. 414 the new C.civ. takes over the normative content of art. 53 para. (1) – and, in part, para. (2) – The Family Code, establishing the presumption of paternity of the child born or conceived during the marriage. As regards the hypothesis of the child conceived during the marriage (and, we understand, born after the dissolution, the finding of nullity or annulment or the termination of the marriage), observe that the new regulation justifiably waives the condition that the birth took place before the mother entered a new marriage (a provision which had the merit of avoiding double paternity)” (414).

Thus, for the child born during the marriage, the establishment of parentage towards the father is facilitated by the legal presumptions of paternity, enshrined in the provisions of art. 53 C fam. which is based on the very fact of marriage, taking into account two situations:

Starting from the finding that the second and third presumptions have as a common denominator the existence of marriage and the quality of the mother's wife, it represents a unique presumption of paternity. On the other hand, other authors distinguish from the provisions of paragraphs 1 and 2 of art. 53 C.fam. two separate presumptions with different grounds, namely: birth during marriage, for one and conception during marriage, for the other.

[1] PhD in progress, University of European Studies of Moldova – Chisinau and Tutor at the Department of Private Law of the “Danubius” University of Galati, Romania, Address: 3 Galati Blvd., 800654 Galati, Romania, Corresponding author: carmenion@univ-danubius.ro.

We consider that their very wording in the second paragraphs of art. 53 C.fam. support a cause in favor of the proponents of the second by which the legislature expresses its intention to treat them as separate entities.

We mention that not being based on certain facts, the presumptions regarding the child born or conceived during the marriage, have a relative character, being able to be overturned by way of action in the denial of paternity.

Therefore, for the child coming from the marriage, the date of conception has a special importance, as it conditions the application of the legal presumption of paternity stipulated by art. 53 para.2 C.fam. respectively: "the child born after the dissolution, the declaration of nullity or the annulment of the marriage has as a father the ex-husband of the mother, if he was conceived during the marriage and his birth took place before the mother entered a new marriage".

Knowing the period of conception of the child is extremely necessary also in terms of solving the actions in the denial of paternity.

In order to establish the paternity of the child coming from outside the marriage by court decision, the period of conception of the child is as important as in the case of children born from marriage. Since the date of conception cannot be known exactly, the legislator took into account the data provided by the medical sciences, the shortest gestation compatible with the viability of the child is 180 days and the longest pregnancy lasts 286 days, thus establishing the legal time of conception as being between the third hundred and one hundred and eighteenth day before the birth of the child. This presumption of the legal time of conception is enshrined in the provisions of art. 61 C.fam.

From the content of art. 61 C.fam. it follows that in order to determine the legal time of conception, the calculation is made "from day to day", so on days and not on hours.

And as the first day of the beginning of the terms is not counted (in this case the day of birth is not taken into account according to the mention "the time between the third hundred and to suck it eighteenth day before the birth of the child") but it is included, instead, in the calculation of the day of fulfillment of the terms, it follows that the difference between the two terms is 121 days. Basically, this time is 121 days, as the law discusses the 300th day and the 180th day "before the birth" of the child, which means that the day of birth (dies a quo) is not counted but the day of fulfillment is considered (dies ad quem).

Summing up briefly, the provisions of art.61 C.fam. it creates an absolute presumption regarding the determination of the legal time of conception. The legal time of conception is based on certain data – the minimum and maximum duration of gestation, presents the character of an absolute presumption that can not be combated in any way by a contrary proof.

If, regarding the indisputable nature of the presumption of the legal time of conception, there is a unanimity of opinions, instead on the admissibility of the proof that the moment of conception would be placed in a certain interval within the legal time of conception, the opinions are totally divided.

In the legal literature, there are opinions that show that the absolute attribute of the presumption of the legal time of conception concerns the fact that it cannot be proved to the contrary that the gestation would last less than 180 days and more than 300 days, nor is it permissible to try to prove that the conception would be placed in a certain part of this interval.

Other authors consider that the absolute character of the presumption of the legal time of conception must be interpreted both in the sense of the impossibility of challenging the limits of gestation between

the 180th and the 300th day before birth, as well as in the possibility of proving that the act of conception is practically placed in a certain part of this period.

There are different legal interpretations, a situation in which, in favor of the second claim, the establishment of the objective truth is possible only in relation to the second interpretation of the legal presumption of the legal time of conception. The fact that within a wide term of 4 months (121 days) it is sought to establish the placement of the moment of conception, does not contradict the irrebuttable character of the presumption of the legal time of conception.

The courts have a peremptory proof which, in conjunction with other means of proof, is able to provide sufficient grounds for establishing the paternity of the child born from the marriage outside it.

Against the background of the above-mentioned aspects, we keep in mind that as long as the bio-medical sciences allow the delimitation within the 121-day interval with a limit value, established by the presumption of the legal time of conception, of a more precise period in which the moment of conception is placed, this possibility must be capitalized in the interest of finding out the truth.

With the help of the forensic expertise regarding the conception period, it is possible to establish the limited period of the child's conception according to certain characteristics presented at birth by the child, which is recorded in the clinical observation sheet of the newborn.

It cannot be considered as irrelevant for the establishment by court of paternity, the specification of the limited period of conception of the child, given that at this moment the existence or non-existence of marriage or the proof of the intimate relations between the mother and the respondent man is reported, etc.

It is doubtful that a presumption cannot prevail over certain material facts scientifically proven by medical expertise.

In conclusion, we consider that the presumption of the legal time of conception, enshrined in art. 81 C.fam. establishes only the limits between which, by scientific means, the exact moment of the child's conception can be established.

In order for this presumption of paternity to be applicable, it does not matter the moment of conceiving the child – before the marriage or during the marriage, but only the moment of his birth must be placed during the marriage. However, the questioning of the two situations is of interest from the point of view of the legislator's grounds in establishing the legal presumption of paternity of the child born during the marriage, the following reasons have been taken into account:

Firstly, the alleged fidelity of the husband's wife, resulting from the duties of fidelity of the spouses, characteristic of the monogamous marriage, secondly the assumption that during the marriage between the spouses, intimate relations took place according to the marital duties (the presumption of paternity considers the tacit recognition of paternity of the one who marries a pregnant woman) and thirdly the assumption that at the time of the child's conception, the mother's husband was able to procreate.

The second legal presumption of paternity, enshrined in paragraph 2 of Article 53 C.fam., refers to the child conceived during the marriage but born after the termination, dissolution, declaration of invalidity or annulment of the marriage.

In order to be able to make this presumption, three conditions must be fulfilled: A) the child was born 180 days after the marriage ended; b) the child was born before 300 days after the termination, dissolution or dissolution of the marriage; c) the birth took place before the mother entered into a new marriage.

The grounds for the legal presumption of the child conceived during the marriage are identical to those on which the legal presumption of the child born during the marriage is based. The assumption of respect for the duty of fidelity by the wife, the fulfillment of the conjugal obligation and the existence of the procreation capacity of the husband during the period of conception of the child.

"In favor of the child in the marriage operates the presumption of paternity, according to which the husband of the mother is the father of the child" (608).

The persons who can prove contrary to the presumption of paternity are the spouse of the mother – in the case of the presumption provided for in paragraph 1 of Article 33 C.fam. Or by the former spouse of the mother, in the case of the presumption established by paragraph 2 of Article 53 C.fam.

For both presumptions, the means of combating it shall be action in the case of a declaration of paternity, and the conditions specifically required shall be those contained in article 54-55 C.fam.

Paternity summaries apply, rightfully, whenever the mentions of the father made in the birth certificate do not correspond to reality, the father of the child being in fact the husband of the mother from the moment of the birth of the child or the former husband of the mother at the time of the conception of the child. Such mentions may be: The father of the child is unknown; and the father of the child is listed another man; in both cases, the rectification of civil status acts may be requested, based on the presumptions of paternity.

Paternity abstracts also take effect if a man other than the mother's husband from the moment of birth or conception of the child would recognize the child, because a child from the marriage cannot be recognized, his paternity being established by presumptions of paternity.

The legal provisions of paternity are based on two material facts: The birth of the child and the marriage at the time of birth or the conception of the child.

The proof of birth is made by the certificate of birth established as a result of the declaration of birth at the Civil status Service or following the recognition of the child's maternity or the establishment of maternity by judicial decision. The proof of the marriage requirement at the time of the birth or conception of the child is made only through the marriage certificate. In order to avoid the possibility of contradictions between the two legal presumptions of paternity – of the child born during marriage and of the child conceived during marriage, the legislator conditioned the application of the second presumption to the negative fact of the mother's remarriage, before the birth of the child.

If the mother remarries before birth, the first presumption of parrinity occurs – the father of the child the husband of the mother at the time of birth. But the new husband of the mother can initiate action in the denuccation of paternity, which, in case of admission, opens the field of applicability to the second presumption of paternity, the father of the child being designated the first husband of the mother.

If the latter is also allowed to take action in the case of a paternity, the child is considered to be born outside the marriage. The priority that the legislator applies to the first presumption is that a man normally does not marry a pregnant woman from a previous marriage.

However, other situations have been described in the legal literature where the two legal presumptions of paternity are likely to be applied – the so-called cases of double paternity.

Such a situation is the hypothesis in which the wife whose husband was declared dead by court order remarries, gives birth to a child before 300 days after the conclusion of the new marriage, but meanwhile the former husband reappears, the death declaration being annulled.

The paternity conflict is settled in this case starting from the finding that the first husband being missing during the child's conception period, the application of the provisions of paragraph 1 of Article 53 C.fam will be made. According to which the father of the child is the husband of the mother of the second marriage.

Another dual paternity situation is that of the bigamy mother of the child, who enters into a new marriage before the termination, dissolution or dissolution of the previous marriage.

Although the second marriage is struck by nullity, according to the provisions of Article 19C.fam. – Being concluded with a violation of a disriment impediment to marriage, the child retains the status of child from the marriage, according to the provisions of paragraph 2 of Article 23 C.fam. Regarding children resulting from marriages declared null.

Between the first marriage valid in law but terminated in fact and the second marriage struck by nullity, but not in relation to the effects on the child, in the literature there is unanimity of views on the application of the paternity presidency to the second husband.

In support of this solution is also the argument of the priority given to the second marriage in several texts of law (article 22, 23 paragraph 2, article 53 paragraph 2 C.fam.).

Conclusions

In this Article, we have been looking at the importance of paternity presumptions. "Undoubtedly, the mixed nature of the presumption of the legal time of the conception in the current Regulation leaves without object the doctrinal dispute generated in the past by the provisions of Article 61 C. fam. Thus, as has already been mentioned, Article 412(2) C. civ.

Provides for the possibility of proof of the conception of the child within a certain period of time between the three hundred and one hundred and eighty days before birth. Moreover, proof of conception can be made even outside this time frame. The current normative solution, in accordance with the realities of human procreation and the progress of science, gives satisfaction, above all, to the "principle of truth", which must prevail over the "assumptions of the legislator" and dominate legal relations, including those of filiation. However, we find a mismatch between the provisions of Article 412(2) C. c., concerning the so-called "scientific evidence", and the provisions of the Code of Civil procedure on "means of evidence". Thus, Article 250 C. pr. civ., under the marginal title "object of proof and means of proof", provides that proof of a legal act or fact can be made by documents, witnesses, presumptions, confession of one of the parties, made on his own initiative or obtained at questioning, by expertise, by material means of evidence, by on-site research or by any other means provided for by law.

Also, in other texts, the Code of Civil procedure refers to "means of proof", "means of proof" and "material means of proof", but not to "scientific means of proof". In fact, this expression is not found in the doctrine of the case-law. The explanation is simple.

Thus, per a contrario, it would be concluded that there are also "unscientific means of proof", which, at the current stage of the evolution of the civil process, is inadmissible.

References

*** (2011). *The new Civil Code. Notes. Correlations. Explanations, edition 1*. Bucharest: CH Beck Publishing House, collection of legal instruments, p. 414.

*** (2012). *The Commentaries of the Civil Code - Family (Art. 258-534)*. Bucharest: Hamangiu Publishing House.

*** (2012). *The new Civil Code Commentaries, doctrine and jurisprudence. Vol. I. Art. 1-952 on civil law. People. Family. The goods*. Bucharest: Hamangiu Publishing House, p. 608.

*** (2012). *The new Civil Code Commentaries, doctrine and jurisprudence. Vol. I. Art. 1-952 on civil law. People. Family. The goods*. Bucharest: Hamangiu Publishing House, p. 608.

*** *Family Code; Code of Civil procedure*.

*** *The new Civil Code*.

Anca, P. (1959). *The characters of the presumption of paternity*, in L.P. no. 5/1959, p. 20 and below).

Bodoasca, Teodor (2018). *Studies of family law*, opinions on the legal time of conception and the legal presumptions of paternity in the Regulation of the Civil Code. Universul Juridic Publishing House.

Filipescu, I. (2013). *Family Law*, pp. 289-290.