

# PATERNITY IN THE LEGISLATIVE VISION OF THE NEW ROMANIAN CIVIL CODE

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## *Abstract*

*The present paper analyses the legislative novelties and changes brought by the new Romanian Civil Code (287/2009 Act) regarding the affiliation (towards the father) as compared with the existing regulations of this institution stipulated in the Family code (4/1953 Act).*

*Concretely, the paper deals with the legislative changes and novelties regarding the paternity presumption of the child resulted from inside the marriage, the presumption of the legal period of conception, the action for denial the paternity of the child resulted from marriage<sup>†</sup> and the action for proving the paternity of the child resulted from outside the marriage.*

**Keywords: paternity (affiliation), new Romanian Civil Code, legislative novelties and changes**

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<sup>†</sup> According to the legal literature, “the child resulted from marriage” means the child born during marriage, even if he/she was conceived before marriage and whether the mother’s husband knew the pregnancy condition of his future wife on the date of the marriage contract. “The child resulted from marriage” also means the child born during a marriage declared null and void as well as the child conceived during marriage, but born after marriage dissolution or annulment if the birth took place prior to the mother’s re-marriage.

## **1. Preliminaries**

Besides the regulations between persons or individuals, assets, legacy, liberalities, obligations, extinctive prescription, private international law rules, the new Romanian Civil Code (287/2009 Act) consists structurally regulations about the family as well as relationships assimilated to the family law.

Thus, it has been succeeded to enclose into a single code, according to a monist conception, all the private law relationships, including private international law relationships.

The new Romanian Civil Code, as a necessity to adapt the actual legislation to the new social and economic conditions, correlated the traditional provisions of the 1864 Code (its main source being the 1804 French Civil Code) to the provisions of the community and international instruments as well to the internal law provisions, taking also into account the solutions given constantly by the legal literature and civil jurisprudence.

As to the range of the family relationships, the idea of law rules to settle this field separately has been given up, as opposed to the existing Family Code (4/1953 Act), and a unitary settlement of all family law institutions has been promoted which can be entirely found in the structure of this new and modern Civil Code. It brings not only a series of changes of the already existing institutions in the present-day settlement (for example, the matrimonial regime or a paternal affiliation institution), but also a series of legislative novelties (for example, affiancement or the matter of human reproduction assisted by a third donee).

As to the paternal affiliation, the new Romanian Civil Code proposes changes but also absolutely new solutions concerning the child paternity resulted from marriage as well as the child paternity resulted from outside the marriage, aspects which will be dealt with in detail in the present paper.

## **2. Paternity Regulation in the new Romanian Civil Code**

Paternal affiliation is settled in Book II of the new Civil Code "The Family", Title III "The Kindred", Chapter II "The Affiliation", Section I "The Affiliation Settlement", §1 – "General Dispositions (art.408, paragraphs (2) and (3) concerning the ways of affiliation settlement; art.412 concerning the legal period of conception, §2 "Paternity presumption" [art.414 paragraphs (1) and (2)], §3 "Child recognition", §4 "Actions concerning affiliation"- I "Affiliation Contestation" [art.421, paragraphs (1) and (2) concerning the action for affiliation contestation"], III "Action of bastard for affiliation" (art.424-428), IV „Actions concerning the paternal affiliation from marriage" (art.429-434) and V "Mutual Dispositions concerning the affiliation actions" (art.435-440).

The existing regulation of the paternal affiliation is found in the Family Code, Title II "The Kindred", Chapter II "Affiliation", Section II "The paternal affiliation" (art.53-61).

Comparing the way of regulating the paternity proposed by the new Civil Code with the actual regulation of this institution by the Family Code, it can be observed that the new Civil Code does not make any delimitation between the maternal affiliation and paternal affiliation any more. Chapter II entitled "The Affiliation" consists of general dispositions regarding the maternity (motherhood) and paternity (fatherhood), then regulates paternal presumption and aspects concerning child recognition (aimed at both natural child's maternity and paternity). At the same time, the new Civil Code deals with the civil actions (in a single paragraph) for affiliation, analysing first of all the action for recognition of maternal affiliation, then the action of natural child for affiliation and finally the actions for the affiliation of the father from marriage.

We consider that even if the maternal and paternal affiliations have and aim at common aspects and there is a strong connection between these two institutions (which undoubtedly was taken into account by the legislator, a delimitation of their regulation would have been preferred both for the theorists and the practitioners).

Article 412, devoted to the legal period of conception, would have had to find its place within a general section concerning paternity because it affects both the paternal affiliation of the child resulted from marriage and the natural child affiliation and not within the general dispositions concerning the affiliation recognition, as the new Civil Code proposes.

The new Civil Code has also chosen to regulate, first of all, the action of natural child for affiliation and then the action for paternal denial, not taking into account the analysis of the aspects of this institution, namely, discussing, first of all, the paternal resulted from marriage and then the paternity of the natural child.

### **3. Paternity presumption**

The Family Code which regulates now the paternal affiliation consists of two paternity presumptions (art.53). Thus, according to art.53 para.(1) from the Family Code, "the child born during the marriage has, as a father, the mother's husband", assuming that the mother's husband is the child's father if he/she was born during marriage, whether the conception period is anterior to or posterior to the marriage contract.

Assuming the conception period is prior to the marriage contract, there is an implicit or tacit recognition of the paternity by the man who marries a pregnant woman.

Art.52 para.(2) deals with another paternity presumption: "the child born after the marriage dissolution, its annulment or rendering it null and void<sup>3</sup> has, as a father, the former mother's husband, if he/she was conceived during marriage and his/her birth took place before mother had got married again".

If we correlate the provisions of art.53, para. 2 from the Family Code with the provisions of art.61 concerning the legal period of conception, it follows that two conditions must be fulfilled cumulatively:

- the child to have been born, the latest after 300 days from the marriage dissolution, its annulment or rendering it null and void<sup>4</sup>;
- mother not to have married again<sup>5</sup>.

Paternity presumptions have a relative character, as they can be overruled through an action for paternity denial.

The merit of the new Civil Code consists in reuniting the two presumptions under one single regulation: "the child born or conceived during marriage has, as a father, the mother's husband". Thus, in this simple and exact wording, the new regulation solves out both the hypotheses already analysed and the discussions in the case law on this matter being maintained in this new variant of drawing up the paternity presumptions.

### **4. Presumption concerning the legal period of conception**

In the actual regulation provided in art.61 the Family Code, "the interval between the 300<sup>th</sup> and the 180<sup>th</sup> day before the child's birth is the legal period of conception".

If the paternity presumption, analysed above, has a certain interest in the problem of paternity resulted from marriage, the presumption of the legal period of conception concerns both the paternal affiliation of the child resulted from marriage (if the child was born after marriage dissolution) and the paternal affiliation of the natural or illegitimate child, situation in which the existence of the intimate relationships or intercourses between the mother and the presumed father during the legal period of conception must be proved.

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<sup>3</sup> Unanimously, the presumption aims not only at the children born after marriage dissolution but also the ones born after marriage suspension due to the mother's husband, according to the case law.

<sup>4</sup> If the child's birth took place after 300 days from the marriage dissolution, the conception period is not situated during marriage which means the paternity presumption provided by art.53 para.(2) is inapplicable.

<sup>5</sup> If mother got married again it will be applicable the paternity presumption towards the new mother's husband and, if the new husband should deny paternity, the child's father will be considered the first mother's husband, a situation known in the case law as "a paternity conflict", where the paternity presumption of the child born during marriage has priority over that of the child conceived during marriage.

The presumption of the legal period of conception has an absolute character regarding the maximum and minimum limit of pregnancy as it cannot be brought a contrary evidence against the fact that the conception period took place at less than 180 days or more than 300 days before the child's birth.

According to an opinion expressed in the classic doctrine of the family law<sup>6</sup>, because the presumption is also an absolute one, no evidence can be given that the procreation took place within a sub-period of the legal period of conception.

According to another opinion<sup>7</sup> (in fact a majority opinion in the present-day legal literature there are admissible (or allowable) only those actions through which the real moment of conception can be established. This moment is situated within an interval of the legal period of conception, because the Family Code, providing the legal period of conception has established that the procreation can take place any time within this period or interval, but not within the whole period or interval.

The new Civil Code puts an end to these differences of opinions, providing that, due to scientific tests, evidence can be given in favour of the child's conception in a period within the respective interval time or even outside this interval.

Since the new regulation allows the evidence according to which the procreation took place within a certain period of the legal period of conception, and even more, outside this interval we can state the presumption of the legal period of conception will be changed in the new Civil Code from an absolute presumption into a relative one.

## **5. Action for paternity denial of the child resulted from marriage**

The object of this legal action consists in overthrowing the paternity presumption and consequently in establishing that the mother's husband is not the legitimate child's father, or in other words, the affiliation relationship between these persons does not exist. In this matter the new Civil Code brings a series of changes and even legislative novelties.

Thus, a first novelty consists in enlarging the range of the titulars entitled to this civil action. If in the existing regulation<sup>8</sup> "the procedure can be brought by any of the spouses<sup>9</sup> as well as by the child<sup>10</sup>", the new Civil Code provides the right of the biological father to bring an action, directly and interested, at the same time, to deny the paternity resulted from marriage and establish to real paternity of the child.

The term "husband" covers, as it is also stipulated in the previous provisions of the 288/2007 Act., the one who has or holds this quality at the procedure date as well as the former husband too, who became the father of the child born by his former wife at more than 300 days from the marriage dissolution, without her having been re-married till the birth date.

The new Civil Code also inclusively allows the heirs to bring this procedure not only to continue it, as it is stipulated now. According to the new regulation, for each titular of this right to the procedure case, the quality of defendant is consequently assessed. Thus, the procedure case is brought by the mother's

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<sup>6</sup>I.Albu, *Dreptul familiei (The Family Law)*, Edit.Didactica si Pedagogica, Bucuresti, 1975, p.228;T.R.Popescu, *Dreptul familiei (The Family Law)*,treaty,vol.II,Edit.Didactica si Pedagogica, Bucuresti,1965,p.45.

<sup>7</sup>I.Filipescu,A.I.Filipescu,*Tratat de dreptul familiei (Treaty of Family Law)*, Ed.VI, Edit.AllBeck, Bucuresti,2001,p.306;E.Florian,*Dreptul familiei(the Family Law)*,Ed.2,Edit.C.H.Beck,Bucuresti, 2008,p.261;A.Bacaci,C. Hageanu,V.Dumitrache,*Dreptul familiei(the Family Law)*,Edit.All Beck, Bucuresti,1999,p.163.

<sup>8</sup> Action for paternity denial is provided in the arts.54-55 of the Family Code as they were modified by the 288/2007 Act – an Act for the modification and completion of the Family Code, published in the Official Bulletin no.748/5 Nov.2007.

<sup>9</sup> In the European legislations, the action for paternity denial brought by mother is accompanied by an action for establishing the real paternity.

<sup>10</sup> Prior to adopting the 288/2007 Act., the Constitutional Court, through its decision no. 349/2001 stated that the art.54 para.2 of the Family Code is unconstitutional, recognizing the right to bring this procedure not only to the mother's husband, but also towards the mother and the child born during marriage, taking into account that the mother's husband were able not to bring the procedure cavillingly, denying the child the right to a real paternity.

husband against the child (if this is deceased, the procedure case is brought against the mother and if it should happen, by others of his heirs). If the husband is interdicted, the procedure case can be brought by the tutor, and in his absence, by a trustee appointed by the court of law.

Supposing the mother or the child brings the procedure case, the quality of defendant is due to the husband, and if this is deceased, the action is brought against his heirs.

Finally, supposing the claimant is the biological father, the action is brought against the mother's husband and the child; if these are both deceased, the action is brought against his heirs.

It is salutary the idea of the new code legislator, taking into account the new titulars of the right to action to draft within distinct enactments, the action for paternity denial for each of these titulars (by the mother's husband – art.430; by the mother – art.431; by the putative biological father – art.432; by the child and heirs – art.433).

As to the term of extinctive prescription applicable to the action for paternity denial, the new Civil Code has maintained the term of the present prescription for 3 years<sup>11</sup>. But, the new code modifies, for the mother's husband, the date from which the prescription term begins, namely either the date at which the husband knew that he was presumed to be the child's father, either at a posterior date when he found out that the presumption did not correspond to the real facts.

It is to be observed that the date from which this term for the mother's husband begins, is different, according to the concrete situations in which he could be. In the present regulation, the term of three years "flows" for the mother's husband from the date when he knew about the child's birth. But we appreciate that the opportune moment, as regard to the mother's husband, for the beginning of the prescription term should have been that when the husband found about mother's lack of chastity<sup>12</sup>.

The new code also stipulates a prescription term of one year from the date of the decease of the mother's husband (if this deceased before the interval of 3 years and without bringing the action) within which the procedure can be brought by the heirs.

But if the claimant of this action is the mother, the term of 3 years begins from the date of the child's birth.

In exchange, for the putative biological father and for the child, the new code stipulates that the action is indefeasible; in other words the same procedure has a different legal regime for each of the titulars to the right of an action (as far as the prescriptibility of this right is concerned).

The admission of the action for paternity denial brought by the putative biological father is conditioned, in the new Civil Code, by the circumstance that this one should give evidence of this paternity towards the child.

In case the biological father deceased the procedure can be brought by his heirs, within, at the most, one year from the date of the decease.

## **6. Action for paternal Affiliation of the Natural Child**

As far as the natural or illegitimate child<sup>13</sup>, the paternity can be assessed either by his/her recognition, or by a court order. Concerning the latter variant, art.424 of the new Civil Code: "if the father of an illegitimate child does not recognize him/her as his child, his/her paternity can be assessed by a court order".

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<sup>11</sup> The 288/2007 Act. for modification and completion of the Family Code has enlarged the prescription term from 6 months to 3 years.

<sup>12</sup> This is the date of the beginning of the prescription term of the action for paternity denial for the mother's husband in Italy and Germany.

<sup>13</sup> In the doctrine, a natural child means: the child conceived and born prior to a marriage agreement; the child conceived and born after marriage dissolution or annulment, even if, later on, his/her parents got married; the child born as a result of a cohabitation relationship.

The code assesses, as in the existing regulation, that the action for paternal affiliation belongs to the child and it is brought in his/her name by the mother, even if she is minor (under-age) or by his/her legal representative.

A novelty in the matter is the fact that this action may be brought or, if necessary, continued by the child's heirs too, not only by the latter ones as it is provided in the existing code.

The new code provides, as the art.59 para.4 of the Family Code does, that the action for paternal affiliation can be also brought against the heirs of the putative father.

Art.426 para.(1) of the new code establishes a new relative presumption concerning paternal affiliation of the illegitimate child, providing that "paternity is presumed if evidence is given that the putative father cohabitated with the child's mother during the legal period of conception".

Art.426 para.(2) provides that "the presumption is overruled if the putative father gives evidence that it is impossible for him to have conceived the child".

As far as the application of the extinctive prescription, as in the existing regulation of the art.60 para.4<sup>14</sup> of the Family Code, the new Civil Code provides the indefeasibility of the action for paternal affiliation during the child's life, as stipulated by art.427, para.1.

But, if the child deceased prior to litigation, his/her heirs can bring an action within a year beginning with the date of the decease.

Another legislative novelty of the new Civil Code is the regulation of the damages the child's mother can claim from the putative father, namely half of the expenses of the birth and childbed and half of the expenses of her financial support during pregnancy and childbed.

More than that, the new code gives the mother the opportunity, even in the situation when the child was born dead or he/she deceased prior to rendering judgment in the action for paternal affiliation.

The new regulation also provides that the right to action of the mother is lost by limitation or prescription within 3 years from the child's birth (art.428, para.3). The mother can claim for damages only if she brings an action for paternal affiliation.

The new code also provides that, besides the expenses of the birth, childbed and the financial support during pregnancy, the mother and her heirs, according to the common law, have the right to claim damages for any other prejudice.

## **7. Conclusions**

The new Civil Code has succeeded, by introducing in its structure of the Book II "The Family", to re-think the way of regulating the family relationships, giving up the idea of a separate code in this field and has proposed a unitary regulation of the legal civil relationships, including the family relationships – a specific variety of the civil relationships.

Beyond this aspect, the new code proposes a regulation which answers to the new social and economic relationships, offering a series of changes and new solutions, some of them waited for, for a long time.

Concretely, as far as paternity is concerned, the new civil code:

- **proposes** a simple and clear wording (drawing up), in a single enactment, of the paternity presumption of the legitimate child;
- **changes** the presumption of the legal time of conception from an absolute presumption into a relative one (allowing to bring evidence that the procreation took place in a subperiod of the legal time of conception and even beyond of this time interval);
- **enlarges** the range of the titulars to the right of action for paternity denial (including the putative biological father, too);
- **brings** a series of changes regarding the prescriptibility of the actions for paternity;

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<sup>14</sup> This new paragraph of art.60 of the Family Code was introduced by the 288/2007 Act for modification and completion of the Family Code.

- **assigns** a new relative presumption for paternal affiliation of an illegitimate child;
- **gives** a fully justified right of the mother to claim a series of damages to the father outside marriage.

Besides these welcome changes and novelties, we are positive that the new Civil Code, once came into force, will rise a series of debates, especially by the doctrine and jurisprudence, concerning the inadvertences , shortcomings or even legislative gaps, inherent to such an important and vast act of parliament.

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