NEW DISPOSITIONS WITH REGARD TO FILIATION

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Abstract

The new Romanian Civil Code[1] is a milestone for the profound reform of our judiciary as regards the matter of private law relationships, on the grounds of valuating the national and international experience.[2] The novelties are represented, mainly, by the review of certain legal institutions and promotion of new principles and solutions. On this backdrop, the regulation of family relationships also received a new face.The present task is devoted to highlighting the amendments interfered in the matter of filiation, by presenting the systematization method of legal regulations and the critical analysis of its content.

Key words: *filiation, paternity presumption, donor assisted human procreation, possession of status, legal timeframe of conception*

I. Introduction

Filiation, the subject of this paper represents an important landmark to all law systems as it provides the rules that guarantee the child's rights to know his/her parents and the duties of all parents regarding the education and care for their own children.

The new Civil Code reiterates the existing rules but also provides for innovations and settles the dispositions regarding filiation against the new issues imposed by the evolution of Romanian society, doctrine and judicial practice. The protection of child's rights and the best interest of the child with regard to filiation remain a priority objective of the new regulation.

Considering both the importance and the innovation character of the regulation of filiation issues, we feel that a systemic approach of the issues is not only necessary but also useful, having in mind that there are few literary references to this subject.

We undertake to elaborate a general presentation of the new legal norms regarding filiation both in terms of theory and practice.

II. General aspects regarding filiation

1. Definition of filiation

Filiation is the descendent relationship between a child and his parents.[3]

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[1] Adopted by Law 287/2009, published in the Official Journal, Part I, no. 511 of 24 July 2009.

[2] Sources of inspiration were mainly the legislation of: France, Italy, Netherlands, Spain and Canada – Province of Quebec, and also a series of international regulations.

[3] Please see: A. Ionaşcu, M. Mureşan, M.N. Costin, V. Ursa –"*Filiation and protection of minors"*, Editura „Dacia", Cluj – Napoca, 1980, page 14.

It usually consists of a biological relationship resulted from conception and birth. In some cases (assisted procreation, donor assisted procreation, unjustified application of the paternity presumption and wrongful maternal or paternal acknowledgement), filiation does not entail a biological relation.

2. Filiation reference

The new civil code regulates filiation in chapter II, Second Book, Title III (art. 408 – 450), structured in 3 sections, namely: Section 1- establishment of filiation: Section 2 –Donor assisted procreation; Section 3 – Legal status of children .

III. Establishment of filiation

1. Means for establishing filiation

1.1. General aspects

Acknowledgement of filiation consists of the procedures that attest the legal fact or act proving the descendent relationship between a child and his parents.

Establishment of filiation is rather different considered the mother's or the father's side in questions.

The new legal norms maintain the existing legal provisions regarding the acknowledgement of filiation[4].

Thus, maternal filiation is the result of giving birth to the child, which applies both to marriage filiation and to out of wedlock filiation. This means that maternal filiation implies of proof of the following elements: a) the mother gave birth to the child; b) identity between the born child and that whose filiation is in question; c) proof of marriage (only in the case of marriage filiation).

In cases strictly provided for, maternal filiation is established by acknowledgement and court decision.

As regards parental filiation, it can be results out of application of the presumptions of paternity. In these cases indivisibility arises in the sense that if maternity filiation is established, the paternal filiation is not questionable.[5]

Paternal filiation for the child born out of wedlock is established through acknowledgement and court decision[6].

In order to produce legal effects, filiation must be proven, as prescribed by law. As a rule, civil status is proven with acts produced by the civil service officers and the civil office certificates handed to the parties. Thus, proof of filiation is made through the act of birth[7] of the respective

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[4] Please see Family Code (Law no. 4/1953) republished in the Official Bulletin no. 13/ 18.04.1956, as subsequently amended and modified.

[5] The attestation of paternity for the child born inside marriage through the paternity presumption is embraced by all legal systems, as an application of the principle „*pater est quem nuptiae demonstrant*" (Ingeborg Schwenzer (editor) – *Tensions Between Legal, Biological and Social Conceptions of Parentage*, Ed. Intersentia, Antwerpen-Oxford, 2007, page 5).

[6] According to article. 3 of the European Convention of the legal status of children born out of wedlock, Strasbourg, 15th of October 1975, ratified by Romanian through the Law no. 101/1992, published in the Official Monitor, no. 243 /10.09.1992: „ Paternal filiation of all children born out of wedlock may be acknowledged or attested through voluntary acknowledgment or court decision.

[7] In the sense that the birth act represents, by excellence the ultimate proof of birth please see: C. Hamangiu, I. Rosetti – Bălănescu, Al. Băicoianu –*Romanian Civil law Treatise*, Editura „Academiei", Colecția „Restitutio", Bucureşti, 1997, Vol. I, page. 285.

person and the birth certificate produced on the basis of the former. For the children born inside a marriage, the marriage must be proven through the act of marriage and the marriage certificate.

Proof of maternal filiation is made through the certificate attesting the birth, which is a medical act and is not to be confounded with the birth certificate. The certificate attesting the birth proves not only the physical act of birth but also the identity of the child[8].

During judicial proceedings before the courts, proof of filiation is made through all legal means of proof, as prescribed by law. The evidentiary force of the act of birth is consolidated through the possession of status in conformity with the former.

1.2. Possession of status

Unlike the former regulations, art. 410 para 1 of the new Civil Code defines the possession of status as " the factual situation indicating the ties of filiation between the child and the family he/she is presumed to belong to". Thus, a relative presumption of filiation is introduced here.

Following, examples are provided to give clues about filiation, such as:

" a) a person behaves towards the child as if it were his own, taking care of raising and educating him/her and the child behaves towards this person as towards his/her parents;

b) the child is recognized by the family, society and if the case may be, by the public authorities as being the child of the person presumably considered his/her parent;

c) the child has the name of the person presumably considered his/her parent."

Possession of status must fulfill the following conditions:

a) it must be continuous, meaning without presenting unjustified interruptions. From this point of view, several difficulties may arise if there are lacks in the raising and education process of the child, but the subjective attitude of the parent will be decisive;
b) it must be peaceful, without any violence;
c) it must be public, meaning that it is not exercised secretly and is made known to all interested parties;
d) it is unquestionable, meaning that it provides a clear significance of the relevant circumstances.

If the possession of status and the act of birth are concordant, as for instance both point to the same woman as mother of the child, then in principle the maternal filiation cannot be questioned neither by the child - requesting another civil status - nor by other persons - contesting the respective civil status.[9] Accordingly, we are in the presence of a presumption that the civil status resulting from the act of birth and the possession of status corresponds to reality.

In exceptional cases, situations may arise when such a presumption does not correspond to reality, as for instance when children have been substituted at birth or when a woman is registered as mother of the child and she is not the one who gave birth to the child. In these circumstances, legal action in court is admissible to establish the real maternal filiation, any legal means of evidence being admissible.

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[8] Pleasse see: Sc. Şerbanescu – *Family Code, amended and modified*, Editura „Ştiinţifică", Bucureşti, 1963, pag. 157; T.R. Popescu – *Family Law, Vol. II,* Editura „Didactică şi Pedagogică", Bucureşti, 1965, pag. 27; I. P. Filipescu – *Family Law,,* Editura „Didactică şi Pedagogică", Bucureşti, 1965, pag. 146. In the sense that this act does not refer to the identity of the child, please see : P. Anca –*Maternal filiation*, în lucrarea „Kinship in the law of the Romanian Socialist Republic.", Editura „Academiei", Bucureşti, 1966, pag. 32.

[9] Please see: article 411 alin. (1) şi (2) of the new Civil Code.

1.3 Presumption regarding the legal timeframe of conception

In order to prove the maternity of the child born inside marriage and out of wedlock, the presumption regarding the legal timeframe of conception applies, as prescribed by article 412 of the new Civil Code in the same lines as the existing article 61 of the Family code, namely:

"The timeframe between the 300th day and the 180th day before the birth of the child represents the legal timeframe of conception."

However, it must be mentioned that where the uterus presents several malformations (double cavity, for instance), the legal timeframe of conception must be determined separately for each child conceived and grown in different cavities of the uterus.[10]

We are in the presence of a legal relative presumption that can be overturn in judicial proceedings through scientific evidence. Thus it can be proven that the child was conceived in a certain period of the 121 days or even outside the legal timeframe of conception, this being one of the newly introduced issues.

2. Paternity presumption [11]

According to article 414 para 1 of the new Civil Code" the child born or conceived during marriage is fathered by the husband of the mother". This provision entails the following aspects:

a) the child was conceived during marriage;

b) the child was conceived before the marriage but was born inside the marriage;

c) the child was conceived during marriage but was born after the divorce, annulment or termination of the marriage.

The new norms do not contain the former disposition prescribed by article 53 para 2 of the Family Code regarding the child conceived during marriage and born after the divorce, annulment or other termination of marriage, in which case the paternity presumption favors the ex - husband of the mother on the condition that the birth takes place before the subsequent remarriage of the mother.

This omission does not mean a change of the view of the Romanian legislator in this respect, thus the solution remains the same – as deduced from article 414 para 1 of the new Civil Code –in the sense that if the mother remarries, the spouse of the mother from the subsequent marriage is presumed the father of the child.

The paternity presumption is applicable ope legis, any wrong or incorrect data in the act of birth of the child being irrelevant (this could point to an unknown father or other person than the mother's spouse)[12].

As regards the legal nature, we are in the presence of a mixed presumption that can be overturned exclusively through an action to contest paternity, in the conditions strictly provided for by law.

We must underline that the legal norms mentioned above institute a preference order, in the sense that the child born during marriage is preferred to the one only conceived during marriage. This envisages the solution in case paternity is contested, thus father of the child will be considered the mother's spouse in the subsequent marriage.

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[10]Please see: D. Lupaşcu –*Family Law*, ediția a V-a, Editura „Universul juridic", București, 2010, page 220.

[11] In the sense that the former norms [art. 53 para (1) şi (2) of the Family Code) contain 2 paternity presumptions, please see: I. Albu – *"Family Law,,* Editura „Didactică şi Pedagogică", Bucureşti, 1975, page. 112; I. Bohotici – "*Establishment and contestation of paternity"*, Editura „Cordial Lex", Cluj – Napoca, 1994, page 14 – 15. In the sense that there is only one paternity presumption, please see: I. P. Filipescu, A.I. Filipescu – *Family Law Treatise,* Editura „All Beck", Bucureşti, 2001, page 302.

[12] Please see: I.P. Filipescu, A.I. Filipescu – *op. cit.*, page 303

3. Establishment of filiation through voluntary acknowledgement [13]

3.1. Definition

Through voluntary acknowledgement a person, unilaterally declares or attests the filiation bond between him/her and the child he/she pretends to be his/her child. It represents a civil status act, in the meaning of negotiun juris and must be registered in the civil status registries.

Voluntary acknowledgment may be used to establish both maternal and paternal filiation.

3.2. Legal nature

Voluntary acknowledgement is of a mixed legal nature: on the one hand it is a manifestation of intent/will that produces legal effects – with regard to the filiation between the parent and the child – and, on the other hand, it is a means of evidence (a confession to a previous legal fact).

Its legal nature also imprints the applicable regime, meaning that it should comply both with the rules which are specific to unilateral judicial acts and those regarding confession. Notwithstanding the common law, the recognition of lineage is valid even when it is made by a person lacking legal capacity or having limited legal capacity, without legal representation or the preliminary approval of the legal guardian being necessary. The only requested condition, from this point of view, is the existence of discernment at the moment of recognition.[14]

Also, acknowledgement is irrevocable, which means that it is irreversible, even if it was made by testament. However, this doesn't prevent the author to challenge it in the case of recognition by error, due to the fact that the essence of revocation is different than the one of the challenge.

3.3. Cases of acknowledgement

The new regulation maintains the current cases in which the acknowledgement of the child is possible, as follows:

1) in the case of maternity: a) the birth was not registered in civil status registries; b) the child was enlisted in the civil status registries as being born from unknown parents;

2) in the case of paternity: the child was conceived and born outside marriage.

The law doesn't distinguish with regard to the reasons for which the birth was not registered in the civil status registries, situation in which we must consider any situation related to this case (for example: the inexistence of the registers; the omission of registration by fault of the civil status officer; loss or deterioration of the registries, etc.).

An issue under the old regulations (and which, for the same reasons, is also maintained until present) is that of admissibility of acknowledgement (especially the recognition of lineage towards the mother), occurred before the birth of the child.

Some authors[15] estimate that the acknowledgement of the child before birth is not possible, because cases of establishing the maternal filiation through recognition refer exclusively to born

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[13] With regard to the establishment of filiation through acknowledgement, please see: A. Bacaci, C. Hageanu, V. Dumitrache –*Family law*, Editura „All Beck", Bucureşti, 1999, page 151 şi urm.; R. Petrescu –*Legal action regarding the persons' civil status*, Editura „Ştiinţifică". Bucureşti, 1968, page 165 şi urm.; I.P.Filipescu, A.I. Filipescu – *op. cit*., page 284 şi urm.; A. Corhan – *op. cit*., page.301 and next.; E. Poenaru –Recognition through will of the child born out of wedlock în Revista „Justiţia Nouă" nr. 3/1956, page 463; A. Ionaşcu, M. Costin, M. Mureşan, V. Ursa – *Filiation and protection of minors*, Editura „Dacia", Cluj – Napoca, 1980, page 23

[14] In this regard, art. 417 of the new Civil Code provides that: „The unmarried minor can recognize his child by himself, if he has discernment at the time of recognition."

[15] In this regard, please see: P. Anca – *op. cit*., pag. 32 and the following.; T.R. Popescu – *op. cit*., pag. 76 – 78.

children. Moreover, if the mother would decease immediately after the birth of the child, before she would register the child as being born, or the child would be registered as being born of unknown parents or not registered at all, proof of filiation is available through any means of evidence in a court of law[16].

Other authors[17] – whose opinion we agree with – consider this acknowledgement admissible, under the suspensive condition that at birth, the child would be in one of the limited situations provided by law in which the recognition may be made. The decisive argument is that, according to art. 36, first thesis, of the new Civil Code: „The rights of the child are recognized from conception, but only if he is born alive." Among these, there is also the right to civil status, as an attribute of identification of the natural person.[18]

The doctrinal dispute with regard to the admissibility of maternal recognition of the deceased child is ended by the express provisions according to which:"After the demise of the child, he can be recognized (both by the mother and father – s.n.), only if he left natural descendants.[19]

Both minors and the adults may be thus acknowledged, the law expressly establishing such a solution.[20]

3.4. Forms of acknowledgement

Due to the juridical effects that it produces, the recognition of the child is a juridical act of special importance, reason for which the law provided it with a solemn character, meaning that it should carry one of the limited forms provided by law, as follows: a) statement at the civil status office; b) authentic document; c) testament.

The recognition is a personal act, which, however, does not exclude the possibility for it to be made in the name of the mother or, as the case may be, the father, by a representative with a special and authentic power of attorney.

The acknowledgement is inscribed through a mention on the edge of the child's birth certificate and, if the registration of birth was not acknowledged, the birth certificate is written and the recognition is inscribed on the edge.

The statement of recognition may be made at any civil status office, but the mention on the edge of the birth certificate is inscribed only by the civil status office which produced that document.

The authority which issued the authentic document by which a person recognizes a child has the obligation to transmit *ex officio* a copy of this document to the competent civil status office, in order for the corresponding mention to be inscribed in the civil status registry.

3.5. The sanction for disrespecting the legal provisions regarding the recognition of the child

The recognition of the child must be made with the respect of the conditions for form and substance provided by law, and, moreover, they must correspond to the truth[21].

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[16] E. Ion, T. Moise – *Legal and genetic bases of legal and medical expertise on lineage*, „Medicală" Publishing House, Bucharest, 1990, pag. 26.

[17] See: A. Ionaşcu – *Liniage towards the mother,* in the work *„Linage and Minor's Care", op. cit.,* pag. 15 – 16; I. Filipescu – *op. cit*., pag. 268.

[18] See: art. 59 and 98 of the new Civil Code.

[19] See: art. 415 para. (3) of the new Civil Code.

[20] According to art. 413 of the new Civil Code: „The provisions of the current chapter referring to the child are applicable also to the adult whose lineage is under investigation."

[21] See: Al. Oproiu – *Cases of absolute invalidity of recognition*, Law Review „Justiția Nouă" no. 1/1961, pag. 131; T.R. Popescu – *op. cit*., pag. 159.

Breaching the conditions provided by law for the recognition of the child may impose the invalidity/nullity sanction, which may be absolute or relative.

The absolute invalidity occurs if a legal provision which defends a general interest is breached[22], and the relative invalidity sanctions the breach of a legal provision which defends a particular interest[23].

Art. 418 of the new Civil Code provides for three cases of absolute invalidity:

a) a child was recognized and his filiation, legally established, was not removed;

b) a deceased child was recognized and he did not leave any natural descendents;

c) the recognition was made in forms other than those provided by law.

Beside those situations, we estimate that the absolute nullity occurs also in the case when the recognition was not made by the parent personally or by representative with a special and authentic power of attorney. Practically, we are in the presence of a virtual invalidity, meaning that the sanction must be applied in order for the scope of the breached legal provision to be reached.[24]

With regard to the applicable legal regime, absolute invalidity/nullity of the recognition is imprescriptible and may be invoked by any interested person, by legal action or exception. Also, the court is obliged to invoke the absolute invalidity ex officio.

If the previous established filiation was removed through a court decision, the recognition is valid and we are in the presence of a validation of this unilateral legal act by covering the invalidity.

The recognition may be annulled in the case of vitiation of consent, by error, dolus or violence.[25] The express provision of this sanction removes another controversy of our legal doctrine.[26]

The case when the parent did not have discernment in the moment of recognition is added to those presented above. It also regards an express provision of the relative invalidity.[27]

The action for annulment of recognition may be exerted only by the parent whose consent was vitiated or who had not discernment at the moment of recognition.

The term of extinctive prescription is 3 years[28] and starts „(…) from the date when the violence ceased or, as the case may be, when the dolus or error was discovered"[29]. We observe that with regard to error, there is a derogation from common law[30], meaning that an objective moment for the start of the prescription is not instituted anymore, respectively „(…) not later than 18 months from the day when the legal act was signed."

As regards the annulment for lack of discernment, we consider that the prescription term starts "from the day when the rightful person, his representative or the one called by law to approve or to authorize his acts, became aware of the invalidity cause, but not later than 18 months from the day when the legal act was signed."[31]

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[22] See: art. 1325 corroborated with art. 1247 para. (1) of the new Civil Code.
[23] See: art. 1325 corroborated with art. 1248 para. (1) of the new Civil Code.
[24] With regard to the virtual invalidity: see art. 1253 of the new Civil Code.
[25] See: art. 419 para. (1) of the new Civil Code.
[26] See: Al. Oproiu – *Is it possible to file an action for annulment of lineage recognition on grounds of incapacity or vice of consent?*?, in The Law Review „Legalitatea populară" no. 9/1961, pag. 51 and the following; Sc. Şerbănescu – *Family Code, commented and annotated*, „Ştiinţifică" Publishing House, Bucharest, 1963, pag. 160 and the following.; Ghe. Nedelschi – *Note to the Decision no. 54/1955 of the Bucharest Tribunal*, in the Law Review „Legalitatea populară" no. 4/1955, pag. 431 and the following; P. Marica – *Controversial aspects in Family Law*, In the Romanian Law Review no. 7/1967, pag. 101 – 102; T.R. Popescu – *op. cit*., pag. 161 and the following.
[27] See: art. 1325 corroborated cu art. 1205 of the new Civil Code.
[28] See: art. 2517 of the new Civil Code.
[29] See: art. 419 para. (2) of the new Civil Code.
[30] See: art. 2529 para. (1) lit. c) of the new Civil Code.
[31] See: art. 2529 para. (1) lit. c) of the new Civil Code.

The relative invalidity of the recognition may be confirmed.

4. Court actions regarding filiation

Both in the case of lineage towards the mother and towards the father, the law provides the possibility for filing court actions.[32]

4.1. Actions for contesting filiation

4.1.1. Action for contesting filiation established by birth certificate

In this situation, we are in the presence of a complaint against the possession of status, which aims at the removal of a lineage, alleged unreal, and its replacement with another, alleged real.

The action for contesting filiation may be exerted in the case when the lineage is established by birth certificate, which is not in accordance with the possession of status.

This action may be filed by any interested person and is imprescriptible.

In court, the proof of the alleged real filiation is made through the medical certificate of birth, through forensic expertise for establishing the lineage or, if the certificate is missing or, in the case when the expertise cannot be carried out, in principle through any type of proof, including the possession of status. With regard to the testimonial evidence, this is admissible only in the following cases: a) a child substitution took place; b) another woman, other than the one that gave birth, was registered as the child's mother; c) there are documents which make the action trustable.

4.1.2. The action for contesting child acknowledgement

Recognition of filiation, if it is not in accordance with the truth, may be contested by any interested person, including the recognized child, by means of a court action.

Contestation against recognition may be intended also by the author of recognition, even if at the date of recognition he was not in error, because the civil status data of the person must correspond to the truth, the person's status being of interest both for him/her and for the society.[33]

Such an action is imprescriptible and any means of proof admitted by law may be used as evidence.

As a rule, the burden of proof is incumbent to the claimant. Art. 420 para. (2) of the new Civil Code deviates from this rule, stating the following: „If the recognition is contested by the other parent, by the recognized child or by his descendents, proof of filiation must be made by the author of recognition or his heirs."

4.1.3. The action contesting paternal filiation inside marriage

The action for contestation of paternity within marriage aims at removing wrongful or fraudulent application of the paternity presumption.

In such a situation, the child was wrongly registered, as being from marriage and having the mother's husband as father although: 1) the child was born prior to the marriage of parents; 2) the child was born after 300 days since the cessation, or as the case may be, or dissolution or annulment of marriage; 3) the child's parents have never been married.

This action is imprescriptible and may be introduced by any interested person, including the child.

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[32] With regard to the court actions for lineage issues, see, for example: A. Corhan, *op. cit.,* pag. 289 and the following.

[33] See: T.J. Hunedoara, civil decision no. 1303/1979, în the Law Review Revista Română de Drept no. 11/1979, pag. 67.

4.2. The action for establishing filiation

4.2.1. The action for establishing maternal filiation

The action for establishing the maternal filiation is an civil status reclamation in order to determine the lineage relation between the child and his mother.

This action may be introduced in the following situations:

a) when, for any reason, the proof of lineage towards the mother cannot be made through the birth certificate;

b) when the reality of those written in the birth certificate is contested.

With regard to the first situation, under the influence of the old regulation, in the legal literature[34] it was underlined that the action's admissibility is conditioned by the absolute impossibility to establish maternity, and not when a temporary obstacle exists, such as, for example, the hypothesis of reconstruction or subsequent elaboration of the civil status act. Also, the action is inadmissible if the birth declaration can be made at a later time.

With regard to the second case, it is not sufficient to contest the reality of those comprised in the birth certificate, but the legal possibility for such contestation must exist, for example in the situations when there is no concordance between the birth act and the possession of status.

We should underline that, within the same action, it is possible to contest the reality of the mentions on the birth certificate and to claim a different marital status, not requiring two separate actions.

Action for determining maternity has a personal character, the child being the bearer of it. If the child lacks the capacity to exercise his rights, the action is introduced, in his name, by the legal representative.

If the child died subsequently to the introduction of the action, his heirs can exert it, according to the law. Even more- unlike the previous regulation- the heirs of the child can introduce the action (if it was not prior introduced by the child).

In our opinion, according to the procedural provisions, the prosecutor[35] can introduce or continue such an action every time it is necessary in order to protect the legitimate rights and interests of minors, of persons under interdiction and of disappeared persons.

The alleged mother has passive locus standi and, after her death, the heirs of the alleged mother.

The right to introduce an action is inalienable. If the right was not exerted by the child, his heirs, in case the child dies, can introduce the action within on year (calculated from the date of the child's death). Within such an action, it should be proven both the fact of birth by the woman against whom the action is exerted and the identity of the born child to that the holder of the action.

In terms of probation, any means of proof admitted by law can be used.

4.2.2. The action fore establishing paternity outside marriage

The action for establishing paternity outside marriage is an action in civil complaint, which is to establish the lineage between the child out of wedlock and his father, when the latter does not recognize the child.

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[34] See, for example: A. Bacaci, C. Hageanu, V. Dumitrache – *op. cit*., pag. 156; A. Corhan – *op. cit.,* pag. 300.

[35] Concerning the action introduced by the prosecutor, see, for example: V. Pătulea -Regarding the prosecutor's right to file an action in order to establish the lineage of minor children out of wedlock, in the Legal Magazine „Legalitatea populară" no. 10/1960, p. 56; E. Poenaru – The prosecutor's action to file a civil action and establishing strictly personal rights,, in the Legal Magazine „Justiția nouă" no. 2/1964, p. 60 and the following.; P.A. Szabo – Problems related to the civil action of the prosecutor, in the Legal Magazine „Justiția nouă" no. 7/1956, p. 127 and the following.

Unlike the prior regulations - when the child and his mother were holders of the action - the new provisions state that the action belongs to the child and can be introduced, in his name, by the mother, even if she is underage, or by the legal representative of the child.

The right to introduce the action in determining paternity outside marriage is not submitted to statutory limitations during the child's life.

If the child died subsequently to the introduction of the action, his heirs can exert it, according to the law. If the child died prior to the introduction of the action, his heirs can introduce the action within one year from his death.

Also, the prosecutor can introduce the action, according to the provisions of the Civil Procedural Code.

The alleged father has the passive locus standi, and after his death this quality passes to his heirs, even if they have renounced the estate, because the action has a personal character.[36]

In case of *plurium concubentium* it is possible to summon all men with whom the mother had intercourse during the timeframe of conception.

In order to establish paternity for a child born outside marriage, the following elements need to be proved: 1) the birth of the child; 2) the intimate liaisons between the alleged father and the mother during the legal timeframe of conception[37]; 3) the fact that the child resulted from such relations.

These elements can be proved by any evidence admitted by law, including by hearings of relatives, except for the descendents.

If the defendant recognizes the child as his own, such a voluntary acknowledgement stands for recognition of paternity in authentic form.

Art. 426 of the new Civil Code provides for a relative presumption of paternity in the hypothesis that the alleged father lived together with the mother during the legal time of conception. In such a case, evidence is no longer necessary for proving intercourse and its result, but the alleged father is called upon to prove - in order to remove such presumption - that he cannot have conceived the child.

The cohabitation of the mother with the alleged father involves living in same household or the existence of stable, continuous contact.[38]

It is worth mentioning that only cohabitation leads to such presumption, and not other situations, like, for example, financially supporting the child.

The new Civil Code provides for a special regulation on the compensation the mother is entitled to ask from the alleged father, concerning the expenses made during pregnancy, birth and puerperium/post partum confinement. Thus, she may ask and obtain from the alleged father the following: a) half of the expenses at birth and puerperium; b) half of the expenses made with her living expenses during pregnancy and puerperium.

Such legal action can be introduced within 3 years from the birth of the child.

The compensation can only be requested if the action for determining paternity was introduced, even if the latter is still pending.

If the action for determining paternity will be irrevocably dismissed and if the compensation were granted during this period of time, we consider that there is no reason for keeping them, the defendant can regress against the child's mother for unjust enrichment.

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[36] See: T.R. Popescu, op. cit., p. 77.

[37] See: Supreme Court of Justice – Civil Section, decision no. 2264/1992, in the paper „Law problems from the decisions of the Supreme Court of Justice 1990 – 1992", „Orizonturi" Publishing House, Bucharest, 1993, p. 184 – 186.

[38] See: Supreme Court of Justice – Civil Section, decision no. 779/1990, in the paper Law problems from the decisions of the Supreme Court of Justice 1990 – 1992", op. cit., p. 180 – 181.

Compensation may be claimed even if the child was born dead or died before issuing the decision establishing paternity.

For any other prejudice caused by the alleged father, the mother of the child and her heirs have the right to compensation according to common law provisions.

4.3. Action in denial of paternity

Action in denial of paternity is an action that aims to remove the paternity established by applying the presumption of paternity.[39]

According to art. 414 (2) of the new Civil Code, „The paternity can be contested, if it is not possible for the mother's husband to be the father of the child." The cases that fall under this general rule may differ, for example: a) the physical impossibility to procreate; b) the material impossibility of cohabitation; c) the moral impossibility of cohabitation, etc.

The new provisions extend the sphere of persons entitled to formulate the action, giving this possibility also to the alleged biological father, as well as to the heirs of the mother's husband, the heirs of the mother, the heirs of the alleged biological father and the heirs of the child.

Considering the holder of the action, we distinguish the following situations:

1) When the action is introduced by the mother's husband, the child is the defendant; if the child is a minor under the age of 14, he will be represented by the mother or by the legal representative; after reaching this age, he will sit alone in court, assisted by the mother or the guardian.

If the child is deceased, the mother's husband introduces the action against the child's mother and, if the case, against any other heirs of the child.

The mother's husband can introduce this action within 3 years, calculated either form the date that he learned he is the alleged father of the child[40], or from a subsequent date, when he learned that the presumption of paternity does not correspond to reality. If the husband died before the expiry of the deadline and did not introduce the action, his heirs can introduce it within one year from his death.

For the husband put under interdiction, the action can be introduced by a guardian, or, failing that, by a court appointed trustee.

It is worth mentioning that the deadline for introducing the action in denial of paternity is not calculated against the husband put under interdiction, the husband being able to introduce the action within 3 years calculated from the ceasing of the interdiction, if such action was not introduced by a guardian or trustee.

2) When the action is introduced by the mother, the mother's husband is the defendant, and if he is deceased, his heirs;

The mother can introduce the action within 3 years, calculated from the birth of the child.

For the mother put under interdiction, the action can be introduced by the guardian or, failing that, by a court appointed trustee.

The deadline for introducing the action is not calculated against the mother put under interdiction, she will be able to introduce the action within 3 years calculated from the ceasing of the interdiction, if such action was not introduced by a guardian or trustee. Also, if the mother died

[39] For other definitions, see, for example: C. Hamangiu, I. Rosetti-Bălănescu, A. Băicoianu –Civil Law Treatise, Vol. I (republishing), „All" Publishing House, Bucharest, 1996, pg. 479; A. Corhan – op. cit., p. 309.

[40] For a de lege ferenda proposal in this respect and critics to the previous solution, according to which the deadline is calculated from the date that the father learned about the birth of the child, see: F.A. Baias, M. Avram, C. Nicolescu – Changes brought to the Family Code trough Law no.288/2007, in the Legal Magazine „Dreptul" no. 3/2008, p. 35.

before the completion of the 3 years deadline, without introducing the action, it can be introduced by her heirs, within one year from her death.

3) When the action is introduced by the alleged biological father, the passive locus standi is incumbent to the child and the mother's husband, and if they are deceased, the action is introduced against their heirs;

Unlike the previous 2 holders of the action, the right to introduce the action does not prescribe during the lifetime of the alleged biological father. If he deceased without introducing the action, his heirs can introduce it within one year calculated from his death.

If the alleged biological father is under interdiction, the action can be introduced by the guardian or, failing that, by a court appointed trustee.

It is extremely important to note that the law imposes the condition that the alleged biological father is due to prove his paternity, in order to have his action in denial of paternity admitted.

4) When the action is introduced by the child, the mother's husband will be called upon in court, and, if he is deceased, the action is introduced against his heirs.

We consider that the provision stating that: "The action in denial of paternity is introduced by the child's legal representative, if he is a minor" can be criticized.[41]

In our opinion, the underage child having full capacity of exercise can introduce the action by himself. Also, the child of 14 years old can promote the action by himself, without needing any previous consent, taking into consideration that the right is personal and non-patrimonial.

The right to introduce the action is cannot be subject to statutory limitations prescribed during the child's life, as well as in the case of the alleged biological father.

If the child dies before the action is introduced, it can be initiated by his heirs, within one year from his death.

4.4. The action for contesting paternal filiation inside marriage

Misapplication of the presumption of paternity to the child registered civil status, as being born in wedlock, although he was born before marriage or was conceived after a period more that three hundred days after the dissolution of marriage or whose parents were never married may be the subject of an action challenging the paternal filiation of the respective spouse.

Such an action is not expressly provided for by law, but it is a creation of the doctrine[42] and received jurisprudential applications.

According to art. 434 of the new Civil Code, the action for contesting the paternal filiation inside marriage is regulated in the same line as the actions concerning the civil status of the person. Thus, the active locus standi belongs to any interested party, and the right to action is not subject to prescription.

By admitting such an action, the presumption of paternity wrongly or fraudulent applied is removed and the child becomes, retrospectively, child out of wedlock, which will have implications on the name, parental care, residence, the obligation to ensure support, etc.[43]

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[41] See: art. 433 (1) of the new Civil Code.

[42] Known under different designations, as: „contesting the paternity of the child wrongly registered from wedlock" „action in contesting paternity", „contesting the paternity of the child apparently from wedlock", „contesting the filiations from wedlock", „contesting the paternity of the child from wedlock"(Emese Florian –Family Law, ed. 3, C.H.Beck Publishing House, Bucharest 2010, p. 325), „contesting the filiations against the father in the marriage" (Alexandru Bacaci, Viorica-Claudia Dumitrache, Codruța Hageanu – Family Law, ed. 4, All Beck Publishing House, Bucharest, 2005, p. 198), „contesting the paternity from marriage" (Dan Lupaşcu – Family Law 5th Edition, amended and revised, op. cit., p. 200).

[43] Alexandru Bacaci, Viorica-Claudia Dumitrache, Codruța Hageanu – op. cit., p. 198; Emese Florian – op. cit., p. 325; Dan Lupaşcu – op. cit., p. 201.

IV. Medically donor assisted procreation

Firstly regulated in Romanian law, the medically donor assisted procreation represents a solution for the straight couples or single women who want a child and cannot bear a child naturally.

The new Civil Code regulates[44] in detail the juridical situation of children conceived through such a method. The regulation is meant to ensure the conditions necessary for the interested persons to choose such a procreation method, the confidentiality of the act, as well as the parental relations concerning a child conceived in such a manner[45].

Third donor procreation is not expressly defined by the new regulatory framework. However, judging from the legal provisions governing its effects, one can deduce that it is a human reproduction method, using specific medical techniques and genetic material that may belong not only to those who will act as parents to the child so conceived, but also to other donors. [46]

According to article 441 of the new Civil Code, persons who may resort to this procreation method may be a couple consisting of a man and a woman or a woman alone, who shall act as parents of the child so conceived. This is quite a permissive approach, also offering to single women the opportunity to have babies[47].

Using medically donor assisted procreation will generate problems as concerns the filiation/lineage of the children born this way. The regime of this situation was clearly regulated by the legislator.

According to article 441, paragraph (1) of the new Civil Code, no filiation connection shall be recognized between the third donor and the child thus conceived. Parents will always be those

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[44] The medically donor assisted reproduction is regulated in art. 441 – 447 of the new Civil Code. These provisions will be completed by special law concerning the legal regime, ensuring the confidentiality of information, as well as the way of transmitting such information.

[45] Such method of procreation is also regulated in other law systems. Thus, in France, 2 laws adopted on the 29th of July 1994 regulated this institution, one concerning the „human body", and the other one concerning the utilization of its „products" and the medically assisted procreation (see, Alain Bénabent – Droit civil de la famille, 9-ème édition, Ed. Litec, Paris, 2000, p. 360). Same provisions are found in the law of other countries, like: Austria, Netherlands, Spain, Japan, Switzerland, etc. For details: Ingeborg Schwenzer (editor) – Tensions Between Legal, Biological and Social Conceptions of Parentage, Intersentia, Antwerpen-Oxford Publishing House, 2007, pg. 9.

[46] The French Public Health Code defines the medical assistance for procreation within article 152-1 of the Law no. 94-654 of 29 June 1994, also maintained after the amendment occurred through the Ordinance no. 2000-548 of 15 June 2000, as "clinical and biological practice allowing the *in vitro* conception, embryo transfer and artificial insemination, and any technique having an equivalent effect and allowing procreation outside of a natural process" ("*Code civil*" 103e edition, ed. Dalloz, Paris, 2004, page 348). For more details, please see: Veronica Dobozi (I), Gabriela Lupşan, Irina Apetrei (II) - Lineage within the medically assisted reproduction, "Law" Review no. 9 / 2001, page 41 et seq.

[47] The possibility to resort to such a procreation method is regulated differently by various law system; thus, while in United Kingdom, Austria or Spain it is not conditioned by the marital status of the person (in this sense: Lupşan Gabriela, Irina Apetrei (II) - *op. cit.*, p. 50), France recognizes as beneficiaries of such means of procreation solely the man and woman forming a couple or able to provide evidence of a common life of at least two years, who are alive and have a suitable age to procreate and who agree beforehand to embryo transfer or insemination. (*Code de la santé publique*, L. 2141-2, in „*Code civil"*, Dalloz, Paris, 2004, p. 348). There are also much more permissive legal systems, such as, for example, that in Quebec. According to the law here, heterosexual and homosexual couples, as well as single women have access to medically assisted procreation (Marie Pratte - *La tension entre la filiation légale, biologique et sociale dans le droit québécois de la filiation*, în Ingeborg Schwenzer (editor) - op. cit., p. 101. A similar situation can be found within the Greek law, where the medical assistance for procreation addresses heterosexual married couples or not, as well as single women (A.C.Papachristos – *Le droit hellénique de la filiation: parenté biologique et parenté socio-sentimentale*, in Ingeborg Schwenzer (editor) – *op. cit*., p. 211).

who have resorted to this method of reproduction. For this reason they must give their consent before a public notary, who will explain beforehand the consequences of this act on the future child's filiation, in terms of strictest confidence. Until the time of conception, this consent will remain void in case of death, an application for divorce, the separation of fact or of its revocation by those who have expressed it.

In this context, the maternal filiation will result from the act of birth[48], according to the principle *mater semper certa est (the mother is always certain).*

The paternal filiation is determined differently, depending on the marital status of the woman who gives birth to the child. Thus, in the case of a married woman, the father's child will be the mother's husband, by applying the presumption of paternity, under article 408, paragraph (1) of the new Civil Code. In the case of an unmarried couple, the paternal filiation shall be determined through recognition or, if the man who consented to medically assisted reproduction using a third donor refuses to recognize the child's parentage, by court order. His responsibility towards the mother and child is expressly provided by law[49] and we believe that this translates into the possibility of applying to this situation[50] the provisions of article 428 of the new Civil Code.

The specific feature of the filiation resulting from the use of this procreation method is that it can not be challenged by anyone, not even by the child born through this method, for reasons relating to medically assisted reproduction. The action to contest/ deny paternity may be filed only if the mother's husband did not consent to medically assisted reproduction with third donor, under the law. We believe that such an action can also be filed by the mother's husband who has revoked his consent before the time of conception, or if, during this period, one of the following circumstances occurs: an application for divorce or separation in fact (cases when, according to the law, the effects of the prior consent are removed).

The opportunity provided by article 443, paragraph (3) of the new Civil Code – regarding the actual application of the provisions regulating the denial of paternity if the child was not conceived in this way – tries to sanction the case where a mother's extra-conjugal relation, which the child might result from, would be disguised by the use of medically donor assisted procreation. We agree with other authors[51], that this legal provision is likely to jeopardize the immutability principle of the child's civil status. This is due to the fact that in an action of denial of paternity filed in the conditions set by common law, where the mother's husband, the mother, the child, the alleged biological father or the heirs of each of the above may have *locus standi*, it can easily be proven by scientific evidence that it is impossible for the mother's husband to be the father to the child, but it is not possible to prove whether or not the child's birth is due to medically assisted reproduction. And the negative consequences of the admission of such an action will reflect upon the child, whose filiation in relation to his/her father will remain not established.

The child conceived through medical intervention with a third donor will benefit from the parental care from the father his/her lineage was established to, under the same conditions as his natural child.

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[48] According to article 408, paragraph (1). It is worth mentioning that the Romanian legislator has not provided the possibility of using the so-called "carrying mother" or "surrogate mothers", who keep the pregnancy and give birth to a child for another couple, child that will then be taken by his/her biological parents. Such a possibility exists in the laws of many states. For details, please see: Veronica Dobozi (I), Gabriela Lupşan, Irina Apetrei (II) - op. cit., p. 45, Emese Florian - op. cit., p. 356; Ingeborg Schwenzer (Editor) - op.cit, p. 10.

[49] Please see: article 444 of the new Civil Code.

[50] In this sense, please see also Emese Florian – *op. cit.,* p. 358.

[51] Emese Florian – *op. cit.,* p. 357

V. The child's legal condition

As concerns the legal condition of the child, the new regulations will reconfirm the equality in rights of children, irrespective of the fact that they are born in wedlock or outside it. This is actually a principle that was enshrined by the Romanian legislation since the Family Code was adopted. Thus, the law provides that the child born outside the wedlock whose lineage was established according to law has the same rights as the child born in wedlock against each parent and his/her relatives.

The difference lays only in determining the child's name, but the legislator has provided modalities converging to achieve the same solution for this case too. Thus, both the child born inside marriage and out of wedlock will have the name of one of his/her parents or the parents' names combined.[52]

VI. Conclusions

The new regulations regarding filiation bring a comprehensive and detailed approach of aspects concerning the meaning of the concept, establishing filiation to the mother and the father, the procedural means that interested persons may resort to in order to solve some practical problems in establishing lineage, as well as the cases in which lineage does not derive from the natural act of procreation. The analysis of these regulations requires a high complexity, especially given the fact that, by their nature, they comprise a number of sensitive issues, which may give rise to difficulties in their practical application.

That is why we believe that a thorough analysis, when relating to how similar rules in other legal systems are enforced, as well as the problems existing in the previous Romanian jurisprudence will prove to be of real support in the implementation of the new Romanian Civil Code.

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[52] Please see: article 449-450 New Civil Code

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