

WHOSE HAND SHOULD ROCK THE CRADLE? RECOGNIZING THE RIGHT OF THE MOTHER AND THE BIOLOGICAL FATHER TO IMPUGN THE LEGITIMACY OF A CHILD*

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ABSTRACT

Philippine Laws provide that a child born to a married woman is presumed to be the legitimate child of her husband. This marital presumption of legitimacy can only be impugned by the child's presumed father and in some instances, his heirs. Neither the mother nor the biological father has a similar right. In fact, the presumption holds even if the mother has declared against the legitimacy of her child or has been sentenced as an adulteress. This rule was made to protect the family from unwarranted and baseless actions made by the wife or persons outside the family unit.

This paper proposes to amend this rule and give the mother and the biological father the right to impugn this marital presumption of legitimacy. The restrictive rule has not only worked against the best interest of the child in certain cases, but it has also become obsolete by reason of the advancements of medical science.

There are situations when the best interest of the child calls for the mother or the biological father to question the presumption, as when the presumed father fails or neglects to do so. It is also possible that the presumed father is dead or incapable of initiating such action. There are also circumstances when it would be better for the child to establish paternity with his biological father such as when the two have already developed a relationship. Advancements in medical science that prove not only non-paternity but also provide sufficient proof of paternity would also prevent baseless and unwarranted attacks on the legitimacy of the child.

In recognizing the right of the mother and the biological father to rebut the legitimacy of the child, statutory precautions were suggested to protect the interests of all concerned. These include a provision for prescription of the action, and requiring a hearing, in case of the biological father, to show that the case would be in the best interest of the child.

* Cite as 44 ALJ 1 (1999).

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I. INTRODUCTION

"Filiation refer(s) to the relationship or tie which exists between parents and their children."¹ It is a tie of utmost importance, as it is the basis of the rights and obligations between a parent and his or her child.

Under Philippine laws, the "filiation of children may be by nature or by adoption. Natural filiation may be legitimate or illegitimate."² Legitimate children are those born inside a valid marriage. Together with this definition of legitimate children is the marital presumption of legitimacy. This presumption provides that a child born by a married woman is presumably fathered by his or her mother's husband.

This presumption of legitimacy was created by the state to protect the stability of the marital family. It is believed that it is in the best interest of the child to live in a normal family atmosphere. This would also allow him to enjoy the advantages of legitimacy.

To prevent unwarranted attacks against the child's legitimate status, only the presumed father, and by substitution, his heirs, can impugn this presumed legitimacy. The right is not given to the mother, more so to the child's biological father.

It is on this part that the proponent intends to suggest amendments - changes in Philippine laws that would give the mother and the biological father the right to impugn the marital presumption of legitimacy.

It is this writer's proposition that in the light of the technical advances that provide means of ascertaining the paternity of children and more importantly, in keeping with the best interests of the child, it has become necessary for biological parents to be given the right to declare the paternity of the child.

A. Statement of the Problem

This paper poses the question: should the mother and the biological father be given the right to impugn the marital presumption of legitimacy? And if answered in the affirmative, what are the limitations of such right?

B. The Objective of the Study

The objectives of this thesis are:

1. To have an in-depth study of the marital presumption of legitimacy, its history, rationale and effects;

¹ MILENCIO STA. MARIA, PERSONS AND FAMILY RELATIONS LAW 443 (1995).

² Family Code of the Philippines, E.O. Art. 163 (1988)

2. To understand the rules of impugning such presumption, the persons who may exercise this right and the grounds upon which the action may be brought;
3. To determine whether it is possible to give the biological parent the right to impugn the marital presumption of legitimacy without harming his or her child; and
4. To suggest the limitations of such right.

C. Scope and Limitations

This paper will focus on the need for giving the mother and the biological father the right to impugn the legitimacy of his or her child. It will not discuss the right of the child to impugn such presumption.

The necessary amendments to the Family Code regarding said presumption will also be discussed in this study. Such amendments would include the provisions that would be affected by giving a natural parent the right to impugn said presumption. However, defects in the wording of the provision regarding the husband's and his heirs' right to impugn will not be discussed. The different scientific methods of proving paternity will only be touched tangentially.

D. Significance of this Study

Establishing paternity is very important for all rights and obligations between a parent and his or her child arise from this. One of the limitations to this right is the marital presumption of legitimacy. As long as the presumed father does not impugn the legitimacy of his wife's child, he would remain the child's legal father, and no other man can establish filiation with the child.

The mother, who is also a parent to the child, is not given this right. In fact, Philippine laws provide that the "child shall be considered legitimate although the mother has declared against its legitimacy or may have been sentenced as an adulteress."³ This is also true with regard to the biological father who is, in fact, considered a stranger to the child.

This limitation may prove detrimental to the best interests of the child. It is highly possible that the child would be better off if he would be able to establish filiation with his biological father. This is especially true if the child's biological father is in a better position to support and care for the child. Moreover, the biological father's love for his child may actually be stronger than the love of his presumed father.

Without the right to impugn the legitimacy of the child the mother may also be encouraged to lie to her husband about the paternity of her child because declaring against her child's legitimacy would do nothing but expose her child to harm.

³ *Id.*, at art. 167.

If the natural parents are given the right to impugn the marital presumption of legitimacy, they may obtain a declaration that the mother's husband is not the father of her child, leaving them free to establish paternity between the child and the biological father. This would encourage the mother to be honest about the paternity of her child and it would also give the biological father the opportunity to establish ties with his child.

Should this proposal be accepted, the chapter on paternity and filiation in the Family Code would have to be amended. Such amendments, are necessary for the law to develop with the changing needs of society, and to protect the interests of the child.

E. Methodology

This study was based on an evaluation of both local and foreign laws and jurisprudence, books, journals and articles on the marital presumption of legitimacy. Electronic resources were also availed of.

F. Organization of the Thesis

This thesis is divided into five chapters. The first chapter gives an introduction and background for the study. Chapter Two discusses the marital presumption of legitimacy, its history and Philippine laws regarding the matter. Chapter Three explains the need for amending Philippine laws to allow the mother and the biological father to impugn the presumption. The considerations and the proposed amendments are discussed in Chapter Four, while Chapter Five sets forth the author's conclusion and recommendations.

II. THE MARITAL PRESUMPTION OF LEGITIMACY

A. History

The marital presumption of legitimacy is one of the oldest presumptions of law. In attempting to protect children from the harsh results that arise from a finding of illegitimacy and to stabilize family relationships, common law developed the presumption that a child born to a married woman was the child of her husband.⁴ *Pater is est quem nuptiae demonstrant*, literally translated: the father is he whom the marriage points out.⁵ At that time, the presumption was conclusive unless the husband was shown to be impotent, or was not in the country at the time of conception.⁶

First articulated in 1777 in the ejectment case of *Goodwright v. Moss*,⁷ the presumption took the form of an evidentiary rule which prevented both husband and wife from testifying to lack of access to one another at the time of conception.⁸ Lord Mansfield, in *dicta*, stated that "a declaration of a father or mother cannot be admitted to bastardize the issue born after marriage. It is a rule founded on decency, morality and policy."⁹

Even if the pronouncement was only an *obiter dictum*, initially, most states adopted this rule. In the United States, it was held that its application prevented many unseemly contests over the legitimacy of the children, and kept inviolate those marital confidences, the disclosures of which only disturb and prove nothing.¹⁰ However upon critical examination, a majority of states rejected it on account of the unjust results which flowed from the rule.¹¹ In fact, this evidentiary rule was repudiated in England more than a century ago, giving way to the modern doctrine that the presumption may be rebutted by any competent and relevant evidence showing that the husband could not have been the father of the child.¹² Similarly, in the United States, it was concluded that the importance of the search for truth clearly outweighed any policy considerations, and that in fact and in truth, decency, morality and justice would be best served by admitting such testimony as evidence.¹³

⁴ Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 589 (1991).

⁵ Tiana Hinnant, *Family Law - Lover's Triangle Turns Bermuda Triangle: The Natural Father's Right to Rebut the Marital Presumption*, 25 WAKE FOREST L. REV. 617, 617 (1990).

⁶ Brenda Runner, *Protecting a Husband's Parental Rights When His Wife Disputes the Presumption of Legitimacy*, 28 J. FAM. L. 115, 116 (1989).

⁷ 98 ENG. REP. 1257 (1977).

⁸ Kisthardt, *supra* note 4, at 589.

⁹ *Goodwright*, 98 ENG. REP. at 1258.

¹⁰ *Ventreco v. Bushey*, 191 A.2d 104, 106 (Maine, 1963), *citing* *Hubert v. Cloutier*, 194 A. 303.

¹¹ *Id.*

¹² *De Leon v. De Leon*, 15 CAR 677, 690 (1970), *citing* C.J. 942.

¹³ *Moore v. Smith*, 172 So. 317 (1937).

In discussing the rule, Dean Wigmore has stated, "[t]he truth is that these high sounding 'decencies' and 'moralities' are mere pharisaical afterthoughts, invented to explain a rule otherwise incomprehensible, and lacking support in the established facts and policies of our law. There never was any true precedent for the rule; and there is just as little reason of policy to maintain it."¹⁴ But even with the rejection of Lord Mansfield's rule, the presumption that a child born inside a marriage is the legitimate child of the spouses still remains. After all, the marital presumption still serves to reinforce the strong state interest in the preservation of the family, which in turn protects the child's welfare.¹⁵

As it stands, the presumption is rebuttable by clear and convincing evidence. In discussing the pronouncements of various courts regarding the matter, the New York Court of Appeals explained, "[w]hat is meant by these pronouncements, however differently phrased, is this, and nothing more, that the presumption will not fail unless common sense and reason are outraged by a holding that it abides . . . The presumption does not consecrate as truth the extravagantly improbable, which may be one, for ends juridical, with the indubitably false."¹⁶

As the presumption became rebuttable, the focus of the judicial discussions shifted to the question of standing. At first, the right was only given to the presumed husband, and in some instances, his heirs or legatees, since he was in the best position to know that he was not the father of the child. This was meant to reduce unwarranted attacks on the paternity of legitimate children, thereby preserving the stability of the family. In addition, the husband was protected from deprivation of the parenthood of children he wished to claim as his own. The personal nature of the disavowal action ensured that vengeful mothers, or others motivated by greed, could not deny the husband the advantages of the benefits of legitimacy.¹⁷

Considering that when someone in the family attacks the presumption, the family's breakup has already occurred, most jurisdictions have allowed the

¹⁴ Ventreco, 191 A. 2d at 106, citing 7 Wigmore, 3d Ed., Vol. VII, § 2063 and 2064.

¹⁵ Scott v. Mershon, 576 A.2d 67, 70 (Pa. Super 1990).

¹⁶ In re Findlay, 170 N.E. 471, 473 (1930).

¹⁷ Helen Scott Johnson, *Louisiana's Presumption of Paternity: The Bastardized Issue*, 40 LA L. REV. 1024, 1027 (1980).

¹⁸ Traci Dallas, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COLUM. L. REV. 369, 369 (1988).

wife and the child to rebut the presumption.¹⁸ Under the Uniform Parentage Act of the United States, the action to rebut the presumption may be brought by the presumed father, the mother and the child.¹⁹

On the other hand, approximately two-thirds of the states recognize the biological father's right to rear his child and establish paternity, by allowing him to impugn the marital presumption.²⁰ Some state legislatures have provided this right, while in other jurisdictions, the courts have provided it.²¹

B. The Marital Presumption of Legitimacy in the Philippines

In the Philippines, the presumption that a child born within a valid marriage is the child of the husband was introduced in December 8, 1889, when by Royal Decree, the Civil Code of Spain was extended to the Philippines. The said Code provides:

ART. 108. Children born after the one hundred and eighty days next following that of the celebration of marriage or within the three hundred days next following its dissolution or the separation of the spouses shall be presumed to be legitimate.

This presumption may be rebutted by proof that it was impossible for the husband to have had access to his wife during the first one hundred and twenty days of the three hundred next preceding the birth of the child.

ART. 109. A child shall be presumed to be legitimate, even though the mother should have declared it to be illegitimate or should have been convicted of adultery.

Shortly after, this presumption of legitimacy was made conclusive with the enactment of the Code of Civil Procedure (Act No. 190). The said Code adopted the following presumptions from American Law:²²

¹⁹ Uniform Parentage Act § 6

§ 6 (a) (Determination of Father and Child Relationship; Who May Bring Action; When Action May Be Brought)

(a) A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2) or (3) of Section 4 (a), may bring an action

(1) at any time for the purpose of declaring the existence of the father and child relationship presumed under Paragraph (1), (2) or (3) of Section 4 (a);

(2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2) or (3) of Section 4 (a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than five years after the child's birth . . .

²⁰ Johnson v. Adams, 479 N.E. 2d 866 (1985).

²¹ Hinnant, *supra* note 5.

²² NAPOLEON MALOLOS AND TEODORO MARTIN, REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES WITH ANNOTATIONS 86 (1951).

SEC. 333. CONCLUSIVE PRESUMPTIONS

The following presumptions or deductions which the law expressly directs to be made from particular facts are conclusive:

x x x

3. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate, if born within the one hundred eighty days immediately succeeding the marriage or after the expiration of three hundred days following its dissolution.

SEC. 334. DISPUTABLE PRESUMPTIONS

Presumptions are satisfactory, if uncontradicted, but they are disputable, and may be contradicted by other evidence.

x x x

29. That a child born in lawful wedlock, there being no divorce, absolute or from bed and board, is legitimate.

From these provisions, it can be seen that the marital presumption at that time was very strong. For as long as it was shown that the wife was cohabiting with a husband who was not impotent, a child born one hundred eighty days after the celebration marriage was conclusively presumed as legitimate.

This rule was applied in the case of *Andal v. Macaraig*.²³ In this case, it was proven that at the time of conception of the child, the husband had been suffering from a form of tuberculosis so serious that he could hardly move on get up from his bed. In upholding the legitimacy of the child, the Supreme Court held that in the absence of proof that the husband was absent, that he was suffering from impotency which is patent, continuous and incurable, or that he was imprisoned, the presumption of legitimacy would not be disputed. The court declared that the presumption could only be rebutted by clear proof that it was physically or naturally impossible for the spouses to indulge in carnal intercourse.²⁴

This rule was retained even after the promulgation of the New Civil Code. Under the Civil Code of 1950:

Art.225. Children born after one hundred and eighty days following the celebration of the marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed to be legitimate.

²³ 89 Phil 165 (1951).

²⁴ *Id.* at 169.

Against this presumption no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred and twenty days of three hundred which preceded the birth of the child.

This physical impossibility may be caused:

- (1) By the impotence of the husband;
- (2) By the fact that the husband and wife were living separately, in such a way that access was not possible;
- (3) By the serious illness of the husband. (108a)

Art. 256. The child shall be presumed legitimate, although the mother may have declared against its legitimacy or may have been sentenced as an adulteress. (109)

Art. 257. Should the wife commit adultery at or about the time of the conception of the child, but there was no physical impossibility of access between her and her husband as set forth in article 255, the child is prima facie presumed to be illegitimate if it appears highly improbable, for ethnic reasons, that the child is that of the husband. For the purposes of this article, the wife's adultery need not be proved in a criminal case. (n)

Corollary to this, the 1964 Rules of Court also articulated the presumption of legitimacy.²⁵

Notably under the Civil Code of 1950 and the subsequent 1964 Rules of Court, physical impossibility due to the illness of the husband and the fact that the spouses were living separately which made access impossible were added as causes of the physical impossibility of access which may be used to dispute the presumption.

²⁵ R. A. No. 386 (1950)

In construing the above-mentioned provisions, the Supreme Court, in *Macadangdang v. Court of Appeals*,²⁶ held that the presumption that a child born within a marriage is the legitimate child of the spouses becomes conclusive in the absence of proof that there was physical impossibility of access between the spouses in the first 120 days of the 300 days which preceded the birth of the child.²⁷ It further held that this non-access must be shown beyond reasonable doubt.²⁸ Thus, a circumstance which makes sexual relations merely improbable cannot defeat the presumption of legitimacy.²⁹

The Court explained that to use the separation of the spouse as proof of non-access, it must be shown that such separation made sexual access impossible. This may take place when they reside in different countries or provinces, and they have never been together during the period of conception,³⁰ or if the husband is in prison during the conception, unless it appears that sexual union took place through corrupt violation of or allowed by prison regulations.³¹

This is also true with the illness of the husband. For such illness to be used as proof of non-access, it should be of such a nature as to exclude the possibility of

²⁶ 1964 Rules of Court

Sec. 4. Quasi-conclusive presumptions of legitimacy.

(a) Children born after one hundred eighty days following the celebration of the marriage, and before three hundred days following its dissolution or the separation of the spouses shall be presumed legitimate.

Against this presumption no evidence shall be admitted other than that of the physical impossibility of the husband's having access to his wife within the first one hundred and twenty days of the three hundred which preceded the birth of the child.

This physical impossibility may be caused:

(1) By the impotence of the husband;
 (2) By the fact that the husband and the wife were living separately, in such a way that access was not possible;
 (3) By the serious illness of the husband.

(b) The child shall be presumed legitimate, although the mother may have declared against its legitimacy or may have been sentenced as an adulteress.

(c) Should the wife commit adultery at or about the time of the conception of the child, but there was no physical impossibility of access between her and her husband as set forth above, the child is presumed legitimate, unless it appears highly improbable, for ethnic reasons, that the child is that of the husband. For the purpose of this rule, the wife's adultery need not be proved in a criminal case.

(d) A child born within one hundred eighty days following the celebration of the marriage is conclusively presumed to be legitimate in any of these cases:

(1) If the husband, before the marriage, knew of the pregnancy of the wife;
 (2) If he consented, being present, to the putting of his surname on the record of birth of the child;
 (3) If he expressly or tacitly recognized the child as his own.

²⁷ 100 SCRA 73 (1980).

²⁸ *Macadangdang*, 100 SCRA at 85.

²⁹ *Id.*

³⁰ *Id.*, at 86, citing *Estate of Benito Marcelo*, 60 Phil 442 (1934).

³¹ *Id.*, at 86, citing 1 Manresa 492-500.

his having sexual intercourse with his wife.³² This is consistent with the ruling in *Andal v. Macaraig*.³³

Evidently even with the addition of separation and illness as proof of non-access, the presumption of legitimacy under the 1950 Civil Code remained strong. For as long as there was a possibility of intercourse between the husband and the wife, the child was presumed to be a legitimate child of the husband.

Remarkably the same Code has allowed a situation where the child is presumed illegitimate even if born within a marriage: when the mother is found guilty of adultery at or about the time of the conception of the child, and it is shown through ethnic reasons, that it is highly improbable for the child to be that of the husband's.³⁴ Thus in a case where a Caucasian claimed to be the father of his wife's child, who upon examination turned out to be a full-blooded Chinese, the Supreme Court held that there was no relation between the two.³⁵

That the presumptions give way to truth is clearly seen in this presumption of illegitimacy as the law refuses to give legitimacy to a child who is obviously not the issue of the husband.

The Philippine legislature went a step further when it enacted the Family Code of the Philippines. This present law, taking into account the advances in medical science, deleted the presumption of illegitimacy but provided for two additional grounds for impugning the marital presumption of legitimacy. Article 166 of the Family Code states:

Art. 166. Legitimacy of a child may be impugned only on the following grounds:

- (1) That it was physically impossible for the husband to have sexual intercourse with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child because of:
 - (a) the physical incapacity of the husband to have sexual intercourse with his wife;
 - (b) the fact that the husband and wife were living separately in such a way that sexual intercourse was not possible; or
 - (c) serious illness of the husband, which absolutely prevented sexual intercourse;
- (2) That it is proved that for biological or other scientific reasons, the child could not have been that of the husband, except in the instance provided in the second paragraph of Article 164; or

³² *Id.*

³³ *Andal*, 89 Phil 105.

³⁴ CIVIL CODE OF THE PHILIPPINES, art. 257.

³⁵ *Lee Sing v. Collector of Customs*, 59 Phil 147 (1933).

- (3) That in case of children conceived through artificial insemination, the written authorization or ratification of either parent was obtained through mistake, fraud, violence, intimidation, or undue influence. (255a)

Thus, upon the effectivity of the Family Code, proof that for biological or other scientific reasons, the child could not have been that of the husband, and proof that the written authorization or ratification of one or both parents was obtained through mistake, fraud, violence, intimidation, or undue influence in cases of children conceived through artificial insemination, may also be used as grounds for impugning the presumption of legitimacy.

The inclusion of scientific testing as a ground for disproving paternity was explained by Justice J.B.L. Reyes on 27 January 1988, during the hearing of the Civil Code Revision Committee of the Senate Committee on Women and Family Relations, as follows:

The present Civil Code proceeds on the basis that it is not possible to ascertain who the father of a person is, but our inquiries have led to the discovery that of recent date, certain biological test especially the Leukocyte test, enable scientists to determine with narrow limits the identity of the father and therefore, we have admitted that the paternity of a person should be determinable by scientific evidence and not only by presumption.³⁶

On the other hand, the addition of the paragraph regarding artificial insemination was necessary in order to determine the status of children born through artificial insemination.

Aside from the inclusion of these two additional grounds, the Family Code also provides that children conceived or born during the marriage of the parents are legitimate. This means that the child need not be conceived and born during the marriage to be legitimate. It would be enough if he was conceived during the marriage but was born after. This is also true even if the child was conceived before the marriage and was born after the ceremony.

These changes eliminated the presumptions in the Rules of Court,³⁷ eliciting a statement from Ernesto Pineda that "the tyranny of presumptions is now over."³⁸ While there is truth to this statement, as indeed, there are presently more grounds to impugn the legitimacy of the child, it can also be said that the marital presumption of legitimacy still remains, as such presumption exists independently of statute.³⁹ This is because said presumption is based on the broad principles of

³⁶ STA. MARIA, *supra* note 1, at 458-459.

³⁷ ERNESTO PINEDA, FAMILY CODE OF THE PHILIPPINES ANNOTATED 248 (1991).

³⁸ *Id.*

³⁹ STA. MARIA, *supra* note 1, at 452.

justice and the supposed virtue of the mother.⁴⁰ Moreover, the rule that a child born within a marriage is the legitimate child of the spouses is made stronger in the Family Code as the status of the child is declared and not presumed.

The extent of this declaration was discussed in the case of *Benitez-Badua v. Court of Appeals*.⁴¹ In this case, a person claiming to be a daughter of a deceased couple sought to be the administrator of the couple's properties. The sister and nephew of one of the deceased-spouses opposed on the ground that the alleged "daughter" could not have been the child of the couple and presented evidence that the deceased-spouses were not able to procreate. The trial court, relying on Articles 166 to 170 of the Family Code ruled in favor of the alleged "daughter." The Court of Appeals reversed the decision. The Supreme Court, in upholding the reversal of the trial court's decision, explained:

Petitioner's insistence on the applicability of Articles 164, 166, 170 and 171 of the Family Code to the case at bench cannot be sustained . . . A careful reading of the above articles will show that they do not contemplate a situation, like in the instant case, where a child is alleged not to be the child of nature or biological child of a certain couple. Rather, these articles govern a situation where a husband (or his heirs) denies as his own a child of his wife. . . Doubtless then, the appellate court did not err when it refused to apply these articles to the case at bench. For the case at bench is not one where the heirs of the late Vicente are contending that petitioner is not his child by Isabel. Rather, their clear submission is that petitioner was not born to Vicente and Isabel.⁴²

Together with this declaration is a provision which has remained consistent-found in Article 109 of the 1889 Civil Code, Article 256 of the 1949 Civil Code and Article 167 of the Family Code. While the wordings of these provisions have slight variations, they all mean the same: that a child shall be presumed legitimate even if the mother may have declared against its legitimacy or may have been sentenced as an adulteress. The justification for the adoption this rule, which was actually based on the *Partidas*,⁴³ is found in the case of *Macadangdang v. Court of Appeals*⁴⁴ where the Supreme Court stated that the rule

has been adopted for two solid reasons. First, in a fit of anger, or to arouse jealousy in the husband, the wife may have made this declaration (Powell vs. State, 95 N.E. 660). Second, the article is established as a guaranty in favor of the children whose

⁴⁰ *Id.*

⁴¹ 229 SCRA 468 (1994).

⁴² *Id.* at 472-274.

⁴³ AMBROSIO PADILLA, 1-A CIVIL CODE ANNOTATED 41 (1975).

⁴⁴ *Macadangdang*, 100 SCRA at 87-88.

condition should not be under the mercy of the passions of their parents. The husband whose honor is offended, that is, being aware of his wife's adultery, may obtain from the guilty spouse by means of coercion, a confession against the legitimacy of the child which may really be only a confession of her guilt. Or the wife, out of vengeance and spite, may declare the child as not her husband's although the statement be false. But there is another reason which is more powerful, demanding the exclusion of proof of confession or adultery, and it is, that at the moment of conception, it cannot be determined when a woman cohabits during the same period with two men, by whom the child was begotten, it being possible that it be the husband himself. (Manresa, Vol. 1, pp. 503-504).

From this, it can be seen that there are several reasons given to justify the adoption of the rule: (1) to guarantee that the status of children will not be under the mercy of the passions of their parents, for the wife may have made the declaration only in a fit of anger or in an attempt to arouse jealousy in the husband; (2) the confession may have been obtained only by means of coercion; and (3) in cases where the paternity of a child is uncertain, as when a mother slept with two men at the time of conception, it would be better for the child to be presumed to be an issue of his or her mother's husband.

Thus, it has been held that the declarations of a mother against the legitimacy of her child are deemed not made,⁴⁵ as they are inadmissible to bastardize the child.⁴⁶

However, in discussing the proper wording of the provision during the meeting of the Code Committee on 6 July 1985, Justice Reyes and Professor Bautista argued that "the evidence of the mother has weight, and therefore, affects the legitimacy of her child."⁴⁷ Since such argument was not objected to by the others, it can be said that those who drafted the Code did not intend to render declarations of the mother inadmissible. Such intention, however, was not reflected in the approved version of the provision. Thus, it is still unclear whether the declarations would be admissible in evidence. Furthermore even if they be deemed admissible, their probative value would still have to be decided upon by the Supreme Court.

A further reading of the same discussion would also show that this rule alone does not prevent the mother from questioning the legitimacy of her child by using evidence other than her declarations. This can be inferred from Justice Caguioa's statement, when he explained that "the idea in the provision is that the child's legitimacy, which is established by birth, is there and that it will not be affected by the mere declaration against legitimacy nor the mere conviction of the

⁴⁵ *Recipulo v. Ardes*, 38 OG 3452 (1940).

⁴⁶ *Macadangdang*, 100 SCRA at 89.

⁴⁷ MINUTES OF THE JOINT CIVIL CODE COMMITTEE MEETING, 3 (1985). [hereinafter MINUTES].

mother as an adulteress."⁴⁸ This explanation was also embodied in the Second Alternative Draft which provides:

Second Alternative Draft:

The mere declaration by the mother against the legitimacy of the child or here mere conviction as an adulteress shall not be sufficient to adversely affect the legitimacy of her child.⁴⁹

Be that as it may, the rule, when read together with Article 170 and 171 of the Family Code will lead to the conclusion that only the husband and his heirs may question the legitimacy of a child.⁵⁰

This construction was mentioned during the meeting of the Joint Civil Code Committee held on August 3, 1985 at the UP Law Complex. In discussing Article 171, Prof. Baviera remarked that under the law, the wife cannot question the legitimacy of her child.⁵¹

The same rule has also found its way in jurisprudence. In *Macadangdang v. Court of Appeals*, the Supreme Court held that "the right to repudiate or contest the legitimacy of a child born in wedlock belongs only to the alleged father, who is the husband of the mother and can only be exercised only by him or his heirs, within a fixed time, and in certain cases, and only in a direct suit brought for the purpose."⁵² As explained in *Macadangdang*, the reason behind the rule is that the presumed father "is the one directly confronted with the scandal and ridicule which the infidelity of his wife produces, and he should decide whether to conceal that infidelity or expose it, in view of the moral or economic interest involved".⁵³

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Arts. 170 and 171 of the Family Code provide:

Art. 170. The action to impugn the legitimeside in the city or municipality where the birth took place or was recorded.

If the husband or, in his default, all of his heirs do not reside at the place of birth as defined in the first paragraph or where it was recorded, the period shall be two years if they should reside in the Philippines; and three years if abroad. If the birth of the child has been concealed from or was unknown to the husband or his heirs, the period shall be counted from the discovery or knowledge of the birth of the child or of the fact of registration of said birth, whichever is earlier. (263a)

Art. 171. The heirs of the husband may impugn the filiation of the child within the period prescribed in the preceding article only in the following cases:

(1) If the husband should die before the expiration of the period fixed for bringing his action;
(2) If he should die after the filing of the complaint without having desisted therefrom; or
(3) If the child was born after the death of the husband. (262a)

⁵¹ MINUTES, *supra* note 47.

⁵² *Macadangdang*, 100 SCRA at 89.

⁵³ *Id.*

This rule was reiterated in *Benitez-Badua*,⁵⁴ when the Supreme Court ruled:

[U]nder Article 166, it is the *husband* who can impugn the legitimacy of said child by proving: (1) it was physically impossible for him to have sexual intercourse, with his wife within the first 120 days of the 300 days which immediately preceded the birth of the child; (2) that for biological or other scientific reasons, the child could not have been his child; (3) that in case of children conceived through artificial insemination, the written authorization or ratification by either parent was obtained through mistake, fraud, violence, intimidation or undue influence. Articles 170 and 171 reinforce this reading as they speak of the prescriptive period within which the *husband* or any of his *heirs* should file the action impugning the legitimacy of said child.⁵⁵

C. Summary

The marital presumption of legitimacy, which provides that a child born within a marriage is a legitimate child of the mother's husband, has undergone many changes. While it remains a strong presumption, it has lost its conclusiveness and has now become rebuttable by clear and convincing evidence.

Even the list of people who are allowed to rebut the presumption has expanded. Where before, only the husband, and in certain circumstances his heirs, had the standing to question the paternity of a legitimate child, at present, foreign jurisdictions have already allowed the mother or the biological father to exercise the said right.

Under Philippine laws, despite the additional grounds by which it may be impugned, the presumption remains strong. Only the husband, and in some circumstances, the heirs, may impugn this presumption. To do so, it must be shown that it was impossible for the husband to have sexual intercourse with the wife within the first 120 days of the 300 days which immediately preceded the birth of the child, that it is proved for biological or other scientific reasons that the child could not have been that of the husband's or that the written authorization or ratification of either parent in the case of artificial insemination was obtained through malice, fraud, violence, intimidation or undue influence.

Despite the fact that the legislature has considered advancements in medical science as grounds by which the presumption may be destroyed, declarations of the mother regarding the paternity of her child, remains insufficient to affect the legitimacy of her child, and may be declared as inadmissible or of no probative value.

⁵⁴ *Benitez-Badua*, 229 SCRA at 473.

⁵⁵ *Id.*

III. THE NEED TO AMEND THE RULES ON THE PRESUMPTION OF LEGITIMACY

A study of the rules on the marital presumption of legitimacy alongside with the recent advances in the sciences would prove the necessity of giving the mother, and in certain circumstances, the biological father, the right to impugn the legitimacy of the child.

A. Reason Behind the Rule: Best Interest of the Child

In discussing the marital presumption of legitimacy, it is important to keep in mind that the rule was created to protect the welfare of the child.⁵⁶ This is consistent with Article 363 of the Civil Code which provides that in all questions relating to the care, custody, education and property of the children, the latter's welfare is paramount. The best interest of the minor can override procedural rules, and even the rights of parents to the custody of their children.⁵⁷

In determining the best interests of the child, the Courts have studied the physical, educational, social and moral welfare of the child concerned, taking into account the respective resources and social and moral situations of the contending parents.⁵⁸ A closer look at the rationale behind the rule that only the presumed father and his heirs may impugn the legitimacy of a child, shows that its focus is not with the interest of the child but on the interest of the presumed father or his heirs.

As previously stated, the reason behind the rule is that the presumed father is directly confronted with the scandal and ridicule which the infidelity of his wife produces. Thus, he should decide whether to conceal that infidelity or expose it, in view of the moral or economic interest involved.⁵⁹

It can be derived that what the law protects is the interest of the presumed father. The law portrays the presumed father as the victim - one subjected to ridicule and scandal and made to share in the responsibility of rearing a child who is not even his. The law gives him two choices - he can shirk the responsibility by impugning the legitimacy of the child, or he can try to hide his humiliation and not do anything at all.

Should he question the legitimacy of the child and succeed in the action, the child and the husband will not be considered as related,⁶⁰ leaving the child free to establish paternity with the biological father. But if the presumed father chooses the second option, he will remain the legitimate father of the child. And neither the mother nor the biological father can contest his decision.

⁵⁶ *Gammon v Cobb*, Fla., 335 So. 2d 261, 266 (1976) citing *Sacks v Sacks*, 267 So. 2d 73 (Fla. 1972).

⁵⁷ *Luna v. Intermediate Appellate Court*, SCRA 7, 16.

⁵⁸ *Unson v. Araneta*, 101 SCRA 183, 189 (1980).

⁵⁹ *Macadangdang*, 100 SCRA at 89.

⁶⁰ *STA. MARIA*, *supra* note 1, at 447.

The child would be fortunate if the presumed father would love the child and treat him as his own as the child would have both a father's affection and the status of legitimacy. However, it is very possible that the presumed father would do otherwise - he can easily choose to discriminate against the child or use the latter as the target of his anger. In such case, it would be the child who would have to suffer the coldness or the wrath of his presumed father.

In this regard, it is also important to note that even if the husband fails to repudiate his paternity of the child, the presumed father may still refuse to give support. Jurisprudence provides that the adultery of the wife is a valid defense in an action for support.⁶¹ In the case of *Sanchez v. Zulueta*,⁶² it was held that such a defense is also available as to the child, because "if he is the fruit of such adulterous relations, then he would not be the child of the defendant and, hence, would not be entitled to support as such."⁶³ Such a rule is extremely prejudicial to the child as this would allow the presumed father to refuse supporting the child even if he fails to impugn the presumption. The child, in this case, would not only be deprived of his right to seek support from his presumed father, he would also have no right to seek support from his biological father.

It can then be concluded that the future of the child is made to depend on the decision of the presumed father. This is because the law sees the presumed father as the only victim, without even looking at the child, who may or may not be a victim, depending on the way the presumed father decides to treat him. This is contrary to the ultimate and overriding consideration behind the marital presumption of legitimacy - the best interest of the child.

B. Need to Allow Biological Parents to Impugn the Legitimacy of a Child.

1. MOTHER

A rule prohibiting the mother from questioning the presumption of legitimacy may also work against this interest in certain situations such as when the presumed father has died without heirs, leaving the mother to raise the child alone, without giving her any opportunity to seek child support from the biological father. Such was the case in *State ex rel. Sprungle v. Bard*.⁶⁴ Here, the mother of the child was married to a member of the Armed Services of the United States who was sent overseas in June 1943. He never returned to the United States as he died in August 1947. The child, whose legitimacy was being questioned, was conceived on 1 March 1946 and born on 15 November 1946. In allowing the complaint to prosper despite the protest of the biological father, the Court held:

⁶¹ *Quintana v. Lerma*, 24 Phil 285, 286 (1913).

⁶² 68 Phil 110 (1939), reiterated in *Lerma v. CA*, 61 SCRA 440, 446 (1974).

⁶³ *Id.*

⁶⁴ 98 N.E. 2d 63 (1950).

[i]f it be held that where, as in this case, the complainant's husband could not be and was not the father of the child, that the complainant cannot maintain this action for the purpose of securing a judicial determination as to who is the father of the bastard child, and an order for support when such fact is judicially established, the mother, and she alone will hold the sole responsibility for such child's support. While the presumption of legitimacy with respect to children conceived and born in lawful wedlock should not be lightly thrown aside, yet such presumption should not be permitted to relieve wrongdoers from their full legal obligation to support their illegitimate children when a construction of the statute will permit such result.⁶⁵

While this case was decided in the United States and thus, merely persuasive, it cannot be denied that such a scenario can happen in the Philippines. Should this happen, following the present rules, the mother will have to carry the duty of rearing her child alone, even if the biological father still lives.

It is also possible the child was conceived and born at a time when the spouses were already separated in fact. In the case of *De Leon v. De Leon*,⁶⁶ the spouses had agreed to separate in 1959 as the husband started living with another woman. In 1962, the wife started living with another man, Doroteo de Leon. Two years later, a child was born. At first, De Leon, attended to his duties as the father of the infant but problems arose when he left his common law family and returned to his legal wife. In this case, the Court of Appeals ruled that the presumption of legitimacy had been successfully impugned and ordered Doroteo de Leon to pay child support.

If in this case, the right of the mother to impugn the legitimacy of her child was in issue,⁶⁷ the Court would have had no choice but to dismiss the complaint. Had this been done, the child would not have been able to claim support from her biological father. This would obviously be against her best interests as her biological father's financial support would have been of great help to her considering that she was not in a good financial situation.⁶⁸

A similar case happened in Florida. In *Gammon v. Cobb*,⁶⁹ the mother asserted that she had no contact with her husband for 20 years and that during the same time, she was already living with another man. Within said period of time, she gave birth to seven children and prior to the filing of the paternity suit, her common law husband accepted paternity of the children and regularly contributed to their support.

⁶⁵ *Id.* at 66.

⁶⁶ 15 CAR 677 (1970).

⁶⁷ In this case, it was the child who filed an action for support, with her mother acting as guardian ad litem. The Court of Appeals acknowledged the child's right to file this claim and it did not even mention the jurisprudential rule that only the husband or his heirs may impugn the presumption of legitimacy.

⁶⁸ The child was a pauper-litigant.

⁶⁹ 335 So. 2d 261 (Fla. 1976).

When the common law spouses separated, the mother sought to have her estranged common law husband designated as the father of the children and to require him to support them. He, in turn, filed a motion to dismiss, alleging that the Florida Statutes limited the right of bringing paternity suits to unmarried women. This statute was premised on the ground that if married women were given the right, their very success in the suit results in the child being judicially declared and labeled a bastard in the face of the presumption that the child is legitimate.⁷⁰

In allowing the case to proceed, the Supreme Court of Florida held that the marital presumption "was created to protect the welfare of the child. To now utilize this same presumption to deny this child support is to destroy the very reason for its existence. The welfare of the child demands that we recognize and honor not the fiction, but the underlying purpose upon which the fiction was created."⁷¹

There are other scenarios where prohibiting the mother from impugning the presumption of legitimacy would not work for the best interest of the child such as when the presumed father is not in a position to properly care for the child due to insanity, insolvency or other causes. It is also possible that the presumed father may leave his wife and child, or even worse, mistreat the child once he learns that he is not the biological father. In such cases, it cannot be expected that such presumed father would go through the trouble of filing an action to disprove paternity. In fact, he may already be barred from filing such action because of the setting of the prescriptive periods. Following the present rules, no actions for paternity and/or support against the natural father may prosper, leaving the responsibility of raising the child solely to the mother.

This is not to say that the present rules do not in any way consider the welfare of the child. Indeed, the rule was made so that the child will be given a chance to live in a stable family relationship where the mother is married to the father. It is indubitable that such a scenario would generally work for the best interest of the child.

In fact, it would be difficult to imagine anything more disruptive to this family relationship than a challenge to the presumption that the husband is the father of the child conceived or born during the marriage. However, the recognition of the right of persons within the family unit, such as the mother, to make such a challenge would simply reflect the reality that, public policy notwithstanding, marriages do fail.⁷² And when relationships reach the point when someone in the family should question such presumption, it can safely be presumed that the family's breakup has already occurred and that there is not much family relationship to protect.⁷³

⁷⁰ *Id.* at 264.

⁷¹ *Id.* at 266.

⁷² *Mcg v. J.W.*, 615 P. 2d 666, 676 (Colo, 1980) (Lohr, J., dissenting).

⁷³ *Hinnant, supra* note 5.

That there is family relationship to protect is obvious in the above-mentioned cases, as when the spouses are already separated in fact, or when one of them is already dead. The degree of stability of the family relationship would have to be considered by the court in determining what is in the best interest of the child.

2. BIOLOGICAL FATHER

Allowing the biological father to impugn the legitimacy of the child, may be required at times, in order that the child's best interest be served. In *Raleigh v. Watkins*,⁷⁴ the biological father of a child sought to establish paternity so that he would be given visitation rights. Said child was conceived before, but born after the divorce between the mother and the presumed father. Since then, the child had resided with his maternal grandparents. When the biological father sought visitation rights, the mother of the child objected stressing the child's inability to comprehend the concept of a biological nonresident father as well as her own distress that would be caused by the biological father's visit. The Court of Appeals of Michigan, in granting visitation rights to the biological father, took into consideration evidence proving that the child did not seem to be disturbed and was actually happy when the biological father visited him, and that the latter was loving and affectionate to the child.

If a case with a similar set of facts is filed in the Philippines, the courts would have no choice but to dismiss the case, as the biological father has no standing to question the child's legitimacy, much less establish paternity. This would not only deprive the biological father of the opportunity to participate in the rearing of his child, but the latter would also lose the chance to have a relationship with his biological father. Such a decision would allow a situation where a mother can deprive her child of a relationship with his biological father just because the latter's visits caused her much distress. Surely, such a ruling would not serve the best interest of the child but would only protect the whims of the mother.

It is true there are several valid arguments against giving the biological father this right to rebut the presumption, the strongest of which is that the denial of such right is needed in order to strengthen and encourage family life for the protection and care of children.⁷⁵ This finds basis on the theory that an action made by the biological father is a challenge brought by a stranger to the marriage, which has the likely effect of seriously disrupting an intact marriage and family contrary to the interest of the State in preserving such institution.⁷⁶

Such an argument, however, fails to acknowledge situations when there no family to protect. Or even if there is a family to protect, it would still be in the best interest of the child to establish paternity with the biological father as, when the presumed father has no affection for the child knowing that the latter is not his. It is also possible that the child has already established relationships with both the presumed and the biological father or the biological father is in a much better

⁷⁴ 293 N.W.2d. 789 (Mich. App. 1980).

⁷⁵ *P.B.C. v. D.H.* 483 N.E.2d 1094, 1097 (Mass. 1985).

⁷⁶ *Id.* at 1098.

position to care for the child. In such case, there would be no reason to deny the biological father the right to assert his rights, as the rule that is supposed to protect the child would work as a detriment to the child's betterment.

The biological father also has the right and duty to rear his child since the rules on parental authority do not limit this right to the legal parents alone.⁷⁷ In fact, Article 209 of the Family Code acknowledges the natural right and duty of parents over the person and property of their unemancipated children.

In the case of *Hutchinson v. Hutchinson*,⁷⁸ the American court recognized that it is rooted in the common experience of mankind that "parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love of a child than anyone else."⁷⁹ Such a relationship may only be broken by the State when the best interests of a child so requires.⁸⁰

As the best interest of the child would be the only justification for the rule on the marital presumption of legitimacy that would deprive the biological father of his right to assert his rights over his child, such rule will have to be disregarded when it is the best interest of the child that requires that paternity with the biological father be established.

C. Summary

The marital presumption of legitimacy was created in order to protect the best interest of the child. However, the rule providing that only the husband and his heirs can impugn the presumption does not always work for the benefit of the child. In the application, the rule may produce detrimental results.

This is true not only when the family unit sought to be protected is already broken, but also when establishing paternity would give more benefits to the child than maintaining the status quo.

Thus, it is necessary to give the mother and the biological father the right to rebut this presumption. As held in *Gammon v. Cobb*,⁸¹ the presumption "was created to protect the welfare of the child. To now utilize this same presumption to deny this child support is to destroy the very reason for its existence. The welfare of the child demands that we recognize and honor not the fiction, but the underlying purpose upon which the fiction was created."⁸²

⁷⁷ See Title IX of the Family Code.

⁷⁸ 649 P. 2d 38 (Utah 1982).

⁷⁹ *Id.* at 40.

⁸⁰ *Kishpaugh v. Kishpaugh*, 745 P. 2d 1248, 1252 (Utah 1987).

⁸¹ 355 S. 2d 261 (1976).

⁸² *Id.* at 266.

IV. PROPOSED AMENDMENTS TO THE RULES ON THE MARITAL PRESUMPTION OF LEGITIMACY

From the foregoing discussion, it has been clearly shown that a rule absolutely prohibiting the mother and the biological father from questioning the legitimacy of the child would sometimes work to the detriment of such child. Thus, it becomes necessary to abandon this rule.

A. Important Considerations

In making such changes, it is important to consider several matters: first, the protection of the presumed father's rights, and second the advancements in medical science that provide proof for both non-paternity and paternity with a high degree of certainty.

1. PROTECTING THE PRESUMED FATHER'S RIGHTS

By allowing the mother and the biological father to impugn the marital presumption of legitimacy, the rights of the presumed father would be affected, especially where the presumed father has chosen to treat the child as his own and has established close relations with the child. It is also possible that the mother has concealed the true biological paternity of the child, making the presumed father believe that the child is his.

Even where extraordinary circumstances exist, as when the parents' rights and the well-being of the child do not converge, it is the child's best interest that should be considered.⁸³ It would not be in harmony with equity and justice if the presumed father was subjected to unnecessary pain and expense by letting him establish bonds with a child, then subsequently revoking such right.

In order to protect the husband's parental interests, the United States courts have come up with different solutions: (1) equitable parent doctrine; (2) dual paternity; and (3) equitable estoppel.

The equitable parent doctrine, fashioned after the doctrine of equitable adoption, elevates the husband to the status of a biological father even if paternity with the latter has been previously established. In the case of *Atkinson v. Atkinson*,⁸⁴ the Court of Appeals of Michigan listed three elements before a husband may be elevated to the status of the natural parent: These are: first, the husband and child must mutually acknowledge a father-child relationship before the action to impugn is filed; second the husband desires to have parental rights; and third the

⁸³ *Boyles v. Boyles* 466 N.Y. S. 2d 762, 764 (A.D. 3 Dept. 1983).

⁸⁴ 408 N.W. 2d 516, 518-519 (1987).

husband is willing to pay child support.⁸⁵ When these elements concur, the husband is given custodial and visitation rights.⁸⁶

Such arrangement, however, may give rise to conflicts between the biological parents and the equitable parent when they try to make arrangements for these custodial and visitation rights. The child's continued relationship with the presumed father may prevent him from having a deeper relationship with the biological parents. Moreover, the equitable parent doctrine can only be made to apply in cases where the presumed father and the child have already developed relationship, for the doctrine requires both the father and the child to recognize a parent-child relationship before the action to impugn filed. Additionally the doctrine on which it is based, equitable adoption, has not been accepted in the Philippine laws which require certain proceedings and formalities before any adoption is recognized.⁸⁷

Dual paternity takes the equitable parent doctrine a step further. In this scenario, an action to establish paternity with the biological father is allowed without destroying the legal relationship between the child and the presumed father. In justifying such doctrine, the Court of Appeals of Louisiana explained that:

[A]n avowal action is not an attempt by the natural father to exercise the presumed father's right to disavow paternity. The two actions are distinct and separate. The disavowal action breaks the tie upon which legitimate filiation is based, and thus serves to bastardize the child; the avowal action establishes the existence of a tie not previously recognized, and thus serves to establish true filiation.⁸⁸

Since paternity with the biological parent can be established without destroying the legal relationship between the child and the presumed father, the child retains his status of legitimacy.⁸⁹ He would also have two legal fathers.

However, the dual paternity doctrine, fails to recognize that the only tie binding the presumed father and the child is the marital presumption of legitimacy. Once paternity has been established with another person, there would be no reason to maintain such presumption as obviously, the presumption will have to give way to the truth. Furthermore, the solution would bring about legal confusion as to who is primarily liable for the care, custody and support of the child.⁹⁰ This would complicate the rules on a child's obligation to support his parents, and the laws on succession. The same difficulties regarding the equitable parent doctrine would also apply.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See Domestic Adoption Act of 1998, R.A. No. 8552.

⁸⁸ *Finnerty v. Boyett*, 469 So. 2d 287, 293 (La. App. 2 Cir. 1985).

⁸⁹ *Smith v. Cole*, 553 So. 2d 847, 854 (La. 1989).

⁹⁰ Jerry Spelling, *Smith v. Cole: Biological Fathers Owe Support to their Children Despite the Mother's Marriage to Another and the Civil Code's "Strongest Presumption,"* 36 Loy. L. Rev. 225, 232 (1990).

While the two earlier solutions allow the establishment of paternity with the biological father, equitable estoppel prevents such an action where the mother's action or inaction led the husband to believe that the child was his, or that he was already allowed to have a father-child relationship which would suddenly be destroyed by the wife's rebuttal of the presumption.⁹¹ The doctrine may also be used against a biological father who having the opportunity to do so, has failed to establish paternity and allowed the presumed father to develop a relationship with the child. Thus, when the mother or the biological father, through action or inaction, has allowed the presumed father to develop a relationship with the child, the latter may be able to prevent a disavowal action by alleging estoppel. However, it has also been held that the exercise of such right would still have to depend on the best interests of the child.⁹²

Among these three solutions, equitable estoppel would be the easiest to assimilate into Philippine law. Not only is estoppel already deeply ingrained in this jurisdiction, it is also the most consistent with the policy of upholding the best interest of the child. In this case, the mother and the biological father would be forced to establish true paternity at the earliest opportunity. This prevents a situation where the bonds between the presumed parent and the child have already become strong at the time paternity is questioned.

In this regard, it also becomes logical to provide a period within which the mother or the biological father may question the paternity of the child. This period will provide a fixed standard to determine whether the biological parent is guilty of delay, and prevent the status of the child from being suspended for a long time. This is consistent with the equal protection of the law, as the presumed father and his heirs are also given definite periods to file the action of disavowal.⁹³

2. ADVANCEMENTS IN MEDICAL SCIENCE

In amending the provisions on paternity, it is also wise to follow the footsteps of the drafters of the Family Code in considering the advancements in medical science, recalling that some of the rules were created to provide presumptions where the facts cannot be established by competent evidence.

One such rule is that found in Art 167 of the Family Code which provides that the child shall be presumed legitimate even if the mother has declared against it or has been sentenced as an adulteress. As previously discussed, the reasons commonly given for this rule are: (1) to guarantee that the status of children will not be under the mercy of the passions of their parents since the wife may have made the declaration only in a fit of anger or in an attempt to arouse jealousy in the husband; (2) the confession may have been obtained only by means of coercion; and (3) in cases where the paternity of a child is uncertain, as when a mother slept

⁹¹ *In re Paternity of DLH*, 419 N.W. 283 (1987).

⁹² *Id.*

⁹³ See Family Code, art. 171.

with two men at the time of conception, it would be better for the child to be presumed to be an issue of his or her mother's husband.

These have been the same reasons for including this provision in the *Partidas* more than a decade ago. Historically, absolute proof of biological paternity has been virtually impossible. Even those most knowledgeable in medicine could make only educated guesses as to biological paternity by determining access to the mother based on probable time of conception. Thus, the presumption of paternity was established as an effective legal solution to this difficult task of proving biological fatherhood.⁹⁴

At present, by the use of scientific tests, one can easily disprove paternity and with a high degree of certainty, prove filiation.

In the case of *Jao v. Court of Appeals*⁹⁵, the Supreme Court affirmed the admissibility of blood grouping tests to disprove paternity. It ruled that such tests are conclusive in excluding paternity. However, they cannot indicate with precision that a particular person is the father of the child whose paternity is in issue.⁹⁶

As far back as 1983, the United States recognized the medical and legal significance of the Human Leukocyte Antigen (HLA) tests which constitute relevant evidence to establish the probability of paternity⁹⁷. The HLA tests, are basically genetic comparison examinations, which when used in concert with traditional blood grouping tests, raise the probability of excluding non-fathers to at least ninety percent.⁹⁸

Paternity can also be established with the use of DNA tests. DNA testing detects and codifies the presence of DNA in human tissue cells and examines the individual's unique genetic composition. Because a child inherits half of his chromosomes and DNA characteristics from this mother, and half from his father, the child's DNA profile, is a unique composite of the profiles of his parents. When comparing the child's and mother's DNA profile, approximately half of the bars should match. The remaining bars are compared with those of the alleged father. If the man is the biological father, essentially all remaining bars of the child's profile will match. While other blood testing can only exclude paternity, theoretically, the DNA comparison positively identifies the father and excludes all men.⁹⁹

Progress in medical science, has allowed the declarations of a mother regarding the paternity of her child to be easily proven or refuted by scientific evi-

⁹⁴ Johnson, *supra* note 17, at 1026 (1980).

⁹⁵ 152 SCRA 359 (1987).

⁹⁶ *Id.*, at 365.

⁹⁷ Owens v. Bell, 451 N.E. 2d 241 (Ohio 1983).

⁹⁸ Hulett v. Hulett, 544 N. E. 2d 257, 258 (Ohio 1989).

⁹⁹ Dee O'Neil Andrews, *DNA and Dads: Considerations for Louisiana in Using DNA Blood Tests to Determine Paternity*, 38 LOY. L. REV. 425, 430 citing Ronald J. Richards, *Comment, DNA Fingerprinting and Paternity Testing*, 22 U.C. DAVIS L. REV. 609, 611 (1989).

dence, whether such utterances were made intentionally to anger or elicit jealousy from the husband, or involuntarily as when she was forced or coerced into making such admissions. One need not worry about depriving a child of his legitimate status because of an unfounded declaration of his mother. Thus, preventing the mother from giving testimony against the legitimacy of her child to protect him from false declarations is unnecessary in light of the advances that would prove the truth or falsity of such utterances. Since paternity can now be ascertained with reasonable certainty, the question of filiation is now a question of fact, and not of presumptions. And the law must yield to the truth.¹⁰⁰ As stated in American jurisprudence, "[w]hen all the ends of the presumption of legitimacy is designed to conserve have been defeated by sordid facts, the courts must deal with the situation in a common sense way."¹⁰¹

Issues may arise, in this regard, as to the manner of procuring the tests. Where all the parties willing to undergo the tests to determine the biological paternity of the child these would be dilemma. But what if some of the parties refuse to undergo testing?

The answer to this question may be seen in Rule 28 of the 1997 Rules of Civil Procedure which provides:

SECTION 1. *When examination may be ordered.* - In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may in its discretion order him to submit to a physical or mental examination by a physician.

SECTION 2. *Order for examination.* - The order for examination may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties, and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

Thus, a party may seek an order to compel the parties to submit to physical examinations, and blood tests would fall under such examinations.¹⁰² It can not be denied that the blood type, the DNA or the tissues of a person are part of his physical condition. The order of examination can be availed of even if the child is not a party to the case. Although the rule refers to examination of a party, the child is considered a party for purposes of establishing paternity as the action is brought for his benefit.¹⁰³

¹⁰⁰ Ernesto Pineda, *Problems in Paternity and Filiation*, 10 Law. Rev. 72, 77 (1996).

¹⁰¹ *In re Findlay*, 170 N.E. 471, 474 (1930) citing *Nolting v. Holt*, 215 P. 281.

¹⁰² The only problem with this is the definition of the phrase "good cause" as provided in Section 2. It is submitted that consistent with the rules on paternity, the phrase should be construed as the best interest of the child. As provided for in *McDaniels v. Carlson*, 738 P. 2d 254, 261 (Wash 1987), "where [the] child is considered legitimate, [the] best interest of the child should be considered before ordering blood tests."

¹⁰³ FLORENZ REGALADO, *I REMEDIAL LAW COMPENDIUM* 334 (1997) citing *Beach v. Beach*, 3 Fed. Rules Service 397 (U.S.C.A. D.C. 1940).

a. GIVING THE MOTHER THE RIGHT TO IMPUGN
THE LEGITIMACY OF A CHILD

For a mother to be given the right to question the paternity of her child, it is necessary to amend Article 170 of the Family Code, which provides the periods when the legitimacy of a child may be questioned by the presumed father and his heirs. This provision implies that the mother does not have the same right, as she is never mentioned. An amendment expressly allowing the mother to impugn the presumption is then necessary.

It is submitted that this provision be amended by adding a paragraph which would read:

The mother may impugn the legitimacy of the child within one year from the child's birth.

Such a provision will expressly give the mother the right to question the presumption and limit the exercise of such right within a year from child's birth. The short prescriptive period avoids a situation where the status of the child is disputed for a long period of time. Such a period would also force the mother to reveal the identity of the father at an earlier stage. She would have no opportunity to encourage the child to have a relationship with the presumed father, then subsequently change her mind at a time when strong bonds have already been established. The period given to the mother is the same as that given to the presumed father or his heirs who reside in the city or municipality where the birth took place. This is so because the mother would obviously know about the birth of the child.

b. ALLOWING THE BIOLOGICAL FATHER
TO IMPUGN THE LEGITIMACY OF A CHILD

Even in jurisdictions that allow biological fathers to question the marital presumption of legitimacy, issues arise as to the extent of such a right. While certain jurisdictions unconditionally grant the biological father the right to file such action,¹⁰⁴ there are others that involve certain requirements to be fulfilled before a biological father can exercise such right.

Jurisdictions that give the right to the biological father without any qualifications argue that blood ties alone are enough to enable the biological father to assert his rights over the child. They insist that qualifying the biological father's right to assert such right would be against the equal protection of the laws as the mothers may assert their rights over their children without having to meet any requirement.¹⁰⁵ On the other hand, those that require qualifications insist that since the action of the biological father is a challenge made by a person outside of the

¹⁰⁴ See *Crane v. Battle*, 307 N.Y. S. 2d 355, 357 (N.Y. Fam Ct. 1970); *R. McG. v. J.W.*, 615 P. 2d 666, 671 (Colo. 1980).

¹⁰⁵ *R. McG.*, 615 P. 2d at 671.

family, which would possibly have the effect of seriously disrupting an intact marriage and family, stringent measures must be taken so that an unwarranted disruption would not occur.¹⁰⁶

It is submitted that the latter opinion is more apt in this jurisdiction. The state has created the presumption because of the belief that protecting the family would be for the best interest of the child. While qualifying the right of the father to impugn the legitimate status of a child would put him in a lower status than the mother, the difference is justified by the fact that the mother is usually considered to be a part of the legitimate family. Should she wish to impugn the presumption, it would be an attack from within a family unit. There would then be no family to protect. This is not true with the biological father, as he is a stranger to the family. In his move to question the legitimacy of a child, there is a possibility that he would deprive the child of a stable family relationship that may be more advantageous to him than establishing a relationship with his biological father.

American writers suggest requiring a preliminary hearing where the biological father must prove a developed relationship with the child, before he can proceed to impugn the presumption.¹⁰⁷ If he can show such a relationship, then the state cannot deprive him of his standing and interest in maintaining such relationship without a hearing on the merits. Since this preliminary hearing would only involve evidence concerning the putative father's actual relationship with the child apart from the issue of paternity, it would not cause a significant intrusion in the marital family.¹⁰⁸

This preliminary hearing would protect the innocent marital unit by permitting only the biological father to present evidence making it unnecessary for the marital unit to defend itself against this evidence. In this way, the marital family is not forced into court for blood tests or forced to experience the disruption of having to answer to the natural father's claim until it is made necessary by the existence of a substantial interest.¹⁰⁹

This "developed relationship" theory is largely based in the ruling in *Lehr v. Robertson*¹¹⁰ that "[p]arental rights do not spring full blown from the biological connection between the parent and child."¹¹¹ It requires relationships more enduring,¹¹² and demands that the biological father demonstrate a prompt assumption of parental duties.¹¹³

¹⁰⁶ *P.B.C. v. D.H.*, 483 N.E. 2d 1094, 1098 (Mass. 1985).

¹⁰⁷ Traci Dallas, *Rebutting the Marital Presumption: A Developed Relationship Test*, 88 COL. L. REV. 369, 383 (1988); Elizabeth Hadad, *Tradition and the Liberty Interest: Circumscribing the Right of the Natural Father*, 56 BROOK. L. REV. 291, 324.

¹⁰⁸ Dallas, *supra* note 107, at 383.

¹⁰⁹ Hadad, *supra* note 107, at 324.

¹¹⁰ 463 US 258 (1983).

¹¹¹ Hinnant, *supra* note 5, at 635.

¹¹² *Id.*

¹¹³ *J.W.T. II*, 872 S.W. 2d 189, 198 (Tex. 1994).

However, such test, may still work against the benefit of the child, as it is still possible for the mother to prevent the biological father from having a relationship with the child.¹¹⁴ This would discourage biological fathers from bringing suit shortly after the child is born since they would need time to develop a substantial relationship with his child.¹¹⁵ This would be against the better policy of encouraging early paternity adjudication. After all, a "paternity suit, by its nature, threatens the stability of a child's world"¹¹⁶ and this threat only increases as the child gets older.¹¹⁷ In this regard, it would also be advisable to provide a period within which a biological father may impugn the legitimacy of a child.

In New Jersey, Washington and Arizona, the courts also require a preliminary hearing before allowing the biological father to question the presumption. However, instead of determining whether there exists a developed relationship, the courts would have to determine whether the action is for the best interest of the child.¹¹⁸ While this test enables courts to balance a child's need for stability within the parent-child relationship against a child's need to learn the truth about his or her natural father, this approach also forces the courts to consider the merits of a biological father's claim in order to resolve the procedural issue of whether the biological father has standing.¹¹⁹

It is submitted that a preliminary hearing that would determine if the filing of the action is in the best interest of the child should be required. And in the determination of what is in the best interest of the child, it is important to consider the factors which weigh upon the issue of the benefit or detriment of the child must be considered. Among such factors are:

- (1) Harm to the child such as emotional injury, distrust, and possible confusion of knowing the parenting father is not the biological father;
- (2) Protection of the child's physical, mental, and emotional needs;
- (3) The stability of the family relationship and extent of the intrusion that will result from a paternity determination;
- (4) The consistency of the biological father's interest in the child;
- (5) Societal stigma that may result or be perceived by establishing relationship, including placing the child's birth outside of the traditional wedlock setting;
- (6) Continuity of established relationships;
- (7) Any extent to which the uncertainty of parentage already exists in the child's mind;

¹¹⁴ Stacy Lynn Hill, *Putative Fathers and Parental Interests: A Search for Protection*, 65 IND. L. J. 939, 962 (1990).

¹¹⁵ Deborah Ellingboe, *Sex, Lies and Gender Tests: Challenging the Marital Presumption of Paternity Under the Minnesota Parentage Act*, 78 MINN. L. REV. 1013, 1042 (1994).

¹¹⁶ *McDaniels v. Carlson*, 738 F. 2d 254, 261 (1987).

¹¹⁷ Ellingboe, *supra* note 115, at 1042 (1994).

¹¹⁸ *M.F. v. N.H.* 599 A. 2d 1297 (N.J. Super. A.D. 1991).

¹¹⁹ Ellingboe, *supra* note 115, at 1023 (1994).

- (8) The child's interest in knowing family and genetic background, including medical and emotional history.¹²⁰

It can be seen that by using the best-interest-of-the-child test courts must look at the existence of the relationship of the child with both his presumed and biological father. However, such factor is not controlling and it must be considered along with the other factors.

This preliminary hearing would be akin to proceedings for support *pendente lite* under Rule 60 of the Rules of Court, wherein the court must provisionally determine the facts and consider the possible outcome of the case, before allowing the biological father's action to proceed. Thus, the biological father would have to establish a *prima facie* case before his action may be allowed to proceed.¹²¹

In order that these considerations may be met, it is recommended that a paragraph be inserted in Article 170 of the Family Code that would expressly allow the biological father to impugn the presumption upon proof that such action would be for the best interest of the child.

As for the period within which the biological father can establish his paternity, it is recommended that he be given the same time as the presumed father and his heirs. The biological father may thus file an action to establish paternity and consequently impugn the legitimacy of a child. This action must be filed one year from the knowledge of birth of the child, should he reside in the city where the birth took place. If he does not reside at the place of birth, the period shall be two years if he resides in the Philippines, and three years if he resides abroad. This provides uniformity in the law, and the short periods prevent the status of the child from being questioned long after he had developed a relationship with the presumed father, while giving the biological father sufficient opportunity to claim his rights.

It must be noted that the period shall commence upon knowledge of the birth of the child. In this case, the mother may not prevent the biological father from establishing his rights by merely keeping from him the birth of the child.

Considering the issues discussed, a paragraph should be added in Article 170 of the Family Code that would state:

The biological father, may impugn the legitimacy of the child upon a *prima facie* proof that such action would be for the best interest of the child in a preliminary hearing. Such action shall be brought within one year from the knowledge of the birth of the child should he reside in the city where the birth took place. If he does not reside at the place of birth, the period shall be two years if he resides in the Philippines and three years if he resides abroad.

¹²⁰ *M.F. v. N.H.*, 599 A.2d 1297, 1302 (N.J. Super. A.D. 1991).

¹²¹ *Lerma*, 61 SCRA at 44.

This provision would allow the biological father to impugn the legitimacy of a child only upon showing that the action would be for the best interest of the child. He would also have to file the action within the periods provided for.

V. CONCLUSION AND RECOMMENDATIONS

The marital presumption of legitimacy effectively protects the interests of the child by preserving the stability of the family. It not only allows the child to grow up in a normal family atmosphere, but lets him enjoy the advantages of being a legitimate child.

There are times, however, when destroying the presumption is called for not only to give way to the truth but also to insure the best interests of the child. There are also situations when it is the best interest of the child that calls for the mother or the biological father to impugn the presumption.

Ever mindful that the reason behind the presumption is the best interests of the child, it then becomes necessary to amend the rules on the marital presumption of legitimacy to make it more effective in achieving its purpose.

Considering the advancements in medical science and other statutory precautions that may be used to prevent unwarranted and baseless actions against the presumption of legitimacy, it is now imperative to recognize the right of the mother and the biological father to impugn this legitimacy in order to further the best interest of the child.

It is thus recommended that Article 167 of the Family Code be deleted and that Article 170 of the same code be amended to read:

Art 170. The action to impugn the legitimacy of the child shall be brought within one year from the knowledge of the birth or its recording in the civil register, if the husband or, in a proper case, any of his heirs, should reside in the city or municipality where the birth took place or was recorded.

If the husband or, in his default all of his heirs do not reside at the place of birth as defined in the first paragraph or where it was recorded, the period shall be two years if they should reside in the Philippines; and three years if abroad. If the birth of the child has been concealed from or was unknown to the husband or his heirs, the period shall be counted from the discovery or knowledge of the birth of the child or the fact of registration of said birth, whichever is earlier.

The mother may impugn the legitimacy of the child within one year from the child's birth.

The biological father, may impugn the legitimacy of the child upon a prima facie proof that such action would be for the best interest of the child in a preliminary hearing. Such action shall be brought within one year from the knowledge of the birth of the child should he reside in the city where the birth took place. If he

does not reside at the place of birth, the period shall be two years if he resides in the Philippines; and three years if he resides abroad.

Such changes would not only allow the mother and the biological father to impugn the legitimacy of the child while still ensuring that the child's best interest is protected, but would also recognize and protect the rights of the other parties concerned.

THE FINE LINE BETWEEN PYRAMIDING AND MULTI-LEVEL MARKETING*

DARA C. ACUSAR**

ABSTRACT

Recently, both the Department of Trade and Industry and the Securities and Exchange Commission were placed under heavy fire by the media, the business sector, the uninitiated and the initiated public alike, and by other departments of the Philippine Government. The issue: Pyramiding schemes.

In the short period following the sudden upsurge of questions on the legality of pyramiding schemes, the departments of government tasked with the protection of the consuming public found themselves unable to clarify the seemingly conflicting and disjointed provisions of law on the issue of what exactly pyramiding is. The objective: the crack down on illegal pyramiding schemes, disguised as multilevel marketing strategies, that have bilked consumers of millions of pesos.

Reference was made to the Consumer Act of the Philippines, as well as the Revised Securities Act, only to discover the extreme difficulty of pinning down the issues and their solutions. Most confusing was the issue of when a company was involved in illegal pyramiding schemes, and when it was actually operating a legitimate multilevel marketing strategy. The cause: a dearth of Philippine law and jurisprudence on the matter.

Whereas legitimate multilevel marketing schemes employ the multilevel structure, wherein distributors at different levels are given the right to recruit other distributors who earn commissions from the sale of consumer products and services, pyramid sales schemes employ the multilevel marketing structure with the focus of the program being recruitment of distributors in order to earn commissions primarily from recruitment activities, rather than from the sale of products and services. There lies the thin line that separates a legitimate multilevel marketing system from an illegal pyramiding scheme. Thus, the predicament: the difficulty in distinguishing the legal multilevel marketing scheme from the illegal pyramid sales scheme, which requires determining whether a particular scheme is established for the sale of products rather than for the recruitment of distributors.

The Consumer Act of the Philippines prohibits pyramiding sales schemes, which are defined as sales devices whereby a participant makes an investment for the right to recruit others, with profits from the scheme being derived primarily from recruitment rather than from the sale of consumer products, services or credits. What constitutes an investment, and when a scheme is directed at earning income primarily from recruitment, are not

* Cite as 44 ALJ 35 (1999).

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