

# THE LEGAL TIME OF CONCEPTION – ITS INFLUENCE ON THE CHILD’S PATERNITY AND HIS/HER RECOGNIZED RIGHTS

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**Abstract:** *Establishing the legal time of conception is important both for establishing the paternity of a child inside marriage and outside of marriage and for the child rights to be recognised from the moment of his conception, as a component of his early capacity of use. This is the reason why the legislator’s intervention is essential in securing the legal time of conception. It is admitted that, by scientific evidence, the presumption of paternity, which has a relative character, can be inverted, meaning to prove the child’s conception within a certain period of the time stipulated by the legal text, or even outside this interval.*

**Key words:** *paternity, conception, presumption, legal time.*

## **1. Introduction. The legal time of conception - regulation, concept and term.**

Article 412 of the new Civil Code [19] defines the legal time of conception as “the interval between three hundred and a hundred and eighty days before the child’s birth is the legal time of conception. It is calculated day by day”.

From the text of law cited above we can detach the maximum length of gestation (300 days) and its minimum duration (180 days), interval within which the legal time of conception is situated.

Starting from the point that the term is calculated day by day, the conclusion that emerges is that this period shall be calculated from the day of the child’s birth, a day which is not included in the calculation, but instead it will be

included in computing the day it turns, consequently the legal time of conception is 121 days.

The legal time of conception was adopted by the legislator as a result of the study of biological statistics [8], and they proved that the shortest gestation was 186 days and the longest 286 days.

Fixing a broader term of between three hundred and one hundred and eighty days, as the legal period of conception, is meant to avoid errors that could prejudice the child’s interests.

## **2. The legal time of conception and the presumption of paternity.**

Regarding the presumption of paternity of a child inside marriage, article 414 of the new Civil Code provides that the father

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of a child born or conceived during marriage is his mother's husband.

As concerns the paternity of a child outside marriage, article 424 of the new Civil Code, states that this can be done through voluntary acknowledgment or by court order.

In order to apply the presumption of paternity, it is of great importance to determine the child's time of conception, both in the period before the new Civil Code and in the subsequent period, aspects that will be comparatively analyzed.

Regarding the earlier period of the new Civil Code, we shall mention that article 53, paragraph (2) of the previous Family Code provided that a child born after the dissolution, declaration of nullity or annulment of marriage has as father his mother's former husband, if he was conceived during the marriage and the birth took place before his mother entered into a new marriage. In this latter situation, it must be determined whether the child's conception occurred during the marriage [7].

We should notice that the previous regulation of the Family Code gave precedence to the criterion of the child's birth in a certain marriage of his mother [7], the criterion of conception in a previous marriage being kept as a secondary reference [4].

What is surprising is that in the current regulation of the new Civil Code, this provision has not been reversed, leaving room for interpretation instead. In the period preceding the adoption of the new Civil Code, the doctrine and practice court ruled that the presumption of conception is absolute, meaning that it was inadmissible to prove that the child's conception occurred over the limits of time set by law, and the inadmissibility of proof that the conception took place in a certain period within this term.

Another part of the doctrine and jurisprudence held that the interpretation of this absolute presumption must be made in the sense that it is not possible to prove the child's conception outside the legal period, but it was possible to prove the child's conception in a certain period of the legal time.

Unable to determine precisely the date of the child's conception, article 412 of the new Civil Code, based on data made available by medical science on the minimum and maximum length of gestation, established the legal time of conception as the period between the 300th day and the 180th day before the child's birthday.

If this period, a part of it or even a day is inside marriage, the child is considered to have been conceived within that marriage, with all the legal consequences arising therefrom.

### **3. The nature of the legal time of conception presumption – doctrinal views**

The text of article 412 of the new Civil Code expressly states that the legal time of conception is calculated day by day.

With no procedural character, the terms will not be counted on days off; in the calculation of both periods of 180 days and 300 days, the day of birth will not be included, but instead we shall include the day they conclude.

As we mentioned, in previous legal literature there was unanimous view regarding the absolute character of the legal time of the conception presumption.

The situation was different in the sense that was attributed to this character. According to one opinion [17] it is argued that the legal time of conception represents an absolute presumption, meaning that it cannot be demonstrated that the duration of gestation was less than 180 days or more

than 300 days and in the sense that they cannot prove that the child's conception took place in a certain part of the legal time of conception.

In another author's opinion [15], the absolute character of the legal time of conception presumption was understood in the sense that it could not be demonstrated that the pregnancy was less than 180 days or more than 300 days, but it could be demonstrated that the conception took place in a certain period of the legal time of conception.

The same opinion is to be found in Professor Emil Poenaru's work [14], showing that "the presumption of article 61 of the Family Code has a general character (and it cannot be countered) regarding the maximum and minimum limits of the legal time of conception that were mentioned.

Once we located the conception within the 121 days legal time interval, nothing prevents the evidence to specify a certain <time> of this interval as the <real> period of conception" [14].

Another issue raised by the doctrine concerned the assumption that the ex-wife would successively give birth to two children in the period of 300 days after the dissolution of marriage.

It was considered that "if we were to strictly apply the presumption that we should decide that the child was conceived during the marriage, because he was born before the expiry of the 300 days period; this solution is impossible, because it is contradicted by factual reality: marriage once dissolute, the woman gave birth to a child; the other child is, therefore undoubtedly conceived after the dissolution of marriage" [5].

So, there are two arguments that support this solution. On the one hand, the legal time of the child's conception presumption, though absolute, cannot be applied because the scientific data leaves no doubt regarding the fact

that the second child was conceived after the dissolution or declaration of nullity of marriage and on the other hand, the same assumption cannot be implemented, because its evidentiary power ceases during the birth of the first child.

According to this view, in the above mentioned exceptional situation, the explanation that was given to the fact that the presumption does not operate with regard to the second child is that the first child's birth proves clearly that the second was not conceived within that part of the legal time of conception which falls during the marriage.

The presumption of paternity towards her former husband no longer found application as the second child was conceived after the dissolution or declaration of nullity of that marriage.

Therefore, also in this case, the presumption of the legal time of child's conception had an absolute character, as it was not proved that the pregnancy was less than 180 days or more than 300 days, so the child's conception was situated within the legal time of the conception term.

In the light of art.54, paragraph (1) of the former Family Code, the presumption of paternity may be rebutted if it does not correspond to the truth, that is when it turns out that it is impossible for the mother's husband to be the child's father.

The text of article 54, paragraph 1 of the Family Code was replaced by art.414, paragraph 2 of the new Civil Code. The problem is to know when this is considered proven.

It is assumed that, within a certain part of the legal time of the conception of a child born by a married woman [14], the part during which, according to medical expertise, the child had been conceived, spouses could not meet, unquestionably matter, but they met during the latter part of the legal time of child conception.

According to the first opinion, the solution is negative because it is believed that it cannot be demonstrated that the conception occurred or not in a particular part of the legal time of the child's conception.

The action in denial of paternity is permissible only if it was shown that the spouses could not see each other throughout the child's legal conception period.

According to a second opinion, the solution is, on the contrary, that the action in denial of paternity may be allowed [10].

The action in denial of paternity designates the action which aims to overthrow by court order the presumption of paternity which operates under the law against the husband of the married woman who gave birth to a child.

The problem can also be raised for other circumstances that would make it impossible for the mother's husband to be the child's father, circumstances existing only in that part of the legal time of conception when it can be scientifically established [12], that, in reality, the child was conceived.

An example is the man's temporary physical inability to have relations, with effects regarding procreation, due to an accident, an impossibility existing only in a part of the legal time of the child's conception.

In the previous examples the situation where the child's conception and birth occurred during marriage was envisaged.

However, there may arise situations in which, through the effect of the legal time of conception presumption, considering that a part of this time is within marriage, the child should be considered conceived during marriage but born after its dissolution and, as such, to be raised the issue of paternity denial regarding the legal time of conception [9].

It is also possible for a child to be considered conceived before marriage, but to be born during it.

In the first case, suppose that a child is born a few days before the expiry of the 300 days period from the dissolution of marriage through divorce and medical expertise shows that the baby is born at 7 months.

Concerning the solution for the action in denial of paternity, according to a first opinion, it is considered that the evidence regarding the moment of conception, situated after the dissolution of marriage, evidence considered legally possible, will have to lead to the admission of the action in denial of paternity

According to another view, on the contrary, it is not sufficient but it must be shown that it is impossible that the former husband be the child's father; taking into account the entire period of legal time of conception, that is both the part within marriage, and the part after divorce [13].

In the second case, when the child is born after the marriage's dissolution, but less than 180 days of its conclusion, the baby is conceived previous to marriage, but he enjoys the presumption of paternity, because he is born inside marriage.

Finally, in the case of a child born during marriage, but when part of the legal time of conception is before marriage, and another part after its dissolution, the baby is considered to be conceived and born during the marriage.

Under the new rules, namely article 412, par. 2 of the New Civil Code [19], the presumption of paternity has a relative character, in the sense that, it may be demonstrated by scientific evidence, the child's conception in a certain period of the interval of time referred to in par. 1 of the legal text, or even outside this period.

The optics embraced by the new Civil Code [19] is based on the fact that, from the medical point of view, analyzing the

child's characteristics such as weight, size, degree of development, we can determine the child's conception in a given period within the 121 days representing the legal time of conception, or we can prove that the legal time of conception is located outside of this period, that can be more or less than 120 days.

The inspiration of this legal text is represented by article 311, par. 3 of the French Civil Code which expressly provides that the legal time of conception is a relative presumption.

So, there are many legal consequences connected to the establishment of the legal time of conception of a child inside marriage.

The action in denial of paternity, meaning that legal action which aims to overthrow the presumption of paternity of a child inside marriage, has undergone significant changes with the entry into force of the new Civil Code.

According to art. 429 of the new Civil Code [19] the number of persons who may introduce this action was expanded, so the procedural legitimacy belongs to the husbands, the biological father and the child. In the old regulation of the previous Family Code, only the mother's husband was entitled to introduce such an action.

Over time it has been shown consistently that this limitation is unjustified. The Constitutional Court through Decision no. 349/2001 declared unconstitutional the provisions of article 54 paragraph 2 of the previous Family Code, as the text recognized the right to act only to the father, not to the mother and the child born within marriage.

#### **4. The legal time of conception and the vocation of succession**

Calculating the legal time of conception is also important at the moment of

determining the vacation of succession, so that a child that was conceived may come to succession.

It is however necessary for the heritage opening date to be determined within the legal period of conception. In assumption of proof that the child was conceived after the date of the opening of succession, he will be removed from the inheritance.

As we know, the rule that the individual's capacity of use starts at the moment of his birth, has an exception, namely the anticipated capacity of use recognized from the time of conception and sustained by the "*infans conceptus pro nato habetur, quoties of commodis eius agitur*" adage.

A first condition that is required in order to recognize such an anticipated capacity is for the child to be born alive.

A second condition is very well synthesized by the reputed Professor Poenaru, according to whom "the capacity acquired by a human being before being born, namely in that time when he was only conceived, may exist only in terms of the rights he can acquire, being non-existent in terms of obligations" [14].

Until the entry into force of the new Civil Code, this principle was regulated by Art. 7, paragraph 2 of Decree no. 31/1954, which provided that "the child's rights are recognized from the moment of conception, if he is born alive."

Today, we find this principle regulated within the content of Art. 36 of the New Civil Code [19]. In applying this principle, the law, given the child's interest, expressly regulates his capacity to come to the succession, on condition that s/he be born alive.

So, Art. 36 of the New Civil Code [19] refers to the provisions of art.412 of the New Civil Code, the one that claims the heritage in the name of the child should demonstrate the child's date of conception,

the determination of the date before the time of opening the inheritance and the fact that he was born alive [3].

In addition to the foregoing, we can invoke the text of Article 957 of the Civil Code which provides that "A person can inherit if he existed at the time of the opening of inheritance."

So, the child's conception is important in determining his paternity within and outside marriage. This moment is related to the recognition of children rights, provided that they are born alive.

The legislator requires that the child be born alive, and viability is not a condition for the recognition of his rights. In the Romanian dictionary (DEX) viable means: one who is able to live or last a long time; able to have a long life.

In the current legislation, the child's rights are recognized from conception with the only condition of being born alive, which seems to be, as we have previously shown, a better solution than the one in the previous regulation.

##### **5. The child's conception outside marriage – legal consequences**

From the legal point of view, the child's conception is relevant both in the case of a child inside marriage, that is related to the paternity presumption, and in the case of a child outside marriage.

Regarding the latter, civil law provides that a child outside marriage is considered to be the child born by a woman that is unmarried at the time of his birth as well as at the time of his conception.

The child inside marriage, whose paternity has been successfully denied, is included in the category of children born outside marriage, since as a consequence of denial of paternity, this reality is removed, thus the child's paternity remains unestablished.

Regarding the child outside marriage, his paternity can be established by the recognition of his father, according to article 416 par. 1 of the New Civil Code [19], which is done either by declaration, by authentic document or by will.

If paternity is not established in this manner, therefore if the father does not recognize the child, his paternity can be established by court order according to Art.424 of the New Civil Code. Art.426 par. 1 and 2 of the new Civil Code regulates that paternity is presumed if it turns out that the alleged father lived with the mother during the legal time of conception and that this assumption can be removed only if the alleged father proves it was impossible for him to conceive the child.

It follows therefore that the legal time of conception is also important in connection with the child outside of marriage, this issue being related to establishing his parentage.

From the interpretation of the presumption provided by Art.426 paragraph 1 of the New Civil Code, it follows that the fact the child's mother lived with the alleged father is important only within the legal time of the conception period, as it is defined in Art.412 of the new Civil Code [19].

So in order to establish the application of this presumption, we need to determine the legal time of conception period, and in relation to it, to prove the cohabitation between mother and alleged father, so that we can apply the presumption that he is the father of the child outside of marriage.

Regarding the proof of cohabitation, it must be mentioned that this aspect can be proved by any evidence, and if we do so, this presumption becomes fully applicable.

If the fact of cohabitation is proved, the court does nothing more than apply the legal presumption and ascertain that the

paternity of the child outside of marriage is established in this way.

The only way this presumption can be overturned is by the provisions of Art. 426, paragraph 2 of the new Civil Code [19], according to which the alleged father proves that it is utterly impossible for him to have conceived the child.

Administering this evidence often means to prove from a medical standpoint that the man is unable to procreate, but obviously this may not be the only reason why the alleged father did not conceive the child. We face again a factual situation that may be proved by any evidence.

Given the topic of this article it may not be without interest to recall that in the realm of criminal law, the offense of injury to the fetus is regulated by Art. 202 of the Criminal Code, this indictment coming to protect life in the making, for a period remained uncovered in the current regulation.

The need for criminalization also results, at least in an indirect manner, from the analysis of the legal protection of the "unborn child" in terms of the right to life, regulated by Art. 2 of the European Convention on Human Rights" [6] as shown in the doctrine.

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