

REVIEW ARTICLE

The normative need of the child entitled to maintenance and its judicial deliberation in cases of extramarital paternity

La necesidad normativa del hijo alimentista y su deliberación judicial en paternidad extramatrimonial

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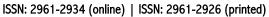
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ABSTRACT

This research aims to determine how the regulation of child support influences the process of extramarital filiation. The research question posed is: how does the regulation of child support influence the process of extramarital filiation? The hypothesis suggests that it is unnecessary to resort to child support when an extramarital filiation process can be initiated, allowing the child to access better rights. To address this issue, a qualitative methodology was employed, including an exhaustive review of legal norms, doctrines, and thesis works related to the topic. The main findings indicate that the current validity of child support regulation is inappropriate, as the extramarital filiation process is more adequate and provides better protection of the child's rights. It is concluded that the child support regulation is outdated, as it is based on an old figure that presumes paternity, which can nowadays be easily refuted through a DNA test. In summary, the study suggests the need to update the legislation to reflect a more modern and effective approach in protecting the rights of children in extramarital filiation cases.

Keywords: Parental responsibility, Filiation, Child rights, DNA testing, Legislation.





RESUMEN

Este trabajo de investigación tiene como objetivo determinar cómo la regulación del hijo alimentista influye en el proceso de filiación extramatrimonial. La pregunta planteada es: ¿de qué manera la regulación del hijo alimentista influye en el proceso de filiación extramatrimonial? La hipótesis sugiere que no es necesario recurrir al hijo alimentista cuando se puede iniciar un proceso de filiación extramatrimonial, lo que permitiría al menor acceder a mejores derechos. Para abordar esta cuestión, se empleó una metodología cualitativa que incluyó la revisión exhaustiva de normas legales, doctrinas y trabajos de tesis relacionados con el tema. Los resultados principales indican que la actual vigencia del hijo alimentista es inapropiada, ya que el proceso de filiación extramatrimonial es más adecuado y proporciona una mejor protección de los derechos del menor. Se concluye que la normativa del hijo alimentista está desfasada, dado que se basa en una figura antigua que presume la paternidad y que hoy en día puede ser fácilmente refutada mediante una prueba de ADN. La investigación sugiere la necesidad de actualizar la legislación para reflejar un enfoque más moderno y eficaz en la protección de los derechos de los menores en casos de filiación extramatrimonial.

Palabras clave: Responsabilidad parental, Filiación, Derechos del niño, Pruebas de ADN, Legislación.

Introduction

The rule governing the child's right to support has lost relevance. Today, single mothers are compelled to initiate child support proceedings for their children. Provisionally, from gestation until birth, the judge will establish a temporary child support order, which will be confirmed upon obtaining a positive DNA test, taking into account the principle of the best interests of the minor (hereinafter referred to as PISM). (Tinizaray Jaramillo, 2018)

In Colombia, Law 75 had already foreseen genetic testing in out-of-wedlock paternity cases (hereinafter referred to as PFE) as early as 1968. Here, at the request of a party, the judge would order the necessary tests to identify hereditary biological traits between the child and the alleged father. Later, Law 721 of 2001 mandated that the judge must order the application of a biological test in each paternity case, with a required accuracy rate of 99.9% or higher. (Abadía Ordóñez et al., 2019). In Spain, regarding biological tests in PFE cases, it is essential to refer to and analyze Article 767.4 of the Civil Procedure Code (LEC), from which it is inferred that compliance with such measures may only be considered a procedural requirement; consequently, it cannot be coercively imposed, unlike in criminal proceedings. (Álvarez Buján, 2018)

Nationally, the presumption of paternity is established in Article 415 of the Civil Code (hereinafter referred to as CC) of 1984. With the enactment of Law No. 27048 in 1999, Article 402 was amended regarding the requirements to file for out-of-wedlock paternity and included a provision concerning DNA tests or other similar or more accurate methods to demonstrate parentage. (Gonzáles Ojeda, 2004)



Subsequently, Law No. 28457 introduced the so-called PFE. It stipulates that a paternity petition must be filed before the local magistrate's court, which will issue a resolution declaring paternity. The alleged father is given no more than ten days to contest the declaration of out-of-wedlock paternity by obtaining a DNA test. (Talavera Quispe, 2018)

Today, the primary issue in PFE cases is no longer the inability to prove or disprove the existence of a disputed biological parent-child relationship, which previously led to a presumption of paternity (the basis of the child's right to support). Now, it is possible to determine this with minimal margin of error through DNA testing.

Along this line, Professor Tinizaray Jaramillo (2018) highlights the implications when the accused is found not to be the biological father; that is, when a negative DNA result nullifies the obligation to pay child support but does not provide compensation to the defendant, who has been harmed by a misleading accusation. This reaffirms the importance of conducting DNA testing in PFE cases, as it is one of the first actions the defendant in a child support case who questions paternity should undertake, with the goal of dismissing the unfounded claim filed against them. In this way, they avoid the risk of a future criminal complaint for failure to provide family assistance.

1. The suitability of genetic testing

According to Professor Abadía Ordóñez et al. (2019), the advisability of genetic testing is worth debating, as DNA testing is set to drastically transform Family Law by providing absolute biological truth. Over recent decades, scientific advancements have exponentially impacted the legal field. A clear example is the discovery of genetic fingerprinting (DNA testing) and its relevance in out-of-wedlock paternity cases, as it enables the biological relationship to be established with near-total certainty.

In this regard, Correa Rubio & Sánchez Rodríguez (2021) examine the legislation that protects the right to contest paternity, noting that while DNA testing provides certainty, its absence does not preclude the process from proceeding or a ruling being issued. This position, entirely protective of children's rights, shifts the burden of proof; that is, it is the father who must prove non-paternity of the child. The opposite occurs in Colombia, where the plaintiff must prove that the defendant is indeed the father.

Building on this idea, Ojeda & Alvarado (2018) argue that if the State ensures access to DNA testing, particularly for the most disadvantaged, it would completely eliminate the "child receiving support" figure. This reveals the significant challenge posed by the "child receiving support" status, as it exposes the many disadvantages faced by minors recognized under this legal concept.





Therefore, this study proposes waiving the cost of DNA testing in PFE cases, so that testing becomes mandatory and thereby eliminates the term "child receiving support" from the Civil Code.

Furthermore, it is often the case that the mother of a child entitled to support focuses more on securing child support, underestimating the Best Interests of the Child (BIC). This diminishes the child's right to a name or identity, resulting in the child being deprived of the full rights legitimately held by recognized children. For this reason, "the importance of biological analysis in out-of-wedlock paternity proceedings is fundamental and derives especially from the formal principle of the child's best interests" (Talavera Quispe, 2018, p.45)

Additionally, it is important to note the differential treatment between a child entitled to support and a legally recognized child. A legitimate child, apart from having legal paternity established, is entitled to receive support until the age of 18, and if pursuing higher education, until the age of 28. In contrast, a child entitled to support only receives it until the age of 18. Therefore, this legal status should be repealed as it infringes on the child's fundamental rights.

2. The normative nature of the maintenance child

In this context, it is prudent to examine the "child entitled to support" status in terms of aspects such as rights, entitlement, and the right to request child support. The legal definition of "child" is determined by the category of marital or extramarital child, whether recognized voluntarily or by court order. In contrast, the concept of a child entitled to support does not rest on a recognition of paternity, but rather on demonstrating the reproductive event between the mother and the alleged father at the time of conception, with the purpose of granting only a support allowance that ensures the child's right to subsist. (Vásquez Rodríguez, 2018)

Article 415 clearly states that a "child entitled to support" is one born out of wedlock, not freely recognized, and with such status because none of the conditions in Article 402 apply. Therefore, in their classification as a child entitled to support, they are granted only the right to claim support until reaching legal adulthood, and, exceptionally, perpetually if they suffer from a physical or mental disability.

In this regard, Talavera Quispe (2018) notes that, according to Article 417, the right of a child entitled to support to claim child support is unique; in other words, it is not transferable to their heirs. However, it can be exercised through a legal representative against the alleged father or his heirs. These, however, are not required to pay the child entitled to support more than what they would have received as a declared or recognized heir.

A crucial point in this investigation pertains to the perspectives regarding the application of the "child entitled to support" status, which we will explain below. From the perspective of



Choquehuanca Reyes & Jiménez Portocarrero (2021) the rationale behind this status lies in the rigidity of Article 402, which limited the possibility of establishing paternity for many children because their conception did not fit any of the scenarios outlined in the article. As a compensatory measure, the legislature essentially said, "if we do not grant them paternity, we will at least grant them support".

In the words of Abadía et al. (2019), "a child entitled to support is not a child" and, therefore, they possess no greater rights than an allowance for subsistence until adulthood, simply because they are not legally recognized as a child. Thus, a ruling that orders the alleged father to pay child support does not create any further legal relationship or confer any familial or inheritance rights.

For Vento (2021), the concept of a child entitled to support places the minor in a position of inferiority, as they receive financial support from their alleged father but do not acquire or enjoy substantial rights such as identity, paternity, visitation rights, increased support, or even inheritance rights, which clearly violates the Principle of the Best Interests of the Child (PISM).

As Mejía (2021), points out, with the legal recognition of biological testing to verify paternity and the judge's continual duty to rule based on the PISM, applying the concept of a "child entitled to support" no longer seems appropriate in practice. On the contrary, Mejía believes that this status might encourage non-recognition by parents who wish to avoid responsibility for their children.

Similarly, Ojeda & Alvarado (2018) argue that, although child support provides material stability for the child entitled to support, it does not legitimize their right to genetic identity, to exist with dignity, or to be raised in a harmonious environment. In this sense, despite its protective qualities, it does not offer comprehensive support for children and adolescents.

Moreover, Meza Katpo (2019) highlights:

The absence of DNA testing in the determination of paternity can lead to incorrect judicial decisions, significantly affecting the identity and rights of the child involved. The ability to contest erroneous rulings thus becomes a vital tool to correct injustices and ensure that paternity is based on conclusive scientific evidence. (p. 60)

In this context, Varela Guimaraes (2018) emphasizes:

DNA testing has become an essential tool for establishing biological truth and, consequently, the identity of the child. The reliability of this method far surpasses traditional evidence, ensuring that paternity recognition is based on irrefutable evidence. (p. 45)





This perspective highlights the importance of safeguarding the child's genetic identity, which is essential for their overall development and right to a dignified life.

3. The judicial determination of extramarital filiation

The out-of-wedlock paternity legal process can be examined from the perspective of its regulatory evolution, which has aimed to reinforce effective judicial protection. Initially, Article 475 of the Civil Procedure Code stipulated that a petition for out-of-wedlock paternity had to be handled through an ordinary process, a procedural route designated for complex cases with evidentiary limitations. (Alcántara Bolaños, 2019)

With the publication of the 1993 Civil Procedure Code, biological tests to prove out-of-wedlock paternity were disregarded, receiving no attention. This changed in 1999, when Law No. 27048 amended Article 402 to include a provision for biological tests or other methods of equal or greater accuracy to establish biological ties.

To expedite a process that upholds the Principle of the Best Interests of the Child (PISM), the Presumed Father's Exclusion (PFE) was instituted through Law No. 28457. Subsequently, this law was amended by Law No. 29821, which specified that a request for paternity recognition could include a claim for child support. (Montesdeoca, 2020)

Finally, it is essential to address perspectives on the practicality of the PFE, which will be explained below. Law No. 28457, which codifies the PFE and was amended by Law No. 30628, states that if the alleged father does not contest the petition within 10 days, the judge has the authority to judicially establish paternity, turning an unrecognized out-of-wedlock child into a child formally declared through a final court ruling.

Consequently, this child would be entitled to receive support, along with all rights derived from the parent-child relationship. In this context, Malca (2020) argues that resorting to the "child entitled to support" status to claim the child's rights would be unnecessary, as the PFE would secure superior rights for the child.

However, according to Ojeda & Alvarado (2018) if the legal framework does not provide a process that robustly protects the child's right to establish parentage, the child's right to seek support under the "child entitled to support" category remains intact. This petition is managed as a summary process, in which it is not necessary to prove a biological link between the child entitled to support and the apparent parent. In response to this, the legislature, through Law No. 30628, stipulated that DNA testing may be conducted on the alleged father, mother, or other descendants of the defendant if their residence is unknown. It also assigned the cost of the DNA test to the





defendant, waived judicial fees, allowed for voluntary compliance before the biological test, and removed the requirement for an attorney's signature in paternity petitions. (García Laos, 2021)

Special mention should be given to the rescheduling of sample collection due to the defendant's non-payment. The law provides that if the alleged father does not cover the cost of the DNA test at the single hearing, the sample collection will be rescheduled within a maximum of 10 days. If payment is not made by the end of this extension, the judge will declare paternity. As Quispe Hilario (2021) points out, this latest amendment aims to prevent excessive delays in the trial due to non-payment of the biological test.

Conclusions

With regard to determining how the regulation of the child support child influences the PFE, it is noted that the regulation of the child support child is outdated in comparison with the regulation of the PFE, since it is an old figure, which is based on a presumption of paternity that nowadays is easily detachable by means of a DNA test. That is to say, the regulation of the maintenance child does not adapt to the technological and social advances and, above all, to the PISM; on the contrary, the PFE allows to establish the filial link which opens the access to all the rights.

On the other hand, since the filial link is not accredited, the right to biological identity is not protected; consequently, it does not allow to know the paternal surname. In addition, it is not correct that the requirement to provide maintenance for the maintenance child derives from a presumption of paternity since there is no certainty of filiation. Finally, we believe that it is not convenient that the maintenance child is still in force in the legal system because it restricts the access to the fundamental rights of the minor.

Ultimately, it must be understood that the Presumed Father's Exclusion (PFE) terminates the child's right to support, but it ensures the Protection of Individual and Social Measures (PISM) and the effective legal protection of the minor. In other words, it takes precedence over the child's right to support because, through DNA testing, it conclusively establishes the biological relationship, thereby superseding the prior legal presumption. Moreover, the judge is obligated to prioritize the minor's welfare and to uphold their rights through judicial decisions, thus safeguarding the PISM and ensuring effective legal protection.

References

Abadía Ordóñez, D. F., López Garzón, M., & Torres Gómez, C. (2019). La pertinencia de la prueba genética en el proceso de filiación en Colombia: Derecho comparado con Francia. [Tesis para



- obtener el título de abogado, Universidad Cooperativa de Colombia]. https://repository.ucc.edu.co/server/api/core/bitstreams/d83e7ddd-2f91-4d17-8247-b2a6860b016d/content
- Alcántara Bolaños, L. M. (2019). Vacíos legales que imposibilitan la impugnación de la paternidad matrimonial ante la demostración de no paternidad por la prueba biológica de ADN en el Perú-2018. [Tesis para optar el grado de magíster, Universidad Nacional José Faustino Sánchez Carrión].
 - https://repositorio.unjfsc.edu.pe/bitstream/handle/20.500.14067/7194/tesis compressed% 20%281%29.pdf?sequence=1&isAllowed=y
- Álvarez Buján, M. V. (2018). *Análisis crítico sobre la prueba de ADN: virtualidad científica y jurídica.* [Tesis de doctorado, Universidad de Vigo]. https://www.investigo.biblioteca.uvigo.es/xmlui/handle/11093/990
- Choquehuanca Reyes, E. A., & Jiménez Portocarrero, I. R. (2021). Derogación de la figura del hijo Alimentista frente a la vulneración de los derechos fundamentales en el Código Civil peruano. [Tesis para optar el título profesional de Abogado, Universidad César Vallejo]. https://repositorio.ucv.edu.pe/bitstream/handle/20.500.12692/82733/Choquehuanca REA-Jimenez PIR-SD.PDF?sequence=1&isAllowed=y
- Correa Rubio, C. N., & Sánchez Rodríguez, P. S. (2021). La Paternidad Evadida en Colombia. El derecho a la Filiación de los Menores Versus el Derecho a la Intimidad y la Autonomía de la Voluntad del Presunto Padre. [Tesis para obtener el título de abogado, Universidad Cooperativa de Colombia]. https://repository.ucc.edu.co/server/api/core/bitstreams/2e4b0005-63db-47ae-9ba7-8d9f79d20b67/content
- García Laos, D. E. (2021). El derecho constitucional a la identidad y la declaración judicial de paternidad extramatrimonial en la corte superior de Pasco durante los años 2016 -2017. [Tesis para optar el grado de magíster, Universidad Nacional José Faustino Sánchez Carrión]. https://repositorio.unjfsc.edu.pe/bitstream/handle/20.500.14067/4474/Daniela%20Edith%20Garc%c3%ada%20Laos.pdf?sequence=1&isAllowed=y
- Gonzáles Ojeda, M. (2004). El Estado Social y Democrático de Derecho y el Estado peruano. *Derecho y Sociedad, 23,* 144–159. https://revistas.pucp.edu.pe/index.php/derechoysociedad/article/view/16863
- Malca Monteza, J. L. (2020). La filiación extramatrimonial y su implicancia en la derogación tácita de la figura del hijo alimentista. [Tesis para obtener el título de abogada, Universidad Nacional Toribio Rodríguez de Mendoza]. https://repositorio.untrm.edu.pe/bitstream/handle/20.500.14077/2167/Malca%20Monteza%20Jhomara%20Lizbeth%20-%20Act.pdf?sequence=1&isAllowed=y
- Mejía Mayhuasca, D. (2021). La responsabilidad civil extracontractual en los centros públicos del sector salud ante el inapropiado servicio de emergencia San Juan de Miraflores. [Tesis para



uence=1&isAllowed=y

- optar el título de Abogado, Universidad Señor de Sipán]. https://repositorio.uss.edu.pe//handle/20.500.12802/10356
- Meza Katpo, K. S. (2019). La impugnación de la sentencia que declara erróneamente la filiación extramatrimonial sin haberse practicado la prueba de ADN, Huaral, 2014-2016. [Universidad San Martín de Porres]. https://repositorio.usmp.edu.pe/bitstream/handle/20.500.12727/5607/meza skm.pdf?sequence=1&isAllowed=v
- Montesdeoca, S. (2020). La prueba de ácido desoxirribonucleico en juicios de impugnación de paternidad, Unidad Judicial Multicompetente del Cantón La Maná, 2019. [Tesis para obtener el grado de magíster, Universidad Nacional de Tumbes]. https://repositorio.untumbes.edu.pe/bitstream/handle/20.500.12874/2139/TESIS%20-%20MONTESDEOCA%20SALME.pdf?sequence=1&isAllowed=y
- Ojeda Cárdenas, M., & Alvarado Gómez, G. (2018). *La vigencia del hijo alimentista y la posible gratuidad de la prueba de ADN en los procesos de filiación* [Universidad San Pedro]. http://repositorio.usanpedro.edu.pe/bitstream/handle/USANPEDRO/324/PI1750441.pdf?sequence=1&isAllowed=y
- Quispe Hilario, S. (2021). La aplicación obligatoria del examen de ADN en la identidad biológica del menor en el Proceso de Filiación Judicial de Paternidad Extramatrimonial, en los Juzgados de Paz Letrado de Huancavelica 2017. [Tesis para obtener el grado de magíster, Universidad Peruana de los Andes]. https://repositorio.upla.edu.pe/bitstream/handle/20.500.12848/2448/T037 43031342 M.p df?sequence=1&isAllowed=y
- Talavera Quispe, W. (2018). Realidad jurídica y social de los hijos alimentistas considerados en el artículo 415 del Código Civil en el segundo y tercer juzgado especializado de familia en la ciudad de Arequipa. [Tesis para obtener el grado de magíster, Universidad Católica de Santa María].

 https://repositorio.ucsm.edu.pe/bitstream/handle/20.500.12920/5885/8T.1391.MG.pdf?seq
- Tinizaray Jaramillo, M. (2018). *Potenciales afectaciones al derecho a la honra del sujeto pasivo en juicios de alimentos con presunción de paternidad*. [Tesis para obtener el grado de magíster, Universidad Andina Simón Bolívar]. https://repositorio.uasb.edu.ec/bitstream/10644/6384/1/T-2725-MDE-Tinizaray-Potenciales.pdf
- Varela Guimaraes, R. (2018). La prueba científica del ADN como medio de prueba para demandar la nulidad del reconocimiento del hijo declarado judicialmente [Tesis para obtener el grado de magíster, Universidad Nacional de la Amazonía Peruana]. https://repositorio.unapiquitos.edu.pe/bitstream/handle/20.500.12737/5660/Rosita Tesis Maestria 2018.pdf?sequence=1&isAllowed=y





Vásquez Rodríguez, E. D. (2018). Consentimiento del menor para garantizar su derecho a la identidad personal en los procesos de filiación extramatrimonial, Arequipa-2017. [Tesis para obtener el grado de magíster, Universidad Católica de Santa María]. https://repositorio.ucsm.edu.pe/server/api/core/bitstreams/2a2fbc0d-f623-43e6-ac47-5e7a2c805a87/content

Vento Yupanqui, M. L. (2021). *Análisis jurídico y normativo sobre los hijos alimentistas en el Código Civil Peruano*. [Tesis para obtener el título de abogada, Universidad de San Martín de Porres]. https://repositorio.usmp.edu.pe/bitstream/handle/20.500.12727/9122/vento-yml.pdf?sequence=1&isAllowed=y

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