

## THE CANONICAL PRESUMPTION OF SPOUSAL PATERNITY

### Preliminary remarks

During the twentieth century ecclesiastical officials were seldom called upon to apply the canons on paternity, chiefly 1917 CIC 1115 §1 and 1983 CIC 1138 §1<sup>1</sup>. This was not surprising, for the basic premise upon which the presumption of spousal paternity rests – namely, that wives bear the children of their husbands – was thoroughly consistent with Christian morality, widespread experience, and social stability. The canonical presumption that husbands father their wives' children simply reflected and reinforced, therefore, a reasonable and desirable expectation<sup>2</sup>. But dur-

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<sup>1</sup> *Codex Iuris Canonici*, Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, *Acta Apostolicae Sedis* 9/2 (1917) 11-521, [herein CIC 1917]. *Codex Iuris Canonici*, auctoritate Ioannis Pauli PP. II promulgatus, *Acta Apostolicae Sedis* 75/2 (1983) 1-320, as revised, [herein CIC 1983]. All English translations of the 1983 Code of Canon Law will be taken from CANON LAW SOCIETY OF AMERICA, *Code of Canon Law*, Latin-English Edition, New English Translation, Washington 1999.

<sup>2</sup> As Blat put it, «Veritas moralis est, quae ut in pluribus iuxta hominum mores existit. Illam igitur respiciens in occultae naturalis paternitatis cognitione, sic rationabiliter decernit canon 1115 §1 [quod, et c.]». A. BLAT, *Commentarium Textus Codicis Iuris Canonici*, vol. III/1, Roma 1921-1927, 670, no. 523.

ing the final decades of the twentieth century, biotechnological developments, chiefly advances in DNA testing, began to raise questions about the plausibility of the spousal paternity presumption. The "false paternity" phenomenon, as it is called, describes a situation wherein significant numbers of men thought to be the fathers of given children are being shown not to be so<sup>3</sup>. Findings of "false paternity" rest on the ability of scientific testing to establish beyond plausible doubt that a given man is or is not the father of a given child, regardless of whether that same man is legally presumed to be the father as a result of his marriage to the mother in question<sup>4</sup>. The ability of biotechnology to

<sup>3</sup> A very informative and recent overview of false paternity is M. BELLIS (et al.), «Measuring paternal discrepancy and its public health consequences», *Journal of Epidemiology and Community Health* (on-line version) 59 (2005) 749-754, suggesting that false paternity rates are probably below 10% (though, if verified, even that figure would be fraught with tremendous social consequences). See also the provocative, if now somewhat dated, article by S. MACINTYRE (et al.), «Non-paternity and prenatal genetic screening», *The Lancet* (on-line version) 338 (1991) 869-871, comparing common estimations of false paternity rates (some of which lurch toward 30%) to "urban folk takes".

<sup>4</sup> DNA testing, which is ever becoming faster, less invasive, more reliable, and cheaper, can exclude a mistakenly proposed male from paternity of a given child with conclusive certainty, and it can confirm an actual (genetic) father with something approaching certainty. The incredible pace of scientific (and consequently, legal) advancements in these areas dates bibliographies very quickly, nevertheless, for an orientation to "false paternity", blood-testing, and DNA techniques, one might see E. REISNER (et al.), «A Layman's Guide to the Use of Blood Group Analysis in Paternity Testing», *Journal of Family Law* 20 (1981-1982) 657-675; R. CERDA-FLORES (et

achieve a certitude about paternity which exceeds that attainable by judges in canon or civil law suggests that a reexamination of the canonical presumption of spousal paternity might be in order<sup>5</sup>.

But beyond even considerations occasioned by bio-technology, the relative rarity of canonical paternity cases means that, when canonical questions of

al.), «Estimation of non-paternity in the Mexican population of Nuevo Leon: A validation study with blood group markers», *American Journal of Physical Anthropology* (online version) 109/3 (1999) 281-293, showing 32 out of 396 children not to have been fathered by the man believed to be the father; and, R. COLLINS (et al.), «Parentage testing anomalies in Hong Kong SAR of China», *Chinese Medical Journal* (on-line version) 116/5 (2003) 708-711, suggesting false paternity rates in Hong Kong to be tracking those allegedly appearing in Western nations. As with all heavily scientific writing, such studies must be read with very close attention to detail. It is easy to misunderstand them as asserting or denying points that in fact are not being asserted or denied. To offer but one example of many, in the Nuevo Leon study, the 8% false paternity rate does *not* demonstrate that 8% of the children born to northern Mexican married couples were the result of adultery, for those criteria were not part of the study protocol. It does suggest, on the other hand, that a significant number of women in northern Mexico (married or otherwise, canonically validly or not), who are carrying their pregnancies to term, are mistaken or mendacious as to who fathered their children.

<sup>5</sup> The social and scientific factors that suggest the need to re-examine *laws* which, at least in part, reflect demographic assumptions about behavior, do not, in my opinion, indicate any need to reconsider the moral *criteria* by which those behaviors themselves are assessed. Indeed, some of the data seeming to indicate a need for reexamination of the law in these areas also suggests the benefits offered to those who adhere to traditional morality.

paternity do occur – as can happen, for example, in regard to, say, assessing obligations of support arising from prior unions (CIC 1983, can. 1071 §1, 3°), investigating relationships arising from alleged consanguinity or affinity (cann. 108-109), or in recording parental names in a baptismal register (can. 877 §2) – Church personnel, lacking extensive experience in the law of paternity, might be hard pressed to identify quickly the salient points of ecclesiastical discipline to be followed in such situations, situations that, if they arise at all, are likely to occasion sensitive pastoral issues as well<sup>6</sup>. This article discusses, then, the canonical norms on paternity<sup>7</sup>, surveys scholarly commentaries on same (noting questions left unresolved by Pio-Benedictine writers), and briefly examines the judicial treatments of paternity law that have occurred in Rotal jurisprudence<sup>8</sup>. Finally, some

<sup>6</sup> See also S. MACINTYRE (et al.), «Non-paternity and prenatal genetic screening» (cf. nt. 3) *passim*, noting that, for example, routine genetic screening for cystic fibrosis could incidentally identify false paternity, and suggesting that medical personnel be trained in how to handle such discoveries. See also M. BELLIS (et al.), «Measuring paternal discrepancy and its public health consequences» (cf. nt. 3), *passim*.

<sup>7</sup> We will not look at the notion of “natural legitimacy” (see, e.g., P. CIPROTTI, «De prole legitima vel illegitima in iure canonico vigenti», *Apollinaris* 12 [1939] 328-347, 490-519, at 337, sketching differences between natural and canonical legitimacy) nor at civil norms on legitimacy.

<sup>8</sup> Three 20<sup>th</sup> century Rotal sentences deal with paternity issues. In one, paternity is the object of the trial. See CORAM CANESTRI, Dec. LXXX, 4 July 1953, published in TRIBUNAL APOSTOLICUM SACRAE ROMANAE ROTAE, *Decisiones seu Sententiae*, vol. 45, Vatican City 1953, 504-510. In two other Rotal cases (CORAM PERSIANI, Dec. X, 11 March 1910, in *Decisiones seu Sententiae*, vol. 2, Vatican City 1910, 96-106,

issues in the canon law of paternity that, I suggest, have emerged only in recent decades as a result of scientific advancements, will be addressed.

Two methodological points should be noted at the outset. First, while “paternity” and “maternity” are biologically-determined qualities in a man or woman in regard to a specific child<sup>9</sup>, “legitimacy” is a legal category into which a given child is generally placed if those sharing in that child’s paternity and maternity are married<sup>10</sup>. Of course, paternity has always been more difficult to establish than has maternity, but because the consequences arising from paternity are so significant, juridic methods for

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and CORAM HEARD, Dec. XXIX, 5 July 1932, in *Decisiones seu Sententiae*, vol. 24, Vatican City 1932, 273-279) paternity issues are raised in the course of treating other matters. See generally C. HOLBÖCK, *Tractatus de Jurisprudencia Sacrae Romanae Rotae 1909-1946*, Styria 1957, 246-247. *Coram Canestri* is discussed at fn. 25, *coram Perisani* at fn. 50, and *coram Heard* at fn. 36.

<sup>9</sup> «La filiation est le rapport existant entre deux personnes dont l’une est le père ou la mère de l’autre. Envisagé du côté de père, ce rapport prend le nom de paternité; considéré du côté de la mère, le nom de maternité». R. NAZ, «Filiation», in R. NAZ (ed.), *Dictionnaire de Droit Canonique*, vol. 5, Paris 1935-1965, 849.

<sup>10</sup> See generally can. 1137-1138 CIC 1983 and can. 1114-1115 CIC 1917. A rare but long-standing exception to the legitimacy of children born to married parents was contained in can. 1114 CIC 1917 whereby the designation of legitimacy was withheld from children who were born to married persons if at least one of them had (usually subsequently to the wedding) made solemn religious vows or had received major orders. In any case, this exception in regard to *legitimacy*, which did not impact the presumption of spousal *paternity*, does not appear in the 1983 Code.



establishing paternity were necessary<sup>11</sup>. In any case, the canonical norm on paternity is (and was under Pio-Benedictine law) sandwiched between the two norms for conferring legitimacy<sup>12</sup>, and those two norms, not a particularly happily-paired couple as we shall see, confused the application of the paternity canon. We should be clear that this article focuses on paternity issues and not on broader questions of legitimacy even though the two topics are closely related and many authors (not needing to draw the distinction carefully for their own purposes) commonly speak of them equivocally.

Second, the current law on paternity offers an unusually clear opportunity to see how the insights of scholars commenting on Pio-Benedictine law can be directly applied by those facing questions under the 1983 Code. The explicit provisions on paternity in both the 1917 Code and the 1983 Code read identically: «The father is he whom a lawful marriage indicates unless clear evidence proves the contrary»<sup>13</sup>. Given the perfect correspondence between

<sup>11</sup> «La filiación natural es un hecho puramente biológico, pero que tiene grave repercusión jurídica». L. MIGUÉLEZ DOMÍNGUEZ, in M. DE ANTA (et al.), *Comentarios al Código de Derecho Canónico*, vol. 2, Madrid 1963-1964, 679-684.

<sup>12</sup> See can. 1114 CIC 1917 and can. 1137 CIC 1983 on the one hand, and can. 1115 §2 CIC 1917 and can. 1138 §2 CIC 1983 on the other.

<sup>13</sup> Can. 1138 §1 CIC 1983: «Pater is est, quem iustae nuptiae demonstrant, nisi evidentibus argumentis contrarium probetur». Can. 1115 §1 CIC 1917: «Pater is est quem iustae nuptiae demonstrant, nisi evidentibus argumentis contrarium probetur». The English translation used is the CLSA's for the 1983 Code. The Code of Canons of the Eastern Churches (1990) contains no norms on paternity or legitimacy. Earlier Eastern marriage law

the 1917 Code and the 1983 Code in this matter one can, and should in accord with cann. 6 §2 and 21<sup>14</sup>,

did have such norms (see Pius XII, m.p. *Crebrae allatae*, cc. 103-106) which were almost indistinguishable from those of Pio-Benedictine legislation, but they were considered unnecessary for revised Eastern law. See V. POSPISHIL, *Eastern Catholic Marriage Law*, New York 1991, 245.

<sup>14</sup> Can. 6 §2 CIC 1983: «Canones huius Codicis, quatenus ius vetus referunt, aestimandi sunt ratione etiam canonicae traditionis habita». *Eng. trans.*: «Insofar as they repeat former law, the canons of this Code must be assessed also in accord with canonical tradition». Can. 21 CIC 1983: «In dubio revocatio legis pra-existentis non praesumitur, sed leges posteriores ad priores trahendae sunt et his, quantum fieri potest, conciliandae». *Eng. trans.*: «In a case of doubt, the revocation of a pre-existing law is not presumed, but later laws must be related to the earlier ones and, insofar as possible, must be harmonized with them».

For that matter, it seems that the contemporary canon law of paternity can be directly traced to legislation much earlier than that of the 1917 Code, for the operative canonical clause (*pater is est, quem iustae nuptiae demonstrant* apparently derives almost *verbatim* from the Digest of Justinian, Book II, Title 4, Law 5: «Paul, Edict, book 4: because she is always identifiable even if the son has been conceived in promiscuity. The father is indeed declared by the marriage (*pater uero is est, quem nuptiae demonstrant*)»). English translation from T. MOMMSEN (et al.), *The Digest of Justinian*, Philadelphia (PA) 1985. Pio-Benedictine canonists commonly attributed the canonical rule to the Digest (see, e.g., P. CIPROTTI, «De prole legitima vel illegitima in iure canonico vigenti» [cf. nt. 7], 340, and J. PETROVITS, *The New Church Law on Matrimony*, Philadelphia 1921, 382). But see F. SCHULTZ, *Classical Roman Law*, Oxford 1951/1954, 143, who doubts that the maxim is classical and suggests that the phrase might even be spurious. It would be interesting to trace out this matter, but even its negative resolution would not detract from the soundness of the spousal paternity principle long accepted in Western canon and secular law. Also, while the correspondence in paternity issues

confidently look to Pio-Benedictine commentaries and jurisprudence to illuminate a norm that has not yet been subject to extensive treatment under the 1983 Code, even in the face of biotechnological developments that, it seems, will need to be embraced by canonical jurisprudence. Thus this article explores Pio-Benedictine treatment of paternity issues in a way that demonstrates, I hope, that familiarity with these earlier authors obviates the need for extensive re-examination of several canonical paternity issues under the 1983 Code, thus permitting modern scholars to focus their attention on some novel paternity issues raised by biotechnological developments that were not, and could not have been, anticipated by the Legislator.

### 1. Scope of the spousal paternity presumption

The canonical presumption that paternity rests with the husband of a wife promotes, I suggest, several goods or values. In no particular order, they may be outlined as follows.

First, because the spousal paternity presumption attaches to males *only* within the context of marriage (and not from any other sort of relationship, as we shall see) the presumption underscores that *marriage*

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between the two western Codes of Canon Law themselves is high, there are some interesting differences between the codified approach to paternity and that taken during the late *ius novissimum*, that is, canon law as it was practiced in the final decades leading up to the Pio-Benedictine Code. These differences will be discussed below.

is that institution directly ordered to the begetting, bearing, and raising of children (CIC 1983 can. 1055 and CIC 1917 can. 1013 §1). Second, as it is generally accepted that children born to married persons typically fare better (financially, emotionally, educationally, and so on) than do those born outside of wedlock, the presumption of spousal paternity helps assure that children who were born under such favorable circumstances in fact reap the benefits thereof, at least to the degree that law can promote that expectation. Third, the presumption of spousal paternity protects the rights of women by requiring those who would claim that their offspring were engendered by males not their husbands to prove their allegations by "very stringent proofs"<sup>15</sup>. Fourth, the presumption of spousal paternity serves an admonitory role by reminding married men that, as law and society will regard them as the fathers of their wives' children, they should strive to conduct themselves in accord with that honor and responsibility and not seek to shirk it. Each of these points warrants elaboration, but let me deal briefly with the fourth point first.

The Christian tradition has long recognized that sound laws make it easier for people to do the right thing. By articulating a reasonable presumption about paternity among the married, canon law advises those preparing for marriage, especially men, about the expectations that civil and ecclesiastical society will make on them in regard to parenthood, and supports

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<sup>15</sup> S. WOYWOD, *A Practical Commentary on the Code of Canon Law* (ed. C. Smith), vol. 1, New York 1957, 800-802, nos. 1147-1149.

those already in marriage to conduct themselves in accord with common sense and Christian morality. The mere existence of a law does not, of course, create virtue in its subjects nor change the facts of people's actual choices, and thus the canonical presumption of spousal paternity is rebuttable (upon what sorts of evidence we shall consider below). But surely one may find in the canonical presumption of paternity an expression of what Pope John Paul II taught was the fundamental purpose of all canon law, namely, «to create such an order in the ecclesial society that, while assigning the primacy to faith, grace and the charisms, it at the same time renders easier their organic development in the life both of the ecclesial society and of the individual persons who belong to it»<sup>16</sup>. We may now examine the canonical aspects of the other three points made above.

Paternity, like maternity, entails serious obligations by natural, canon, and civil law. The *loca* of maternal obligations is, of course, very easy to identify. Pregnancy, in all but rare circumstances, causes easily recognizable changes in the appearance and behavior of a woman over a period of several months. Moreover, «because the birth of a child usually takes place in the presence of others», writes Bánk, «maternity can also be proven by the testimony of others, hence the maxim, *the mother is known*. It is otherwise with the father [...] for conception is a hidden process»<sup>17</sup>. Dom Augustine

<sup>16</sup> JOHN PAUL II, Ap. con. *Sacrae disciplinae leges*, 25 January 1983, AAS 75/2 (1983) vi-xiv, at xi [par. 16].

<sup>17</sup> «Cum nativitas prolis plerumque aliis adstantibus fiat, maternitas etiam testimonio aliorum probari potest; inde axioma:

amplifies this point: «[...] the mother can be proved by the birth, whereas the father's cooperation is hidden in obscurity, [so] the law must *suppose* the child to be a lawful issue»<sup>18</sup>. Or, as Schmalzgrueber wrote early in the 18<sup>th</sup> century,

Proof of filiation comes in two forms, one resting on the truth, the other on a presumption. The truth arises with certainty only with the mother [...] regarding the father, filiation can only be demonstrated by presumption. The reason is, that the mother is always certain, but not so with father. Thus, conjectures and presumption must be called upon for assistance<sup>19</sup>.

*mater semper certa*. Aliud dicendum de patre [...] Cum conceptio sit processus absconditus [...]». J. BÁNK, *Connubia Canonica*, Roma 1959, 522-523. My trans. See also R. NAZ (ed.), *Dictionnaire de Droit Canonique* (cf. nt. 9), 849. Biotechnological developments such as surrogate motherhood suggest the need to reconsider the canonical presumptions arising from physical birth, but such questions of maternity are beyond the scope of this article.

<sup>18</sup> DOM AUGUSTINE [C. BACHOFEN], *A Commentary on the New Code of Canon Law*, vol. 5, London 1935<sup>5</sup>, 334. My emphasis. See also R. NAZ (ed.), *Dictionnaire de Droit Canonique* (cf. nt. 9), 849-850, noting that a finding of paternity is never more than a probability (an assertion no longer sustainable in light modern biotechnology, of course), or P. PALAZZINI, «Paternitas», in P. PALAZZINI (ed.), *Dictionarium Morale et Canonicum*, vol. 3, Roma 1962-1968, 619, where he writes: «In natura maternitas est factum, quod documentari mediis directis potest; [paternitas] vero est praesumptio, quae tantum indicii probari potest».

<sup>19</sup> «[...] filiationis probationem esse duplicem, aliam videlicet veram, et aliam praesumptam. Vera, et certa tantum datur ex parte matris; [...] ex parte patris filiatio probari potest praesumptive tantum. Ratio est, quia mater semper est certa, pater autem non item. Hinc adhiberi in subsidium debent con-



One may sense, I think, in these lines from the famous Baroque Jesuit canonist a preference for the truth over presumptions, a point worth recalling in light of scientific advances that make certainty in this area attainable<sup>20</sup>. Most Pio-Benedictine authors wrote, of course, from a tradition that knew little of blood-testing, less of DNA, and nothing of later biotechnological techniques for attributing or denying the maternity of a given child to a specific woman. Such scientific advancements, however, only serve to make easier the canonist's search for the truth in more complex maternity cases such as might arise when a separation of a mother and child occurs shortly after birth and is prolonged for many years<sup>21</sup>.

jecturae, et praesumptiones». F. SCHMALZGRUEBER, *Jus Ecclesiasticum Universum*, vol. 4, Roma 1844, 54, n. 56.

<sup>20</sup> The same point – that the search for objective truth should not be impeded by the misplaced use of legal presumptions – is made several times by Pope Pius XII in his 1942 Address to the Roman Rota. For English text of the address see W. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-1994*, Ottawa 1994, 18; 20.

<sup>21</sup> A typical early discussion of applying biotechnological tests to paternity and maternity questions (here, the use of basic blood typing) occurs in J. BANK, *Connubia Canonica* (cf. nt. 17), 523: «2. Probatio paternitatis...c) *Classificatio sanguinis*. Excludi potest paternitas ope investigationum circa *classem sanguinis*. Principium est: classis sanguinis ad posterum transit. Unaquaeque classis sanguinis duas in se continent qualitates: unam a patre, alteram a matre. Hac in re diversi typi admittuntur diversique modi adhibentur a medicis». See also P. PALAZZINI (ed.), *Dictionarium Morale et Canonicum* (cf. nt. 18), 619, referencing blood analysis and citing a few somewhat earlier canonical considerations of medical-legal issues. There are, however, several considerably older canonical precedents

But granting all of this, why is the legal presumption of paternity placed on a husband, and not on any other male consort? The answer, I suggest, lies in appreciating the nature of marriage. Petrovits writes:

The first effect of the conjugal bond is the establishment of a distinct family under the supervision and guardianship of the husband and wife.... The conjugal bond constitutes the two contracting parties [as] a principle of generation and invests their offspring with all the prerogatives of [civil] and canonical legitimacy<sup>22</sup>.

upholding the general use of medical experts in assessing paternity issues and related matters. See, e.g., CORAM PERSIANI, Dec. X (cf. nt. 8), 104-105, no. 19, a 1910 Roman Rota case where sworn medical testimony about "resemblance" (*somiglianza*) between the legitimate and illegitimate children of a petitioner was admitted, and, still earlier (circa 1746/1763), Ferraris' report of support for entertaining medical testimony (such as it was at the time) whereby legitimacy might be found for a child born to a mother 11 months after the death of her husband: «Immo multi volunt, quod in casu extraordinario etiam post completum undecimum mensem filius natus reputandus sit legitimus, maxime si Mater nedum sit optimaefamae, ed etiam sit specialis cujusdam corporalis dispositionis, et complexionis, seu alia in ipsa concurrant, propter quae ex Medicorum judicio potuerit sic tarde parere [...]». See «Filius, Filii» in L. FERRARIS, *Prompta Bibliotheca Canonica Juridica Moralis Theologica*, vol. 3, Monte Cassino 1844-1855, 608-623. Moreover, even though these issues are beyond the purview of the present article, we should note that canonical questions arising from the phenomena of children being born well after the death of their fathers have returned as a result of *in vitro* fertilization and because of frozen embryo implantation (including those whose fertilization was the result of anonymous sperm donation), and need to be explored.

<sup>22</sup> J. PETROVITS, *The New Church Law on Matrimony* (cf. nt. 14), 380-381.

More precisely, because a husband has freely and demonstrably taken on the obligations of married life – else, he would not be a *husband* – and because marriage itself is fundamentally «ordered to the good of the spouses and the procreation and education of offspring» (can. 1055 §1), canon law imposes on a husband, but only on a husband, the presumption of paternity of any children born to his wife. On no other facts or conditions besides matrimony does canon law impose a presumption of paternity, not even from extended and notorious cohabitation without benefit of matrimony<sup>23</sup>, for from no other fact pattern can a given male be presumed to have assumed the awesome responsibility for children born to a given woman. If paternity is asserted against (or claimed by) any man not the husband of the mother – and obviously, in many cases such an assertion is plausible – paternity must be proven.

An early and indirect illustration of the reluctance of canon law to impose a finding of paternity on an unmarried male is found, I suggest, in one of the *fontes* to 1917 CIC 1115 §1 recorded by Cardinal Gasparri,

<sup>23</sup> It might be suggested that extended cohabitation, as opposed to simple fornication, represents at least to some degree a greater commitment between the parties and in that sense could serve as the basis of a mitigated presumption of a consort's paternity. Even though such a proposal raises, it seems to me, as many questions as it answers and might be obviated by advances in biotechnology, it has some history of support in canon law. See F. SCHMALZGRUEBER, *Jus Ecclesiasticum Universum* (cf. nt. 19), n. 57: «Extenditur 4. [Praesumptio paternitatis] etiam ad natum ex concubina; nam qui domi eam habuit, praesumitur esse pater filii ex ea nati [...] Ratio est, quia hoc favorabilius, et melius est filio, quam ut dicatur vulgo conceptus, atque incerto patre».

specifically, in a decretal letter from Pope Alexander III (1159-1181) to the archbishop of Rotterdam<sup>24</sup>. In that case, suit was brought by the certainly legitimate children of a husband and wife for a declaration concerning their rights of inheritance in the face of the presence of a child known to have been born to the same man and woman before they were married and raised by them to early adulthood. The pope directed the archbishop to accept the parents' admission of their

<sup>24</sup> C. 3, X, *qui filii sint legitimi* IV, 17, or Liber Extra (Decretals of Gregory IX), Book IV, Title 17, chap. 3, in A. FRIEDBURG, *Corpus Iuris Canonici* editio Lipsiensis secunda post Aemilii Ludouici Richter, vol. 2., Leipzig 1881, col. 710: «TITULUS XVII, QUI FILII SINT LEGITIMI [Alexander III] Rothomagensi Archiepiscopo. Transmissae nobis tuae continebant, quod, quem (Nicholas) civis tuus usque ad iuventutem quandam puerum nutritisset, uxore sua (Matilda) tunc (nondum) desponsata (cum eo) cohabitante, postmodum ipsam, sicut dicitur, legitime desponsavit, et filios sustulit ex eadem. Quibus paternam hereditatem petentibus, praedictis iuvenis (contradixit), (dicens) se filium et heredem, quamvis a vicinia, quae ipsum filium eorum esse (credebant), (praedictus) spurium diceretur. (Praedictus) vero (Nicholas) et uxor eius Matilda praefatum iuvenem spurium suum aut legitimum filium esse negabant, sed dicebant, quod eum pietatis intuitu nutritissent. Quum autem quaestio coram te mota esset, et praedictus iuvenis pro eo, quod iuri stare nolebat, vinculo sit excommunicationis adstrictus, quid de hoc agere debeas, nos consulere voluisti. Super hoc itaque Consultationi tuae taliter respondemus, quod in tali (causa) standum est verbo viri et mulieris, nisi certis indiciis et testibus tibi constiterit, esse filium (eorum) iuvenem (praedictum)». My selection of variants shown in parentheses, editorial italics removed. Note that in denying their son to be "spurious", the parents were indirectly asserting that, at the time of his conception and birth, they were not canonically impeded from marrying. See DOM AUGUSTINE, *A Commentary on the New Code of Canon Law* (cf. nt. 18), 333.



paternity and maternity of the child and, on the facts of the specific case, to treat the youth as legitimate. What is interesting about the case, I suggest, is that even where biological paternity (and maternity) was notorious over a long period and was admitted publicly, the law demanded an examination of evidence before concluding to legitimacy, and did not allow, among other things, the application of a *presumption* of paternity to an unmarried man, even where marriage between the same couple followed with subsequent progeny<sup>25</sup>.

That the husband is presumed to have fathered the children born to his wife is so universally regarded as a basic good for the child, that any remaining doubts about a husband's paternity – as would arise only on plausible but incomplete evidence of non-spousal paternity – must be resolved in favor of the child, which favor is regarded as a finding of legitimacy, that is, of spousal paternity. Thus, writes Ciprotti, «It cannot be ruled out that other evidence against the presumption might be brought forward; but one must always keep before ones eyes that, because there is a presumption about paternity, if any doubt remains, one cannot pass sentence against the presumption»<sup>26</sup>.

<sup>25</sup> For an extended and later illustration of the care with which canonical tribunals approach the imposition of paternity, see CORAM CANESTRI, Dec. LXXX (cf. nt. 8), *passim*, finding paternity based on two-year, non-conjugal cohabitation, past financial support, and an entry in a baptismal register.

<sup>26</sup> «Non excluditur etiam aliter posse contra illam praesumptionem probationes afferri; sed semper prae oculis est habendum, cum adsit praesumptionis de paternitate, si quod supersit dubium, non posse sententiam ferri contra praesumptionem». P. CIPROTTI, «De prole legitima vel illegitima in iure canonico vigenti» (cf. nt. 7), 341.

Woywod explains, «Sound public policy demands that the honor and future welfare of the child be absolutely protected by the law of the Church, and the laws of the various states of our country follow the same policy»<sup>27</sup>. Ayrihac echoes the idea that the presumption of spousal paternity favors the child when he notes that the presumption «admits of proofs to the contrary; only, they must be convincing ones; the benefit of the doubt, if any remains, is given to the child»<sup>28</sup>. Petrovits recognizes that the child in question is eligible to assert and defend his right to be recognized legitimate<sup>29</sup>.

Moreover, the presumption of spousal paternity works to protect the rights and reputation of the mother, albeit to a degree that, I suggest, might not be evident upon first reading the canon. Dom Augustine observes, «The law naturally supposes that children are the fruit of legal unions, not of adultery or fornication [...]»<sup>30</sup>. Woywod is more detailed: «The principle, *nemo malus nisi probetur*, induces the [1917]

<sup>27</sup> S. WOYWOD, *A Practical Commentary on the Code of Canon Law* (cf. nt. 15), 801, n. 1148.

<sup>28</sup> H. AYRINHAC, *Matrimonial Legislation in the New Code of Canon Law*, 3<sup>rd</sup> rev. ed. by P. Lydon, New York 1957, 296-297, n. 279. H. Jone noted that if a prudent doubt arose concerning the legitimacy of a child, the presumption would apply even to the point of making unnecessary later a request for dispensation (presumably, *ad cautelam*) from the irregularity of illegitimacy for orders which was then a part of canon law (can. 984, 1° CIC 1917). See H. JONE, *Commentarium in Codicem Iuris Canonici*, vol. 2, Paderborn 1950-1955, 353.

<sup>29</sup> J. PETROVITS, *The New Church Law on Matrimony* (cf. nt. 14), 382.

<sup>30</sup> DOM AUGUSTINE, *A Commentary on the New Code of Canon Law* (cf. nt. 18), 344.

Code to lay down the rule that without convincing proof the wife must not be considered to have conceived a child through adulterous intercourse with another man, and her husband is to be considered the father of the child»<sup>31</sup>. Both scholars could find ample support for their positions in a decree from the Sacred Consistorial Congregation, cited by Gasparri as a source for can. 1115 §1 CIC 1917:

It is a long-standing presumption of law that (unless the contrary can be shown by manifest evidence such as prolonged absence or male impotence or some similar cause), the child is to be taken as being [fathered] by the spouse rather than to be have been begotten by an adulterer, even though it is certainly demonstrated that the mother frequently soiled herself with impure embraces<sup>32</sup>.

Moreover, the presumption of spousal paternity stands even if the mother herself admits to committing adultery. Under most circumstances, of course,

<sup>31</sup> S. WOYWOD, *A Practical Commentary on the Code of Canon Law* (cf. nt. 15), 801, n. 1148, invoking Juvenal's maxim «No one is guilty without proof».

<sup>32</sup> «Constans enim est iuris praesumptio (nisi contrarium doceatur per manifesta, vel diuturnae absentiae aut impotentiae viri vel alterius similis causae [sic] argumenta) sobolem ex coniugio potius, quam ex adulterio esse procreatam, quamvis certo constet, matrem saepius pollutam fuisse nefariis amplexibus». S.C.C. *Bobien.*, 16 February 1743, in P. GASPARRI – J. SERÉDI (edd.), *Codicis Iuris Canonici Fontes*, vol. 5, Vatican City 1923-1949, 985-986, no. 3547. The Sacred Consistorial Congregation (see can. 248 CIC 1917) was predecessor to what today is called the Congregation for Bishops and dealt with a similar range of topics. See Pope PAUL VI, Ap. con. *Regimini Ecclesiae universae*, 15 August 1967, AAS 59 (1967) 885-928, English trans. at *Canon Law Digest VI*, 324-357, esp. nos. 46-53.

an admission against one's self may be accorded a higher degree of credence than are other kinds of assertions<sup>33</sup> but, as Petrovits explains, «The fact that the mother was guilty of adultery, even after her admission of such moral offense, would not clearly indicate the illegitimacy of her offspring»<sup>34</sup>. Obviously, a wife's adulterous relations with one man does not, in and of itself, rule out the possibility of conjugal relations with her husband near the same time, leaving open the possibility of spousal paternity of a subsequent child and with it the benefits for mother and child that would attach to spousal paternity. These scenarios are, of course, the very things upon which biotechnology can now shed great light. But as a matter of law, in the meantime, the inability even of sworn admissions of adultery, standing alone, to overturn the presumption of spousal paternity is widely admitted, even when those maternal admissions are accompanied by admissions of illicit relations offered by the other man, and by assertions of non-paternity submitted by the husband<sup>35</sup>. Gasparri paints the rule in stark terms:

<sup>33</sup> See can. 1535-1536 CIC 1983, and can. 1750-1751 CIC 1917. But see F. SCHMALZGRUEBER, *Jus Ecclesiasticum Universum* (cf. nt. 19), at n. 57, who questions the credibility of a mother who would admit to such illicit relations in the first place: «Extenditur 3. etsi mater dicat, se filium talem ex adulterio concepisse; [...] quia deponit de propria turpitudine, et propterea ei credendum non est». See also, F. WERNZ – P. VIDAL, *Ius Canonicum*, vol. 5, Roma 1946, 774, no. 613.

<sup>34</sup> J. PETROVITS, *The New Church Law on Matrimony* (cf. nt. 14), 382. See also F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 33), 774, no. 613.

<sup>35</sup> S. WOYWOD, *A Practical Commentary on the Code of Canon Law* (cf. nt. 15), 801, n. 1148: «The assertion of either

The proof [of non-spousal paternity] is not had simply by the fact that the mother has committed adultery, for standing alone such information does not establish the adulterer instead of the husband to be the father of the child. Indeed, it is not sufficient proof even if the mother, eminently worthy of belief, dying, solemnly affirms it by oath, unless she offers such evidence that would suffice in the external forum, either because no case can rest on the testimony of a single witness, however legitimate, or because one alleging his own wrong-doing is not worthy of belief<sup>36</sup>.

the wife or the husband, or their united testimony, that the child is not legitimate, is no proof in Canon Law of the illegitimacy of the child». See also J. ABBO – J. HANNAN, *The Sacred Canons*, vol. 2, St. Louis 1960<sup>2</sup>, 374; I. CHELODI, *Ius Matrimoniale iuxta Codicem Iuris Canonici*, Tridenti 1921<sup>3</sup>, 164; and T. DOYLE, commenting on can. 1138 §1 CIC 1983 in J. CORIDEN (et al.), *The Code of Canon Law: A Text and Commentary*, New York – Mahwah 1985, who writes at 810: «The admission of adultery on the part of the mother with the consequent suspicion that another man is the father is not sufficient to prove illegitimacy». Only one author, Nau, most unreflectively I suggest, writes in a contrary way: «The sworn confession of the woman freely made could be sufficient proof». See L. NAU, *Manual on the Marriage Laws of the Code of Canon Law*, Regensburg 1933, 171. No elaboration is offered by Nau for his unusual claim and there is no recognition by him that in this opinion he apparently stands alone.

<sup>36</sup> «Haec probatio evidens non est ex simplici facto quod mater adulterium commiserit, quia id solum evidentem non evincit adulterum et non maritum esse patrem. Imo nec est probatio evidens, si mater, fide dignissima, moriens iuramento id sollemniter affirmaverit, nisi talia proferat indicia quae in foro exteriori satis forent, tum quia nulla est causa quae unius testimonio, quamvis legitimo, terminetur, tum quia meretur fidem allegans turpitudinem suam». P. GASPARRI, *Tractatus Canonici de Matrimo-*

## 2. Conditions needed to invoke the spousal paternity presumption

Having outlined the presumption of spousal paternity in canon law, we may now turn to determining more precisely when the presumption arises. Given the centrality of marriage to the operation of the law in this matter, we must examine first what kind of marriage supported the application of can. 1115 §1 CIC 1917, today can. 1138 §1 CIC 1983.

Pio-Benedictine authors split over the question of whether the marriage that would demonstrate paternity had to be valid or need only be putative. This is a point on which it seems that many authors blurred the distinction between the presumption of legitimacy and the presumption of paternity, so it is not clear which way several authors who were mainly addressing legitimacy issues would have sided on the narrower question of paternity. In any case, there is some divergence of scholarly opinion. Domínguez<sup>37</sup> and probably Dom Augustine<sup>38</sup> held for validity of the

*nio*, vol. 2, Vatican City 1932<sup>9</sup>, 194-195, no. 1113, citations omitted. Gasparri could appeal to similar comments from the Sacred Congregation of the Consistory in 1743: «Idque adeo verum est, ut neque si mater ipsa, vel uterque etiam parens in mortis articulo adseverent, quempiam ex filiis natum esse extra legitimum coniugii usum, ullatenus eis credi oporteat». SCC *Bobien* (cf. nt. 32), 986. See also L. MIGUÉLEZ DOMÍNGUEZ, in *Comentarios al Código de Derecho Canónico* (cf. nt. 11), 680 and F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 33), 774, n. 613. See also CORAM HEARD, Dec. XXIX (cf. nt. 8), 279.

<sup>37</sup> L. MIGUÉLEZ DOMÍNGUEZ, in *Comentarios al Código de Derecho Canónico* (cf. nt. 11), 680.

<sup>38</sup> «If the validity of a marriage is clearly established by



marriage as a requirement for the presumption of spousal paternity to apply, while others, including Wernz-Vidal<sup>39</sup>, Jone<sup>40</sup>, Ciprotti<sup>41</sup> and probably Petrovits<sup>42</sup>, thought a putative marriage to be sufficient for the presumption to attach. On the whole, I believe those who held putative marriages to be sufficient were correct<sup>43</sup>. To rephrase Ciprotti's argument<sup>44</sup>, remembering that we are striving to establish mere paternity, not legitimacy, it seems reasonable to expect the male in a putative marriage to be exclusively admitted to sexual relations by the female in such a relationship, precisely because «not rarely both of them, and often at least one of

the ecclesiastical record, every child born of that marriage is presumed legitimate, unless there is strict proof to the contrary». DOM AUGUSTINE, *A Commentary on the New Code of Canon Law* (cf. nt. 18), 334, but see his comments at p. 332 implying "putative validity" sufficient for the presumption. Notice the blurring of the distinctions between paternity and legitimacy.

<sup>39</sup> F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 33), 770-771, no. 610.

<sup>40</sup> H. JONE, *Commentarium in Codicem Iuris Canonici* (cf. nt. 28), 353.

<sup>41</sup> P. CIPROTTI, «De prole legitima vel illegitima in iure canonico vigenti» (cf. nt. 7), 340.

<sup>42</sup> J. PETROVITS, *The New Church Law on Matrimony* (cf. nt. 14), 381.

<sup>43</sup> The few 1983 Code commentators who have looked at the question in any detail seem to agree. See, e.g., J. FORNÉS, «Commentary on can. 1138», in A. MARZOA (et al.), *Exegetical Commentary on the Code of Canon Law*, vol. III/2, Montréal 2004, 1535-1536.

<sup>44</sup> P. CIPROTTI, «De prole legitima vel illegitima in iure canonico vigenti» (cf. nt. 7), 340-341.

them»<sup>45</sup> were acting in good faith in coming together in what they regarded as a marriage in the first place. To tie the *paternity* presumption to the validity of the marriage would be to introduce uncertainty about paternity where almost no one would say any exists. Moreover, this interpretation leaves open the possibility of withholding the presumption of spousal paternity from relationships that neither party entered in good faith, an arguably acceptable consequence for unfortunate fact patterns that are not difficult to imagine. Finally, the option of DNA testing remains for disputed cases.

But regardless of where one comes down on the valid *versus* putative marriage question, the wider context in which the presumption of spousal paternity appears, albeit "wider" only by one norm on either side of the paternity norm, complicates the discussion of our topic and must now be addressed. Briefly, the norm preceding our subject canon, according to which «children conceived or born of a valid or putative marriage are legitimate» (can. 1137 CIC 1983, indistinguishable in this regard from can. 1114 CIC 1917) seems anomalous when compared to the norm following ours, according to which «children born at least 180 days after the day the marriage was celebrated [...] are presumed legitimate» (can. 1138 §2 CIC 1983, repeating in substance can. 1115 §2 CIC 1917). Would a child born, say, two months after the wedding be considered legitimate, as canons 1137 *olim* 1114 would seem to

<sup>45</sup> «[...] e quibus non raro uterque aut saepe saltem unus est in bona fide [...]». F. WERNZ – P. VIDAL, *Ius Canonicum* (cf. nt. 33), 772, no. 610.

assert, or would the child be illegitimate as canons 1138 §2 *olim* 1115 §2 seem to state? Recalling that a man's natural paternity obligations to a child would not be obviated by the child's juridic illegitimacy, how would either answer impact on the presumption of paternity, itself an important question independently raised from questions about legitimacy of the child? Resolution of these questions is not easy, and I am not sure it was achieved by Pio-Benedictine scholars.

Some authors simply commented, ably enough, on each legitimacy canon in turn as if the other canon did not exist<sup>46</sup>. Perhaps this was because they perceived no inconsistency between the two canons, and thus they would not have discussed a problem they did recognize. A few canonists explicitly denied that there was a problem. The redoubtable Veermersch-Creusen wrote:

There is no conflict between c. 1115 §2 and c. 1114. For Canon 1114 treats of children who are born *from two spouses*; but if a child is born before six months from the beginning of marriage, it cannot be claimed that he or she was conceived by a husband and wife, unless we presume the husband is also a fornicator. One may not do that, unless he admits it by silence<sup>47</sup>.

<sup>46</sup> See, e.g., J. PETROVITS, *The New Church Law on Matrimony* (cf. nt. 14), 380-382.

<sup>47</sup> «Neque inter c. 1115 §2 et c. 1114 ulla est contradictio. Canon enim 1114 de filiis qui *ex duobus conjugibus* nati sunt agit; si vero proles nascatur ante sex menses ab initio matrimonio, eam ex marito et uxore conceptam esse asseri non potest, nisi praesumendo maritum quoque fornicatum esse. Quod non licet, nisi ipse id silentio admiserit». A. VERMEERSCH —

This explanation is unsatisfying in several ways. First, and most obviously, it ignores the fact that can. 1114 CIC 1917 expressly allows for children who are *born* from a valid or putative marriage, not simply conceived in one, to attain legitimacy; second, it curiously focuses on the male as the only wrong-doer, making one wonder what the female's status in the relationship was to begin with; and third, it allows complicity in an objectively immoral action to be attributed to an individual based on his silence (*pace* St. Gerard Majella) in the face of questions that might not have even been posed to him!

Some scholars, however, addressed the problem directly. Woywod, for example, admitted that

there is some difficulty in determining whether a child is legitimate, if a married woman gives birth to a child within less than six months after her marriage. Some commentators apply the principle of Canon 1114 to the case, and say that the child is legitimate because it is born in legitimate wedlock. If that rule of the Code decided the case, it was superfluous to add the second sentence to Canon 1115<sup>48</sup>.

J. CREUSEN, *Epitome Iuris Canonici*, vol. 2, Mechliniae 1930<sup>4</sup>, 257-258, no. 420. See also C. DE CLERQ, «Des Sacrements», in R. NAZ (ed.), *Traité de Droit Canonique*, vol. 3, Paris 1954<sup>2</sup>, 391-393, no. 444, at 392: «Les deux canons forment un tout: le can. 1114 formule la règle actuellement en vigueur dans l'Église latine; le can. 1115 §2 indique quand un enfant doit être présumé conçu pendant le mariage [...]» a resolution that begs the question. P. CIPROTTI, «De prole legitima vel illegitima in iure canonico vigenti» (cf. nt. 7), 430, admitted the canons were unclear, but seemed only to rephrase the conundrum in a way that left it unresolved.

<sup>48</sup> S. WOYWOD, *A Practical Commentary on the Code of Canon Law* (cf. nt. 15), 801, no. 1149.

But Coronata wrote in perhaps the most direct manner:

The phrasing of the Code, *children conceived or born*, is misleadingly redundant and seems less than happy. It would have been sufficient and better simply to have said *conceived* from a valid or putative marriage, for birth itself informs the concept of legitimacy, not at all; [birth] is not required nor *per se* sufficient to render a child legitimate. It is not required that a child be born of a mother who at time of the birth is bound by marriage, for a child can be born *posthumously*, that is, after the death of the father when the marriage no longer exists and still be legitimate as expressly set out in canon 1115 §2. [Birth] is *not sufficient*, because in order that a child be considered legitimate it is required that the birth be «at least six months from the day of the celebration of the marriage» as expressly set out in canon 1115 §2. Therefore, in order that a child be considered legitimate, one must show him to have been conceived from a valid or putative marriage, that is, by parents who at that time were bound in such marriage<sup>49</sup>.

<sup>49</sup> «Dictio Codicis filii concepti aut nati pleonastica et minus felix videtur; sufficienter et melius dictum fuisset simpliciter *concepti* ex matrimonio valido aut putativo. Nativitas enim in conceptum legitimationis influere nequit; ipsa nec requiritur nec per se sufficit ad legitimum reddendum filium. Non requiritur ut filius nascatur ex matre momento nativitatis matrimonio iuncta; potest enim filius nasci *postumus*, idest post mortem patris, quando matrimonium non amplius existat et esse legitimus ut expresse habet canon 1115 §2. *Non sufficit* quia ut filius legitimus praesumatur requiritur ut natus sit "saltem post sex menses a die celebrati matrimonii" ut expresse habet canon 1115 §2. Ut igitur filius legitimus habeatur constare debet ipsum conceptum fuisse ex matrimonio valido aut

It does not appear that Pio-Benedictine authors ever reached a resolution of this problem. I will suggest one when we discuss can. 1138 §1 CIC 1983, below.

### 3. Overturning the spousal paternity presumption

When the presumption of spousal paternity seemed applicable in a given case, how could it be overturned? Traditionally, only three lines of argument (or two, depending upon how one categorizes them), could, if proven, result in overturning the presumption of spousal paternity<sup>50</sup>: absence of the hus-

putativo seu a parentibus tunc temporis ligatis tali matrimonio». M. CONTE A CORONATA, *Compendium Iuris Canonici ad usum scholarum*, vol. 3, Torino 1949, 698-700, at 699, n. 1086.

<sup>50</sup> Even to speak of "lines of argument" for "overturning the presumption" requires some comment. In late decretal law, it appears, the presumption of spousal paternity was *juris et de jure* and admitted no contrary proof. See F. SCHMALZGRUEBER, *Jus Ecclesiasticum Universum* (cf. nt. 19), n. 57 «[...] Estque praesumptio ista juris, et de jure ita, ut adversus eam non admittatur probatio». But how, then, if contrary proof was not admitted, did pre-codified canon law handle the obvious problem of concluding to spousal paternity when the husband was indisputably absent or impotent at the material time? It did it, I suggest, by including these two factors, and these two factors alone, in the situation envisioned as being eligible for the presumption in the first place. F. SCHMALZGRUEBER, *Jus Ecclesiasticum Universum* (cf. nt. 19), n. 57, writes: «Et 1. quidem si quis natus sit ex uxore in domo mariti *cum ea cohabitantis, et potentis generare*; tunc enim filius ipsius esse praesumitur... Estque praesumptio ista juris, et de jure ita...». My emphasis. This entire passage is quoted with approval in CORAM PERSIANI, Dec. X (cf. nt. 8), 99-100, no. 9, which case arose, of course, under pre-Code law.



band at the material time or his impotence<sup>51</sup>. As Gasparri put it: «[...] there is evident proof that the husband is not the father of the child and that the wife is an adulterer if it is shown that the husband never had sexual relations with his wife due to a long absence or a period of impotence or some other similar cause»<sup>52</sup>.

Under normal circumstances, human gestation is reckoned at approximately 40 weeks or nine months. Allowing for variations in pregnancy duration (at least variations that, depending on the quality of medical support available, tend to result in live births and hence occasion the practical need to address questions of paternity), and recalling that the spousal paternity presumption fosters several goods (marriage, children, reputations, responsibility, and so on), canon law has adopted a biologically generous time frame in which a husband could be absent

<sup>51</sup> See DOM AUGUSTINE, *A Commentary on the New Code of Canon Law* (cf. nt. 18), 334: «There are only two ways to prove the contrary: absence of the spouses from each other and impotency. A third is hardly imaginable». Other ways are imaginable today, of course, but Dom Augustine's underlying point about the gravity of the spousal paternity presumption stands. See also J. BÁNK, *Connubia Canonica* (cf. nt. 17), 523.

<sup>52</sup> «[...] est probatio evidens maritum non esse patrem prolis et hanc esse adulterinam, si constat quod maritus, ob diuturnam absentiam vel temporaneam impotentiam vel aliam similem causam, nunquam uxori est copulatus». P. GASPARRI, *Tractatus Canonicus de Matrimonio* (cf. nt. 36), 195, no. 1113. See also C. HOLBÖCK, *Tractatus de Jurisprudencia Sacrae Romanae Rotae* (cf. nt. 8), 247: «Requiritur ratio evidentem cogens, quatenus v.g. constat maritum tempore legalis conceptionis fuisse absentem vel ratione infirmitatis impotentem».

from his wife (or impotent, discussed below), but still presumed to have fathered her child. Abbo-Hannan explains it thus: «Sufficient proof of illegitimacy would be afforded if it could be shown that during the period of four months that lay between [the] beginning of the tenth and the sixth month respectively before the child's birth the father was either impotent or was prevented from having access to the mother»<sup>53</sup>. Thus, the time of conception being estimated at nine months before the (normal) birth date, proof of the absence of the father for two months *before and after* that estimated time of conception would overturn the presumption that he was the father of his wife's child. The alleged absence of a husband at the material time must not simply be proven<sup>54</sup>, but must be proven to have been complete, i.e., without even the briefest periods of private association between the spouses<sup>55</sup>.

<sup>53</sup> J. ABBO – J. HANNAN, *The Sacred Canons* (cf. nt. 35), 374. Notice that the time period for paternity borrows from, but is not dependent upon, the time periods accorded to legitimacy questions. See also F. CAPPELLO, *Tractatus Canonico-Moralis de Sacramentis*, vol. 5, Torino 1947<sup>5</sup>, 731, no. 748.

<sup>54</sup> DOM AUGUSTINE, *A Commentary on the New Code of Canon Law* (cf. nt. 18), 334, notes simply "The absence must be proved by trustworthy witnesses under oath."

<sup>55</sup> See Chelodi at 164. Robitaille misspeaks somewhat when she writes that, in order to overturn the presumption of paternity, "the couple [must] have lived apart for more than ten months (300 days) before the baby's birth." See LYNDIA ROBITAILLE, [Commentary on Canon 1138], in J. BEAL, et al., eds., *New Commentary on the Code of Canon Law*, New York – Mahwah (NJ) 2000, at 1358. Obviously, *that* lengthy a separation is not biologically necessary to eliminate the husband as the father of a given child.

The second argument that might result in overturning the presumption of spousal paternity is impotence of the husband at least at the material time<sup>56</sup>. One can only imagine that impotence arguments would be especially difficult to prove because such questions, already complex in themselves, would arise either earlier in the marriage (thus more directly impugning the validity of the marriage, something presumed per can. 1060 CIC 1983 and can. 1014 CIC 1917) or later in the marriage when, as likely as not, other children might have already been born. Dom Augustine would, in any case, demand medical evidence<sup>57</sup>, which evidence would, notes Abbo-Hannan, have to account for an entire four-month period around the likely conception date<sup>58</sup>.

To impotence should be added, however, sterility as a possible grounds for overturning the presumption of spousal paternity<sup>59</sup>. Sterility is, of course,

<sup>56</sup> J. BÁNK, *Connubia Canonica* (cf. nt. 17), 523.

<sup>57</sup> DOM AUGUSTINE, *A Commentary on the New Code of Canon Law* (cf. nt. 18), 334.

<sup>58</sup> J. ABBO – J. HANNAN, *The Sacred Canons* (cf. nt. 35), 374. Kelly suggests that «if the couple never had sexual intercourse» that would be sufficient to overturn the presumption of paternity. D. KELLY, «Commentary on Canon 1138», in G. SHEEHY (et al.), *Canon Law: Letter and Spirit*, London 1995, 641. I think this is imprecise. Certainly, non-consummation of the marriage, if proven, could overturn the presumption of paternity, but non-consummation is a fact virtually impossible to prove in men and in the large number of women coming to marriage not as virgins (not to mention in women obviously pregnant by *someone*). What Kelly probably had in mind was something more akin to “impossibility of conjugal relations at the material time”.

<sup>59</sup> See D. KELLY, «Commentary on Canon 1138» (cf. nt. 58), 641.

distinguishable biologically and canonically from impotence<sup>60</sup>, though the failure of some authors to respect that distinction accounts, I suggest, for why some commentators believe that there are only two ways to challenge the presumption of spousal paternity (a husband's alleged physical absence or impotence/sterility) where others see, more precisely, three (a husband's alleged absence, impotence, or sterility)<sup>61</sup>. In every case, however, recall Ciprotti's admonition that lingering doubts about paternity must be resolved in accord with the spousal presumption of same<sup>62</sup>.

The importance of the canonical presumption of spousal paternity and the strictness by which any attempts to overcome that presumption are to be assessed, are encapsulated in an 1884 decree of Sacred Consistorial Congregation issued just a few decades before the codification of canon law. In that case, the Congregation decreed that a child born to a married woman many years after her apparent separation from her husband must nevertheless be considered his child and thus legitimate. The Congregation, noting that travel between the two towns into which the spouses had moved would not have been difficult (though there was no evidence that such trips had been made by the parties), observed:

<sup>60</sup> See can. 1084 CIC 1983 and can. 1068 CIC 1917.

<sup>61</sup> F. CAPPELLO, *Tractatus Canonico-Moralis de Sacramentis* (cf. nt. 53), 731, no. 748, simply refers to the impossibility of “carnal exchange” (*commercium carnale*) at the material time, without specifying how that impossibility appeared.

<sup>62</sup> See P. CIPROTTI, «De prole legitima vel illegitima in iure canonico vigenti» (cf. nt. 7), 341.

[I]t must be appreciated that, such is the force of the presumption that the father is known by marriage, that none should consider departing from it unless the contrary, by the most conclusive arguments, is proven in fact, and indeed only (*taxative*) by the absence of the husband or his physical impotence, since all this concerns the sanctity of marriage, the good of society, and the tranquility of families which, but for the crucial presumption of legitimate filiation, would be racked with deplorable turmoil<sup>63</sup>.

What must be borne in mind today, of course, is the possibility that irrefutable biotechnological evidence can conclusively eliminate a husband as the father of a given child born to his wife, *regardless* of his inability to prove canonically his impotence, sterility, or absence at the material time. Indeed, he need not even assert one of these three conditions, as adulterous conception can now be proven scientifically. To address better these matters, we will examine briefly the legislative history of can. 1138 §1 CIC 1983.

The post-conciliar legislative history of can. 1138 CIC 1983 is unremarkable. The Pio-Benedictine norm on paternity (can. 1115 §1 CIC 1917),

<sup>63</sup> «[...] perpendendum occurrit, talem vim inesse praesumptioni, quae patrem ex nuptiis demonstrat, ut ab ea nulatenus recedi queat, nisi concludentissimis argumentis contrarium in facto probetur, et quidem taxative ex viri absentia vel physica impotentia, cum id exigat matrimonii sanctitas, societatis bonum et familiarum tranquillitas, quae citra iuris praesumptionem de legitima filiatione sancitam deplorandum in modum turbaretur». S.C.C., *Verulana*, 9 Aug. 1884, in P. GASPARRI – J. SERÉDI (edd.), *Codicis Iuris Canonici Fontes*, vol 6, 668-671, at 670, no. 4264.

appeared without change in 1975 Schema de Sacramentis (can. 334 §1), progressed through 1980 Schema (can. 1092 §1) and 1982 Schema (can. 1138 §1, where a comma was added after "*est*"), resulting in can. 1138 CIC 1983<sup>64</sup>. A brief discussion of can. 334 of Schema de Sacramentis was held 21 October 1977, where it was expressly noted, however, that §1 (on paternity) did not occasion comment, doubtless because its terms were well-settled in canon law<sup>65</sup>. Later, 1980 Schema's can. 1092, by virtue of its inclusion in a sequence of canons dealing with legitimacy (1980 Schema's cann. 1091-1094), was thought by three Fathers to be unnecessary in a revised Code that would eliminate all canonical consequences to illegitimacy<sup>66</sup>. But the suggestion to remove these norms from universal law was rejected because of the possible relevance of these norms on legitimacy to some (unspecified) issues in particular law<sup>67</sup>. All of this supports, therefore, the suggestion made earlier, namely, that the use of Pio-Benedictine commentary on what became can. 1138 §1 CIC 1983 is wholly in order, even though that means in some respects that lingering questions about the application of the law have been passed on to modern canonistics.

<sup>64</sup> See generally, E. PETERS, *Incrementa in Progressu 1983 Codicis Iuris Canonici. A Legislative History of the 1983 Code of Canon Law*, Montréal 2005, 1015.

<sup>65</sup> See *Communicationes* 10 (1978) 106.

<sup>66</sup> See *Relatio complectens*, p. 264, also available in *Communicationes* 15 (1983) 240.

<sup>67</sup> *Relatio complectens*, p. 264.



#### 4. Some conclusions and suggestions for further development

DNA tests are being put to a wide and ever increasing range of uses quite besides the more obvious ones of establishing the truth of claims raised in some divorce and child-support (including inheritance) proceedings. These uses include screening for numerous genetically-related diseases and anomalies, tailoring medical therapies to suit genetic profiles, facilitation of organ and tissue donation, various criminal forensics, identifying victims in disaster situations, and even determining eligibility for citizenship<sup>68</sup>. None of these latter, and far more common, testing situations are administered with the intention of identifying false paternity, yet every one of them can do so. It is inevitable that the results of these tests, and the even the very availability of these tests<sup>69</sup>, is going to impact ecclesiastical practice as it has already begun to affect secular profes-

<sup>68</sup> See generally M. BELLIS (et al.), «Measuring paternal discrepancy and its public health consequences» (cf. nt. 3), *passim*, and, for citizenship-related uses, see US DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS, «DNA Parentage and Blood Testing» available on-line [http://travel.state.gov/visa/immigrants/info/info\\_1337.html](http://travel.state.gov/visa/immigrants/info/info_1337.html).

<sup>69</sup> It is interesting to speculate with Bellis as to whether the mere knowledge that such tests can be performed easily and accurately might «convince some men that care free sex and denial of paternity is no longer a viable option». M. BELLIS (et al.), «Measuring paternal discrepancy and its public health consequences» (cf. nt. 3), 753. On the other hand, this same availability might result in greater use of morally illicit contraceptive methods, to say nothing of more frequent abortion, in an attempt to avoid the discovery of one's sexual misconduct.

sions<sup>70</sup>. The time to decide whether and upon what grounds such tests may be authorized for use in canonical contexts has arrived. As a starting point for those conversations, and by way of concluding this study, I would like to suggest the following.

The presumption of spousal paternity presented in can. 1138 §1 serves the same values and goals that spousal paternity presumptions served in earlier canon law, and it should be retained. This presumption should, however, be clearly recognized as a *praesumptio tantum iuris* and consequently as being susceptible to evidentiary challenge like any other *praesumptio iuris*<sup>71</sup>. In other words, the canonical tradition once treating the presumption of spousal paternity as *iuris et de iure* or at least as some sort of “strongly held” (*tan fuerte*, very stringent proofs, *vehementissima*, etc.) presumption, should be superceded.

The words “or born” (*aut nati*) should be eliminated from can. 1137 CIC 1983. Their retention is confusing and no longer serves any purpose that cannot be better met by the modification suggested immediately below or by resort to biotechnological testing.

Can. 1138 §2 should be modified, or authentically interpreted, to hold that children born less than 180 days after the wedding, or more than 300 after the cessation of conjugal life, enjoy neither the presumption of legitimacy (to the degree that such has any canonical significance anymore) nor of spousal

<sup>70</sup> See M. BELLIS (et al.), «Measuring paternal discrepancy and its public health consequences» (cf. nt. 3), *passim*, and A. LUCASSEN (et al.), «Revealing false paternity: some ethical considerations», *The Lancet* 357 (2001) 1033-1035.

<sup>71</sup> See generally cann. 1584-1586 CIC 1983.

paternity (which does have canonical significance)<sup>72</sup>. The canonical effects arising from the presumption of legitimacy and spousal paternity may be imputed to a child born less than 180 days after the wedding upon affirmation to this effect made by husband and wife. The competent ecclesiastical authority may determine the conditions under which such affirmations should be made and accepted (for example, should it be offered in writing or before witnesses, under oath, supported by relevant documentation, and so on). Once such an affirmation is made and accepted, the presumption of legitimacy and paternity attach, but only to the same degree that any *praesumptio iuris* applies.

As stated at the outset of this article, the canonical presumption of spousal paternity reflects and reinforces important aspects of family life in a way consistent with Church teaching and social stability. At the same time, *contra factum non valet argumentum*, and ecclesiastical personnel should be afforded the opportunity to make use of information offered by advances in medical science, which information will allow them, and the people they serve, to recognize and act appropriately on the truth about paternity in cases where reasonable questions have been raised regarding same.

EDWARD N. PETERS

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<sup>72</sup> Recall the canonical questions that could arise over the possibility of support due to prior unions (can. 1071 §1, 3° CIC 1983), investigating relationships and consequent potential impediments from alleged consanguinity or affinity (cann. 108-109, 1091-1092 CIC 1983), or the recording parental names in a baptismal register (can. 877 §2 CIC 1983), all of which would be impacted by mistaken attributions of paternity.