The Social Sciences 11 (Special Issue 6): 7300-7304, 2016
ISSN: 1818-5800

Who's Your Daddy? The Legal Issues on Presumption of Legitimacy in Malaysia

[1]Mazlina Mahali, [2]Ramalinggam Rajamanickam and [2]Anisah Che Ngah
[1]Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia
[2]Faculty of Law, National University of Malaysia, 43600 Bangi, Selangor, Malaysia

Abstract: Section 112 of the Malaysian Evidence Act 1950 provides for conclusive proof of legitimacy of a child born or conceived during subsistence of a valid marriage where a husband of a married woman is determined as the legal father of the child. Although, the provision provided for lack of sexual access as a rebuttable fact that can be admitted in court, a thorough analysis into this provision showed that it present significant legal issues that need to be advanced in the context of modern development of scientific evidence. The aim of this study is to identify and highlight the legal issues concerning the presumption. The nature of methodology used is purely qualitative and doctrinal. This study concluded that revamp of the provision is desirable, principally owing to the best interest the child.

Key words: Presumption of legitimacy, paternity, scientific evidence, DNA, Malaysia

INTRODUCTION

Imagine these fictitious facts: June and Kevin met when they were at college. They fell in love and got married in 2002. About 2 year later, a beautiful baby girl was born and the couple named them Anna. In 2010, the couple decided to petition for dissolution by mutual consent. The court ordered a decree of divorce upon being satisfied that both parties freely consented to the dissolution. Proper provision for the support, care and custody of Anna were also attached in the decree. June was given the physical custody of Anna and Kevin received the standard visitation rights for his daughter. Additionally, Kevin was ordered to pay RM700.00 a month for child support. Kevin never missed a visit and had gladly paid the child support obligation every month.

About 3 year after the divorce, Kevin ran into some old friends and from there he was made privy to the fact that June had cheated on him when they were still married. Kevin began to question whether he is truly Anna's father and this was also motivated by the fact that Anna does not acquire any of his physical resemblance. Kevin then brought Anna to a private test lab and had a DNA test performed. The test conclusively determined that Kevin is not Anna's father.

Frustrated with the result, Kevin filed a motion to disprove his paternity and to end child support obligation. When the case was heard, June's lawyer argued that Anna was born during a valid marriage between June and Kevin and as such she is conclusively presumed as the legitimate child of Kevin based on Section 112 of the Evidence Act 1950. Kevin offered no evidence of non-access. The court decided that Kevin had not rebutted the presumption and ordered that the continuing obligation to support the child.

Background of the presumption: The presumption of legitimacy of a child in Malaysia has its origin from the common law and is codified in Section 112 of the Evidence Act 1950 (Paul, 2010). The presumption is a reproduction of Section 112 of the Indian Evidence Act 1872 (Pinsler, 2010). The provision conclusively presumed that a child born during a continuance of a valid marriage or 280 day after its dissolution is a legitimate child of a man who married his or her mother. The provision however, provided for lack of sexual access as the only rebuttable fact that can be admitted to disprove legitimacy of the child.

The presumption is also guarded by the Lord Mansfield rule which was developed in the case of Goodright Ex d. Stevens v Moss 98 Eng Rep 1257). The rule provided that neither spouse shall testify to the non-access of the other during the period when conception might have occurred, so as to rebut the presumption. In Malaysia, Section 120 (1) and (2) of the Evidence Act 1950, however, provided that a husband and wife is a competent witness for or against each other in a civil or criminal proceeding.

Although, the presumption provided for proof of legitimacy of a child, the presumption essentially determined the legal father of the child. Thus, the question of paternity cannot be disassociated with the question of legitimacy of a child in the construction of the provision. In fact, in some countries like the United States,

Corresponding Author: Mazlina Mahali, Faculty of Law, Universiti Teknologi MARA, 40450 Shah Alam, Selangor, Malaysia

the presumption is known as the presumption of paternity (Uniform Parentage Act in 2002). Some scholars in the United Kingdom refer the ancient common law presumption as the marital presumption of paternity.

The researchers acknowledged that the policy behind this presumption goes beyond protecting the status of the child. By recognizing the child as legitimate, the child is entitled to obtain financial benefit such as child support inheritance rights and other obligations due from the father (Kaplan, 2000). It eventually prevented the child to become wards of the state. Marriage stability could also be upheld as the presumption certainly disallows other man to claim that he has fathered one of the family's children. However, it is also the researcher's contention that the presumption has treated man, especially married man, unfairly. The disputation is largely based on the existence of various consequences of the provision. One of them is demonstrated in the fictitious facts above. The husband, although not biologically related to the child is liable to maintain the child as provided by Section 92 of the Law Reform (Marriage and Divorce Act 1976), read together with Section 3(1) of the Married Woman and Children Maintenance Act 1950. The situation is different for unmarried man. Section 3(2) of the Married Woman and Children Maintenance Act 1950 provided for the power of the court to order any man to maintain his illegitimate child upon proof that he is the father of the child. The existence of the word 'proof' under that provision certainly allows the court to accept all relevant and reliable evidence. Scientific evidence can be admitted by the court to determine the father of a child born out of wedlock. This situation is clearly unfair to married man because determination of the legal father of a child born within a valid marriage is based on the presumption which is almost impossible to overcome.

Legal issues of the presumption: The issue of battling paternity of a child emerged due to an increased of out of wedlock birth. Paternity action is no longer a new issue in the United Kingdom and United States (Rossin-Slater, 2015). Statistics in 2008-2010 showed that the number of child born out of wedlock amounted to 152, 182 children (Utusan Malaysia, 16 November, 2011). With diverse consequences of proving one's paternity, the trend of bringing such popularity in Malaysia. Certainly, the trend is not limited to proving paternity of children born out of wedlock but extends to cases where the child is born during valid marriage. While scientific evidence could be utilized to prove paternity of child born out of wedlock, it cannot be admitted to prove the paternity of child born within a valid marriage based on Section 112 of the Evidence Act 1950. Thus, it is the researcher's contention that there are loopholes in the said provision and this contention is based on the following reasons.

The first legal issue in relation to Section 112 is the admissibility of scientific evidence. Scientific evidence such as DNA (scientifically referred as deoxyribonucleic acid) evidence or blood test is presently capable of proving or disproving whether a particular man had in fact fathered a child. DNA evidence for example was rarely used back then as the technology was still extending. Now, much has changed and the test results are highly accurate (Roberts, 2003). Testing can be done by a simple cheek swab rather than drawing a blood. The procedure now required the participation of the purported father and child, rather than the rigid participation of the mothers and another family member of the purported father.

The researchers claimed that the presence of the phrase 'conclusive proof' in Section 112 bars the admissibility of this evidence. 'Conclusive proof' is specifically mentioned in Section 4(3) to indicate that when a presumption uses the phrase, the court is not allowed to admit any evidence to rebut the presumption. In other words, although the presumption is a procedural tool, the effect of the phrase is substantive in nature. The only rebuttable fact allowed by the provision and can be admitted by the court is evidence of non-access of the husband to the wife. The burden lies on the party who asserts non-access and clear and convincing evidence must be presented to prove this fact. Confession of parties is not enough to rebut the presumption. A husband who enjoys sexual access towards his wife would definitely have a difficult process of relief in disproving the legitimacy of the child born as a result of adulterous affairs of the wife with other man.

Secondly, the researcher's are aware of several judicial decisions in Malaysia that had allowed scientific evidence, particularly DNA evidence to rebut the presumption (for example, Alesiah Jumil and Chua Kin Han v Julas Joeno l(2013) 1 LNS 1213; Chua Kim Suan v Ang Mek Chong (1988) 3 MLJ 231). These decisions had indirectly acknowledged the mischief of Section 112 in the era of scientific development. With due respect, the authors contended that the judges had misinterpreted Section 112. The only rebuttable fact that can be admitted is evidence of non-intercourse and no other evidence (Per Aitken J in Ainan Bin Mahmud v Syed Abu Bakar Bin Habib Yusoff and Ors (1939) MLJ 209). Although, the authors welcome the judicial creativity presented by the judgments, this attitude promotes inconsistencies of the laws. No appeal on the question of law had been made to these decisions. Thus, there are no binding decisions as to the admissibility of scientific evidence to rebut the

presumption. The position of the law is therefore not clear on this issue. The researchers maintained that if the provision has not used the phrase 'conclusive proof,' other reliable scientific evidence such as DNA, blood test, evidence of impotency or sterility, parental likeness or medical evidence can be admitted to rebut the presumption.

Thirdly, the provision failed to provide adequate relief to married men who subsequently discover they lack genetic ties to the child in question (Epsetin, 2003). As a result, he may be obligated to pay child support for years and parent-child relationship may be imposed even if it is not in the child's best interest. A biological father, who seeks to prove the paternity of a child born a married woman, may also be in difficult situation. As per Section 112, the legal father of child is the husband of the mother. Consequently, the biological father who is willing to support the child and had participated in the child's life, is barred from taking that responsibility by the law.

Next, the provision encourages women to commit paternity fraud. The term 'paternity fraud' refers to the act of deceptive women holding men into believing that a child is biologically theirs. Section 112 is undeniably supporting a deceitful and unfaithful wife to fraudulently misrepresent her husband by legally determining the husband to be the father of a child conceived as a result of an extra marital affair. No particular studies in the area of paternity fraud have been conducted in Malaysia so far, thus, the researchers are not aware as to the rampancy of the practice but court's decisions in Malaysia have held that the fact that a woman had sexual intercourse with other man during the subsistence of a valid marriage does not rebut the presumption that the child remains the legitimate child of the husband. In the United Kingdom, a study that had been conducted in 2008 indicated that one in 500 fathers was wrongly identified by mothers in child support cases (Wintour, 2008). In the United States, a study conducted in new hampshire under the auspices of the commission on the status of men revealed that 30% of men paying child support were not the biological fathers of the children supported. It is the authors assertion that wrongfully forcing men to support children which are not the fruit of their loins tantamount to fundamental breach of rights.

Section 112 on the other hand discourages paternity identification which may be desirable by the children themselves. Paternity attribution allows children to have personal autonomy towards their well-being (Sperling, 2009). This is in line with Article 7 of the United Nation Convention on the rights of the child which among others, the right to know his or her parents. Accurate information on medical history can be given to medical practitioners for any decisions. For example, if illness necessitates organ transplant or replacement and blood donation, genetic relatives are the best candidates for donors.

Accordingly, if legitimacy is misattributed as provided by Section 112 of the evidence Act 1950, other problems may also occur within the spur of the abovementioned context. It is the researcher's submission that Section 112 needs to be revamped so as to place fairness to all parties involved.

MATERIALS AND METHODS

This research adopts qualitative types of research methodology. This methodology is suitable to be employed for exploring complex research areas where little is known for beginning to understand a phenomenon or for development of new theories or laws (Singh, 2015). The researcher's categorized this study as purely legal research. The researchers used a systematic exposition of the rules governing Section 112 of the evidence Act 1950, analyses the relationship between rules in Malaysia and other countries such as the United Kingdom and the United States, explain areas of difficulty such as the multiracial environment in Malaysia and predict future development of law in this area. The researchers also employed knowledge from other disciplines to generate data in order to develop a law reform based research. Knowledge in the area of family law, evidence law and biology were combined together in this research.

The primary data for this research are statutes and case laws. The main statute referred to is the Evidence Act 1950. The secondary data includes textbooks, studies from journals as well as online sources. In this research, the researchers consider themselves as the main instrument. The researchers played a vital role in collection of both the primary and secondary data, analyzed as well as synthesized them. Discussion with experts in the area also helped the researcher in interpretation of data.

RESULTS AND DISCUSSION

Proposal for reform: It is the researchers assertion that wrongfully forcing men to support children which are not biologically theirs tantamount to fundamental breach of human rights. The situation is different where the man is willing to support them.

With the modern advancement of scientific evidence, the traditional method of determining legitimacy as provided by Section 112 no longer provides the best formula in resolving the issue. Hence, the researchers have come to several proposals to overcome these issues by referring to the experience of both the United Kingdom and the United States. The United Kingdom has taken a brave move in allowing scientific evidence to determine parentage of a child as early as 1969. Section 20(1) of the United Kingdom Family Law Reform Act 1969 provides that the courts may make a direction for blood tests in the course of any civil proceeding where parentage of any person falls to be determined. The 1969 Act was then replaced with the 1987 Act and the direction now includes a direction for any scientific tests.

With the incredible development of scientific evidence in determination of identity and genetic, especially the introduction of DNA evidence that can now certainly prove and disprove paternity, the marital presumption of paternity in the United Kingdom is now a rebuttable one. Section 23 of the United Kingdom Family Law Reform Act 1987 provides for the admissibility of scientific evidence in civil proceeding in which parentage of a person falls to be determined. The specific power of the court to direct any scientific tests to be carried out in determination of parentage was accorded to avoid any procedural challenge.

The United States on the other hand introduced the Uniform Parentage Act which was later amended in 2002. The Act allows for the admission of scientific evidence to play its role on the ongoing saga in relation to the law of presumption of paternity, especially to non-marital child. On the other hand, the Act also allows non-married parents to sign a Voluntary Acknowledgement forms (VAP) acknowledging the mother and father of the child without them having to marry each other. The states in the United States are given freedom to adopt and/or modify the provisions in the Uniform Parentage Act 2002.

By referring to the experience of these two countries, it is the researcher's humble opinion that Malaysia is ready for the change of the law in regards to this issue. The admissibility of scientific evidence to determine legal fathers, especially to child born within a valid marriage, has to be allowed by statute and not merely by practice and judicial creativity. The applicability or relevance of Section 112 of the Evidence Act 1950 cannot be determined by unwritten rules and judicial interpretation of a statutory provision falling outside the Evidence Act 1950 cannot nullify the evidential restriction found in Section 112. The current Section 112 of the Evidence Act 1950 provides as follows:

> 'The fact that any person was born during the continuance of a valid marriage between his mother and any man or within 200 and 80 days after its dissolution, the mother remaining unmarried shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been

The researcher's propose that the abovementioned provision be amended. Two ways how this can be done are as follows:

- Deletion of the adjective 'conclusive' and replaced by 'prima facie.' Limitation to evidence of no access be omitted in the provision and replaced with admissibility of any reliable relevant evidence
- The provision may stay as it is but a proviso may be inserted that the provision shall not bar the admissibility of blood samples or bodily specimens to be taken to show that a person is or is not excluded from being the father of another person

To avoid any procedural challenge as to the taking of blood samples or bodily specimens in determination of parentage cases as advanced by the case of Peter James Binsted v Juvencia Autor Partosa (2000) 2 MLJ 569, the researchers suggested that specific powers be accorded to the courts to make such order or direction. The order or direction must among others:

- The name of person to whom the order or direction is to be addressed and it is not limited to the parties of the proceedings only
- The specific duration of time of the order or direction
- The specific bodily samples that can be taken
- The name of the specific labs that can perform the test
- The date of the order

This procedure may be inserted in the Rules of Courts 2012 or under the Law Reform (Marriage and Divorce Act 1976). With the amendment of Section 112 of the Evidence Act 1950 and the insertion of procedure of the taking of blood samples or bodily specimen, the issue in relation to legitimacy of child born within a valid marriage may be settled.

CONCLUSION

It would appear to the researchers that it is high time that a reform is needed to modernize Section 112 of the

Evidence Act 1950 so as to meet society's reality. With modern scientific aid we are presented today, determination of parentage, especially the father of a child is not as technical as before. When such reform is taken, the courts will no longer encounter any difficulties in constructing Section 112. Restricted way on how to overcome the presumption as provided by the current Section 112 poses more complicated issues if further steps are not taken to amend the provision. Accurate determination of paternity may be needed by the child to amend the birth certificate to establish a right to inherit property or to acquire citizenship. The father may seek it for a parental responsibility order and a mother or child support agency may need it to require the father to contribute for maintenance of the child. On this note, the authors respectfully proposed the reform of Section 112 as stated above.

REFERENCES

Epsetin, A.S., 2003. The parent trap: Should a man be allowed to recoup child support payments if he discovers he is not the biological father of the child. Brandeis Law J., 42: 655-656.

Kaplan, D.S., 2000. Why truth is not a defense in paternity actions. Tex. J. Women Law, 10: 69-69.

Paul, A., 2010. Evidence: Practice and Procedure. 4th Edn., Lexis Nexis, Kuala Lumpur, Malaysia,.

Pinsler, J., 2010. Evidence and the Litigation Process. 3rd Edn., Lexis Nexis, New York, USA., Pages: 456.

Roberts, P., 2003. Truth and consequences: Part I disestablishing the paternity of non-marital children. Family Law Q., 37: 35-35.

Rossin-Slater, M., 2015. Signing-up new fathers: Do paternity establishment initiatives increase marriage, parental investment and child well-being?. Masters Thesis, University of California, Santa Barbara, California.

Singh, P., 2015. A Comprehensive Guide to Writing a Research Proposal. Venton Publishing, Kuala Lumpur, Malaysia, Pages: 118.

Sperling, D., 2009. From Iran to Latin America: Must prenatal diagnosis necessarily be provided with abortion for congenital abnormalities?. Am. J. Bioethics, 9: 61-63.

Wintour, P., 2008. One in 500 fathers wrongly identified by mothers in child support agency claim. The Guardian, UK.