

The Judicial Management of Cohabitation of Spouses under Legal Separation

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ABSTRACT

The disagreement between the spouses is the cause of the separation and on the basis of one of the statutory causes or their consent, the judge grants them the legal separation. Within the present study entitled “the management of cohabitation of spouses under legal separation in Rwandan law”, there were examined the effects of the cohabitation of spouses in separation, and there was found out that spouses in separation from the body are exempt from the duty of cohabitation, but the separated spouses retain all other duties arose marriage. The consequences of cohabitation during the period of separation of bodies are multiple and greatly affect the woman and the child born of this cohabitation.

In order to deal with these kinds of problems, it is necessary that the judge who ordered the suspension of the duty of cohabitation be aware of the resumption of cohabitation. If the suspension of cohabitation requires a legal procedure, its purpose should also be law and not in fact. Otherwise the reason will be given to the one who has evidence before the judge to justify the resumption of cohabitation or not, and yet the evidence is easier to find for the husband than for the wife.

In our view, we recommend that the resumption of common life be known by the judge beforehand. The separated woman is the first victim in case her husband fails to accept that he is the author of the cohabitation observed by signs outside the woman.

Cohabitation before the resumption of life together and where a child is conceived is always ineffective because the situation is always similar to that of the period of legal separation. The judge who issued the judgment authorizing the separation of bodies does not know the resumption of cohabitation. Finally, we say that the force of the thing judged is a principle that applies to all decisions of the judge whose remedies have been exhausted. The opposite option to that taken by the judge must be agreed upon by the parties at trial. In our study the woman will find herself in precarious conditions, once she tries to make an instant cohabitation with her husband, it is to her that belongs the burden of proof.

A judgment becomes a law; the parties must respect it and execute it properly. It is advisable to go through the legal procedures to avoid any consequences that may arise from a de facto procedure.

Therefore, there is recommended that the proved cohabitation may imply reconciliation and entail the removal of the claim on one side and on the other side that the Rwandan government do all it can to help children who are victims of this kind of disavowal to do the DNA testing and restore the rights of these children.

INTRODUCTION

In Rwandan family law, the Legal separation has the following forms: legal separation for any cause provided by law; and legal separation by mutual consent. The petition for legal separation may be filed by the spouses under the same conditions and on the same grounds as divorce. The petition for legal separation is filed, heard and decided in accordance with provisions of this Law relating to divorce. When the petition for legal separation and for divorce is concurrently filed, the court first decides on

the legal separation. Legal separation relieves spouses of the duty of cohabitation but does not entail the severance of a marriage bond or the dissolution of matrimonial regime. After the ruling on legal separation, the duty of support and fidelity remains. Children born to parents involved in legal separation are protected in accordance with provisions of Articles 243, 244, 245 and 246 of this Law.¹ Article 207 of the

¹ Articles 249 and 250 of the law n°32/2016 of 28/08/2016 governing persons and family, O.G N°37 of 12/09/2016

same code adds that marriage creates a community of life with a duty of cohabitation between spouses. Despite the community of life created by marriage, some causes can lead to its dissolution, such as death and divorce, as stipulated in Article 218 of the law governing persons and family. Alongside these two causes which lead to the total dissolution of the marriage, there is the legal separation which is the condition of two spouses legally exempted from the obligation of cohabitation.²

It suspends only the exemption from the obligation of cohabitation and allows the marriage to remain, i.e. it suspends only cohabitation and maintains all other obligations. The separated husband remaining married, continues to be subject to the duty of relief and assistance prescribed by Article 251 of the same law.

In this regards, the legal separation always entails the separation of property. This provision applies only to married spouses under the regime of the universal community and the community reduced to acquisitions. Married spouses under the separation of property already live in separation of property. We also believe that the disagreement and other causes that triggered the separation of bodies will not leave the spouses under the same roof; hence the separation of residence will also benefit them. The affection they had during the marriage seems diminished at the time of the separation of bodies, but the spouses have not yet matured their decision to divorce, which is why they sometimes go through the separation of bodies.

Legally, the marriage persists, the spouses remain married, but in reality the marital bond is not there. Father Dido put it this way: that in the case of separation of bodies: "of all things that constitute marriage such as: beliefs, virtues, sorrows and joys, trials and hopes, the unification of the body and property practically exist more".³

If for one reason or another the legally separated spouses manage to meet for sexual intercourse, which in principle are designated under the duty of cohabitation for the spouses, how then to qualify this cohabitation made by the spouses during this period when the judge issued the

exemption from cohabitation? Will it be qualified as adultery? Will it be analyzed into a free union? Or will it be analyzed as a gesture of reconciliation?

It is accepted that if the wife becomes pregnant in the event of a separation of bodies, what will be the fate of a child born or conceived in cohabitation made during the period when the duty of cohabitation was suspended by the judge? the passion between a man and a woman can lead them to live together even if they are in separation of bodies and if a child is conceived there, what is the evidence that the woman will be able to present to force the husband to recognize the child? The presumption *pater is quem nuptiae demonstrant* can it come into play? The present research will lead to reflect on these issues raised above. what are inconvenient effects of cohabitation of spouses under legal separation? how legally to address such defavorable effects?

The present study globally aims to manage issues arising from the relationships between spouses during the legal separation. Specifically, it intends to overview the legal regime of legal separation; to assess the effects of cohabitation of spouses in legal separation and issues arising from it; and to suggest solutions to handle consequences of such an irregular cohabitation

In order to attain the objectives of this study, different techniques and methods will be used. The documentary technique will be used in collecting data from different written documents relevant to the topic including law texts, books, journal articles, annual reports, newspapers, etc. The exegetic method will help to interpret the various law materials. The analytic method will be used for analysis of different elements of data collected. Finally, the synthetic method will help in regrouping the collected data in a coherent manner

The present research does not pretend to be exhaustive; instead, it is limited in time, space and domain. Timely, the research takes into account the period starting from 2016, year of publication of the law governing persons and family, to date. Spatially, it will be conducted inside Rwandan territory while it frames with the Rwandan civil law.

The study consists of four chapters. The first chapter deals with the general introduction. The second chapter critically assesses the impact of cohabitation on the legal separation. The fourth one focuses on the legal and political

² *ibid*

³ Didon, *Indissolubilité et divorce*, quoted by R.H. SCHOENFELD et E. POITERIN, *Le droit et les problèmes conjugaux*, Bruxelles, Bruylant, 1971, p.28.

mechanisms proposed to address challenges identified. Lastly, there is drawn a conclusion of the study

THE IMPACT OF COHABITATION OF SPOUSES UNDER LEGAL SEPARATION

What to do when someone breaks a separation agreement? Is dating while separated adultery? Such questions among many others do affect legal analysts of the legal issues arising from cohabitation during the legal separation. In this regards, the present chapter is meant to highlight the legal provisions governing the legal separation and assess their respect by spouses judicially separated.

Rwandan Rules Governing Legal Separation

Forms of Legal Separation

According to Article 248 of the law governing persons and family, legal separation and application procedure Legal separation has the following forms:

- Legal separation for any cause provided by law;
- Legal separation by mutual consent. The petition for legal separation may be filed by the spouses under the same conditions and on the same grounds as divorce. The petition for legal separation is filed, heard and decided in accordance with provisions of this Law relating to divorce.

Article 249 of the same law deals with the connection between the application for legal separation and divorce. In its terms, when the petition for legal separation and for divorce are concurrently filed, the court first decides on the legal separation.

Effects of legal separation

Legal separation relieves spouses of the duty of cohabitation but does not entail the severance of a marriage bond or the dissolution of matrimonial regime. After ruling on legal separation, the duty of support and fidelity remains. Children born to parents involved in legal separation are protected in accordance with provisions of Articles 243, 244, 245 and 246 of this Law. The management of the property of spouses applying for legal separation is done in accordance with legal provisions governing the management of property of the spouses involved in divorce proceedings, as the case may be. The legal separation judgment determines alimony for the spouse in need irrespective of the spouse with

whom the fault rests.⁴The legal separation does not affect the marriage; it continues to survive with all its legal effects. Only the obligation to live together and the effects that flow from the community of existence are suspended. From the above provisions, there should be drawn the following considerations

Effects Affecting the Spouses' Person

The judgment of legal separation loosens the bonds of marriage, but it does not remove them. For this reason the duty of faithfulness of the spouses and the mutual duty of relief survives the legal separation. The suppression of the duty of cohabitation is the essential effect of the legal separation. The abolition of the duty of cohabitation automatically leads to the duty of assistance.⁵The legal separation results in the separation of residence for the spouses. The separation of residence is also pronounced by the judge on the very day of the legal separation. The union of man and woman through marriage is an ideal, but sometimes this ideal is a fiction, a bitter disappointment like that which occurred in the event of a legal separation. In this case, the common life becomes a hotbed of trouble, a permanent cause of scandals. It is in this context that the legislator has set up a way to defuse the crisis and create favorable conditions for the restoration of common life, family and social tranquility. This is the separation of residence governed by sections 248 to 254 CCLI and authorized by the judge.⁶However, the spouses are still married, the duty of fidelity is not abolished and the breach of that duty leads to adultery. The duty of relief also exists between spouses and this duty being reciprocal, it is not necessary to distinguish whether it is the plaintiff spouse or the defendant spouse who is the creditor.⁷Finally, the persistence of marriage between the separated spouses is shown in the fact that they can come together without having

⁴ art.250&251 of the same law

⁵ Sbarra, D. A., Law, R. W., & Portley, R. M. (2011). Divorce and death: A meta-analysis and research agenda for clinical, social, and health psychology. *Perspectives on Psychological Science*, 6, 454– 474. <http://dx.doi.org/10.1177/1745691611414724.1028709>

⁶ Art.2020-209 law on persons and family, Official Gazette n°37 of 12/09/2016

⁷ Sobal, J., & Rauschenbach, B. S. (2003). Gender, marital status, and body weight in older U.S. adults. *Gender Issues*, 21, 75–94. <http://dx.doi.org/10.1007/s12147-003-0007-y> Socio-Economic Panel (SOEP), data for years 1984-2014, version 31, SOEP, 2015, doi: 10.5684/soep.v31.

a new union celebrated. Such a union is tantamount to reconciliation.

End of Legal Separation

Generally, the legal separation ends with the death of one of the spouses, the voluntary resumption of life together or the divorce.⁸

The Death of One of the Spouses

When a husband dies, the marriage, which had not been dissolved by the legal separation, is now dissolved by death. Article 214 of the Civil Code book first states that "marriage dissolves by the death of one of the spouses." If it is the custodial parent of the children who is predeceased, there is, in principle, automatic devolution of parental authority to the other spouse.⁹

Divorce

It is always possible for the spouses to end the legal separation by reconciling, more precisely by a voluntary resumption of the common life.¹⁰ This situation is very likely when the legal separation was pronounced because of adultery, but also and above all under the emotional effect that followed the fact of adultery. It may be that, on reflection, at the end of the emotions, the spouses will resume the common life. The resumption of common life erases the effects of separation on children and on spouses, but not on property except out of an express desire to return to his former matrimonial regime.¹¹

Conversion of Legal Separation into Divorce

After two (2) years of legal separation from the final judgment, the court upon joint application by both spouses and either of them, converts the legal separation judgment into divorce judgment. The application for the conversion of legal separation into divorce is filed in accordance with the ordinary rules relating to the application for divorce.¹²

⁸ Ibidem

⁹ Brinig, Margaret; Douglas W. Allen (2000). "These Boots Are Made for Walking: Why Most Divorce Filers are Women". *American Law and Economics Review*. 2 (1): 126–129. doi:10.1093/aler/2.1.126.

¹⁰ Wagner, G. G., Frick, J. R., & Schupp, J. (2007). The German Socio-Economic Panel Study (SOEP): Evolution, scope and enhancements. SSRN Electronic Journal. <http://dx.doi.org/10.2139/ssrn>

¹¹ Blackstone, *Commentaries on the Laws of England*, p. 435 (Legal Classics Library spec. ed. 1984.

¹² art.252 of the same law

CRITICAL ANALYSIS

Cases of Legal Separation

According to the legislator's wish, the conjugal bond is indissoluble. However, there may be situations in which the maintenance of common life would be an evil.

It is as a remedy for this evil that Parliament has allowed the dissolution and loosening of the marital bond through divorce and legal separation. But he has been careful to determine rigorously why and under what conditions spouses will be able to resort to this extreme remedy.

The causes of divorce apply mutatis mutandis to the causes of legal separation. They are strictly interpreted and do not suffer any analog extension.

Article 248 law on persons and family states that "legal separation may be requested by spouses under the same conditions as divorce."

The application for legal separation is brought, heard and tried according to the rules concerning divorce.¹³ The couple's life together is the result of a marriage contract, it cannot be legally suspended, the marital bond can only be broken by the fulfillment of the strict formalities prescribed by law and in the cases indicated by it.¹⁴

Apart from these cases and under the strict observance of these formalities, any agreement that would take place between two spouses in order to establish a voluntary separation between them would be null and void because its cause would be unlawful: The legal separation may result from a or come from the mutual consent of the spouses.

Legal Separation Based on a Statutory Cause

In all cases where divorce should be filed for cause, it would be open to the spouses to file an application for legal separation. It follows from this text that the causes of divorce and legal separation are strictly the same and that the choice of one or the other action depends on the

¹³ Athenagoras Peckstadt, Bishop of Sinope (18 May 2005). "Marriage, Divorce and Remarriage in the Orthodox Church: Economia and Pastoral Guidance". *The Orthodox research Institute*. Archived from the original on 20 January 2009. Retrieved 19 November 2008.

¹⁴ ibid

discretionary assessment of the plaintiff spouse.¹⁵

The causes of the legal separation are stated in art. 218 of the family law. We sought to group these cases into three categories: Facts-based cases that violate the duty of marriage, cases based on the intolerable maintenance of the common life, and the case attributable to the other spouse.

Facts-Based Causes a Violation of the Duty of Marriage

Adultery, either from husband or wife, constitutes a serious violation of the duty of fidelity of the spouses.¹⁶ A married spouse has an obligation to have sex with his or her spouse. In the event that one spouse has deviated from this duty of fidelity, the other may, on the basis of this serious violation, request the legal separation.

The applicant spouse faces a evidence challenge because it is often difficult to establish it except for a criminal conviction of the spouse who committed an adultery offence. It is therefore made up of sexual relations with someone other than the spouse during the marriage. It is the most extreme form of infidelity at least for the right.¹⁷ The spouse's infidelity is sanctioned by divorce or legal separation depending on the applicant's choice unless he or she has been able to prove adultery of the other spouse to serve one of them.

Another duty to which the spouses are forced to marry is the contribution to the household expenses. The family law states in Article 211 states that "each spouse contributes to the household's expenses according to his faculties and his means."

The refusal to perform the duty of contribution to household expenses is a violation, the obligations that arise from marriage and constitutes a cause of legal separation.

¹⁵ P. T. & Cummings E. M. (1994). Marital Conflict and Child Adjustment: An Emotional Security Hypothesis. *American Psychological Association Psychological Bulletin*, 116, 387–411. Retrieved March 13, 2012

¹⁶ D. F. McKenzie (2002). "The London Book Trade in 1644". *Making Meaning: Printers of the Mind and Other Essays*. University of Massachusetts Press. pp. 140–1. ISBN 978-1558493360.

¹⁷ E. Coke, *Institutes of the Laws of England*, 235 (Legal Classics Library spec. ed. 1985).

The method of contribution of expenses takes into account the faculties and the means of the spouse change. The one who has more means contributes more than the one who has the least.

The contribution to household expenses adapts to changes in the means of the spouses. If a spouse refuses to contribute to the household expenses.

The spouse who claims the contribution of the other, instead of bringing an action by requesting the legal separation, he can bring a legal action to compel the other spouse and to oblige to satisfy that obligation.¹⁸

The spouses are required, in principle, to the duty to live in the home or the conjugal residence. If one of them leaves the matrimonial home without a justified reason, he will be considered the author of the abandonment of the family. If this abandonment of the home lasts more than twelve months, it is a cause of legal separation.

Finally, the prolonged de facto separation allows the judge to find that there is no longer a community of life and that objectively it can no longer be reconstituted. Such a separation must be motivated and knowingly intended by at least one of the spouses.

If the legal separation lasts more than 3 years, the interested spouse may request that the separation be converted into a divorce. The legislature established an ongoing term of three years.¹⁹ This period can in principle be interrupted by some conciliation.

Causes Based on the Intolerable Maintenance of Life Together

The common life of the spouses requires tolerance and constant affection. In case of inhuman treatment of one spouse to another, allows a request for legal separation.

The spouses will therefore be able to ask for the legal separation for abuse. Abuse, cruelty, personal abuse, any malicious assault on the part of one spouse and of exceptional gravity are defined as mistreatment by one spouse.²⁰

Any kind of material and physical abuse of cruelty is classified as abuse.²¹ The husband, a

¹⁸ *ibid*

¹⁹ See the law on persons and family

²⁰ Fawcett, Margaret I. (2016). "The Changing Family in Northern Ireland". *Youth & Society*. 32: 81–106.

²¹ *Ibidem*

victim of this abuse, may request the legal separation.

Article 218 of the family law classifies the excesses among the causes of legal separation, but it does not give its definition. GERRARD defined excess as acts likely to endanger the life of the spouse when they were committed with conscious intent. These acts, once confirmed by the judge, can result in the legal separation.

Finally, serious insults are also a cause of legal separation. They are defined as any word, writing or outrageous acts that constitute acts contrary to the rights and obligations of marriage and violate the honor and dignity of one of the spouses.²²To assess the character of the gravity of the insult, the facts articulated as a whole will be considered and the frequency and repetition of the wrongs will be taken into account.²³Verbal insults such as hurtful, derogatory and scornful words are considered serious if uttered in front of strangers. But they are excusable if they were caused by accidental drunkenness.²⁴ Insults are also included, insulting correspondences, even in the form of secret and confidential letters addressed by one spouse to the other or to a third party.²⁵Refusal to perform and have sexual relations with one's spouse is also a serious insult that could justify a request for separation. It is in this sense that the NGOMA Primary Court granted the legal separation in favour of NK. against his wife A.B., who refused to have sex with her husband without just cause. The court found that the woman refused to perform one of the essential duties of marriage, that of maintaining sexual relations, and is equated with a serious insult, which is why the legal separation is pronounced in favour of NK.²⁶

Cause Attributable To One or the Other Spouse

Conviction for an offence that seriously devalues honor is an inherent sentence of the person who committed an offence. The other spouse may on the basis of this conviction request the legal separation.

The sovereign judgment of the judge alone, qualifies the fault as seriously enticing the honor or not. Therefore, there is no limiting list of offences on which judges can rely in pronouncing the legal separation.²⁷

The judge before him must assess the nature of the dishonorable act and the attitude of the spouse before and at the time of the facts in order to find an offence.⁴⁵ Examples include a conviction for fraud, rape of a minor, conviction for the offence of poisoning, etc.

The fault that causes an offence that seriously enforces honor is made up of offences that have consequences not only in view of society, nor only on the perpetrator, but on the whole family. This is why the offended spouse can ask for the legal separation to keep his honor.

Legal Separation Based on the Consent of Spouses

The legal separation based on the mutual consent of the spouses is a mutual and persevering agreement of the spouses to separate, expressed in the manner prescribed by law, under its conditions and according to the trials it determines.²⁸

Perseverance is sufficient proof that the couple's life together is unbearable and that there is a preemptory cause of legal separation.²⁹ When the spouses ask together for this legal separation, they do not have to make the cause known. It remains secret.

At the time of separation by mutual consent, the marriage takes the form of a contract in which the parties agree not to disclose the cause of their loosening of the marital bond. There is nothing to prevent the judge from granting them separation.

Spouses often choose separation by mutual consent to maintain and maintain the respect they have given to their home, despite the loosening of the marital bond. It should not be forgotten that they can reconcile in a given time, but without abusing their family in front of the public at the outset, from which the cause of legal separation will not be revealed, only their

²² GERRARD J. – 2000 – Fundamentals Soils. Routledge UK, p.172

²³ ibid

²⁴ ibid

²⁵ P.GERRARD, *Op.cit.*,p.191.

²⁶ Primary Court of Ngoma, R.C 0370/07/TB/NGOMA rendered 27/06/2008, unpublished

²⁷ Emily Doskow, Different Types of Separation: Trial, Permanent, and Legal Separation, Nolo's Essential Guide to Divorce, NOLO.

²⁸ Ibid.

²⁹ Peires Law, LLP. "Peires Law - Toronto Family Lawyers |Separation Agreements". www.peireslaw.com. Retrieved 2016-11-08.

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consent through the judge will grant them the legal separation.

The Rwandan legislator limited the spouses to the request for legal separation by mutual consent by stating that this type of legal separation can only be admitted after five marriages.³⁰

We believe that Parliament intended to limit early separations abounding from the immaturity and inexperience of married life. For this it requires a period of 5 years to know well the happiness and constraints of marriage especially since the case is not revealed to the judge.

Factual and Legal Issues from Cohabitation in Separation

Virginia courts generally recognize in-home separations as valid. Courts realize that sometimes divorcing spouses are unable or unwilling to maintain separate households for financial, child care, or other reasons during the divorce. So how does an in-home separation work? That answer is a bit more complicated and there is no single way of doing it, but outlined below are some of the important things to consider when separating in the same home.³¹

How to Live Separate Under the Same Roof

The goal of separation is to prove to the court that you no longer are or act as a married couple. So, during an in-home separation you must live your life as though you are sharing a space with a roommate. It is critical that you maintain separate bedrooms, that you have no romantic relations, and that you not present yourself in public as a married couple (e.g. no wedding rings, attendance at events, etc.). You should also, if possible, separate personal expenses, don't take meals together, don't purchase food for each other or clean each other's living spaces or do each other's laundry, and keep socializing together inside the house to a minimum. You should also let family members and close friends know you are living separately in the same house.

A key aspect of an in-home separation is you and your spouse's mutual agreement to separate in this manner. You can avoid disputes over either side's intentions and/or the "official" date of your separation with a simple agreement in writing. Even better yet, create a clear plan with

³⁰ Tom Lutzenberger, Definition of Separation in Marriage, Our Everyday Life, December 8, 2017.

³¹ *ibidem*

your spouse on the new living arrangements so that there is no confusion for either person.³²

What to Do When Someone Breaks a Separation Agreement?

If the separation agreement has been incorporated into a court order, you can request that the court issue a Rule to Show Cause, and have the violator held in contempt for his or her actions. The court may impose different sanctions on an individual violator, depending on the nature and severity of the breach.

Is Dating While Separated Adultery?

"Adultery" means only sexual intercourse between a man and a woman. However a divorce can also be granted based on other forms of sexual contact. Before engaging in any form of sexual contact with anyone other than your spouse, even if you're separated, you should discuss the situation with an attorney to determine how your actions may affect your situation.³³

An Illegitimate Child Conceived or Born During Separation – Who Is The Legal Father?

Several years ago, I had a client who was in a very unhappy marriage. She and her husband had one child. She was the primary breadwinner and caregiver to their son, while her husband contributed little to their family, financially or otherwise. He was controlling and emotionally abusive, and so it took some time before she was able to muster the courage to leave him. She lived in fear that he would act out in some way, impeding her ability to move on, or even use their son as a weapon against her.

Eventually, my client did leave him. And, as she feared, her husband did everything in his power to keep her tethered to him. During the separation, my client developed a wonderful, loving relationship with another man. The two fell in love and planned to marry following my client's divorce. As fate would have it, however, my client became pregnant with her boyfriend's child, further complicating the divorce process.

Why? Maryland law provides that when a child is conceived or born to a married woman, there is a presumption of legitimacy for that child; the

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³³ Gadoua, Susan Pease (25 April 2010). "Can a Marital Separation Make Your Marriage Better?". *Psychology Today*

woman's husband is automatically presumed to be the child's biological father, even if the parties are separated with the intention of getting a divorce.³⁴

We now had a new concern: what impact would this pregnancy have on her divorce proceeding, and the custody of her children, both born and unborn? Would her husband try to assert custody over the unborn child, punishing my client and her boyfriend? Would her husband use the information to claim that my client was an unfit mother and that he should have primary physical custody of their son?

Fortunately, her husband did not do these things. He wanted nothing to do with the unborn child, and her boyfriend stepped up to the plate. My client's boyfriend appeared in court and testified that he was ready, willing, and able to be a father to the unborn child and that he would provide the financial and emotional support required. The judge concluded that based on the testimony, the Maryland presumption of legitimacy was properly rebutted, and the boyfriend was found to be the father of the unborn child.

Would the outcome have been different if the boyfriend had been unwilling to accept responsibility for his unborn child? Perhaps. Under Maryland law, testimony of the married woman or her husband cannot be used to bastardize a child conceived or born during their marriage. Additional evidence, such as testimony from a third party that the husband did not have the opportunity or ability to engage in sexual relations with his wife at the time of the child's conception or a DNA test result excluding her husband as the child's biological father, is necessary to rebut the presumption of paternity.³⁵

The scenario faced by a married woman who became pregnant after separation but prior to divorce is occurring more frequently as couples delay getting a divorce after their separation. If you are in this situation, whether you are the husband, wife, or the fellow who fathered the

child, you will need to know your rights and what to expect in court.³⁶

Revoking the Husband's Paternity in a Divorce

If you have a non-marital child who was born during your marriage, you and your spouse may agree that the husband will continue to be the legal parent of the child after the divorce. Or, you may want to undo the husband's status as the child's legal father.

If you are the husband or the wife, you can ask the judge to revoke (undo) the husband's paternity of a non-marital child. Either you or your spouse must file a Motion to Determine Child Born Out of Wedlock to ask the judge to revoke paternity. You can use the Do-It-Yourself Revoke Paternity Established by Marriage tool to prepare the forms you will need. If you do not file a Motion to Determine Child Born Out of Wedlock, the husband will continue to be the child's legal father.

You can file a Motion to Determine Child Born Out of Wedlock as part of your pending divorce case, or you can wait until the divorce is final. However, the judge may be less likely to revoke paternity the longer you wait to file. To learn more about how the judge makes a decision in this type of case and about the court process, go the I Need to Revoke Paternity Established by Marriage: Tools for the Legal/Presumed Father toolkit or the I Need to Revoke Paternity Established by Marriage: Tools for the Mother toolkit.³⁷

Giving Birth during Separation

A few days before the birth of her second child, Angela V. of Pennsylvania discovered a troubling fact: Although her baby's biological father was her live-in boyfriend of two years, under Pennsylvania state law, her not-yet-ex-husband — whom she hadn't been intimate with for more than a decade — was considered the baby's legal father.

"I had no idea!" Angela says. "I was talking about last names with my friends and mentioned

³⁴ Strong, B., DeVault C., & Cohen T. F. (2011). *The Marriage and Family Experience: Intimate Relationships in a Changing Society*. Belmont, CA: Wadsworth Cengage Learning..

³⁵ Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts, and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 81 (1993);

³⁶ Thomas, S. G. (2011, October 28). *The Good Divorce*. The New York Times. Retrieved March 15, 2012

³⁷ Zartler U., Heinz-Martin, V., Arránz Becker, O. (Edts.) (2015): *Family Dynamics after Separation. A Life Course Perspective on Post-Divorce Families*. Special Issue ZfF, Volume 10, Opladen/Toronto: Barbara Budrich. ISBN 978-3-8474-0686-0

that, legally, I still had my ex's last name because we had never actually divorced. That's when one of my friends told me that my boyfriend wouldn't be considered the legal father because I was still technically married. I didn't believe her at first, but it turned out to be true."

Sure enough, once the baby was born, Angela discovered that she had to have her ex sign a waiver stating that he was not the baby's biological father before she could list her boyfriend on the baby's birth certificate.

"To be honest, I hadn't even considered that this would be an issue," Angela says. "My ex and I have been legally separated for 12 years, but we were both too stubborn to pay for a divorce. I know that we should have taken care of this years ago, but I guess I'd sort of stopped thinking about it. In my mind we were divorced, even though we had never made it legal."

When she started dating her boyfriend two years ago, Angela told him she was separated but not legally divorced. Still, when the two discovered Angela was pregnant, the last thing on their minds was the legal status of the father.

"When I called my ex and asked him to sign the waiver, I thought he was going to have a heart attack," Angela says. "He texted me all day, to make sure he wasn't going to be responsible for another man's baby. If I'd known, I could've warned him. But, on the bright side, this did prompt us to go ahead with that divorce!"

Angela's situation is not as unusual as it might seem. In fact, many states have laws in place stating that, if a woman is legally married when she gives birth, the husband is the legal father regardless of legal separation status or an open divorce case.³⁸

The Effects of Legal Separation

Separation, which results in the suspension of the duty of cohabitation on its own, cannot occur on its own, it will be followed by various consequences: for the spouses, for the children and for the property.

³⁸ Jacob Mincer & Solomon Polachek, Family Investments in Human Capital: Earnings of Women, in NAT'L BUREAU OF ECON. RESEARCH, ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN, AND HUMAN CAPITAL 397, 415 (Theodore W. Schultz ed., 1973), available at <http://www.nber.org/chapters/c2973.pdf> (noting that increased time spent at home results in a "net depreciation of earning power")

Effects of Legal Separation against Spouses

The legal separation can end in divorce. In this regard, there are two different scenarios:

First, the divorce may be pronounced, because of the new facts that have occurred since the legal separation was pronounced. The successful spouse may invoke both the later and pre-separation facts and file for divorce.³⁹

It is also not excluded that, between separated spouses, the divorce will be pronounced on the spouse's joint request. Similarly, one may file for divorce if the legal separation has lasted three years since the transcript of the judgment admitting the legal separation⁶⁷.

In conclusion, we found that the concept of cohabitation is used in the civil book code first as a duty that falls to the spouses because once married, the spouses form a community of life. For different reasons, this community of life can be interrupted above all by the legal separation, which suspends the duty of cohabitation. Nevertheless, separated spouses can meet and sometimes the woman can conceive a child a child, resulting in problems of disavowal of paternity as well as the cause of the complete dissolution of the marriage.

PERSPECTIVES FOR THE LEGAL MANAGEMENT OF COHABITATION OF SPOUSES IN LEGAL SEPARATION

The legal separation of the spouses assumes that there has been a judicial decision by the competent court, allowing each of them to have a separate residence. Therefore, cohabitation is impossible even if the marriage persists.

The suspension of the duty of cohabitation is understood, in the broad sense that the spouses no longer share the common life, they no longer have the same vision and the disagreement is unrelenting, seeing these kinds of situations and to maintain their safety, the judge orders a separate dwelling for them. In the narrowest sense, the spouses do not have sexual relations because the environment in which cohabitation was to be carried out no longer exists.

However, separated spouses may meet in a variety of settings, such as work, parties, conferences or ceremonies. In such situations,

³⁹ Maaïke Voorhoeve (2013). "Divorce. Historical Practice". *The Oxford Encyclopedia of Islam and Women*. Oxford: Oxford University Press. doi:10.1093/acref:oiso/9780199764464.001.0001

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the spouses are together for a non-short interval so that the anguish and causes that stimulated their separation can be momentarily forgotten.

The feelings of love can then awaken and remind them of the good times of their marriage and their engagement and push them to have sex. After these transient holidays, they retain their state of separated and in many cases do not resume the common life. This unexpected cohabitation causes many problems especially in case shall not be followed by the resumption of life together, the woman can conceive a child, become pregnant as a result of this sexual intercourse made on an ad hoc basis.

The first question that remains in our brief is to characterize this cohabitation. Even if the spouses are still married, the cohabitation was suspended by the judge either at the request of one or the other or at their joint request. How then can we describe the so-called cohabitation? Is it adultery? A free union? Or the resumption of life together?

Qualification Approach

Depending on the state in which the spouses live, their cohabitation may appear in different aspects: adultery, free union or resumption of common life. Under this section we will analyze and make a comparative approach to such cohabitation with the last three elements mentioned above.

Cohabitation Described As Adultery

As defined, cohabitation is an obligation to have sexual relations with one's spouse. The problem is what quality the cohabitation of the spouses in legal separation will have. Some people believe that the cohabitation of spouses in separation is adultery.⁴⁰ To deal with this kind of thinking, we will first analyze the notion of adultery.

Definition of Adultery

Adultery is a violation of the duty of fidelity arising from the intimate and monogamous nature of marriage; it is an absolute cause of legal separation.⁴¹ Adultery must have a material element that involves a sexual union with a person other than one's spouse as so well prescribed by art. 353 C .p.

For the intentional element, consent must be free. In other words, the parties must have

wanted this sexual intercourse independently of any pressure or violence. If this consent is tainted, adultery will not be considered a cause of divorce or legal separation.⁴²

Under Rwandan law, adultery is considered an offence. But it is judged differently depending on whether it is the man or woman who has violated the duty of fidelity. Article 354 CP stipulates that a woman found to be in adultery will be punished with imprisonment from one month to one year, while the husband will be punished with imprisonment from one month to six months. With the draft revision of the penal code, this differential treatment between men and women will be abolished.

Conditions of Adultery

For adultery to be found, the accused must be legally married to a registrar and be unfaithful to his spouse. Second, the spouse must have had a sexual relationship with someone other than his or her spouse. This is what is referred to in criminal cases as a material element of the offence of adultery. As long as sexual union is not consumed, there is no adultery. Mere attempts and licentious behavior do not constitute adultery.

Finally, the consent of the person who committed adultery must be free and thoughtful. As a result, the simple defect of consent, rape, the state of dementia prevent the characterization of this sexual union as adultery.

he analysis of the concept of adultery allows us to affirm that spouses in legal separation who meet sexually for various reasons, i.e. during a baptism party of a child and a birthday, do not commit adultery for reasons Following:

First, spouses who have cohabited even though the duty of cohabitation has been suspended by the judge remain married. The first element constituting adultery is the fact of being unfaithful to one's spouse, and both have the status of the bride and groom among themselves. There are therefore no breaches of the promise of fidelity. The offence of adultery assumes the prior existence of the marriage contract or the legal separation has not dissolved the marriage.

The spouses have not fallen into infidelity, their cohabitation is between them. Even if they did not respect the decision of the judge who

⁴⁰ Meyer, Cathy. "Issues Surrounding a Contested Divorce". *About.com*. Archived from the original on 13 November 2013. Retrieved 10 September 2013.

⁴¹ Ibidem

⁴² San Antonio Divorce Center. "Comparative Rectitude". Archived from the original on 2014-10-29.

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pronounced the legal separation, they did not violate the duty of fidelity. It would therefore be a wrong reasoning to think that they committed an offence of adultery while their marriage remains.

Second, the offence of adultery requires a free intention of the spouse who intended to act voluntarily and freely with a person other than his spouse. The analysis and determination of the cohabitation of the spouses in separation from the body into adultery would be impossible because the two spouses did not have the guilty intention of violating their duty of fidelity. We therefore say that the cohabitation of spouses in separation is incompatible with adultery.

COHABITATION DESCRIBED AS A FREE UNION

The cohabitation of spouses in separation can also be reconciled to the free union. As a result of the definition we are going to give, we will lay the groundwork for free union and in the end we will determine the relationship between the two.

Definition of the Free Union

Free union is when a man and a woman live together without being united by the bonds of marriage. They therefore make a community of beds, tables and roofs. Free union is distinguished from marriage by the fact that marriage implies a total life and that marriage was celebrated according to the forms prescribed by law and in accordance with the conditions imposed by it.

Traditionally, free union has been defined as a man and a woman having a certain duration and stability of sexual relations like married people when they are not.

The lexicon of the legal terms defines free union as a common-law relationship characterized by a common life with a character of stability between two persons of different sex or of the same sex who live in a couple while the conjugal union has not been celebrated.⁴³

Generally, people use the term free union to present the same phenomenon that union outside marriage presenting some stability. Free union is

more intellectual because it emphasizes the intellectual element of wanting to live together without ever going through the legal proceedings. It is not subject to any formality and is above all likely to be freely broken.⁴⁴

Categories of Free Unions

The first category contains purely casual or transient relationships that do not in principle have legal consequences for partners, but often create an unfortunate situation with regard to children who are often abandoned to their single mothers.⁴⁵ Rwanda is experiencing several cases of this situation of single-parent families, which absolve fathers of their responsibilities.

The second category of free union is that marked by a stable bond, but without cohabitation, it is limited to the bed community, the same is true for some cases of creation commonly referred to as "second or third office" frequent especially urban centres."The third category of free union is characterized by a true community of life, close to marriage as a true institution. Under this point of free union we note that it is difficult to reconcile the cohabitation of spouses in legal separation with those people living in common-law relationships.

First, the free union is a common-law union while the separated have a legal union, their conjugal union has been officially celebrated.

Second, people living in a common-law relationship are more or less stable and continuous even if their union is not recognized by law.

On the other hand, the cohabitation of spouses in legal separation has no stability or continuity. Their cohabitation was mainly caused by a temporary situation of one night or a single day and sometimes of a small moment. Their cohabitation does not have a character of stability and continuity that free union possesses.

This cohabitation is very close to the first category of free union which results in occasional or transient relationships. For this

⁴³ Amato, Paul R., Jacob E. Cheadle. "Parental Divorce, Marital Conflict and Children's Behavior Problems: A Comparison of Adopted and Biological Children." *Divorce, Conflict and Child Behavior Problem* 86.3 (2008): 1140–1161. Business Source Premier. Web. 23 Nov. 2013

⁴⁴ Rodgers, Kathleen B, and Rose, Hillary A. *Personal, Family, and School Factors Related to Adolescents' Academic Performance: A Comparison by Family Structure.* *Marriage and Family Review.* V33 n4. pp 47–61. 2001.

⁴⁵ Primary Court of Busasamana, 20/05/2008, R.C. R.C.0500/06/TB/BSSMNA, unpublished

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category, relationships are occasional or transient but they are repeated.

The two partners do not reside together but they are dating, whereas the cohabitation of the spouses in legal separation has taken place suddenly, so that it will be difficult for a third person to prove their cohabitation.

People living in a common-law relationship are not subject to the obligation of maintenance and assistance, they are not bound by the duty of fidelity because there is no marriage link between them. Separated spouses are exempt from the duty of cohabitation and allow all other duties arising from marriage to remain.

The effects of free union are different from the effects of the cohabitation of spouses in legal separation. When there is a break in the free union, the court determines the fate of the assets of partners and children.⁴⁶

In a judgment issued by the Primary Court of BUSASAMANA dated 20/05/2008, a woman alleged that her husband sold the fields and went to pick up another woman. The husband left with all the property leaving the wife with eight children. The court decided that the husband must bring back these assets to support the children. In the event of legal separation, the court cannot determine the assets of the child born in the legal period of suspension, because his mother cannot prove that it is her husband who is the father of the child, for lack of continuous cohabitation.⁴⁷ Under this point, we therefore say that separated spouses are still spouses and their cohabitation does not result in a violation of the duty of fidelity, for there is no encounter with anyone other than his spouse.

The break-up between the separated spouses is the result of a judge's decision based on a case defined by law, whereas the break-up of persons united freely does not in itself constitute fault. However, compensation may be awarded by a court decision, where the breach is the cause of a fault.

Cohabitation Described As a Resumption of Common Life

After a long or short period of time, spouses in separation may decide to resume their life together. The causes that led to the loosening of

the marital bond may disappear. Or the correction of the conduct of one of the spouses who was the cause of separation, can positively change remarkably, so that the offended spouse decides to relive with his spouse and both resume their pre-separation state.

The characteristic of the resumption of common life is the continuous cohabitation of the spouses as before the separation. The separation of residence resulting from the legal separation no longer exists, the children entrusted to one or the other spouse are then in the same family environment.

What is missing with the resumption of common life is the procedure to be followed to confirm the end of the separation and mark the resumption of the common life. In my opinion, the continuous cohabitation of the spouses is enough to mark this resumption of the common life.

If the legal separation has resulted in the payment of support, on the day of the resumption of the common life, this pension ends. Only the separation of property which is the consequence of the legal separation requires a further modification of the scheme before the registrar in case the spouses want to adopt the matrimonial regime they had before the separation or another, different from the separation of property.

In concluding we say that the cohabitation of spouses in separation cannot be equated with a resumption of common life. From an intentional point of view, the spouses wanted for reason beyond their will, to make instant cohabitation, while the resumption of common life requires beforehand a period of reflection and the full conviction to resume the union Domestic.

As for the evidence, the resumption of common life is easy to prove because it is continuous. The persons surrounding the family found that the separated spouses resumed the common life as before the legal separation while the one-off cohabitation of the spouses in legal separation is well known by the two spouses only. It is difficult for a third party to say that the spouses in legal separation have had sexual intercourse that is always done in a hidden and instantaneous way.⁴⁸

⁴⁶ Edward W. Cooley, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROBS. 213, 219–20 (1939).

⁴⁷ Primary Court of Busasamana, 20/05/2008, R.C. R.C.0500/06/TB/BSSMNA, unpublished Cherlin,

⁴⁸ Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 28 (2001); Chester G. Vernier & John B.

CONSEQUENCES OF THE COHABITATION OF SPOUSES IN LEGAL SEPARATION

Any cohabitation between the spouses during the period of legal separation always has effects, either with respect to the spouses or towards the children who may be born from this cohabitation.

In The Case of a Child's Conception

Every human person is supposed to have connections to his or her parents, that is, the father and mother. While motherhood is an easily proven fact through childbirth, this is not the case with regard to fatherhood. Article 256 of the law on persons and family sets out a principle that "the child conceived during the marriage is legitimate and has the husband of his mother as his father."

Legal Status of a Child Conceived In Times of Legal Separation

The child has the right to know his parents and to be raised by them. When the child is unable to live with his parents, he is entitled to the basic care of his parents and to visit them whenever he wants, however it undermines his safety and that of the country. As long as the child has not yet reached the age of six, he must live with his mother without this being contrary to the child's interest.

The child has the right to know his parents, he has the right to be raised, educated and cared for by them. The child conceived during the period of legal separation is either legitimate or illegitimate.

Illegitimate Child

The bond of motherhood is established with ease, but this is not the case with regard to fatherhood, as it is presumed and sometimes skepticism may arise with the consequence of demonstrating by any means that a particular child is not the fruit of his or her presumed to be his presumptive father. The paternity challenge exercised by the alleged father leads to illegitimate parentage in the child's head.

THE FOUNDATION OF THE CHILD'S ILLEGITIMACY

Under this point we want first to recall that the legal separation is a decision of the judge and suspends for the spouses the duty of

cohabitation. We have tried to demonstrate previously under what circumstances separated spouses may meet, making it difficult for a third party to prove that the spouses once cohabited after their separation.

It is of course that, in the absence of the husband's good will to admit paternity, the wife will not be able to demonstrate by civil means that her husband is the author of her conception. With this in hand, the husband can challenge the paternity that the law grants him. In this case, the child remains illegitimate.

The disagreement between the spouses was the cause of the separation, and on the basis of one of the statutory causes or their consent, the judge granted them separation. He suspended the duty of cohabitation for them. But the judge, in accordance with the provisions of the law, did not dissolve the marriage so that the duty of fidelity remains between the spouses.

Normally, no cohabitation is tolerated as long as the spouses have not resumed life together. The instantaneous and transient cohabitation of the separated spouses is contrary to the judge's decision because the effect of separation is the non-cohabitation of the spouses. This will make it difficult for the mother to prove that the child conceived is her husband's. The husband's admission of paternity will only result from his good will, especially since he is protected by a judgment of legal separation where he is exempted from cohabitation.

This is where many women become victims. This issue is very similar to that of women in de facto separation. The husband completely denies their part in the birth of children born in such periods.

For example, the District Court of GIKONDO (currently the KAGARAMA Primary Court) refused to grant paternity to the child of NYANDWI due to the lack of evidence of cohabitation: "There is no evidence that the resumption of life together with the spouse."⁴⁹

During my internship at the Legal Aid Clinic of the Faculty of Law of the National University of Rwanda, I found that these kinds of questions are numerous.

The main causes of these paternity challenges are based mainly on the refusal of the charges for the maintenance of the newborn and the

Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 197 (1939).

⁴⁹ Primary Court of GIKONDO, 17 August 2005, M.c/k., judgment no R.C. 512/05/TD/KRO, non published.

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determination not to resume life together with the separated woman.

Presumption of Woman's Infidelity

Since it is not easy for the woman in separation to show that it is her husband with whom she had sex that is the cause of her pregnancy, there is nothing to prevent anyone from thinking that the woman has been unfaithful to her husband.

Thus, on the basis of this pregnancy, the husband can file for divorce, by charging his wife, adultery which is a serious violation of the duty of fidelity.

According to Article 300 CC LI: "In the event of a judgment or application for divorce or legal separation, the husband may disavow the child born three hundred days after the judgment and less than one hundred and eighty days since the final rejection of the application or the reconciliation."⁵⁰

According to the interpretation of this article, the husband has the right to disavow the child by demonstrating that the legal separation from his wife lasted more than three hundred days. As a result, children conceived during this period of separate residence are subject to disavowal.

The de facto union between the husband and wife that took place during the legal period of the suspension of cohabitation does not protect the woman as long as she cannot demonstrate the existence of those unions.⁵¹

Reading Article

256 law on persons and family shows us that the child is the father of her mother's husband. Although the legal separation leaves to remain. This article appears to be fragile in its application because the separation has suspended cohabitation for the spouses. Therefore the child, which can be conceived during the legal separation where cohabitation was suspended by the judge, cannot be considered to be the result of the works of his mother's husband. The child is therefore subject to disavowal.

Legitimate Children

⁵⁰ AJ (1992). *Marriage, Divorce, and Remarriage*. Cambridge, MA: Harvard University Press. p. 142

⁵¹ Swarns, Rachel L. (2012-03-01). "More Americans Rejecting Marriage in 50s and Beyond". *The New York Times*. Archived from the original on 2017-06-26. Retrieved 2017-02-26.

It is very likely that the child born during the legal period of suspension of the duty of cohabitation may be legitimate, depending on the attitude of his mother's husband.

NO CHALLENGE TO PATERNITY OF THE CHILD

A husband who has not challenged the parentage relationship that results from the presumption of paternity that the law assigns to him is always presumed to be the father of the child, regardless of the period in which he was born.

Article 310 CC LI stipulates that no one can claim a state contrary to that given to him by his birth certificate and possession in accordance with that title. It appears from this section that if the husband has not brought the state challenge against the child, the child remains legitimate. The husband's inaction must be interpreted as an acceptance of the child. Thus, the Court of first instance of Gikongoro based its decision on the father's pre-death silence as proof of paternity: "found that N.ne can reasonably deny the child born to Mr. the child did not protest before his death."The law does not depart from the case law, article 282 provides that paternity may be admitted when the defendant has contributed to the maintenance, education and establishment of the child as a father. It should be noted that the separated spouse may, during this period of separation, continue to provide support to his wife who has even gave birth to another child. This continuation of the delivery of child support involves the maintenance of the newborn. The Kigali Magistrates' Court in its judgment of 09 July 1997 said that the disavowal of the child is exercised only by his father, and the illegitimacy of the child born to two legally married parents is not presumed. Only the father has the right to exercise the action in disavowal of paternity. That is why this court ruled that "the NY child. k. remains among the successors because, throughout his life, k. has not brought an action in disavowal of paternity against NY.⁵²

RESUMING LIFE TOGETHER

The resumption of life together despite the woman's conception of a child is a sign of the reconciliation of the spouses in separation from the body. It is the best way for the husband to

⁵² T.P.I. of Gikongoro, 20 January 1970, in R.J.R.,1981/1 p.195

accept the legitimacy of the child. Once the spouses manage to forget the causes of their separation and resume cohabitation, this gesture is a sign that the child born may have legitimate parentage. Reconciliation of the separated spouses goes with the resumption of the common life or the resumption of the duty of cohabitation which has been suspended by the legal separation. It is very likely that separated spouses who may have lived together on their own will may also be able to reconcile. Their feelings of carnal love, which reappear and lead to cohabitation, can also lead to their reconciliation. As a result, the child born in the legal period of suspension of the duty of cohabitation is automatically legitimate.

Evidence

It is also very important to provide evidence from the husband who wants to disavow the child in order to convince the judge to grant him what he asks for. In turn, the child must also have complete evidence to justify his paternal relationship with the husband in question.

Proof of the Child's Illegitimacy

We have already had the opportunity to point out that a child's legitimacy rests on the duties to which his parents are bound to each other as spouses. These duties, among others, are fidelity and cohabitation. The legal separation of the spouses assumes that there was a judicial decision made by the competent court, allowing each spouse to have a separate residence during the legal separation because the climate in the household no longer allowed them to live under the same roof. Therefore, when spouses have separate residences, the presumption of paternity can be easily reversed, i.e. the chances of a child having a legitimate parentage are lost or have become weaker, for although marriage the duty to cohabitation no longer exists. Indeed, the law allows the husband to disavow the child born during a period of legal separation of the spouses, because although they do not live under the same roof, the duty of fidelity remains. It should be noted that the legitimacy established by marriage is overturned by the action of the husband. The evidence of the child's illegitimacy for the husband is to show that the conception of the woman took place during the legal period of the suspension of cohabitation. These being so to prove through the judgment pronouncing the legal separation.

Evidence of the Child's Legitimacy

The first step for the child to establish paternity is to start from the presumption *pater is quem nuptiae*, the general rule that all children born to a married woman are always presumed to be those of their mother's husband. Nothing prevents the separated body woman always remains married, so that the children born during the period of legal separation always remain the children of the separated man until the proof to the contrary.

Evidence Based on Presumption of Paternity

The Rwandan civil code has adopted, the presumption of Roman law: "*pater is quem nuptiae demonstrant*". This is an essential rule of marriage; it could be defined as the union that gives full rights to the man, the children of the woman or as the desire expressed by the man to accept in advance as his own, all the children that the woman will put to the world. The presumption of paternity is not considered in the same way, according to the views of several authors. Some believe that the presumption of paternity is a better proof of paternity,⁵³ and others that it is a substantive rule which is justified by the idea of family security and solidity. It thus remains a fundamental effect of marriage.

Thus, the presumption of paternity as the best evidence is based on two principles in this case, the presumption of fidelity and that of cohabitation of the spouses, as well as the presumption based on the husband's anticipated willingness to recognize unborn children of his wife.

Evidence Based on the Presumption of Cohabitation

We have to show that the parents had a community of married life. According to G. CORNU, the community of life assumes that the marriage is consummated.

When the child is conceived and born in marriage and the spouses live together or do not live together by allowing marriage to survive, in this case the paternity of the child is based not only on marital duties, but on the reality of the community of life which presumes the carnal agreement of the spouses.⁵⁴

⁵³ Peires Law, LLP. "Peires Law - Toronto Family Lawyers | Separation Agreements". www.peireslaw.com. Retrieved 2016-11-08.

⁵⁴ CORNU (dir.), *Vocabulaire juridique*, 7^e éd., revue et augmentée, Paris, PUF, 1988, p. 13.

However, where the child born during the marriage was conceived before the marriage, the presumption of paternity does not connect to the duty of community of life or the duty of fidelity that does not yet exist, it becomes a presumption of fact that is easily overturned.⁵⁵ The child who is seeking paternity, established by all means the existence of legal cohabitation between his mother and his father.

Evidence Based on Husband's Tacit Confession

This is a tacit recognition by the husband in the marriage of his wife's unborn children, which may include children born before the 180th day of marriage when the presumption of fidelity and cohabitation consider these children to be non-legitimate because, even if they are conceived before marriage or during the period of slackening of the marital bond, the duty of fidelity and community does not exist.

COLIN points out that marriage is a cradle that welcomes children and that legitimate parentage is not based on the will of the husband.⁵⁶ It should be noted that the presumption of paternity remains a better means of proof notwithstanding the controversy over its merits and in particular the substantive rule which tends to guarantee the safety of the legitimate family.

The husband's silence is interpreted in his tacit admission, according to section 313 CCLI. The presumption of paternity, however, regains full force if the child with respect to the spouses has the possession of a legitimate child. As a result, this provision requires reconciliation of the spouses.

Opportunity to End Legal Separation

The relaxation of marriage can end in two ways: the resumption of the couple's common life, derived from their reconciliation and the conversion of the legal separation into divorce.

The Resumption of Life Together

If the spouses of their own free will decide to live together and thereby resume their life together on a regular basis, the legal separation ends.

⁵⁵ *ibidem*

⁵⁶ Glennon, Theresa (1999). "Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity". *West Virginia Law Review*. 102: 547. Retrieved 17 September 2017.

Doctrine and jurisprudence teach that cohabitation between spouses presupposes the possibility of sexual relations and must therefore be presented in such a way that this possibility is allowed.⁸⁹ Cohabitation is therefore understood in the sexual sense and not merely a meeting. A child conceived in such circumstances will be considered legitimate because it is derived from the works of the spouses.

On the other hand, a simple meeting of spouses in separation cannot be considered cohabitation. Thus, it was held that it was not a union that could give rise to the action in search of paternity, the fact that the spouses met in front of witnesses, in a public place, or the fact that they were going out together.⁵⁷

These facts alone were found to be insufficient in the absence of other, more significant elements to establish the possibility of intimate relationships between the spouses. It is up to the judge to decide sovereignly whether the facts alleged by the child's mother constitute a meeting within the meaning of section 300 CCLI.⁵⁸

However, an integration of the child conceived during the legal period of suspension of cohabitation in the family of two parents to their presence is a tacit admission on the part of the husband. In this case, the maintenance of the child becomes one of the factors establishing a legitimate parentage.

The Conversion of Separation into Divorce

Article 291 CC LI stipulates that after 3 years, the legal separation can be converted into a divorce at the request of the spouses.

Causes of Conversion

Before the 3-year delay if the woman has become pregnant, the husband will be able to say that the pregnancy of the woman in separation is a sign of her infidelity, probably the very cause of adultery.

Pregnancy and the birth of a child are intangible evidence of a woman's sexual relationship with

⁵⁷ Smith, Meredith (4 March 2016). "Intestate Succession Rights and Children Born Out of Wedlock". *UNC School of Government*. Retrieved 31 May 2017.

⁵⁸ C. NTAMPAKA, *Ce que la femme et la fille rwandaises doivent savoir de leur droits, V.I., la fille et la femme dans sa famille d'origine*, HAGURUKA, Kigali, p.13 tiré dans M. MUTONI, *Des problèmes juridiques des femmes divorcées*, Mémoire, Butare, 2000, p.4.

a man. We do not know whether it is her husband or not, what we do know is that the wife is separated with her husband and no longer live together so that this pregnancy leads to the presumption of her infidelity. There is, therefore, the presence of a material element, which is the sexual union with another person.⁵⁹

In these circumstances, divorce, which appears to be a sanction imposed on the offending spouse,⁶⁰ should be used, in other words the spouse who is responsible for the dissolution of the marriage. It has been instituted to this effect that the guilty spouse should lose the benefit of the support that the spouse paid him during the separation of the body and that even in the allocation of custody of the children; priority should be given to the spouse innocent.⁶¹

This is the same position taken by the Primary Court of MUKAMIRA in a judgment handed down on 01 August 2008. He held that U. failed in his duty of fidelity that a woman owes to her husband, even if the spouses were separated from the body for eight months, they still remain married and each owes the other the duty of fidelity, even if U. says that it is her husband who is the author of s has pregnancy.

The court cannot take it as truth because it does not show evidence of resumption of cohabitation. The court ordered that ND. is divorced with U. because of adultery, orders that children over 7 years of age must be kept and educated by ND. Support as ND. Pouring to U. during the separation period is suspended.⁶²

Possibility of Disavowal of Paternity

If the maternity relationship is established with ease, this is not the case with regard to paternity. This is presumed and sometimes skepticism can arise with the consequence of demonstrating by any means that a particular child is not the fruit of the presumed sire and therefore of his presumptive father. The father can then disavow the child.

⁵⁹ MUTONI M, *Des problèmes juridiques des femmes divorcées*, Mémoire, Butare, U.N.R., 2000, p.23

⁶⁰ *ibid*

⁶¹ RUDACOGORA J., *Les causes de divorce en droit écrit et coutumier au Rwanda*, Mémoire, Butare, U.N.R., 1977, p.32.

⁶² Primary Court of Mukamira, R.C.0117/08/T.B/MUKAMIRA rendered on 01 août 2008, unpublished

The disavowal of fatherhood puts us in touch with concepts related to fatherhood. It is then a question of studying the notions of the disavowal of fatherhood as well as the situations giving rise to its opening.

In order to carry out a study on the disavowal of paternity, especially in the case of a child born of the cohabitation of the spouses in legal separation, it is first necessary to specify what is meant by "disavowal". Thus, it will be a question of seeing the basis of the presumption of fatherhood, the notion based on marriage, and in the end we make an approach on the disavowal of a child born during the legal separation.

Definition of Disavowal of Paternity

In the terminology sense, the word "disavowal" is "the technical expression dedicated to the designer the act by which the husband intends to break the presumption of paternity that the law establishes with regard to children conceived or born in marriage."

Indeed, there is no legal definition of the action in disavowal. In doing so, the law merely states its terms of practice as well as its characters. However, the term "disavowal" has several meanings depending on whether it is considered in the colloquial language seen in legal language.

In common parlance, disavowal is the action or act by which facts known by oneself or by another are denied or removed on our behalf, or facts that are unjust to you by another.⁶³ It is a kind of re-establishment, disapproval or denial.

We agree with H. DEPAGE that disavowal is the term used by legal terminology to describe the act by which the husband rejects the paternity attributed to him by law.⁶⁴

As for G. CORNU, disavowal is the act by which the husband denies being the father of the legitimate child born to his wife and tends to override the legal presumption of paternity (in a case where it weighs on him), or by justifying all facts proper to show that he may be father.⁶⁵

It emerges from these definitions that disavowal is the action that comes from the husband he is

⁶³ J. RUBELLIN-DEVICH, *Droit de la famille*, Paris, Dalloz, 1999, p. 445.

⁶⁴ E PAGE H., *Traite élémentaire du droit civil belge*, T.I., Bruxelles, A.R.S.C., 1954,355p.

⁶⁵ CORNU G., *Droit civil : La famille*, Paris, Montchrestien, 3éd., 1993,p.296

trying to prove that he is not the father of his wife's child. Indeed, the uncertainty that hangs over true fatherhood remains wide spread, it is enough that the husband considers it necessary to exclude this presumption of paternity for the disavowal to have his birth certificate.⁶⁶

Foundation of Disavowal of Paternity

The disagreement between the spouses was the cause of the separation, and on the basis of one of the statutory causes or their consent, the judge granted them separation.

The judge's decision suspended the duty of cohabitation for them, but it did not dissolve the marriage so that the duty of fidelity remained between the spouses. Pregnancy during this period, apart from the resumption of joint life, is considered adultery with consequence the disavowal of the child.

The husband may base his disallowance action on Article 300 CC LI which states that "in the event of a divorce or legal separation, the husband may disavow the child born three hundred days after the judgment and less than one hundred and eighty days since the final rejection of (e) request or reconciliation."

According to the interpretation of this article, the husband has the right to disavow the child by proving that the legal separation from his wife lasted more than three hundred days.

Children conceived during the separate residence caused by the legal separation and which lasted more than three hundred days may be disavowed by the mother's husband.

That is why, in a paternity claim judgment issued by the Primary Court of NGOMA dated 27/06/2008, the court refused to grant paternity to H.C. because his alleged father showed the court a judgment pronouncing the legal separation from his wife.

Indeed the same court, dated March 3, 2002 granted him the legal separation with his wife and the child H. born on 26/08/2005 is not the result of his works. The husband said he was in the period of suspension of the duty of cohabitation.

The court held that the child was born three hundred days after the legal separation and that Mrs. M.G., who represents her son, gave the court no evidence of the cohabitation that

existed with her husband during the separation period.⁶⁷

The de facto union between the husband and mother that took place during the legal period of suspension of cohabitation does not protect the child until the mother can demonstrate the existence of that union.⁶⁸

The only reliable evidence is to use DNA testing, only he can establish the biological link between the father and the child born during the legal separation.

COHABITATION AS RECONCILIATION AND END OF SEPARATION ORDER

Proof of Reconciliation

Reconciliation of Marriage means that the parties to the marriage started to live separate and apart and at least one of them intended that the separation would be permanent but after that time the parties resumed the marital relationship. The North Carolina General Statutes §52-10.2 defines resumption of marital relations as follows: "Resumption of marital relations" shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual intercourse between the parties shall not constitute resumption of marital relations." While it sounds like it should be easy to prove reconciliation, it isn't always clear because the definition of "the marital relationship" is not clear.

There are two lines of cases regarding what it means to resume marital relations. The first line of cases deals with factual scenarios where the parties are in virtual agreement as to the evidence of reconciliation and the question presented is whether the parties hold themselves out as husband and wife. Apparently, holding yourselves out as husband and wife involves a bit more than just living together. There has to be "substantial indicia of cohabitation as husband and wife." In other words, were they just roommates or were they back together as a married couple? When such evidence exists, the

⁶⁶ ibidem

⁶⁷ Singer, Jana (2006). "Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption". Maryland Law Review. 65. Retrieved 17 September 2017.

⁶⁸ Strasser, Mark (1996). "Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child". University of Kansas Law Review. 45: 49. Retrieved 17 September 2017

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court may make a determination on the issue as a matter of law.

The second line of cases involves conflicting evidence such that the subjective mutual intent of the parties becomes an essential element.

So what does the subjective intent of the parties mean? Well, it means what did the parties each think they were doing? There is a partial list of things that look like reconciliation but it really depends on the facts of each case.

Reconciled

In the Schultz case, the Court of Appeals analyzed the case under the first method due to the largely undisputed facts. The Court of Appeals recognized that on defendant's return to the home,

- he kept his automobile at the residence,
- moved his belongings in,
- paid utility bills and other joint debts,
- mowed the lawn and
- Kept his pets at the residence.
- plaintiff was doing defendant's laundry,
- the parties went shopping together
- dined out together,
- filed joint tax returns together
- Engaged in sexual relations once per week for two or three months after defendant returned to the home.

In Estate of Adamee, 291 N.C. 386, 230 S.E.2d 541 (1976), Based upon this largely undisputed evidence, the Supreme Court held that the parties had, indeed, reconciled as a matter of law when:

- The wife returned to the marital residence one month after the parties entered into a separation agreement and consent order.
- The wife remained in the home until husband's death some eight months later.
- The parties occupied the same bedroom and slept in the same bed together,
- That husband told friends that they had worked out their problems.
- The parties also told their respective attorneys to stop the sale of their jointly owned property
- The parties were making plans to retire and open an antique shop together..

CONCLUSION

Throughout this study which examined the effects of the cohabitation of spouses in separation, there was found that spouses in separation from the body are exempt from the duty of cohabitation, but the separated spouses retain all other duties arose marriage.

Since it is difficult to separate completely from the one we have lived together, separated spouses can co-exist occasionally during the legal period of separation. This unauthorized cohabitation always has negative effects on the woman and the child who may be born from this encounter. It is on this issue that we have devoted our research.

We have seen that in our human and family law, cohabitation is legal when it has not been preceded by the celebration of marriage before the registrar and that there has been no court decision suspending this cohabitation.

Within the third chapter dealing with issues arising from cohabitation of separated spouses there was found out that driven by carnal instincts, the spouses in legal separation sometimes make cohabitations during these legal moments of suspension of the duty of cohabitation. To this end, they deviate from the judge's decision and the provisions of the law.

The problem that can arise is the conception of a child by the woman whom her husband refuses to recognize. If the husband disputes the instantaneous relationships made in this period, it is up to the wife to prove the existence of these cohabitations.

Cohabitation during the legal period of suspension is a violation of the law that determines the moments of cohabitation and non-cohabitation to maintain the safety of spouses and unborn children.

Nevertheless, by their agreement, the spouses can depart from the decision of the civil judge and resume cohabitation, as is the case of the resumption of the spouses' common life which demonstrates the reconciliation of the spouses. This cohabitation must be in good faith.

Otherwise, it is the evidence that will determine whether the spouses agreed to depart from the judge's decision and resume cohabitation.

The proof of cohabitation for the woman is proven by her pregnancy or by her birth. In this case, the evidence that she co-inhabited is no longer necessary, the burden she has is to

demonstrate with whom she lived with. It is clear that the husband is in better conditions by completely denying this relationship with his wife. Based on his acts, he can charge his wife with adultery, because he knows that the woman will have a hard time proving that he is the author of his child.

Therefore, the disavowal of paternity of the child born during this period is very likely. In the eyes of mainly Rwandan society, the woman is seen in a prostitute's gown. The child born is the victim of being cared for by a single parent while he was born to two legally married parents. In the face of society he is a natural child, which is shameful and shocking.

Apart from the disavowal of paternity which is quite possible, there is a complication in the characterization of this meeting of the spouses, because it is neither adultery, nor free union, nor resumption of common life. This is difficult for legal practitioners to convict the separated for derogation from the judge's decision.

With the chapter four devoted to perspectives for an effective management of cohabitation in legal separation, there was realized that the consequences of cohabitation during the period of legal separation are multiple and greatly affect the woman and the child born of this cohabitation.

In order to deal with these kinds of problems, it is necessary that the judge who ordered the suspension of the duty of cohabitation be aware of the resumption of cohabitation. If the suspension of cohabitation requires a legal procedure, its purpose should also be law and not in fact.

Otherwise the reason will be given to the one who has evidence before the judge to justify the resumption of cohabitation or not, and yet the evidence is easier to find for the husband than for the wife.

In our view, we recommend that the resumption of common life be known by the judge beforehand. The separated woman is the first victim in case her husband fails to accept that he is the author of the cohabitation observed by signs outside the woman. Cohabitation before the resumption of life together and where a child is conceived is always ineffective because the situation is always similar to that of the period of legal separation. The judge who issued the judgment authorizing the legal separation does not know the resumption of cohabitation.

Finally, we say that the force of the thing judged is a principle that applies to all decisions of the judge whose remedies have been exhausted. The opposite option to that taken by the judge must be agreed upon by the parties at trial. In our study the woman will find herself in precarious conditions, once she tries to make an instant cohabitation with her husband, it is to her that she belongs the burden of proof.

A judgment becomes a law; the parties must respect it and execute it properly. It is advisable to go through the legal procedures to avoid any consequences that may arise from a de facto procedure.

We recommend that the Rwandan government do all it can to help children who are victims of this kind of disavowal to do the DNA testing and restore the rights of these children.

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Citation: Munderere jean damascene, "The Judicial Management of Cohabitation of Spouses under Legal Separation", *Journal of Law and Judicial System*, 3(1), 2020, pp. 39-60.

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