



Analyzing “Child Born Out Of Wedlock” (“Illegitimate Child”) In The Law On Marriage And Family

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ABSTRACT

The rights of children born out of wedlock (illegitimate children) is an issue that has not been addressed adequately in law. This article addresses how illegitimate children can identify their parentage according to the law. It also, within its scope, covers the rights of out-of-wed-lock children, such as the right to identify their parentage, the procedure to be followed while identifying parents, and the relevant legislation. The article further focuses on the inheritance rights of illegitimate children and their stepparents. The article has identified some weaknesses in the laws governing the identification of parents and children. It has also discussed the shortcomings in the law dealing with inheritance and suggested some changes that would strengthen the law. Moreover, the article has also noted the challenges the requester faces while determining parents or children.

Keywords: *Illegitimate children, Wedlock, out-of-wedlock, Stepparents, Determination of parents*

1. INTRODUCTION

First, to learn and analyze the law on “child born out of wedlock,” it is necessary to learn the meaning of “wedlock”. In the Vietnamese Dictionary, the term “giá thú” (wedlock) derives from Chinese (the word “jià” (giá) means to take a husband; the word “qǔ” (thú) means to take a wife). Wedlock is the marital relationship between a man and a woman to establish a family, live together, be faithful, help each other, procreate, etc. This relationship is recognized and protected by law if it complies with the prescribed conditions. If a couple intends to break their marriage (cease living together), they must undertake the laid down divorce procedure. Wedlock is considered a legal regime. The law has specific regulations on conditions for setting

wedlock, forms of wedlock, wedlock validity, and classification of wedlock in different cases and circumstances. Or in other words, wedlock is to get married, which is recognized by law.

If the above concept is understood based on semantics only, then it is not entirely accurate. The term “wedlock” is no longer used in the Law on Marriage and Family. Lawmakers have replaced it with “marriage” as a noun and “get married” as a verb. However, the term “child born out of wedlock” is still in use. Besides, no legal document in Vietnam defines “child born out of wedlock”.

This article posits that the law was not applied uniformly due to the distinct circumstances of Vietnamese history

(the country was divided into two regions, South and North, in 1954). The concept of “actual marriage” was introduced to create conditions for establishing a spousal relationship to ensure the rights of spouses and their common children during the war. Although the above concept was abolished in the 2000 Law on Marriage and Family, Resolution No. 02/2000/NQ-HDTP of the Judicial Council of the Supreme People’s Court stipulates that people who have been living together as husband and wife since before January 3, 1987, without marriage registration, will be deemed to be legally married. Therefore, a child born while its parents were not married on January 3, 1987, is still identified as a common child or a child in wedlock. Suppose the concept of “child born out of wedlock” has no time limit. In that case, it will lead to a deviation in the identification of subjects, leading to misapplication of the law.

From the above arguments, the concept can be concluded as follows: Children born out of wedlock (or children born outside marriage) are those whose parents are not husband and wife. Usually, a non-marital child (illegitimate) is conceived by the mother and born when she has no marriage relationship (unmarried mother). Sometimes, an illegitimate child is conceived or delivered by the mother during a marriage (married mother). Still, the Courts have ruled that the husband is not the father of such a child (except for cases where the couple was living together as husband and wife before January 3, 1987).

According to the study, it can be seen that illegitimate children, in general, and their rights, in particular, are regulated in the Law on marriage and family and are related to civil law. However, the terms used in the 2014 Law on Marriage and Family and the 2015 Civil Code are inconsistent. Specifically, in the fourth part of the Civil Code, the regulation on inheritance only refers to the term “stepchildren” and the provisions on the inheritance rights of stepchildren. Hence, the reader may wonder whether there is any difference between “stepchildren” and “children born out of wedlock”. A “stepchild” is a child of either a husband or a wife from another relationship. A stepchild may be a child born to a spouse before

marriage (from a previous relationship or to a married spouse who has had a child outside of marriage). It may be a stepchild of the wife if it is born during the marriage period. Also, Vietnamese Courts have determined that in cases where a married woman conceives for another man while already married, her husband is not the child’s

On the other hand, if a competent court determines that a married man fathered/sired a child outside marriage, then he will it will be his stepchild. Hence, for a man, the stepfather-stepchild relationship can be either in or outside marriage.

Comparing this concept with the abovementioned concept of the “child out of wedlock”, we can easily recognize the differences. The concept of stepchildren implies that the child is born during or outside the marriage so that the child may be biological or adopted. A child out of wedlock is defined as a child born between biological parents who are not married. Therefore, we can affirm that the concept of a stepchild is a category that includes an out-of-wedlock child. However, the applicable law should provide guidance documents stipulating the above concepts to create uniformity during trials.

2. The Rights Of Out-Of-Wedlock Children In The Law

The general principle of non-discrimination in Article 2 of the 1989 Convention on the Rights of the Child (CRC): “States Parties shall respect and ensure the rights outlined in the present Convention to each child within their jurisdiction without discrimination of any kind...” is specified as follows. From general principles to specific regulations in Vietnam, equal rights and obligations between child subjects (whether children born in or out of wedlock) are maintained. According to Clause 2, Article 68 of the Law on Marriage and Family 2014, “children born regardless of their parent’s marital status all have the same rights and obligations toward their parents...”. From the above regulations, we can understand that children born when parents have a legal marriage relationship and children born when parents do not have a legal marriage

relationship are entitled to the same rights and obligations. Next, “Rights are legal science concepts used to refer to the things that the law recognizes and ensures the implementation by each individual...”. Therefore, the concept can be stated as the rights of the out-of-wedlock children are also legitimate rights and interests that the out-of-wedlock children are recognized by law, specified explicitly in Article 70 of the applicable Law on Marriage and Family.

This article will focus on the right to acknowledge the father, mother, or child and the inheritance rights. The right to determine parents and children is one of the most sacred rights under natural laws and social ethics, and it is recognized by law. This recognition ensures that the legitimate rights and interests of the father, mother, and child are safeguarded and resolves disputes over upbringing, support, and inheritance. In addition, after completing the legal recognition of father, mother, and child, illegitimate children naturally have their legal rights, typically the right to inheritance. Also, these two rights have a lot of inadequacies regarding the subject’s rights.

2.1 The right to identify father, mother, and child of illegitimate children in Law on marriage and family

2.1.1. Identification of children

Acknowledging a child is a matter raised by a person claiming to be the biological father or mother of a person as opposed to the father or mother who wishes to admit or deny that a person is not his or her child. According to Article 89 of the 2014 Law on Marriage and Family, “1. A person who is not recognized as the parent of a person may request a court to identify that the latter is their child; 2. A person who is recognized as the parent of a person may request a court to identify that the latter is not their child.” Therefore, the identification of a child’s father or mother has two perspectives.

In the first case, “A person who is not recognized as the parent of a person may request a court to identify that the latter is his/her child.” The above provision means that a person who is not the father or mother of a person in the manner of identifying a child’s parents prescribed by the law

on marriage and family is entitled to request the Court to identify that particular person as their child. In this case, the requested person is a child of another father; therefore, the request implies a double requirement. The first is to recognize that the child is the common child of the requester and the person acting as a mother. The second is to reject the status of the person who the child refers to as the father. Suppose the identified person is the mother of another person. In that case, she has the right to request the Court to determine that she is the biological mother of that person. Suppose the requested person identifies as the child of another mother. In that case, this requirement implies acknowledging an exchange of the child at birth or an admission of the lost child.

In the second case, “a person who is recognized as the parent of another person may request a court to identify that the latter is not his/her child.” Cases requiring denial of a parent-child relationship are fewer than cases requiring acknowledging a parent-child relationship. It occurs when the person acknowledging the father or mother has confusion, misunderstanding, or other illegitimate purposes, such as impersonating the relationship for profit regarding property, reputation, social welfare, etc.

It can be seen that this is a provision of the law to build a complete legal framework for marriage and family relationships. In practice, bringing a case to Court to identify a biological child (or not a biological child) when they are not acknowledged (or is acknowledged) seldom happens. In the above cases, the parent usually proactively requests the Court to determine whether a person is their child. The article will deal with some of the existing exceptions in the following section: “A person is entitled to ask for the identification of father, mother, child in case of an out-of-wedlock child.” When requesting the Court to determine whether or not a person is their child, the requester, under the provisions of the civil procedure law, shall be obliged to provide legal evidence proving the relationship between them and the requested person to determine whether the latter is their child. Based on the evidence provided by the requester, the Court shall issue a decision to recognize or reject

the petitions of the involved parties. However, this is also a legitimate right of a person to verify and clarify the truth, contribute to stabilizing social relations, and ensure the interests of subjects in terms of relations.

2.1.2. Identification of parents

Identification of parents is a sacred right of every person. The fact that a person has no father or mother or does not know his/her father or mother is a loss and disadvantage that cannot be compensated physically and mentally. Therefore, identifying parents is a legal regulation that protects the rights and interests of the subjects in that relationship and has a deep human meaning under social ethics. Therefore, even in cases where the father or mother has died, the child still has the right to determine his/her relationship with the deceased. Identifying a child’s father or mother is understood as identifying the child’s father or the child’s mother. The right to identify parents means that a person claiming to be another person’s child may request a court to identify them as such person’s child. According to the provisions of Article 90 of the applicable Law on Marriage and Family, “A person has the right to recognize his/her parent even in a case where the parent has died; An adult may recognize his/her parent without the consent of the other parent.” This, however, seems to be a sensitive issue:

A. Identifying a child’s father

Suppose the person is required to be identified as the biological father while the person requesting to be acknowledged as a common child of two other persons. In this case, the request implies a double request: The first is to deny the status of the person who is currently identified as the father of the applicant; the second is to acknowledge the out-of-wedlock physical relationship of the person who is the mother and the person who is being asked to identify as the biological father. A person's determination as a child’s biological father means that he must perform the obligations prescribed by law to the child. Therefore, it is not always the case that fathers of children born of wedlock (parents do not have a legal marriage relationship)

acknowledge them voluntarily. Sometimes they are made to take up responsibility forcibly through administrative procedures. Therefore, at the request of the persons concerned, it is common to determine the child’s parentage to the laid down according to judicial procedure. The conditions necessary to carry out the identification of the father of the child according to the judicial procedure include such conditions as lack of consensus between the parents of the child, non-existence of a legal marriage relationship, the dispute over the father of the child when the alleged biological father does not recognize the child born by the woman as his child.

B. Identifying the mother for the child

This usually happens when the mother gives birth to a child, and then because of one reason or another, the child is lost, or the mother deliberately leaves the child, and then later, she wants to take the child back. The child must be identified through judicial procedures to determine the mother in these cases. This requirement involves identifying that a fraudulent exchange or someone picked up the abandoned child and accepted it as their biological child. In Court, the woman must show evidence that she is the one who gave birth to the child she wants to adopt. The evidence presented by the woman may be documents proving the mother-child relationship or having specific witnesses confirming the mother-child relationship of the woman and the child, such as the results of a medical examination, etc. The Court can determine or deny the woman as the child’s mother by verifying the evidence.

Usually, in special cases, the person who requests the identification of the father or mother is the child or some other agency or organization. In addition, there are cases where a woman gives birth, but the man declared as the child’s father declines to acknowledge the child. In such a situation, the woman has the right to file a petition in court seeking to compel the man to acknowledge the child as his. When making a prayer for the Court to identify the man as the father of the said child, the woman is the plaintiff. In principle, the plaintiff, the child’s mother, is

obliged to prove that the defendant is the child’s father. When determining the case, the Court shall check the evidence’s authenticity.

In addition, there are cases where “the adult son receives the father, without the consent of his mother or receives the mother, without the consent of his father”. This new regulation came into force with the promulgation of the 2000 Law on Marriage and Family and affirms the right of adult children to make independent decisions regarding recognising their parents. The regulation recognizes and respects the right of adult individuals to think, decide and master their behavior independently. Moreover, the empowerment of the child to decide without depending on the father or mother’s consent to avoid the obstacles that come from parents due to conflict or prejudice against each other. These obstacles are primarily a result of selfish parents who do not want the child to establish official relations with the other parent affecting the child’s emotional life and legitimate rights.

In summary, after analyzing the right to identify parents and children, it is evident that the law’s provisions on this issue are fully consistent with the tradition of social ethics. The provisions also protect the legitimate rights and interests of the subjects in determining parents and children. In addition, although the rights have increased compared to previous laws, the current regulations have not harmonized the parties’ interests. While parents have the right to or not to receive their children (Article 89), the child only has the right to adopt their father and mother (Article 90). Legally, suppose a child wishes to exclude a person considered their current parent. In that case, they should be able to identify the person whose biological parent is without sidelining the parent who nurtured them.

Socially, the non-recognition of this right is aimed at preserving the traditional moral values of the Vietnamese people: “The gratitude of birth is not equal to the gratitude of nurturing”. - This value rightly elevates the parent who nurtured a child above the biological parent who may not have played any role in raising the child. In terms of jurisprudence, considering that the right to identify parents and children is a legitimate personal right, it is necessary to ensure equality

between subjects. Lawmakers should consider granting the right to identify a parent to a child to ensure full implementation of the 1989 International Convention on the Rights of the Child.

2.1.3. Evidence is the result of assessment in case of determination of parents and children

The development of modern medicine has solved many complex problems in life. The assessment conclusion referred to herein is the blood relation test (or DNA addition test) between the requester and the requested person. Through the results of DNA testing, the parent-child relationship is proven with high accuracy. Therefore, the DNA testing results are considered the most important and accurate ground for the Civil Registry or the Court to decide the relationship between the requester and the requested. Therefore, many countries’ laws have explicitly stipulated the obligation to examine DNA when addressing the requirement to identify parents and children.

Circular No. 04 of 2020 of the Ministry of Justice on “Detailing the implementation of some articles of the Law on civil status and Decree No. 123/2015 ND-CP dated November 15, 2015” of the Government deals with the issue of identifying parents and children. The circular has guidelines on how to apply the Law on Civil Status when identifying parents and children. It stipulates the administrative procedures, the documents of health agencies, assessment agencies, or other competent agencies and organizations both in the country and abroad that can certify the father, mother, and child relationship. Further, certifying the father, mother, and child relationship is one of the two grounds for recognizing the relationship. When carrying out administrative procedures between parents and children, they may agree to carry out a voluntary parent-child relationship confirmation. Then, the above provision has shown the simplification of evidence identifying parents and children to create favorable conditions for the registrant and the civil status officer.

On the contrary, when the voluntary DNA test results are being used as evidence for judicial procedures, the civil procedure law only

stipulates its common name as “Expertise Conclusion”. Therefore, we can determine the subject of the DNA testing is not necessarily bound to be the father or mother but can also be the father’s relatives - the mother or their children. However, in many cases, people required to have a DNA test exercise the right to refuse a DNA test in Court without giving a good reason. Refusal of DNA testing upon request is common in the legal practice of countries. At the same time, DNA testing between the dead and the living is now quite common practice (especially to prove blood relations as a basis for inheritance). However, Courts usually do not accept this request if the deceased’s family does not agree to the exhumation. For example, Judgment No. 1393/201/HC - PT dated November 23, 2012, of the People’s Court of Ho Chi Minh City. Ho Chi Minh City: At the appellate level, Mr Minh Tam requested the exhumation of Mr Luc and Ms Thanh for evaluation related to his bloodline. However, the above request was not approved by the relatives of Mr Luc and Ms Thanh, so the appellate level has no basis for accepting this request. Respect for the deceased is still considered a value worthy of protection. In terms of tradition and society, exhumation is a measure that is minimally limited when done.

Therefore, the identification of blood relationships can be replaced by DNA testing of siblings or other relatives, and the results of DNA testing can be considered acceptable. The applicant should provide other relevant evidence (photographs, letters, witnesses, etc.) instead of asking for an exhumation to confirm DNA. Besides, suppose the deceased leaves the parts that allow the DNA test. In that case, we should still allow the examination of genes to determine the bloodline of the living to respect the right to protect the parentage of each individual.

According to current regulations in Vietnam, DNA testing procedures have been prescribed as grounds to prove the relationship between the father, mother, and child. However, there are currently no legal documents regulating the sequence and procedures of genetic testing to prove the requirements for determining blood relations. In addition, everyone has the right to the inviolability of the body, protected by law in

health, honor, and dignity. Therefore, the decision to take a DNA test should depend on the free will of the person being asked. So in practice, DNA testing is critical to prove a blood relationship. Still, it is not the only basis for the Court to rule on the parent-child relationship. However, suppose there are cases where the person requesting genetic testing refuses to cooperate. In that case, the Court shall use the evidence flexibly to protect the rights and interests of the subjects concerned.

2.1.4 Jurisdiction, order, and procedures for identification of parents and children of illegitimate children in the law on marriage and family

From a legal perspective, the concept of parentage is always associated with certain legal facts. The relationship between parents and children is legally binding only when certified by a competent state agency. That is, biologically - socially, achieving a parent-child relationship as a biological father, mother, and child is possible. The legal procedure for identifying parents and children officially recognises this status. Thus, as a legal relationship, the identification of parents and children is the social relations arising in the search process and the identification of the father, mother, and child in terms of the bloodline of subjects regulated by legal regulations. When there is no legal marriage relationship between the child’s father and mother, the determination of a child’s parentage, in this case, is conducted according to two types of procedures: administrative and judicial. Based on the nature of the parent-child relationship, whether there is a dispute or not. If there is a dispute, it is the basis for determining the competent authority to determine the parentage.

2.1.4.1. Administrative procedures

According to administrative procedures, recognizing children born out of wedlock by administrative means is a right that parents can exercise. For cases where the illegitimate children seek to voluntarily determine their parents, and there is no dispute, the administrative procedure to be followed is determined at the civil status registration agency.

Specifically, the competent agency for settlement is the commune People’s Committee (Commune, ward, or town People’s Committee), the place of residence of the person who recognizes or is recognized as the parent or child.

There being no specific law, it is difficult to determine whether there is a dispute in the relationship because it is impossible to determine which dispute arises between which subjects. According to Assoc. Prof. Dr Nguyen Ngoc Dien, the phrase “no dispute arises” is understood as:

- The admitted person must not have been identified (according to judicial procedures) as the child of another person of the same sex as the petitioner, according to a legally valid judgment;
- The admitted person must never be recognized (according to administrative procedures) as the child of another person of the same sex as the person whose claim is determined;
- The person admitted is not presumed to be the common child of the husband and wife according to Clause 1, Article 88 of the current Law on Marriage and Family;
- The admitted person does not bear the illegitimate child status of a person of the same sex as the applicant, as evidenced by the birth certificate and biological factors.

a. Regulations on the order and procedures for registration of receipt of parents and children include:

- Persons requesting the registration of parents or children shall submit declarations according to the forms and evidence proving the relationship between father-child or mother-child to the civil status registration office, including:
- Documents of health agencies, assessment agencies, or other competent agencies or organizations in the country or abroad certifying father-child or mother-child relations.
- Suppose there is no evidence proving the parent-child relationship as prescribed above. In that case, the parties receiving the parent-child relationship shall make a written

commitment to the parent-child relationship. The civil status registration agency must clearly explain to the person making the written declaration of the responsibility and the legal consequences of an untruthful declaration. At least two people must have testified about the parent-child relationship.

- The two parties must be present when registering to receive the parents and children.
- Within 03 working days from the date of receipt of sufficient documents as prescribed in Clause 1 of this Article, if it is found that the receipt of parents and children is correct and there is no dispute, the civil servant of justice – civil status shall record in the civil status register. Then the person registering the receipt of parents and children signs the civil status register and reports it to the Commune People’s Committee Chairperson for an excerpt to the requester.
- In case it is necessary to verify, the time limit may be extended for no more than 05 working days.

This regulation has shown conformity with administrative procedure reform, limiting the number of long-term backlogs and creating conditions for subjects receiving illegitimate children. However, due to time constraints, there is pressure on civil status officials to verify whether disputes arise or not. S

b. Effect of recognition

According to the current law, only the administrative procedures for civil registration and the legal validity of civil registration transactions, including confirmation of parents and children, are outlined in the law. However, it can be thought that due to being a very conscious process, identifying parents and children establishes convincing evidence about the relationship between parents and children, even more convincing than the birth certificate. It is like a statement about the existence of the relationship of the previous subjects to everyone. However, the proof of the father, mother, and child relationship admission can be overturned by other, more compelling evidence. Even so, the denial of admission must be made within the framework of a civil case.

2.1.4.2. According to judicial procedures

If the father or mother does not acknowledge the child (the two parties have a dispute), the child or the child’s representative or an agency or organization recognized by law may request identification by judicial means. Identification of parents and children according to judicial procedures means the settlement of civil cases of the requested subjects by competent agencies-courts. The determination of parents and children according to judicial procedures is based on the Court’s judgment. The right to identify the involved parties (father, mother, and child) shall be respected and protected by law.

- Competent agencies: The procedure for initiating a lawsuit is stipulated in the 2015 Civil Procedure Code; the person with the right to initiate a lawsuit must file a lawsuit petition at the district-level People’s Court, including the district, town, provincial city, or their equivalent at the place where the defendant resides and is obliged to prove their claim.
- The lawsuit dossier includes the following:
 - A petition;
 - Identity card of the plaintiff and defendant (certified true copy);
 - The defendant’s household registration book, written confirmation of the defendant’s place of residence;
 - The copy of the birth certificate of the child to be identified (certified true copy);
 - Documents and evidence to prove the relationship of father, mother, and child (certified true copy);
 - Order and procedures for settlement;
 - To file a petition and related documents and evidence to the competent Court for settlement.
- Within three working days of receiving the petition, the tribunal president of the Court shall assign a judge to consider the petition (Clause 2, Article 191 of the 2015 Civil Procedure Code).
- Within five working days from the date of assignment, the judge shall consider the petition and issue one of the following decisions: request for amendment and supplementation of the petition; accepting the case; transferring the petition to the

competent Court; or returning the petition and clearly state the reason (Clause 3, Article 191 of the 2015 Civil Procedure Code).

- After accepting the case, the Court shall conduct the trial preparation process within four months from the acceptance date. If the case is complicated or due to force majeure or objective obstacles, the Court may decide to extend the time limit, but no more than two months.
- In case of disagreement with court judgments or decisions, the involved parties may appeal according to appellate procedures within 15 days from the date of judgment pronouncement.

The Court shall settle the marriage and family case within four months. If the case is complicated, it may be extended for an additional period but not exceeding two months. Within trial preparation, the Court shall issue one of the following decisions: to suspend the case, terminate the case, or bring the case to trial. Within one month from the issuance date of the decision to bring the case to trial, the Court shall open the court hearing. In case of legitimate reasons, this time limit is two months.

These provisions have essentially met the general requirements in terms of proceedings. However, sometimes, courts find it difficult to determine the evidence. For example, documents such as letters, photos, etc., cannot be certified by competent authorities.

- Statute of limitations for initiating lawsuits Because this is a personal rights dispute, the applicable law does not provide a statute of limitations for lawsuits arising from father, mother, and child-related disputes. It seems that according to the legislation, due to the relationship of father, mother, and child based on biological facts, it is unreasonable to set a statute of limitations for initiating a lawsuit on the dispute about this relationship. Why do lawmakers recognize the right to identify the father, mother, and child as a personal right? In the provisions of the applicable law, the right to recognize the father, mother or child, as well as the right to deny parentage, are rights associated with the identity of the right holder. Except for those listed by law, no one else can exercise that right on behalf of the person entitled.

The validity of determining the relationship of father, mother, and child is considered retrospective and relative. The biological parent-child relationship is assumed to be defined or denied as required. In accordance with the biological truth, the relationship of the biological father, mother, and child will be generated or denied from the child’s date of birth. Consequences that may arise:

- If the biological parent-child relationship is established, the involved parties are considered to have rights and obligations towards each other from the child’s date of birth.
- If the biological parent-child relationship is denied, the involved parties are never considered to have rights and obligations towards each other.

By law, however, parental-child relationships determined or denied by judicial means have no absolute value and may be denied or re-identified once more conclusive evidence is presented in another case. Once again, we are faced with the delicate issue of prescription.

Proceedings in case the requester for the identification of the father, mother, or child dies

According to Articles 90 and 91 of the 2014 Law on Marriage and Family, children can apply to identify their father or mother even if the father or mother has died. At the same time, parents have the right to acknowledge a child, even in the event of the child’s death. On the other hand, the person recognized as the father or mother of a person has the right to request the identification of that person who is not his or her child, even in the event of the person’s death. A person recognized as a child has the right to request identification of a person recognized as the father or mother, not his or her father or mother, even if the latter has died.

In the above cases, relatives of this person have the right to request the Court to identify the father, mother, and child and to perform procedures for the deceased requester. There are cases where involved parties initiate lawsuits in Court to request the identification of parents for children whose parents are deceased. The request is meant to have the court declare the deceased as

the biological parents of the child in question. However, a problem may arise if the relatives of the dead do not agree to provide samples for DNA testing, and there is no effective mechanism to determine the relationship in this case, or there are difficulties regarding exhumation.

2.2. Inheritance of illegitimate children in marriage and family law

The legal nature and general principles of children’s rights to property and inheritance, children’s rights to property, and children’s rights to inherit property are also the principles of inheritance of illegitimate children. In addition to inheriting the parent’s property grandparents, and great-grandparents based on the provisions of the inheritance law, children are also entitled to their parents’ inheritance. Regardless of the content of a will, illegitimate children have a right to inherit their grandparents, or great-grandparents property according to the law of the stepfather, stepmother, etc. The researcher will analyze the following contents.

2.2.1. Inheritance under wills

The applicable law recognizes that individuals are entitled to make a will to dispose of an estate after death. Inheritance under the will is an inheritance form of the institution of inheritance. It can be understood as transferring the property left by the deceased, according to that person’s will when they were alive, as expressed in the will, to the heir specified in that will. Article 624 of the 2015 Civil Code stipulates: “Will means an expression of the wishes of a natural person, made to bequeath his or her property to others after his or her death.” And Article 609 of the 2015 Civil Code stipulates: “Natural person may make a will to dispose of his or her estate, may leave his or her property to an heir in accordance with the law, or may inherit an estate left to him or her under a will or in accordance with the law.” Accordingly, an individual has the right to make a will to leave their property to another person and has the right to receive an inheritance left by another person according to that person’s will. This is the legal basis of inheritance under wills.

However, there are also exceptions where the illegitimate children automatically receive a share of the estate despite not being named in the will of the deceased because they have a legitimate claim to the inheritance regardless of the content of the will. Since the subject matter of the dissertation is illegitimate children, in the case where the heir, regardless of the contents of the will, is determined to be a minor child or an adult child without working capacity, the law stipulates follows:

A minor child: The time of determining the child’s age to serve as a basis for dividing inheritance regardless of the content of the will is the time of commencing inheritance.

An adult child without working capacity: This person must be incapable of working to support themselves, regardless of their economic circumstances. The person who is unable to work to support themselves can be understood as an adult at the time of commencing inheritance but suffer from mental illness or other diseases that lead to loss of cognitive ability, mastery of their behavior such as incurable diseases (cancer, chronic kidney failure, etc.); severe illness such as systemic paralysis, spinal paralysis, cervical vertebral paralysis, paralysis from two or more limbs, amputation from two or more limbs, blindness; Loss of working capacity from 81% or more. Determination of working capacity loss from 81% or more may require a certificate from a competent medical facility or forensic examination agency.

Although the content of Article 644 of the 2015 Civil Code does not specify a time to determine when an adult child is incapable of working, to protect the rights of an adult child in the above unfortunate situation, it is necessary to determine the age of adulthood based on the time of opening the will, while the status of “loss of working capacity” is based on the time of opening the will or the actual time of dividing the estate. It is because minor children or adult children incapable of working are those who cannot support themselves. Parents should be responsible for raising their minor children or caring for adult children who have lost their civil act capacity or have no working capacity or property to support themselves. But for some

reason, parents die and do not fulfill their responsibilities to their children. Still, in case parents have property, according to common sense, parents reserve the such property for their children to live on until they grow up. Therefore, parents must have the obligation “To look after, nurture, care for, protect the legitimate rights and interests of minors, adult children who have lost their civil act capacity or are unable to work and have no property to support themselves”. In case the parents do not want to leave the inheritance to their children but write a will to leave the whole property to others or leave their children less than 2/3 of the inheritance rate according to the law. Article 644 of the Civil Code 2015 stipulates that a child is entitled to at least 2/3 of the inheritance rate according to the law.

It is evident that when the provision of the heir’s property does not depend on the content of the will, the law only stipulates the minimum that natural persons are entitled to inherit without specifying the maximum level of entitlement. This rule can lead to an heir inheriting more than just an heir. Example: Mr A has no children, only one nephew. Mr A married Ms B, but the purpose of the marriage was not achieved, so Mr A asked for a divorce. While the Court was settling the divorce, Mr A wrote a will for all his private property to his nephew, and Mr A died. According to the provisions of Article 655, Ms B is still entitled to Mr A’s inheritance. According to Article 644, Ms. B (his wife) is entitled to at least 2/3 of the estate, i.e., 2/3 of the entire estate of Mr. A. Thus, Ms. B is entitled to 2/3 of Mr. A’s estate. Mr A’s nephew is entitled to only 1/3 of the estate that should have been entitled to the whole. The law should stipulate the maximum inheritance from a deceased person’s estate.

2.2.2. Inheritance by law

The origin of the inheritance relationship under the law is the relationship between people related by blood and family. It is common sense that a person dies and leaves an inheritance to his relatives. Based on the extent to which heirs are entitled to inheritance under the law, legislation has grouped these people into three levels of heirs, corresponding to the degree of closeness and kinship between the heirs and the deceased. In general, the inheritance rights of illegitimate

children are not different from other subjects. However, there are still some specific inheritance relationships in this subject. Due to the limited capacity of the article, the author only mentions and analyzes specific inheritance relationships, specifically:

Inherited relationship between illegitimate children and stepfather and stepmother

Many couples marry and live with stepchildren of one or both parties in a previous marital relationship. Therefore, the status of stepfather and stepmother living with stepchildren of the other party is relatively common. When a mother has a child and is married to another man, the relationship between her new husband and the child is determined by the relationship between the stepfather and his stepson. Similarly, the relationship between the stepmother and the stepchildren. In principle, the stepchildren cannot inherit from either of them for the inheritance of the stepfather or stepmother because there is no blood relation. There are cases where stepchildren and their stepfathers and stepmothers care for each other like they are biologically related. But there are also cases where these subjects do not have good relationships, do not take care of each other, or even have mutual emotional relationships. Therefore, in this case, the father, mother, and child relationship is not automatically determined to be the same as the relationship between biological parents or adoptive parents with their adopted children. Still, it is necessary to have conditions stipulating if the relationship between stepchildren, stepfathers, and stepmothers involves the same care as biological parents and their children. They are determined to be heirs in the first level of inheritance of each other.

According to the provisions of Article 79 of the 2014 Law on Marriage and Family, stepfathers and stepmothers have the right and duty to look after, support, care for, and educate their stepchildren who live with them. Stepchildren must also care for and support their step-parents, who live with them. Although there is no blood relationship between them, based on caring and nurturing, they also have an inheritance relationship with each other. This issue has been

mentioned in many previous legal documents, for example, in Part 3 of Circular No. 81 of April 27, 1981, of the Supreme People’s Court on Guiding disputes over the settlement of inheritance, stipulates: “The stepchildren of the deceased person must not inherit the deceased person’s estate, because there is no blood relation between them. But suppose there is sufficient evidence to establish that the stepson was loved, brought up, and cared for by his stepfather or stepmother as an offspring. In that case, the stepchild is considered a common child and should be inherited.”

Currently, according to the provisions of Article 654 of the 2015 Civil Code, “If a stepchild and his or her stepparents care for and support each other as though they were biologically related, they may inherit each other’s estates and may also inherit under articles 652 and 653 of this Code.”. It can be understood as follows: The inheritance relationship, in this case, is likely to exist in two relationships: the relationship between the stepchild and the stepfather (the relationship between the husband and the wife’s stepchild) and the relationship between the stepchild and the stepmother (the relationship between the wife and the husband’s stepchild). The basis for the inheritance relationship between the stepchild and the stepparents is caring for and supporting each other “as though they were biologically related”. The relationship of caring, supporting, and loving each other between stepchildren and stepparents can be shown: There is no discrimination between stepchildren and common children; Stepparents consider stepchildren as their children; Stepchildren express the obligations to their stepparents as to their biological parents; All expressions of care and love are shown in nature, not as a formalistic expression.

Accordingly, to enjoy the right to inherit the estate between stepchildren and stepparents, the law requires them to have a caring relationship with each other as though they were biologically related. However, when applying this regulation to solve specific cases, many different interpretations lead to the application of the law inconsistently in terms of how “caring for each other as though they were biologically related” is understood or interpreted. The law has not

outlined the criteria for evaluating “caring and supporting each other as though they were biologically related”. For example: (1) How long will it take to care for and support each other to be considered as though they were biologically related; (2) Will two parties show the act of caring or only one party (the heirs) and (3) If one party only shows this behavior, but they do not seem like they are biologically related, will they inherit according to laws? Currently, Vietnamese law has no specific regulations on this.

Therefore, the Government should issue a document guiding the implementation of Article 654 of the 2015 Civil Code. Specifically, the criteria for assessing the case are based on “caring for each other as though they were biologically related”. At the same time, these regulations must be flexible such as not requiring daily care or depending on the place of residence or having a certain level of measurement because the evaluation of “supporting and caring” also depends on the customs of each place.

Inheritance relationship between illegitimate children and siblings

Inheritance relations between siblings in the case of illegitimate children are established based on the blood relationship or marriage. The former law, the 1956 Circular No. 1742 of the Ministry of Justice, did not list siblings in the first level of heirs. The 1981 Circular No. 81 of the Supreme People’s Court, the second level of heirs also includes “siblings, half-siblings and adoptive siblings”. As for the Ordinance on Inheritance and the 2000 Civil Code on people on a level with the estate’s owner, only “siblings of the deceased” was mentioned. So, can the “siblings” of the estate’s owner be half-siblings? Previously, “in some customs, half-siblings are also considered to be outsiders because they have different surnames, then the case law has wondered how to determine the right of inheritance,” and there was an opinion that “in the current system of Vietnamese law, half-siblings are not allowed to inherit from each other.” However, when it comes to “biological” relationship, it means that they must be related by blood. Siblings are in a collateral relationship often called “generation” in the genealogy of

Vietnamese families. The understanding that to be considered siblings, they must be born by the same parents is very narrow. Suppose they are brothers and sisters related by blood or have the same maternal or paternal bloodline. In that case, it is considered “biological”. Therefore, Resolution no. 2 of the Supreme Court’s Council of Judges specified: “Siblings include half-siblings, that is, all children born by the same mother are siblings, regardless of the father.” In the same way, all children born by the same father are siblings, regardless of the mother. The stepchildren of a husband and a wife are not siblings”.

Today, when it comes to determining the status of siblings in Article 651 of the Civil Code 2015 without further explanation, the interpretation of Resolution No. 2 of the Supreme Court Council of Judges has been used. Then, with the above provisions in the Civil Code, it can be said that these people also inherit from each other: “All children born by one person are siblings.” Therefore, illegitimate children may be entitled to inheritance from their siblings or half-siblings. However, it should be noted that Resolution No. 02/HDTP has expired. According to the provisions of the 2015 Law on Promulgation of legislative documents, the documents elaborating implementation of such documents also expire when legislative documents expire. Resolution No. 02/HDTP guides the application of some provisions of the 1990 Ordinance on Inheritance, which expired on July 1, 1996, so the former has also expired.

From the perspective of comparative law, this solution is similar to the solution of foreign laws such as China’s and Thailand’s. Both countries have similarities in economy, society, and geography with Vietnam; however, the legal perspectives between the countries are different. For example, China’s 1985 Inheritance Law stipulates that the second level of heirs comprises siblings and grandparents. In particular, siblings include full-siblings; half-siblings; adoptive siblings; and stepsiblings if they care for and nurture each other as siblings. It is evident that Chinese law not only clearly defines siblings but also extends the inheritance relationship between them to stepsiblings (which may include illegitimate children) if the stipulated conditions

are met. As analyzed, according to the provisions of the Civil Code of Vietnam, siblings (full or half) belong to the same second level of heirs. Unlike Vietnam, Thailand has put these subjects on another level. According to Article 1629 of the Civil and Commercial Code of Thailand, siblings are in the third level of heirs, while the half-siblings are in the fourth one.

According to the writer, in the future, the Supreme People’s Court Council of Judges may consider issuing a Resolution guiding the application of some of the inheritance law’s provisions, including the definition of “siblings”, to ensure the uniform application of the law during trials. In addition, Vietnamese law should also consider transferring the inheritance from half-siblings to the third level (one level lower than the inheritance from siblings) as prescribed by Thai law to ensure the maintenance, protection, and development of inheritance by blood relations. Also, it should be considered to extend inheritance to the stepchildren of the stepmother or stepfather if there is a caring or supporting relationship.

3.0. Shortcomings in the regulations on illegitimate children

3.1.1. Provisions in the obligation to prove the identification of father, mother, and child

Firstly, the applicable Vietnamese law on marriage and family distinguishes the authority to resolve the request to determine the parent-child relationship in the event of a dispute or not. The determination of the parent-child relationship shall be settled according to administrative or judicial procedures upon request. In addition, there is no specific procedure related to genetic testing to justify the requirement to identify blood relations. In the past, Resolution 02/2000/NQ-HDTP has mentioned “genetic testing” when necessary. According to judicial procedures, genetic testing has not been prescribed as a mandatory legal procedure to prove a parent-child relationship. Genetic testing results are not the only basis for proving this relationship.

Secondly, about the DNA testing between the requesting person and their relatives in case the requested person (father, mother, or child) dies.

Currently, DNA testing requirements to determine the parent-child relationship between the deceased and the living are most common to prove blood relations as a basis for inheritance. However, Courts usually do not accept this request if the deceased’s family (in respecting the deceased's dignity) does not agree to the exhumation. Hence, an alternative measure is to replace it with the DNA of siblings or other relatives. The results of DNA testing are considered reliable. Most surviving family members often do not tend to cooperate when the request is made because the estate may be divided into smaller parts. Therefore, whether this non-cooperation may be evidence to confirm, the Court should also consider a blood relationship.

Judgment no. 36/2018/HNGD-ST dated July 10, 2018, of Tay Ninh Provincial People’s Court is appealed against for the settlement of disputes over the identification of parents and child by the first-instance Marriage and Family Judgment No. 44/2018/DS-ST dated July 24, 2018, of the People’s Court of District T, Tay Ninh province. On June 15, 2013, Ms Vo Thi Mong T gave birth to Pham Tran Minh A at the house of Ms Nguyen Thi N2 (midwife). Two days after giving birth, she handed Minh A to Tran Thi V for nurturing. She did not have a birth record or a birth certificate for Minh A. After adopting Minh A, Ms V took Minh A to Pham Thi at N3’s house, who was to care for Minh A while working as a maid for N3. On December 16, 2016, Ms N3 died, now Minh A was directly raised by Ms Tran Thi N and Mr Tran Van Q. Now she requests the Court to identify Pham Tran Minh A, born on June 15, 2013, as her biological child and requests that Ms N and Mr Q hand over Minh A to her.

According to the author, the trial results presented by the Court of Appeal are entirely reasonable. However, the researcher would like to consider a circumstance in the case: “In the process of solving the case at the first instance and appellate courts, Ms T requested Minh A’s DNA assessment. The Court asked Ms N to take Minh A to Court to take a DNA sample at the request of Ms T; however, Ms N refused to give Minh A a DNA test because she believed that the DNA test would affect the psychological

development of Minh A. Therefore, the Court cannot conduct the DNA testing procedure at the request of Ms T.” The identification of the mother-child relationship between Ms T and M is only based on the verification of witnesses living in stability around Ms N3 and Ms N’s house, along with the DNA test, which has not been carried out in accordance with the order and procedures prescribed by the procedural law provided by Ms M. In the case above, Ms N (A’s guardian) refuses to perform a DNA test. This has greatly hindered the process of proving Ms T’s request. It can be seen that from the Court’s point of view, DNA testing is essential to prove the blood relationship. However, this does not imply that the plaintiff’s request will not be granted if a party does not voluntarily conduct an expert examination. To a certain extent, the right to genetic examination or not depends very much on the willingness of the involved parties. The Court boldly offered the solution to accept the request to identify the father without DNA test results.

3.1.2. Shortcomings in the provisions on inheritance rights of illegitimate children

Judgment No. 46/2017/DS-ST dated December 18, 2017, of the People’s Committee of Soc Trang Province to consider this regulation: Mrs W (died on March 2, 2009) and Mr H has four common children, including Q, M, P, and N. By 1966, Mr H died, so in 1971, Mrs W married Mr Z (died on June 16, 1998) and had two children who are Y and X. They died intestate. The common assets of Mrs W and Mr Z include 2 plots of land called parcel 156 and parcel 721.

The first is the provision on the consideration of the legal marriage relationship between the father (mother) of the illegitimate child and the stepmother (stepfather): The hypothesis of the writer is, in this case: To apply the “inheritance relationship between stepchildren, stepfather, stepmother,” is there a husband and wife relationship between the father and the stepmother or between the mother and the stepfather that must be recognized by law? The applicable regulations are not clear. Still, theoretically, it can be seen that the “husband and wife” relationship between the couple must be recognized by law. Typically in the judgment that

is analyzed, the consideration of the husband and wife relationship between Mr Z and Mrs W. is based on the fact that they were married before 1987. Since their marriage existed before 1987, it can still be considered a legal marriage relationship without marriage registration. Hence, it is reasonable to determine the inheritance of Mr Z, and Mrs W is equal to half of their joint property. However, Assoc. Prof. Dr Do Van Dai also made his point: “Based on a reconsidered decision which implies that the wife’s children may still inherit the stepfather’s estate if they have a caring and nurturing relationship even though the wife is not considered to be legally married”. The Court affirmed that “Ms Truyen is not Mr Thang’s legal wife” but forced the local Court to consider: “Did her children take care of Mr Thang? There is a reason to consider the rights of your children. “If they care for Mr Thang, what are the legal consequences? The Reviewing Court did not specify in what capacity it considered the rights of “the children of Mrs Truyen”. Therefore, if considering the above benefits as “stepchild and stepfather”, it means that this regulation can be applied even when the father or mother does not have a husband and wife relationship recognized by law. The mentioned judgement is not clear enough to confirm this.

The second is the regulation on the issue of assessing the care and support of each other. Regarding the Court’s subsequent judgment at the trial, the Court said that “when Mr Z started living with Mrs W, Ms Q, Mr M, Ms P, and Ms N were still very young, so they lived with Mr Z from childhood to adulthood. Mr Z also married for the children, living together until they got their own families.” This article agrees with the Court’s view that Mr Z considers his wife’s (Mrs W) children as his offspring. However, in the ruling, there is no evidence that Mrs W’s children cared for Mr Z as they cared for their biological father. According to the provisions of Article 654 of the 2015 Civil Code, “If a stepchild and his or her stepparents care for and support each other as though they were biologically related, they may inherit each other’s estates...” Ho Chi Minh, the City University of Law, also mentions the above question: “The inheritance relationship between stepchildren, stepfathers, and stepmothers is not

naturally two-way. They are not heirs of each other like the inheritance relationship between adoptive parents and adopted children”. Therefore, the problem is whether it is necessary to prove the opposite relationship that the children of Mrs W, including M, N, P, and Q, care for Mr Z as they would their biological father. The verdict is unclear if it is necessary to prove the opposite relationship. However, the critical issue, in this case, is that the four children of Mrs W are inheriting the estate of Mr Z, and not Mr Z inheriting the estate of the stepchildren.

4. Recommendations to improve the regulations on “illegitimate children” in the law on marriage and family

4.1. Recommendations for completing regulations related to genetic testing procedures

Firstly, it is necessary to issue legal documents specifically regulating this issue. The applicable Vietnamese law does not have specific regulations on DNA testing procedures to prove the blood relation to specific guidelines on genetic testing for illegitimate children. The practice has shown that this is the most effective and accurate way for the Court to rule. However, we cannot rule out cases where people being asked to undergo genetic testing refuse to cooperate. This creates significant difficulties in the process of proving and approaching the truth. The approach of the Court is entirely appropriate when there is a flexible use of evidence to protect the relevant rights of the subjects concerned. However, the document’s promulgation is also necessary to avoid inconsistent local application.

Secondly, creating a binding mechanism for genetic testing of the subjects involved in identifying parents and children is necessary. This is also considered a problem in applying the law on inheritance. This article posits that the DNA test results are compelling evidence of a blood relationship. At the same time, the freedom to determine genetic testing should also be inextricably linked to the right to determine parentage. This is necessary to protect the right to determine parentage and other legitimate interests of the subjects concerned.

4.2. Recommendations to improve regulations for determining “nurturing and caring relationship” between illegitimate children and stepparents.

Firstly, the Government should issue a document guiding the implementation of Article 654 of the 2015 Civil Code. Specifically, there should be a clear definition of “caring for each other as though they were biologically related” and “a stepchild and his or her stepparents care for and support each other as though they were biologically related”. Also, it should be clarified under which inheritance level they fall if they are entitled to each other’s inheritance as per Clause 1, Article 651 of the 2015 Civil Code. This article finds that stepchildren and stepparents having a right to inherit each other’s estate at the first level per the precedence set in previous trials is a step in the right direction. Secondly, the evaluation of care and nurturing criteria between illegitimate children and their stepparents’ should be considered if they relate with them as they would with their biological parents. Thereby, we can also understand that stepchildren and stepparents care for and nurture each other as though they were biologically related when they show the acts specified in Articles 69, 70, 71, and 72 of the 2014 Law on Marriage and Family. Accordingly, the stepparents have an obligation and right to love, care for, nurture, and protect the legitimate rights and interests of the stepchildren, take care of their learning and education to develop healthily physically, intellectually, morally, etc. In other words, the law should stipulate the threshold for evaluating the care and nurturing of each other between stepchildren and their stepparents for them to enjoy the same rights and obligations biological children enjoy with their biological parents. Therefore, practical application will become more convenient and easier for judicial officials.

Thirdly, it is necessary to develop regulations that ensure flexibility. The flexibility in question includes: 1. It is necessary to stipulate that the mutual care between stepchildren and stepparents is not necessarily based on living together in the same place of residence because there are many cases where the child is far away (such as going to work or having a distant spouse) but still always cares, shows mutual love and acts to help

the stepparent by sending money as well as other materials; 2. The criteria for evaluation of care and nurture should be prescribed in the most general way. In practice, it can be seen that it is impossible to detail the level of care and nurturing due to the culture of each locality.

5. CONCLUSION

The provisions on the rights of out-of-wedlock or illegitimate children are complete. Still, the provisions on the identification of father, mother, and child and the inheritance rights of illegitimate children (stepchildren) have partly promoted the effect of the adjustment in practice. Through analysis, it has been shown that certain limitations are unsuitable in theory and the general trend of modern law. Therefore, the applicable law should have additional guidance documents on issues not explicitly prescribed, such as genetic testing procedures or criteria for assessing “care and nurture” between stepchildren and stepparents. It is to ensure a legal order in identifying the father, mother, and child, as well as ensuring harmony between personal interests and the common interests of the family and society.

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