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# DNA TESTING: THE MODERN METHOD FOR ESTABLISHING PATERNITY

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## ABSTRACT

The development of genetic testing has changed the scenario by providing a scientific and reliable means of determining biological parentage, however, if there is a paternity dispute, even after a valid marriage, such dispute can be settled through DNA testing, but it can't be direct on a routine basis. This paper examines the legal, ethical, and social implications of using DNA, evidence to determine legitimacy, highlighting its impact on family Law, policy reforms, and protection of children's rights. It argues that while DNA testing offers objective clarity, it must be implemented with sensitivity to the child's best interest, privacy considerations, and potential emotional consequences for the family unit. The study also addresses the challenges and limitations associated with the reliance on genetic evidence, advocating for a balanced approach that integrates scientific accuracy with humanistic values in addressing issues of child legitimacy.

**Keywords:** DNA testing, Presumption of legitimacy, Scientific Advancement, Paternity, Child interest

## INTRODUCTION

The use of the father's name by his child signifies respect and status for him in society, as his validity can't be questioned. The father's name is extremely essential to a child since it provides him with social stability and security, as well as protection from exploitation and vagrancy, and it shapes his entire future. Consequently, every effort should be taken to keep the child's name associated with his father. Historically, a child's validity was decided by the father's marital status or acknowledgment. Which frequently resulted in complex discrimination against children born out of wedlock. "There is no trust more sacred than one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want, and that they grow up in peace" [Kofi A, Annan]

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A child is the most valuable and delicate national asset, that the future depends on, as a result, they ought to be shielded against injustice and hardship. Children's problems are quite significant, and they might be religious, social, or legal, in this perspective, children's legitimacy and illegitimacy are major concerns in contemporary culture because it has deep psychological, social, and legal effects on the children and their families. Which influences the child's entire personality. The concept of legitimacy has been defined by the traditional legal from work with the marital status of parents playing an important role in defining legitimacy. However, the advancement of current technology and techniques, such as DNA testing, has challenged traditional recognition. This can provide an accurate conclusion using scientific methods in paternity issues even after that this is the most curious aspect of the law of paternity in almost all systems of law that paternity is still a matter of legal presumption, despite the great strides made in the medical science.<sup>2</sup> But technology and society force the Law to accept Change in this regard, Justice armored observed as follows, "When the social changes are accompanied by scientific developments which provide an invaluable evidential tool to help in the solution of problems such as the present, to decline to use the tool in deference to tradition is to run the risk of restricting the ability of the court to do justice which is difficult to justify." However, it is socially and morally justifiable to limit the use of such scientific methods in some situations one such issue is related to DNA testing to determine the legitimacy and paternity of children because the state has to fulfil its obligation as "Pater patriae" to ensure the welfare of weaker and disabled peoples. As has been said "The legal presumption that he is the father whom the nuptials show to be so is the foundation of every man's birth and status. It is a plain and sensible maxim which the corner-stone, the very foundation, on which rests the whole fabric of society, and if you allow it once to be shaken there is no saying what consequences may follow"<sup>3</sup>

Apart from numerous personal laws, the provision of the legitimacy of children has been envisaged in section 112 of the Indian Evidence Act-1872 which is described as section 116 of the BSA-2023 is based, on the dictates of justice. A verdict based on slender material that will have the effect of branding a child as a bastard and its mother an unchaste woman is desisted by the courts and the courts would not render such a verdict lightly hastily.<sup>4</sup>

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<sup>2</sup> Paras Diwan (2014) Muslim Law in modern India, P-118

<sup>3</sup> B. Malik and S.S. Saitry (1959) Law of evidence in India (Vol.II), p-316

<sup>4</sup> Dukhtar Johan vs Mohammend foroog, AIR .1987 S.C. 1049 see also Abdual Salam vs Chalil sajida and Anr, I (2003) DMC. 774

## **PRESUMPTION OF LEGITIMACY: UNDER THE BHARTIYA SAKSHYA ADHINIYAM, 2023 (BSA)/ THE INDIAN EVIDENCE ACT, 1972 (IEA)**

Section-116 of BSA lays down a rule of conclusive proof as to the legitimacy of a child born during the continuance of a valid marriage which is based on the Latin maxim "Pater est quem demonstrat" Which means 'he is father whom the marriage indicates' gained a sturdy legislative recognition in India which resulted in the formulation of the rule of evidence envisaged in section-112 of IEA/section-116 of BSA. It is based on the **Mansfield** rule which state that if a child is conceived within marriage, the husband is presumed to be the father, it is the only exception is when the husband proves that he had no access to his wife at the time of conception of a child.<sup>5</sup> As per section-112 of IEA/116 of BSA- Birth during marriage, conclusive proof of legitimacy. The fact that any person was born during the continuance of a valid marriage between his mother and any man or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage have no access to each other at any time when he could have been begotten. This Section lays down a rule of prudence and also by the rule of natural justice- **Bhagwathi Amma vs Aiyappan**<sup>6</sup> it assumes the existence of valid marriage. The legal presumption of paternity raised by it applies only to the offspring of a married couple. Section-112 presumption is so strong that if the child is born within the matrimonial relationship, it doesn't matter how many days after the marriage the child was born. Even if the wife was pregnant at the time of marriage the legitimacy is not affected even if the child was born sometime after the marriage, In the case of **Shambhu vs Palani**.<sup>7</sup> The Madras High Court decided that if a man married a woman knowing she was pregnant with someone else. i.e., it was evident that a woman was pregnant with her first husband, the child born a few moments after marrying a second person will be considered the legitimate child of a man with whom the marriage occurred. The legal presumption of validity is based on the principle of "**Odiata et in bones non sunt lege pre Sumenda**" Which means the law, in general, presuming against vice and immorality. However, this section covers evil and immorality to make one's life happier and more positive in the future. One be freed from exploitation and torment. Although the law is presumed in favor of marriage

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<sup>5</sup> Abhijeet Sharma, (2007) Guide to DNA tests in paternity determinations & Criminal investigation: Wadhwa, Nagpur, P. 194-195

<sup>6</sup> 1953 T.C. 470: AIR 1952 T.C. 709

<sup>7</sup> ILR-1925, Madras 553

and against concubinage, in favor of legal relationship and against adultery, and in favor of valid marriage and against void marriage.

To avoid the rigors of presumption and conclusion for such a noble goal, the party denying paternity must first prove non-accessibility before the presumption under section 116 can be rebutted, even the piles of impotence, sickness,<sup>8</sup> and adultery are not generally accepted as evidence of non-accessibility nor is DNA testing authorized as an alternative to non-accessibility.

## CONFLICT OF SCIENTIFIC ADVANCEMENT AND PRESUMPTION OF LEGITIMACY

To ascertain the truth, DNA testing can be utilized to gather important information regarding the biological relationship of an individual whose biological relationship is disputed. A Person has an emotional attachment to this relationship which is an extremely delicate and sensitive issue. In this regard, one point of view holds that, since contemporary science has made it possible to determine a child's paternity, one should not hesitate to use this method when needed. However other viewpoints hold that the court should be reluctant towards such scientific investigations, which infringe on the privacy of a person and may even have catastrophic consequences for the child because the result of such scientific tests can raise questions about the innocent child because of this, the court must exercise caution when issuing such an order. On the one hand, it must protect the child by designating him as its guardian; on the other, it must determine whether there is another reason for the test. The court fulfils the guardianship obligation in two ways: first, by declining to issue a general order permitting the use of the test to uphold the presumption of section 116, and second by granting the test as being in the child's best interest. In this regard, the supreme court in **Gautm Kamdu vs State of West Bengal**<sup>9</sup> laid down the following guidelines regarding the permissibility of blood tests to prove paternity: -

- 1- The court of India cannot order blood tests as a matter of course.
- 2- Whenever an application is made for such prayers to have a roving inquiry, the prayer for a blood test cannot be entertained.
- 3- There must be a strong prima facie case in that the husband must establish non-access to dispel the presumption arising under section 112 of the Evidence Act.
- 4- The court must carefully examine as to what would be the consequence of ordering

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<sup>8</sup> Norendra Nath Pahari vs Ram Gobind Pohori and other-1901, P.C. I.A.- 17

<sup>9</sup> AIR-1993, S.C. 2295, 1993(3) SCC 4181

the blood test; and whether it would have the effect of branding a child as a bastard and his mother as an unchaste woman.

5- No one can be compelled to give the sample for analysis.

The apex court further held that the object of this section was to overcome the evil of illegitimacy and prevent blameless children from being bastardized.

Section 116 addresses the legality of a child born during a valid marriage. An important question arises as to whether husband impotence should be considered as evidence of non-access and whether DNA testing should be permitted in such circumstances to prove the legitimacy of children. In the case of *Smt. Kanti Devi vs Poshi Ram*<sup>10</sup>. While accepting the accuracy of the test held that the result of a genuine DNA test is said to be scientifically true but that is not enough to escape from conclusiveness of section-112 of the Evidence Act if a person is born during the continuation of the marriage, the court must always rely on the precept of justice and uphold the legitimacy of justice and uphold the legitimacy of the child unless the fact is so compelling and clear that the parents could not be found at the time conception or the legitimacy of the child would result in injustice to the father. It was further observed therein that this may look hard from the point of view of the father. But in such cases, the law leans in favor of the innocent child. That is, it is submitted that there is a serious lacuna in the law and DNA evidence should be made a part of the statute book to conclusively and accurately prove the parentage of the child. In its 185<sup>th</sup> report, the Law Commission of India also proposed that impotence be accepted as proof of non-access.

In the case of *Babita Devi vs, the State of Jharkhand*.<sup>11</sup> In this case, SC Held that section 112 of the Evidence Act was enacted at a time when current scientific techniques like DNA and RNA were not contemplation by legislators. The DNA test results are said to be accurate but it is not enough to avoid the presumption of the Evidence Act. If the husband and wife lived together at the time of gestation under the presumption of section 112, that individual would be obligated to support the child, who may be innocent in such circumstances. The law protects him from difficulty and harassment if a couple lived together throughout their lives and DNA tests demonstrate that a child cannot be born to her spouse, the presumption of section 112 becomes irrelevant, in such circumstances, DNA testing will not be allowed.<sup>12</sup> There may be instances where the husband and wife are living together and the wife may have gone astray and then delivered a

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<sup>10</sup> AIR (2001) S.C. 2226, 2001 (5) SCC 311

<sup>11</sup> (2014) Cr. M.P. No. 1087 of 2013

<sup>12</sup> *Banarsi Dass vs Teeku Datta and Anr* : AIR online-2005 SC 87, 2002 AIR KAR R8, (2005) CIR. 669

child through illicit connection but in the view of the legal presumption under section 112 of the Indian Evidence Act, 1872 The husband cannot be allowed to prove that the child is not born to him since husband and wife are living together, even if it is proved that the wife has some illicit relationship with another person in general, ordering a DNA test without invalidating the presumption of legitimacy may prove fatal to the child. In the *Sunil Eknat Trombake vs Leelavati Trombake* case,<sup>13</sup> the court decided that if either party disputes paternity, it does not necessarily require the ordering of a DNA test to be settled. If the court determines that it is impossible to reach a conclusion based on the evidence on record or that the matter cannot be resolved without a DNA test, the court may order one otherwise, it may not. In most cases, access needs to be proven, but in some situations to the woman during pregnancy, his access cannot be shown, a DNA test can be performed to determine the truth. Truth is the hallmark of the court so it is important to know the truth<sup>14</sup> in a situation when there is the possibility of grave injustice being done to the parties. The rigors of section- 116 are justified by consideration of public policy for the stigma of illegitimacy is very severe and may affect not only the entire life of the child, and his family but his future generation as well.<sup>15</sup> The conclusive presumption under section 116 is rather based on a sound policy of affording protection to the sanctity and stability of the family relationship so that for every trifling suspicion or oblique purpose the question of legitimacy of the child born or conceived in wedlock does not become a handy target of scandalization and indecent investigation.<sup>16</sup>

## **IN THE BEST INTEREST OF THE CHILDREN**

There is no provision either in the Hindu Marriage Act or Indian Evidence Act/BSA or in any other law, empowering the court, to issue a direction upon a party to the matrimonial proceeding or any other proceeding to compel them to submit the blood test, or any other medical test. However, in the best interest of the children and cases of maintenance claims, The court can order to submit these types of reports. In general, no one wants to take responsibility for their immoral action, especially when those acts involve a person's honor and status and are seen negatively by society and religion in these situations, the court can order DNA testing to determine the biological father of the child to impose the burden of maintenance on him if the father denies his responsibility. Where the fact of the marriage is in dispute about the potential action shall be taken

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<sup>13</sup> AIR (2006), Bombay. 140, 2006 (2) MHLJ-654

<sup>14</sup> *Nandlal Wasudeo Badvaik vs Lata Nundlal Badwaik & Anr*, AIR (2014) S.C. 932, 2014(2) SCC 576

<sup>15</sup> *Heera singh S/o Dharm Dev Singh v/s State of U.P., Smt. Lalmuni Devi D/o Chandra Bali Singh Yadav and Manoj Kumar*. 2005, crij 3222 (2006) DMC 19

<sup>16</sup> *Smt. Nigamma and another v/s Chikkaiah and another* AIR-2000(Kant), ILR-1999, KAR, 3389-2000

to ensure the welfare of the child, and it would be justified for the court to order DNA testing it is difficult to resist that law was, as it presently stands, does not contemplate any impediment or violation of rights in directing persons to submit themselves for DNA test, especially where the parentage of a child is in controversy for the grant of maintenance.<sup>17</sup>

The family court has the authority to mandate that an individual goes through the medical examination if the case prime facie looks to be in the child's best interest, the court may use its power<sup>18</sup>, to determine paternity or maternity disputes, succession cases, maintenance proceedings, and matrimonial disputes etc. New technology should be made available to the courts. Even DNA testing may be used to rebut the statutory presumption arising under the act, if available, or to establish evidence, where no presumption arises.<sup>19</sup> Given the established scientific fact, DNA parentage testing may provide evidence to show that a person has a biological connection with a person and can be proof in support of a maintenance claim in that cases, the alternative remedy to decide the paternity must be the DNA test and to adapt ourselves to new scientific technology, we should not hesitate, depending upon only the conservative form of evidence.<sup>20</sup> If the father denies paternity and maintenance of the child, the court may order DNA testing to reach a determination after evaluating the presented evidence regarding paternity. Ordering such a test is not a violation of Article 21 because the right of privacy under Article 21 was not absolute and such a direction could be given looking at the conduciveness of the DNA test and its scientific accuracy. If the applicant has a strong prime-facia case and there is sufficient material before the court. It is mistaken to believe that a court cannot compel someone to undergo a DNA test or other medical examination.<sup>21</sup> Although the court is empowered it cannot order a person to submit to such a test as a matter of routine and only in deserving cases such direction be given. The court is expected to exercise such discretion in matrimonial cases, only when such test is in the best interest of the child. The object of the court always is to find out the truth it is true that no person can be compelled to give a sample of blood for analysis against his/her will. However, in the event of refusal, it is open for the court to draw on adverse inferences.<sup>22</sup> If the paternity of the children is denied by the husband there is some strong evidence regarding the ceremony of marriage. That a point, the defiant stand of the husband in refusing to undergo a DNA test would also lead to a strong prime facie satisfaction as the existence of marriage, and the paternity of the child.<sup>23</sup> If they

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<sup>17</sup> Kanchan Bedi and Anr vs Gurpeet sing Bedi 2003 II AD (Delhi) 252 A.I.R.-2003, Delhi, 446

<sup>18</sup> Shorda vs Dharmpal A.I.R.-2003, S.C., 3450

<sup>19</sup> Md. Mahasin sk vs Sayeda Khatun Bibi-1(2006) DMC 48

<sup>20</sup> Shariq Ahmad vs sundar Lal, 2008, (1) MPHI-51

<sup>21</sup> Bhabani prasad Jena vs convenor secretary, Orissa state commission for women and Anr. (2010) (8) SCC-633

<sup>22</sup> Sunil Eknat Trambake vs Leelavati Trambake, AIR-2006, Bombay-140, 2006 (2) MHLJ-654

<sup>23</sup> K. Selvaraj vs P. Jaya kumari 2000 rjlj 4748: II (2001) DMC-13



are true then they should have no fear in the minds of parties, to undergo a DNA test because it would nullify the defendant's claim and end in the favour of the plaintiff, making it true. It also benefitted in favor of child even they can go to the extent of coming to shore in the properties of the father it would solve not only the present problems but also the future problems if any arise.<sup>24</sup> In the current changing scenario, taking a proactive approach to DNA testing in matters related to children's welfare and the right to know paternity, has been held in the case of Rohit Shekhar vs Naryan Dutt Tiwari.<sup>25</sup>

That the court must distinguish between legitimacy and paternity. A child has the right to know the truth about his origin. DNA testing provides a reliable scientific medium for children's right to know their biological roots; it is appropriate to order DNA testing to determine the paternity of a child even if the court finds that he is not the father of a kid. The court should not close this consideration because while the law places responsibility for his children on the biological father it does not disregard the right to maintenance of an illegitimate child.

## CONCLUSION

It is evident from the aforementioned record, instances, and court rulings that a blood or DNA test is a crucial piece of evidence for establishing a child's paternity. However, neither Indian evidence nor any other parties to undergo blood test or any such test in matrimonial proceeding or any other proceeding doing so would rebut the presumption of section 116 of the Act, the conclusive presumption of 116 cannot be defeated by restricting to a DNA test. It must be demonstrated that the couples did not have access to each other, where access or non-access does not imply actual cohabitation but rather the availability or absence of opportunity for marital intercourse. Access and non-access are very difficult to prove by direct or indirect evidence but they can be proved by other physical facts like DNA or blood tests, in all these situations the court carefully exercises its discretionary power, and an order is only granted in that situation of a dispute where it appears without this it is not possible to do justice to the parties. The law commission suggested in its 185<sup>th</sup> report that DNA testing be permitted to resolve paternity issues and that impotence be included in the rebuttal to the presumption of sec-112. However, these recommendations have not been fully implemented.

Generally, the husband cannot use a DNA test to prove paternity under sec-116 for these

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<sup>24</sup> Bommi and Anr vs munirathinam 2004(5) CTC 182: 1 (2005) DMC-636

<sup>25</sup> AIR, 2012, Delhi-151

admirable goals. These tests are typically not allowed to determine the paternity of children born during a valid marriage, but they may be conducted in the best interests of the children or where paternity can be established beyond the boundaries of lawfulness or illegality or in maintenance proceedings to keep a child from starvation, abandonment and becoming immoral. Therefore, many illegitimate children have been granted legality through legitimation to safeguard their future to go beyond legitimation and illegitimate behavior, and to provide them with financial security, those who are denied legal status are awarded to right to maintenance. So, they can be taken care of in the future.

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