

Abstract

Paternity Fraud and Misattribution has become a topical global issue and now a front-burning phenomenon in Nigeria. Paternity fraud occurs when a male partner is deceived into believing that he is the child's biological father when in fact this may not be the case, whereas paternity misattribution occurs when a man (and occasionally the mother) incorrectly assumes he is the child's biological father. It is undeniable that the advent of Deoxyribonucleic acid (DNA) testing coupled with the judicial and statutory recognition has uncovered more instances of paternity fraud and misattribution than ever before. Despite the element of fraud and malpractices, it is still unclear how the law and the courts should respond and compensate persons who have fallen prey to paternity fraud and paternity misattribution. This paper employs a desk-based doctrinal approach in analyzing the socio-legal perspectives and effects of paternity fraud and misattribution in Nigeria and South Africa, while it unravels the absence of express statutory provisions to regulate and remedy this challenge in Nigeria and examines South African legislation with similar African climate and draw lessons from South Africa for Nigeria. The paper recommends the amendment of existing enactment on matrimonial and family legislations to provide adequate remedies for the harm and rising issues emanating from paternity fraud and misattribution in Nigeria.

Keywords: Paternity Fraud, Paternity Misattribution, DNA Testing, Fatherhood, Court

1. Introduction

Fatherhood involves the deliberate decision to have a child and a commitment to nurture that child with love, resources, and time. This includes adjusting one's lifestyle to guarantee the child's well-being is secured and providing consistent support throughout their life. The term 'father' has evolved from its traditional economic role of being the 'breadwinner' to also encompass emotional and developmental contributions to a child's life.¹ A 'father' may be defined as a biological parent or as a social father who fulfills parental responsibilities without genetic connections and who should be considered more to be the 'true' father.² Ultimately, a man can be recognized as a father based on his commitment and role, regardless of biological ties. Paternity fraud and paternity misattribution are sensitive issues with significant legal and psychological implications in Nigeria. When a father is misled into believing he is the genetic father of a child or paternity is mistakenly assigned to an individual, the institution of the family which is ideally built on love, trust, harmony and care is undermined and threatened. The attendant social and emotional trauma if not well managed is capable of breaking the home and destabilizing the family. This paper explores the dynamics of paternity fraud and paternity misattribution in Nigeria and South Africa. It analyses the available legal framework in Nigeria and South Africa from where lessons are drawn for Nigeria. It concludes with a recommendation on workable solutions like legal reforms, accessible, affordable and compulsory DNA testing at birth, counselling and therapy. It is believed that a multifaceted approach to tackling paternity fraud and paternity misattribution in Nigeria will be more rewarding.

2. Paternity Fraud

The emotional hard knocks and financial burdens³ streaming from paternity fraud flows from the deception that a man is falsely presented as the biological and natural father of a child.⁴ It is often linked to situations where a woman has had extramarital affairs and presents another man's child as her husband's. According to Marylin⁵, paternity fraud is a deception that permeates the very depth of a man's being. This deception has existed throughout history and is distinct from adultery, as it involves deliberate fraud rather than mere infidelity in a marriage. It shatters the inherent dream of every father to transmit in his own gene and produce a bloodline for himself, someone who would look like him, someone he can legitimately call his own. The pain and psychological trauma may result to unforgivable actions.⁶ It also undermines the value of trust and honesty cardinal to marital relationships.⁷

Legal definitions emphasize that paternity fraud involves deceit and concealment, causing the 'social father' to erroneously consider himself as the biological or genetic father of a child. The psychological impact can be severe, potentially leading to

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¹ Encyclopaedia Britannica: <<https://www.encyclopedia.com/social-sciences-and-law/sociology-and-social-reform/sociology-general-terms-and-concepts/fatherhood>> last accessed 19 October 2024

² Heather Draper, 'Paternity fraud and compensation for misattributed paternity', (2007) *Journal of Medical Ethics*, 475–480.

³ Victor Ayeni, 'Heartbreaking stories of men damaged by Paternity Fraud', 18 (September) 2024, Punch Newspaper, Lagos State.

⁴ Monday Richmond Efut, Amarachi Chiagoziem, 'Paternity Fraud: Examining its Causes, Tort of Deceit and Victims Compensation' 2021 *Global Scientific Journal*. Pp 736-747

⁵ Marilyn S., 'Is paternity fraud really a 'Ticking time Bomb'' (2011) *Stowe family law*; *Global Scientific Journal*

⁶ Caribbean Times NYC, Paternity predicament: More Jamaican men are getting 'Jackets'. Caribbean News (2019), Caribbean News <<https://caribbeantimes.com/paternity-predicament-more-jamaican-men-are-getting-jackets/>> last accessed 19 October 2024

⁷ Gary Da Silva, Paternity Fraud in South Africa?, (2024) <https://www.f4j.co.za/2024/10/30/paternity-fraud-in-south-africa/?v=eac6463a8002#:~:text=This%20case%20raises%20a%20broader,men%20feeling%20vulnerable%20to%20exploitation.> Last accessed 3 March 2025

drastic consequences for all involved. However aside from being a ground for divorce, the modern trend of compensating hurting fathers for the action of their cheating wives is the basis for this concept.⁸ The underlying difference between paternity fraud and adultery is that adultery on its own is an infidelity against a spouse in a marriage but paternity fraud is what it is- a fraud. In the case of *Adimora v Ajufo*,⁹ per Oputa JSC, described the word 'fraud' for the purpose of civil law to include acts, omissions and concealments by which undue and conscienceless advantage is taken of another. In *Aina v. Jinadu*¹⁰ Tobi JCA opined that fraud constitutes elements of deceit, imposture, snare, deceptive trick, which connotes that a person is a cheat and a swindler. Hence, as the name suggest is Paternity fraud involves making a definite false statement wherein the truth is withheld with full intention and desire to conceal the truth of a child's paternity.¹¹

3. Paternity Misattribution

Paternity misattribution, is a wrong assumption by a man (and sometimes the mother) that he is the biological father of a child. Such assumption may arise from the false concealment or deceit from the mother or a consequence of factors external or unrelated to the marriage relationship.¹² This situation arises when an individual is mistakenly identified as the genetic father,¹³ or when a child believes their social father is their biological parent, while the real biological parent remains unknown.¹⁴ Misattributed paternity can come to light during medical evaluations or DNA tests, often triggered by concerns over physical traits or suspicions of infidelity.¹⁵ Misattributed Paternity may occur within or without the knowledge of the mother and may result from various factors, including undisclosed adoptions, baby exchanges, or medical errors in reproductive procedures such as using the wrong semen during artificial insemination and in-vitro fertilization.¹⁶ Misattributed paternity delineates a faulty interplay between genetic and social kinship reinforced on falsehood, mistaken or negligent assumptions.¹⁷

Globally, there have been both successful and unsuccessful cases of paternity fraud. For instance, an Australian man who found out that his children were not biologically his sought to recover child support payments on the grounds of emotional damage he suffered but lost his case in the High Court.¹⁸ Conversely, in the United Kingdom (UK), another individual successfully reclaimed child support payments amounting to thirty thousand pounds for children later identified as not his. In fact, his case was one of the over 3000 cases which the Child Support Agency in the UK had treated for over 7 years where they had to repay more than 3000 men their child support payments on discovering paternity fraud played on them.¹⁹ Men have stopped making child support payments upon finding out they were falsely named as fathers. In France, a man was awarded approximately twenty-three thousand euros, which included compensation for financial expenses and emotional distress. In Canada, a challenge in paternity fraud claims involves men who had reasonable suspicions of being misattributed as fathers but did not take action in time.²⁰

In the case of *Anozia v Nnani*,²¹ the Supreme Court made consequential pronouncements relevant to the rising issues of paternity fraud and paternity misattribution. The appellant had instituted an action jointly against the 1st respondent and the 2nd respondent (son to the 1st respondent), where he sought for a declaration of the 2nd Respondent's paternity. The appellant argued the consequence of his intercourse with the 1st respondent sometimes in 1957, when the 1st respondent's husband was seriously ill and incapable of sexual performance, was the 2nd Respondent; a claim which both respondents denied. The Appellant brought an interlocutory motion requesting for the trial court to order parties for a DNA test, which was refused. Upon making an interlocutory appeal to the Court of Appeal, the judgment of the trial court was upheld and appeal dismissed. Upon appeal, the Supreme Court defined the meaning of the word 'DNA', that is, 'deoxyribonucleic acid' as a molecule that contains a person's genetic code which is hereditary and has become an expression for scientific examination of a person's genetic constitution to determine one's roots.²² The court held that in the case of a minor whose paternity is in issue, the court may order for a DNA test, *subject to the overall interest of the child*, to determine the child's paternal parentage. But in this instance, where the 'child' is not a minor but an adult, it was the responsibility of the Appellant to establish his claim through an independent report or go for a DNA test on his own or woo the 2nd Respondent without resorting to the using the forcible authority of the court. The child in issue was 57 years old, who has never disputed his paternity, hence, the court held that he is an adult who alone can decide to waive his rights, oblige his parents and those laying claim on him to submit DNA test in proving his root. The Court further held that the 57years old 'child' had the fundamental right to privacy and subjecting him to such a DNA test against his will and consent would amount to the breach of those rights. The Court noted that it is empowered to make judicial

⁸ Monday Richmond Efut, *op cit*

⁹ (1988) LLER 21085 (SC)

¹⁰ (1992) 4 NWLR (Pt. 233) 91, 110 paragraph A-B,

¹¹ Monday Richmond Efut, *op cit*

¹² Heather Draper, *op cit*

¹³ Alyona Cerfontyne1, Levita D'Souza, and Lefteris Patlamazoglou, 'Psychosocial Consequences of Disclosing Misattributed Paternity: A Narrative Review' (2024) Journal of Family Issues, pp: 1822–1842;

¹⁴ Heather Draper, *op cit* pp 475–480.

¹⁵ *ibid*

¹⁶ Alyona Cerfontyne, *op cit*

¹⁷ Wright, C. F., Parker, M., & Lucassen, A. M., 'When genomic medicine reveals misattributed genetic relationships-the debate about disclosure revisited' (2019) Official Journal of the American College of Medical Genetics, pp 97–101.

¹⁸ Munro I., \$70,000 paternity ruling sets precedent. The Age (2002) <<http://www.theage.com.au/articles/2002/11/22/1037697877139.html?oneclick=true>> (accessed 19 October 2024).

¹⁹ Wright, C. F., *op cit*

²⁰ *ibid*

²¹ (2015) 8 NWLR (PT. 1461) 241

²² *Ibid*, pp 256, para H

pronouncements on the paternity of a child on the proof of evidence of a DNA test of the parties involved,²³ however it is a woman's right to declare who the father of a child is. There is conclusive presumption in favour of the father that a child born within wedlock is his seed.²⁴ This case laid a foundation for the main discussion on paternity fraud and paternity misattribution in Nigeria.

4. Causes and Impact of Paternity Fraud and Misattribution

Paternity fraud in Nigeria is primarily rooted in cultural pressures related to childbearing and lineage, rather than outright adultery. The traditional Nigerian society has an intense cultural disposition towards child bearing and preserving family lineage, hence a marriage is not complete without the cry of a baby. This disposition compels women to want to bear children at all cost, to preserve their marriages and protect their husbands' reputations, even in cases where the man may be impotent, as the women are the major recipient of the sarcasm of childlessness- this contributes to increased paternity fraud.²⁵ The man is only recognized as a Father once a child is born within marriage, and questions of paternity arises only if doubts are raised.²⁶ The high emphasis of having one's own birth children results to Paternity fraud.²⁷

Women are usually primary recipients of the accusation of paternity fraud; because they are most times victims of domestic violence, rape, and uncertainty, they may not find it easy to disclose the truth about the child's paternity. Unmarried women may also falsely attribute their child's paternity to avoid social stigma from having intimate multiple relationships outside of marriage. Accusations of paternity fraud predominantly target women, who may wrestle with disclosing the child's true parentage due to fears of domestic violence, abandonment, and financial insecurity. Non-disclosure of paternity can stem from deeply held and complex issues related to paternity secrets.²⁸ Arguments have been raised against the demonization of women regarding paternity fraud and suggests that society should understand these matters as unintended consequences of human relationships, rather than viewing them in a moralistic or judgmental way.²⁹ On the other hand, paternity misattribution may occur with or without knowledge of either spouse; it may be due to child swapping in hospitals or medical inconsistencies, albeit infrequently, which can lead to marital breakdowns. A woman will be excused from being liable for infidelity upon concrete evidence of child swapping without her knowledge or intention.

DNA testing has become a veritable tool for uncovering paternity fraud and misattribution, revealing the alarming number of men who have fathered someone other than their primogenitor.³⁰ A current report from a Lagos-based DNA testing centre, which covered July 2023 to June 2024, revealed that nearly 27 per cent of paternity tests conducted by the centre returned negative results. The results indicated that more than one in four men tested within that time frame were not their children's biological father. The report revealed a gap in statistics on DNA test carried out for proof of paternity misattribution conducted on the mainland, where 67.5 per cent proved paternity misattribution and 32.5 per cent on the Island.³¹ An ethnic statistical breakdown showed that the Yoruba accounted for 53 per cent of the tests, 31.3 per cent for the Igbo clan, and 1.2 percent for the Hausa clan.³²

Paternity fraud and misattribution create significant issues. It deprives children and fathers of a meaningful relationship, sets the stage for emotional upheaval when the truth comes to light, misplaces financial support obligations, and allows the biological father to evade their responsibilities.³³ These situations often stem from infidelity, leading to mistrust, conflict, criminal investigation and legal disputes surrounding paternal responsibilities. The implications of paternity fraud and misattribution can be profound for both father and child. While social fathers may develop strong bonds with their children, the revelation of misattributed paternity can cause emotional distress and damage to familial relationships.³⁴

Though marital relationships are not commercial relationships with financial penalties, but issues like Paternity fraud, which constitute deception, fraud or misrepresentation under civil law would ordinarily attract damages; hence a deceived party should be able to claim recompense for infidelity irrespective of the fact that the spouses had children in the union³⁵. Though the request for financial compensation may not totally heal the psychological and emotional damage on the 'social father', nor replace the supposedly wasted time, energy and emotional involvement with the child, especially when he is forced to end the marriage. Similarly, children may be affected by the revelation that their 'father' is not their bio-genetic father. The social father may have provided the child with such care and love their bio-genetic father could not; and a change in such situation may not be healthy for the child's psychological well-being.

²³ *Olayinka v Adeparusi* (2011) LPELR 2697 referred to in *Tony Anozia v. Mrs Patricia Okwunwa Nnani & Ignatius 'Nnani'* 2015 (8 NWLR (PT. 1461) 256, para F -G

²⁴ (2015) 8 NWLR (PT. 1461) 256, para C - D

²⁵ *Monday Richmond Efut, Amarachi Chiagoziem, supra*

²⁶ *ibid*

²⁷ *ibid*

²⁸ *Caribbean Times NYC, supra*

²⁹ *ibid*

³⁰ Shawn Seliber, 'Taxation Without Duplication: Misattributed Paternity and The Putative Father's Claim for Restitution of Child Support' (2007) *Washington and Lee Journal of Civil Rights and Social Justice*, pp 98-124

³¹ Sodiq Ojuroungbe, 'One in four paternity tests in Nigeria returns negative — Report', 3 September 2024, <https://punchng.com/one-in-four-paternity-tests-in-nigeria-returns-negative-report/>. *Punch Newspaper*, Lagos State

³² *ibid*

³³ Shawn Seliber, *op cit*

³⁴ Michael Gilding, *Rampant Misattributed Paternity: The Creation of an Urban Myth* (2005) *People and Place*, p 9.

³⁵ Heather Draper, *op cit*.

Investigations have revealed that in the modern times among the reasons for the increase in paternity fraud and misattribution, aside from financial enrichment and fear of stigmatization, swapping of babies in hospitals is also a major factor for this menace.³⁶ Many unreported cases abound of baby swapping in Nigeria hospitals. It takes years before parents whose child (-ren) were swapped finds out and may not be able to trace the hospital personnel who did the swapping nor find enough evidence to hold the hospital responsible.³⁷

5. Legal Framework on Paternity Fraud in Nigeria

The laws regulating the marital relationships in Nigeria³⁸ do not address paternity fraud or misattribution, despite growing concerns over failed marriages and child custody issues. Rather Paternity fraud, which is often likened to marital unfaithfulness or adultery, is recognized as one of the facts to show that a marriage has broken down irretrievably under the Matrimonial Causes Act and is a crime under the Nigerian Penal Code.³⁹ Both pieces of legislation have no provision or regulation on the issue of fraudulently having a child outside the bounds of a subsisting marriage and deceiving the spouse about the child's paternity. However, the Nigerian Constitution and many other related legislations provide for the legitimacy of all children born within or outside the marriage, or children adopted within a marriage.⁴⁰ These provisions reflect efforts to protect the marital institution and children. Every child born before, within or outside the marriage by any of the spouses, whether legitimated or not, as well as a child adopted by any of the parent are all regarded as children of the marriage.⁴¹

Under the Nigerian Evidence Act any person born during the continuance of a valid marriage is presumed to be a child of that marriage.⁴² On the other hand, where there is no subsisting marriage, as long as he acknowledges himself as the father of the child, then so is he.⁴³ The burden of proving otherwise rests with the party alleging the contrary.⁴⁴ *Per M.U. Peter-Odili, JSC*, re-echoing the provision of Section 165 of the Evidence Act *emphasized* that the presumption under Section 148 (now Section 165) of the Act is not one to be taken lightly and requires the standard of proof demanded in criminal cases. In Nigeria, paternity fraud can either be brought under criminal law or as a tort. The call for criminalization of paternity fraud is extraneous as men who father children outside wedlock, without the knowledge of the wife should also be criminally liable for not only adultery but deceiving the wife of their nuclear status. Lawyers have opined that although paternity fraud may not be criminalized, there are, however related issues affiliated with paternity frauds which pass for crimes such as criminal deceit or perjury or intentionally making false statements as public declarations on documents such as a birth certificate which may all amount to a crime.⁴⁵ In some jurisdictions, such false declarations have been criminalized with prescribed punishment.⁴⁶ The claim for Paternity fraud can also be captured as a 'Tort of deceit', as elements of an untrue formal representation intentionally made causing the Plaintiff some loss, including pecuniary damages which he must prove. Liability may also arise when there was agreement to artificial paternity. The component of fraud is established where the defendant deliberately, and with full intent made relevant representations that reasonably induced the plaintiff to rely on the false representations and as a result suffer damage.⁴⁷

Proof of Paternity in Nigeria

The traditional or non-conventional method of ascertaining Paternity in Nigeria include recognizing certain similar physical features present in both parents and child; or that there was or wasn't any sexual intercourse about the time the child was conceived. The conventional and more scientific methods include comparison of blood group, human leucocytes antigen (HLA) typing and Deoxyribonucleic acid (DNA) profiling.⁴⁸ Legally speaking, there are three ways to prove paternity in Nigeria, which were made explicit by the court to include proof by acknowledgement, proof by presumption and proof by abduction of evidence.⁴⁹

Proof by Acknowledgement occurs when a father acknowledges the child as his biological seed or that he is the legally recognized father of the child, even in the event that the child is not a direct product of the marriage. This proof by acknowledgement can also be called proof by conduct; premised on the fact that a child cannot be without a father.⁵⁰ This proof

³⁶ The Guardian Newspaper, (Saturday Magazine) 'Baby Switching... A booming 'trade' behind increasing paternity crisis' (27 April 2024) reported by Gbenga Akinfenwa; <https://guardian.ng/saturday-magazine/babyswitching-a-booming-trade-behind-increasing-paternity-crisis/> last visited on the 18 March 2025

³⁷ *ibid*

³⁸ The Matrimonial Causes Act 2020, the Marriage Act 1964 and the Matrimonial Causes Rules 2022.

³⁹ Sections 387 and 388 of the Penal Code Act provides for imprisonment of two years or a fine for adultery.

⁴⁰ Section 42(2) of the 1999 Constitution of the Federal Republic of Nigeria.

⁴¹ Section 69 of the Matrimonial Causes Act

⁴² Section 165 of the Evidence Act

⁴³ Afolabi Saka Adebayo et al; Overview of The Concepts of Legitimacy and Legitimation under the Nigerian Laws (2023) *Journal of Advanced Research and Multidisciplinary Studies*, p 62

⁴⁴ *Idahosa v. Idahosa* (2020) LLER – 52011 SC

⁴⁵ Adelanwa Bamgboye, 'Lawyers weigh criminalizing paternity mistake, fraud' (2021), Daily Trust News blog.

⁴⁶ In Jamaica, under the Registration (Births and Deaths) Act, it is an offence to knowingly make a false declaration of paternity on the birth certificate which attracts a term of 3 months imprisonment or a fine not exceeding \$250,000. (extracted from Caribbean Times NYC, *supra*)

⁴⁷ Monday Richmond Efut, Amarachi Chiagoziem, 'Paternity Fraud: Examining Its Causes, Tort of Deceit and Victims Compensation' (2021) *Global Scientific Journal* Vol 9(12)

⁴⁸ Uchendu OJ, and Odokuma EI, 'Cases of Paternity Discrepancy in a Nigerian Tertiary Hospital' (2015) *Int. J of Forensic Med Invest*, Pg 15

⁴⁹ *Anozia v Nnani* (2015) 8 NWLR (PT. 1461) 241

⁵⁰ *Anode v Mmekaka* (2008) 9 CMLR 160, 166

is resolved during the lifetime of the said father, and in instances the father passed away, witnesses can acknowledge the existence of such proof. For proof by acknowledgement or conduct to stand, the act or conduct of the father (*not the mother's*) should be overriding, regular, consistent and un-debatable that such acts gained evidential value as proof of his paternity of the child. Such acts or conduct would be said to include actively participating physically in the dedication of the child as the father, taking 'fatherly' photos with the child and his mother, providing regular support, visiting relatives or elder of the family or the traditional rulers of the community of the mother acknowledging the paternity, making health care available, paying school fees and so on, will be held as prima facie evidence of proof by conduct. These however are rebuttable presumption; until the otherwise is proved by contrary evidence.⁵¹

The proof by presumption is premised on the fact that where a child's paternity, born within a subsisting marriage is contended, there exist a rebuttable presumption that the father in the marriage is the biological father until proven otherwise. Proof of presumption here is different from proof by conduct or acknowledgement, as the proof of acknowledgment is usually within the context of having a child before or outside marriage. In *Ibeabuchi v Ibeabuchi*,⁵² the court re-echoed this proof by presumption by relating to section 165 of the Evidence Act, which provides that where a person was born during the subsistence of a valid marriage or within 280 days after the dissolution of that marriage, where the mother still remained unmarried, the court will presume that the person in question is legitimately the child of the man in that marriage. The burden of proof of the presumption of a child's paternity is usually placed on the mother, yet, the court can still presume the man of the subsisting marriage to be the father or where the child was born within 280 days or 9 months of his divorce with the child's mother. But a presumption is still a presumption and not a final conclusion. In *Anozia v Nnani*,⁵³ the court held that the principle stated in section 165 is a rebuttable presumption which cannot be given judicial immunity against clear and undeniable evidence to the contrary. Hence, until the evidence of an irrefutable nature shows to the contrary that the woman to whom a man was validly married to remains unmarried not more than 280 days within which the child was born, such a man would be favourably assumed to be the child's father. Also in *Elumeze v. Elumeze*,⁵⁴ the Supreme Court held that any child born within a valid marriage is presumed legitimate, unless it can be proved that the husband and wife had no physical access to each other or that sexual intercourse could not have taken place.⁵⁵ However, such an evidence in a paternity case, must of necessity be proved beyond reasonable doubt, far beyond the proof of preponderance of evidence which applies in civil cases.⁵⁶

Proof by evidence, in view of the case of *Anozie v Nnani*, is proof by DNA evidence wherewith through scientific analysis, a person's genetic composition can be used to determine his origin, or prove paternity.⁵⁷ This proof is a qualified one in that it is not available to all persons in all circumstance. Section 63 (1) (a) of the Child Rights Act⁵⁸ provides that the court 'may' give direction for the use of DNA testing to prove a person's paternity where the determination of a person paternity or maternity is a fact in issue in a civil proceeding.

However, borne out of the sincere desire to protect the 'sacred' marriage institution and the best interest of the child, the court may not readily request for the proof of paternity unless it is raised as a ground for divorce or custody dispute. The Nigeria Court, though aware of the child's right to his/her full identity, would however refuse to give an order for a DNA testing to determine the paternity where:

- i. The claim emanates from a third party to a marriage, for a child conceived before but given birth to during the marriage⁵⁹
- ii. Such a claim is against the wishes of the married partners in a subsisting union where the child is born.⁶⁰
- iii. Where an acclaimed biological father applies for an order in respect of an adopted child.
- iv. Issues arise on the identity of Children from Assisted Reproductive Techniques.⁶¹

However, the courts are aware that the paternity test of a child becomes necessary, and undeniable in several instance such as in divorce proceeding when mothers allege that the father has no right to contact, custody or visitation because he is of his faulted paternity or when a woman seek child maintenance from a man who denies paternity. The Child also has a right to know persons he has genetic links with, especially where he seeks to identify one parent when the other parent is unavailable to give evidence.⁶² Child Paternity test is also relevant for establishing family relations and inheritance rights.⁶³ The Child's Right Act

⁵¹ *Philips v Philips* (1946) 18 NLR 102; *Abisogun v Abisogun* (1963) 1 All NLR 237; *Young v Young* (1953) 4 – 5 WACA

⁵² (2016) LPELR-41268(CA),

⁵³ (2015)8 NWLR (PT. 1461) 241

⁵⁴ (1969) LPELR-25522 (SC); (1969) 1 ANLR 301.

⁵⁵ See also *Idahosa v. Idahosa & Ors*- (2010) LPELR-9072 (CA).

⁵⁶ Per Okoro JSC, in *Sgt. Stephen Idahosa v Christopher Idahosa* (2020) Legalpedia (SC) pp 12669

⁵⁷ (2015)8 NWLR (PT. 1461) 256, para-H

⁵⁸ Childs Right Act, No. 26 of 2003

⁵⁹ *Preston Jones v Preston Jones* (1951) AC 391

⁶⁰ (2015)8 NWLR (PT. 1461) 256, para-H

⁶¹ Aderonke E. Adegbite, 'The Nigerian Legal Framework on the Use of DNA in the Resolution of Child Paternity Dispute' (2016) *Lead City University Law Journal*.

⁶² Bertus Preller, 'Navigating the Complexities of Paternity Law in South Africa: DNA Testing to Misattributed Paternity' (2024) *Family Laws South Africa*; The landmark German case of *BVerfG, 1BvR 421/05* established with emphasis the rights of the child to know his biological parentage. The Court in the United Kingdom equally ruled same in the case of *Re H and A (Paternity: Blood Tests)* (2002) EWCA Civ 383 that the courts could order a DNA testing against the wishes of the presumed father or mother, put into utmost consideration the right of the child to know his biological parentage.

⁶³ Aderonke E. Adegbite, '*op cit*

permits courts to order DNA testing when other methods of proving paternity fails.⁶⁴ The courts are allowed to mandate scientific tests, including blood and DNA, to determine parentage and to collect samples from relevant parties within a certain time frame.⁶⁵

In *Idahosa v. Idahosa*,⁶⁶ the Supreme Court made a notable pronouncement on the need to seek scientific evidence instead of litigation in court on matters of paternity. The court opined that today's world has shifted significantly in proving paternity through scientific analogies, thus parties to an appeal should consider subjecting themselves to taking DNA test to determine paternity rather than going through the route of litigation which consumes time. Also, the Court of Appeal encouraged the use of DNA as at when appropriate in *Gbadamosi v Kabo Travel Ltd*⁶⁷ when it charged Judges to keep pace with changing times and not live in complete obscurity and ignorance of what is happening around them.

6. Legal Framework on Paternity Fraud in South Africa

The laws regulating the marital relationships in South Africa⁶⁸ like it is in Nigeria, do not address paternity fraud or misattribution, despite growing concerns, rather these issues are addressed specifically under the South African Children's Act⁶⁹ and its 1996 Constitution which prioritizes the child's interests in matters concerning them. The call for criminalization of Paternity fraud in South Africa, like Nigeria, is on the basis that the perpetuated 'fraud' has left many men and children emotionally damaged and the men financially drained.⁷⁰ It's been argued that both the mother, as well as the genetic father should be held liable to requite for the maintenance the 'social father' incurred, as well as compensate for any legal costs incurred in proving paternity.⁷¹ Though South African law does not presently acknowledge paternity fraud as a crime, rather the element of fraud, which involves deliberately misleading a person to secure financial vantage, could be tried as a civil wrong under general laws on fraud. The fact that there are no specific legislation addressing this menace have left many men endangered to victimization hence the need for legal reforms that protect men from paternity fraud.⁷²

Proof of Paternity in South Africa

Traditionally, to prove/disprove the Paternity the parties must establish evidence which include the presence or lack of sexual intercourse at the time that the child could have been conceived, sterility and impotency, the gestation period in which the woman was already pregnant and not possible to conceive nor could he have fathered the child etc.⁷³ However, this approach has not proven to be too reliable as the use of DNA test have proven, overtime to be the most reliable method of proving paternity with almost 100% accuracy; the statistical chance of a particular man being the father could be as high as 99.9%.⁷⁴ This position was re-echoed by the court in *M v R*⁷⁵.

Section 37 of the SA Children's Act presumes that a man is the natural father of a child born out of wedlock where he had sexual intercourse with the woman at the time the child could have been conceived, except there is adverse proof beyond reasonable doubt. Sections 38 and 39 provide that where a child is born of married parents (irrespective of whether the marriage was a void or voidable marriage) at any time after the child was born, must for all purposes be regarded as a child born to parents married at the time of his or her birth. A man who alleges otherwise must submit himself to DNA testing, as the only mode of proving true paternity.⁷⁶ This position simply establishes that where parties are married, the man presumed to be the father must prove on the balance of probabilities that he is not the father; also, where the parties are unmarried the man must prove beyond reasonable doubt that he is not the father.⁷⁷ Under the Children's Act, DNA testing have come to be the final mode of determining paternity. The court in *VJS v SH*⁷⁸ challenged the traditional methods of resolving paternity disputes by evidencing how modern scientific methods can conclusively rebut the common law presumption of paternity during marriage. The court's adoption of DNA evidence from two distinct science lab established the scientific basis for determining paternity. In this case, a US Embassy project manager in Pakistan sought to terminate his parental rights after finding out he was not the biological father of a child born during his marriage. The couple married in 2012 and got divorced in 2022, with the applicant required to pay monthly maintenance for the child born in November 2017 and sharing medical costs. He retained contact rights with the child who lived mainly with the ex-wife. Following this discovery of WhatsApp messages which indicates his ex-wife had an affair during his absence, coincidental with the child's conception date; the messages pointing to another man as the child's 'real father', the applicant took paternity tests at two labs, both of which confirmed he was not the biological father.

⁶⁴ ibid

⁶⁵ Section 63 of the Child Rights Act 2003

⁶⁶ (2020) LLER – 52011 SC

⁶⁷ (2000) 8 NWLR (pt. 668) 248 at 288

⁶⁸ The South African Marriage Act 25 of 1961, the Recognition of Customary Marriages Act 120 of 1998 (RCMA) and the Civil Union Act 17 of 2006

⁶⁹ Children's Act 38 of 2005.

⁷⁰ Gary Da Silva, *Paternity Fraud in South Africa?* (2024) <https://www.f4j.co.za/2024/10/30/paternity-fraud-in-south-africa/?v=eacb463a8002#:~:text=This%20case%20raises%20a%20broader,men%20feeling%20vulnerable%20to%20exploitation.>

⁷¹ ibid

⁷² ibid

⁷³ ibid

⁷⁴ Waheeda Banoobhai, and Shannon Hctor, *The Court's Power to Compel DNA Testing in Paternity Disputes –LB v YD* 2009 5 SA 463 (T) (2009) OBITER CASES / VONNISSE p 795

⁷⁵ (1989 1 SA 416 (O) 425)

⁷⁶ Section 38 of the Children's Rights Act

⁷⁷ Waheeda Banoobhai *op cit*, p 796

⁷⁸ (19578/2024) [2024] ZAWCHC 333

Despite being notified about the urgent application, the ex-wife did not contest the matter nor appeared in court. The case challenged the legal assumption that a child born in a subsisting marriage is the husband's, rebutting this presumption through the combination of scientific evidence, the court found that the respondent may have intentionally hidden the truth about the child's paternity to gain financial benefits, labeling this as paternity fraud and misrepresentation. The judgment took into account the child's best interests alongside the legal responsibilities of a non-biological father, ultimately resulting in the termination of the applicant's parental rights under the Children's Act.

In proving the existence Paternity fraud and the consequent liability, the court in the case of *MN v BN*⁷⁹ noted that to prove the element of 'fraud' an express representation must be made by the wife to her husband, with her knowledge that the representation is false and had intended that the husband will act on the representation. The representation made must have induced the husband to act, in response to it. The husband/plaintiff averred that the non-disclosure of her extra-marital affairs amounted to a representation. The High Court found that the wife/defendant's silence/non-disclosure about her one-night sexual escapade did not amount to a false representation neither did it amount to a misrepresentation as nothing was disclosed. All the same, even if a misrepresentation is established, the husband/plaintiff had failed to prove that the misrepresentation was fraudulent since he could not establish that the wife/defendant had the knowledge that the youngest child was not his biological child. Thus, the High Court could not unravel any intentional misrepresentation with knowledge it was in fact false or untrue. The husband/plaintiff further argued that the wife/defendant had a duty to disclose to him her extra-marital affair at the time the child was conceived, which she failed to do with the aim of deceiving him. The court however relying on various foreign judgment⁸⁰ held that the wife does not owe a duty of disclosure to her husband that he may not be the child's father. Consequently, her failure of non-disclosure did not amount to a fraudulent or deceitful non-disclosure as alleged by the plaintiff.

While adjudicating between disgruntled spouses, the South African Court is also wary of the impact of the paternity proceedings on the Child as it has the disposition to ruin an existent loving and caring parental bond with a child whose rights to family and parental care are protected under Section 28 of the Constitution.⁸¹ The constitutional right of the Child under South African Law is of paramount consideration in a Paternity proceeding. The court take cognizance of the impact of giving an order to carry out DNA test on a Child's constitutional right of dignity,⁸² to privacy⁸³ and to security of the person and bodily integrity.⁸⁴ However, in a bid to balance the interest of justice and seeking the truth using reliable scientific evidence, a minor infringement of privacy will not harm the legitimacy of the administration of justice.⁸⁵ Perhaps discovery of truth would be in the best interests of the child to clear doubts about true paternity by resorting to the best available evidence.⁸⁶ In *YM v LB*,⁸⁷ the court stated that the child born within a marriage, which has presumed paternity can be rebutted in the face of conclusive DNA evidence. Also in *F v L*,⁸⁸ the court took into consideration the best interest of the child when it held that even if there is misattributed paternity, the child's welfare would necessitate maintaining the *status quo* in order to avoid both psychological and emotional harm which a child can suffer. This case shows how delicate the court would have to be in addressing the discrepancies in the biological and legal issues of the welfare of the child. In *Botha v Dreyer*,⁸⁹ the court affirmed that there is inherent power in the High Court to order DNA testing; such an order would be in the interest of the child in spite of the marginal infringing of the child's right to privacy.

The Children's Rights Act further outlines other related provisions on Paternity, which include the consequences of refusing blood tests,⁹⁰ guidelines for men seeking legal recognition as fathers,⁹¹ including conditions for presumption of paternity of children born outside wedlock, the issue of paternity as it relates to adoption, matters of eligibility and circumstance under which a biological father may adopt.⁹² The biological father who desires to acquire parental rights (which he does not have) can do so on the condition that at the birth he cohabits with the mother permanently or in life-partnership; that he consents to be identified as father of the child and so declares; that he has taken active steps in contributing to the child's upbringing and

⁷⁹ (2023) ZAFSHC 236

⁸⁰ In the Australian case of *Magill v Magill*, it was held that: 'There is currently no recognized legal or equitable obligation, or duty of care, on a spouse to disclose an extra-marital sexual relationship to the other spouse during the course of a marriage. There is a mantle of privacy over such conduct which protects it from scrutiny by the law...; The trust and confidence required between marriage partners must be supplied by them; it cannot be provided by legal norms and duties in the same way as those norms and duties may regulate commercial interactions'. The High Court also relied on the case of *(D.R.) v. G. (S.E.)*, where it was held that a wife owes no duty to a husband to tell him that he might not be the father of the child. (Extracted from the blog 'ENSight' titled 'South African High Court Rules in favour of non-disclosure in a paternity fraud case' <https://www.ensafrica.com/news/detail/7301/south-african-high-court-rules-in-favour-of-n> (last accessed on 16 March 2025))

⁸¹ *MN v BN* (2023) ZAFSHC 236

⁸² Section 10, South Africa Constitution 1996

⁸³ Section 14, South Africa Constitution 1996

⁸⁴ Section 12, South Africa Constitution 1996

⁸⁵ Latiefa Albertus, Some unresolved complexities in matters involving paternity: a South African Perspective (2014) *Adam Mickiewicz University Law Review*, p 235

⁸⁶ Latiefa Albertus, *op cit*, p 236

⁸⁷ 2010 (6) SA 338 (SCA)

⁸⁸ 1987 (4) SA 525 (W)

⁸⁹ (2008) ZAGPHC 395

⁹⁰ Section 37, Children's Act 28 of 2005

⁹¹ Section 26, Children's Act 28 of 2005

⁹² section 231, Children's Act 28 of 2005

maintenance in good faith within a reasonable period of time.⁹³ The Children's Act seeks to bring about an equilibrium in the father's rights to paternity and the welfare of the child.

7. Basis for Claims made under Paternity Fraud

Misattributed paternity is a refutable proof of unfaithfulness and deception while paternity fraud is simply fraud or deception as the name implies. These issues come under consideration when there has been a relationship breakdown, a suspicion of infidelity and later a paternity test which finally collapses the relationship. It is upon this basis that men make claims that they have fathered a child that is not theirs, therefore all that have been spent on child support should be returned back. The claim for compensation or reimbursement of child support, may be in form of collecting back property given in the marriage or financial cost of bringing up children, all on the basis that the responsibility of raising the child belonging to another man was imposed on him, the pain resulting from emotional attachments formed with the child, the breach of duty by the wife in making truthful assertion about paternity and the deception involved in infidelity.⁹⁴ Such claims, largely financial, are directed towards the mother and the 'lover' or the genetically related Father. Claims made against the 'lover' or the other man is on the grounds that he is aware that the child belongs to him and fails to take financial responsibility. Where the other man is unaware of his paternity and/or the existence of the child, he may be exonerated of the fraud but he is required to take financial responsibility.⁹⁵ The Justification for these claims includes the financial sacrifices made by men, the extensive effort involved in raising children, emotional pain upon discovering the truth, and the feelings of betrayal and breach of trust resulting from the deceit. Paternity fraud exposes infidelity and can lead to the breakdown of relationships. It is however necessary to stress that financial compensation for emotional harm may not address the deeper psychological and relational issues that arise from these situations. When a man is aware of the true paternity, he can choose to accept the child and fulfill his obligations. If he does not accept responsibility, he is freed from those obligations. However, if he is deceived into taking on responsibilities for a child that is not his, this can strain the marriage and lead to its end.⁹⁶

A claim for damages is not automatic; it must be justified or else the court may not grant it. This was the position of the court of appeal in the first reported case of paternity fraud in South Africa, *Nel v Jonker*⁹⁷, where the respondent discovered that he had no paternity relationship with the child he had been supporting years after divorce. The trial court ruled in his favour allowing him to recover the cost of maintenance incurred as a result of false paternity. On appeal, the court held that he had not met the qualification for an unjustified enrichment claim because his error in incurring cost of maintenance was not justifiable in law. First, at time he had his suspicion of paternity fraud, he didn't act on time. He only took the step of challenging Paternity when providing for the child's maintenance was becoming burdensome hence the respondent ought to institute prompt action upon suspicion of paternity fraud. Secondly, the court found that there was no proof that the child's mother was actually unjustly enriched by the maintenance payments, since the child was the only person that benefited from the payments. In order to do so, he ought to prove fraud or unjust enrichment giving evidence that the mother's estate or assets increased as a result of the payments.

8. Comparative Analysis of Nigeria and South Africa Situations

An issue of Paternity fraud and misattribution is a global issue not peculiar to only Nigeria and South Africa. The cited cases reveal similar interplay of social realities and principles of law in a legally complex manner in South Africa and Nigeria. The emotional trauma issues and financial obligations arising from paternity disputes are usually core to these legal and social complexities and for the many reasons earlier discussed, paternity fraud seems to be an inevitable social ill that the legal provisions may not be able to cure completely. A close look at the legal framework of both jurisdiction reveals that both jurisdictions have no direct legislation that caters for Paternity Fraud and Misattribution, **but** unlike Nigeria, the South African Children's Act, with the aim of protecting the Child, makes provision for Paternity ascertainment in the best interest of the Child.

The provisions of the South African Children's Act and the deliberate integration of some of these rights in the South African Constitution reveals the degree at which the Country strives to protect their children from emotional, psychological, physical and mental stress that arises from strained parental relationships. The rights and well being of the Child is not a passive concern for the state but an active and deliberate one. Despite resultant effects of Paternity fraud, the Child is of paramount concern because he suffers more once his family becomes dis-integrated. Nigeria's attempt to prove or disprove paternity fraud is provided in the Evidence Act but only with the aim of unraveling the truth and not necessarily for the protection of the Child. The Nigeria's Child's Right Act's only provision related to Paternity fraud and misattribution lies in section 63 where the court is empowered to give an order for DNA testing. However, the non-recognition of illegitimate children under the 1999 Constitution was for the sole purpose of avoiding any form of discrimination against the Nigerian Child and not with the intent to save the child from any traumatic experience that may arise under Paternity Fraud. Nigeria needs to learn from South Africa legal framework on how to provide maximum security for the Nigerian Child- security in every way- social, economic, health, emotional, psychological etc. The provisions of the South African Children's Act and the inculcation of the Children's

⁹³ Section 21, 26 Children's Act 28 of 2005

⁹⁴ *ibid*

⁹⁵ Heather Draper, *op cit*

⁹⁶ Ashley Shepard, *Discovering Misattributed Paternity After DNA Testing and its Impact on Psychological Well-Being and Identity Formation*, (2022) American Journal of Qualitative Research pp. 189-211

⁹⁷ [(WCHC) unreported case number A653/2009 dated 2011-02-17]

fundamental right in its constitution is a positive step in a positive direction that could help fortify the protection a child needs in an ailing family drama.

In both Jurisdiction, the courts have made efforts to resolve rising agitation on Paternity fraud and misattribution but has not, nor can it, address the underlying cause. It is only natural to ask- Is the award of damages adequate to heal the emotional damage and psychological traumatic experience a man and the child would have experienced as a result of paternity fraud? What should be the proper remedy for paternity fraud? Research has proven that the effect of the revelation of paternity fraud on men could lead to death, heart attacks, stigmatization, failed marriages etc. The answer as to what could be an adequate and sufficient judicial redress or recompense to this problem is still rhetorical and will need deep legislative and judicial deliberations.

However, the need for a potent legislative framework in Nigeria cannot be dispelled with, Case laws abound on this issue, but a legal framework either on its own or integrated in the Matrimonial Causes Act in Nigeria will do justice to this menace. Though we know that under our law in southern Nigeria, adultery or infidelity is not a crime, but parties who through their negative motives and actions causes other people pain, robbing them of their right of choice to adopt a child as their own, robbing them of their financial assets for their selfish gains, and causing traumatic experiences should be civilly liable for their actions. This proposed law should not only hold women liable for Paternity Fraud but men also for Maternity Fraud committed against their wives; and hospitals liable for suspected paternity Misattribution.

9. Conclusion and Recommendations

While judicial decisions are growing on this subject, required significant measures are needed to address consequential challenges flowing from paternity fraud and misattribution. The establishment of a definite legislation to address this issue may not bring lasting remedy to the emotional and psychological pain that flows from Paternity fraud; financial damages may cover sufferings encountered as a result of child support expenses but not the the betrayal, confusion and identity challenges associated with such deceit. The financial damages on its own cannot be totally quantified but will be left at the discretion of the court upon examination of various factors. On the other hand, paternity misattribution, being largely a function of medical negligence or deliberate medical manipulation can be remedied on the basis of tortuous negligence; the financial compensation for the emotional and financial trauma to be borne by the hospital involved. However, the court may order, *suo motu*, counselling and therapy to help parties involved to recover from the associated grief. However, it is suggested that DNA testing should be made accessible, affordable, and compulsory at birth to prevent future paternity disputes, thereby upholding the fundamental right to human dignity and right of choice of the father if the child doesn't turn out to be his biological child. It also reduces the risk of emotional trauma for the child from attachment to a father who may likely reject him if the reverse is the case; and where the father accepts him, biological or not, the child's psychological well-being will be preserved; perhaps at birth the child is not aware of the happenings around him and cannot be emotionally traumatized by the outcome of paternity fraud or misattribution. The likely effect of this test on spouses will determine earlier than expected the status of their marriage and will save the social Father such trauma and financial expense he may incur through fraud, except he chooses to accept the child and the responsibility that comes with child maintenance. Moreover, while DNA testing has come to be accepted as a potent way of determining biological paternity, the inaccuracy and possible errors that may emanate from this technological prediction may not be foreseen. It is not absurd to question the validity or accuracy of the DNA test results especially where laboratory negligent or malpractice is possible. This leads to the recommendation that the courts cannot wholly embrace DNA test as the only proof of paternity. Physical attributes, similar inherent character traits and further scientific and physical investigation needs to be examined to prove concretely paternity. Proof by every means however must be beyond reasonable doubts.

Based on the premise that no illegitimate child exists in Nigeria and South Africa, and in the consideration of 'the best interest of the child', the courts should aim at preserving the emotional and psychological well-being of the child hence raising the bar to the strict application of the proof of paternity. The traditional African society never gave room for discrimination of any child based on paternity, but rather had a way of assimilating every child into the family communal circle. This of course is not to encourage continuous fraud or deceit or promote increased sexual immorality, but rather to protect the child who should not be punished for the sins of her father or mother. To address the issue of deceit from mothers in paternity fraud or misattribution cases, it is suggested that that there should be consequences for the mother's action in order to deter women from creating situations of misattributing paternity fraudulently. Furthermore, the need for establishing uniform legislation and procedures regarding proof of paternity, the creation of family courts to ensure fairness and efficiency in handling related issues, and the introduction of certified family arbitration to resolve paternity disputes outside traditional court settings cannot be over emphasized. This approach would facilitate better outcomes for children's welfare and allow for more amicable resolutions, especially where scientific evidence like DNA testing is involved. Moreover, it is suggested that the Child Rights related commissions and agencies should form special committee or department on paternity so as to provide tailored made solutions to complexities of paternity fraud and misattribution in Nigeria.