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SECTION 112 OF MALAYSIA EVIDENCE ACT: MAJOR AREAS OF CONCERN AND THE WAY FORWARD

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Abstract: *In the nineteenth century, when science had nothing to offer and illegitimacy was a social stigma as well as a depriver of rights, the presumption of legitimacy was a necessary tool, the use of which required no justification. In spite of that, as science has blossom tremendously and DNA paternity test has hastened on and as more and more children are born out of marriage it seems that the paternity of any child is to be established by science and not by legal presumption or inference. The problem of largely irrebuttable presumption of legitimacy in the Evidence Act (which operates also as a largely irrebuttable presumption of paternity of the mother's husband) requires urgently to be improved. The most important change to the presumption must be to "its' largely irrebuttable character" since it is this that prohibits the court from hearing all relevant evidence that might suggest that, despite the mother being a married woman, it is not her husband who is the father of her child. It should be changed to a rebuttable presumption. Using content analysis methodology of research, this paper intended to highlight the weakness of section 112 of Evidence Act, and with the advancement of technology at a lightning fast pace, perhaps this provision should be amended and allowed the admissibility of DNA test in rebutting presumption of legitimacy in the realm of family law.*

Keywords*: Biological Parentage, Proof, Section 112 Evidence Act, DNA, The Way Forward*

Introduction

Parents, Child and the Proof of Biological Parentage

Conventionally, parenthood is a straightforward biological fact. Through the sexual intercourse of parents, a child is conceived and born after gestation in the mother's womb. The identity of the mother is, as such, never in doubt. Indeed, the proof of parentage is a proof of paternity (Leong, 2006). Having said that, determining paternity is a necessary matter, but far more tricky. The father's role in conception is exhausted in his fertilisation of the mother's mature egg and he, plays no further role until the child is born. No records would have been kept at

this early stage of conception. As such, it has always a bigger challenge to put together succinct and persuading evidence to prove who the child's biological father is (Leong, 2006). The relationship between parent and child is often created naturally without legal process. The only instance when such relationship is created via legal process is the relatively rare occurrence of adoption (Adoption Act 1952) of the child, where 'the proof of adoptive parentage is simply by the adoption order of court because adoption of a child is only legally possible through court proceedings' (Leong, 2013, p 254). In contrast, the relation between spouses is created only upon complying with statutory prescriptions of formation of marriage, *viz* The Law Reform (Marriage and Divorce) Act 1976 (Act 164). Hence for the vast majority of parents and their children, the law merely recognises the relationship that was naturally, *i.e.* biologically created (Leong, 2013, p 231). Although it is often not required to resort to the law which offers several ways to prove the parentage of a person with respect to a particular child, yet it serves potentially importance for parentage to be successfully proven, particularly when it is sought to establish the relationship or to enforce an obligation that the parent owes to the child (Leong, 2013, p 254).

Under the common law basic substantive rule, for a child's relationship with her parents to be legitimate, the child must first be able to prove three facts:

(i) who her mother is,

> The first fact is easy to prove. Given that most birth taken place are medically assisted and under medical supervision, especially so in countries like Malaysia where, since the early days, the process of child birth is invariably medically assisted. It is often well equipped with proper medical records of the birth which, as such render quite illogical for anyone other than the birth mother to claim maternity or, conversely to dispute her maternity. It may only be in countries where the public has little faith in the integrity of hospital procedures, of which Malaysia is not one, that the mother may believe that some other woman's baby could have mistakenly been given to her and thus seek a maternity test (Leong, 2006).

(ii) who her father is, and

(iii) her mother and her father were parties to a valid marriage at her conception or latest, her birth.

> The third fact is made easy by routine registration of every solemnisation of marriage in Malaysia.

Based on all the above three facts, it is proving the second fact that was practically impossible until the technological advances and the progressive development of the DNA test of parentage (Leong, 2013). The DNA of each person is unique, however parents and their child possess very close similarities in the chemical signals of the DNA molecule. A DNA test matches for these similarities. By careful comparison, a DNA test properly executed reveals positively whether the child inherited her DNA from the person tested. DNA can specifically pinpoint the chances of an individual being parent of the child. It can therefore prove if the person is the father or mother of the child, on probabilities well in excess of the civil standard of 'balance of probabilities'. Indeed parentage can be proven to probabilities that, practically, approach certainty (Leong, 2013). Evidence of parentage that is of the highest probative value is the result of testing the DNAs of the child with the alleged father or mother. It is precisely

because the test result suggests probabilities of astronomical proportions, either positively or negatively, that such result can be devastating to the party against whom it is used. It follows, therefore, that the court must first be absolutely sure that the test result was obtained using the best industry standard so that it is an accurate result. Precisely because of the immense potential for prejudice from a DNA test result used against an opponent, the court must approach the use of such evidence with all appropriate caution (*Nadasan Chandra Secharan v Public Prosecutor* [1997] 1 SLR(R) 118). This reminder will ensure a better approach to a scientific evidence. A court need not be overwhelmed by the prospect of scientific evidence as proof of any fact in issue. It should first be convinced that the scientific evidence was obtained according to the industry's best practices before it hears the evidence.

Even where the existence of a biological father-child relationship is one of the issues raised in a legal dispute, there may be no need to "prove" paternity. There may be only one man who is alleged to be the father and he could readily admit to this relationship. An admission of fact that is not challenged by any other person is sound proof thereof. In other cases the matter of who the child's father is needs to be proved like any other fact that is in issue between parties. Where this is so the court must first pick from among the 'facts' that the disputing parties try to convince the court of which to 'finds' as the facts of the case and thereby to come to its decision on these facts. Where there is a dispute over the facts, one piece of evidence that might tip the scale is evidence of family members of their beliefs as to the existence or lack of the relationship (Leong, 2006). Section 50(1) of Evidence Act provides:

When the court has to form an opinion as to the relationship of one person to another, the opinion expressed by conduct as to the existence of such relationship of any person who as a member of the family or otherwise has special means of knowledge on the subject, is a relevant fact.

What if a party seeks to introduce the result of a DNA paternity test? This raises two sets of legal issues:

(i) One, do the rules of evidence allows the courts in Malaysia to admit as evidence the results of a paternity test?

(ii) Two, what is the effect of the evidential presumption of paternity?

Besides, one of the most tricky issue lies on: what is the proper relationship between the DNA test result and the presumption of paternity in section 112 of Evidence Act in the realm of family law. In fact tedious consideration must be pointed on as to when should a court allow the admission of the DNA test result where a child is born to a married woman (Leong, 2013, pp 258-262).

Importance of DNA Tests

The welfare of the child is paramount when it comes to family law. Despite so, the comments of the House of Lords' in *S. v S. ; W. v. Official Solicitor* case [1972] AC 24 on the issue had made it a rather debatable matter. The House of Lords opined that the reason that the English courts have the discretion to order or compel a person to undergo a blood test and/or paternity test is not simply a matter of the child's upbringing, so that the child's welfare is not necessarily the paramount consideration; but that justice would usually require that the truth be told and

this would, in general, be a contributing factor for the betterment of the child. Though in special cases, the courts would deny DNA tests that may detriment the child's welfare (see *Re F. (A minor : Paternity Test)* [1993] 1 FLR 598), it is usually the opposite. Whether courts agree that the child's welfare is paramount or not, both opinions weigh to side that DNA testing in determining paternity is one of great importance to the family law and families in general (see *T. v. T.*, The Times, July 31, 1992).

In general, the importance of a paternity test is for the dispute of child support (Hoggett, 1993). In English courts, where the question of a child's parentage arises for the purpose of calculating child support maintenance, section 27(1) of the Child Support Act 1991 enables the Secretary of State for Social Security or a person with care to apply to the court (The Family Court Practice, 2004). Scientific tests may be made on application by either party to the court, but may also be done ordered by the court of its own motion (Family Law Reform Act 1968, section 20). In Malaysia and Singapore, however, the court cannot compel a man to take or undergo a DNA test. Here, the presumption that a child is a man's is rebutted by evidence which "shows more probable than not." Usually, the courts would choose the most-likely father (*Re Overbury* [1955] Ch. 122). Such evidence is of two types; one seeks to show that the husband and wife did not or could not have intercourse at the relevant time; the other seeks to show that even if they may have had intercourse, the child was not a product of it (Hoggett, 1993).

Section 112 of Evidence Act and its' Weakness

Section 45(1) of the Evidence Act allows the results of scientific tests to be admissible as evidence where the court has to form an opinion upon a point of science and the results constitute the opinions upon that point of persons specially skilled in such science. The result of the paternity test must be 'relevant' to the issue being considered by the court so as to become admissible evidence. It is beyond doubt that the result of paternity is relevant to the disposal of the issue of paternity and hence it is an admissible evidence. There are two kinds of paternity tests: blood test and DNA test. The Evidence Act provides evidential aid to a person who needs to prove who her father is. Section 112 of the Evidence Act (in *pari materia* to section 114 of Singapore's Evidence Act) provides:

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 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten. (see similarly Halsbury's Laws of Singapore, Volume 11, Family Law, 2001, LexisNexis at para [130.553])

Based on the above proviso, it can be concluded that on proof of either of two primary facts (Leong, 2013), the child shall be conclusively proven to be the legitimate son of the man who is or was married to the mother unless this conclusive presumption is rebutted on evidence that the mother and her husband or former husband had no access to each other at the possible times of conception of the child. Hence two separable parts of section 112 are:

(i) the presumption itself, and

(ii) the way to rebut the presumption.

Despite section 112 employing the term 'legitimate son' and the provision being subtitled 'birth during marriage conclusive proof of legitimacy', it has long been observed that this provision is really, only, a presumption of paternity (Kenneth, 1976). On its own, section 112, as a rule of evidence, does not suffice to confer legitimacy on the relationship between the child and the parents. The presumption must be coupled with proof of who is the mother as well as the father and mother being validly married at her birth, under the 'common law basic substantive rule', to reach the conclusion that the relationship between the child and her parents is a legitimate relationship. Legitimacy is a legal construct from these facts and not reached, simply, on the presumption of one fact by section 112. Hence when a married woman gives birth, her husband is presumed to be the father of her child. The presumption can only be rebutted with one kind of evidence: they have 'no access' to each other at the possible time of conception of the child.

Under the Evidence Act, section 112 does not require a court to find legitimacy but permits the court to presume legitimacy instead. Thus, when one presumes that X is a legitimate child of Y, one is not bound to first find that paternity as a primary requirement is satisfied; this primary requirement of legitimacy is effectively presumed to be fulfilled until proven otherwise. And precisely because section 112 permits such a presumption to arise only after facts that would otherwise constitute the secondary requirement of legitimacy are successfully proven to exist, what is essentially left for dispute under every triggered statutory presumption is for all practical purposes really the question of factual kinship (paternity) the rebuttal of which can only be made by evidence of "no access" at the relevant time. The explanation above summarises the foregoing. 'No access' is not a technical term. This term is not a term of art and there is no definitive judicial discussion of it. Leong (1997) suggested that the best reading of 'no access' only admits two types of evidence, *viz*

(i) the mother and her husband were physically separated during the possible times of conception of the child, and

(ii) although physically together the husband, being impotent during the possible times of conception of the child, had no sexual access to the mother that could have led to the child's conception.

These, it is suggested, are equivalent to separation in relation to the likelihood of the mother's husband being the father of her child. Apart from evidence that proves the lack of physical access or at the broadest understanding of the term, the lack of sexual access, it is hard to argue that any other evidence can be incorporated into 'no access'. That these other evidence could possibly reflect on the accuracy of presuming that her husband is the child's father is irrelevant as 'no access' is the threshold they need to pass. In other words, it is not expected that evidence other than total separation or the mother's husband's impotence, during the possible times of conception of the child, is included even by the most liberal reading of 'no access'. Even evidence clearly relevant to the issue of whether the husband is the father, example the result of a scientific test which positively establishes that he is extremely unlikely to be the father, may not be heard by the court as it can only consider evidence of 'no access'. It means, the evidential rule requires that, once the mother and her husband did not have sexual

access, the court is not allowed to consider evidence which establishes that the sexual access did not result in this child's conception (Leong, 2013).

The presumption in the section 112 Evidence Act applies on the facts but when one party seeks to admit DNA test result, the court must first decide whether such test result is evidence of 'no access' between the mother and her husband. Only evidence of 'no access' is permitted in rebuttal of the presumption. Even though 'no access' is not a term of art, it is hard to see how any court can regard DNA test result as evidence of 'no access'. The decisions of the court shows the contrary view on this, attracting many criticisms and scrutinies by scholars. The contrary judgement are such that the DNA test result is evidence that, despite the mother and her husband having sexual access with each other, nevertheless the child was not conceived from such access. Such interpretation of 'no access' by the court to include a DNA test result, would be taking such liberties as to make nonsense of the term. Where the Evidence Act limits the court to evidence of 'no access', no scientific test (whether of the blood or DNA of the parties), fits such limitation. In other words, the Evidence Act, becomes, is not an evidential provision of general applications. It applies selectively only in applications where the paternity of the child was relevant because the legitimacy of her relationship with her parents was in issue. In applications where the law makes legitimacy irrelevant, the presumption does not apply to determine the paternity of the child. Instead a court is free to admit any relevant evidence of paternity including DNA test results (Leong, 2013). This is illustrated in the case of *WX v WW* [2009] 3 SLR(R) 573, illustrates such contrary. In year 2006, H had proposed and married the plaintiff after discovering and believing that the plaintiff was pregnant with his child. However, H's suspicion grew when it became apparent from the blood group of the child that H was not her biological father. It subsequently transpired that prior to H's and the plaintiff's marriage, the plaintiff had been secretly dating and had constant sexual relations with another man, the defendant. A negative DNA test further confirmed that H was not the biological father of the child. An action for child maintenance was originally brought by the plaintiff against the defendant at the District Court after the plaintiff's marriage with her husband, H, was nullified in a separate matrimonial proceeding. The District Judge circumstantially found as a fact that the defendant was the biological father of the child and thus ordered the defendant to pay child maintenance under s 69(2) of the Singapore's Women's Charter. The defendant appealed against the decision of the District Court and sought to invalidate the finding that he is the biological father of the child by arguing that section 114 of the Evidence Act (in *pari materia* with section 112 of Malaysia's Evidence Act) applies and presumes as conclusive proof that the child is the legitimate child of H who was unable to adduce evidence of "no access" to rebut the said presumption. Applying to the facts of the present case, the Evidence Act reading literally (as suggested by Leong, above, as to how this proviso should be read), required the court to presume the married girlfriend's husband as father of her child, only allowed evidence of lack of sexual access between them at the possible times of conception in rebuttal and thereby prohibited the admission of DNA test result. Unfortunately Lee Siu Kin J took a restrictive view of the presumption as applying only to the issue of legitimacy. As legitimacy was irrelevant within maintenance, section 114 of Singapore's Evidence Act could be ignored. In the result the judge was able to uphold the maintenance order made against the appellant as the father of the child. This decision attracted criticisms. Goh (2010) phrased his thoughts as follows:

"… undoubtedly motivated by a keen sense to do justice [but] it may be necessary to consider the wider implications of the approach taken…"

Similarly Seow (2010) opined:

"... Indeed it is understandable in light of the need to protect the welfare of the child vis-à-vis the defendant who was effectively seeking to disclaim his primary parental responsibilities owed to the child. With respect, however, the interpretation of s 114 of the Evidence Act [in pari materia with section 112 of Malaysia Evidence Act] may be questionable in WX's case… This case starkly illustrates the awkwardness of interposing an anachronistic statutory presumption of legitimacy over the traditional common law understanding of legitimacy. As things stand, it would seem that the courts are not able to dispense material justice without at the same time appearing to engage in some exercise of awkward "law-bending"..."

The subsequent case of *AAE v AAF* [2009] 3 SLR(R) 827, at para [25] to [35], drew inspiration from the WX's case that also concerned a husband sued as parent for maintenance of his wife's child. Belinda Ang J even conceded that this allowed the court 'to get round the evidential restriction in section 114 of Singapore's Evidence Act' to uphold a maintenance order. In light of these two cases, if these two decisions are correct, the presumption that a married mother's husband is the father of her child unless she and he did not have sexual access at the possible times of conception of her child arises only where proof of parentage is critical to establishing the legitimacy of the relationship between the parents and child. Where legitimacy is not relevant in the application, this presumption is also inapplicable. With all due respect, this cannot be right. There is no restriction on the scope of application of provisions within the Evidence Act. They apply to all proceedings. Section 112 applies, by its literal reading, whenever a child is born to a married woman and, by it, a court cannot find that her husband is not the father of her child unless there is credible evidence that she and her husband had no sexual access at the possible times of conception of her child. In particular, of a child born to a married woman, the court is prohibited from admitting scientific tests of paternity. For the purposes of the discussion here, it is assumed that the Evidence Act section 112 should be read as it is written. Birth of a child to a married woman raises presumptive proof that her husband is the father. This presumption may only be rebutted by evidence that the mother and her husband had no sexual access with one another at the possible times of conception of her child. Of a born to a married woman, there is restriction on proof of paternity (Leong, 2011). In Malaysia, the case of *Ng Chian Perng (Sued By Her Mother And Next Friend Wong Nyet Yoon) v Ng Ho Peng* [1998] 2 MLJ 686, the court quoted that under section 112 of the Evidence Act 1950, there is a strong presumption that the child was the legitimate child of the husband for the reason that at the material time of the birth, there subsisted a valid marriage between the appellant and the husband. To rebut the presumption, the appellant must show that she and the husband had no access to each other at any time when the child should have been begotten. In *Peter James Binsted v Jevencia Autor Partosa* [2000] 2 CLJ 906, the respondent wife applied to the Magistrate Court for maintenance for herself against the appellant under section 3(1) of the Married Woman and Children (Maintenance) Act 1950. She claimed that the appellant was her husband and they had a children form their marriage. The appellant disputed her claim and upon the respondent's oral application, the Magistrate ordered the applicant, the respondent and the child to undergo a DNA test. The appellant appeal against the said order. The court held that neither the Act 1950 nor any either piece of legislation contains any provision that allows the court to order the DNA test. The courts in Malaysia have no power under statute or common law to order a person to undergo a test to ascertain paternity. A person is perfectly entitled to refuse to submit himself to such a test. In *Othman Bin Haji Abdul Halim v Hamisah Binti Awang* (1994) 3 CLJ 78, DNA test was conducted to determine the paternity of the child. In *Lau Zhan Chen (An Infant By His Mother & Next Friend Lau Fatt Wan (f) v Makoto Togase*

& 2 Ors [1995] 1 CLJ 841, this was petition *inter alia* a declaration that the Petitioner was the legitimate child of the first and the second respondent. The court has accepted the DNA test which confirmed that the first respondent was the biological father of the petitioner with a probability of 99.7%. Where scientific evidence by means of a blood test can resolve the issue of paternity conclusively, the interest of justice require that a blood test should be done in the absence of strong reasons to the contrary.

Therefore, section 112 of Evidence Act currently operates in a way that evidence of the husband's sterility, that the child's skin colour is significantly different from the mother's husband, or that there is a singular lack of facial resemblance between him and the child and, most importantly, a DNA test result that shows an extremely high improbability of the mother's husband being her child's father are, theoretically, highly relevant to the issue of whether he should be determined as father. None of them, however, comes within 'no access' unless this term is understood so broadly as to be meaningless (Leong, 2013). In *MB v MC* [2005] SGDC 181, the husband wanted to subject the child to DNA tests as he alleged that he was not the father. When the mother refused, the husband asked the court to draw an adverse inference against her and thereby find that he is not the father of the child. Laura Lau DJ refused thus:

"… The main thrust of the husband's case is that the wife had refused to submit the child to a DNA test for the purpose of establishing his parentage… whilst recognising that 'the result of a DNA test is positive proof of parentage', the author of Principles of Family Law in Singapore [by Leong Wai Kum] found it 'hard to envisage that such a result can come within the phrase "no access" (page 604)'… In interpreting section 112 of the Indian Evidence Act (which is in pari materia to section 112 of Malaysia Evidence Act and section 114 of Singapore's Evidence Act), the authors of Ratanlal & Dhirajlal's The Law of Evidence stated:

> *'… the only way the conclusive proof can be rebutted is by proving non-access. No other method of rebuttal is permissible under the Act… It therefore, follows that blood tests or DNA 'finger printing' test may not be admissible in cases under section 112 as one more method of rebutting the conclusive proof cannot be introduced into section 112…'*

[Therefore] if the results of DNA tests are inadmissible for the purpose of rebutting the presumption under section 11[2], it follows that any adverse inferences drawn from a refusal to undergo such tests would likewise be inadmissible…"

The Way Forward

After reviewing section 112 of the Evidence Act, the net result is that where a child is born to a married woman who continued to have sexual relations with her husband during the period of her child's conception, the result of a paternity test cannot be admitted in evidence. By the virtue of this legal position, the courts have to accept as fact the mere presumption that her husband is the father even in the face of a DNA test result that, if the court could consider, may just prove the contrary. A largely irrebuttable presumption of paternity of this nature is seriously problematic. It served a useful purpose when it was impossible to produce anything that was close to a positive direct proof of paternity. However, the situation has changed completely. We are now capable to produce scientific test results to an extremely high order of probability, and to continue to labour under the largely irrebuttable presumption is, as such, anomalous. The presumption hinders the discovery of the fact of paternity where the better

evidence of it is suppressed. The sooner presumption is changed, the more rational this area of the law of evidence becomes.

However, the common law presumption of paternity that is still law in England today is slightly preferable to that in our Evidence Act. It is observed that the courts in England are not limited to evidence of 'no access to each other at any time when [the child] could have been begotten' and may receive any relevant evidence that would suggest that the mother's husband is not the father of her child. Even so, there has been vociferous judicial endorsement by Thorpe LJ in the English Court of Appeal (*Re H and A (children)* [2002] 2 FCR 469 at [29]-[30]) of the certainty that is obtained from considering the fact of the result of a DNA paternity test over the mere presumption of paternity:

"… I do not consider that the factual distinction begins to displace the points of principle to be drawn from cases, first that he interests of justice are best served by ascertainment of the truth and second that the court should be furnished with the best available science and not confined to such unsatisfactory alternatives as presumptions and inferences….

… In the nineteenth century, when science had nothing to offer and illegitimacy was a social stigma as well as a depriver of rights, the presumption was a necessary tool, the use of which required no justification… But as science has hastened on and as more and more children are born out of marriage it seems to me that the paternity of any child is to be established by science and not by legal presumption or inference…"

The presumption in section 112 of Evidence Act is somewhat awkward in that, despite providing that it is conclusive, the second part of the provision allows one type of evidence to rebut it. The conclusiveness of the proof may still be achieved to a degree, however, by giving a strict reading to this one type of evidence to rebut the presumption. This provision is in fact weakest, archaic in being out of synchrony with the means that modern technology makes available for the proof of parentage (Leong, 2013, pp 365-367). There has been a judicial statement urging urgent reform of the largely irrebuttable presumption in the Evidence Act that the husband of a married woman who gives birth to a child is her child's father unless husband and wife had "no access" to each other at the possible times of conception of her child (Leong, 2011). In Singapore, Choo Han Teck J.in *AD v AE (minors: custody, care, control and access)* [2005] 2 S.L.R. (R.) 180, observed that the character of the presumption is better suited to the olden times when direct proof of parentage by DNA test was unavailable thus:

"… Section 11[2] of the Evidence Act was promulgated at a time when it was not contemplated that the paternity of a child could be proved scientifically at a level of confidence beyond 99.9%. It was intended to avoid bastardising children and the social stigma that attached to it, more so in the past than today, perhaps. Although some changes to this section might be necessary to avoid more serious problems than the one before me, it is still useful to have a provision that presumes paternity, provided that it is not, as presently so, an irrebuttable or conclusive presumption…"

It is to be borne in mind that there is still need for a presumption that operates in default. The vast majority of children should not need to introduce DNA test results in court to prove who their father is. Where there is no challenge mounted, the presumption that a child born to a married woman is her husband's serves us well. It is only when a challenge to this presumption is mounted that the evidentiary rule is weak in not allowing any other evidence in

rebuttal than "no access". For the sake of completeness, it hence bears significance to repeat the suggested reform voiced by Leong (2006) in this regard:

[O]ne, that the adjective 'conclusive' be deleted or substituted with 'prima facie' and, two, the limitation to evidence of 'no access' be omitted so that the court can hear all relevant evidence offered in rebuttal of the presumption. With the character of the presumption [under s 112 of the Evidence Act] thus changed from being largely irrebuttable to being rebuttable with any convincing evidence, the presumption will continue to serve its role well even with the modern tests of paternity that are available.

Indeed, it would appear that it is high time that such reform be undertaken (Seoh, 2010) to modernise section 112 of the Evidence Act so as to meet the modern technological realities society is presented with today and to eliminate the technical difficulties the courts encounter under the current statutory framework on legitimacy. One practical answer suggested to solve this problem maybe:

"… To turn the largely irrebuttable character of the presumption into being rebuttable, at least two amendments need to be made. One, the adjective "conclusive" should either be omitted from the provision or it could be substituted with something akin to "prima facie". Two, the current restriction of the evidence that the court may hear in rebuttal should be omitted. It should be possible for any party to admit any relevant evidence that rebuts the presumption that the husband is the father. Pre-eminent among evidence in rebuttal, of course, would be the result of a DNA test of paternity. Apart from these, it should also be possible to admit any other relevant evidence such as skin colour or facial resemblances or lack thereof although it should be noted that, where a paternity test is readily available, it is not excepted that parties will try to use much less convincing evidence to rebut the presumption…" (Leong, 2006)

Conclusion

The current legal position of section 112 of Malaysia Evidence Act has posed a major area of concern on the presumption of legitimacy in the realm of family law. This provision disallowed the admissibility of DNA evidence to be as a proof of biological parentage. As it stands, the only evidence admissible in the court of law is 'no access' between the spouse at the possible time of conception during marriage. Nonetheless, it must be reemphasised that the current rule in the provision must not eradicate completely, and there is still need for this presumption operating in default. It means that in general circumstances, the introduction of DNA test results in the court to prove who their father is, is not necessary. When there is no challenge mounted, the presumption that a child born to a married woman is her husband's serves us well. The amendments need to be made hence focus on the admissibility of additional evidential rule, *viz* when a challenge to this presumption is mounted, the DNA evidence should be admitted to determine the conflict of paternity. Such amendment will modernise section 112 of the Evidence Act so as to coincide with the modern technological realities presented today. It will, in fact further put an end to the technical difficulties the courts encounter under the current statutory framework on child legitimacy.

References

Brenda Hoggett. (1993). *Parents and children.* Sweet and Maxwell.

Goh Yihan. (2011). Two Contrasting Approaches in the Interpretation of Outdated Statutory Provisions: WX v WW and AAG v Estate of AAH, deceased. *Singapore Journal of Legal Studies* ,530-545.

Habibah Omar, Siva Barathi Marimuthu, Mazlina Mahali. (2014). *Law of Evidence in Malaysia*. Subang Jaya: Sweet and Maxwell.

Leong Wai Kum. (2006). Legal Implications of Paternity Testing. Presented at the *Life Sciences and the Law in Singapore Seminar Series Session II 'Genetic Testing and Screening*' 20 September 2003 Singapore Academy of Law Singapore. In Terry Kaan and Edison Liu (eds) *Life Sciences: Law and Ethics.* Singapore: Singapore Academy of Law and Bioethics Advisory Committee, 2006.

Leong Wai Kum. (2011). The Next Fifty Years Of The Women's Charter—Ripples Of Change. *Singapore Journal of Legal Studies* 152-177.

Leong Wai Kum. (2011). Parental Responsibility as the Core Principle in Legal Regulation of the Parent-Child Relationship. In Yeo Tiong Min, Hans Trio & Tang Hang Wu (gen eds) *Developments in Singapore Law between 2006 and 2010: Trends and Perspectives.* Singapore: Academy Publishing.

Leong Wai Kum. (2013). *Elements of Family Law in Singapore.* Singapore: LexisNexis.

Salim, Rafiah, May Fong, Cheong. (2013). *Evidence in Malaysia and Singapore: Cases, Materials and Commentary*. Third edition. Petaling Jaya: LexisNexis.

Sarkar, SC. (2018). *Sarkar Law of Evidence*. Petaling Jaya: Lexis Nexis.

Seoh, Colin Fu Hong. (2010). Case Note: The Statutory Presumption Of Legitimacy. *Singapore Academy of Law Journal, 22,* 720-728.

The Family Court Practice 2004. (2004). Bristol: Jordan Publishing Ltd.

Wee, Kenneth KS. (1976). The Law of legitimacy in Singapore. *Malaya Law Rreview, 18,* 1-25.