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Chapter 5

Filiation – Parent & Child

PART II

Filiation

Chapter 5
PARENT AND CHILD

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Chapter 5
PARENT AND CHILD

§ 5.01. Legitimacy, Illegitimacy, Presumption, and Proof of Paternity

Set forth below are the Louisiana Civil Code provisions governing illegitimate children.

La. Civ. Code art. 238: "Illegitimate children generally speaking, belong to no family, and have no relations; accordingly they are not submitted to the paternal authority, even when they have been legally acknowledged."

La. Civ. Code art. 239: "Nevertheless [notwithstanding that illegitimate children do not come within parental authority],[1] nature and humanity establish certain reciprocal duties between fathers and mothers and their illegitimate children."

La. Civ. Code art. 240: "Fathers and mothers owe alimony to their illegitimate children, when they are in need; illegitimate children owe likewise alimony to their father and mother, if they are in need, and if they themselves have the means of providing it."

La. Civ. Code art. 241: "Illegitimate children have a right to claim this alimony, not only from their father and mother, but even from their heirs after their death."

La. Civ. Code art. 242: "But in order that they may have a right to sue for this alimony, they must: 1. Have been legally acknowledged by both their father and mother, or by either of them from whom they claim alimony; or they must have been declared to be their children by a judgment duly pronounced, in cases in which they may be admitted to prove their paternal or maternal descent; 2. They must prove in a satisfactory manner that they stand absolutely in need of such alimony for their support."

La. Civ. Code art. 243: "The obligation of giving such alimony ceases, when the illegitimate child is able to earn his subsistence by labor, or whenever his father or mother have—has—caused him to be instructed in an art, trade or profession fit to procure him a sufficient livelihood, unless some continual sickness or infirmity prevents such child from working for his subsistence.

"The debt of alimony ceases likewise to be due from the estate of the father or mother of the illegitimate child whenever either of them

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1. La. Civ. Code art. 283.

has provided during his or her life a sufficient maintenance for his or her illegitimate child, or have made to him donations or other advantages which may be sufficient for that purpose."

La. Civ. Code art. 244: "The other rules established respecting alimony to be granted to legitimate children, take place likewise with respect to [or by][2] illegitimate children, except so far as they may be contrary to the foregoing provisions."[3]

Children are legally related to their parents by way of consanguinity or adoption. They are also classified as either legitimate or illegitimate. Their legal status vis-a-vis their parents is either legitimate or illegitimate. Civil Code article 179 provides that a legitimate child is one born or conceived within marriage or legitimated.[4] An illegitimate child, therefore, is one born or conceived outside marriage and not legitimated.[5] A child born illegitimate may be acknowledged and remain illegitimate or may be legitimated.

A child may be legitimated in two ways:[6] (1) by the marriage of his or her parents, plus formal or informal acknowledgment either before or after marriage;[7] or (2) by declaration of a parent in an authentic act before a notary and two witnesses that he intends by the act to legitimate the child.[8]

Historically, parents incapable of marrying at the time of conception or the birth could not legitimate their child. These prohibitions now have been abrogated and there are no longer any limitations on legitimation or acknowledgment, other than the assumption that the person doing so is the actual, biological parent. The legitimation or acknowledgment may be challenged. If scientific testing establishes that the legitimator or the acknowledgor is not the biological parent, he or she will not have any rights or advantages of legitimation or acknowledgment, although he will probably have the obligations. We will consider each of these institutions and statuses separately. First we will

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2. The "or by" was not included in the English translation of the official French.
3. To the extent that these articles provide less opportunity for support to illegitimate children, as compared to legitimate ones, they are likely unconstitutional. *See infra.*
4. La. Civ. Code arts. 179, 180, 954.
5. La. Civ. Code art. 180.
6. La. Civ. Code art. 181.
7. La. Civ. Code art. 198.
8. La. Civ. Code art. 200.

consider illegitimacy, then we will analyze acknowledgment, next legitimation, and finally proving paternity.

§ 5.02. —History and Conceptual Background: Status, Discrimination, Persecution and Stigma

Why has the classification of a child as illegitimate been so important throughout our history? Why has discrimination against illegitimate children been so constant and ruthless? How do notions of illegitimacy relate to notions of family and (parental/patriarchal) autonomy? Does our law relating to illegitimacy and matters incidental to illegitimacy reflect a gender bias? These questions are important historically and are valuable to the understanding of our current law.

The Oxford English Dictionary defines "illegitimate" as: "not authorized by law; irregular, improper; not born in lawful wedlock, bastard. . . ." It defines "bastard" as: "[child] born out of wedlock or of adultery, illegitimate; [of things] unauthorized, hybrid, counterfeit."[9] The American Heritage Dictionary provides that "illegitimate" means: "against the law; illegal. Born out of wedlock. . . ." It defines "bastard" as: "an illegitimate child. Something of irregular, inferior, or dubious origin . . . Born of unwed parents; illegitimate. . . ."[10]

In ancient Germanic law, illegitimacy was not a central concern. Whether born of a marriage or not, a child was under the mundium if the father acknowledged him.[11] Hence, illegitimate (natural) sons of the Merovingians inherited from them in competition with the legitimate ones.[12] The impact of Christianity was to provide legitimate status only to those children who were either conceived, born or born and conceived during a lawful marriage.[13] Canon law, Roman law, and the

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9. Oxford English Dictionary,

10. AMERICAN HERITAGE DICTIONARY (2nd College ed. 1976). *See* Teichman, *Illegitimacy: An Examination of Bastardy* 1 (1982).

11. Brissaud, A HISTORY OF FRENCH PRIVATE LAW 202 (1912). Mundium was the legal/protective mantle of the father over his family. *See* discussion of the Germanic "mundium" and the family, in L. Wardle, C. Blakelsey, and J. Parker, FAMILY LAW IN THE UNITED STATES: PRINCIPLES, POLICY, AND PRACTICE, at § 2:01 (1988).

12. Brissaud, A HISTORY, *supra* note 11, at 203.

13. *Id.*, at 204; Teichman, *Illegitimacy*, *supra* note 10, at 28; La. Civil Code article 180, provides: "Illegitimate children are those who are conceived and born out of marriage."

systems which derived their law explicitly from those traditions, while clearly delineating illegitimate and legitimate children, attempted to protect the illegitimates by providing a way that they could be legitimated (by subsequent marriage of the parents or juridical act) for those not born of an incestuous or adulterous relationship.[14]

Blackstone defined an "illegitimate" or "bastard", under English law, as: "one that is not only begotten, but born out of lawful matrimony."[15] Thus, if a child were conceived out of wedlock, but born after its parents' marriage, the child was legitimate. Blackstone submitted in his commentary that the law of England, in allowing this, but abrogating the ancient (Norman or Canon law influenced) English law allowing legitimation by marriage of the child's parents after the child's birth, was superior to canon law or Roman law, in that it best promoted and protected the integrity of marriage and devolution of property.[16]

In addition to those born or conceived outside of wedlock, children born to a null marriage generally, unless there is legislation to the

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14. Ayer, *Legitimacy and Marriage*, 16 Harv. L. Rev. 22, 23, 24 (1902). Apparently, at least from the time of Constantine, legitimation of children born of "fornicato simplex" was possible. *Id.*; Legitimation is provided in articles 329-336 of the French Code Civil. *See* Audit, *Recent Revisions of the French Civil Code*, 38 La. L. Rev. 747, 771, *et seq.* (1978); Foote, Levy & Sander, CASES AND MATERIALS IN FAMILY LAW, 627, *et seq.* (2d ed. 1976). Virtually all states of the Union today provide some mechanism for legitimation, if they continue the distinction between legitimate and illegitimate children. H. Clark, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 156 (1968); Foote, Levy & Sander, *supra* this note at 162, 163. Krause, CHILD SUPPORT IN AMERICA—THE LEGAL PERSPECTIVE 112 (1981).

15. Blackstone, COMMENTARIES ON THE LAW OF ENGLAND 442 (Oxford reprint, 1966). Marriage of the parents before the birth was an essential precondition to legitimacy. *Id.* Several American states so provide, as well. *See, e.g., In re Lund's Estate*, 26 Cal. 2d 472, 479, 159 P.2d 643, 647 (1945). La. Civ. Code, art. 27; *but see* La. Civ. Code art. 184, which provides: "The husband of the mother is presumed to be the father of all children born or conceived during the marriage." (emphasis added) (as amended in 1976). This was designed to render such children legitimate.

16. *Id.*, at 443, 444. Foote, Levy, Sander, CASES AND MATERIALS ON FAMILY LAW 147, 48 (3d ed. 1985). If a child were to be legitimated, it had to be done by a special act of Parliament. The term "bastard" has now been abolished in most jurisdictions, because of its pejorative social and legal connotations. *See* Clark, SOCIAL LEGISLATION 341 (1957); Comment, *The Sins of the Fathers from Filius Nullius to the Sixth Circuit's Liberal Interpretation of Social Security Child Survivorship Provisions*, 14 U. Tol. L. Rev. 1017, 1019, n. 13 (1983).

contrary, have been deemed illegitimate.[17] Also, both historically and today, unless and until the presumption of paternity (often conclusive presumption—or rule of law—that the husband of the mother is the father of the child) obtains,[18] a child born to a married woman under circumstances in which her husband could not possibly be the father is illegitimate.[19] Thus, the status of illegitimate (or legitimate) child is based essentially on the parent's marital status at the time of the child's conception or birth, or, if such is allowed, the "legitimation" of the child.[20]

Historically, the notion of illegitimacy was seen as an essential element in the state's arsenal to promote the traditional family, to preserve the integrity of marriage and the proper or orderly devolution of property.[21] Introduction of a seed, external to the formally recognized family was seen as a threat to these values. Thus, consanguinity and formality were interrelated. To be recognized as having status of a

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17. *See* discussion of nullity in L. Wardle, C. Blakesley, J. Parker, FAMILY LAW IN THE UNITED STATES: POLITY, PRINCIPLES AND PRACTICE, Chapter 16, and the incidents of nullity and putative marriage in §§ 34:01 and 34:06, of that work; and in C. Blakesley, *The Putative Marriage Doctrine*, 60 Tulane L. Rev. 1 (1985).

18. *See* Harry Krause, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 106 (1981). Lord Mansfield's Rule, first articulated in *Goodright v. Moss*, 98 Eng. Rep. 1257 (KB 1777). Cal. Evid. Code § 621 (as modified late 1992): "(a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage. (b) Notwithstanding subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with § 890) of Division 7 are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly. . . . Cal. Evid. Code § 892 now provides that a person's refusal to submit to court- ordered blood tests is admissible in a paternity proceeding. *Cf.*, *Everett v. Everett* 150 Cal. App. 3d 1053, 1067, 198 Cal. Rptr. 839 (1984). Cal. Civil Code § 7004 provides a rebuttable presumption of paternity under certain circumstances. *See also* La. Civ. Code arts. 184-190. *Cf.*, Ore. Rev. Stats. Ann. § 41.350.

19. Wis. Stats. Ann. § 52.45 (Supp 1979); Krause, ILLEGITIMACY AND SOCIAL POLICY 17-18 (1971); Krause, CHILD SUPPORT, IN AMERICA: THE LEGAL PERSPECTIVE 105 & 106 (1981).

20. *See* Krause, CHILD SUPPORT, *supra* note 18, at 105. Legitimation of children is discussed in Krause, CHILD SUPPORT, *supra* this note, at 112-113.

21. Foote, Levy, Sander, CASES AND MATERIALS ON FAMILY LAW 627 (2d ed. 1976).

family member, and to have the right of access to family property, a child was required to be the legal issue of the legally recognized family. An illegitimate child represented a threat to traditional family integrity, a danger to the peace and tranquility of the family and its members, and a challenge the traditional family's right to and control over its property. Indeed, in some jurisdictions, at times during their history, neither adoption nor legitimation were possible.[22]

Thus, an illegitimate child was *fillius nullius*, no one's son, or *fillius populi*, son of the people. This notion was so strong that such a child was considered not legally to have mother, father, sister or brother.[23] From late Antiquity to the Renaissance, and certainly before that, illegitimates formed the largest percentage of the amazingly high number of children abandoned by their parents.[24] In Nineteenth Century Paris, 83% of the foundlings apparently were bastards[25] and between 20 and 30 percent of the *registered* births were abandoned.[26] In poor quarters of Toulouse, the rate of abandonment reached 39.9% and in rich areas was 15%.[27] In Lyon, between 1750 and 1789, the percentage of abandoned children was about 33%.[28] The percentages indicated are most certainly low, because many people who would have abandoned their children would neither register their births or their

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22. *See* Krause, CHILD SUPPORT, supra note 14, at 105; La. Civ. Code of 1808, 1.7.35 (abolished adoption): "Adoption which was authorized by the laws heretofore in force, shall be and is hereby abolished." *Fusilier v. Masse*, 4 La. 423 (1832); Vidal v. Commagere, 13 La. Ann. 516 (1858). La. Civ. Code art. 217 (1825); (abolishing legitimation outside marriage). Pascal & Spaht, LOUISIANA FAMILY LAW COURSE 336 (2d ed. 1979); Pascal, *Louisiana Succ. and Related Laws & the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 Tulane L. Rev. 167, 175 (19). *See also* discussion of legitimation, in Krause, CHILD SUPPORT, *supra* note 14, at 112-113.

23. *Stevenson's Heirs v. Sullivant*, 18 U.S. (5 Wheat) 207, 262 note a (1920). "The earlier common law . . . had beheld the illegitimate child as *filius nullius*—no one's son—so completely that he even lacked a legal tie to his mother. . . ." Krause, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 799 (2d ed. 1983).

24. For a fascinating and learned book on the subject of child abandonment and their *accueil* by kind strangers, *see* J. Boswell, KINDNESS OF STRANGERS: *The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1988).

25. *Id.*, at 17, n. 34.

26. *Id.*, at 15.

27. *Id.*, at 15.

28. *Id.*

baptism. John Jacques Rousseau apparently abandoned all five of his children to foundling homes, not even bothering to record their birth dates.[29] Later in his *Confessions*, Rousseau suffers remorse over this[30] to the point that in *Emile*, he made a virtual public confession and admonished his readers that "[h]e who cannot fulfill the duties of a father has no right to become one. No poverty, no career, no human consideration can dispense him from caring for his children and bringing them up himself."[31]

The French Revolution brought revolutionary visions of the family, including elimination of laws which discriminated against illegitimate children. Some of these reforms were surprisingly modern and, were indeed, 200 years before their time. They also were accompanied by violence and the eradication of many former antagonists or, at least, those believed to have been antagonists or related to antagonists.[32] Tactics of terror learned from their masters were used in the Revolution and the Reign of Terror that followed. Actual violence led to radical reform, but ultimately helped a totalitarian regime to ensconce itself. Violent and terroristic means swallowed up the end that the revolutionaries thought they were promoting.[33] Ultimately, virtually all the protections for women, illegitimate children and other oppressed individuals were eliminated and an even harsher discrimination, intolerance and oppression replaced them.

The horrific story is delightfully told by Crane Brinton.[34] From the triumphant revolutionary slogan, "*il n'y a plus de batards en France*,"[35] the Revolution was felt to have abolished discrimination. But the pendulum swung rapidly. Within ten years, the bourgeois men,

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29. *Id.*, at 20; also at 3, n. 1, citing Rousseau, *Confessions* 424 (8th ed. J. Voisin ed. 1964) (Rousseau boasting of this accomplishment).

30. Rousseau, *Confessions, supra* note 29, at Book 12, p. 702; J. Boswell, KINDNESS OF STRANGERS, *supra* note 24, at 20, n. 42.

31. J. Rousseau, *Emile* (Book 1); cited and discussed in J. Boswell, KINDNESS OF STRANGERS, *supra* note 24, at 20, n. 42.

32. *See* A. France, *Les Dieux Ont Soif, supra.*

33. For more on the relationship of violence and family law, *see* Christopher L. Blakesley, FAMILY AUTONOMY (1993) (at press).

34. Crane Brinton, FRENCH REVOLUTIONARY LEGISLATION ON ILLEGITIMACY 1789-1804 (1936); cited and discussed in Caleb Foote, Robert J. Levy, & Frank E.A. Sander, CASES AND MATERIALS ON FAMILY LAW 154-55 (3d ed. 1985).

35. Obviously, only a reference to children born out of wedlock.

Napoleon at their head, regained their senses and realized that "children of love" having equality with other children would wreak havoc with property. The allegation raised that such a doctrine would destroy marriage, eliminate the protection women needed by and through marriage, and that the best form of protection was to prevent the fathers and husbands from being harassed by paternity actions.[36]

Crane Brinton notes:

> Now that they know they cannot foist their children on some rich and respected gentleman by the vicious procedure of *la recherche de la paternité*, women will be more careful of their virtue. Presumably now that they have to answer to their conscience instead of merely to the law for their bastards, men will also think twice before they procreate them. At any rate, morality, which a few years ago was all with Nature in favor of equal treatment of all children [and women/men], has now decided with equal vigor against such equality of treatment.[37]

The *Code Napoléon* abolished the paternity action altogether.[38] Crane Brinton notes the traditional inability to resolve the conflict of helping those suffering discrimination rocking the boat of comfort upon the beneficiaries of the discrimination are floating:

> Along one pleasant track their minds passed easily to the full rehabilitation of these children of nature, once called bastards; on an equally pleasant track their minds arrived at a France filled with virtuous, happy married couples. Now bastardy and marriage in this world are quite complementary—you cannot have one without the other. In another world, you may indeed separate the two institutions and eliminate one of them, either by having marriage so perfect—in various senses—that no one will ever commit fornication or adultery, or by having fornication

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36. Foote, Levy, & Sander, *supra* note 34, at 154.

37. Crane Brinton, FRENCH REVOLUTIONARY LEGISLATION, *supra* note 34, at 62; quoted in Foote, Levy, & Sander, *supra* note 34, at 154.

38. "*La recherche de la paternité est interdite.*" French Code Civil of 1803, art. 340. Articles 331, 335, 338 and 342 prohibited children of incestuous or adulterous intercourse from establishing maternity or paternity or from being legitimated or acknowledged and that such children had none of the rights that obtained for legitimate children. Foote, Levy, & Sander, *supra* note 34, at 155, n. 9; L. Wardle, C. Blakesley, J. Parker, II CONTEMPORARY FAMILY LAW: PRINCIPLES, POLICY, & PRACTICE at Chs. 8 & 9 (1986).

> so perfect that no one will ever commit marriage. But these are definitely other worlds.[39]

While Crane Brinton's writing is delightful, it presents the tragic reality that fervor for good has often redounded only momentarily to its intended beneficiaries. This is especially true when totalitarian means and rhetoric are utilized to produce such benign ends. So, today, the anarchistic and totalitarian means articulated by demagogues for all of the best purposes ultimately will simply place reactionary elements into power. Totalitarian rhetoric and action simply breed totalitarians and totalitarianism, which ultimately turn on and destroy the ideals they pretended to promote. This is not to say that revolutionary rhetoric, analysis and even violence are never justified. Certainly they are justified in rebellion and revolution to escape oppression. John Stuart Mill wrote: "Political liberties or rights which it was to be regarded as a breach of duty in the ruler to infringe, specified resistance, or general rebellion, was held to be justifiable."[40] Thus, revolution and related violence were seen as culminations of the Enlightenment philosophy and have been considered justified, even noble. Care, however, is required to ensure that the means do not obtain their own *raison d'ètre* and replace the ends, as noted above in relation to the French Revolution.

The discrimination and the stigma attached to the illegitimate child was so devastating and its social consequences so tremendous, however, that society sought legislative or equitable palliatives in the form of, among other institutions, presumptions of paternity, adoption, and the putative marriage doctrine. These were designed, if not to ameliorate the harshness of the law, at least to minimize the scope of its impact.[41]

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39. Crane Brinton, FRENCH REVOLUTIONARY LEGISLATION, *supra* note 34, at 82-83; quoted and discussed in Foote, Levy, & Sander, *supra* note 34, at 155.

40. J.S. Mill, ON LIBERTY 2 (1847).

41. Foote, Levy, & Sander, *supra* note 14, at 627, *et seq.* Indeed, this terrible social impact created the atmosphere wherein the tendency was to find ways to consider a child to be part of the formal family. Thus, adoption, legitimation, and the presumption of paternity (that the child born during an ongoing marriage was presumed to be the child of the marriage) were developed as palliatives to the harsh repercussions of considering a child illegitimate. Blakesley, *Putative Marriage*, 60 Tulane L. Rev. (1985).

§ 5.03. —Modern Attempts at Amelioration

Many states tried to palliate the harsh realities of illegitimacy and developed mechanisms to give legitimate status to children born of nearly any alliance resembling a legitimate marriage.[42] These included, among others, the putative marriage doctrine and the presumption of the validity of the last marriage in time. There has been significant amelioration in the plight of the illegitimate child, from the extremely harsh and depressing saga of society's historical reaction to the illegitimate child, to the relative improvement through U.S. Supreme Court decisions accelerating in the line of cases beginning in 1968 with *Levy v. Louisiana*.[43]

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42. Blakesley, *Putative Marriage*, *supra* note 41. Krause, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 799 (2d ed. 1983).

43. The Supreme Court seems always to have been sympathetic to the plight of illegitimate children. This concern was always rhetorical and of little benefit to the concerned children who were denied rights of other citizens. Beginning in 1968, the sympathy became active, providing judicial relief. The decisions include: *Stevenson's Heirs v. Sullivant*, 18 U.S. (5 Wheat) 207, 261 (1820) (although concerned with the plight of illegitimate children, who were "bastards, . . . incapable of inheriting from their mother, notwithstanding they were the innocent offspring of her incontinence . . . , [the court held that, although in some ways they were "quasi-legitimate"] "they are, nevertheless, in all others bastards, and as such, they have, and can have, neither father, brothers, or sisters."); *Brewer v. Blougher*, 39 U.S. 178, 198 (1840) ("[I]t would appear to have been given on the principle, that it is unjust to punish the offspring for the crime of the parents."); *Gaines v. Hennen*, 65 U.S. 553, 599 (1860) (recognizing the Louisiana putative marriage doctrine, analyzed in detail in Wardle, Blakesley & Parker, CONTEMPORARY FAMILY LAW, *supra* note 38, at Chapter 34, which functioned to allow a child born of a null marriage to be legitimate); *Cope v. Cope*, 137 U.S. 682, 686 (1891) (The Court upheld a Utah Territory law allowing illegitimate children to inherit from their, generally polygamist, fathers. It noted that these inheritance laws protected children and "did not shield or countenance polygamy."); *DeSylva v. Ballentine*, 351 U.S. 570 (1956). *See generally*, Roper, *Legal Disabilities of Illegitimacy*, unpublished paper on file with author.

The line of cases representing active judicial relief for illegitimates, which began in 1968 and are listed as follows: *Levy v. Louisiana*, 391 U.S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509 (1968); *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 20 L. Ed. 2d 441, 88 S. Ct. 1515 (1968); *Labine v. Vincent*, 401 U.S. 532, 28 L. Ed. 2d 288, 91 S. Ct. 1017 (1971); *Weber v. Aetna Casualty & Surety Co*, 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972); *Gomez v. Perez*, 409 U.S. 535, 35 L. Ed. 2d 56,

(continued...)

Since then the trend has been to erode discrimination against illegitimates.[44] Still today, however, to be classified as illegitimate carries a social and legal stigma.[45] The penalties of being classified as illegitimate have been reduced. Discrimination solely on the basis of one's parents' marital status at the time of one's conception or birth is

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43.(...continued) 93 S. Ct. 872 (1973); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619, 36 L. Ed. 2d 543, 93 S. Ct. 1700 (1973); *Jimenez v. Weinberger*, 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496 (1974); *Mathews v. Lucas*, 427 U.S. 495, 49 L. Ed. 2d 651, 96 S. Ct. 2755 (1976); *Trimble v. Gordon*, 430 U.S. 762, 52 L. Ed. 2d 31, 97 S. Ct. 1459 (1977); *Fiallo v. Bell*, 430 U.S. 787, 52 L. Ed. 2d 50, 97 S. Ct. 1473 (1977); *Lalli v. Lalli*, 439 U.S. 259, 58 L. Ed. 2d 503, 99 S. Ct. 518 (1978); *Califano v. Boles*, 443 U.S. 282, 61 L. Ed. 2d 541, 99 S. Ct. 2767 (1967); *United States v. Clark*, 445 U.S. 23, 63 L. Ed. 2d 171, 100 S. Ct. 895 (1980); *Mills v. Habluetzel*, 456 U.S. 91, 71 L. Ed. 2d 372, 103 S. Ct. 2199 (1983); *Pickett v. Brown*, 462 U.S. 1, 76 L. Ed. 2d 372, 385, 103 S. Ct. 2199 (1983); *Clark v. Jeter*, 486 U.S. 456 (1988) (six-year statute unconstitutional). Cases involving father's rights include: *Stanley v. Illinois*, 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 54 L. Ed. 2d 511, 98 S. Ct. 549 (1978); *Parham v. Hughes*, 441 U.S. 347, 60 L. Ed. 2d 269, 99 S. Ct. 1742 (1979); *Caban v. Mohammed*, 441 U.S. 380, 60 L. Ed. 2d 297, 99 S. Ct. 1760 (1979); *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614, 132 S. Ct. 2985 (1983). *See* Doskow, *The Constitution, Notice, and the Sins of the Fathers*, 8 J. Juv. L. (No. 1) 12 (1984). *But see Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

44. The Louisiana State Constitution of 1974, provides that "No law shall arbitrarily, capriciously or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations." La. Const. Article I, section 3. "The reference to *birth* encompasses prohibition of discrimination against illegitimate children." Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 9 (1974); Katherine Venturios Lorio, *Succ. Rights of Illegitimates in Louisiana*, 24 Loy. L. Rev. 1 (1978).

45. This evolution began in 1576, when English Parliament enacted legislation which "required either the mother or father to support the illegitimate child . . . to prevent the child from becoming dependent upon the parish." Comment, *The Sins of the Fathers From Filius Nullius to the Sixth Circuit's Liberal Interpretation of Social Security Child Survivorship Provisions*, 14 U. Tol. L. Rev. 1017, 1019 (1983); Clark, *Social Legislation*, 348-49 (1957). The major policies have been to protect children and to require parents of illegitimate children to care for them, to ameliorate the community burden. Comment, *supra* this note, at 1019; Clark, *supra* this note, at 349, 353-54, 360. From these social policies developed the requirement of parental support and permissive legislation concerning legitimation, presumption of paternity and inheritance rights. *Id.*

unconstitutional, unless it is based on an important state interest and unless there is a substantial relationship between the state interest and the discrimination.[46] Differential treatment has been justified in the past by the countervailing state interests of promoting the traditional family, as defined by the individual States,[47] the final and orderly disposition of decedents' estates,[48] and the special nature of congressional power in the area of immigration.[49]

As reflected by the Supreme Court in *Labine v. Vincent*,[50] historically the rule was that classification of children as illegitimate promoted the state's significant interest in protecting the traditional family. In 1977, however, the U.S. Supreme Court determined that the use of a child's birth status to sanction or influence his or her parent's conduct is improper; discrimination against illegitimate children was held not to

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46. *Trimble v. Gordon, supra* note 43. Professor Krause, FAMILY LAW: CASES, COMMENTS AND QUESTIONS 835-836 (2d ed. 1983) states: "But however tortuous the road behind or ahead, we may fairly conclude from this "wealth" of decisions that state and federal law may not significantly discriminate between children on the basis of their parents' marital status in any significant substantive area."

47. *See Labine v. Vincent*, 401 U.S. 538, *supra* note 43, at 430 U.S. 771, 28 L. Ed. 2d 294, 91 S. Ct. 1021, wherein the United States Supreme Court provided: "But the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State."

48. *Trimble v. Gordon, supra* note 43, at 430 U.S. 771, 52 L. Ed. 2d 39, 97 S. Ct. 1465, wherein the Supreme Court noted that: "[t]he more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." *Note also, Lalli v. Lalli*, wherein J. Powell's plurality opinion, note 43, *supra*, at 439 U.S. 269, 58 L. Ed. 2d 511, 99 S. Ct. 524-525, provided: "The primary state goal underlying the challenged aspects of [NY Const. Laws, Estates, Powers & Trust] § 4-1.2 is to provide for the just and orderly disposition of property at death [footnote omitted]. We long have recognized that this is an area with which the States have an interest of considerable magnitude."

49. *Fiallo v. Bell, supra* note 43, at 430 U.S. 793-797, 52 L. Ed. 2d 57-59, 97 S. Ct. 1478-1480 (wherein the court ruled that the Congress had great power to exclude aliens and could do so even where the classification created would be unacceptable as applied to United States citizens).

50. *Labine v. Vincent, supra* note 43.

be substantially related to the promotion of the traditional family.[51] The need to promote final and orderly disposition of decedents' estates and the congressional power over immigration through discrimination against illegitimates have not lost their judicial imprimatur.[52]

Even where a state recognizes that discrimination would be unconstitutional, the gulf between the abstract constitutional right and the practical realization of legal equality for illegitimate children is significant.[53] There is still some inequality of opportunity for illegitimate children, as compared to legitimates, to prove or ascertain paternity.[54] Time restrictions on when an illegitimate child may bring an action to prove paternity may be extremely onerous on the child's opportunity ever to exercise his or her rights vis-a-vis his or her father.[55] The U.S. Supreme Court approved in *Lalli v. Lalli*,[56] New York's rule that an illegitimate child must prove the paternity prior to the alleged father's death. This is a harsh rule for children whose fathers die when they are in the womb or during their infancy. Yet, the state's interest in clearing land titles was deemed sufficient to overcome the discrimination against children with the bad luck or timing to have their fathers die at that stage. In 1983, however, the Supreme Court recognized the unconstitutionality of making the time limitation too short after the child's birth, apparently distinguishing the difference in policy when the father is still alive, by stating:

> . . . It requires little experience to appreciate the obstacles to such suits that confront unwed mothers during the child's first year. Financial difficulties caused by childbirth expenses or a birth-related loss of income, continuing affection of the child's father, a desire to avoid disapproval of family and community, or the emotional strain and confusion that often attend the birth of an illegitimate child all encumber a mother's filing of a paternity suit within 12 months of birth. Even if

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51. *See Trimble v. Gordon*, note 43, *supra* at 430 U.S. 770, 97 S. Ct. 1464, wherein it is noted: "In subsequent [subsequent to *Labine v. Vincent, supra* note 43] decisions, we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships" (parenthetical added).
52. *See* decisions cited in notes 48 and 49, *supra.*
53. Krause, FAMILY LAW, *supra* note 46, at 835.
54. *Id.*
55. *Lalli v. Lalli, supra* note 43.
56. *Id.*

> the mother seeks public financial assistance and assigns the child's support claim to the State, it is not improbable that 12 months would elapse without the filing of a claim. Several months could pass before a mother finds the need to seek assistance, takes steps to obtain it, and is willing to join the State in litigation against the natural father. . . . Moreover, this unrealistically short time limitation is not substantially related to the State's interest in avoiding the prosecution of stale or fraudulent claims. In Gomez we recognized that the problems of proof in paternity suits 'are not to be lightly brushed aside," but held that such problems do not justify a complete denial of support rights to illegitimate children. . . . Neither do they justify a period of limitation which so restricts those rights as effectively to extinguish them. We can conceive of no evidence essential to paternity suits that invariably will be lost in only one year, nor is it evident that the passage of 12 months will appreciably increase the likelihood of fraudulent claims.[57]

The federal *Child Support Enforcement Amendments of 1984* require all states that participate in federally funded welfare programs to allow paternity actions to be brought until the child reaches at least eighteen years of age.[58] Thus, a child may be required to prove paternity prior to the death of the alleged father or, as in Louisiana within one year from his death or within eighteen years of the child's birth (19 years in Louisiana), whichever is shorter.[59] This affects the rights and duties of individuals. A child must prove paternity in accordance with state law

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57. *Mills v. Habluetzel, supra* note 43, at 456 U.S. 100-101 (citations omitted).

58. The U.S. CHILD SUPPORT ENFORCEMENT AMENDMENTS OF 1984, PL 98-378, 98 Stat. 1305, 42 U.S.C. 601, 652, *et seq.* (1984), an Act to Amend Part D of Title IV of the Social Security Act, and related statutes. This act amends virtually all federal laws which impact on child support enforcement. The Act requires the states to improve their proof of paternity and their child support enforcement programs. For example, the Act requires each state to amend its statute of limitations for proving paternity, to allow such an action at any time prior to the child's eighteenth birthday. PL 93-378, § 466 (a) (5), 42 U.S.C. 666 (a) (5). FAMILY SUPPORT ACT OF 1988, 42 U.S.C. 667, *See* U.S. Dept of Health & Human Services, Office of Child Support Enforcement, National Institute for Child Support Enforcement, Paternity Establishment 105, 106 (Nov. 1985). These are incorporated in La. R.S. 46:236.1, *et seq.*; *see* L. Wardle, C. Blakesley, & J. Parker, FAMILY LAW IN THE UNITED STATES, *supra* note 17, at Chapter 29, *Alimony* and Chapter 30, *Child Support.*

59. La. Civ. Code art. 209.

before asserting rights to support or inheritance from an alleged father.[60] The mother of an illegitimate child must support and nurture that child alone, unless the father is found and paternity proved.[61] To secure public benefits for herself, she must assist the state in locating the alleged father and in proving his paternity.[62] On the other hand, should an unwed father choose to try to assert his rights to custody and visitation, he must prove his status in a timely fashion and establish that it is in the best interests of the child.[63] His right to block the adoption of his child depends upon the extent of his relationship with the child, including his having met his support obligations.[64] A child's father

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60. *See, e.g., Lalli v. Lalli, supra* note 44 (inheritance); *Gomez v. Perez, supra* note 43 (support). *People ex rel. Lawton v. Snell*, 216 N.Y. 527, 111 N.E. 50; *State v. Coliton*, 73 N.D. 582, 17 N.W.2d 546 (1945) (support). *See also* 10 Am. Jur. 2d 895-896, 900 Bastards §§ 68, 74 (Support); 10 Am. Jur. 2d 960, Bastards § 258 (inheritance) and cases cited therein. Comment, *A Survey of Recent Changes in Intestate Succ. Law Affecting Illegitimate Children: The Informally Acknowledged Child Is the Ultimate Loser*, 29 Loy. L. Rev. 323 (1983).

61. *See Gomez v. Perez, supra* note 43.

62. 42 U.S.C. §§ 6O2(a)(26)(B), 606(b)(2).

63. *La Croix v. Deyo*, 113 Misc. 2d 89, 447 NYS.2d 864 (1981) (father successfully established paternity of child, after mother had died, in order to assert his right to custody). *J.B. v. A.F.*, 92 Wis.2d 696, 285 N.W.2d 880 (1979) (facts similar to New York *La Croix* case, *supra*, this note.) *See also* Note, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 Vand. L. Rev. 1587, 1588, note 3 (1983) (citing cases); 10 Am. Jur. 2d 890-892 (1984 Supp. pp. 226-230) Bastards §§ 62, 62.5; Note that the mother of an illegitimate child is its natural guardian, *see* materials on guardianship in Wardle, Blakesley & Parker, CONTEMPORARY FAMILY LAW, *supra* note 17, at Chapter 38 § 2.

64. La. Civ. Code arts. 245; 131; *Walker v. Washington*, 540 So.2d 1002 (La. 2d Cir. 1989); *cf., Smith v. Cole, supra*; R.S. 9:291; *In re B.G.S., supra*; La. Ch. Code article 1193; *Caban v. Mohammed, supra* note 43, at 441 U.S. 389 n. 7 and 393 n. 14 (wherein an unwed father who had established a de-facto family relationship with his children could not be deprived, on the basis of gender, from full participation in the adoption proceeding triggered by his ex-partner and mother of the children); *Lehr v. Robertson, supra* note 43 (wherein the Supreme Court upheld the termination of parental rights of an unmarried biological father and the adoption of the child by the mother's new husband, without notice to the biological father, when the father had not established any relationship with the child nor taken any steps to protect his parental rights. This was done, even though the mother had acted to prevent the biological father from establishing a relationship with the child.). *See* Blakesley, Parker & Wardle, *supra* note 17, at Chapter 10 on Adoption and (continued...)

may not be prevented from placing his illegitimate child in his will with equal inheritance rights to his legitimate children.[65] If an illegitimate child proves paternity, an unwilling father may be required to abide his support obligations until the child's majority.[66] Recently, Louisiana law has approved the constitutional validity and legality of the state or a party in interest proving paternity, even in a situation in which another man is the current husband of the mother and definitively presumed to be the father.[67]

Thus, the state interest in promoting the traditional family via discrimination against the illegitimate child is no longer seen as appropriate or constitutional.[68] A mother who chooses to have and

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64.(...continued)

§ III, *infra*, on Legitimacy and the Constitution. *See* Weinhaus, *Substantive Rights of the Unwed Father: The Boundaries Are Defined*, 19 J. Fam. L. 445, 455 (1980-81).

65. Statutes which bar fathers from providing equally to their legitimate and illegitimate children by will are unconstitutional. *Succ. of Robins*, 349 So.2d 276 (La. 1977).

66. This may occasionally create an undeserved burden and errors may be made as to actual paternity, as noted by some commentators who have signalled a high incidence of error in paternity actions. *See generally*, Cade, *Should Indigent Putative Fathers Be Provided Court Appointed Counsel in Ohio Paternity Proceedings*, 10 Ohio N.U. L. Rev. 473, 473 (1983); and Note, *Human Leukocyte Antigen Testing: Technology Versus Policy in Cases of Disputed Parentage*, 36 Vand. L. Rev. 1587, 1595-1598 (1983).

67. *See Smith v. Cole*, 553 So.2d 847 (La. 1989); La. R.S. 46: 236.1 (1990): "Unless it is not in the best interest of the child, the department may direct civil action, including actions to establish filiation against an alleged biological parent and notwithstanding the existence of a legal presumption that another person is the parent of the child solely for the purpose of fulfilling its responsibility. . . ."

68. *See, e.g., Trimble v. Gordon, supra* note 43; *Succ. of Bartie*, 472 So.2d 578 (La. 1985) (Louisiana's forced heirship provisions held unconstitutional, because they did not include illegitimate children); *Succ. of Robins*, 349 So.2d 276 (La. 1979) (Louisiana Civ. Code art. 1488 held unconstitutional, because it prohibited a parent from his or her illegitimate child a substantial portion of his or her estate); *Succ. of Thompson*, 367 So.2d 796 (La. 1979) (La. Civ. Code art. 483, held unconstitutional, because it prohibited an illegitimate child to receive his mother's legacy, if she had any legitimate offspring); *Succ. of Brown*, 388 So.2d 1151 (La. 1980) (La. Civ. Code art. 919, held unconstitutional, because it left acknowledged illegitimates out of intestate successions, if their deceased parent was survived by legitimate descendants); *Succ. of Clivens*, 426 So.2d 585 (La.

(continued...)

raise a child without the involvement of the father after conception may well have to be independent of public resources in order to do so.[69] A father in a nonmarital cohabitation relationship will have to take care to see that his rights concerning the children will not be subordinate to those of the mother, and that the children will also be his heirs.[70]

§ 5.04. Establishment of Paternity

Paternity can be established through any of four different methods: (1) applicability of the various *presumptions* of paternity; (2) proof of paternity by blood tests; (3) acknowledgment; or (4) legitimation. Each of these methods are discussed individually below.

68.(...continued)
1983) (applied *Brown, supra* this note, retroactively to the effective date of the Louisiana Constitution of 1974); *Jones v. Batiste*, 427 So.2d 17 (La. App. 3d Cir. 1983) (La. Civ. Code art. 204 held unconstitutional, because it prohibited acknowledgment of a child by parents who could not legally contract marriage with each other); *Succ. of Levy*, 428 So.2d 904 (La. App. 1st Cir. 1983) (forced portion of grandparents' estate allowed to illegitimates, if the latter died after the effective date of the Louisiana Constitution); *Jordan v. Cosey*, 434 So.2d 386 (La. 1983) (La. Civ. Code art. 1486, held unconstitutional, because it limited the amount of a donation by father of an illegitimate child to ¼ of the latter's property, if he were survived by legitimate ascendants or siblings). I would like to thank Professor Lee Hargrave for providing me with this genealogy of the demise of sanctions visited upon illegitimate children in Louisiana.

69. 42 U.S.C. §§ 602(a) (26), 606(b) (2). *See* Donovan, *The Uniform Parentage Act and Nonmarital Motherhood by Choice*, 11 NYU Rev. of L. & Soc. Change 193 (1982-1983); *See also Doe v. Norton*, 365 F. Supp. 65 (1973), *vacated and remanded Roe v. Norton*, 422 U.S. 391, 45 L. Ed. 2d 268, 95 S. Ct. 2221 (1975), *on remand, Doe v. Maher*, 414 F. Supp. 1368 (1976).

70. *See, e.g.,* Kentucky: The father of a wrongfully killed out-of-wedlock child held eligible to share in the proceeds of wrongful death action. The court of appeals overruled trial court that had held that such a father was not a "parent" under the applicable statutes and, thus, had no right to recover in wrongful death. The Court of Appeals held that the terms: kindred, parent, father and mother clearly could be read to include unwed or putative father. *Cox v. Cummins*, Ky. Ct. App. No. 87-CA-001317-MR, 3/17/89, 15 F.L.R. 1290 (4/18/89).

§ 5.05. —Presumptions of Paternity

The Louisiana presumptions of paternity as set forth in Civil Code articles 184–190, have been held to be constitutional.[71] Civil Code article 184 articulates the "strongest presumption known to the law." It provides that: "[t]he husband of the mother is presumed to be the father of the child born or conceived during the marriage."[72] In addition, the gestation period is very broadly defined, so as to create an additional presumption of conception during the marriage. Thus, Civil Code article 185 provides that "[a] child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage. A child born three hundred days or more after the dissolution of the marriage is not presumed to be the child of the husband."[73]

Article 186 attempts to provide a mechanism to avoid the presumption of paternity in certain circumstances. It provides that: "[t]he husband of the mother *is not* presumed to be the father of the child, if another man is presumed to be the father."[74] Because of the definition of a legitimate child in article 179 as a child *born or conceived* during the marriage, and because of the wording of article 184 (the husband of the mother of a child *born or conceived* during the marriage is presumed the father), both in relation to article 186, one cannot determine in many cases which is the husband and which is the "other man." For example, suppose a child is born within 300 days of a couple's divorce, but during the marriage of the mother and another man. Which man is the "husband" and which is the "other man," for purposes of article 186? Because the child was born within 300 days of the dissolution of the first marriage, he is deemed to have been conceived during the first marriage, so pursuant to both articles 179 and 184, the child is presumed to be that of husband number one. Although the child was born during the mother's marriage to husband number two, article 186 provides that the "husband of the mother [when the child is born? or when it is conceived?] is not presumed to be the father of the child, if another man is presumed [by its birth or by its conception?] to be the

71. *Williams v. Williams*, 587 So.2d 112, 115 (La. 2d Cir. 1991) (dictum); *see Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

72. La. Civ. Code art. 179; 184.

73. La. Civ. Code art. 185.

74. La. Civ. Code art. 186.

father." Thus, it is arguable that each husband is presumed to be the father, simultaneously being both the husband and the "other man."

It would seem that the only thing one can do with such a perfect circle is to interpret the legislation to promote the policy for which the presumptions were promulgated: to protect the child.[75] Hence, in the example above, both men are still presumed to be the father. The child, therefore, has two legal fathers. The presumption law, with the exception of disavowal of paternity authorization pursuant to article 187 (*see infra*), was not promulgated to protect presumed fathers.

Article 188, on the other hand, which prevents a man who marries a pregnant woman, with the knowledge that she was pregnant at the time of the marriage, from disavowing paternity, again emphasizes the protection of the child as the primary policy.

It is important to point out that the state cannot use the civil law presumption that a husband is the father of a child to prove the fact of parenthood in a prosecution for criminal neglect of a family by a parent pursuant to R.S. 14:74(2). Use of Civil Code article 184's presumption of paternity in such a criminal prosecution unconstitutionally relieves the state of its burden of proving every essential element of the crime beyond a reasonable doubt. *See State v. Jones*, 481 So.2d 598 (La. 1986).

§ 5.06. — —Disavowal of Paternity

Louisiana Civil Code article 187 provides that:

> The husband can disavow paternity of a child if he proves by a preponderance of the evidence, facts which reasonably indicate that he is not the father. However, these facts must be susceptible of independent verification or of corroboration by physical data or evidence, such as scientific tests and verifiable physical circumstances of remoteness, including but not limited to any one of the following: (1) Negative blood tests; (2) Unmatched DNA prints; (3) Sterility; (4) Physical impossibility because of location during the time of conception; or (5) Any other scientific or medical evidence which the court may deem relevant under the circumstances.[76]

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75. Louisiana jurisprudence has consistently held that this is the primary policy. *Williams v. Williams,* 587 So.2d 112, 114 (La. 2d Cir. 1991); citing *Phillips v. Phillips*, 467 So.2d 132 (La. 3d Cir. 1985); and *Pounds v. Schori*, 377 So.2d 1195 (La. 1979).

76. La. Civ. Code art. 187.

Civil Code article 187 has been updated to include modern scientific testing and other evidence in its text, rather than just in the comments.[77]

With the policies involved in articles 184–188, in mind, would it be a proper result, in a hypothetical situation like that presented immediately above, to decide that both men in the hypothetical would have an action to disavow the child? The Louisiana Third Circuit Court of Appeal, in 1983, indicated this, when it provided, as follows:

> An example of the situation contemplated by La. Civ. Code 188 would be where a woman becomes divorced from her first husband and marries a second time with her second husband's knowing that she was pregnant at the time of marriage. A child is born during the second marriage but less than 300 days after dissolution of the first marriage. In this situation, both the first and the second husbands are presumed to be the father of the child. Under such circumstances, both presumed fathers could maintain an action for disavowal.[78]

§ 5.07. — —Husband's Awareness of Woman's Pregnancy at Time of Marriage

A husband who married the mother of a child, knowing that she was pregnant at the time of the marriage, cannot disavow the paternity of such child born of such pregnancy.[79] However, pursuant to the 1989 revision to article 188, if the woman acted in "bad faith" and made a "false claim of fatherhood," to the marrying spouse, he may disavow paternity, provided that he proves such bad faith on the part of the mother, and proves by a preponderance of the evidence that the child is not his.[80] If, however, another man is presumed to be the father, the provisions of article 186 apply.[81] This latter provision puts us right back into the perfect circle, wherein each husband is simultaneously, the husband and the "other man." Also, a husband cannot disavow a child

77. *See* discussion on interrogatories re blood testing and DNA testing, *infra.*

78. *Cook v. Perron*, 427 So.2d 499, 501-502 (La. 3d Cir. 1983), writ denied, 433 So.2d 1054 (La. 1983); *see also Verneuille v. Verneuille*, 438 So.2d 615 (La. 4th Cir. 1983). These cases are discussed in Gruning, FAMILY & OBLIGATION, THE LOUISIANA LAW OF PERSONS, at 393-400.

79. La. Civ. Code art. 188.

80. *Id.*

81. *Id.*

born as the result of artificial insemination of the mother to which he consented.[82]

The 1989 amendment has been held to be substantive and not retroactive.[83] In *Williams v. Williams*,[84] a man married a woman, knowing she was pregnant. The child was born seven and one-half months after the marriage and was given the man's name. Even if the man was deceived by his wife before marriage and given assurances that he was the biological father, he was so suspicious that he had blood tests performed some eighteen months after the child's birth. These tests indicated that he was not the biological father. He did not file suit to disavow until some three years and four months after the child's birth, however. The man had accompanied the mother to the hospital for the birth, so he had immediate knowledge of the child's birth. The Second Circuit held that it was incumbent upon him to institute disavowal proceedings within 180 days, unless "for reasons beyond his control,"[85] he was unable to file his suit timely. The delay under Civil Code article 189 may be suspended only in situations where the husband does not have notice of either: (1) the child's birth; or (2) circumstances apprising him of possible paternity claim.[86] As noted above, Louisiana jurisprudence has required that the Civil Code articles governing actions to disavow paternity be given strict construction, favoring and protecting the child.[87]

§ 5.08. — —Delay Period in Which Disavowal Action Must Be Brought

Only the presumed husband, or his heir or legatee, whose interest in his succession will be reduced, has the right to disavow paternity.[88]

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82. *Id.*
83. *Williams v. Williams*, 587 So.2d 112, 115 (La. 2d Cir. 1991); citing *Pounds v. Schori*, 377 So.2d 1195 (La. 1979).
84. *Williams v. Williams, supra* note 83, at 112.
85. La. Civ. Code art. 189.
86. *Williams v. Williams*, 587 So.2d 112, 114 (La. 2d Cir. 1991); *Robertson v. Young*, 433 So.2d 421 (La. 4th Cir. 1983); *Naquin v. Naquin*, 374 So.2d 148 (La. 1st Cir. 1979).
87. *Williams v. Williams, supra* note 83, at 114; citing *Phillips v. Phillips*, 467 So.2d 132 (La. 3d Cir. 1985); and *Pounds v. Schori*, 377 So.2d 1195 (La. 1979).
88. La. Civ. Code art. 189-190.

The delay for disavowal is also very limited.[89] The suit for disavowal must be filed within one hundred eighty days after the husband learned or should have learned of the birth of the child; but, if the husband for reasons beyond his control is not able to file suit timely, then the time for filing suit shall be suspended during the period of this inability.[90] If the husband dies within the delays for disavowal, without having filed a disavowal action, an heir or legatee whose interest in the succession will be reduced has one year from the death or one year from the birth of the child, whichever period is longer, within which to file a disavowal action.[91]

In *Pounds v. Schori*,[92] the Louisiana Supreme Court held that the delay within which an action in disavowal must be brought is *peremptive*. *Peremption* is a form of prescription which does not allow interruption or suspension. It is akin to French *forfeiture*. On July 22, 1976, a child was born during the marriage of the husband and wife. Approximately on August 3, 1976, the husband moved from Louisiana to Oklahoma (12 days after the child's birth). In October 1976, the husband sued in Oklahoma to determine paternity (later amended his action to obtain a divorce). On May 31, 1977, a divorce was granted to the husband, but his disavowal action dismissed, for want of jurisdiction. The issue was whether the husband's action to disavow in Oklahoma suspended or interrupted the delay provided in Louisiana law. The Louisiana Supreme Court held that was neither suspended nor interrupted. Thus, the husband was barred from disavowing the child.

The rationale articulated by the Court was that the presumption of paternity articles in the Code are aimed at the protection of the child. The Court, therefore, requires *strict construction* of the statute regarding disavowal and others related thereto.

§ 5.09. — —Conclusive Presumption of Paternity in California Upheld

In *Michael H. and Victoria D. v. Gerald D.*, the United States Supreme Court upheld, in a plurality opinion, the constitutionality of California's conclusive presumption that the husband of the mother who

89. *Id.*

90. La. Civ. Code art. 189.

91. La. Civ. Code art. 190.

92. 377 So.2d 1195 (La. 1979).

conceived and gave birth to a child during the marriage is the father of the child, indicating that the presumption is a substantive rule of law.[93] In so ruling, the Court promoted the state's interest in the traditional family over the interests of the biological father and his child. The Supreme Court decided that a man, for whom blood tests indicated a 98.07% "probability" that he was father of a child born to a woman (married to another and living with her husband when the child was conceived) had no cause of action to establish paternity under California law, at least when the mother and the husband now wish to rear the child. The California presumption does not violate the claimant father's liberty interests. The Supreme Court held that there were no triable issues of fact as to paternity under California Evidence Code § 621, which provides that a child born to a married woman living with her husband, who is neither impotent nor sterile, is presumed to be a child of the marriage, and that this presumption may be rebutted only by the husband or wife and then only in very limited circumstances.

The presumption was read to be a "substantive rule of law, based on the legislature's determination of overriding social policy that the husband should be held responsible for the child and that the integrity and privacy of the family unit should not be impugned."

Essentially, Justice Scalia, writing for the Chief Justice, Justices O'Connor and Kennedy, opined that the presumption provided an absolute bar to a claimant father under the relevant circumstances proving paternity and to visitation. The plurality declined to apply the "fatherhood plus" standard to an unwed father when the father's and child's interests came up against the state's interest in defining family. Justice Scalia tested the fathers and the child's constitutionally protected "liberty"[94] interest by asking whether the father's relationship with the child was one that "ha[d] been treated as a protected family unit under historic practices of our society."[95] The biological father failed to establish that his claimed liberty interest in proving paternity and having claimed a relationship with his claimed daughter was a "fundamental"

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93. *Michael H. v. Gerald D.*, 109 S. Ct. 2333, rehearing denied, 110 S. Ct. 22 (1989); Note, *Michael H. v. Gerald D: Upholding the Marital Presumption Against a Dual Paternity Claim*, 50 La. L. Rev. 1015 (1990).

94. *Michael H. v. Gerald D.*, 109 S. Ct. at 2341.

95. *Michael H. v. Gerald D., supra* note 93, at 109 S. Ct. 2342; Note, *Michael H. v. Gerald D.: Due Process and Equal Protection Rights of Unwed Fathers*, 17 Hastings Con. L.Q. 759, 760 (1990); Note, *Michael H. v. Gerald D: Upholding the Marital Presumption Against a Dual Paternity Claim*, 50 La. L. Rev. 1015, 1032 (1990).

one traditionally protected in our society.[96] Indeed, "quite to the contrary, our [society's] traditions have protected the marital family . . . against the sort of claim Michael asserts."[97]

Victoria, the daughter's due process claim was considered merely the obverse of the unwed father's and, thus, also non-fundamental.[98] The four plurality Justices, under Scalia's opinion, found that Michael H. had not established a sufficient due process liberty interest to justify any constitutional protection. They did not balance the state's interests with those of Michael H. or Victoria O. because he had not established them sufficiently.[99]

Justice Stevens (concurring), the fifth member of the plurality, on the other hand, argued in his concurring opinion that, although this situation did not so provide, a natural father "might in some case have a constitutionally protected interest in his relationship with a child whose mother was married and cohabitating [sic] with her husband at the time of the child's conception and birth." Justice Stevens also argued that the California Statutory scheme does (or should) not really deprive the putative father of a fair opportunity to prove that he is a "person having an interest in the welfare of the child" to whom "reasonable visitations rights" may be awarded in the discretion of the trial judge (Cal. Civ. Code section 4601).

Four dissenters (Justices Brennan, Marshall, Blackmun, and White) argued that the putative father has a due process liberty interest in proving paternity and in maintaining a relationship with his putative child by visitation.

Thus, five members of the Court refused to foreclose the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to and cohabitating with another man at the time of the child's conception and birth. Four members of the Court agreed that the putative father has a liberty interest in his relationship with his putative child (White, J. dissenting) and one assumed for purposes of the case that he does (Stevens, J.).

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96. *Michael H. v. Gerald D., supra* at 2341; Note, *Unwed Fathers, supra* at 761.

97. *Michael H. v. Gerald D., supra* at 2342; Note, *Unwed Fathers, supra* at 761; Note, *Upholding the Marital Presumption, supra* at 1032.

98. *Michael H. v. Gerald D., supra*, at 2346.

99. *Michael H. v. Gerald D., supra*, at 109 S. Ct. 2333, 2341-45; *see discussion in* Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. Rev. 1, 18-23 (1991).

§ 5.10. — —Presumption of Paternity Held Unconstitutional Where Application Is Injurious to Child's Interests

Not long after the U.S. Supreme Court decision in *Michael H.*, the California Supreme Court held that § 621 of its Evidence Code is unconstitutional, if its application would be harmful to the child.[100] The California presumption of paternity was found unconstitutional when it injured a child's interests. *Michael H.*, was distinguished. The California conclusive presumption of paternity is unconstitutional when it would place a child with her presumptive (and non-biological) father, rather than with her biological father with whom she had lived for four years and eight days after birth and would remove her from her putative sister with whom she is very close. The California Court of Appeals applied a due process balancing test to decide that under these circumstances, the presumption is unconstitutional; it weighed the competing private and state rights and interests.[101]

§ 5.11. — —Biological Father's Duty to Provide Support

In a case having import on the rights of parents and children, via the protections of unwed fathers and their children, the Louisiana Supreme Court recently held that biological fathers are civilly obligated to support their offspring, even if these offspring are deemed to be the legitimate children of the husband of the mother, via Louisiana Civil Code articles 184, *et seq.*[102] A child may bring a paternity action to prove biological paternity, even if that child is legally presumed to be the legitimate child of another man (the husband of the mother at the time of conception or birth).

Also, failure of a presumptive father to timely disavow will not conclusively operate to deny a biological father his right to avow

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100. *In re Melissa G.*, 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989) ("the 'categorical preference' for an extant marital union which Justice Scalia recognized as being expressed by the statute thus has no application to this case").

101. *In re Melissa G.*, 213 Cal. App. 3d 1082, 261 Cal. Rptr. 894 (1989).

102. *Smith v. Cole*, 553 So.2d 847 (La. 1989).

paternity.[103] The Fifth Circuit held that interpreting article 184's presumption as irrebuttable in that way would deprive biological fathers of the opportunity to develop a relationship with their child and thereby deprive them of their due process rights. This is quite an interesting case in that it seems to recognize some independent content in the Louisiana Constitution's notions of privacy and due process.[104]

The facts of *Smith* were as follows. The husband (H) was married to wife (W). They were the Smiths. H and W had two children. W left H and began to live with Mr. Cole, but did not marry him. A child (C) was born one year later in 1975. Mr. Cole and (W) lived together, without marrying, for five years. H had no relationship with W since H, Mr. Smith, had moved to California. The child's birth certificate, however, named H as the father, although Mr. Cole did acknowledge the child as his. H and W never did get back together and were divorced in 1978. W and Mr. Cole split up in 1980. H never disavowed the child, but now claims that he is not father. In 1988, wife (W) sued Mr. Cole for child support. In the support action, Mr. Cole argued that he cannot be named the father, because the child is already the legitimate child of H. Cole claimed that a mother cannot be allowed to bastardize her child. The Louisiana Supreme Court disagreed with Mr. Cole and held that biological fathers are civilly obligated to support their offspring, even if these offspring are deemed to be the legitimate children of the husband of the mother, via La. Civ. Code arts 184, *et seq.* A child may bring a paternity action to prove biological paternity, even if that child is legally presumed to be the legitimate child of another man (the husband of the mother at the time of conception or birth). Thus, although the child is the legitimate child of the first husband of the mother, the biological father is determined and may be required to provide support. The failure of a presumptive father to timely disavow will not conclusively operate to deny a biological father his right to avow paternity.[105] .

103. *Id.; Finnerty v. Boyett*, 469 So.2d 287 (La. 2d Cir. 1985); *Durr v. Blue*, 454 So.2d 315 (La. 3d Cir. 1984), writ denied, 461 So.2d 304 (La. 1984); *In re Necaise Applying for Adoption*, 544 So.2d 1197 (La. 5th Cir. 1989).

104. *In re Necaise Applying for Adoption*, 544 So.2d 1197 (La. 5th Cir. 1989).

105. *Id.; Finnerty v. Boyett*, 469 So.2d 287 (La. 2d Cir. 1985); *Durr v. Blue*, 454 So.2d 315 (La. 3d Cir. 1984), writ denied, 461 So.2d 304 (La. 1984); *In re Necaise Applying for Adoption*, 544 So.2d 1197 (La. 5th Cir. 1989) (interpreting article 184's presumption as an irrebuttable presumption would deprive biological fathers of the opportunity to develop a relationship with their child and thereby deprive them of their due process rights).

Note, R.S. 46:236.1 (1990), allows the state to prove paternity and obtain support for a child, even when a man other than the biological father is presumed, under La. Civ. Code arts. 184–190, to be the father.

§ 5.12. —Blood Tests

In 1991, the Supreme Court held that an illegitimate child of a deceased is allowed to require a legitimate child to have a blood test, to determine whether that child's presumed father is actually his or her biological father.[106] The Louisiana Supreme Court, in a per curiam decision, held that an illegitimate child could require a legitimate child to submit to a blood test, pursuant to R.S. 9:396 (blood test statute) and La. C.C.P. art. 1422 (discovery statute). The Court stated that while it was true that R.S. 396, subd. A names only the father, the mother and the child as subject to being ordered to have blood drawn for the purpose of determining paternity, it clearly recognizes the strong evidentiary force of blood tests in a suit involving parentage and does not prohibit testing others. When the blood test statute and the discovery article are considered together, they constitute authority for allowing an illegitimate child have a legitimate child to submit to a blood test. (Note also that Civil Procedure Code article 1464 may also constitute authority for such a test, as it required examinations where physical condition is in controversy.)[107]

Justice Dennis argued to grant full review of the case, because the case "raises several important questions that should be considered and resolved by this Court including whether the statute authorizes a compulsory blood test in this situation, whether a threshold showing for the test must be made, and whether the trial judge abused his discretion." Justice Cole dissented, noting that the majority opinion amounted to judicial legislation. It does appear that the Legislature did not contemplate this scenario when it drafted R.S. 9:396. It actually was concerned with providing for scientific means of establishing or disavowing paternity. The author, who favors the theory of Dennis, would add that the decision might run against the traditional policy emphasized by the United States Supreme Court in *Michael H. v. Gerald D.*, of not allowing outside parties to infringe upon the sanctity of the

106. *Sudwisher v. Estate of Paul C. Hoffpauir*, 577 So.2d 1 (La. 1991) (per curiam); *see* L'Enfant, *Civil Procedure and Evidence Outline for 1991 Continuing Professional Development* 19 (1991).

107. La. C.C.P. art. 1464; L'Enfant, *supra.*

traditional, "legal" family. However, when significant public policies run up against each other, the Court ought to give the decision its full and careful attention.

Other states have held that a father of a child born to another man's wife is *not entitled* to obtain a court ordered blood test of the child.[108]

§ 5.13. —Acknowledgment

Louisiana Civil Code article 203 provides: "The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of the child." Civil Code article 209 (A), provides: "A child not entitled to legitimate filiation or filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article."

§ 5.14. — —Methods and Proof of Acknowledgment

Acknowledgment may be made either formally or informally.

Formal Acknowledgment

Formal acknowledgment is accomplished by authentic act. The act does not have to be specifically for that purpose. For example, a birth certificate will suffice. Formal acknowledgment used to be the only way to acknowledge; legislation did not recognize informal acknowledgment, although the judiciary did, assuming its existence in many cases.

The fact that a father is named in or on a birth certificate is not considered a formal acknowledgment or declaration of paternity, unless the father *signs* the certificate. La. R.S. 40:34 and 42, when read together, "clearly contemplate that the identity of an illegitimate child's father need not appear on the birth certificate unless he signs the certificate to approve the use of his surname for the child. Under the apparent statutory scheme, the birth certificate does not purport to be

108. *E.g., Donnelly v. Lindenmuth*, Pa. Super. Ct., No. 03461 (Phila. 1990) (10/21/91), 18 Fam. L. Rptr. 1034-35 (11/19/91).

prima facie evidence of 'fact' of paternity unless it is signed by the father.[109]

Informal Acknowledgment

In 1944, the Louisiana Legislature recognized informal acknowledgment, via La. Civ. Code 198 (strangely enough, on Legitimation). But, the greater includes the lesser, so this includes acknowledgment.

If an alleged father has not formally acknowledged a child whom the child's mother is alleging is his, the mother has the burden to prove informal acknowledgment (or paternity via scientific testing). Louisiana jurisprudence provides that, in proving informal acknowledgment, no one factor is determinative.[110] Courts look to the entirety of the evidence to determine whether the alleged parent has affirmatively stated or acted as if he believes that he is the father of the child.[111] Evidence of informal acknowledgment of paternity must be continuous, unequivocal and of a sufficient frequency that there can be little doubt that the alleged father believes himself to be the child's father.[112] Where, for example, a man, for a number of years, has provided a home for the natural mother and the child, paid for the child's school expenses, and admitted on record that he was fully aware his name was placed upon the child's birth certificate, as her father, it establishes clearly that he, throughout the child's life, agreed to be held out and did indeed hold himself out to the public as the child's natural father.[113] The father's claim that he was homosexual and, therefore, unable to engage in male-female sexual relations, was not sufficient to supplant the informal acknowledgment.[114]

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109. *Succ. of Brown*, 522 So.2d 1382 (La. 2d Cir. 1988).

110. *Hall v. Hall*, 588 So.2d 172, 173 (La. 5th Cir. 1991).

111. *Hall v. Hall, supra* note 110, at 178, citing *Griffin v. Succ. of Branch*, 479 So.2d 324 (La. 1985); *In re Wildeboer*, 406 So.2d 687 (La. 2d Cir. 1981).

112. *LaPrarie v. King*, 575 So.2d 921, 926 (La. 2d Cir. 1991); *Hall v. Hall*, 588 So.2d 172, 173 (La. 5th Cir. 1991); *Jordan v. Taylor*, 568 So.2d 1097 (La. 4th Cir. 1990), writ denied, 571 So.2d 650 (La. 1990); *Thomas v. Smith*, 463 So.2d 971 (La. 3d Cir. 1985); *State v. Sharplin*, 431 So.2d 864 (La. 2d Cir. 1983).

113. *Hall v. Hall, supra* note 110, at 174.

114. *Id.*

In proving informal acknowledgment, courts have relied on criteria presented in Civil Code articles 208–209. In *Succ. of Matte*,[115] the Louisiana Third Circuit Court of Appeal held that rumor was not enough to prove informal acknowledgment. It applied the criteria in La. Civ. Code article 209.

A man's statement to an aunt of the mother over the phone that he was the father of the child was not sufficient to establish informal acknowledgment. Nevertheless, informal acknowledgment is not the only way to establish paternity under La. Civ. Code art. 209. La. Civ. Code art. 209 expressly provides that proof of filiation may include, but is not limited to, informal acknowledgment.[116] In addition, failure to introduce the results of blood testing that has been completed or to produce an available corroborating witness about it creates a "presumption" that the evidence would have been adverse. This presumption, however, is only applicable when there is a failure to explain it (e.g., when financial considerations prevented its being introduced). In addition, even if relevant, the presumption is merely one factor that must be weighed along with other evidence.[117]

§ 5.15. — —Effect of Acknowledgment

When a child is acknowledged by a man, that man takes on the obligations of a parent toward that child. Thus, all of the obligations that a father has to his child obtain: for example, the obligation to support.

Most states have a rule that a man generally may not challenge his paternity of a child, after he has acknowledged that child as being his.[118] However, if the acknowledgment was induced by fraud, proved by clear and convincing evidence, the alleged acknowledged father has been allowed to attack the paternity determination with DNA or other scientific testing, at least where the alleged father was of limited intelligence and experience and could not reasonably be expected to

115. *Succ. of Matte*, 346 So.2d 1345 (La. 3d Cir. 1977).

116. *Cunningham v. Dicarlo*, 539 So.2d 1315, 1317 (La. 3d Cir. 1989).

117. *Id.* at 1318.

118. *B.O. v. C.O.*, Pa. Super. Ct. No. 679 Pgh. 1990 (4/26/1991); 17 Fam. L. Rptr. 1325 (May 14, 1991).

question the mothers claim that he was the father and that she had not had sexual relations with any other men.[119]

§ 5.16. — —Who May Be Acknowledged

Can a man acknowledge a child of a woman who is married to another man at the time of the birth? Former Civil Code article 204, as amended in 1948, forbade acknowledgment of any child whose parents were forbidden to marry each other at the time of conception, unless, the parents later married. Article 204 was repealed in 1979. Civil Code article 200, amended in 1972, however, allowed *legitimation* of illegitimate children as long as there was *no impediment to the marriage of the parents at the time of legitimation (not conception).*

This result was of questionable constitutionality.[120]

Civil Code article 200 was amended again in 1983, to eliminate all limitations on legitimation by the mother or the father. Parents can legitimate any illegitimate child at any time. Today there is *no prohibition* against acknowledging any child, even one of a married woman. Note, however, that Civil Code article 256 allows the mother to not accept this acknowledgment for tutorship purposes.[121]

Acknowledgment is certainly allowed liberally insofar as it causes obligations to arise in the father.[122] As to whether it allows a father to have constitutional rights and protections as to his rearing the child or blocking an adoption, provide serious and interesting difficulties. It appears that an acknowledging father will not obtain any rights vis-a-vis his alleged child, unless and until the acknowledging father also proves that he is actually the biological father. Moreover, the acknowledging father will not be allowed to establish paternity, unless he has established a relationship with the child or was prevented from doing so by the sole action of the mother (immediately after the birth of the child).

In 1990, the Louisiana Supreme Court held that a natural father who has done everything he could do to acknowledge and to establish a relationship with his illegitimate child, but who was prevented from

119. *Id.*

120. *Griffin v. Succ. of Branch*, 479 So.2d 324 (La. 1985); *Smith v. Cole, supra* note 103; *but cf., Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

121. *See also* La. Civ. Code art. 205 (acknowledgment by father alone has effect only on the father).

122. *Griffin v. Succ. of Branch*, 479 So.2d 324 (La. 1985); *Smith v. Cole*, 553 So.2d 847 (La. 1989).

doing so by the mother, has a constitutionally cognizable interest in blocking the child's adoption. This interest carries over to allow such a father to prove paternity.[123] Where a natural father has an actual relationship with his child or where he has been prevented by the mother from forming one, and he institutes an avowal action within a reasonable time following the child's birth, he may utilize R.S. 9:396 (the blood test statute) to prove his paternity.[124]

The Children's Code requires the father to legitimate the child and to record the legitimation or to have himself registered in the *Putative Father Registry* prior to the child's birth to establish his rights to block an adoption.[125] Presumably, the same would be required of a father claiming any rights vis-a-vis a child.

§ 5.17. —Legitimation

The Louisiana Supreme Court, in 1991, quoted Planiol to define legitimation as: "an advantage by which the attribute of legitimate child is *fictitiously conferred*, with all its consequences, upon a child conceived outside marriage and which operates in favor of both the parents and child."[126] It is strange in a sense to call legally provided legitimation as *fictitious*. True, they are legitimate after legitimation, when they were not before, but it is the law that does it. That does not seem any different from the law considering, after all, the children to be legitimate or illegitimate merely on the basis of when and under what circumstances they were born; considering children born or conceived during wedlock as legitimate, pursuant to Civil Code article 179.

Legitimation has "an incontestable moral influence by inducing the transformation of irregular households into legitimate families."[127] There are two types of legitimation: legitimation by authentic act[128]

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123. *Smith v. Jones*, 566 So.2d 408 (La. 1st Cir. 1990) (per Alford, J., with two other justices specially concurring); *cf.*, *In re B.G.S.*, 556 So.2d 545 (La. 1990).

124. *Smith v. Jones, supra* note 123, at 414.

125. La. Civ. Code arts. 1135, 1136.

126. *Chatelain v. State, DOTD*, 586 So.2d 1373, 1377 (La. 1991) (emphasis added). *See* 1 M. Planiol, CIVIL LAW TREATISE §§ 1549, 1551 (La. St. Law Inst. transl. 1959).

127. *Id.*; 1 M. Planiol, *Civil Law Treatise* §§ 1549, 1551 (La. State Law Inst. transl. 1959).

128. La. Civ. Code art. 200.

and informal legitimation by the marriage of the child's parents and acknowledgment by them.[129]

Legitimation by Authentic Act

Civil Code article 200 provides that formal legitimation occurs when: "[a] father or mother [passes an act] before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child. . . ."[130] Civil Code article 200, formerly prohibited the legitimation of adulterous or incestuous bastards (if there was an impediment to the marriage of the parents at the time of the child's conception). It was amended in 1972, however, to allow *legitimation* of illegitimate children as long as there was *no impediment to the marriage of the parents* *at the time of legitimation* *(not conception)* and if either parent has any legitimate ascendants or descendants at the time of legitimation. Civil Code article 200 was amended again in 1983, to eliminate all limitations on legitimation by the mother or the father. Thus, today there are no impediments to the legitimation of a child, except presumably, it is required that the parties legitimating the child be his or her biological parents.[131] The child can be legitimated without any requirement that the parents marry.

Informal Legitimation

There are two elements to legitimation under La. Civ. Code article 198: (1) marriage by actual parents; and (2) acknowledgment by each. This acknowledgment may be formal or informal. Civil Code article 198 provides that: "[i]llegitimate children are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them as their children, either before or after marriage."[132] Thus, for legitimation under article 198, there are two separate requirements. There must be a marriage subsequent to the child's birth between the biological father and the biological mother of the child.[133] Second, there must be an acknowledgment of the child by

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129. La. Civ. Code art. 198.

130. La. Civ. Code art. 200.

131. *See Chatelain v. State DOTD*, 586 So.2d 1373, 1377 (La. 1991) ("relating to legitimation by marriage," per La. Civ. Code art. 198).

132. La. Civ. Code art. 198.

133. *Chatelain v. State, DOTD*, 586 So.2d 1373, 1377 (La. 1991).

the parent or parents.[134] Marriage without acknowledgment or acknowledgment without marriage is insufficient to legitimate a child.[135]

§ 5.18. — —Standard of Proof for Legitimation

While Civil Code article 209 requires proof of filiation by clear and convincing evidence when the alleged parent is dead, article 198, does not specify any standard of proof for legitimation.[136] The standard of "proof by clear and convincing evidence requires a party to persuade the trier of fact that the fact or causation sought to be proved is highly probable, i.e., much more probable than its non-existence."[137] This standard is an intermediate one between the burden of proof by a preponderance of the evidence and the burden of proof beyond a reasonable doubt.[138] The requirement of proof by clear and convincing evidence has traditionally been applied in cases in which there is a special danger of deception or in which the particular type of claim is disfavored on policy grounds.[139] The Louisiana Supreme Court held, in 1991, that "[i]t is logical that a higher standard of proof should be required for *both* filiation and legitimation when the alleged parent is dead. Claims by an illegitimate child to the property of an alleged parent or to the status of a wrongful death beneficiary of the alleged parent, when not presented until after the death of the alleged parent, are replete with danger of fraud."[140] While Civil Code article 198 refers to formal and to informal acknowledgment, and article 203 lists specific requirements for formal acknowledgment, the Civil Code does not specify the requirements for informal acknowledgment. The jurispru-

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134. *Id.*

135. *Id.*

136. La. Civ. Code arts. 198, 209; *Chatelain v. State DODT, supra* note 133, at 1378.

137. *Chatelain v. State DODT, supra* note 133, at 1378; citing McCormick, ON EVIDENCE § 340(B) (3d ed. 1984); *Succ. of Bartie*, 472 So.2d 578 (La. 1985).

138. *Chatelain v. State DODT, supra* note 133 at 1378; *Louisiana State Bar Ass'n v. Edwins*, 329 So.2d 437 (La. 1976).

139. *Chatelain v. State DODT, supra* note 133, at 1378; *Succ. of Lyons*, 452 So.2d 1161 (La. 1984); McCormick, *supra* note 138, at § 340(B).

140. *Chatelain v. State DODT, supra* note 133, at 1378-79; citing Katherine Spaht, *Developments in the Law, 1931-1982—Persons*, 43 La. L. Rev. 535, 537 (1982).

dence, however, has recognized informal acknowledgment as a method of proving filiation and has set forth standards for evidence constituting informal acknowledgment.[141]

§ 5.19. — —Standard of Proof of Filiation

Under Civil Code article 209, proof of filiation to a living parent must be made by a preponderance of the evidence.[142] The United States Supreme Court has affirmed the constitutionality of applying the preponderance standard to establish paternity.[143] Thus, taken as a whole, the evidence must show that the fact or cause sought to be proved is more probable than not.[144] The following evidence has been found to be sufficient to meet this standard: the mother and alleged father had an extended relationship during which they engaged in sexual intercourse; the mother was not having sexual relations with other men; she believed that defendant was the father; the approximate date of conception coincided with the child's date of birth, taking into account that it was seven weeks early; the conception date was within the accepted range of time the mother and the alleged father had sexual intercourse; the alleged father had informally acknowledged the child through financial aid and statements made and through his conduct.[145] While any one of these factors, taken alone, may not be sufficient to meet the preponderance standard, they are important factors to be weighed with all other evidence presented.[146] It is not an abuse of discretion to hold that the plaintiff's burden has been met, upon this evidence, even without the benefit of blood or other scientific testing.[147] Evidence of informal acknowledgment of paternity must be

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141. *Chatelain v. State DODT, supra* note 133, at 1379; citing *Succ. of Vance*, 34 So. 767 (La. 1903); *Succ. of Corsey*, 131 So.841 (La. 1930); *Taylor v. Allen*, 91 So. 635 La. 1922); *see* Oppenheim, *Acknowledgment and Legitimation in Louisiana*, 19 Tul. L. Rev. 325 (1945).

142. La. Civ. Code art. 209; *LaPrarie v. King*, 575 So.2d 921, 925 (La. 2d Cir. 1991).

143. *Rivera v. Minnich,* 483 U.S. 574 (1987).

144. La. Civ. Code art. 209; *LaPrarie v. King, supra* note 142, at 925; *Worley v. Thirdkill*, 506 So.2d 1288 (La. 2d Cir. 1987); *State v. Essex,* 427 So.2d 71 (La. 4th Cir.), writ denied, 430 So.2d 82 (La. 1983).

145. *LaPrarie v. King, supra* note 142, at 925.

146. *Id.*

147. *Id.*

unequivocal and of a sufficient frequency that there can be little doubt that the alleged father believes himself to be the child's father.[148] When it is unequivocal as to leave little doubt, it is sufficient to establish the defendant as the child's father.[149]

Some courts and commentators[150] had inferred that the 1981 amendment to La. Civ. Code art. 209 ("[a] child not entitled to legitimate filiation . . . must prove filiation. . . ."), when combined with the amendment to R.S. 46:236.1 (F) (Louisiana's Child Support Enforcement Program, authorizing the Department of Health & Human Resources to institute filiation proceedings against alleged biological fathers, notwithstanding the existence of a presumptive father), prohibited a child who had legitimate filiation from instituting a proceeding to establish filiation to another man. This position was rejected by the Louisiana Supreme Court in *Griffin v. Succ. of Branch*,[151] and again in 1989, in *Smith v. Cole*.[152] The *Griffin* and *Smith* cases adopted the view that the phrase "*a child not entitled to legitimate filiation*" means a child who is not entitled to legitimate filiation *to the parent to whom he is attempting to prove filiation*.[153] Therefore, he or she may prove paternity of another man under La. Civ. Code arts. 208 and 209.

Louisiana Civil Code articles 203 and 209 provide for acknowledgment and proof of filiation of an illegitimate child respectively. Article 203 provides that acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of the child. Article 209 provides that a child who has not been formally acknowledged can prove filiation to an alleged living parent *by a preponderance of the evidence* in a civil proceeding instituted by the child or on his behalf within one year of the death of the alleged parent or within

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148. *LaPrarie v. King, supra* note 142, at 926; *State v. Sharplin*, 431 So.2d 864 (La. 2d Cir. 1983).

149. *LaPrarie v. King, supra* note 142, at 926.

150. Spaht, *Developments in the Law, 1980-81: Persons*, 42 La. L. Rev. 403, 407; *Fontenot v. Thierry*, 422 So.2d 586 (La. 5th Cir. 1982), writ denied., 427 So.2d 868 (La. 1983); *IMC Exploration Co. v. Henderson*, 419 So.2d 490 (La. 2d Cir. 1982),

151. 479 So.2d 324 (La. 1985).

152. 553 So.2d 847, 853 (La. 1989).

153. *Id.*; *Griffin v. Succ. of Branch*, at 472 So.2d 324, 327.

nineteen years of the child's birth, whichever first occurs. This time limit runs against all persons, including interdicts and minors. After the time period has run, a putative child may not prove paternity, except for the sole purpose of establishing damages for wrongful death, pursuant to article 2315. An action for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages. A child who has not been formally acknowledged, must prove his filiation to a deceased parent by *clear and convincing evidence.* An informal acknowledgment of filiation must be continuous, habitual, unequivocal, and must leave little doubt that the alleged father considered himself to be the father of the child.[154] One may prove that the deceased was *generally reputed to be the father,*[155] but mere rumor or prior braggadocio is not enough.[156]

The critical requirement for classification of a person as a child under article 2315, wrongful death or survival actions, is the biological relationship between the tort victim and the child.[157] If a child has a biological connection to the tort victim, whether the child is legitimate, legitimated, or illegitimate, he has the right to bring an action for wrongful death and survival damages.[158] However, when the child is neither legitimate at birth nor subsequently legitimated by the parent, Civil Code article 209, imposes a time limitation for establishing the filiation necessary to qualify as a child under article 2315.[159]

§ 5.20. Prescription and Proof of Paternity

It is unconstitutional to deprive an illegitimate child of his or her opportunity to establish parenthood. In 1978, the United States Supreme Court reaffirmed that it is unconstitutional to discriminate against

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154. *Jordan v. Taylor*, 568 So.2d 1097, 1098 (La. 4th Cir. 1990); *Thomas v. Smith*, 463 So.2d 971 (La. 3d Cir. 1985); *State Through Dep't of H.H.R. in Interest of Brown v. Williams*, 451 So.2d 1064 (La. 3d Cir. 1985).
155. *Succ. of Corsey*, 171 La. 663, 131 So. 841 (1930); *Succ. of Matte*, 346 So.2d 1345 (La. 3d Cir. 1977).
156. *Succ. of Matte, supra* note 115; *Family Law—Illegitimate Children—Proof of Paternity*, 15 La. L. Rev. 218 (1954).
157. *Chatelain v. State, DOTD*, 586 So.2d 1373, 1376 (La. 1991); *Warren v. Richard*, 296 So.2d 813 (La. 1974).
158. *Chatelain v. State, DOTD, supra* note 133, at 1376; *Levy v. Louisiana*, 391 U.S. 68 (1968).
159. *Chatelain v. State, DODT, supra* note 133, at 1376.

illegitimate children, unless it was substantially related to promoting an important interest,[160] but that New York's law which required an illegitimate child to prove paternity within the father's lifetime was not unconstitutional.[161] Subsequently, the United States Supreme Court has held that it is unconstitutional to require an illegitimate child to prove paternity within one year,[162] within two years,[163] and within six years of his or her birth.[164] If states wish to receive AFDC benefits, they must allow the illegitimate child to have eighteen years to prove paternity.[165]

Recently, the Colorado Supreme Court decided that a three-year statutory prescriptive period in Colorado for children born without a statutory presumption of paternity was unconstitutional under the Equal Protection Clause of the U.S. Constitution.[166]

§ 5.21. Attorney's Fees and Proof of Paternity

Attorney's fees are to be awarded to the prevailing party in an action to prove paternity.[167]

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160. *Lalli v. Lalli*, 439 U.S. 259 (1978); *reaffirming, Trimble v. Gordon*, 430 U.S. 762 (1977); *Succ. of Brown*, 388 So.2d 1151 (La. 1980).
161. *Lalli v. Lalli, supra* note 160.
162. *Mills v. Hableutzel*, 456 U.S. 91 (1982).
163. *Pickett v. Brown*, 462 U.S. 1 (1983).
164. *Paulussen v. Herion*, 106 S. Ct. 1339 (1986); *Clark v. Jeter*, 486 U.S. 456 (1988).
165. *See* discussion in relation to Child Support Enforcement, *supra*.
166. *In re J.M.A.*, Colo. Sup. Ct. No. 90SA117, 12/17/90; 17 Fam. L. Rptr. 1167 (2/12/91); citing *Clark v. Jeter*, 486 U.S. 456 (1988).
167. La. R.S. 9:398.1, La. Act 854, 1991.