**Journal of Civil Law Studies**

Volume 5
Issue 1 *200 Years of Statehood, 300 Years of Civil Law: New Perspectives on Louisiana's Multilingual Legal Experience*
*October 2012*

Article 14

10-1-2012

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Sarena Gaylor, *Department of Social Services ex rel. P.B. v. Reed*, 5 J. Civ. L. Stud. (2012)
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# A TALE OF TWO FATHERS: *STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES EX REL. P.B. V. MICHAEL REED*

Sarena Gaylor*

## I. BACKGROUND

A child, P.B., was conceived in May 2000 while his mother, B.B., was married and simultaneously involved in a sexual relationship with her brother-in-law, Michael Reed. Because B.B.'s husband had undergone a vasectomy, she believed Reed was the biological father of P.B. On September 10, 2007, the Department of Social Services (DOSS) filed suit against Reed to Prove Paternity and Obtain Child Support.[1] DOSS offered genetic evidence, which reflected Reed's probability of being P.B.'s biological father as 99.999%.

On November 10, 2008, the juvenile court judge determined it was in P.B.'s best interest for Reed to be established as P.B.'s biological father. Following this ruling, a hearing took place to set child support. Using two paycheck stubs from the mother, an unauthenticated list of bank deposits for the biological father, two different Louisiana Automated Support Enforcement System (LASES) worksheets, and a 1099 form for the biological father, the judge ordered Reed to pay B.B. $365.00 per month for P.B.'s support.

The State appealed the award arguing that the juvenile court judge erred, as a matter of law, in the methodology used to calculate the child support obligation of a biological father. The trial judge did not have the adequate evidence necessary under

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1. 52 So. 3d 145 (La. App. 5 Cir. 2010).

Louisiana Revised Statute 9:315, *et seq*. to determine Reed's financial obligation to the child.

## II. JUDGMENT OF THE COURT

On appeal, the Fifth Circuit Court of Appeal reversed and remanded the case. The trial court's discretion in setting child support is structured and limited[2] by the Guidelines for Determination of Child Support which are set forth in Louisiana Revised Statute 9:315 *et seq*.[3] Louisiana Revised Statute 9:315.2 requires "each party to provide a verified income statement showing gross income and adjusted gross income with documentation of current and past earnings…The documentation shall include a copy of the party's most recent Federal Tax Return." It was uncertain as to what exhibits of those transmitted to the Fifth Circuit were actually introduced into evidence at the hearing. Additionally, no copy of the parties' most recent federal tax return was provided. Moreover, it was unclear to the Fifth Circuit how the trial judge came upon the amount of income imputed to the legal father or the biological father with the evidence provided. In cases where the record contains inadequate information and documentation upon which to make a child support determination under the guidelines, a remand to the to the trial court is necessary.[4] Accordingly, the Fifth Circuit concluded the trial court judge abused her limited discretion in calculating the child support award, and the court consequently vacated the award and remanded the case to the lower court for a hearing to set child support in compliance with the guidelines, including, but not limited to Louisiana Revised Statute 9:315.2(A).

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2. *Id.* at 147, citing State of Louisiana, Department of Social Services ex rel. D.F. v. L.T., Jr., 934 So. 2d 687, 690 (La. 2006).
3. Reed, 52 So. 3d at 147.
4. *Id.*

## III. COMMENTARY

Unlike the rest of the United States, Louisiana has long recognized the possibility of a child having two fathers: a biological father and a legal presumptive father.[5] This concept, referred to as "dual paternity," is now legislatively provided for in Louisiana Civil Code articles 197 and 198.[6] Dual paternity allows a child to seek support from his or her biological father, though the child is presumed to be the child of a marriage between the mother and another man (legal father).[7]

In *Smith v. Cole*,[8] the court stated "the biological father does not escape his support obligations merely because others may share with him the responsibility," establishing that in circumstances where a child already has a legal father to support him or her, the biological father's duty to the child is not extinguished. Furthermore, biological fathers are civilly obligated to support their offspring.[9] Whether the biological father has or has not played a role in the child's life has no material effect on the obligations he has assumed.[10]

The aforementioned duty the fathers owe to the child is, of course, expressed by way of child support. Louisiana Revised Statute 9:315.2 provides a rigid guideline as to the calculation of basic child support. The statute requires parties to provide verified income statements showing gross and adjusted income, documentation of current and past earnings, a copy of the party's most recent federal tax return, and any documents related to the

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5. LA. CIV. CODE ANN. art. 197 (2011); *see also* art. 197 comments. (a), (b); LA. CIV. CODE ANN. art. 198 (2011); State of Louisiana ex rel. C.W. v. Wilson, 855 So. 2d 913, 914 (La. App. 2 Cir. 9/24/03).

6. LA. CIV. CODE art. 197 allows a child to establish paternity though he is presumed to be a child of another. LA. CIV. CODE Art. 198 allows a man to establish paternity of a child who is presumed to be that of another.

7. Wilson, 855 So. 2d at 914, citing State, Dep't of Soc. Serv., Office of Family Support ex rel. Munson v. Washington, 747 So. 2d 1245 (La. App. 2d Cir. 12/08/99).

8. Smith v. Cole, 553 So. 2d 847, 854 (La. 1989).

9. *Id.*

10. Wilson, 855 So. 2d at 915.

ownership interest in a business.[11] Using the information provided, the parties combine the amounts of their adjusted gross incomes and then determine (by percentage) his or her proportionate share of the combined adjusted gross income.[12] The court then determines the basic child support obligation amount from the schedule provided for under Louisiana Revised Statute 9:315.19 using the combined adjusted monthly gross income of the parties and the number of children for whom support is sought.[13] The amount which each party is obligated to pay is divided in proportion to each parents' percentage share of the combined adjusted gross income.[14] While seemingly fair and equitable to the parties involved, the statute contemplates that there are two – and only two—parents, one mother and one father.

Although dual paternity has long been a part of Louisiana law, there has yet to be either legislation or *jurisprudence constante* developed to establish guidelines to determine the legal and biological fathers' financial obligations to the child in terms of child support. The court in *State ex rel. C.W. v. Wilson* attempted to resolve this issue by combining the adjusted gross incomes of the biological and legal father with that of the mother.[15] Utilizing the schedule within Louisiana's current child support guidelines, Louisiana Revised Statute 9:315.19, the paternal support obligation was established.[16] The court then compared the two fathers' shares of income and the mother's income and determined that the fathers, together, were responsible for 67.4 percent ($519.88) of the child's total support obligation; the mother was responsible for the remaining 32.6 percent ($251.48).[17] Of the $519.88, the legal father was responsible for 65 percent ($339) of the paternal

11. LA. REV. STAT. ANN. §315.2(A) (2011).
12. LA. REV. STAT. ANN. §315.2(C) (2011).
13. LA. REV. STAT. ANN. §315.2(D) (2011).
14. *Supra* note 12.
15. Wilson, 855 So. 2d at 913-914 (2003).
16. *Id.*
17. *Id.* at 915 n.5.

obligation, and the biological father was responsible for 35 percent ($180.88) of the paternal obligation.[18] The Second Circuit Court of Appeal affirmed the lower court's judgment finding that the calculation was done "in the spirit of the guidelines [of LA. REV. STAT. §9:315.2]," because child support was allocated in proportion to the needs of the child and the ability of the parents to provide such support.[19] The Fifth Circuit in *Reed*, noting the formula accepted by the Second Circuit, described this methodology as "interesting" and remanded the question to the lower court to determine a proper child support payment in compliance with Louisiana Revised Statute 9:315.[20] Again, this is, strictly speaking, impossible because Louisiana Revised Statute 9:315 does not provide a formula for multiple fathers.

Though the *Wilson* resolution allows a child to receive the necessary support, are we inadvertently rewarding a woman for committing adultery? Including an extra parent in the child support calculation will only reduce the obligation of the mother. Further, accepting adultery is inconsistent with Louisiana's strong public policy that considers the sanctity of marriage and familial values top priority.

On the other hand, if courts do not follow the procedure set forth in *Wilson*, where does the legal father stand in a dual paternity situation? Should the legal father be required to support the child at all? If so, are the two fathers bound solidarily on the obligation to the support the child? If the legal father is forced to pay, can he_seek indemnity from the biological father? Or, if he cannot obtain indemnity, can he at least obtain contribution? If he can, then in what amount?

These are the questions facing Katherine Spaht, Professor Emeritus at LSU Law Center, chairman and reporter of the Marriage and Persons Committee of the Louisiana State Law

18. *Id.* at 915-16.
19. *Id.* at 916.
20. Reed, 52 So. 3d 145, 148 n.2.

Institute and member of the Child Support Committee. The Marriage and Persons Committee has been given the task by the Louisiana Legislature to identify all areas of law, which are effected by "dual paternity"; one of these areas, naturally, is child support.[21] On behalf of the Marriage and Persons Committee, Prof. Spaht drafted the proposed resolution regarding child support in a dual paternity situation.[22] The proposal acknowledges that the guidelines used in *Wilson* were proper: considering the income of all three parents and proportioning the responsibility of each parent gave the most satisfactory resolution.[23] Prof. Spaht's proposal will likely be introduced at the next Child Support Review Committee guidelines meeting, which meets every four years (the next meeting to be held in 2016).[24] Until then, courts have freedom to determine dual paternity child support in any manner that strikes them as consistent with the current Child Support Guidelines.

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21. *Dual Paternity: Hearing on Child Support Before the Marriage & Pers. Comm.*, 2012 Sess. 20 (prepared by Katherine S. Spaht, Reporter, Marriage & Pers. Comm.).
22. *Id.*
23. *Id.*
24. LA. REV. STAT. ANN. §315.16 (A) (2011).