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# An Unborn Child's Right to Prove Filiation: Malek v. Yekani-Ford

Roy Edward Blossman

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## NOTES

### AN UNBORN CHILD'S RIGHT TO PROVE FILIATION: *Malek v. Yekani-Ford*

A pregnant woman filed suit on behalf of herself and her unborn child, seeking to establish the child's paternal filiation and to obtain support. The defendant alleged that since the plaintiff was legally married, the unborn child was presumed to be the child of the plaintiff's husband. The trial court dismissed the suit as premature since the child had yet to be born. The supreme court reversed, reasoning that a curator of an unborn child could file suit against the alleged father to establish filiation and obtain prenatal and natal support. *Malek v. Yekani-Ford*, 422 So. 2d 1151 (La. 1982).

The Louisiana Civil Code accords beneficial property rights to an unborn child. For example, an unborn child may inherit by intestate succession, and may have a curator appointed to take care of his estate.<sup>1</sup> He also may recover workmen's compensation benefits from the employer of his deceased father.<sup>2</sup> No legal recognition is given to the child, however, if such recognition would result in a detriment to him.<sup>3</sup> For example, the husband of the mother of a legitimate child can not disavow paternity prior to birth.<sup>4</sup>

Not until the *Malek* case, however, had the Louisiana courts granted an unborn child standing to sue his alleged father to establish filiation. The majority began its analysis by determining that parental filiation, with its consequent entitlement to support and heirship, is a property right of an unborn child. It then concluded, relying on Civil Code article 21 and excerpts from Planiol,<sup>5</sup> that the Louisiana Civil Code provides an unborn child standing to assert his property rights. After specifying that an illegitimate and his representatives can claim natal expenses and support from his biological father, the majority reasoned that since Louisiana recognizes an unborn child's rights in property matters, there is no reason to distinguish between natal and prenatal expenses and to postpone the biological father's responsibility until birth.<sup>6</sup> To strengthen this conclusion, the court mentioned that an early resolution of paternity is in the interest of both the state and the child, and that since a father can volun-

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1. La. Civ. Code arts. 954, 29.
2. La. R.S. 23:1021(3) (Supp. 1984).
3. 1 M. Planiol, *Treatise on the Civil Law* pt. 1, no. 367, at 245 (11th ed. La. St. L. Inst. trans. 1959).
4. La. Civ. Code art. 189.
5. 1 M. Planiol, *supra* note 3.
6. 422 So. 2d at 1153.

tarily acknowledge an unborn child,<sup>7</sup> an unborn child should be permitted to judicially establish filiation with his father.<sup>8</sup>

A judgment of paternity necessarily establishes the obligation of support. This paper will first analyze an unborn child's right to support under Louisiana law and will then analyze the wisdom of allowing a paternity action to be instituted prior to birth.<sup>9</sup>

### *Unborn Child's Right to Support*

Civil Code articles 28, 29, and 227 arguably provide a basis for the right of an unborn child to obtain support. Article 28 provides: "Children born dead are considered as if they had never been born or conceived." Article 29 states: "Children in the mother's womb are considered, in whatever relates to themselves, as if they were already born; thus the inheritances which devolve to them before their birth, and which may belong to them, are kept for them, and curators are assigned to take care of their estates for their benefit." And article 227 reads: "Fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children."

The drafters of Civil Code articles 28, 29, and 227 did not contemplate an action for support being brought either prior to birth or by an illegitimate child. At the time the articles were drafted an illegitimate child had no property rights other than a limited duty of support owed to him by his parents under Civil Code article 240.<sup>10</sup> Hence, article 29, which gives an unborn child legal personality for property rights, was not intended to apply to an illegitimate child. Articles 29 and 227 were not intended to apply to an unborn child because article 209, which provided the methods of proving paternity, primarily contemplated the use of physical proof after the child's birth.<sup>11</sup> But articles 28, 29, and 227 can

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7. 1 M. Planiol, *supra* note 3, no. 1475, at 808.

8. 422 So. 2d at 1154.

9. Although the wisdom of allowing the illegitimate child in *Malek* to bring a paternity action against a man other than the presumed father is questionable, this issue has been discussed extensively by Professor Spaht and the judiciary and will not be addressed in this note. See *Warren v. Richard*, 296 So. 2d 813 (La. 1974); *Fontenot v. Thierry*, 422 So. 2d 586 (La. App. 3d Cir. 1982), cert. denied, 427 So. 2d 868 (La. 1983); *IMC Exploration Co. v. Henderson*, 419 So. 2d 490 (La. App. 2d Cir. 1982); Spaht, *The Work of Appellate Courts, 1978-1979—Persons*, 40 La. L. Rev. 550 (1980); Spaht, *Developments in the Law, 1979-1980—Persons*, 41 La. L. Rev. 372, 380 (1981); Spaht, *Developments in the Law, 1980-1981—Persons*, 42 La. L. Rev. 403, 405 (1982); Spaht & Shaw, *The Strongest Presumption Challenged: Speculations On Warren v. Richard and Succession of Mitchell*, 37 La. L. Rev. 59 (1976).

10. Civil Code article 240 provides that parents owe alimony to their illegitimate children, when they are in need.

11. La. Civ. Code art. 209 (1870). Under this article, however, a child could possibly prove paternity by facts occurring before his birth, such as concubinage at the time of conception or an acknowledgement by the father that the pregnant mother is carrying his child.

apply by analogy to the facts of *Malek* because under the equal protection clause illegitimate children arguably have the same right to support as legitimate children.<sup>12</sup> Also, since these articles are quite old,<sup>13</sup> they can be interpreted to accomplish present social objectives under existing conditions.<sup>14</sup> Historically, these articles were probably not intended to apply to an unborn or illegitimate child, so they cannot be strictly construed.

One of the keys to acquiring some form of support for an unborn child prior to birth is to read articles 28 and 29, as the court in *Malek* did, to allow the child's right to be exercised before birth. To reach the result of *Malek*, article 28 must be read as containing a resolutive condition. Thus, the unborn child, after establishing filiation with his biological father, becomes the creditor of his biological father's obligation of prenatal support subject to the resolutive condition of not being born viable.<sup>15</sup> Such a reading would be consistent with Civil Code articles 954 and 955<sup>16</sup> which provide that an unborn child may participate in a succession subject to the resolutive condition of not being born alive. As the creditor of an obligation subject to a resolutive condition, the unborn child can execute his right to prove filiation as a prerequisite to obtaining support even though the condition may still be accomplished.<sup>17</sup> Civil Code article 29 gives an unborn child rights in whatever relates to himself and should be read in "the most sweeping character."<sup>18</sup> The article illustrates this principle by providing that a child retains inheritances which devolve to him before birth. Although the general concept embodied in the article would apply most frequently to succession rights, it is certainly not limited to such rights<sup>19</sup> and arguably includes the right to support. Thus, article

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12. See *Gomez v. Perez*, 409 U.S. 535 (1973), where the Supreme Court held that Texas law denying the right of paternal support to illegitimate children while granting it to legitimate children violated the Equal Protection Clause of the Fourteenth Amendment. Cf. *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

Even if Civil Code article 227 does not apply to illegitimate children, the biological father owes a limited duty to them under Civil Code article 240, which reads in part: "Fathers and mothers owe alimony to their illegitimate children when they are in need."

13. The present article 28 was originally drafted in the Louisiana Digest of 1808, book I, title I, article 28. The present article 29 is identical to article 29 of the Civil Code of 1825. Likewise, article 227 is identical to article 227 of the Civil Code of 1825.

14. Reig, *Judicial Interpretation of Written Rules*, 40 La. L. Rev. 49, 53-65 (1979).

15. As to whether a child is considered as born alive, see Civil Code articles 956 and 963.

16. The resolutive condition has different effects on support payments and succession rights. Although an unborn child may participate in the succession of his forbear, he will receive nothing should the resolutive condition of not being born viable occur. On the other hand, support payments will already have been made before the occurrence of the condition. Whether the alleged father should be entitled to recoup the payments made if the child is not born viable is discussed in text accompanying notes 74-79 infra.

17. See La. Civ. Code art. 2045.

18. *Cooper v. Blanck*, 39 So. 2d 352, 360 (La. App. Orl. 1923).

19. *Cooper v. Blanck*, 39 So. 2d at 360.

29 would provide the unborn child with a right to support, and article 28 subjects that right to a resolutive condition that extinguishes the right of the child not born alive.

Civil Code article 227 imposes a broad duty upon a father to support his legitimate children, and arguably the equal protection clause extends this obligation to illegitimate children as well.<sup>20</sup> As the *Malek* court pointed out, this duty should not await birth. The needs of an unborn child are similar to those of one already born, as both require adequate nutrition and medical care. Since the need for adequate health care and legal protection exists before birth, legal personality and the rights which flow from it should be concomitant in time with those needs.<sup>21</sup>

Allowing support for a child prior to birth also serves the social goal of providing the mother of a child with the means for adequate health care during the period from conception to birth when it is most needed. The important policy aspects of prenatal rights and care were recognized over twenty years ago by the United Nations in its Declaration of the Rights of the Child: "The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*"<sup>22</sup> Clearly, a father's legal obligation to support his children should not await birth as a policy matter.

Policy dictates that an unborn child be provided with support, and the Civil Code arguably supports this conclusion. However, whether an unborn child should be permitted to bring a paternity action to establish the obligation for support, as was allowed in *Malek*, is questionable.

#### *Paternity Action Prior to Birth*

Civil Code article 209(C) states that a filiation proceeding "must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs."<sup>23</sup> This language seems to suggest that the legislature intended a filiation action to await birth. But the purpose of the article is to avoid the assertion of stale claims and to protect the stability of property distributions from a succession. This purpose is evident from the last sentence of article 209(C) which states that "if the filiation proceeding is not timely instituted, the child may not thereafter establish his filiation."<sup>24</sup> The evidence which would be used to establish an unborn child's filiation would be far from stale.

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20. See supra note 12.

21. Keyerlingk, A Right of the Unborn Child to Prenatal Care—The Civil Law Perspective, 13 *Revue de Droit Université de Sherbrook* 49, 64 (1982).

22. Preamble, Declaration of the Rights of the Child, 14th Session of U.N. General Assembly, F.A. Res. 1286, 14 UN.W. GAOR Supp. 16, at 19 (U.N. Doc. A1435) (1959) (emphasis added).

23. La. Civ. Code art. 209(C).

24. *Id.*

Although Civil Code article 209 does not contradict the result of *Malek*, a stronger reason exists for questioning the wisdom of permitting an unborn child to bring a paternity action: blood-test data, perhaps the most crucial evidence, may not be available prior to birth. A columnist once wrote: "It took the testimony of a sage, an oracle, a drunken party goer, a messenger, a shepherd and his own wife before Oedipus could figure out who his father was."<sup>25</sup> A judge usually has less evidence available than did Oedipus to determine the father of a child in a paternity proceeding.<sup>26</sup> However, a judge today may have the benefit of blood tests, which Oedipus did not have. Blood-grouping tests have been proven to be "the most certain and the most invaluable item of evidence that can be produced in an affiliation proceeding,"<sup>27</sup> because the "scientific evidence of nonpaternity, gathered impersonally and objectively in the laboratory, has proven infinitely superior to mere testimonial evidence."<sup>28</sup>

In order to fully comprehend the role blood-grouping tests play in paternity proceedings, an examination of the types and reliability of the various tests is necessary. Many blood-grouping systems exist, but all of them can be classified into four basic groups: (1) those based on the red cells; (2) those based on serum proteins; (3) those based on enzymes; and (4) those based on leukocyte antigens (HLA).<sup>29</sup> Depending on the probability of paternity desired, any or all of the available blood-groupings can be run.<sup>30</sup> When tests are run on the red blood cells alone, only about 75 percent of the falsely accused men could be excluded from being the father of the child in question.<sup>31</sup> If HLA tests alone are run, the exclusion rate is 95 percent,<sup>32</sup> and this figure will undoubtedly rise in the future.<sup>33</sup> The combined results of red blood cells and HLA testing have

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25. N.Y. Times, June 15, 1981, at A3, col. 1.

26. *Beaudoin v. Tilley*, 110 Misc. 2d 696, 696; 442 N.Y.S.2d 914, 915 (N.Y. Fam. Ct. 1981).

27. 1 S. Schatkin, *Disputed Paternity Proceedings* § 901 (rev. ed. 1980).

28. *Id.*

29. N. Bryant, *Disputed Paternity—The Value and Application of Blood Tests* (1980); *Paternity Testing: A Seminar Presented by the Committee on Technical Workshops of the American Association of Blood Banks* (H. Silver ed. 1978) [hereinafter cited as *Paternity Testing*]; Sussman, *Up to Date Blood Testing for Paternity and Non-Paternity*, 24 *Trauma* 5-24 (June 1982).

30. *Id.*

31. Sussman, *supra* note 29; 1 S. Schatkin, *supra* note 27, at 8-29.

32. Sussman, *supra* note 29.

33. D. Bodmar & L. Thompson, *Population Genetics and Evolution of the HLA System: HLA and Disease* 280 (1977).

One commentator wrote:

The HLA tests will, in the course of time, become the most powerful tool for the determination of paternity or nonpaternity. In fact, the probability of exclusion by HLA, will be greater than the cumulative probability for all other systems. Science has progressed to a point where ultimately in virtually every case where the accused is innocent, there will be an exclusion. And a man not excluded after complete testing will undoubtedly be the actual father of the child.

1 S. Schatkin, *supra* note 27, § 8.08.

an exclusion rate of 98 percent.<sup>34</sup> If tests for serum proteins and red blood cell enzymes are added, the exclusion rate for the falsely accused man is 99.9995 percent.<sup>35</sup> However, absolute positive proof of paternity cannot be established by any known blood test.<sup>36</sup>

Since blood-grouping tests can be critical evidence in a paternity trial, the wisdom of allowing an unborn child to bring a paternity action will in part depend upon whether accurate and safe blood-grouping tests can be run on a fetus. At the time of birth, many of the red cell groups and the serum protein groups are not fully developed for testing. Therefore, to postpone testing for these antigens until several months after birth would be advantageous.<sup>37</sup> The HLA tests, on the other hand, can be run as soon as amniocentesis can be performed on the mother. But the possible risks associated with performing amniocentesis are present, and the results of prenatal HLA testing are not as reliable as testing at birth.<sup>38</sup> Also, most experts recommend that the red cell tests, for which most of the blood groups do not develop until a few months after birth, be performed first. This procedure is recommended because the red cell tests are easy to perform, relatively inexpensive, and will sometimes exclude an alleged father where the HLA tests will not.<sup>39</sup>

Louisiana Revised Statutes 9:396 allows the court upon its own initiative to order a blood test. The statute also gives any party to a paternity proceeding the right to file a motion for blood tests, and requires the court to grant the motion unless it would unduly delay the proceedings.<sup>40</sup> If the court appoints an expert witness, it can order the parties to pay the expert's compensation in any proportion it prescribes or it can tax the compensation to the parish. If the expert is called by

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34. See *supra* note 31 and accompanying text.

35. See *supra* note 31.

36. See generally *Paternity Testing*, *supra* note 29; Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: A Response to Terasaki*, 17 *J. Fam. L.* 457 (1978-1979).

37. Sussman, *supra* note 29; Silver, *supra* note 36.

38. Telephone interview with Dr. John Danilous of the UCLA Medical Center—Laboratory of Molecular Biology (Oct. 10, 1983).

39. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing*, 16 *J. Fam. L.* 543, 554 (1977-1978); Joint AMA-ABA Guidelines: *Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 *Fam. L.Q.* 247, 258 (1976).

40. La. R.S. 9:396 (Supp. 1984) reads as follows:

Notwithstanding any other provision of law to the contrary, in any civil action in which paternity is a relevant fact, or in an action *en desaveu*, the court, upon its own initiative or upon request made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child, and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the rights of justice so require.

a party but not appointed by the court, the compensation is paid by the party calling the expert.<sup>41</sup>

If an unborn child brings a paternity action and the alleged father moves for a continuance until blood tests can be performed, Louisiana courts should grant the continuance in light of the mandatory wording of Louisiana Revised Statutes 9:396 and the fact that blood tests are so highly determinative of paternity. Since the test can be performed shortly after birth, the continuance would not unduly delay the proceeding. The alleged father's right to demand a blood test arguably outweighs any right the child may have to bring a paternity action prior to birth and the state's interest to decide paternity as soon as possible. But in *Malek* the alleged father apparently did not file a motion for blood tests, and the court did not discuss whether or not the unborn child's paternity action would be affected by a motion for a blood test. The issue, therefore, remains open as to what a Louisiana court would do if an unborn child brings a paternity action and the alleged father demands a blood test.

#### *Treatment in Other States*

The procedures adopted by other states which permit a paternity action to be filed prior to birth may provide guidance to Louisiana courts in dealing with this issue. Although few states have considered the problem, the states that allow a paternity action to be filed prior to birth can be classified into three groups: (1) those states in which a paternity action is automatically continued until after birth with no support payments pending the birth available to the mother or child; (2) those states in which the paternity action is continued until after birth only if the father demands blood tests, and no support payments pending the birth are available to the mother or child; and (3) those states in which support payments pending the birth can be acquired by the mother and child from the alleged father regardless of whether the paternity action is automatically continued or only continued upon a demand for a blood test.<sup>42</sup>

The first group consists of the states that have adopted the Uniform Parentage Act. Under section 6(e) all actions brought before the birth of the child are stayed until after birth, except for service of process and the taking of depositions.<sup>43</sup> Six states have adopted this section and have no provision for support payments before the issue of paternity is tried.<sup>44</sup>

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41. La. R.S. 9:397.2 (Supp. 1984). The alleged father's right to a blood test should not be conditioned on his ability to pay the expenses of a blood test. If such were the case, an indigent defendant who could not afford the expenses and would consequently be denied a defense could attack the statute on constitutional grounds.

42. See *infra* notes 44 & 49.

43. Unif. Parentage Act § 6(e), 9A U.L.A. 587 (1973).

44. Hawaii Rev. Stat. § 584-6(d) (1976); Minn. Stat. § 257.57(5) (1982); Mont. Code Ann. § 40-6-107(4) (1982); N.D. Cent. Code § 14-17-05(5) (1981); Wash. Rev. Code Ann. § 26.26.060(6) (Supp. 1983); Wyo. Stat. Ann. § 14-2-104(e) (1983).

Although California has adopted the Uniform Parentage Act,<sup>45</sup> it specifically allows a paternity action to be brought before birth.<sup>46</sup>

The second group consists primarily of the states which have adopted section 6 of the Uniform Act on Paternity. Under this section, if a paternity action is brought while the mother is pregnant, the trial cannot be held prior to birth unless the alleged father consents to a trial before birth.<sup>47</sup> The Commissioner's Note makes it clear that the section is intended to prevent a trial before blood test evidence becomes available.<sup>48</sup> Six states have adopted this section.<sup>49</sup> Two other states, New York and North Carolina, have reached this position through jurisprudence.<sup>50</sup> The states that have adopted the Uniform Act on Paternity have no provision allowing the pregnant mother or the unborn child to recover support payments prior to a trial on the issue of paternity. And the courts of New York and North Carolina have made it clear that the defendant's substantial right to a blood test prevents him from being liable for any support until a trial with the blood test groupings can be conducted.<sup>51</sup>

The two states in the third group differ from the other states which permit the filing of a paternity action prior to birth primarily because the defendant can be compelled to pay support to the mother and unborn child regardless of whether the trial on the issue of paternity must await birth.<sup>52</sup> Colorado, the first of these two states, has a blood testing statute which, like Louisiana Revised Statutes 9:396, is based on the Uniform Act on Blood Tests to Determine Paternity.<sup>53</sup> The Colorado Supreme Court, in interpreting its statute, has held that requiring a defendant to proceed to trial on the issue of paternity without the benefit of blood tests is a violation of the due process clause of the Fourteenth Amendment.<sup>54</sup> California is the other state falling within this final group, and its procedure differs from Colorado's in only one respect: while the unborn child's action in Colorado is automatically continued until after

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45. Cal. Civ. Code § 7000 (West 1983).

46. Cal. Civ. Code § 7006(f) (West 1983).

47. Unif. Act on Paternity § 6, 9A U.L.A. 626 (1960).

48. Unif. Act on Paternity § 6, 9A U.L.A. 633, commissioners' note (1980).

49. Ky. Rev. Stat. Ann. § 406.071 (Baldwin 1981); Me. Rev. Stat. Ann. tit. 19, § 276 (1981); Miss. Code Ann. § 93-9-19 (1973); N.H. Rev. Stat. Ann. § 168-A(5) (1964); R.I. Gen. Laws § 15-8-10 (1981); Utah Code Ann. § 78-45a-6 (1977).

50. *Fowler v. Rizzuto*, 205 Misc. 1088, 121 N.Y.S.2d 666 (N.Y.C. Ct. Sp. Sess. 1953); *State v. Morgan*, 31 N.C. App. 128, 228 S.E.2d 523 (N.C. Ct. App. 1976); *Beaudoin v. Tilley*, 110 Misc. 2d 696, 442 N.Y.S.2d 914 (N.Y. Fam. Ct. 1981); *Grant v. Konis*, 203 Misc. 1089, 122 N.Y.S.2d 21 (N.Y.C. Ct. Sp. Sess. 1953); *Anne E.S. v. Antonios S.*, 115 Misc. 2d 192, 454 N.Y.S.2d 50 (N.Y. Fam. Ct. 1981).

51. *Id.*

52. Colo. Rev. Stat. § 19-7-103(3) (1982); Cal. Civ. Code § 4357 (West 1983).

53. Colo. Rev. Stat. § 13-25-126 (1982).

54. *Franklin v. District Ct. of 10th Jud. Dist.*, 172 Colo. 189, 571 P.2d 1072 (1977), reh'g denied, Nov. 21, 1977 (en banc).

birth, California courts will not stay the proceedings unless the alleged father demands a blood test.<sup>55</sup>

Justice Traynor, of the California Supreme Court, analyzed the prevalent state legislation and laid down the nature and purpose of the action for child support pending birth in *Carbone v. Superior Court*.<sup>56</sup> He described the proceeding as follows:

The plaintiff, upon the hearing of the order to show cause, must prove by a preponderance of the evidence that the defendant is her father before he can be ordered to pay her support, costs of suit, or counsel fees pending the trial of the issues of the case. The defendant must be given an opportunity to be heard and to present his evidence. Then, even though the court upon a preponderance of the evidence presented at the hearing issues the order, its implied finding of paternity is not res judicata nor determinative of the issue of parentage at trial. The proceeding is merely a hearing upon an order to show cause for the purpose of determining plaintiff's right to an award pendente lite, and while defendant may put the jurisdictional prerequisite of parentage in issue, the evidence produced by the parties need not be so extensive as at the trial of the action. The resulting judgment is temporary in effect; except as to payments already accrued thereunder, its operation terminates upon the final determination of the action or upon order of the court.<sup>57</sup>

Although the sections of the California Code pertinent to the discussion in *Carbone* have been altered since the decision,<sup>58</sup> none of the legislative changes have materially affected the unborn child's right to support,<sup>59</sup> and the order to show cause is still the procedural device used to enforce this right in California.<sup>60</sup>

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55. Cal. Evid. Code § 892 (West 1983); Cal. Civ. Code § 7006(f) (West 1983).

56. *Carbone v. Superior Court*, 18 Cal. 2d 768, 117 P.2d 872 (1941).

57. *Carbone*, 18 Cal. 2d at 768, 117 P.2d at 872.

58. Cal. Civ. Code § 4357 (West 1983). The current statute allowing payments provides: During the pendency of any dissolution, child custody, or child support proceeding the superior court may order the husband or wife, or father or mother, as the case may be, to pay any amount that is necessary for the support and maintenance of the wife or husband and for the support, maintenance and education of the children, as the case may be. An order made pursuant to this section shall not prejudice the rights of the parties or children with respect to any subsequent order which may be made. Any such order may be modified or revoked at any time except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke.

59. *City & County of San Francisco v. Superior Court*, 86 Cal. App. 3d 87, 150 Cal. Rptr. 45 (1978).

60. *City & County of San Francisco*, 86 Cal. App. 3d at 90, 150 Cal. Rptr. at 46; *Richter v. Superior Court*, 214 Cal. App. 2d 821, 29 Cal. Rptr. 826 (1963); *Suay v. Superior Court*, 147 Cal. App. 2d 764, 305 P.2d 990 (1957).

A subsequent California decision recognized that the duty of the trial court in an order to show cause for support prior to the birth of the child involves a weighing of conflicting considerations. An early hearing produces the risk that a defendant will be burdened with expenses for a child which he has not fathered. However, postponing the hearing until after the child's birth involves the risk that, for lack of adequate funds for medical and other prenatal expenses, the child may not receive proper prenatal care.<sup>61</sup> The trial court must, therefore, consider the financial position of the pregnant woman and her ability to pay prenatal expenses. If she can afford adequate prenatal care, the alleged father's interest in not having to support a child which may not be his and the court's interest in not having to go through both a prenatal hearing and a postnatal trial arguably justify postponing any judicial action until after the child's birth.

#### *A Proposal*

California's procedure equitably balances the interests of the parties in a paternity proceeding. The unborn child in need is provided support during the critical period of pregnancy, yet the defendant's substantial right to demand a blood test is not impaired. The equitable approach would seemingly fit well within the present law of Louisiana. Since according to *Malek* an unborn child can bring a paternity action and under Louisiana Revised Statute 9:396 a defendant to a paternity proceeding has the right to a blood test, Louisiana is arguably in line with California and several other states in that the paternity proceeding can be tried before the child's birth unless a party to the suit demands a blood test. But whether this will be the Louisiana position remains an open question because in *Malek* the alleged father apparently did not file a motion for blood tests, and the court did not discuss whether or not the unborn child's paternity action would be affected by such a motion.

Louisiana could permit the pregnant woman to seek support pending the birth of the child through a rule to show cause under article 2592(8) of the Code of Civil Procedure. Although Colorado and California have provided for support pending the birth by statute,<sup>62</sup> Louisiana need not adopt such a statute because authority for allowing support pending the birth can be found in the Civil Code.<sup>63</sup> Through these Civil Code provisions, Louisiana could develop a procedure for support pending the birth

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61. *Richter v. Superior Court*, 214 Cal. App. 2d 821, 825, 29 Cal. Rptr. 826, 829 (1963).

62. Colo. Rev. Stat. § 19-7-103(3) (1982) ("The court may enter a temporary support order, to remain effective pending a final disposition of the proceeding."). For the California statute, see *supra* note 58.

63. See generally *supra* text accompanying notes 10-22.

by an unborn child similar to that fashioned by Justice Traynor in California.<sup>64</sup>

By adopting such a procedure in Louisiana, however, certain problems would arise under the Civil Code which deserve mention. First, if the mother was never married to the alleged father, she should be able to bring an action for support pending birth as tutrix of the child under Civil Code article 256.<sup>65</sup> If a single mother can maintain an action for support pending birth for an illegitimate child, a married,<sup>66</sup> divorced, or separated mother should likewise be permitted to bring an action for support of a child presumed to be legitimate. But the necessity for the action may not be as crucial to the divorced or separated mother since the mother and child may have a form of support in the mother's claim for alimony under Civil Code article 148 or 160, or claim for support under article 119.<sup>67</sup>

If the pregnant mother is separated or divorced, she should be able to bring the action as tutrix of the child under Civil Code article 250.<sup>68</sup> Although article 250 provides that tutorship belongs to the *custodial* parent, it should not be difficult for a pregnant mother to get legal custody of her child. In *Simon v. Calvert*,<sup>69</sup> in order to allow the mother to claim child support before qualifying as tutrix, the court held that a judgment of child support was the property of the custodial parent. Therefore, the mother could bring the support action in her own name. Viewed either way, the mother would be the proper party to bring the suit. According to *Simon*, if the mother sues in her own name, then Louisiana Revised Statutes 9:291<sup>70</sup> will bar the action if the mother and father are living

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64. See *supra* text accompanying note 57.

65. See La. Civ. Code art. 256 ("The mother is of right the tutrix of her illegitimate child not acknowledged by the father, or acknowledged by him alone without her concurrence.").

66. However, if the child is the legitimate child of living parents who are not divorced or separated, the father is the proper party to sue to enforce a right of the child under Code of Civil Procedure article 683. This would include the child's right to support under Civil Code article 227.

67. La. Civ. Code arts. 119, 148, 160.

68. See Civil Code article 250, which provides in pertinent part: "Upon divorce or judicial separation from bed and board of parents, the tutorship of each minor child belongs of right to the parent under whose care he or she has been placed or to whose care he or she has been entrusted . . ." An analogy can be drawn with Civil Code article 252, since the separation or divorce can be analogized to the death of the husband and since the appointment of a curator is necessary for the preservation of the rights of the unborn child. But such a curator will presumably not be the mother since at the birth of the child such curator will become the undertutor, whereas the mother will of right become the tutrix if she acquires legal custody from a court.

69. 289 So. 2d 567 (La. App. 3d Cir. 1974). See also *In re Jones*, 337 So. 2d 283 (La. App. 2d Cir. 1976); *Coleman v. Coleman*, 209 So. 2d 801 (La. App. 2d Cir. 1968).

70. La. R.S. 9:291 ("Unless judicially separated, spouses may not sue each other ex-

together; the action will not be barred if the mother and father are divorced, living separate and apart, or judicially separated. If the mother sues under article 250 as tutrix of the unborn child, then the action will be barred by Louisiana Revised Statutes 9:571<sup>71</sup> unless the spouses are judicially separated or divorced.

A more difficult problem would arise if a married woman sued her husband. If the courts extended the rationale of *Simon* to this situation, then the mother could bring an action in her name. As mentioned in the previous paragraph, such an action by the nondivorced mother will be barred by 9:291 only if the spouses are living together. If the courts do not intend *Simon* to cover this situation, then even though the mother might, by analogy, qualify as tutrix of the child because the father failed or refused to act for the child,<sup>72</sup> such an action would be barred under 9:571 because it would be instituted during the marriage. The action would not be barred by 9:571 if the mother could get a judicial separation or divorce.

Another problem would arise if the baby dies in the womb, and blood testing evidence cannot be obtained to aid in determining whether the defendant paying support is actually the father. Under a strict reading of Civil Code articles 28 and 29, the mother would have to return the support payments<sup>73</sup> because the death of the child accomplishes the resolutive condition which retroactively extinguishes the obligation of support.<sup>74</sup> But since the drafters of these articles did not contemplate this situation,<sup>75</sup> the articles need not be strictly construed. And in the case previously mentioned, if the support is the property of the mother,<sup>76</sup> these articles would not apply.

The Civil Code imposes a broad obligation on the father to support his children.<sup>77</sup> If applied to the unborn, the fact that the child died before birth would not change the fact that an obligation of support was owed to the unborn.

Recall that under the California procedure, a judge has initially found

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cept for causes of action arising out of . . . the custody of a child or alimony for his support while the spouses are living separate and apart, although not judicially separated.”).

71. La. R.S. 9:571 (“The child who is not emancipated cannot sue: (1) Either parent during the continuance of their marriage, when the parents are not judicially separated . . .”).

72. La. Code Civ. P. art. 4502 (“The mother shall have the authority of the father during such time as the father is mentally incompetent, committed, interdicted, imprisoned, or an absentee. Moreover, with permission of the judge, the mother may represent the minor whenever the father fails or refuses to do so . . .”).

73. See La. Civ. Code arts. 2301, 2306-2307.

74. For the text of articles 28 and 29, see *supra* text following note 9; see also La. Civ. Code arts. 2041, 2045.

75. See *supra* text accompanying notes 10-14.

76. See *supra* text accompanying note 69.

77. La. Civ. Code arts. 227, 240.

at a contradictory hearing based on some evidence (but not blood testing data) that the defendant was the father, and consequently ordered payments pending the birth. After the death of the child, no more evidence is available than was presented at the rule to show cause. Therefore, since a judge has found that, based on all available evidence, the defendant was the father, to deny the father recovery of the payments already made is not unreasonable. Further support for this argument can be found by drawing an analogy to the situation in which the wife gets more alimony *pendente lite* than a court later finds she deserved. In such a situation the husband does not get any of the payments back.<sup>78</sup>

A similar problem will arise if the mother gets an abortion after the hearing in which support pending the birth was awarded. The same analysis that applied where the child died of natural causes would apply in this situation. Since a mother can legally choose to have an abortion,<sup>79</sup> she should not be penalized for making this choice, and the father should not receive a windfall. Realistically, a large amount of support would not accrue before the abortion because the mother will likely get the abortion as soon as possible.<sup>80</sup> Also, any support that would accrue would be reduced by the attorneys' fees necessary to pursue the action.

The final problem is the situation in which a mother gets a judgment for support pending the birth, and subsequent to the birth, a trial with blood testing data excludes paternity. The situation would seem to be the payment of a thing not due, thus allowing the defendant to be reimbursed under Civil Code article 2301.<sup>81</sup> The father will have paid support even though he owed no such obligation. Allowing reimbursement would discourage false suits. As previously mentioned,<sup>82</sup> when a prior alimony *pendente lite* judgment is found to be excessive, courts do not allow recovery of the excess paid. But the alimony *pendente lite* situation can be distinguished from the support pending birth. In the former, the paying spouse owed an obligation to the other spouse but merely paid more than should have been required; in the latter, the alleged father made payments even though no obligation was owed at all.

As can be seen, the judiciary will have great flexibility in establishing the support pending birth and resolving the issues which arise therefrom. If greater certainty is desired, the legislature can adopt a statute patterned after California's model<sup>83</sup> and Traynor's decision in *Carbone v. Superior*

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78. Langham v. Langham, 381 So. 2d 1284 (La. App. 2d Cir. 1980); see also Frederic v. Frederic, 302 So. 2d 903 (La. 1974).

79. Roe v. Wade, 410 U.S. 113 (1973).

80. See La. R.S. 40:1299.35.1(3), 1299.35.3, 1299.35.4(A) (Supp. 1983).

81. La. Civ. Code art. 2301 ("He who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it.").

82. See *supra* text accompanying note 78.

83. See *supra* note 58.

*Court.*<sup>84</sup> But a statute is not a necessity since the Louisiana statutory scheme provides adequate support for such an action and for potential solutions to the resulting problems.

### *Conclusion*

*Malek* held that a curator of an unborn child could file suit against the alleged father to establish filiation and obtain support. Although the wisdom of permitting an unborn child to bring a paternity action is questionable, the Civil Code supports the right of an unborn child to some form of prenatal support. Whether the result of *Malek* may be altered if the alleged father demands a blood test under Louisiana Revised Statutes 9:396 is an unresolved issue. Arguably, the alleged father's substantial right under this statute would outweigh whatever right the child may have to try the action prior to birth. Louisiana could adopt a procedure similar to California's, thereby balancing the interests involved by continuing the unborn child's action until after birth if the alleged father demands a blood test and alternative means of support are available. The curator of the unborn child will still be provided an opportunity to sue for support pending the birth if support from the alleged father is necessary. Although problems will arise from such a procedure, the Civil Code is adequately equipped to resolve them in an equitable manner.

*Roy Edward Blossman*

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84. 18 Cal. 2d 768, 117 P.2d 872 (1941). For discussion, see *supra* text accompanying note 57.