
Katherine Shaw Spaht
Who's Your Momma, Who Are Your Daddies?  
Louisiana’s New Law of Filiation

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I. INTRODUCTION

A Louisiana State Law Institute project that commenced in 1991 with meetings of the Marriage/Persons Committee culminated in the enactment of a series of new Civil Code articles in 2005. The new articles both reshape the organization and arrangement of articles on proof of filiation,¹ and respond to the challenges left in the wake of decisions by the United States and Louisiana Supreme Courts in the mid-1970s and early 1980s.² To a lesser extent, the articles also respond to challenges presented by the cutting-edge issues of assisted conception and reproduction.³ Just one year after the legislature enacted these new articles, it enacted implementing legislation contained in Act of the Louisiana Legislature No. 322 of 2006, which made changes in complementary legal provisions governing proof of filiation necessitated by the previous year’s enactment. During the 2006 regular legislative session, negotiations over the implementing legislation with the Department of Social Services revealed the full

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¹ The predecessor articles had not been reorganized since the decisions referred to infra note 2, which resulted in eliminating the legal distinctions between legitimate and illegitimate children, a distinction critical to the organization of the Civil Code articles before the constitutional decisions. Piecemeal revision legislation was enacted in 1979 and 1981, but not until 2005 did the organization of chapters reflect the constitutional reality of the law of filiation. Furthermore, the same constitutional impetus compelled the 2004 Act that eliminated the word illegitimate and substituted in its place, child born outside of marriage. See 2004 La. Acts No. 26.

² See, e.g., Trimble v. Gordon, 430 U.S. 763 (1977); Succession of Clivens, 426 So. 2d 585 (La. 1983); Succession of Brown, 388 So. 2d 1151 (La. 1980).

³ When it was obvious that more expertise was necessary from fields other than the law, the legislature created a task force composed of law professors, legislators, doctors, nurses, other health professionals, and clergy. The Task Force report issued at the conclusion of that deliberative process appears at the end of this article as Appendix A. Legislation that owes its existence to Task Force recommendations is also referenced in Part II of this article.
extent of the current federalization of state family law and federal intervention into policy decisions historically reserved to the states.

This article will explore the policy decisions that shaped the new Civil Code articles on proving filiation, both during Law Institute Marriage/Persons Committee meetings and Council meetings, as well as during the two-year legislative process. Two other articles in this issue concentrate on different aspects of the same revision: a detailed article-by-article analysis and critique of the new law by a member of the Marriage/Persons Committee, and an examination of the new articles permitting a mother, for the first time and subject to restrictions, to contest the paternity of her husband. To assist in a discussion of the policies underlying many of the more significant changes, there are three appendices attached to this article: first, two reports of the legislative Task Force on Assisted Conception ("Task Force"); second, the document distributed at the Law Institute Council ("Council") meetings posing the issues surrounding the judicial recognition of "dual paternity"; and third, a document prepared during the 2006 legislative session by Jim Carter, staff attorney for the Law Institute, that dissects mandatory federal legislation to which he then correlates a list of pertinent Louisiana statutes constituting compliance.

For the Law Institute's Marriage/Persons Committee, Act of the Louisiana Legislature No. 192 of 2005 represents fourteen years of concentrated work. Meetings at which the topic of filiation were discussed began in 1991. By far the most controversial and difficult issue discussed was dual paternity, considered by the Law Institute Council on six separate occasions. When and under what circumstances should a child whose filiation is established be permitted to establish that a second person is his biological father, and what should the legal consequences be? Many of those meetings ended with the Council's having reached a result that conflicted with the result reached at a previous meeting. Because the legislature created the Task Force on Assisted Conception, the bulk of those legal issues were bypassed at the Law Institute. Nonetheless, for the first time, the Civil Code now contains an article identifying the mother of the child.

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6. See infra app. A.
7. See infra app. B.
8. See infra app. C.
practically before the development of techniques for assisted reproduction such as in vitro fertilization and gestational and/or genetic surrogacy. Yet, of all the lessons learned in the enactment of both the substantive law of filiation and its implementing legislation, the most salient is the extent to which the federal government now regulates the subject matter of family law, traditionally reserved to the states. It does so rather directly with "strings" attached to federal funds in the form of requirements imposed upon state law, and less directly by administrative regulations and interpretations of state and federal law by the federal agency’s attorneys. The average American would find the extent of federal intrusion remarkable, especially as authorized during the administration of a Republican president.

II. IDENTIFICATION OF MOTHER

For the first time the Civil Code of Louisiana contains language identifying the mother of a child as “the woman who gives birth to the child.”10 The scientific developments in assisted reproduction that necessitated a definition of motherhood, or what common law authorities would describe as a “default” rule, receive recognition in the reference at the end of the same Civil Code article with the language “except as otherwise provided by law.”11 Clearly, the vast majority of genetic mothers do indeed give birth to their children in Louisiana since enforceable contracts for paid genetic/gestational surrogacy are prohibited,12 and only in a narrow set of circumstances does Louisiana law permit the genetic mother to arrange for gestational surrogacy by a relative.13 Otherwise, the gestational “mother,” who does not supply the egg, undergoes in vitro fertilization within the meaning of Louisiana’s statute,14 gives birth to a child, and constructively adopts the fetus and resulting child under Louisiana law, at least if she is married.15 Even if the gestational mother is not married, the general rule of article 184 applies and identifies the mother as she who gave birth.

The narrow exceptions to the principle that the woman giving birth to the child is the mother, which are cross-referenced in the

13. Id. § 40:34.
14. Id. § 9:121.
15. Id. § 9:130 (“Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.”).
official comments to article 184,\textsuperscript{16} obviously create their own set of problems, leaving many unanswered questions.\textsuperscript{17} Because the legislative Task Force on Assisted Conception existed and it had issued both a majority and a minority report,\textsuperscript{18} the Council of the Law Institute chose to defer to those recommendations already submitted to the Louisiana Legislature. The legislature has yet to act on the recommendations of the Task Force, but any such action will now occur against the backdrop of the principle contained in article 184—the woman who gives birth to a child is that child’s mother.

III. PRESUMPTION APPLIED TO FIRST AND SECOND HUSBANDS: DISAVOWAL AND RESURRECTION OF PRESUMPTION

Before June 29, 2005, when there were “overlapping” presumptions such that two different husbands of the mother were presumed to be the father of the child, the law resolved the conflict by identifying the husband of the mother at the time of conception as the father.\textsuperscript{19} Overlapping presumptions of paternity resulted from the amendment in 1976 to Civil Code article 184 that expressly extended the presumption of paternity to the husband of the mother of a child born during their marriage.\textsuperscript{20} Thus, a child conceived during a first marriage because born within three hundred days of its termination\textsuperscript{21} but born during a second

\begin{itemize}
\item \textsuperscript{16} LA. CIV. CODE. ANN. art. 184 cmt. (c) (2006) (“For exceptions provided by other laws, see R.S. 9:121-133; R.S. 40:32 (definition of ‘biological parents’ to include husband and wife providing sperm and egg for in vitro fertilization by physician and fetus is carried by surrogate birth parent who is blood relative of either the husband or the wife); R.S. 40:34(B)(1)(h)(v) and (B)(1)(j) (birth certificate reflect mother and father as married couple who donate gametes when child born to a gestational surrogate by in vitro fertilization who is a relative of the husband or wife).”).
\item \textsuperscript{17} See Sandi Varnado, Comment, Who’s Your Daddy?: A Legitimate Question Given Louisiana’s Lack of Legislation Governing Assisted Reproductive Technology, 66 LA. L. REV. 609 (2006).
\item \textsuperscript{18} See infra app. A for these recommendations.
\item \textsuperscript{19} LA. CIV. CODE ANN. art. 186 (2005), repealed by 2005 La. Acts No. 192, § 1 (“The husband of the mother is not presumed to be the father of the child if another man is presumed to be the father.”).
\item \textsuperscript{20} LA. CIV. CODE ANN. art. 184 (2005), amended by 1976 La. Acts No. 430, § 1 (“The husband of the mother is presumed to be the father of all children born or conceived during the marriage.”).
\item \textsuperscript{21} LA. CIV. CODE ANN. art. 185 (2005), repealed by 2005 La. Acts No. 192, § 1 (“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.”).
\end{itemize}
marriage was presumed to be the child of both husbands. Prior to its amendment in 1976 and the repeal of Civil Code article 137, the overlap theoretically did not exist because a woman was prohibited from marrying within ten months of dissolution of her first marriage on pain of nullity of her second marriage.\textsuperscript{22}

Despite the Law Institute’s recommendation to revise the result in overlapping presumption cases based upon the cause for termination of the marriage,\textsuperscript{23} the legislature chose to retain the result reached by the predecessor article: "If a child is born within three hundred days from the day of the termination of a marriage and his mother has married again before his birth, the first husband is presumed to be the father."\textsuperscript{24} This article is the only one in Chapter 2 without an official comment because the Senate Committee amendment that restored the content of the first paragraph of article 186 to that of its predecessor also deleted the comment.

Unlike its predecessor, however, article 186 recognizes that the interests of two different husbands, as well as the child, are involved. New article 186 envisions and provides for the possibility that the husband of the first marriage might seek to disavow the child born to his former wife, a possibility heightened by the increasing leniency of the law as it relates to the time period applicable to the disavowal action.\textsuperscript{25} To assure protection of the

\textsuperscript{22} LA. CIV. CODE ANN. art. 137 (1870), repealed by 1970 La. Acts No. 108, § 1 ("The wife shall not be at liberty to contract another marriage, until ten months after the dissolution of her preceding marriage.").

\textsuperscript{23} As originally introduced on recommendation of the Louisiana State Law Institute, proposed Civil Code article 186 read, "If a child is born within three hundred days from the day of the termination of a marriage and his mother has married again before his birth: (1) The second husband is presumed to be the father if the previous marriage was terminated by judgment of divorce, declaration of nullity, or declaration of death under Article 54. (2) The first husband is presumed to be the father if the previous marriage was terminated by death." H.R. 91, 2005 Reg. Sess. (La.), available at http://www.legis.state.la.us/billdata/streamdocument.asp?did=291659. The reason for the distinction in result based upon the cause for termination of the marriage of the husband and the mother was extensively explained in the comments. For example, comment (b) read, "The distinction made by this Article between causes for termination of the marriage is based on the assumption that if the cause for termination of the marriage is divorce, declaration of nullity or of death under Civil Code Articles 47 and 54 (rev. 1990), the husband of the mother at the time of the birth of the child is often more likely to be the father." \textit{Id.}

\textsuperscript{24} LA. CIV. CODE ANN. art. 186 (2005) (amended 2006).

\textsuperscript{25} LA. CIV. CODE ANN. art. 189 (2006) ("The action for disavowal of paternity is subject to a liberative prescription of one year. This prescription commences to run from the day the husband learns or should have learned of the birth of the child. \textit{Nevertheless, if the husband lived separate and apart from the mother continuously during the birth of the child, this prescription does not}
second husband who will be affected if the first husband's disavowal action is successful, the second husband must be a party to the suit.

Furthermore, article 186 explicitly provides that, should the first husband to whom the presumption of paternity applied be successful in his disavowal action, the second husband "is presumed to be the father." In other words, the presumption that had applied to the second husband because the child was born during his marriage to the mother and then was displaced is effectively "resurrected" upon the success of the first husband's disavowal action. Because the second husband must be made a party to the disavowal action of the first husband, he receives notice of the potential effect of the action upon him—that he will once again be presumed to be the father of the child if the first husband is successful. As a consequence of the "resurrection" of the presumption of paternity applied to the second husband, article 186 recognizes that he, too, must be given an opportunity to disavow the child born to his wife. However, the time period of one year during which he may institute a disavowal action is explicitly peremptive, rather than prescriptive. In addition, the time period commences to run "from the day that the judgment of disavowal obtained by the first husband is final and definitive." The decision to convert the time period for disavowal by the second husband from prescription to peremption relies upon the following rationales: (1) the time period during which the first husband may institute the disavowal action is liberal and could conceivably be lengthy; (2) the second husband received notice by service of the first husband's petition for disavowal that he could be presumed to be the father if the first husband proves to be the husband is notified in writing that a party in interest has asserted that the husband is the father of the child." (emphasis added). See also LA. CIV. CODE ANN. art. 189 cmt. (a) (2006) ("The only change in law made by this Article is that the period of time for instituting a disavowal action under this Article is explicitly prescriptive, overruling Pounds v. Schori (former Civil Code Article 189, the predecessor to this Article, contained a peremptive period for the disavowal action."). The heirs of the first husband are also extended this same liberal time period. LA. CIV. CODE ANN. art. 190 (2006).

27. LA. REV. STAT. ANN. § 9:401(A) (as added by 2006 La. Acts No. 344, § 4) ("A person who will be presumed to be the father under Civil Code Article 186 if the plaintiff obtains a judgment of disavowal shall be made a party to the disavowal action and shall be served with process.").
29. Id.
30. Id.
successful; (3) the second husband has ample opportunity to prepare for the filing of his own action for disavowal considering both the length of the time period for filing and the length of the litigation involved in the first husband’s action; and (4) the interest of the child demands resolution of its paternity within a reasonable period of time. The second paragraph of article 186 and its implementing legislation attempt to balance fairly the interests of three directly affected parties—the two husbands as well as the child.

IV. CONTESTATION ACTION BY THE MOTHER: NEW BUT LIMITED

Although the new action extended to the mother of the child to contest her husband’s paternity is subsequently discussed in great detail in this issue by another author, it is appropriate here to explain why the Law Institute recommended the new action be included in the revision. Once that decision was made, it is likewise appropriate to explain why the Law Institute decided to limit the scope of the contestation action more so than its French counterpart. For the first time, Louisiana law permits the mother to contest the paternity of her husband, but the mother may institute this action only if she is presently married and the "present husband has acknowledged the child by authentic act or by signing the birth certificate." Furthermore, the action to contest must be "instituted within a peremptive period of one hundred eighty days from the marriage to her present husband and also within two years from the day of the birth of the child,"

32. See Kantrow, supra note 5.
33. See LA. CIV. CODE ANN. art. 191 cmt. (a) (2006) ("This Article is new. Under many statutory schemes regulating disavowal of paternity the mother of a child is permitted to disprove her husband’s paternity. See, e.g., French Civil Code Articles 318, 318.1; Uniform Parentage Act 6(a); Quebec Civil Code Article 275; Cal. Civil Code § 7006.").
34. LA. CIV. CODE ANN. art. 191 (2006) ("The mother of a child may institute an action to establish both that her former husband is not the father of the child and that her present husband is the father. This action may be instituted only if the present husband has acknowledged the child by authentic act or by signing the birth certificate.").
35. LA. CIV. CODE ANN. art. 193 (2006). See also LA. CIV. CODE ANN. art. 193 cmt. (2006) ("The time period for instituting this action is similar to that of French Civil Code Article 318.1 in that both actions must be brought within six months of the inception of the marriage. This Article departs from the French article, however, in requiring that the action be instituted before the child has attained the age of two years. Under French Civil Code Article 318.1 the action must be instituted before the child has reached the age of seven years.").
which is the locus of the difference between the Louisiana contestation action and that of the French.\textsuperscript{36}

Arguably, the mother’s contestation action assists in accomplishing one clearly stated objective of the revision of the law of filiation: to more closely align biological and legal paternity. Yet, the series of articles devoted to the mother’s contestation action recognizes that this alignment must pose the least possibility of potential harm to the child and the family.\textsuperscript{37}

The objective of aligning biological and legal paternity principally reflects dissatisfaction with the historical application of the presumption that the husband of the mother is the father of the child conceived or born during marriage.\textsuperscript{38} The presumption had become virtually irrebuttable. Even before the Law Institute revision passed in 2005, legislative changes to the time period for instituting a disavowal action markedly liberalized the rebuttal of the presumption of the husband’s paternity.\textsuperscript{39} The liberalizing legislative change that suspended the time period\textsuperscript{40} if the child was born more than three hundred days after a continuous physical separation of the mother and her husband was incorporated into the Law Institute’s revision. In addition, the revision took an additional liberalizing step by converting what was arguably a peremptive time period for instituting the action into an explicitly prescriptive period, subject to both suspension and interruption.\textsuperscript{43} Thus, the potential for more closely aligning legal and biological paternity exists by virtue of the continued liberalization of the rules regulating the disavowal action by the

\begin{footnotes}
\item [37] See infra app. B.
\item [40] Ordinarily, the time period for a disavowal action under Louisiana Civil Code article 189 “commences to run from the day the husband learns or should have learned of the birth of the child.” LA. CIV. CODE ANN. art. 189 (2006).
\item [41] Id. (“Nevertheless, if the husband lived separate and apart from the mother continuously during the three hundred days immediately preceding the birth of the child, this prescription does not commence to run until the husband is notified in writing that a party in interest has asserted that the husband is the father of the child.”).
\item [42] See Pounds v. Schori, 377 So. 2d 1195 (La. 1979).
\end{footnotes}
husband and, for the first time, extending an action of contestation to the mother of the child.

Nonetheless, liberalization in the pursuit of truth must be tempered with profound concern for the effect of the alignment on the child and the broader family, particularly if that alignment is new. With the abundance of empirical data now available, most if not all scholars agree that on average a child who is reared in the home of his or her biological parents united in marriage prospers in ways unattained by children reared in other family structures. These results obtain across a wide array of social measurements, such as high school drop-out rates, teen pregnancy, alcohol and drug experimentation, and criminal behavior, to mention but a few. Thus, a mother’s unlimited contestation action, which necessarily challenges the paternity of her husband, would result in “bastardizing” her child and severing the relationship between her former husband and the child without regard to the length, depth, or quality of that relationship. Potentially, the result of such a contestation action could be to remove the child from what was at one time an intact family and from the only father the child has ever known.

For these reasons, the legislature placed justifiable limitations upon the exercise of the contestation action by the mother, each of which focuses on the interest of the child. First, the mother must rebut the presumption of her husband’s paternity by clear and convincing evidence, just as he must in a disavowal action. Assertion of the action to contest her first husband’s paternity requires that the mother be married again and that the second husband acknowledge the child as his. Second, if the mother is successful in her contestation action, the result realigns the legal paternity of the child consistently with biological paternity. The probability of the second husband’s paternity is based initially upon his acts of marrying the mother and


49. LA. CIV. CODE ANN. art. 194 (2006) (“A judgment shall not be rendered decreeing that the former husband is the father of the child unless the judgment also decrees that the present husband is the father of the child.”).
acknowledging the child as his, which, of course, the first husband may challenge and seek to disprove.50 Third, the assertion of this action can occur only if the father is married to the child’s mother, the result being that the child would remain in an intact married family.51 The mother may not contest the paternity of her husband if the biological father is unwilling to marry the mother or if the biological father is unknown. In other words, the mother’s contestation action ultimately may not “bastardize” her child, for the child is considered by law to be the child of her second husband.

Furthermore, in consideration of the emotional attachments that a child and an adult can form, the contestation action may only be brought within one hundred eighty days from the day the mother and second husband married and within two years of the child’s birth.52 The time period is peremptive53 and intended to encourage a quick resolution of the child’s status and filiation before emotional and psychological damage can occur to the child through the severance of his attachment to a person who cared for and nurtured him.54 The provisions of the Revised Statutes that implement the substantive legislation do, however, permit the first husband to seek visitation with the child: “A judgment rendered in favor of the mother terminates existing child custody and visitation orders. However, the former husband in extraordinary circumstances may be granted reasonable visitation if the court finds it is in the best interest of the child.”55

50. Disproving the paternity of the second husband occurs most frequently by the use of blood or tissue (DNA) testing as provided for in Louisiana Revised Statutes Section 9:396. See LA. REV. STAT. ANN. § 9:396 (2006).
51. See LA. CIV. CODE ANN. art. 191 cmt. (b) (2006) (“The mother is permitted to file the contestation action only if she seeks to establish the child’s paternity to her present husband. The restricted right of the mother to file an action to contest her former husband’s paternity serves to align more closely biological and legal paternity in instances when the child’s status will not be adversely affected by the social stigma of birth outside of marriage if the action is successful. In the situation contemplated by this Article, the mother’s action serves to establish legally the child as a member of an intact family, whose stability is marked by the marriage of the mother and alleged father.”).
53. Id.
V. LEGITIMATION BY SUBSEQUENT MARRIAGE BECOMES A PRESUMPTION OF PATERNITY

What had constituted legitimation by subsequent marriage before 2005 creates a presumption of paternity under the new revision. If the child is otherwise unfiliated, which as a condition to legitimation by subsequent marriage constitutes a change in the law, the man who marries the child's mother after the child's birth and acknowledges the child as his by authentic act or by signing the birth certificate is presumed to be the father of the child. This newly created presumption can be rebutted just as the presumption that applies to the husband of the mother of a child conceived or born during the marriage. Because this article explicitly requires the concurrence of the mother and a formal acknowledgment by the husband/father, the time period during which he may disavow his paternity is peremptive and short—one

56. LA. CIV. CODE ANN. art. 195 cmt. (a) (2006) ("Former Article 198 recognized legitimation by subsequent marriage as a method of establishing paternity.").
57. Id. ("This Article establishes a new presumption of paternity that corresponds to the circumstances of former Civil Code Article 198 (rev. 1979).”).
58. LA. CIV. CODE ANN. art. 195 cmt. (b) (2006) ("Furthermore, in a contestation action brought by the mother under Articles 191–194 (rev. 2005), the presumption does not apply and the mother must prove the paternity of her present husband by clear and convincing evidence.").
59. Id. ("This Article creating a presumption does not apply if the child born prior to the marriage is filiated to another man.").
60. See LA. CIV. CODE ANN. art. 195 cmt. (d) (2006) ("The presumption created by this Article arises when, subsequent to the birth of a child, the mother marries a man who formally acknowledges, or has acknowledged, the child as his with the mother’s concurrence.” A child born during but conceived before the marriage is presumed to be the child of the mother’s husband at the time of the child’s birth.).
61. LA. CIV. CODE ANN. art. 195 (2006) ("A man who marries the mother of a child not filiated to another man and who, with the concurrence of the mother, acknowledges the child by authentic act or by signing the birth certificate is presumed to be the father of that child.") (emphasis added).
62. Id. ("The husband may disavow paternity of the child as provided in Article 187.").
63. LA. CIV. CODE ANN. art. 195 cmt. (d) (2006) ("Prior law provided that a child was legitimated by the subsequent marriage of his parents if the child was formally or informally acknowledged before or after the marriage. This Article requires a formal acknowledgment, which may be made at any time. An informal acknowledgment consisted of a writing not the equivalent of an authentic act in which the father referred to the child as his, or conversations and other similar conduct to the same effect.").
hundred eighty days from "the day of the marriage or the acknowledgment, whichever occurs later."  

In fact, the creation of a presumption that must be rebutted by a father who marries the mother after the birth of the child and acknowledges her with the mother's concurrence strengthens the position of the child under such circumstances. The presumed father whose acts reflect the conviction that he is the father bears the responsibility of disproving his paternity, rather than the child bearing the responsibility of establishing the truth of all of the facts—i.e., most importantly, that the man acknowledging him is his biological father. Just as in the case of the presumption that the husband of the mother is the father of the child born during marriage, a child "legitimated by subsequent marriage" enjoys protection that other children born outside of wedlock do not. That protection, which assumes by presumption that the husband is the father in both cases, relies upon marriage to the mother as evidence either of compliance by the husband with his positive obligation of fidelity or, in the latter case, of his belief confirmed by the mother that he is the father of the child.

VI. FORMAL ACKNOWLEDGMENT AS A PRESUMPTION: DEPENDS UPON AGE OF CHILD AND THE ISSUE LITIGATED

In a departure from prior law explored in greater detail elsewhere in this issue, article 196 presumes that the man who

64. Id. See also LA. CIV. CODE ANN. art. 195 cmt. (c) (2006).
65. LA. CIV. CODE ANN. art. 195 cmt. (e) (2006) ("The concurrence of the mother required by this Article is a juridical act.").
66. LA. CIV. CODE ANN. art. 195 cmt. (a) (2006) ("Former Article 198 recognized legitimation by subsequent marriage as a method of establishing paternity. By creating a presumption of paternity under circumstances that previously constituted legitimation by subsequent marriage, this Article overrules such cases as Chatelain v. State, DOTD . . . and O'Brien v. O'Brien . . . (father who signed birth certificate and married the mother was not presumed to be father of child born before marriage.").
67. LA. CIV. CODE ANN. art. 98 cmt. (b) (2006). Also, Louisiana Civil Code article 185 assumes that the wife complied with her negative obligation of fidelity, that is, not to have sexual intercourse with anyone other than her husband. See LA. CIV. CODE ANN. art. 185 (2006).
68. Trahan, supra note 4. See also LA. CIV. CODE ANN. art. 196 cmt. (b) (2006) ("Under former Civil Code Article 203(B)(2) (rev. 1997), a presumption of paternity was created only when there was an acknowledgment made by signing of the registry of birth or baptism, and that presumption was explicitly declared rebuttable by a mere preponderance of the evidence . . . . This Article changes the law in that, under this revision, no presumption is created by signing the baptismal registry."); LA. CIV. CODE ANN. art. 196 cmt. (c) (2006) ("This Article changes the law as to a child acknowledged by authentic act: it creates a
acknowledges a child by authentic act or by signing the birth certificate is the father of the child, but only, as a general proposition, if invoked by the child: "The presumption can be invoked only on behalf of the child." As a consequence, there is no reference, as there is in the case of a child "legitimated by subsequent marriage," to methods of rebutting the presumption. As a general rule, the presumption cannot be invoked by the father so it fails to operate in the same manner and with the same strength as the other two presumptions previously discussed in this article.

The presumption created by this Article must be distinguished from the presumptions under Sections 1 and 2 of this Chapter. There is no similar limitation in this Section as to who may bring the action to rebut the presumption created by this Article . . . . Likewise, there is no time period during which an action to challenge the presumption of this Article must be instituted.

An exception to invocation of this presumption only by the child exists in "custody, visitation, and child support cases." The 2006 amendment to this Civil Code article, which was initially revised in 2005, includes a comment that suggests the exception provided for in cases of custody, visitation, and child support involves only the "authentic act of acknowledgment," not necessarily the birth certificate, and affords to that rebuttable presumption of paternity in favor of the child only, whereas former Civil Code Article 203(B)(1) (rev. 1997) created "a legal finding of paternity" but for limited purposes [child support only]."

69. LA. CIV. CODE ANN. art. 196 cmt. (b) (2006) ("This Article changes the law in that, under this revision, no presumption is created by signing the baptismal registry.").
70. LA. CIV. CODE ANN. art. 196 (2006).
71. See LA. CIV. CODE ANN. art. 195 cmt. (b) (2006).
72. LA. CIV. CODE ANN. art. 196 cmt. (a) (2006) ("The man who executes the acknowledgment or signs the birth certificate will not create a presumption in his own favor that he is the father.") (emphasis added).
73. See discussion supra notes 19–28, 53–64.
74. LA. CIV. CODE ANN. art. 196 cmt. (d) (2006).
75. LA. CIV. CODE ANN. art. 196 (2006).
76. LA. REV. STAT. ANN. §§ 9:392, 392.1, 405, 406 (2006), amended by 2006 La. Acts No. 344, § 4. Despite the fact that in the "except" clause in Louisiana Civil Code article 196 no such limitation appears, the substantive provisions that elaborate on the exception, such as Louisiana Revised Statutes Sections 9:392, 392.1, and, arguably, 405 limit the effect generally to acknowledgments by authentic act. This argument may be made although
acknowledgment "the effect of a legal finding of paternity in compliance with 42 U.S.C. § 666." Reserving for later reference the federal statute to which the comment refers, the most important of the statutes addressing this exception provides that "[i]n child support, custody, and visitation cases, the acknowledgment of paternity by authentic act is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity." 77

Mandated by federal law for minor children whose "child support" or whose custody or visitation is at issue, the acknowledgment by authentic act constitutes a "legal finding of paternity." 78 Note that these are the sole issues for which the acknowledgment equals a legal finding of paternity; child support, which is a term used to describe support for a minor child or major child if extended under special circumstances, and custody and visitation, which likewise by definition refer to minor children. Thus, issues of inheritance or support for a major descendant who is not entitled to "child support" or its extension, are governed by the general rule that the presumption created by a formal acknowledgment may be

Louisiana Revised Statutes Section 9:405, unlike Section 9:392.1, does not mention "acknowledgment of paternity by authentic act." See id. § 9:405.

77. LA. CIV. CODE ANN. art. 196 cmt. (2006). The comment continues by citing the relevant Louisiana statutes so providing: "For example, see the provisions of R.S. 9:392, 392.1, 393, 400, 405, 406, R.S. 40:34(b)(1)(a)(iv) and (h)(iv)." Id. The two most important of the provisions on effect are Louisiana Revised Statutes Sections 9:392.1 and 9:405.


79. See discussion infra Part VIII. See also infra app. C.


86. LA. CIV. CODE ANN. art. 2315.2 (2006).

invoked *solely* by the child. The father, who executes a self-serving act of formally acknowledging the child, cannot in such circumstances create a presumption that he can invoke to inherit or to recover for the wrongful death of the child. Clearly, the language chosen to delineate specific issues that require proof of the filiation of *minor* children means the general rule educated in article 196 applies in cases involving major children and in cases involving minor children where the issue does not concern "child support," custody, or visitation. That general rule is that the presumption created by a formal acknowledgment cannot be invoked by the alleged father, only by the child.

VII. LIMITED RECOGNITION OF DUAL PATERNITY WHEN ASSERTED BY THE FATHER

Of all the issues presented for deliberation by the Council of the Law Institute that concerned filiation, the most contentious, and the issue that produced the most vacillating results, was "dual paternity." On six separate occasions, the Council considered the fundamental question of whether the law should permit a child to have two legally recognized fathers, one of whom was the husband of the mother when the child was conceived or born, often reaching conflicting results. The issue posed each time was that in Appendix B to this article: Should the Louisiana Legislature ever recognize that a child has two legal fathers, and, if so, under what circumstances? After the decision rendered by the United States Supreme Court in *Michael H. v. Gerald D.*, involving a California statute, the Law Institute Council concluded that denying the biological father of a child the right to establish his filiation when another man was presumed to be the father was not unconstitutional. Thus, the Council considered the full range of

88. There are two narrow exceptions that involve an extension of child support awarded to a minor child. Louisiana Revised Statutes Section 9:315.22C (extension of child support awarded to a minor until nineteen years of age under certain circumstances) and Section 9:315.22D (extension of child support awarded to a minor until twenty-two years of age if he has a developmental disability). See LA. REV. STAT. ANN. § 9:315.22C (2006), and id. § 9:315.22D.

89. Minutes in which there is reference to the discussion and the resolution of the issue of dual paternity are in the personal files of the author.

90. See infra app. B.


92. LA. CIV. CODE ANN. art. 197 cmt. (b) (2006) ("Louisiana currently is the only state which recognizes that a child may establish his filiation to more than one father. The United States Supreme Court concluded that the United States Constitution did not prohibit a California statute from denying the biological
legislative options in such cases, from legislative recognition for
the first time of "dual paternity" to abolition of the
jurisprudentially created phenomenon, and any and all legislative
solutions in between. For example, one solution arguably in
between was that "legal" paternity for both fathers did not
necessarily mean the concomitant legal rights and obligations. Unsurprisingly, due to concern principally for the child, the
Council of the Law Institute and ultimately the legislature chose a
legislative solution in between the two obvious extremes as to
statutory recognition of a second legal father; but, if he was
recognized, the Council decided he should have all the legal rights
and obligations of a legal father.

The revision of the paternity action instituted by the child and
the addition of the avowal action of the biological father distinguishes, in the latter case, an action instituted when a child is
otherwise unfiliated and an action instituted when the child is
already filiated to another man. In the former case, the child may
institute the action at any time except for purposes of succession only. If the action is for purposes of succession, the applicable
peremptive period is one year, which commences to run from the
day of death of the alleged parent. For the child, the rules

father such a right. See Michael H. v. Gerald D . . . . But see Lawrence v.
Texas, 123 S.Ct. 2472 (2003), which does not directly concern the biological
father's right [to establish his paternity] but rejects part of the rationale of the
decision in the Michael H. case.

93. See, e.g., Smith v. Cole, 553 So. 2d 847 (La. 1989); Griffin v.
Succession of Branch, 479 So. 2d 324 (La. 1985); Succession of Mitchell, 323
So. 2d 451 (La. 1975); Warren v. Richard, 283 So. 2d 507 (La. App. 1st Cir.),
aff'd, 296 So. 2d 813 (La. 1974).

94. In Smith v. Cole, 553 So. 2d 847, 855 (La. 1989), the Louisiana
Supreme Court left open the question of whether both legally recognized fathers,
one biological and the other legally presumed, would always have the same
rights and obligations ("The question of whether the 'legal' father in this case
also shares the support obligation is not before the court. We decline for now to
hold the legal father will, in all factual contexts, be made to share the support
obligations with the biological father and the mother.").

95. LA. CIV. CODE ANN. art. 197 cmt. (a) (2006) ("If the child establishes
paternity under this Article, all of the civil effects of filiation apply to both the
child and the father. Civil effects of filiation include the right to support, to
inherit intestate, and to sue for wrongful death.").

96. LA. CIV. CODE ANN. art. 198 cmt. (a) (2006) ("Even before the
enactment of Article 191, the jurisprudence recognized the right of the father to
institute an avowal action as a predicate to, or simultaneous with, the exercising
of parental rights.").

98. Id.
applicable to the paternity action apply *regardless* of whether the child is filiated or not.\(^9\) However, the father's avowal action and his right to institute it depend upon whether the child is filiated to another man. If the child is unfiliated, the father may institute an avowal action at any time except that "the action shall be instituted no later than one year from the day of the death of the child."\(^{100}\) Note that the father's action is limited in ways that the child's action is not, even if the child is unfiliated. As to the father's action, the one-year peremptive period from day of death of the child applies "in all cases," and, unlike the child's action, is not limited to instances in which the issue is a succession matter.\(^{101}\)

Yet, the most salient distinction between the paternity and avowal actions concerns the time period for instituting the action if the child is otherwise filiated: the avowal action "shall be instituted within one year from the day of the birth of the child" with a narrow exception if the mother deceived the father as to his paternity.\(^{102}\) The child, however, can institute the paternity action at any time.\(^{103}\)

Obviously, the legislation that recognizes "dual paternity" affords the child significantly greater rights than those afforded the father in such situations. The comments explain why:

If the child is presumed to be the child of another man, the alleged father must institute his action within one year of the child's birth, to which there is one exception. If the child dies, the action must be instituted no later than one year from the death of the child. These restrictions imposed upon the alleged father's rights to institute the avowal action recognize first, that state attempts to require parents to conform to societal norms should be directed at the parents, not the innocent child of the union (see Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977)), and second, that a father who failed during a child's life to assume his parental responsibilities should not be permitted

\(^{99}\) *Id.* ("A child may institute an action to prove paternity, *even though he is presumed to be the child of another man . . .*")(emphasis added).

\(^{100}\) *LA. CIV. CODE ANN.* art. 198 (2006).

\(^{101}\) *Id.*

\(^{102}\) *Id.* ("If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.").

\(^{103}\) *LA. CIV. CODE ANN.* art. 197 (2006).
unlimited time to institute an action to benefit from the child's death.\textsuperscript{104}

Another comment adds: "The time period of one year from the child's birth imposed upon the alleged father if the child is presumed to be the child of another man requires that the alleged father act quickly to avow his biological paternity."\textsuperscript{105} Why must the alleged father act quickly?

Requiring that the biological father institute the avowal action quickly is intended to protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father.\textsuperscript{106}

VIII. FEDERALIZATION OF FAMILY LAW

Although comment (g) to Civil Code article 198 states that the time period during which the biological father must act if the child is presumed to be that of another man does not apply to the Department of Social Services "in accordance with 42 U.S.C. 666,"\textsuperscript{107} Louisiana Revised Statutes Section 9:404 now directs that the time period contained in article 198 "shall apply to the Department of Social Services."\textsuperscript{108} What a difference a year makes in the interpretation by attorneys of the Administration for Children and Families, U.S. Department of Health and Human Services about the thrust of Civil Code article 198 (limited dual paternity). They now accept the avowal action by the biological father as a "disestablishment" rather than as an "establishment" of paternity.\textsuperscript{109} Thus, federal legislation does not require that Louisiana law permit the biological father to "establish" his paternity until the child is eighteen because his establishment

\textsuperscript{104} LA. CIV. CODE ANN. art. 198 cmt. (d) (2006) (citation omitted).
\textsuperscript{105} LA. CIV. CODE ANN. art. 198 cmt. (e) (2006).
\textsuperscript{106} Id.
\textsuperscript{107} LA. CIV. CODE ANN. art. 198 cmt. (g) (2006) (emphasis added). The comment cites Louisiana Revised Statutes Section 9:395.1 as authority, which has been repealed by 2006 La. Acts No. 344, § 7.
\textsuperscript{109} Telephone conversation with Margot Bean, Attorney for ACF, A Division of the Department of Health and Human Services (Feb. 24, 2006), in response to Letter from Katherine Shaw Spaht to Wade Horn, Assistant Secretary of Children and Families, Department of Health and Human Services (Feb. 21, 2006) (on file with author).
would, *in effect for their purposes*, "disestablish" the paternity of the husband of the mother even if that is not the result under Louisiana law.

By contrast, if the "establishment" of paternity occurs by acknowledgment of a child otherwise unfiliated to another man, federal legislation requires that an acknowledgment executed under the federally mandated circumstances of Louisiana Revised Statutes Section 9:392 (which implements the hospital-based acknowledgment program) constitutes a "legal finding of paternity." This legal finding of paternity "is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity." Obviously, this legal treatment of an acknowledgment departs from the general rule contained in article 196, which is that the acknowledgment creates a presumption of paternity in favor of the child only and has no effect, much less a *legal finding of paternity*, upon the father. Article 196 as amended in 2006 reflects this exception, but is careful to narrowly limit that exception to the mandatory requirements of federal law—that is, to litigation involving custody, visitation, and child support.

Notice that by contrast to the provisions of article 196 enacted in 2005, these exceptions to the effect of an acknowledgment apply whether the litigation is "handled by the Department of Social Services" or not. The exception applies to all litigants in custody, visitation, and "child support" cases, which effectively means cases in which custody and visitation or "child support" for a minor child is at issue. The use of "child support" as a term of art was intended to limit the exception to only what is federally

111. Id.
112. LA. CIV. CODE ANN. art. 196 (2006) ("Except as otherwise provided in custody, visitation, and child support cases, the acknowledgment does not create a presumption in favor of the man who acknowledges the child.").
113. Louisiana Civil Code article 196 as originally enacted in 2005 contained a last sentence that read: "In those support and visitation cases handled by the Department of Social Services, the acknowledgment is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity." LA. CIV. CODE ANN. art. 196 (2005) (amended 2006).
114. There are two exceptions to the limitation of the issue of "child support" to minor children and those pertain to instances in which child support granted to a minor is continued beyond minority. See LA. REV. STAT. ANN. § 9:315.22C (2006) (for dependent child in secondary school until nineteen years of age), and id. § 9:315.22D (for developmentally disabled child until twenty-two years of age).
mandated. Thus, the exception that makes an acknowledgment a "legal finding of paternity" does not apply to litigation to enforce the obligation to support a descendant who is a major imposed by Civil Code article 229, much less to a wrongful death or succession action. For all other issues related to a minor child and proof of his filiation, an acknowledgment by the father does not even create a presumption in his favor, although it does so in favor of the child. Should the litigation concern the filiation of a major child, clearly the exception does not apply. Furthermore, the acknowledgment executed pursuant to the provisions of Louisiana Revised Statutes Section 9:392 involves a specific procedure with the participation of the notary and both parents. The participation of both parents eliminates the policy objection to the exception that a father can unilaterally execute an authentic act of acknowledgment for the purpose of exercising rights, rather than incurring obligations, and have it constitute a legal finding of paternity. In addition, another reason for limiting the exception is that the legislation concerning this type of acknowledgment and its effect as a legal finding of paternity only provides for revocation by the father who executes it—no explicit provision is made for challenging the truth of the acknowledgment by other interested parties, including the child.

Limiting the effect of federal legislation on policy decisions made by the State of Louisiana through its legislators represents the


116. LA. CIV. CODE ANN. art. 229 (2006) ("Children are bound to maintain their father and mother and other ascendants who are in need, and the relatives in the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal. This reciprocal obligation is limited to life's basic necessities of food, clothing, shelter, and health care, and arises only upon proof of inability to obtain these necessities by other means or from other sources."). Arguably, Louisiana Revised Statutes Section 9:405 (as amended by 2006 La. Acts No. 344, § 4) should be interpreted to mean if the acknowledgment is one executed under the authority of Louisiana Revised Statutes Section 9:392 ("In child support, custody, and visitation cases, the acknowledgment of paternity by authentic act is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.").

outcome of many contentious, lengthy legal arguments with federal officials at both the regional and national level (principally with their attorneys) about the exact requirements under federal law and whether Louisiana's statutes, as amended by Act of the Louisiana Legislature No. 344 of 2006, would be in compliance. The contents of Appendix C to this article represent one of the results of these contentious arguments; Appendix C contains the pertinent federal statutes and a reference to the Louisiana statutes that constitute compliance with the federal mandates. In an attempt to protect the State of Louisiana from adverse actions by the Department of Health and Human Services, whose lawyers argued that the 2005 filiation revision did not comply with federal law, the amendments to Louisiana Civil Code article 196 (acknowledgment) and Louisiana Revised Statutes Section 9:392.1 (effect of acknowledgment in accordance with hospital-based acknowledgment program) were explicitly made retroactive. Complicating matters further, Louisiana's Civil Code and the relationship of the Civil Code Ancillaries to the Code typically confound attorneys from other states, necessitating a basic lecture on the relationship between the two bodies of law, including the fact that both are the law and the Ancillaries supplement the Civil Code with more specific statutory material, which is, of course, not superseded by the Civil Code.

What is most striking about this experience in the area of proof of filiation is the extent to which, even in a Republican administration, the federal government through legislation and administrative rules has intruded into an area of law historically reserved to the states. This intrusion, which is both serious and objectionable, should be particularly worrisome to Louisiana officials and citizens because of the inflexibility of federal bureaucracies and their lack of sensitivity to and understanding of a civil law jurisdiction.

IX. CONCLUSION

Since the late 1970s Louisiana's law of filiation has reflected a highly structured classification system based upon the circumstances surrounding a child's conception and birth. That system was substantially and permanently altered by constitutional decisions of

120. See infra app. C.
121. 2006 La. Acts No. 344, § 8 (“Notwithstanding any provision of law to the contrary, the provisions of Article 196 and R.S. 9:392.1 shall be retroactive to June 29, 2005.”).
both the United States and Louisiana Supreme Courts. The Civil Code articles failed to reflect the result of those decisions, that is, that the highly structured classification system represented nothing more than different methods of establishing paternity. Piecemeal legislation attempted to add some order to and recognition of the significant changes wrought by the decisions, but the entire body of law related to proof of filiation desperately needed revision and coherence.

Furthermore, scientific advances in assisted reproduction altered the understanding not only of paternity but also, and even more fundamentally, of maternity. Occasionally, by specific legislation narrowly tailored to a particular set of circumstances, these scientific advances were acknowledged.123 Much work remains to be done if there is to be a comprehensive recognition of legal issues prompted by assisted reproduction, issues which focus on identification of the parents and regulation of the medical procedures. These legal issues involve sensitive and enormously important policy matters which thus far the legislature has been reluctant to address. The scientific and medical communities in the United States and Louisiana generally prefer to remain unregulated and free of constraint in their desire to advance scientific knowledge and practice in the service of patients.

The legislative revision of the law of filiation accomplished in 2005 and further implemented by legislation in 2006 did improve the coherence of the law and does reflect more accurately its current state. Important policy issues underlying decisions made in the revision process, issues as fundamental as whether Louisiana should retain the presumption that the husband of the mother is the father of the child conceived or born during marriage, were explored and resolved systematically. Nonetheless, time waits for no man (or woman) and for no revision of the law, so issues of assisted reproduction remain largely unresolved and the procedures unregulated. To that extent, the revision is less than comprehensive. As troubling as the unresolved issues of assisted conception are, the extent of federal intrusion into state family law revealed by response to the revision process poses more serious concerns for the immediate future. That federal intrusion is one more example of good intentions (protection of children) gone awry. As to the future, Louisiana should address the issues of

123. See comment (c) to Louisiana Civil Code article 184, which cites as specific exceptions to the definition of maternity, Louisiana Revised Statutes Sections 9:121–33 (in vitro fertilization statute), 40:32, 40:34(B)(1)(h)(v) and (B)(1)(j) (gestational surrogacy, gamete providers as parents).
assisted reproduction as the Task Force reports in Appendix A\(^\text{124}\) suggest and continue to monitor and oppose any further federal intervention into the law of Louisiana families.

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124. *See infra* app. A.
APPENDIX A

Report of the Task Force on Assisted Conception

CHARGE OF THE TASK FORCE

Louisiana Senate Concurrent Resolution No. 141—BE IT RESOLVED that the Legislature of Louisiana does hereby create a task force to study the impact of assisted conception and artificial means of reproduction relative to state laws.

I. ASSISTED INSEMINATION

A. Existing law:

Louisiana Civil Code (La. C.C.) Article 184. Presumed paternity of husband
The husband of the mother is presumed to be the father of all children born or conceived during the marriage.

La. C.C. Art. 188. Husband's loss of right to disavowal
... The husband also cannot disavow paternity of a child born as a result of artificial insemination of the mother to which he consented.

B. Considerations: Should there be more specific regulation?

1. Consent—Should a particular form of consent be required? Must it be in writing? What result if the consent is not in proper form? How long does the consent last? Can it be revoked?

   a. Recommendations of Louisiana State Law Institute Marriage-Persons Committee (See document prepared by Professor Katherine S. Spaht for Meeting of the Committee on January 30, 1998.)

      1. Form. The writing may be act under private signature.
2. Sample Form. A sample consent form will be provided for in the Revised Statutes. It is valid as long as in substantial compliance, like the statutory will (R.S. 9:2442).

3. Content. Language in the form should state that the husband agrees that he will be the father of the child conceived by assisted conception and that he has no right to bring a disavowal action. Should we have an affirmative statement that the husband shall be the natural father or is it enough to deny him the right to disavow? NOTE: Essence of the statements to be included in the form is that the husband assumes the legal responsibility of the father, therefore it may be enough to simply deny him the right to disavow.

4. Time of Consent and Duration. The consent of the husband must be dated within seven days of the procedure. The consent is irrevocable for a period not to exceed one hundred eighty days, unless the act of consent provides for a shorter period.

5. Revocation. The consent is automatically revoked upon divorce or death, unless the husband expressed a contrary intent in the act of consent. However, a child may use the consent in a paternity action for a period of two years after the death of the husband. Sample statute from Virginia is in Appendix of document.


Section 704. Consent to Assisted Reproduction.

(a) A consent to assisted reproduction by a married woman must be in a record signed by the woman and her husband. The requirement does not apply to the
donation of eggs for assisted reproduction by another woman.

(b) Failure of the husband to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding that the husband is the father of a child born to his wife if the wife and husband openly treated the child as their own.

c. Model Assisted Reproductive Technologies Act Draft (December 1999) (Draft prepared by ABA Family Law Section’s Committee on Reproductive and Genetic Technology - not yet endorsed)

1.06A Parenthood

Subd. 2. Intended parent(s) who execute a written agreement shall be the parent(s) of a child conceived through assisted conception.

2. Rights and responsibilities of donor. What regulation is necessary with regard to the relationship of the donor to the child? Should we clearly define a donor?

a. USCACA (1988)
Sec. 1. Definitions

(2) “Donor” means an individual [other than a surrogate] who produces egg or sperm used for assisted conception, whether or not a payment is made for the egg or sperm used, but does not include a woman who gives birth to a resulting child.

b. UPA (2000)
Section 102. Definitions

(8) “Donor” means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:

(A) a husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife; or

(B) a woman who gives birth to a child by means of assisted reproduction [except as otherwise provided in {Article} 8].
c. Model Assisted Reproductive Technologies Act Draft (December 1999) (not yet endorsed by ABA)

**1.01 Definitions**

Subd. 8. "Donor" means an individual, not an intended parent, who provides egg, sperm, or embryo used for assisted conception.

Should we state that he/she is not a parent?

a. USCACA (1988)

Sec. 4 Parental Status of Donors and Deceased Individuals

[Except as otherwise provided in Sections 5 through 9 {Surrogacy Agreements}]:

(a) A donor is not a parent of a child conceived through assisted conception.

**UPA Section 702. Parental Status of Donor**

A donor is not a parent of a child conceived through means of assisted reproduction.

b. Model Assisted Reproductive Technologies Act Draft (not yet endorsed by the ABA)

**1.07 Inheritance**

Subd. 2. A child resulting from assisted conception is not an heir of a donor.

Subd. 3. A donor has no rights against the child or the child’s estate.

Should we provide for a procedure for waiver of his rights?

a. Model Assisted Reproductive Technologies Act Draft (not yet endorsed by the ABA)

**1.06A Parenthood**

Subd. 3. Upon execution of a written document at the time of donation of gamete(s) or embryo(s), the donor(s) relinquish all rights, responsibilities, interests and control over those gametes or embryos.

Subd. 4. A donor who executes a written agreement is not a parent of a child conceived through the use of his or her gamete(s) or embryo(s).
3. Possible exception for insemination of an unmarried woman. Should the law make a distinction between insemination of a married woman, as opposed to an unmarried woman? In the former case, with the husband assuming the parental role, the child would have two parents. In the case of an unmarried woman, that may not be the case. Should the central consideration be that the child have two parents, if possible?

III. SURROGACY AGREEMENTS

A. Genetic/gestational

1. Existing law:

   La. R.S. 9:2713. Contract for surrogate motherhood; nullity
   A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.
   B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agreed for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligation to the child. [Emphasis added.]

2. Considerations: The statute refers to compensated agreements. Should the agreements be recognized if no compensation was paid?

B. Gestational

1. Existing law:

   La. R.S. 40:32. Definition of terms
   As used in this Chapter, the following terms shall have the meanings ascribed to them in this Section unless otherwise provided for or unless the context otherwise indicates:

   (1) "Biological parents" means a husband and wife, joined by legal marriage recognized as valid in this state, who provide sperm and egg for in vitro fertilization, performed by a licensed physician, where the resulting
fetus is carried and delivered by a surrogate birth parent who is a blood relative of either the husband or wife. [Emphasis added.]

La. R.S. 40:34. Vital records forms
B.(1) Contents of birth certificate. The certificate of birth shall contain, as a minimum, the following items:
(a) Full name of child

(viii) In the case of a child born of a surrogate birth parent who is a blood relative of a biological parent, the surname of the child's biological parents shall be the surname of the child.

(h)

(v) In the case of a child born of a surrogate birth parent who is a blood relative of a biological parent, the full name of the biological parent who is proven to be the father by DNA testing shall be listed as the father.

(i) Maiden name of mother; however, if the child born of a surrogate birth parent who is a blood relative of a biological parent, the maiden name of the biological parent who is proven to be the mother by DNA testing shall be listed as the mother and the name of the surrogate birth parent is not required.

(j) In the case of a child born of a surrogate birth parent who is a blood relative of a biological parent, the biological parents proven to be the mother and father by DNA testing shall be considered the parents of the child.

2. Considerations: Louisiana law is silent as to gestational surrogacy agreements between non-relatives, whether compensated or not. The statute recognizes gestational surrogacy agreements to some extent. In the case where the birth mother is a blood relative of the genetic father or mother, the genetic mother is relieved from having to adopt the child in order to be recognized as the child's mother.
What if there is a dispute between the birth mother and the genetic mother? What if there is no dispute between the birth and gestational mothers, as they both agree to share the rights and responsibilities of motherhood? How shall we define mother?

a. UPA. Recognizing the highly controversial nature of gestational agreements, whether genetic/gestational or purely gestational, the Drafting Committee of the UPA, included the following Introductory Note to its article on gestational agreements:

The subject of gestational agreements was last addressed by the Conference of Commissioners on Uniform State Laws in 1989 with the adoption of the Uniform State of Children of Assisted Conception Act (USCACA). That Act offers two alternatives on the subject: to regulate such activities through a judicial review process or to void such contracts. Only two states have adopted either version of the Act; Virginia chose to regulate such agreements, while North Dakota opted to void them.

The Drafting Committee recognizes that there are strongly held differences on this subject. Nonetheless, the Committee has concluded that the advances of science and the wide use of such reproductive agreements virtually demand that provisions for judicial supervision of gestational agreements be enacted. For this reason, Article 8 is included as an option in the Act. However, the Committee includes this article without a recommendation either for or against its adoption. The Uniform Parentage Act, as revised, contains too many important changes to jeopardize its passage because of opposition to this article. If the inclusion of Article 8 is so controversial in a state considering adoption of this Act to cause a risk of failure, the article may be omitted entirely.

References to Article 8 appear in brackets throughout the act.

Section 102. Definitions
"(11) "Gestational mother" means the woman who gives birth to a child."

Section 201. Establishment of Parent-Child Relationship

(a) The mother-child relationship is established between a child and a woman by:

(1) the woman’s having given birth to the child [except as otherwise provided in {Article} 8];
(2) an adjudication of the woman’s maternity; [or]
(3) adoption of the child by the woman; [or]
(4) an adjudication confirming the woman as a parent of a child born pursuant to a gestational agreement validated under [Article] 8 or other enforceable gestational agreement.]

b. Model Assisted Reproductive Technologies Act (not yet endorsed by the ABA)

1.06B Gestational Agreements

Subd. 1. A gestational carrier is not the parent of the child whom she gestates for the intended parent(s).

Subd. 2. If a gestational carrier is married, her spouse is not the parent of the child whom she gestates for intended parent(s).

1.07 Inheritance

Subd. A. In the absence of a testamentary document executed by an intended parent, the following principles apply:

* * *

(b) If one or both intended parents dies at any time during the pregnancy of a gestational carrier, the resulting child is an heir of both intended parents.

3. Gestational surrogacy with donor eggs: If we opt to recognize the concept of "intended parents," how far should we go? Consider the case of In re Buzzanca, 61 Cal.App. 4th 1410, 72 Cal. Rptr 2d 280 in which a divorcing husband and wife were held to be the lawful parents of a child who was biologically unrelated to them, but whose birth resulted from a surrogacy agreement entered into by the husband and wife, using a donor egg.
IV. EGG DONATION

A. Existing law:

*La. R.S. 9:122. Uses of human embryo in vitro*

...The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.

B. Considerations: Although prohibiting the sale of human eggs, the law in Louisiana is silent as to the donation, without compensation, of human eggs. What is the status of an egg donor with respect to the child? Should the same rules relative to donors of sperm apply to the donors of eggs? (See Section on Assisted Insemination.)

V. EMBRYO DONATION

A. Existing law:

*La. R.S. 9:122. Uses of human embryo in vitro*

...The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.

*La. R.S. 9:130. Duties of donors*

An in vitro fertilized human ovum is a juridical person which cannot be owned by the in vitro fertilization patients who owe it a high duty of care and prudent administration. If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance with written procedures of the facility where it is housed or stored. The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. No compensation shall be paid or received by either couple to renounce parental rights. Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.
La. R.S. 9:133. Inheritance rights
Inheritance rights will not flow to the in vitro fertilized ovum as a juridical person, unless the in vitro fertilized ovum develops into an unborn child that is born in a live birth, or at any other time when rights attach to an unborn child in accordance with law. As a juridical person, the embryo or child born as a result of in vitro fertilization and in vitro fertilized ovum donation to another couple does not retain its inheritance rights from the in vitro fertilization patients.

B. Considerations: The existing law prohibits the sale of human embryos and provides for a type of pre-natal adoption for one married couple to another. The statute clarifies that the child born would not retain inheritance rights to the original couple whose egg and sperm were used for the creation of the embryo.

VI. POSTHUMOUS CHILDREN

A. Existing law:

La. C.C. 26. Unborn child
An unborn child shall be considered as a natural person for whatever relates to its interests from the moment of conception...

La. C.C. 939. Existence of successor
A successor must exist at the death of the decedent.

La. C.C. 940. Same; unborn child
An unborn child conceived after the death of the decedent and thereafter born alive shall be considered to exist at the death of the decedent.

La. C.C. 1474. Unborn children, capacity to receive
To be capable of receiving by donation inter vivos, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation mortis causa, an unborn child must be in utero at the time of the death of the testator. In either case, the donation has effect only if the child is born alive.
La. R.S. 14:101.2. Unauthorized use of sperm, ovum, or embryo
A. No person shall knowingly use a sperm, ovum, or embryo, through the use of assisted reproduction technology, for any purpose other than that indicated by the sperm, ovum, or embryo provider’s signature on a written consent form.
B. No person shall knowingly implant a sperm, ovum, or embryo, through the use of assisted reproduction technology, into a recipient who is not the sperm, ovum, or embryo provider, without the signed written consent of the sperm, ovum, or embryo provider and recipient.
C. Knowing violation of the provisions of this Section shall be grounds for immediate revocation of the violator’s professional license.
D. This Section shall not apply to the use by a surviving spouse of the human ova or sperm of the deceased spouse in order to conceive a child, provided that prior to his death the deceased spouse signed a consent form authorizing such a donation.

B. Considerations: The Civil Code has always recognized the rights of a posthumously born child to inherit from his father. With the advent of new reproductive technology, questions regarding the right of posthumously implanted and posthumously conceived children arise. Some posit, considering fertilization and conception to be the same, that if fertilization takes place prior to the death of the persons supplying the egg and the sperm, then a child of that fertilization is considered in existence at the time of conception, if later born alive and capable of inheriting; while conceding that existing law would preclude such a child from receiving donations if the embryo was not in utero at the time of the alleged parent’s death.

However, a child who was not conceived until after the parent’s death would be incapable of receiving, even intestate. Yet, the Criminal Code does not prohibit the use of ova or sperm by a surviving spouse after the death of the other spouse, if the deceased spouse signed a consent form authorizing such a donation. Should the resulting child in such a case be granted inheritance rights? What if no consent form was signed by the decedent? Although the spouse might be subject to sanctions, should the child be deprived of inheritance rights?
**Sec. 4. Parental Status of Donors and Deceased Individuals**  
(b) An individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child.

*Comment*— . . . Section 4(b) is the only provision of the Act which would deal with procreation by those who are married to each other. It is designed to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material could lead to the deceased being termed a parent. Of course, those who want to explicitly provide for such children in their will may do so. [Emphasis added.]

2. **UPA**  
**Sec. 707. Parental Status of Deceased Spouse**  
If a spouse dies before placement of eggs, sperm, or an embryo, the deceased spouse is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased spouse would be a parent of the child.

3. **Model Assisted Reproductive Technologies Act (not endorsed yet by the ABA)**  
**1.02 Informed Consent, Written Agreements and Confidentiality**  
Subd. 6. It shall be unlawful to collect gametes or embryos from a deceased person for any reason, without a written testamentary document executed by an intended parent pursuant to section 1.07 of this Act.

**1.07 Inheritance**  
Subd. 1. In the absence of a testamentary document executed by an intended parent, the following principles apply:
(a) If an intended parent dies before embryo transfer, the resulting child has no rights against the state of that intended parent.

***

(c) If an intended parent dies after storage of gametes or embryo(s), then the resulting child is not the heir of the deceased intended parent.

(d) If one or both intended parents dies after the transfer of an embryo(s) or gametes, but before the birth of the child, the resulting child is an heir of both intended parents.


Twin girls were conceived in vitro almost eighteen months after the death of William Kolacy, with the sperm he had stored prior to his death with the intent that his wife bear children after his death. The court held the state law which allowed children conceived before death of father, but born after the death, to inherit, unconstitutional in its discrimination against posthumously conceived children. Noting that the statute had been adopted without thought to the situation presented, the court reasoned that the general intent was to provide for posthumously born children and thus granted inheritance rights to the twins.
Minority Report: Task Force on Assisted Conception and Artificial Means of Reproduction

I. INTRODUCTION

A minority of the members of the Task Force on Assisted Conception and Artificial Means of Reproduction dissents from two recommendations contained in the report submitted on behalf of the Task Force by Vice Chairman, Kathryn Venturatos Lorio. They are:

1. Recommendation No. 5: “All legal relations between the sperm donor and the child should be severed when an unmarried woman is inseminated, absent an agreement by the parties prior to the procedure, to the contrary.”

2. Recommendation No. 7: “Gestational surrogacy contracts whereby one woman agrees, for valuable consideration, to carry and give birth to a child created with the genetic material of another woman, should be enforceable when medical reasons preclude the woman who provides the egg to carry or bear the child. In such cases, the egg provider should be presumed to be the mother of the child.”

Recommendation No. 5 received a Task Force vote of 7-5 (actually 6-4 by appointed members of the Task Force), and Recommendation No. 7 received a Task Force vote of 8-4. For the following express reasons a minority of the Task Force urge a rejection of the two aforementioned proposals and instead provide that the sperm donor is the father of a child born as the result of artificial insemination of an unmarried woman and that gestational surrogacy contracts for valuable consideration (pay) are unenforceable.

II. RECOMMENDATION NO. 5

All legal relations between the sperm donor should be severed when an unmarried woman is inseminated, absent an agreement by the parties prior to the procedure, to the contrary.

Why we are opposed to this recommendation:
A. "Our legal system grants no parent, male or female, the right to be a sole parent."

1. Children conceived naturally by sexual intercourse between a male and a female create two parents. Even in the case of adoption by a single person which Louisiana law permits, (1) adoption is no right and requires court approval after extremely careful screening and (2) such adoptions, which constitute the exception to the proposition stated italics, are intended to provide for a child already born and in this world who needs any sort of stable home.

2. "Children of divorced and never-married parents may well experience parental absence, but they nonetheless can claim two parents and two sets of biological relatives—grandparents, uncles, aunts, cousins—whom they can identify as family and with whom they may establish ties."

3. To grant to a woman the right to bear a child without a father encourages the widespread cultural impression, fueled by scholars in the field of law and economics and a hyper market economy, that children are like consumer products and that "if you want one you can buy one." Such an outlook, increasingly pervasive in this country, is extremely damaging to children and their need for adults to be child-centered, rather than individually concerned with "their rights" and entitlements. This is particularly true for feminists for whom bearing a child is most often referred to as a "right."

B. All social science evidence confirms that on average a child reared in a two-parent home fares far better than a child who is reared in a single-parent home, and state and national policymakers now recognize and incorporate this consistent finding in state and national policy.

1. Outcomes for children in a single parent family: They are "more likely, and in many instances far more likely, to die young, to live in poverty, to be on welfare, to perpetuate a crime, to commit suicide, to drop out of the labor force, to leave school, and to have illegitimate children themselves. Seventy percent of America's adolescent murderers, and of America's long-term prisoners, come from fatherless homes."

2. In Louisiana during 2000, 45% of children were born out of wedlock. [By 2002, 46.3% were born out of wedlock.]

3. In the 1996 Welfare Reform Act state monetary savings from the Temporary Assistance to Needy Families Act (TANF) were to be used for four purposes, and two of those purposes were
to promote the creation of two-parent families among those receiving this welfare assistance and to encourage marriage. In the re-authorization of the Welfare Reform Act scheduled for debate when Congress convenes in 2002 it is expected that the Department of Health and Human Services, Office of Children and Families will insist upon emphasizing these two goals.

4. To permit a woman with sufficient means to be inseminated with the sperm of a donor whose legal relationship to the child is severed is to discriminate against the poor woman whose only means to bear a child is sexual intercourse with a man. She is denied the option of bearing and rearing a child without “interference” and “participation” by a father if he so chooses.

C. It is reasonable to distinguish permitting a single person to adopt and denying a single person the right to be inseminated by sperm from a person whose legal relationship with the child is severed.

The state has to be concerned with children already born and living in situations in which the parent desires to surrender the child because she cannot responsibly care for him or the parent has been abusive or neglectful. To assure that there is a sufficient pool of prospective adoptive parents to care for and nurture children already brought into the world, it is reasonable for the State of Louisiana to permit single persons to adopt. “Adoption agencies seek to ensure that children continue to enjoy the care of two parents, allowing single-parent adoptions only in the case of hard-to-place children who are otherwise unlikely to be adopted at all.”

Quite to the contrary, the State of Louisiana has a very important interest in promoting and encouraging two-parent involvement in the lives of their children and to prevent the purposeful, intentional creation of a child for life in an environment that we know is not the ideal.

... it is often said these days that the private sexual behavior of two people [or one person and a sperm donor] is of no legitimate interest to the wider community, and if a couple [unmarried woman] has a child out of wedlock, that is nobody’s business but their own. Clearly, that is not so. Illegitimacy and fatherlessness have costly consequences, being linked, as we have seen, to infant mortality, crime, joblessness, homelessness, educational failure, and the disintegration of whole neighborhoods.
D. Distinguishing between the right of a married woman and that of an unmarried woman to be inseminated with the sperm of a donor whose rights are severed is constitutional.

In the majority report the case of Eisenstadt v. Baird is cited as authority for the proposition that there are “constitutional concerns about restricting procreative liberties of the unmarried.” The right described in the Eisenstadt case is the right “married or single” to be free from unwarranted governmental intrusion so fundamentally affecting a person as the decision whether to bear or beget a child.” (Due process clause of the United States Constitution, “the right to privacy”)

1. Understanding this “right” and its parameters determines whether an unmarried woman is entitled without any governmental regulation to bear a child without a legally responsible father. Rights so recognized under the Fourteenth Amendment to the Constitution are those recognized as deeply rooted in our country’s history and culture, according to two 1980s United States Supreme Court opinions. Nothing suggests that the right of an unmarried woman to bear a child without a legally responsible father is such a right. Instead, our legal tradition has thus far followed a more moderate approach, “which allows states considerable latitude both in regulating technological conception and in defining the status of participants.”

2. Furthermore, the Eisenstadt case recognized that the intrusion by the government must be unwarranted and must so fundamentally affect the person’s decision that the state statute implicates the Fourteenth Amendment. The intrusion is warranted because of what we now know and understand about the consequences for children reared in single-parent homes which necessarily implicate the public interest. Secondly, the proposal of the minority of the Task Force does not “fundamentally affect the person’s decision” because the minority report does not recommend proscribing single women from artificial insemination, which some countries do, but instead simply recommends that the rights and obligations of the sperm donor NOT be severed. How can such a state statute maintaining the legal rights of the genetic father of the child be “fundamentally” affecting the decision of the unmarried woman? In no other situation is an unmarried or married woman for that matter given the choice of conceiving, bearing and rearing a child without a potential legal father. She is clearly able to make the decision to bear the child and like every other would-be parent would not be legally entitled to parent alone.
E. We are not persuaded by the argument that failing to sever the sperm donor's rights as father to a child born as the result of the insemination of an unmarried woman would reduce single women's reproductive options available through adoption or sexual intercourse with a man.

1. "The fact that donor responsibility would likely reduce the numbers of both donors and users is not a sufficient reason to absolve donors of parental responsibility...Women who want to parent alone would undoubtedly find unprotected sexual intercourse more attractive and have a wider choice of sexual partners if men who fathered children sexually could forgo parental rights and responsibilities. But parentage law and policy has firmly opposed such an expansion of parenting possibilities. And while respect for procreative liberties suggests that government should not counter-mand the decision to bear a child, it hardly mandates state acquiescence in one parent's wish to deny the existence of the other."

2. "There is simply no logical basis for a one-parent policy applicable only to single AID users. The only interests ultimately served by such a policy are those of the single woman who wants a child but does not want that child to have a father."

Recommendation No. 5: All legal relations between the sperm donor and the child should be maintained when an unmarried woman is inseminated.

III. RECOMMENDATION NO. 7

Gestational surrogacy contracts whereby one woman agrees, for valuable consideration, to carry and give birth to a child created with the genetic material of another woman, should be enforceable when medical reasons preclude the woman who provides the egg to carry or bear the child. In such cases, the egg provider should be presumed to be the mother of the child.

A minority of the Task Force opposed this recommendation which for the first time in Louisiana legal history, if adopted, would permit an enforceable agreement for payment for surrogacy, although admittedly for gestational surrogacy only and only when the egg donor is precluded for medical reasons from carrying or bearing the child.
A. The recommendation breaches the hitherto unbreached sacred notion that any part of childbearing is not for sale and in the case of gestational surrogacy, that a woman’s womb is not for rent.

A minority of the Task Force believed that adoption of this recommendation would violate ethical, moral and religious boundaries to the effect that human body parts are not for sale or rent. They are in the language of the civil law—extrapatrimonial, too personal to be considered property—which inferentially this recommendation does. In the same way Recommendation No. 5 encourages the notion that children are commodities, nothing more than consumer products in the view of some scholars of law and economics, and this recommendation recognizes that the human body itself is a consumer product. Some scholars refer to this phenomena as the “commodification” of the human being. Is nothing sacred and beyond the reach of market activity?

B. The recommendation will permit the exploitation of poor women in need of money by other women who for “medical” reasons are “precluded” from carrying the child.

One member of the minority expressed passionately his concern that the most likely victim of this recommendation would be the poor women of this state. In some instances desperate for money for their own families, their bodies would be hired out for this most intimate of tasks to be performed for another woman of means who is precluded from carrying the child.

Of course, the “medical” reason precluding the “renter” from carrying the child could be emotional, mental, or psychological, as well as physical which is clear from use of the word “preclude” which is not the equivalent of “physically cannot.” The range of possibilities that exists which would qualify to preclude the “renter” from bearing the child include severe inconvenience (emotional or psychological) and if a surrogate was used under those circumstances would preclude one of the natural purposes for a nine-month gestation period—bonding with the fetus. Thus, the fetus in such a scenario becomes a product produced by the participation of an incubator—closer to the notion of any other product that often requires a producer and distributor.

Recommendation No. 7 should be rejected. The Revised Statutes recognize the possibility of gestational surrogacy as long as there is no “valuable consideration,” as when a family member volunteers to serve as a gestational surrogate.
Filiation Policy Issues to be Resolved by the Council of the Institute

The Persons Committee requests the Council’s direction on the following related policy issues involving the law of filiation, (more particularly the presumption of paternity of the husband of the mother):

Should the legislation of Louisiana:

1. Overrule present Louisiana jurisprudence and refuse to recognize dual paternity in instances where the presumption of paternity applies to the husband of the mother; or
2. Codify the present Louisiana jurisprudence by recognizing dual paternity where the presumption applies to the husband of the mother?

If the decision of the Council is the latter of the two choices: should the legislation distinguish the right of the child to establish paternity for the purpose of imposing obligations upon the father, from the right of the father to establish paternity for the purpose of exercising rights pertaining to the child?

For example, should the legislation deny to the father, one who committed adultery with the mother, any “rights” vis-a-vis the child? Would such a distinction be constitutional under the equal protection clauses of both the U.S. Constitution and Louisiana Constitution? Would denial of “rights” to the father, but imposition of obligations constitute a denial of due process under both the U.S. Constitution and Louisiana Constitution? Interestingly enough, the interpretation of the Louisiana constitutional guarantees may present greater obstacles to such a distinction than the parallel guarantees in the U.S. Constitution.

Louisiana Jurisprudence

Dual paternity, the possibility that a child may have two fathers recognized by the law, exists under present Louisiana jurisprudence. Dual paternity occurs in instances where the law presumes that the husband of the mother is the father of her child
(legal father) yet despite that presumption, the child and/or the biological father is permitted to establish that someone else is the actual father. As early as *Succession of Mitchell*, 323 So.2d 451 (La. 1975), the jurisprudence permitted proof that the wife’s second husband was the biological father of the children even though the husband of the mother had not disavowed the children (Civil Code articles 184–190). See also, *Warren v. Richard*, 296 So.2d 813 (La. 1974). Later cases were to the same effect and not limited to the peculiar language of Civil Code Article 198 (legitimation by subsequent marriage), which was the particular factual pattern in *Mitchell*. See Spaht and Shaw, *The Strongest Presumption Challenged*, 37 La. L. Rev. 59 (1977).

In 1980 and again in 1981 Civil Code articles 208 and 209 were amended to place limitations upon the action to establish filiation; limitations in the form of a peremptive period, burden of proof, and, as reflected by the legislative history, the children who were permitted to bring such an action. The last act containing the amendments to both articles was recommended to the Legislature by the Law Institute. The language of Civil Code articles 208 and 209 was intended to deny to the child who enjoyed legitimate filiation the right to establish filiation to one other than the husband of the mother. See Civil Code arts. 208, 209. Evidence of this intention came in the form of an amendment to La. R.S. 46:236.1 F (Child Support Enforcement Program—AFDC), which explicitly permitted the Department of Health and Human Resources to establish filiation to a father who owed child support even if the child was presumed to be the child of the husband of the mother. The Department insisted upon the amendment to avoid the effects of what it understood to be the intention of those who drafted Articles 208 and 209—i.e., to deny to the child who enjoyed legitimate filiation the right to institute an action to establish filiation to one other than the husband of the mother. See Spaht, *Developments in the Law, 1980–1981*, 42 La. L. Rev. 403 (1982).

Despite the statutory changes to the Civil Code and Title 46 of the Revised Statutes described above, the Louisiana Supreme Court in *Griffin v. Succession of Branch*, 479 So.2d 324 (La. 1985), a succession case, interpreted Civil Code articles 208 and 209 as follows: “We conclude that children who fall into one of the enumerated classes contained in Article 209 [i.e. a child who enjoys legitimate filiation] are not precluded from instituting a filiation action under that article, they are merely relieved of the obligation to do so by operation of law.” Thus, despite the intention to end dual paternity in 1981 the Louisiana Supreme Court confirmed the concept by its interpretation of the Civil Code.
NEW LAW OF FILIATION

articles. See also Finnerty v. Boyett, 469 So.2d 287 (La. App. 2d Cir. 1985) (visitation sought by alleged biological father even though child presumed to be child of husband of mother); Smith v. Cole, 553 So.2d 847 (La. 1989) child support case brought against biological father even though child presumed to be child of the husband of the mother). The Smith case contains an excellent discussion of all the Louisiana cases on dual paternity and U.S. constitutional decisions affecting the issue of paternity.

Until 1992 the issue of dual paternity presented itself whenever the husband of the mother had failed to disavow a child within the peremptive period of Civil Code article 189 and the child (or someone on his behalf) or the father sought to establish actual paternity. Under the jurisprudence the husband of the mother was conclusively presumed to be the father but proof could be offered that someone else was the actual father under Civil Code articles 198, 200, 203 or 209. See Smith v. Cole, supra. However, in Gnagie v. DHHR, 603 So.2d 206 (La. App. 1st Cir. 1992), the First Circuit Court of Appeals noticed, ex proprio motu, that the husband of the mother of a child conceived and born during the marriage was not the father of the child, and as a consequence, had no right to bring a survival or wrongful death action for death of the child. The court mischaracterized the issue as res nova in Louisiana. In fact, another panel of the First Circuit Court of Appeals in Cosey v. Allen, 316 So. 2d 513 (La. App. 1st Cir. 1975), decided the same issue, concluding that the husband of the mother had a right of action but still had to prove damages. Since he had no relationship with the child, he failed to prove that he had suffered damage. See also Meaux v. Wiley, 325 So. 2d 655 (La. Appl. 3d Cir. 1975). Interestingly, in the Gnagie case the trial court had reached the same conclusion, with the assistance of a jury, as the court had in Cosey v. Allen. In the Gnagie case the court states: "The status of ‘legal’ father does not necessarily confer on that alleged parent all of the rights and obligations of paternity [i.e., a right to recover the child’s wrongful death].” That statement represents a significant departure from prior law and suggests that the court can pick and choose among rights and obligations as to the “legal” father. There is no suggestion, however, that the court has the same choice in the case of the biological father, who apparently has greater rights although he committed adultery with the mother. In the Gnagie case, furthermore, the court permitted evidence not for the purpose of establishing that a party to the action was the actual biological father, but for the purpose of disproving that the husband of the mother was the father. The court permitted essentially a form of disavowal not instituted by the husband, who was in fact precluded
from doing so because of Civil Code article 189 (lapse of more than 180 days).

Persons Committee Deliberations

Against the background of the Louisiana jurisprudence, the Persons Committee began discussing the drafts of new Civil Code articles on filiation (parent/child relationship) more than four years ago. We interrupted our work to draft articles on former community property, but resumed our meetings on filiation last spring.

The Title (Parent and Child) is tentatively arranged in three chapters—maternity, paternity, and artificial means of reproduction. At present the chapter on maternity consists of only one article and is straightforward: “Maternity may be established by a preponderance of the evidence.” The chapter on artificial means of reproduction will contain more articles identifying the mother in circumstances where artificial means of reproduction—such as surrogate motherhood, in vitro fertilization, embryo transfer, and egg donation—are utilized to produce offspring.

Initially, work on the chapter on paternity began with some new formulations of the articles containing the presumption of paternity. The Committee may suggest to the Council that the presumption of paternity of a child born or conceived during the marriage be narrowly drafted to apply only when the child has registry (as by birth certificate) or the reputation of being the child of the husband of the mother. The Committee will reconsider the proposal after the Council acts on the policy issue of dual paternity. If the Council concludes that the legislation should continue to recognize dual paternity, then a narrow formulation and application of the presumption would reduce the potential instances of dual paternity, and in many cases thus permit the alignment of legal and biological paternity.

In another conscious restriction of the presumption, the Committee will suggest a new successor article to Civil Code article 186, an article that resolves the dilemma of overlapping legal presumptions of paternity where a child is conceived during one marriage and born during another. The Committee will suggest that in resolving the dilemma that the cause of termination of the first marriage determine whether the first or second husband is presumed to be the father of the child. For example, if the first marriage is dissolved by divorce, the second husband is presumed to be the father; if the first marriage is dissolved by death, the first husband is presumed to be the father. The rather obvious
The Committee also will suggest that for the first time under Louisiana law the mother of the child be permitted to contest her husband's paternity, but only (tentatively) for the purpose of establishing that her present husband is the father. The factual circumstances contemplated by the proposed article are that the child is presumed to be the child of the mother's first husband but the mother subsequently marries a man who acknowledges that the child is his before or after the child's birth (i.e., *Succession of Mitchell, supra*). The mother's action to contest paternity is like that of the husband or his heirs, subject to a relatively short peremptive period. Thus, the mother is permitted to establish paternity to someone other than her former husband who is presumed to be the father, but only if it is to establish paternity to her present husband (child then will be part of intact marital family).

The Committee proposals outlined above potentially restrict the presumption of the husband's paternity of a child conceived or born during the marriage, and afford others the opportunity to contest it. Furthermore, after the United States Supreme Court's decision in *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989), the Persons Committee believes that a State may provide that the presumption of paternity is conclusive, precluding proof that someone other than the husband of the mother is the father of the child (no dual paternity recognized), without violating the guarantee of the United States Constitution against the denial of due process or equal protection. The same may be true under parallel provision of the Louisiana Constitution. *Cf. In Re B.G.S.*, 556 So.2d 545 (La. 1990).

Even though a State *may* deny dual paternity to a child who is conceived or born during the marriage, the question remains, should it as a matter of policy. *Michael H.*, a case decided after *Smith v. Cole, supra*, reopens for discussion the issue of whether the state should recognize dual paternity if it is not constitutionally mandated. The Persons Committee has debated and discussed the matter on numerous occasions without reaching a consensus. The principal alternatives consist of the two enumerated at the beginning of this document: (1) overrule explicitly the jurisprudence by refusing to recognize dual paternity; or (2) codify existing jurisprudence by continuing to recognize dual paternity. The tension inherent in choosing between these two principal alternatives lies in the answer to the following question: Is it best
for society to protect and preserve the marital unit, to provide for the individual child's needs or to recognize biological fact? In addition, the most recent case (Gnagie, supra) demonstrates the need to restore order and certainty to the system of proof of paternity; otherwise, a concursus proceeding will be required every time there is a wrongful death action, succession proceeding, or support claim. The interest of justice is served by clear definitive rules on the subject.

The Persons Committee needs direction from the Council in resolving this most serious of policy issues. The Committee cannot proceed further with its work without a decision about dual paternity. Resolving the issue is difficult because there are compelling arguments for each alternative. The Persons Committee awaits your decision.
Reciprocal Rights and Obligations of Parent and Child

The parent/child relationship legally binds the two persons in an intricate web of reciprocal rights and obligations, and in some cases unilateral rights and obligations. The "what" of parental obligations, at least the principal examples found in the Civil Code, includes the following:

Parental authority over the minor child and resulting responsibility for that child. Parents have authority to control the behavior of the child (C.C. arts. 218–220), to control and administer his property (C.C. arts. 221, 2333; C.C.P. arts. 4501–4502), and to enjoy the fruits from his property with a few exceptions (C.C. arts. 223–224, 226). Parents also have a corresponding responsibility for his acts that cause damage (C.C. arts. 237, 2318), and for this support, education and maintenance (C.C. arts. 227, 230; R.S. 9:315.1 et seq.). During and after termination of the marriage by divorce, provisional proceedings permit a parent or parents to seek custody and child support (C.C. arts. 131 et seq., C.C. arts. 141 et seq., respectively).

Tutorship of minor children. If there is an occasion for the tutorship of a minor child (C.C. arts. 246 et seq.), parents as natural tutors have preference over all others and also have authority under certain circumstances to appoint a testamentary tutor (C.C. arts. 257, 258).

Ascendants and descendants (including majors) continuing reciprocal obligations to support each other if in need. C.C. art. 229 provides that children "are bound to maintain their father and mother . . . who are in need . . . and relatives in the direct ascending line are likewise bound to maintain their needy descendants." The obligation is limited to the necessities of life in the absence of other available sources.

Reciprocal rights of inheritance. Children are within the favored class of forced heirs (C.C. arts. 1493 et seq.) with such rights as collation (C.C. arts. 1227 et seq.) and reduction (C.C. arts. 1502 et seq.) and within the most favored class of intestate heirs (C.C. art. 888). Parents, as
defined by C.C. art. 891 [a definition more inclusive than that of children under C.C. art. 3506(8)], are within the second most favored class of intestate heirs as to separate property of the deceased (C.C. arts. 891–897).

Right to institute the survival action and to recover for wrongful death. Children fall within the most favored class of beneficiaries and parents within the second most favored class of beneficiaries (C.C. arts. 2315.1 and 2315.2).

Other rights and obligations. In addition to the above mentioned rights and obligations there are also numerous statutory examples of children and family modifying rights and obligations or affecting them in other ways. See, e.g., C.C. art. 2355 (judicial authorization to act without concurrence of spouse when action in best interest of family); art. 2362 (alimentary obligation deemed community obligation); art. 2365 (reimbursement upon termination of community for community obligations incurred for certain family expenses); and art. 2372 (spouse solidarily liable with spouse who incurs obligation for necessaries for family).
Federal Statutory Rights of Children

Pay and Allowances of Uniformed Service. Members of the uniformed services are entitled to certain allowances based on a variety of circumstances including whether the member has dependents. 37 U.S.C.A. § 401(2) defines dependents as a child or "an illegitimate child whose alleged member-father has been judicially decreed to be the father of the child or judicially ordered to contribute to the child's support, or whose parentage has been admitted in writing by the member" and who is under 21 or is incapable of support.

Servicemen's Life Insurance. The servicemen's group life insurance law provides for insurance for members of the armed forces. 38 U.S.C.A. § 1965(8) defines "child" as a legitimate child and "an illegitimate child as to the mother, or an illegitimate child as to the alleged father, only if:

(A) he acknowledged the child in writing signed by him; or
(B) he has been judicially ordered to contribute to the child's support; or (C) he has been before his death, judicially decreed to be the father of such child; or (D) proof of paternity is established by a certified copy of the public record of birth or church record of baptism showing that the insured was the informant and was named as father of the child; or (E) proof of paternity is established from service department or other public records, such as school or welfare agencies, which show that with his knowledge the insured was named as the father of the child.

Longshore and Harbor Worker's Compensation Act. The Act defines a child to include "a child in relation to whom the deceased employee stood in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent on the deceased". 33 U.S.C.A. § 902(14).

Immigration laws. The immigration laws grant citizenship to certain persons at birth. 8 U.S.C.A. § 1409 provides for children born out of wedlock as follows:

(a) The provisions of paragraph (c), (d), (e), and (g) of section 1401 of this title, and of paragraph (2) of section 1408 of this title, shall apply as of the date of birth to a person born out of wedlock if (1) a blood relationship between the person and the father is established by clear and convincing evidence, (2) the father had the nationality of the United States at the time of the person's birth, (3) the
father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years, and (4) while the person is under the age of 18 years—(A) the person is legitimated under the law of the person’s residence or domicile, (B) the father acknowledges paternity of the person in writing under oath, or (C) the paternity of the person is established by adjudication of a competent court.

Proposed Filiation Articles Draft

Chapter 2. Paternity

SECTION 1. THE PRESUMPTION, DISAVOWAL [AND CONTESTATION]

Subsection a. The Presumption

Art. 185. Presumption of paternity of husband

The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days of the termination of the marriage.

[This presumption shall apply only if the child is registered as or has the reputation of being the child of the husband of the mother.]

Art. 186. Presumption of paternity if child born after divorce or after death of husband

If a child is born less than three hundred days following the termination of a marriage, and his mother has married again before his birth:

1. The new husband is presumed to be the father if the previous marriage was terminated by judgment of divorce, declaration of nullity, or declaration of death of an absent person.
2. The former husband is presumed to be the father if the previous marriage was terminated by death.

Subsection b. Disavowal

Art. 187. Action in disavowal of paternity; standard of proof

The husband can disavow paternity of the child by clear and convincing evidence that he is not the father. The testimony of the husband must be corroborated by other evidence.

Art. 188. Loss of right in case of artificial means of conception

The husband of the mother cannot disavow a child born to his wife as the result of artificial means of conception to which he consented [with the intent to be recognized as the father.]
QUESTION: If a man marries a pregnant woman and knows that she is pregnant and that the child is not his, should he lose the right of disavowal?

Art. 189. Peremptive period for disavowal by husband or his successors

An action for disavowal of paternity must be filed within a peremptive period of one hundred eighty days after the husband learned or should have learned of the birth of the child. If the husband for reasons beyond his control is not able to file the action timely, then the period of time for filing the action is suspended during that period of inability.

If the husband dies within the period for filing the action without having done so, his successor who is his relation by consanguinity, adoption, or affinity and whose interest in the estate will be reduced has one year from his death or one year from the birth of the child, whichever period is longer, within which to file the action.

Subsection c. Contestation

Art. 190. Contestation by mother

The mother may file an action to contest the paternity of the former husband, but only to establish under Article 191 that her present husband is the father of the child. The mother must prove by clear and convincing evidence that the former husband is not the father. The testimony of the mother must be corroborated by other evidence.

The action by the mother must be filed within one year of the child's birth.

QUESTION: Should contestation by the mother be extended to other instances? Is the action in contestation that of the mother or of the child? If the former, should the child himself at some mature age have the right to contest his paternity (of husband of his mother)?
SECTION 2. SUBSEQUENT MARRIAGE AND ACKNOWLEDGEMENT

Art. 191. Establishment of paternity by marriage of parents and by acknowledgment

The paternity of a child is established by the marriage of the child’s mother to a man who has formally or informally acknowledged the child as his before or after the child’s birth.

Art. 192. Proof of paternity by formal acknowledgment

A child may establish his paternity against the father who has signed his birth certificate or who has declared his paternity in an authentic act.

QUESTION: What effect should such a formal acknowledgment have in other contexts and if offered by someone other than the child, such as the father?

SECTION 3. ACTION TO ESTABLISH PATERNITY

Art. 193. Establishment of paternity by judgment; standard of proof

An action to establish paternity may be brought by the child [or a person on his behalf] if paternity is not otherwise established under the preceding articles of this Chapter.

Such action must be brought within twenty-four years of the child’s birth or within one year of the alleged father’s death, whatever first occurs.

In an action to establish paternity filed during the life of the alleged father, proof must be made by a preponderance of the evidence. In an action to establish paternity filed after the death of the alleged father, proof of paternity must be made by clear and convincing evidence.
Comparison Between 42 U.S.C. § 666(a)(5) and Louisiana Law

This document will compare 42 U.S.C. § 666(a)(5) and Louisiana law to determine if Louisiana law complies with and does not conflict with any provision of 42 U.S.C. § 666(a)(5) as it relates to paternity establishment and voluntary acknowledgments.

42 U.S.C. § 666(a)(5)

(5) Procedures concerning paternity establishment.—
(A) Establishment process available from birth until age 18.—
(i) Procedures which permit the establishment of the paternity of a child at any time before the child attains 18 years of age.
(ii) As of August 16, 1984, clause (i) shall also apply to a child for whom paternity has not been established or for whom a paternity action was brought but dismissed because a statute of limitations of less than 18 years was then in effect in the State.

(Louisiana law: Civil Code Articles 185 to 198 and R.S. 9:391.1 to 400.1 provide for the establishment of paternity and for voluntary acknowledgments. Proposed Louisiana HB No. 322 proposes amendments and additions to current law. If enacted, R.S. 9:401 to 406 will add provisions relative to filiation and paternity. Present Louisiana law, C.C. Art. 197, provides that a child may bring an action to establish paternity even though he is presumed to be the child of another man. However, for purposes of succession only, this action is subject to a preemptive period of one year. Present Louisiana law, C.C. Art. 198, provides that a man may bring an action to establish his paternity of a child at any time except as provided in C.C. Art. 198. Proposed HB 322 repeals R.S. 9:395.1 and enacts R.S. 9:404 to provide that the preemptive periods in C.C. Art. 198 shall apply to the Louisiana Department of Social Services when providing services in accordance with 42 U.S.C. § 666.)

(B) Procedures concerning genetic testing.—
(i) Genetic testing required in certain contested cases.— Procedures under which the State is required, in a contested
paternity case (unless otherwise barred by State law) to require the
child and all other parties (other than individuals found under
section 654(29) of this title to have good cause and other
exceptions for refusing to cooperate) to submit to genetic tests
upon the request of any such party, if the request is supported by a
sworn statement by the party—
(I) alleging paternity, and setting forth facts establishing a
reasonable possibility of the requisite sexual contact between the
parties; or
(II) denying paternity, and setting forth facts establishing a
reasonable possibility of the nonexistence of sexual contact
between the parties.

(ii) Other requirements.—Procedures which require the State
agency, in any case in which the agency orders genetic testing—
(I) to pay costs of such tests, subject to recoupment (if the State
so elects) from the alleged father if paternity is established; and
(II) to obtain additional testing in any case if an original test
result is contested, upon request and advance payment by the
contestant.

(Louisiana law provides for blood or tissue sampling to
determine paternity in R.S. 9:396 to 398.2:

R.S. 9:396. Authority for test; ex parte orders; use of results
[HB 322 proposes to amend this Section by adding the underlined
text and deleting the striked text.]

A.(1) 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 may, on its own initiative, or
shall, under either of the following circumstances, order the
mother, child, and alleged father, or the mother’s husband or
former husband in an action en desaveu, to submit to the collection
of blood or tissue samples, or both, and direct that inherited
characteristics in the samples, including but not limited to blood
and tissue type, be determined by appropriate testing procedures:

(a) Upon request made by or on behalf of any person
whose blood or tissue is involved, provided that such request is
supported by a sworn affidavit alleging specific facts which either
tend to prove or deny paternity.

(b) Upon motion of any party to the action made at a time
so as not to delay the proceedings unduly.
(2) 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 interests of justice so require.

B.(1) The district attorney, in assisting the Department of Social Services in establishing paternity as authorized by R.S. 46:236.1.1 et seq., may file a motion with a court of proper jurisdiction and venue prior to and without the necessity of filing any other legal proceeding. Upon ex parte motion of the district attorney and sworn affidavit of the party alleging specific facts tending to prove paternity and other facts necessary to establish the jurisdiction and venue of the court, the court shall issue an ex parte order directing the mother, her husband or former husband, child, and alleged father to appear at a certain date and time to submit to the collection of blood or tissue samples, or both and shall direct that inherited characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing procedures. The order shall be personally served upon the alleged father. If any party refuses to submit to such tests, the court, in a subsequent civil action in which paternity is a relevant fact, may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

(2) If the written report of the results of the initial testing absolves a party from the allegation of paternity, the district attorney and the department shall be enjoined from initiating any subsequent civil action against that party to establish paternity of the same child. If the written report fails to absolve a party from the allegation of paternity, such report may be used by the district attorney or the department as evidence against the alleged father in any subsequent civil action for the establishment of paternity or by the alleged father in any subsequent proceeding in which filiation is an issue.

C.(1) Prior to ordering the alleged father to submit to paternity testing under the provisions of this Section, the court may, upon motion of the alleged father and after a contradictory hearing, order a person presumed to be the father of the child, pursuant to the provisions of the Civil Code Articles 184 and 185, to produce the results of prior blood or tissue testing or to submit to the collection of blood or tissue samples, or both, and direct that inherited characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing
procedures. If the written report of the results of the testing negates the presumption that this person is the father of the child, only then may the court order the alleged father to submit to paternity testing.

(2) If a presumed father is unknown by the parties or unavailable to submit to testing, then the court shall resolve the matter in the interest of justice in chambers.

R.S. 9:397. Selection of expert

The tests shall be conducted by a court appointed expert or experts qualified as examiners of blood or tissue samples for inherited characteristics, including but not limited to blood and tissue type. The number and qualifications of such expert or experts shall be determined by the court.

R.S. 9:397.1. Compensation of expert witnesses and recovery of testing costs

A. The costs of the blood or tissue tests conducted by the expert witness appointed by the court shall be fixed at a reasonable amount. The costs shall be advanced by the party who requested that such tests be conducted. If the court orders the blood or tissue tests on its own motion, the petitioner shall advance the costs of the tests. In either case, the court shall tax the costs to the party against whom judgment is rendered. The compensation of each expert witness appointed by the court and called by a party shall be fixed at a reasonable amount. It shall be paid by the party against whom judgment is rendered, which shall be taxed as costs of court.

B. If the state, a political subdivision of the state, or the petitioner pays the initial costs of testing under this Part in a paternity action, the state, political subdivision, or petitioner may recover those costs from an individual only if he is found to be the father of the child in the action. The court shall determine the manner in which the reimbursement for the costs shall be made.

R.S. 9:397.2. Chain of custody of blood or tissue samples

The chain of custody of blood or tissue samples taken under this Part may be established if documentation of the chain of custody is submitted with the expert's report and if such documentation was made at or near the time of the chain of
custody and was made in the course of regularly conducted business activity.

R.S. 9:397.3. Admissibility and effect of test results

A.(1) A written report of the results of the initial testing, certified by a sworn affidavit by the expert who supervised the tests, shall be filed in the suit record. The affidavit shall state in substance:

(a) That the affiant is qualified as an examiner of blood or tissue samples for inherited characteristics, including but not limited to blood and tissue types, to administer the test and shall give the affiant's name, address, telephone number, qualifications, education, and experience.

(b) How the tested individuals were identified when the samples were obtained.

(c) Who obtained the samples and how, when, and where the samples were obtained.

(d) The chain of custody of the samples from the time obtained until the tests were completed.

(e) The results of the test and the probability of paternity as calculated by an expert based on the test results.

(f) The procedures performed to obtain the test results.

(2) A notice that the report has been filed shall be mailed by certified mail to all parties by the clerk of court or shall be served in accordance with Code of Civil Procedure Article 1314.

(3) A party may challenge the testing procedure within thirty days of the date of receipt or service of the notice.

B.(1) If the court finds there has been a procedural error in the administration of the tests, the court shall order an additional test made by the same laboratory or expert.

(2)(a) If there is no timely challenge to the testing procedure or if the court finds there has been no procedural error in the testing procedure, the certified report shall be admitted in evidence at trial as prima facie proof of its contents, provided that the party
against whom the report is sought to be used may summon and
examine those making the original of the report as witnesses under
cross-examination. The summons for the individual making the
original of the report may be served through his employer's agent
for service of process listed with the secretary of state or served
pursuant to R.S. 13:3201 et seq.

(b) A certified report of blood or tissue sampling which
indicates by a ninety-nine and nine-tenths percentage point
threshold probability that the alleged father is the father of the
child creates a rebuttable presumption of paternity.

C. Any additional testing ordered by the court pursuant to this
Part shall be proved by the testimony of the expert.

D. If the court finds that the conclusions of all the experts as
disclosed by the reports, based upon the tests, are that the alleged
father is not the father of the child, the question of paternity shall
be resolved accordingly. If the experts disagree in their findings or
conclusions, the question shall be submitted upon all the evidence.

R.S. 9:398. Applicability to criminal actions

This part shall apply to criminal cases subject to the
following limitations and provisions:

(1) An order for the tests shall be made only upon application
of a party or on the court's initiative;

(2) The compensation of the experts shall be paid by the parish
of the party's domicile under order of court;

(3) The court may direct a verdict of acquittal upon the
conclusions of all the experts under the provisions of R.S.
9:397.3(D), otherwise the case shall be submitted for determination
upon all the evidence.

R.S. 9:398.1. Award of attorney's fees in actions to establish
paternity

When the court renders judgment in favor of a party seeking to
establish paternity, it shall, except for good cause shown, award
attorney's fees costs to the prevailing party. However, the
provisions of this Section shall not apply to compensation of expert
R.S. 9:398.2. Petition for order to submit to blood or tissue tests prior to bringing filiation action [HB 322 proposes to amend this Section by adding the underlined text.]

A.(1) Notwithstanding any other provision of law to the contrary, the husband of the mother, prior to filing an action of disavowal of a child born or conceived during his marriage to the mother and prior to the expiration of the time required to file an action of disavowal, may petition a court of proper jurisdiction and venue for an order directing the mother, child, and petitioner to submit to the collection of blood or tissue samples, or both, for determination of paternity for the purpose of exercising rights relating to the child. The filing of the petition suspends the period for bringing the disavowal action for a period of one year from the date the petition is filed.

(2) Notwithstanding any other provision of law to the contrary, the alleged biological father of a child born outside of marriage, prior to filing any action to establish filiation of the child, may petition a court of proper jurisdiction and venue for an order directing the mother, child, and petitioner to submit to the collection of blood or tissue samples, or both, for determination of paternity for the purpose of exercising rights relating to the child.

B. The petition authorized in Paragraphs (1) and (2) of Subsection A of this Section shall name the mother as defendant and shall allege specific facts tending to prove the relationship or the circumstances of any physical relationship with the mother, or facts tending to prove paternity, and other facts necessary to establish the jurisdiction and venue of the court.

C. The court, after contradictory hearing, may order the parties to submit to blood or tissue samples, or both, and direct that inherited characteristics in the samples, including but not limited to blood and tissue type, be determined by appropriate testing procedures as provided in this Part.

D. If the court issues an order directing blood or tissue tests, or both, the provisions of R.S. 9:397 through 397.2 and 397.3(A) and (B) shall be applicable to the selection and compensation of experts, payment of testing costs, establishment of chain of custody, filing of test results in the court record, and authority of
the court to order additional tests if it finds there has been a procedural error in the administration of the tests.

E. The court shall not make a determination of paternity based on the test results and conclusions of the experts filed in the record; however, the test results shall be admissible in any subsequent action filed by any of the parties relating to filiation of the child.

F. The provisions of this Section shall not in any manner affect the status of a child whose legal father is the husband of the mother who does not timely disavow paternity of the child nor affect any right that a child may have to file an action of filiation as provided by law.)

(C) Voluntary paternity acknowledgment.—

(i) Simple civil process.—Procedures for a simple civil process for voluntarily acknowledging paternity under which the State must provide that, before a mother and a putative father can sign an acknowledgment of paternity, the mother and the putative father must be given notice, orally, or through the use of video or audio equipment, and in writing, of the alternatives to, the legal consequences of, and the rights (including, if 1 parent is a minor, any rights afforded due to minority status) and responsibilities that arise from, signing the acknowledgment.

(Louisiana law: R.S. 9:392 provides the following:

R.S. 9:392. Declaration of acknowledgment. Acknowledgment; requirements; content [HB 322 proposes to amend this Section by adding the underlined text and deleting the striked text.]

A. Prior to the execution of a declaration of an acknowledgment pursuant to Civil Code Article 203 of paternity, the notary shall provide in writing, and orally or by directing them to video or audio presentations, to the party or parties making the declaration acknowledgment of the following:

(1) Either party has the right to request a genetic test to determine if the alleged father is the biological father of the child.

(2) The alleged father has the right to consult an attorney before signing an acknowledgment of paternity.

(3) If the alleged father does not acknowledge the child, the mother has the right to file a paternity suit to establish paternity.
(4) After the alleged father signs an acknowledgment of paternity, he has the right to pursue visitation with the child and the right to petition for custody.

(5) Once an acknowledgment of paternity is signed, the father may be obligated to provide support for the child.

(6) Once an acknowledgment of paternity is signed, the child will have inheritance rights and any rights afforded children born in wedlock.

(7)(a) A party who executed a notarial act an authentic act of acknowledgment may revoke the act, without cause, before
the earlier of the following:

(i) Sixty days after the signing of the act, in a judicial hearing for the limited purpose of revoking the acknowledgment.

(ii) A judicial hearing relating to the child, including a child support proceeding, wherein the affiant to the notarial act authentic act of acknowledgment is a party to the proceeding.

(b) Thereafter, the acknowledgment of paternity may be voided only upon proof, by clear and convincing evidence, that such act was induced by fraud, duress, or material mistake of fact, or error, or that the father person who executed the authentic act of acknowledge is not the biological father.

(8) All parties to the action have any other rights and responsibilities which may be afforded by law now or in the future.

B. In addition to the general requirements of the Civil Code, an acknowledgment of a child born outside of marriage shall include the social security numbers of the father and mother, and, in accordance with the provisions of 42 U.S.C. § 652(a)(7), shall include all minimum requirements specified by the secretary of the United States Department of Health and Human Services. Failure to recite a party's social security number as required herein shall not affect the validity of the declaration.)

(ii) Hospital-based program.—Such procedures must include a hospital-based program for the voluntary acknowledgment of
paternity focusing on the period immediately before or after the birth of a child.

(Louisiana law: R.S. 40:46.1 provides the following:

R.S. 40:46.1. Hospital-based paternity program

A. Any hospital in the state which provides birthing services shall have a program that allows for the voluntary acknowledgment of paternity during the period immediately before or after the birth of a child.

B. During the period immediately before or after the birth of a child to an unmarried woman, a hospital-based program established in accordance with this Section shall, at a minimum:

(1) Provide to both the mother and alleged father, if he is present in the hospital:

   (a) Written materials about paternity establishment.

   (b) The forms necessary to voluntarily acknowledge paternity.

   (c) A written description of the rights, responsibilities, and alternatives as provided in R.S. 9:392(A) which are involved in acknowledging paternity.

   (d) The opportunity to speak with hospital personnel, either by telephone or in person, who are trained to clarify information and answer questions about paternity establishment.

(2) Provide the mother and alleged father, if he is present, the opportunity to voluntarily acknowledge paternity in the hospital in accordance with the Civil Code and R.S. 9:392.

(3) Afford due process safeguards.

(4) Forward completed acknowledgments to the state registrar.

C. Hospital support personnel that provide birthing services shall possess notarial powers to administer oaths to and authenticate signatures of any persons in connection with execution of a formal acknowledgment of paternity in accordance with this Section. Any oaths administered or signatures
authenticated pursuant to this Section shall have the same force and effect as if taken or signed before a duly commissioned notary public.

D. Hospital personnel shall forward an acknowledgment of paternity to the state registrar who shall forward copies of same to the Department of Social Services, office of family support, support enforcement services. A statewide data base shall be maintained by the Department of Social Services in accordance with federal regulations.

E. A voluntary acknowledgment executed in accordance with this Section shall be signed by both parents and the parents' signatures shall be authenticated by a person possessing notarial powers in accordance with state laws.

F. The Department of Social Services, office of family support, support enforcement services shall provide to all birthing hospitals in the state:

(1) Written materials about paternity establishment.

(2) Forms necessary to voluntarily acknowledge paternity.

(3) Copies of a written description of the rights, responsibilities, and alternatives as provided in R.S. 9:392(A) which are involved in acknowledging paternity.

(4) Training, guidance, and written instructions relative to voluntary acknowledgment of paternity, as necessary to operate the hospital-based program.

(5) An assessment of each birthing hospital's program on at least an annual basis.

G. Except in the case of intentional misconduct, no hospital or any agent or employee thereof shall be held civilly or criminally liable for any action or omission arising out of the performance of, attempted performance of, or failure or inability to perform the duties imposed herein.)

(iii) Paternity establishment services.—

(I) State-offered services.—Such procedures must require the State agency responsible for maintaining birth records to offer voluntary paternity establishment services.
(II) Regulations.—

(aa) Services offered by hospitals and birth record agencies.—The Secretary shall prescribe regulations governing voluntary paternity establishment services offered by hospitals and birth record agencies.

(bb) Services offered by other entities.—The Secretary shall prescribe regulations specifying the types of other entities that may offer voluntary paternity establishment services, and governing the provision of such services, which shall include a requirement that such an entity must use the same notice provisions used by, use the same materials used by, provide the personnel providing such services with the same training provided by, and evaluate the provision of such services in the same manner as the provision of such services is evaluated by, voluntary paternity establishment programs of hospitals and birth record agencies.

(Louisiana law: R.S. 40:46.2 provides the following:

R.S. 40:46.2. Paternity establishment services

The state registrar shall provide voluntary paternity establishment services in accordance with regulations prescribed by the secretary of the United States Department of Health and Human Services. The state registrar may designate specific employees in the offices of the vital records registry who shall possess notarial powers to administer an oath to any person in connection with any document required in the course of establishing paternity.)

(iv) Use of paternity acknowledgment affidavit.—Such procedures must require the State to develop and use an affidavit for the voluntary acknowledgment of paternity which includes the minimum requirements of the affidavit specified by the Secretary under section 652(a)(7) of this title for the voluntary acknowledgment of paternity, and to give full faith and credit to such an affidavit signed in any other State according to its procedures.

(Louisiana law: R.S. 9:392(B) and 393 provide the following:

R.S. 9:392. Declaration of acknowledgment; requirements; content

* * *

B. In addition to the general requirements of the Civil Code, an acknowledgment of a child born outside of marriage shall
include the social security numbers of the father and mother, and, in accordance with the provisions of 42 U.S.C. § 652(a)(7), shall include all minimum requirements specified by the secretary of the United States Department of Health and Human Services. Failure to recite a party's social security number as required herein shall not affect the validity of the declaration.

R.S. 9:393. Full faith and credit of acknowledgments

Full faith and credit shall be given by Louisiana courts to an affidavit acknowledging paternity executed in any state in accordance with the laws and procedures of that state.)

(D) Status of signed paternity acknowledgment.—

(i) Inclusion in birth records.—Procedures under which the name of the father shall be included on the record of birth of the child of unmarried parents only if—

(I) the father and mother have signed a voluntary acknowledgment of paternity; or

(II) a court or an administrative agency of competent jurisdiction has issued an adjudication of paternity.

Nothing in this clause shall preclude a State agency from obtaining an admission of paternity from the father for submission in a judicial or administrative proceeding, or prohibit the issuance of an order in a judicial or administrative proceeding which bases a legal finding of paternity on an admission of paternity by the father and any other additional showing required by State law.

(Louisiana law: R.S. 40:34(B)(h) provides the following:

R.S. 40:34. Vital records forms

B. * * *

(h)(i) Full name of father if the father was the husband of the mother of the child at the time of conception and birth of the child or had not been legally divorced from the mother of the child for more than three hundred days prior to the birth of the child. If the husband of the mother was not the biological father of the child, the full name of the biological father may be recorded in accordance with the provisions of Item (vi) or (vii) of Subparagraph (a). A subsequent successful disavowal action by the husband of the mother or his heirs pursuant to Civil Code Article 189 may later affect this entry and the child's surname.
Otherwise, the full name of the father may be recorded as provided by Item (iv) of Subparagraph (a).

(ii) Full name of father if a court has issued an adjudication of paternity.

(iii) In all other cases, the name of the father and other information pertaining to the father shall not appear on the birth certificate and the surname of the child shall be recorded as the maiden name of the mother.

(iv) Nothing in this Subparagraph shall preclude the Department of Social Services, office of family support, support enforcement services from obtaining an admission of paternity from the biological father for submission in a judicial proceeding, or prohibit the issuance of an order in a judicial proceeding which bases a legal finding of paternity on an admission of paternity by the biological father and any other additional showing required by state law.

(v) In the case of a child born of a surrogate birth parent who is a blood relative of a biological parent, the full name of the biological parent who is proven to be the father by DNA testing shall be listed as the father.

(vi) In the case of a child born outside of marriage whose certificate of birth fails to list the full name of the father, the full name of the biological father who is proven to be the father by DNA testing shall be listed as the father upon submission, by the mother or father of the child born outside of marriage, to the registrar of vital records for the Department of Health and Hospitals of a certified copy of the DNA test results establishing paternity of the biological father.

(ii) Legal finding of paternity.—Procedures under which a signed voluntary acknowledgment of paternity is considered a legal finding of paternity, subject to the right of any signatory to rescind the acknowledgment within the earlier of—

(I) 60 days; or

(II) the date of an administrative or judicial proceeding relating to the child (including a proceeding to establish a support order) in which the signatory is a party.

(iii) Contest.—Procedures under which, after the 60-day period referred to in clause (ii), a signed voluntary acknowledgment of
paternity may be challenged in court only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger, and under which the legal responsibilities (including child support obligations) of any signatory arising from the acknowledgment may not be suspended during the challenge, except for good cause shown.

(Louisiana law: Civil Code Article 196, R.S. 9:392(A)(7), and proposed R.S. 9:392.1 provide the following:

C.C. Art. 196. Formal acknowledgment; presumption [HB 322 proposes to amend this Article by adding the underlined text and deleting the striked text.]

A man may, by authentic act or by signing the birth certificate, acknowledge a child not filiated to another man. The acknowledgment creates a presumption that the man who acknowledges the child is the father. The presumption can be invoked only on behalf of the child. Except in those cases handled by the Department of Social Services as otherwise provided by law, the acknowledgment does not create a presumption in favor of the man who acknowledges the child. In those support and visitation cases handled by the Department of Social Services, the acknowledgment is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.

* * *

R.S. 9:392. Declaration of acknowledgment Acknowledgment; requirements; content [HB 322 proposes to amend this Section by adding the underlined text and deleting the striked text.]

A. Prior to the execution of a declaration of an acknowledgment pursuant to Civil Code Article 203 of paternity, the notary shall provide in writing, and orally or by directing them to video or audio presentations, to the party or parties making the declaration acknowledgment of the following:

* * *

(7)(a) A party who executed a notarial act an authentic act of acknowledgment may rescind revoke the act, without cause, before the earlier of the following:
(i) Sixty days after the signing of the act, in a judicial hearing for the limited purpose of revoking the acknowledgment.

(ii) A judicial hearing relating to the child, including a child support proceeding, wherein the affiant to the notarial act of acknowledgment is a party to the proceeding.

(b) Thereafter, the acknowledgment of paternity may be voided only upon proof, by clear and convincing evidence, that such act was induced by fraud, duress, or material mistake of fact, or error, or that the person who executed the authentic act of acknowledgment is not the biological father.

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Proposed R.S. 9:392.1. Acknowledgment; obligation to support; visitation

In child support and visitation cases, the acknowledgment of paternity by authentic act is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.)

(E) Bar on acknowledgment ratification proceedings.—

Procedures under which judicial or administrative proceedings are not required or permitted to ratify an unchallenged acknowledgment of paternity.

(Louisiana law: C.C. Art. 196 and proposed R.S. 9:392.1 provide the following:

C.C. Art. 196. Formal acknowledgment; presumption [HB 322 proposes to amend this Article by adding the underlined text and deleting the striked text.]

A man may, by authentic act or by signing the birth certificate, acknowledge a child not filiated to another man. The acknowledgment creates a presumption that the man who acknowledges the child is the father. The presumption can be invoked only on behalf of the child. Except in those cases handled by the Department of Social Services as otherwise provided by law, the acknowledgment does not create a presumption in favor of the man who acknowledges the child. In those support and visitation cases handled by the Department of Social Services, the
acknowledgment is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.

Proposed R.S. 9:392.1. Acknowledgment; obligation to support; visitation

In child support and visitation cases, the acknowledgment of paternity by authentic act is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.)

(F) Admissibility of genetic testing results.—Procedures—
(i) requiring the admission into evidence, for purposes of establishing paternity, of the results of any genetic test that is—
(I) of a type generally acknowledged as reliable by accreditation bodies designated by the Secretary; and
(II) performed by a laboratory approved by such an accreditation body;
(ii) requiring an objection to genetic testing results to be made in writing not later than a specified number of days before any hearing at which the results may be introduced into evidence (or, at State option, not later than a specified number of days after receipt of the results); and
(iii) making the test results admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy, unless objection is made.

(Louisiana law provides for blood or tissue sampling to determine paternity in R.S. 9:396 to 398.2. For the texts of these statutes, please see pages 2–9 supra.)

(G) Presumption of paternity in certain cases.—Procedures which create a rebuttable or, at the option of the State, conclusive presumption of paternity upon genetic testing results indicating a threshold probability that the alleged father is the father of the child.

(Louisiana law: R.S. 9:397.3 and provides the following:

R.S. 9:397.3. Admissibility and effect of test results
A.(1) A written report of the results of the initial testing, certified by a sworn affidavit by the expert who supervised the tests, shall be filed in the suit record. The affidavit shall state in substance:

(a) That the affiant is qualified as an examiner of blood or tissue samples for inherited characteristics, including but not limited to blood and tissue types, to administer the test and shall give the affiant's name, address, telephone number, qualifications, education, and experience.

(b) How the tested individuals were identified when the samples were obtained.

(c) Who obtained the samples and how, when, and where the samples were obtained.

(d) The chain of custody of the samples from the time obtained until the tests were completed.

(e) The results of the test and the probability of paternity as calculated by an expert based on the test results.

(f) The procedures performed to obtain the test results.

(2) A notice that the report has been filed shall be mailed by certified mail to all parties by the clerk of court or shall be served in accordance with Code of Civil Procedure Article 1314.

(3) A party may challenge the testing procedure within thirty days of the date of receipt or service of the notice.

B.(1) If the court finds there has been a procedural error in the administration of the tests, the court shall order an additional test made by the same laboratory or expert.

(2)(a) If there is no timely challenge to the testing procedure or if the court finds there has been no procedural error in the testing procedure, the certified report shall be admitted in evidence at trial as prima facie proof of its contents, provided that the party against whom the report is sought to be used may summon and examine those making the original of the report as witnesses under cross-examination. The summons for the individual making the original of the report may be served through his employer's agent
for service of process listed with the secretary of state or served pursuant to R.S. 13:3201 et seq.

(b) A certified report of blood or tissue sampling which indicates by a ninety-nine and nine-tenths percentage point threshold probability that the alleged father is the father of the child creates a rebuttable presumption of paternity.

C. Any additional testing ordered by the court pursuant to this Part shall be proved by the testimony of the expert.

D. If the court finds that the conclusions of all the experts as disclosed by the reports, based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence.)

(H) Default orders.—Procedures requiring a default order to be entered in a paternity case upon a showing of service of process on the defendant and any additional showing required by State law.

(Louisiana law: General provisions of Louisiana law, Code of Civil Procedure Articles 1701 to 1704, provide the law relative to default.)

(I) No right to jury trial.—Procedures providing that the parties to an action to establish paternity are not entitled to a trial by jury.

(Louisiana law: Code of Civil Procedure Article 1732 provides the following:

C.C.P. Art. 1732. Limitation upon jury trials

A trial by jury shall not be available in:

* * *

(3) A ... filiation ... proceeding.

* * *

(J) Temporary support order based on probable paternity in contested cases.—Procedures which require that a temporary order be issued, upon motion by a party, requiring the provision of child support pending an administrative or judicial determination of parentage, if there is clear and convincing evidence of paternity (on the basis of genetic tests or other evidence).
(Louisiana law: R.S. 9:399 provides the following:

R.S. 9:399. Establishment of child support; interim order during proceeding; final order following judgment of paternity

A. In a proceeding for the determination of paternity and upon motion of any party, the court presiding over the paternity issue shall issue an order of interim child support if there is clear and convincing evidence of paternity on the basis of genetic testing or other evidence susceptible of independent verification or corroboration.

B. If no interim child support was ordered pursuant to Subsection A of this Section, a judgment for final child support rendered against a defendant who has acknowledged paternity after a paternity suit has been filed or has been adjudged in a suit to establish paternity to be the parent of the child for whom support is ordered shall be effective from the date on which the paternity suit was filed. In the event the court finds good cause for not making the award retroactive to the date of the filing of the paternity suit, the court may make the award retroactive to a date subsequent to the filing of the paternity suit, but in no event shall the award be fixed later than the date of the rendition of the paternity judgment. Any monetary support provided by the judgment debtor, from the date the petition for support is filed to the date the final support order is issued to or on behalf of the person for whom support is ordered, may be credited to the judgment debtor against the amount of the judgment.

(K) Proof of certain support and paternity establishment costs.—Procedures under which bills for pregnancy, childbirth, and genetic testing are admissible as evidence without requiring third-party foundation testimony, and shall constitute prima facie evidence of amounts incurred for such services or for testing on behalf of the child.

(Louisiana law: R.S. 9:394 provides the following:

R.S. 9:394. Evidence of hospital bills and tests in paternity action

In an action to establish paternity, originals or certified copies of bills for pregnancy, childbirth, and genetic testing shall be admissible as an exception to the hearsay rule and shall be prima
facie evidence that the amounts reflected on the bills were incurred for such services or testing on behalf of the child. Extrinsic evidence of authenticity of the bills, or their duplicates, as a condition precedent to admissibility shall not be required.)

(L) Standing of putative fathers.—Procedures ensuring that the putative father has a reasonable opportunity to initiate a paternity action.

(Louisiana law: C.C. Art. 198 provides the following:

C.C. Art. 198. Father's action to establish paternity; time period

A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.

If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.

In all cases, the action shall be instituted no later than one year from the day of the death of the child.

The time periods in this Article are preemptive.)

(M) Filing of acknowledgments and adjudications in state registry of birth records.—Procedures under which voluntary acknowledgments and adjudications of paternity by judicial or administrative processes are filed with the State registry of birth records for comparison with information in the State case registry.

(Louisiana law: R.S. 40:34 provides the following:

34. Vital records forms

B. The forms shall be printed and supplied or provided by electronic means by the state registrar and the required contents are:
(1) Contents of birth certificate. The certificate of birth shall contain, as a minimum, the following items:

(a) Full name of child.

(iv) If the child is born outside of marriage, the surname of the child shall be the mother's maiden name. If the father is known and if both the mother and the father agree, the surname of the child may be that of the father or a combination of the surname of the father and the maiden name of the mother. For purposes of this Item, "father" means a father who has acknowledged his child or who has been judicially declared the father in a filiation or paternity proceeding.

(v) Any change in the surname of a child from that required herein or to that allowed herein shall be by court order as provided for in R.S. 13:4751 through 4755 or as otherwise provided in this Chapter or by rules promulgated thereunder.

(vi) Notwithstanding the provisions of Item (B)(1)(a)(iii), and except as otherwise provided in Item (B)(1)(a)(vii), if the father of the child is not the husband of the mother, the surname of the child may be the maiden name of the mother, or, if the mother, husband, and father agree, the surname of the child may be that of the father or a combination of the surname of the father and the maiden name of the mother. The Department of Health and Hospitals, office of public health, shall develop a form for the purposes of implementing this Item. However, the provisions of this Item shall be limited to cases wherein the husband and mother have lived separate and apart continuously for a minimum of one hundred eighty days prior to the time of conception of the child and have not reconciled since the beginning of the one hundred eighty-day period, as evidenced by an affidavit of the parties submitted to the registrar.

(vii) In the case of a child born of the marriage, which includes cases where both a person, presumed to be the father pursuant to the Civil Code, and a biological father exist, the surname of the child's biological father who has been judicially declared to be the father of the child in a filiation or paternity proceeding, either prior or subsequent to the birth of the child, shall be the surname of the child, if the biological father has sole or joint custody of the child and the presumed father, if any, is no longer married to the mother. If the biological father and the mother agree, the surname of the child shall be the maiden name of
the mother or a combination of the surname of the biological father and the maiden name of the mother. The child's mother, the husband of the mother, and the biological father shall be indispensable parties in a filiation or paternity proceeding brought under this Item, except when parental rights have been terminated or the person is deceased.

* * *

(h)(i) Full name of father if the father was the husband of the mother of the child at the time of conception and birth of the child or had not been legally divorced from the mother of the child for more than three hundred days prior to the birth of the child. If the husband of the mother was not the biological father of the child, the full name of the biological father may be recorded in accordance with the provisions of Item (vi) or (vii) of Subparagraph (a). A subsequent successful disavowal action by the husband of the mother or his heirs pursuant to Civil Code Article 189 may later affect this entry and the child's surname. Otherwise, the full name of the father may be recorded as provided by Item (iv) of Subparagraph (a).

(ii) Full name of father if a court has issued an adjudication of paternity.

(iii) In all other cases, the name of the father and other information pertaining to the father shall not appear on the birth certificate and the surname of the child shall be recorded as the maiden name of the mother.

(iv) Nothing in this Subparagraph shall preclude the Department of Social Services, office of family support, support enforcement services from obtaining an admission of paternity from the biological father for submission in a judicial proceeding, or prohibit the issuance of an order in a judicial proceeding which bases a legal finding of paternity on an admission of paternity by the biological father and any other additional showing required by state law.

(v) In the case of a child born of a surrogate birth parent who is a blood relative of a biological parent, the full name of the biological parent who is proven to be the father by DNA testing shall be listed as the father.

(vi) In the case of a child born outside of marriage whose certificate of birth fails to list the full name of the father, the full name of the biological father who is proven to be the father by
DNA testing shall be listed as the father upon submission, by the mother or father of the child born outside of marriage, to the registrar of vital records for the Department of Health and Hospitals of a certified copy of the DNA test results establishing paternity of the biological father.

* * *

D. The state registrar of vital records is hereby authorized to amend an original birth certificate in accordance with a final court order which specifically orders the amendments, provided the court's order complies with existing Louisiana laws.

E.(1) If the child is a child born outside of marriage and the father is known to the mother, she shall complete and sign a paternity information form issued by the Vital Records Registry which shall include the name and date of birth of the child, full name of the father, his mailing address, his street address or the location where he can be found, his date of birth, and the name of his parent or guardian if he is a minor, his state and city of birth, his social security number, and his place of employment, if known. Within fifteen days after the date of admission, the hospital or birthing facility shall forward the form to support enforcement services, office of family support, Department of Social Services, with such information as the mother has provided. If the birth occurred at a location other than a licensed hospital or birthing facility, the form shall be completed at the time the home birth is recorded by the Vital Records Registry and submitted to support enforcement services within fifteen days thereafter. If the natural father has not executed an acknowledgment of paternity, the mother shall sign as the informant unless she is medically unable or mentally incompetent in which case her guardian or legal representative shall sign.

(2) The department shall serve notice on the alleged father that he has been named as the father of the child. If the alleged father is a minor, service shall be made upon his parent or guardian. The notice shall be served by certified mail, return receipt requested. The notice shall include the name of the child and the name of the mother of the child and shall advise the alleged father how the allegation of paternity can be contested. The notice shall also advise the alleged father that he can request that blood tests be conducted, and that the alleged father can sign an acknowledgment of paternity.

(3) Upon receiving the notice, the alleged father shall have ninety days to contest the allegation that he is the father. He shall
do so by advising the department in writing that he is not the father. If the alleged father fails to contest the allegation in writing within ninety days, he shall be presumed to be the father of the child, for support purposes only, and the agency or the custodial parent can use this presumption in an action to seek a support order.

(4) If the alleged father contests paternity at the hearing for support, the court may order blood tests.

(5) If the results of the blood test indicate by a probability of 99.9% or higher that the alleged father is in fact the father of the child, or if the alleged parent fails to appear for the court-ordered blood tests, the court shall rule that he is the father of the child, for purposes of support only, and shall issue an order for support in accordance with state law.

(6) Nothing in this Subsection shall be deemed, construed, or interpreted to create any presumption of legal paternity for any purpose other than support as set forth in this Subsection.

(7) In the event the alleged father is found not to be the father, all costs of the hearing, medical costs, expert witnesses costs, and costs incurred by the alleged father defending himself shall be paid by the party who made the allegations against the alleged father.)