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Family Law - Use of Blood Tests in Actions en Desaveu

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equitable, distribution could have been achieved by considering the two wives as participants in separate communities and as strangers to each other instead of forcing them to contribute to a multi-party community as was done in the instant case.

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FAMILY LAW — USE OF BLOOD TESTS IN ACTIONS EN DESAVEU

Plaintiff brought an action to disavow a child born to his wife during a voluntary separation. Being unable to establish his non-paternity by any other method, he requested that his wife and the child be required to submit to physical examinations involving blood grouping tests which could prove that he could not possibly be the father of the child.[1] This motion was denied in the lower court. On appeal, *held*, affirmed.[2] The Louisiana Civil Code does not authorize the *action en desaveu* based on blood grouping tests. *Williams v. Williams*, 230 La. 1, 87 So.2d 707 (1956).

Article 184 of the Louisiana Civil Code provides that "the law considers the husband of the mother as the father of all children conceived during the marriage."[3] However, this presumption is not absolute, and, in certain circumstances, the husband is allowed to disprove his paternity.[4] When it is clear that the child

1. For a general discussion of the use of evidence obtained through blood tests to disprove paternity, see SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 164-289 (3d ed. 1953); WIGMORE, EVIDENCE § 165 (3d ed. 1940).

2. For convenience of trial, this case was consolidated with another action brought by the plaintiff against his wife for divorce on the grounds of adultery. The court refused to grant the husband a divorce, finding that he failed to establish the adultery of the wife.

On the grounds that he did not have the authority to order anyone to submit to a skin puncture, the trial judge refused to order the tests. Plaintiff contended on appeal that the virtual incorporation of the Discovery Statute of the Federal Rules of Civil Procedure into the Louisiana Revised Statutes beginning 13:3741 gave the court the authority to order such a test. He cited the case of Beach v. Beach, 72 App. D.C. 318, 114 F.2d 479 (1940), which held that such an examination involving blood grouping tests could be ordered under Rule 35(a) of the Federal Rules of Civil Procedure. 28 U.S.C. Rule 35(a) (1948). The Supreme Court did not decide whether or not such a test could be ordered under the Louisiana Revised Statutes 13:3783, but the case was affirmed on the theory that, even if the evidence was obtained through the tests, a disavowal of a child conceived during the marriage could not be based on such evidence under the Louisiana Civil Code.

3. LA. CIVIL CODE art. 184 (1870).

4. For a general discussion of the *action en désaveu*, see Comment, *Presumption of Legitimacy and the Action en Désaveu*, 13 LOUISIANA LAW REVIEW 587 (1953) and 14 LOUISIANA LAW REVIEW 401 (1954); Guillory, *The Action en Désaveu*, 5 TUL. L. REV. 449 (1931).

was conceived during the marriage,[5] the Code provides for a disavowal in two situations: first, when the husband can prove that the wife committed adultery and that she concealed the birth of the child from him,[6] and second, when "the remoteness of the husband from the wife has been such that cohabitation has been physically impossible."[7] The Code provides no other instance in which a child conceived during the marriage can be disowned and even denies the husband the right to disavow by alleging his natural impotence.[8]

There is no previous case in Louisiana in which a disavowal was attempted through the use of evidence obtained from blood grouping tests.[9] In fact, it appears that a husband had never before sought the disavowal of a child conceived during the marriage on any evidence independent of the two instances outlined in the Code.[10] Dicta in several cases has indicated that these two

5. Articles 186 and 187 of the Louisiana Civil Code of 1870 create additional occasions when the *action en désaveu* can be maintained. However, in neither of these articles is the child presumed to have been *conceived during the marriage.* Article 186 allows the husband to disavow a child born less than 180 days after the celebration of the marriage, and Article 187 allows the action when the child is born more than 300 days after the dissolution of the marriage or judicial separation from bed and board.

6. LA. CIVIL CODE art. 185 (1870). There has been a considerable difference of opinion among the French commentators as to the proper interpretation of this article. The older school interprets the article so as to require proof of adultery as well as proof of the concealment of the birth. 2 MARCADE, EXPLICATION DU DROIT CIVIL art. 313, § 1 (8th ed. 1886); 2 TOULLIER, DROIT CIVIL FRANÇAIS nº 812 (4th ed.). This is the view that has been taken by the Louisiana court. See Feazel v. Feazel, 222 La. 113, 62 So.2d 119 (1952); Lejeune v. Lejeune, 184 La. 137, 167 So. 747 (1936).

However, the more recent writers say that the husband should be able to disavow by proving concealment of birth together with any other reliable evidence that he is not the father of the child. 1 COLIN ET CAPITANT, TRAITÉ DE DROIT CIVIL nº 904 (Juillot de la Morandiere's ed. 1953); 2 PLANIOL ET RIPERT, TRAITÉ DE DROIT CIVIL FRANÇAIS nº 804 (2d ed. 1952). See Comment, *Presumption of Legitimacy and the Action en Désaveu,* 14 LOUISIANA LAW REVIEW 401, 409 (1954).

7. LA. CIVIL CODE art. 189 (1870).

8. *Id.* art. 185. Two theories have been advanced concerning the omission of the husband's natural impotence from the instances in which disavowal will be allowed. One view takes the position that at the time the Code was drafted there was no reliable proof of impotence. The other view maintains that the omission was intended as a punishment for the husband who enters the marriage contract without the ability to fulfill one of the major objectives of marriage. Guillory, *The Action en Désaveu,* 5 TUL. L. REV. 449 (1930); LAURENT, PRINCIPES DE DROIT CIVIL nº 367 (2d ed. 1876).

9. Evidence obtained from blood tests has been accepted in many states and in many foreign countries. For a general survey of the use of this type of evidence, see SCHATKIN, DISPUTED PATERNITY PROCEEDINGS 216 *et seq.* (3d ed. 1953).

10. In Feazel v. Feazel, 222 La. 113, 62 So.2d 119 (1952), the husband offered a deposition made by his wife stating that she and her husband had never consummated their marriage. It is believed that this deposition was offered to prove adultery as an adjunct to concealment and was not intended to be independent grounds for the disavowal. The court held that declarations by either or both spouses can-

instances would be considered exclusive.[11] In one case the court said that "the legal presumption . . . can only be *rebutted in the mode* and within the time *prescribed by law.*"[12] (Emphasis added.)

In the instant case the court affirmed its previous dicta and clearly expressed its unwillingness to permit the disavowal of a child conceived during the marriage other than by proof of the wife's adultery accompanied by concealment of the birth of the child, or by proof that the remoteness of the spouses made cohabitation physically impossible. Consequently, even if the husband can clearly show that he is not the father of the child, he will not be permitted to disavow the child conceived during the marriage unless he can prove one of the two situations specifically prescribed by the Code. The practical effect of the decision is that the disavowal of any child conceived during the marriage will be extremely difficult. The "remoteness test" of Article 189 of the Louisiana Civil Code has never been met,[13] and, with transportation continually becoming more rapid, it would appear that the requirements of this test will seldom be satisfied in the future. Article 185 of the Louisiana Civil Code, which prescribes the other instance in which the *action en désaveu* can be maintained, has been given such a strict interpretation by the court that the likelihood of the husband's disavowing a child conceived during the marriage under this article seems equally improbable.[14]

Perhaps the better solution to the problem would have been to order the wife and child to submit to the blood tests and then to admit the evidence obtained from the tests as proof of the

not affect the legitimacy of the child. On this latter point see Tate v. Penne, 7 Mart.(N.S.) 548 (1829); Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892).

11. Feazel v. Feazel, 222 La. 113, 62 So.2d 119 (1952); Dejol v. Johnson, 12 La. Ann. 853 (1857).

12. Dejol v. Johnson, 12 La. Ann. 853, 855 (1857).

13. LA. CIVIL CODE art. 189 (1870). See Lejeune v. Lejeune, 184 La. 837, 167 So. 747 (1936); Switzer v. Switzer, 170 La. 550, 128 So. 477 (1930). See also Harris v. Louisiana Oil Refining Co., 127 So. 40 (La. App. 1930); Vernon v. Vernon's Heirs, 6 La. Ann. 242 (1851).

14. In Lejeune v. Lejeune, 184 La. 837, 167 So. 747 (1936), the court held that disavowal under Article 185 required concealment of the pregnancy as well as concealment of the birth. In Feazel v. Feazel, 222 La. 113, 62 So.2d 119 (1952), the wife left Louisiana and went to Kansas. The baby was born in Kansas and the court held that there was not a concealment of the birth because the wife registered the child as the child of her husband on the public records of the State of Kansas. It would seem the court intended to make disavowal by this method as difficult as possible.

husband's non-paternity.[15] Such a result could have been obtained through the application of an accepted theory of Code interpretation offered by the plaintiff. The principle behind the *action en désaveu* is to permit the disavowal whenever clear and certain proof that the husband is not the father is available.[16] When the Code was written, there were few ways that positive proof that the husband was not the father could be obtained, and the specific rules set out in the Code were necessary to prevent the actual parent from disowning his child. But through advances in medical science, evidence of non-paternity is now available that is clearer and more accurate than the evidence provided by either of the instances prescribed by the Code. Thus the intention of the redactors to limit the disavowal of a child conceived during the marriage to cases where the proof is clear would not be altered by the admission of evidence obtained from blood tests. In fact, the principle would be furthered by the admission of this new type of evidence which was unknown at the time the Code was drafted.

The argument presented by the counsel for the plaintiff was fully in accord with the theory of Code interpretation generally accepted in France and other civilian jurisdictions ever since the contributions of François Geny.[17] The essence of this theory is that it is properly the function of the judge to interpret the law in the manner in which the law probably would have been written had the drafters had the benefit of present day knowledge and had they contemplated present day conditions.[18] Following this approach, the French courts came to admit the possibility of disavowal based on evidence obtained from blood grouping tests even though the articles dealing with disavowal in the French Civil Code are substantially similar to those contained in the Louisiana Civil Code.[19]

The court made no mention of the plaintiff's argument in this regard, apparently feeling that such a change would be a

15. See note 2 *supra*.

16. 2 TOULLIER, DROIT CIVIL FRANÇAIS no 810 (4th ed.)

17. Geny's principal work on this subject is MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF (2d ed. 1932).

18. *Id.* at 287 *et seq.*

19. CODE CIVIL arts. 312-318. See the comprehensive article by Barbier, *L'examen du sang et le role du judge dans les procès relatifs a la filiation*, 47 REVUE TRIMESTRIELLE DE DROIT CIVIL 345 (1949). The use of blood tests has now been specifically authorized in France by legislation. See Loi no 55-934 du 15 juillet 1955.

matter for the Legislature rather than the court.[20] In any event, it is clear that a disavowal of a child conceived during the marriage must be based on one of the fact situations provided in the Code. Therefore, evidence obtained from blood grouping tests, or any other evidence which may prove non-paternity with equal certainty, will be inadmissible in *actions en désaveu* until the Legislature specifically authorizes their use.

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LOCAL GOVERNMENT—MUNICIPAL IMMUNITY FROM TORT LIABILITY—THE NUISANCE EXCEPTION

Plaintiffs sued the City of New Orleans to recover damages for the death of their four-year old son who drowned in a pool of water which was allowed to accumulate in an area maintained by the city as a garbage dump. Plaintiffs alleged that the deceased child had been attracted to the pond by a large number of sea gulls which constantly lined its banks. The city filed an exception of no cause of action based on the theory that a municipality is immune from liability for damages arising ex delicto from its exercise of a governmental function. The trial court maintained the exception and dismissed the suit. On appeal, *held*, exception overruled and case remanded. The immunity of municipalities does not extend to cases in which an attractive nuisance has been created or maintained by the municipality.[1] *Burris v. New Orleans*, 86 So.2d 549 (La. App. 1956), cert. denied, June 11, 1956.

At Anglo-American law, while municipalities are held liable in damages for torts committed by their employees in the exercise of "proprietary" functions, they are immune from liability for torts committed in the exercise of "governmental" functions.[2]

20. In view of the decisions of the Supreme Court in such cases as Feazel v. Feazel, 222 La. 113, 62 So.2d 119 (1952), and Lejeune v. Lejeune, 184 La. 837, 167 So. 747 (1936), it could be said that the real rationale behind the exclusion of the blood test evidence is the desire of the court to prevent the bastardizing of any child conceived during the marriage, despite the fact that the Code provides for the *action en désaveu* under certain circumstances.

1. The court held that under some circumstances a pond may be an attractive nuisance. See Saxton v. Plum Orchards, Inc., 215 La. 378, 40 So.2d 791 (1949); Fincher v. Chicago, R.I. & P. Ry., 143 La. 164, 78 So. 433 (1918). See Comment, 10 LOUISIANA LAW REVIEW 469 (1950).

2. Wysocki v. City of Derby, 140 Conn. 173, 98 A.2d 659 (1953); Woodford v. City of St. Petersburg, 84 So.2d 25 (Fla. 1955); Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947); Millar v. Town of Wilson, 222 N.C. 340, 23 S.E.2d 42 (1942); Tolliver v. City of Newark, 145 Ohio St. 517, 62 N.E.2d 357