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Repository Citation

Robert A. Pascal, *Forum Juridicum: Who Is The Papa? (The Husband in Louisiana; The Paramour in France)*, 18 La. L. Rev. (1958)

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Who Is The Papa?

(*The Husband in Louisiana; The Paramour in France*)

Robert A. Pascal*

Those who are aware of the strictness with which the Louisiana Supreme Court has applied the presumption that the husband of the mother is the father of her child¹ will find either shocking or refreshing, according to their bent of mind, the French judicial willingness not to permit this presumption to prevail against the obvious facts. A number of post-war decisions have refused to apply the presumption in instances in which the mother's paramour had acknowledged the child as his own (without naming the mother, of course) and in which the presumption was later invoked, either by the mother acting without the concurrence of her husband in the effort to establish the child's legitimacy, or by the paramour himself in order to have his own acknowledgment declared null.² By a decision of May 28, 1957, however, the *Cour de Cassation* reduced the presumption's sphere of application even more, declaring that not even the husband of the mother could invoke it in order to claim the child as his own if the husband, the paramour, and the mother were all certain that the child was in fact that of the paramour.³

The decision of May 28, 1957, may prove too much of a departure from the traditional application of the presumption even for matter-of-fact French jurists, largely on the ground that if the husband of the mother wants to accept the child into the

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1. LA. CIVIL CODE art. 184 (1870); FRENCH CIVIL CODE art. 312. Among the Louisiana decisions applying Article 184 are *Eloi v. Mader*, 1 Rob. 581, 38 Am. Dec. 192 (La. 1841); *Succession of Saloy*, 44 La. Ann. 433, 10 So. 872 (1892); *Feazel v. Feazel*, 222 La. 113, 62 So.2d 119 (1952); *Williams v. Williams*, 230 La. 1, 87 So.2d 707 (1956). Among the writings on the application of Article 184, see *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Persons*, 14 LOUISIANA LAW REVIEW 121-26 (1953); *The Work of the Louisiana Supreme Court for the 1955-1956 Term — Persons*, 17 LOUISIANA LAW REVIEW 310-11 (1957); Comment, *Presumption of Legitimacy and the "Action en Desaveu,"* 13 LOUISIANA LAW REVIEW 587-99 (1953) and 14 LOUISIANA LAW REVIEW 401-20 (1954); Note, *Use of Blood Tests in Actions en Desaveu*, 17 LOUISIANA LAW REVIEW 494-98 (1957).

2. For summaries of the jurisprudence and doctrine on this point, see the note by J. Soudé, 1954 Gaz. Pal. 1.D.45-49 and the notes cited in note 3 *infra*.

3. Cass. civ. (1re sect. civ.) 28 mai 1957 (*Duran C. Mouchotte*) D.1958.J.89, note Tallon, and S.1958.J.81, note.

legitimate family that should be his concern.⁴ Whatever its worth, or whatever its fate in future cases of the same kind, the decision does afford us an occasion to reflect comparatively on the two lines of jurisprudence, the French and our own, and to suggest some changes in our law which might make it a better instrument of justice.

A number of decisions of French *cours d'appel* rendered prior to the *Cassation* decision of May 28, 1957, treated the presumption of paternity as rebuttable in some circumstances even though the husband had not disavowed the child.⁵ These decisions seem to have been based on an interpretation of Articles 323 and 325 of the *Code Civil* (essentially the same as Articles 196 and 197 of the Louisiana Civil Code)⁶ implied in a now well known decision of the *chambre des requêtes* of May 6, 1941, to the effect that any time the child does not enjoy the reputation of legitimacy the presumption of legitimate paternity contained in Article 312 of the *Code Civil* (Article 184 of the Louisiana Civil Code) may be overcome by proof to the contrary.⁷ Thus in cases in which the paramour has acknowledged the child, or in which the child has been reared as an illegitimate child, it is not enough to prove maternity and invoke the presumption of legitimate paternity; the actual paternity of the husband of the mother is put at issue. This line of reasoning can be considered

4. Both notes cited in note 3, above, criticize the decision on this ground.

5. See Amiens, 29 nov. 1949, Gaz. Pal. 1950.1.210; Amiens, 29 oct. 1953, Gaz. Pal. 1954.1.339; Amiens, 7 juill. 1955, Gaz. Pal. 1955.2.159; Paris, 8 mai 1947, J.1948.6, note Holleaux.

6. The French Civil Code articles read: "Art. 323. *A défaut de titre et de possession constante, ou si l'enfant a été inscrit, soit sous de faux noms, soit comme né de père et mère inconnus, la preuve de filiation peut se faire par témoins.*

"Néanmoins, cette preuve ne peut être admise que lorsqu'il y a commencement de preuve par écrit, ou lorsque les présomptions ou indices résultant de faits dès lors constants, sont assez graves pour déterminer l'admission."

"Art. 325. *La preuve contraire pourra se faire par tous les moyens propres à établir que le réclamant n'est pas l'enfant de la mère qu'il prétend avoir, ou même, la maternité prouvée, qu'il n'est pas l'enfant du mari de la mère.*"

The Louisiana Civil Code articles read: "Art. 196. If there be neither register of birth or baptism, nor this general reputation, or if the child has been registered under a false name, or as born of unknown parents, also if the child has been exposed or abandoned, or if his condition has been suppressed, the proof of his legitimate filiation may be made either by written or oral evidence."

"Art. 197. Proof against the legitimate filiation may be made by evidence that the plaintiff is not the child of the mother whom he pretends to be his, and the maternity being proved, that he is not the child of the husband of the mother."

7. Cass. req. 6 mai 1941 (Da Re C. Moneta Caglio), D.C.1941.J.108, S.1947.2.82. A husband who sought to establish his paternity of a child born to his wife and registered by the paramour as his own was said to have the right to do so, but subject to the application of Articles 323 and 325 rather than Article 312. See the notes cited in note 3 *supra*.

based exclusively on legislative texts. The decision of May 28, 1957, however, applies not only the implication of Articles 323 and 325 of the *Code Civil* (Articles 196 and 197 of the Louisiana Civil Code), but also the general principle of *good faith*, which would operate to prevent one from claiming the benefit of a legislative text to perpetrate an abuse of the law itself. The husband who is certain he is not the father of the child cannot invoke the rule of law which ordinarily operates to attribute its fatherhood to him. Furthermore, to provide another note of contrast with our own jurisprudence, the *Cour de Cassation* considered the husband's refusal to submit to blood grouping tests evidence of his belief in his non-paternity.⁸

Thus the French jurisprudence has avoided making the presumption of the husband's paternity of his wife's child one which would dictate solutions contrary to the obvious facts. The Louisiana jurisprudence, on the other hand, has required the application of Article 184 of the Louisiana Civil Code (Article 312 of the French Civil Code) once the mother has been shown to be a married woman (1) unless the father or his heirs have disavowed the child,⁹ and at the same time (2) has made it almost impossible for a husband to succeed in an action for disavowal, no matter how inconsistent the conclusions so reached with the known facts.¹⁰ For over a century the unwillingness to label a child an illegitimate has led to decisions which imposed legitimate descent from the husband of the mother on children who never claimed him as father and imposed paternity on husbands in situations in which no geneticist or layman would even

8. An excerpt from the motivations for the decision reversing that of the cour d'appel, though cryptic, may evidence the thought of the Cour de Cassation: "Whereas the decision of the cour d'appel recites 'that the record in the case shows that Mme. Mouchotte affirmed in writing on many occasions her conviction of Duran's paternity; that M. Mouchotte declared himself in agreement with her on this point, that he had sought to disavow the child . . . and discontinued his suit only after becoming reconciled with his wife; that the sincerity of Duran is manifest; and that the spouses Mouchotte, in refusing to submit to the blood grouping test ordered by the judges below, once again evidenced their certitude of the non-paternity of M. Mouchotte'; and whereas the cour d'appel, despite these facts, decided that Art. 312 of the Code Civil permitted M. Mouchotte to claim the legitimate paternity of the child, and in so deciding falsely applied this legislative text; . . . (the decision of the cour d'appel is annulled)."

9. The most extreme cases are *Eloi v. Mader*, 1 Rob. 531, 38 Am. Dec. 192 (La. 1941); and *Succession of Saloy*, 44 La. Ann. 433, 10 So. 872 (1892). For a discussion of these and other cases see Comment, 14 LOUISIANA LAW REVIEW 401, 401-05 (1954).

10. See especially the decision in *Feazel v. Feazel*, 222 La. 113, 62 So.2d 119 (1952), which imposed almost impossible criteria for the proof of adultery and of concealment of pregnancy and birth of the child, in effect rendering disavowal on these grounds most difficult.

suspect him of fatherhood in fact.¹¹ Indeed, in contrast to the attitude of the *Cour de Cassation*, our own jurisprudence has rejected the use of blood grouping tests in paternity cases.¹² The time has come for a rewriting of this aspect of our law.

In the opinion of the writer, the reform of our law on the paternity of a child born to a married woman might very well be based on the following guiding principles:

1. Disavowal by the husband or his heirs should be required absolutely only if the child could have been conceived while the mother and her husband were living as man and wife, that is, were not separated in fact or by judgment.
2. The child conceived by a married woman while living in concubinage with another should be presumed to be the child of the paramour, subject to his right to disavow the child under the same circumstances under which the husband of the mother living with her at the time of its conception could do so.
3. The child conceived by a married woman while separated from her husband in fact or by judgment, and while not living with another in concubinage, should be considered the child of the husband only if he acknowledges it or if he fails to disavow the child within a reasonable time after actual notice of the mother's naming him as its father in the registry of birth or baptism or in a formal act of acknowledgment. In this case, it should be sufficient for the disavowal for the husband to show with reasonable certainty that he had not cohabited with his wife during the period of possible conception.
4. In any case of proven adultery of the wife at the time of possible conception or of an attempt on the part of the mother to hide her pregnancy from her husband, or of conception while the mother and her husband are separated in fact or by judgment, the husband should be allowed to disprove his paternity by blood-grouping tests.

These principles, of course, assume that legitimate status is

11. As in *Eloi v. Mader*, 1 Rob. 581, 38 Am. Dec. 192 (La. 1841); *Succession of Saloy*, 44 La. Ann. 433, 10 So. 872 (1892); *Feazel v. Feazel*, 222 La. 113, 62 So.2d 119 (1952).

12. *Williams v. Williams*, 230 La. 1, 87 So.2d 707 (1956).

not something to be assured a child regardless of injustice to the husband of the mother. The rules of law should presume legitimacy where there is a reasonable and indissoluble doubt as to whether the husband is the father; but there is no need to impose paternity and all its obligations on a man whose non-paternity can be demonstrated beyond any reasonable doubt.