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Private Law: Persons

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THE WORK OF THE LOUISIANA APPELLATE COURTS FOR THE 1978-1979 TERM

A Symposium

[*Editor's Note.* The articles in this symposium discuss selected decisions of Louisiana appellate courts reported in the advance sheets dated July 1, 1978, to July 1, 1979.]

PRIVATE LAW

PERSONS

*Katherine Shaw Spaht**

ALIMONY AFTER DIVORCE—CIVIL CODE ARTICLE 160

In last year's symposium,[1] the author discussed three aspects of alimony after divorce: (1) the constitutionality of its availability only to the wife,[2] (2) when the wife is not *at fault*,[3] and (3) when the wife is *without* sufficient *means*[4] for her support. During the 1979 legislative session, Civil Code article 160 was amended to make alimony available to needy *husbands*, as well as wives.[5] Such a change is consistent with the United States Supreme Court's decision in *Orr v. Orr*.[6] At the same time, article 160 was amended to enumerate the

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1. *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Persons*, 39 LA. L. REV. 657, 659 (1979) [hereinafter cited as *Persons*].

2. *Id.*

3. *Id.* at 663.

4. *Id.* at 670.

5. 1979 La. Acts, No. 72, *amending* LA. CIV. CODE art. 160.

6. 99 S. Ct. 1102 (1979). *See also* Bruner v. Bruner, 373 So. 2d 971 (La. App. 2d Cir. 1979). In *Bruner*, the Second Circuit Court of Appeal stated:

> We hold *Orr v. Orr* . . . should not be applied retroactively. Consequently, alimony which accrued prior to the U.S. Supreme Court's decision will not be affected and this will minimize the hardship caused to those needy former wives who have made expenditures expecting to accrue past due alimony. Mavis is entitled to alimony up to December 14, 1978, the date the court of appeal's judgment holding Mavis' fault precluded her from receiving permanent alimony became final and definitive. Under these circumstances all alimony to which Mavis was entitled had accrued before the March 1979 U.S. Supreme Court decision of *Orr v. Orr* . . . .

Id. at 978.

factors to be considered in determining whether the claimant spouse has insufficient *means*.[7]

"Fault" of the claimant spouse remains an *absolute* bar to a request for alimony after divorce.[8] At the 1979 legislative session, there was a bill introduced[9] to eliminate fault as an absolute bar to a claim for alimony, yet retain consideration of "the relative responsibility of the parties for the breakdown of the marriage" as a relevant factor. The bill was not enacted. To appraise the merits of eliminating "fault" as an absolute bar, it is necessary to examine first several of the court of appeal decisions from last year. Through an analysis of the jurisprudence, it becomes evident that some courts of appeal decisions cannot withstand scrutiny under the legislation or Louisiana Supreme Court decisions. Furthermore, consideration of complicated fact situations and inconsistent judicial opinions occupies the energies of our appellate courts solely because fault is an absolute bar to alimony. Because fault is an absolute bar, it perhaps incorrectly appears that the judiciary is more concerned with legal technicalities, rather than providing support for a needy spouse.

In *Brannon v. Brannon*[10] the wife filed suit for separation from

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7. LA. CIV. CODE art. 160, *as amended by* 1979 La. Acts, No. 72, provides in pertinent part:

> In determining the entitlement and amount of alimony after divorce, the court shall consider the income, means, and assets of the spouses; the liquidity of such assets; the financial obligations of the spouses, including their earning capacity; the effect of custody of children of the marriage upon the spouse's earning capacity; the time necessary for the recipient to acquire appropriate education, training, or employment; the health and age of the parties and their obligations to support or care for dependent children; any other circumstances that the court deems relevant.
>
> In determining whether the claimant spouse is entitled to alimony, the court shall consider his or her earning capability, in light of all other circumstances.

The language of article 160 overrules *Ward v. Ward*, 339 So. 2d 839 (La. 1976), and *Favrot v. Barnes*, 339 So. 2d 843 (La. 1976), which held that the earning capacity of the claimant wife could not be considered in determining whether she was entitled to alimony after divorce.

8. LA. CIV. CODE art. 160, *as amended by* 1979 La. Acts, No. 72, provides in pertinent part: "When a spouse has not been at fault and has not sufficient means for support, the court may allow that spouse, out of the property and earnings of the other spouse, alimony which shall not exceed one-third of his or her income."

9. La. H.B. No. 901, proposed LA. CIV. CODE art. 161, 5th Reg. Sess. (1979).

10. 362 So. 2d 1165 (La. App. 2d Cir. 1978).

In last year's symposium, the following cases concerning fault for purposes of alimony after divorce were cited and discussed: Bruner v. Bruner, 364 So. 2d 1015 (La. 1978); Welch v. Crown Zellerbach Corp., 359 So. 2d 154 (La. 1978); Fulmer v. Fulmer, 301 So. 2d 622 (La. 1974); Brannon v. Brannon, 362 So. 2d 1164 (La. App. 2d Cir. 1978); Bennett v. Bennett, 349 So. 2d 909 (La. App. 1st Cir. 1977); Moon v. Moon, 345 So. 2d

bed and board against her husband on the grounds of cruel treatment and abandonment.[11] The husband reconvened against the wife, seeking a separation on the basis of cruel treatment. Thereafter, the wife filed a suit for divorce alleging adultery by the husband. All three suits were consolidated for trial. The wife was awarded a divorce on the grounds of the husband's adultery but was denied alimony after divorce because of her fault in causing the separation. As authority for its legal conclusion, the court analogized the facts to those in *Thomason v. Thomason*:[12] "The *Thomason* case is analogous to the facts here presented for the reason that in neither case had there been a prior adjudication of fault and in the initial proceedings aimed at dissolution of the marriage the trial court made an adjudication of mutual fault."[13] However, it seems the analogy is inappropriate. In *Thomason* the respective spouse's fault constituted grounds for divorce. In *Brannon* the wife was guilty of cruel treatment which is *only* grounds for separation; and the husband was guilty of adultery, grounds for *divorce*.

More apposite as authority and also cited by the court was *Smith v. Smith*.[14] In *Smith* the wife had obtained a divorce on the grounds of adultery but nonetheless was required to prove her own lack of fault to claim alimony after divorce.[15] Relying on *Smith*, the court in *Brannon* concluded, "In the event the plaintiff-wife is guilty of fault, she is not entitled to alimony even though she is entitled to

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168 (La. App. 3d Cir. 1977); Smith v. Smith, 216 So. 2d 391 (La. App. 3d Cir. 1968). *See Persons, supra* note 1.

Other cases this term not included in the text discussion were Brocato v. Brocato, 369 So. 2d 1083 (La. App. 1st Cir.), *cert. denied*, 371 So. 2d 1341 (La. 1979); Laurent v. Laurent, 369 So. 2d 476 (La. App. 4th Cir.), *cert. denied*, 371 So. 2d 1343 (La. 1979); Martin v. Lopez, 367 So. 2d 84 (La. App. 4th Cir. 1979).

11. LA. CIV. CODE art. 138.

12. 355 So. 2d 908 (La. 1978). In *Thomason*, the wife sought a divorce on the basis of the conviction and sentence of her spouse to imprisonment at hard labor; the husband reconvened for divorce on grounds of the wife's adultery. After abrogating the doctrine of recrimination in divorce litigation, the Louisiana Supreme Court affirmed a lower court's finding of mutual fault, and awarded the wife a divorce. However, the wife was denied alimony on the basis of her *mutual* fault.

13. 362 So. 2d at 1168.

14. 216 So. 2d 391 (La. App. 3d Cir. 1968).

15. The rationale of the judge's ruling is that if the wife is granted a divorce on the grounds of adultery, the husband cannot contend she is guilty of fault barring alimony.

> We think the trial judge was in error.
>
> . . . .
>
> We see nothing in our construction of Article 160 which is absurd or which is inconsistent with the traditional principle of our law that only the wife who has not been at fault shall be entitled to demand alimony after divorce.

Id. at 392-93.

a divorce because of her husband's adultery."[16] Yet, *Smith* was a case decided well before the Louisiana Supreme Court's decision in *Fulmer v. Fulmer*,[17] which held that a determination of fault at the separation proceedings was conclusive of the issue of fault for purposes of alimony after divorce. The *Smith* decision was also prior to *Thomason*, in which the supreme court made the following statement in a footnote:

> In Fulmer v. Fulmer, we held that the determination of fault in a separation proceeding is conclusive of pre-separation fault and cannot be relitigated. *To the same effect, determination of fault in a proceeding for immediate divorce is conclusive for purposes of permanent alimony following divorce.* Thus, neither party in the instant suit would be entitled to alimony.[18]

Thus, it is reasonable to conclude that *Smith* was overruled by the language of *Fulmer* and *Thomason*.[19]

In *Bell v. Bell*[20] the Second Circuit Court of Appeal again concluded that the wife who had obtained a divorce from her husband on the grounds of adultery was not relieved of proving her lack of fault for purposes of alimony after divorce.[21] *Smith* was cited as authority. To distinguish statements made in *Fulmer*[22] and *Thomason*[23] regarding determination of fault in a divorce proceeding, the court emphasized that the wife in *Bell* had not requested alimony in her suit against the defendant for divorce. The distinction is tenuous; in *Fulmer*, where fault was adjudicated for purposes of separation from bed and board, there was no present claim of the wife for alimony after divorce. Probably in recognition of the questionable distinction in facts, the court concluded that *Smith* had been unaffected by *Fulmer* and *Thomason*: "*Smith* . . . was discussed with approval in *Bruner*, . . . which was a later decision than *Fulmer* . . . and *Thomason*. . . . We are therefore of the opinion the rule of *Smith* . . . is viable and is applicable in this situation."[24] *Smith* was discussed approvingly in *Bruner v. Bruner*[25] as authority for the proposition that "for the wife to be entitled to post-divorce alimony our law requires

16. 362 So. 2d at 1168.
17. 301 So. 2d 622 (La. 1974).
18. 355 So. 2d at 912 n.8 (emphasis added) (citation omitted). *Thomason* involved mutual fault.
19. For further discussion, *see Persons*, *supra* note 1, at 667-68.
20. 368 So. 2d 777 (La. App. 2d Cir. 1979).
21. *Id.* at 780.
22. 301 So. 2d at 629.
23. 355 So. 2d at 912 n.8.
24. 368 So. 2d at 780.
25. 364 So. 2d 1015 (La. 1978).

that she be free from fault both prior to the separation judgment and prior to the divorce."[26] Whether citing *Smith* for the foregoing proposition constitutes supreme court approval of the legal result in *Smith* is difficult to determine. If it does, the decisions in *Fulmer*, *Thomason*, and *Bruner* seem inconsistent.

The author speculated in last year's symposium[27] about the effect of a judgment of separation awarded to a spouse less at fault than the other. By invoking the doctrine of comparative rectitude, which compares the spouses' respective faults, the spouse less at fault should be awarded the separation. It was the opinion of the author that comparative rectitude had been neither legislatively overruled in separation suits[28] nor judicially abrogated in divorce suits.[29] The purpose of Civil Code article 141, overruling recrimination as a defense in separation suits, was remedial. The article's purpose was to provide relief for a spouse who could not obtain a separation because of the application of the doctrine of recrimination. That the doctrine of comparative rectitude has also been overruled does not necessarily follow. Article 141 was unnecessary as a remedy in separation suits in which the faults of the spouses were not equal in degree or seriousness. If a separation judgment were rendered on the basis of invoking comparative rectitude, arguably the successful spouse should be considered *not* at fault for purposes of alimony after divorce. Language to support such a conclusion can be found in *Fulmer*. Additionally, the same result obtains in a somewhat analogous situation, the application of comparative negligence statutes. The most popular comparative negligence system permits recovery if the plaintiff's negligence was not equal to or greater than that of the defendant.[30] In light of Planiol's expression that the

26. *Id.* at 1019.

27. *Persons*, *supra* note 1, at 668.

28. LA. CIV. CODE art. 141, *as amended by* 1976 La. Acts, No. 495, provides: "A separation from bed and board shall be granted although both spouses are mutually at fault in causing the separation. In such instances, alimony pendente lite may be allowed but permanent alimony shall not be allowed thereafter following divorce."

29. Thomason v. Thomason, 355 So. 2d 908 (La. 1978). By discussing the respective faults of the spouses in *Thomason*, the implication was that it is proper for a court to weigh and compare the offenses of the spouses in determining against whom the judgment shall be rendered.

> We do not agree that the commission of adultery is the greater fault, *under all circumstances*. As with nearly all absolutes, such a rule is both unnecessary and unreasonable. To the extent that *J.F.C. v. M.E.*, . . . and *Abshire v. Hanks*, . . . stand for that proposition, they are overruled.
>
> We cannot say from the record before us that Mrs. Thomason's having taken up residence with another man nine months after her husband was incarcerated is any more serious than his having committed a robbery.

Id. at 911.

30. *See, e.g.*, COLO. REV. STAT. § 13-21-111 (1973); WIS. STAT. § 895.045 (1966).

philosophical source of article 160's concern with fault[31] is the principle embodied in article 2315[32] and the legislature's enactment of a comparative negligence statute in 1979,[33] the analogy is apt and in accord with at least some of the current notions of comparative fault.

Despite the foregoing rationale, the First Circuit Court of Appeal concluded that article 141 abrogated not only the doctrine of recrimination, but also that of comparative rectitude. In *Brocato v. Brocato*[34] the court stated: "We doubt very seriously that the legislature by the adoption of Article 141 in 1976 had in mind the technical distinction between the theory of recrimination and the theory of comparative rectitude and more particularly the weighing process required of the court under the latter theory."[35] The court's conclusion concerning comparative rectitude is probably *dictum*; based upon the evidence, the spouses were apparently guilty of "equal"

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31. 1 M. PLANIOL, CIVIL LAW TREATISE, pt. 1, no. 1259, at 696-97 (11th ed. La. St. L. Inst. trans. 1959). Planiol states:

> The community of life permitted the spouse without means to share the welfare of the other. Suddenly through no fault of the spouse in question, he or she finds himself or herself devoid of resources and plunged into poverty. It is manifestly in such a case as this that the guilty party should be made to bear the consequences of his wrong act.

32. LA. CIV. CODE art. 2315 provides in pertinent part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

33. 1979 La. Acts, No. 431. Louisiana's comparative negligence statute differs from those cited in note 30, *supra*. Under Act 431, Civil Code articles 2103 and 2323 were amended to read as follows:

> Art. 2103. When two or more debtors are liable in solido, whether the obligation arises from a contract, a quasi-contract, an offense, or a quasi-offense, the debt shall be divided between them. If the obligation arises from a contract or a quasi-contract, each debtor is liable for his virile portion. If the obligation arises from an offense or a quasi-offense, it shall be divided in proportion to each debtor's fault.
>
> A defendant who is sued on an obligation which, if it exists, is solidary may seek to enforce contribution, if he is cast, against his solidary co-debtor by making him a third party defendant in the suit, as provided in Article 1111 through 1116 of the Code of Civil Procedure, whether or not the third party defendant was sued by the plaintiff initially, and whether the defendant seeking to enforce contribution if he is cast admits or denies liability on the obligation sued on by the plaintiff.
>
> Art. 2323. When contributory negligence is applicable to a claim for damages, its effect shall be as follows: If a person suffers injury, death or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the claim for damages shall not thereby be defeated, but the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death or loss.

34. 369 So. 2d 1083 (La. App. 1st Cir.), *cert. denied*, 371 So. 2d 1341 (La. 1979).

35. *Id.* at 1086.

fault.[36] In addition to the rationale offered by the court, its decision can be sustained on the basis that comparative rectitude was developed *solely* to ameliorate the doctrine of recrimination. If the doctrine of recrimination is legislatively abrogated, there is no basis for further application of the doctrine of comparative rectitude.

Although the courts of appeal decisions, reflecting their concern with the legal technicalities of fault, appear to support elimination of fault as an absolute bar, there are more persuasive arguments. Preoccupation with fault for purposes of alimony after divorce was based upon the principle that whatever act of man that causes damage to another obliges him by whose fault it happened to repair it.[37] Historically, alimony was an indemnity awarded to the spouse who, through no fault of his own, had been wronged or damaged by the other.[38] Current notions of the foundations of the alimony obligation do not correspond to its historical basis.[39] Therefore, if one considers alimony as "socio-economic legislation"[40] which provides support for those in need by exacting it from those who have provided similar maintenance in the past,[41] then fault should not be a condition to its award.

With increased knowledge about the various causes of failure of a marriage, a finding of fault on the part of only one spouse does not accord with reality; rarely does a marital relationship dissolve because one spouse alone was at fault. Furthermore, fault has become an economic issue because of *Fulmer* and its progeny; it is litigated in suits for separation from bed and board. Accusations concerning the wrongdoing of the other spouse have become financially imperative, the result being an unfortunate focus on the separation proceedings. A spouse frequently cannot afford to forego the opportunity to accuse and prove the other guilty of serious fault. By making separation fault an economic issue, the legislative policy to encourage reconciliation after a separation judgment[42] is under-

36. "It is difficult to determine which of the above acts of misconduct on the part of one caused or brought on the wrongful and retaliatory conduct of the other." *Id.* at 1087.

37. LA. CIV. CODE art. 2315.

38. See note 31, *supra.*

39. In *Loyacano v. Loyacano*, 358 So. 2d 304 (La. 1978) (on original hearing), Justice Dennis described alimony after divorce as follows: "However, it would appear that the underlying practical reason for alimony is to provide support for those who need it, with a minimal amount of social dislocation, by extracting it from those who have provided similar maintenance in the past." *Id.* at 308 n.12.

40. Justice Barham described alimony after divorce as socio-economic legislation in *Montz v. Montz*, 253 La. 897, 907, 221 So. 2d 40, 44 (1969) (dissenting opinion).

41. LA. CIV. CODE arts. 119-20.

42. LA. R.S. 9:302 (Supp. 1977). Judge Beer has had occasion to comment on the

mined. It is unreasonable to expect spouses, after making public accusations about each other, to reconcile their differences. The French, who originally considered alimony as a type of indemnity, have eliminated fault entirely from alimony considerations.[43] If the legislature is reluctant to eliminate fault entirely, a compromise suggestion would be its elimination as an absolute bar to alimony and the retention of fault as a discretionary factor.

PRESUMPTION OF PATERNITY—CIVIL CODE ARTICLE 184

The presumption that the husband of the mother is the father of a child born or conceived during marriage[44] continues to be assaulted by the jurisprudence. In *Warren v. Richard*[45] and *Succession of Mitchell*,[46] the Louisiana Supreme Court admitted evidence establishing biological paternity even though the child was conclusively presumed under state law to be the issue of another man. In *Warren* the court relied upon a series of United States Supreme Court decisions[47] as compelling the admission of evidence[48] of biological paternity. The legislative history of Civil Code article 198[49] was relied upon by the court in *Mitchell* to permit the legitimation by subsequent marriage of children presumed those of the husband of the mother, thus legitimate. In both cases the court confused two distinct, yet interrelated, processes described by this author elsewhere[50] as *filiation* and *classification*.

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judiciary's preoccupation with fault and to urge its elimination in Hingle v. Hingle, 369 So. 2d 271, 272 (La. App. 4th Cir. 1978) (Beer, J., concurring); Dixon v. Dixon, 357 So. 2d 856, 858 (La. App. 4th Cir. 1978) (Beer, J., concurring); Clary v. Clary, 341 So. 2d 628, 629 (La. App. 4th Cir. 1977) (Beer, J., concurring).

43. C. CIV. arts. 278 to 280-1. These articles are described in Audit, *Recent Revisions of the French Civil Code*, 38 LA. L. REV. 747, 776 (1978). See note 42, *supra*.

44. LA. CIV. CODE art. 184 provides: "The husband of the mother is presumed to be the father of all children born or conceived during the marriage."

45. 296 So. 2d 813 (La. 1974).

46. 323 So. 2d 451 (La. 1975).

47. 296 So. 2d at 816-17, *citing* Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar. and Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

48. [In *Warren*,] [t]he Supreme Court granted certiorari and received a record which contained by way of relevant evidence (1) a birth certificate and prior tutorship proceedings on behalf of the child, both of which indicated that the child was the biological issue of decedent, and (2) affidavits alleging that the child's mother was married to a man other than the decedent at the time the child was born.

Spaht & Shaw, *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59, 73 n.37 (1976).

49. LA. CIV. CODE art. 198, *as amended by* 1979 La. Acts, No. 607, provides: "Illegitimate children are legitimated by the subsequent marriage of their father, and mother, whenever the latter have formally or informally acknowledged them as their children, either before or after the marriage."

50. Spaht & Shaw, *supra* note 48.

Filiation, for purposes of this article, is defined as "*the act of fixing paternity*, that is, of identifying a specific man as the biological father of a specific child."[51] Consequently, filiation's main concern is with proof: what sort of evidence is required to prove the identity of the father to the satisfaction of the trier of fact. The mechanism created by law as a solution to problems of proving legitimate filiation and as a means of avoiding clumsy case-by-case adjudication was the presumption contained in article 184.[52] In summary, filiation has as its purpose the identification of a father-child relationship existing between two specific persons.

Classification, on the other hand, is defined as "*the process of arranging persons in, or assigning persons to, either the class of legitimate children or the class of illegitimate children.*"[53] As previously stated by this author, "[t]he purpose of classification is to provide a vehicle for regulation of the parent-child relationship, that is, for identifying the rights and obligations which parents incur by the birth of their children. . . . It may be said, then, that the importance of classification derives from its *effects*, that is, the legal consequences which the legislator chooses to attach the status."[54] Classification is made "according to a three-step *method* prescribed by the Civil Code: (1) identify the mother, (2) identify the father, (3) determine date of conception."[55] Filiation and classification are obviously interrelated in that identification of the father is *one* step in the codal method for classification of children. Filiation, which fixes paternity, is precedent to and has an effect on classification.

The distinction is important because what has concerned the United States Supreme Court constitutionally is not the filiation process, but the effects of the classification as either legitimate or illegitimate. Yet, in *Warren* and in *Mitchell*, the effects of classification were not at issue; the children were not deprived of rights because they were illegitimate. The children in both cases were legitimate. At issue was the process of filiation imposed upon the child by state law. In both cases, following prior jurisprudence, the court found that the children were not entitled to claim certain rights because the alleged biological father was not, *in the eyes of the law*, the father.

The impact of both *Warren* and *Mitchell* was to create problems in application, because the conclusiveness of the presumption of article

51. *Id.* at 63.
52. See note 44, *supra*.
53. Spaht & Shaw, *supra* note 48, at 62.
54. *Id.*
55. *Id.* at 63.

184 was destroyed without being replaced by a substitute standard for proving paternity. After examining both decisions, it is suggested that the Louisiana Supreme Court implicitly held, in startling contrast to prior jurisprudence,

> (1) that a class of persons, undefined but certainly including persons other than the husband or his heirs, may rebut the presumption of Article 184, (2) without any apparent time limits within which they must act, (3) by meeting an undefined standard of proof which is in any event less rigorous than that required for an action *en desaveu*.[56]

As was predicted by this author previously, "[a] logical extension of [*Warren* and] *Mitchell* would open [an] alternative avenue of filiation (1) to any interested party (2) in any situation in which the existence of a father-child relationship is pertinent."[57]

In *Interest of Poche*[58] a child presumed that of the husband of the mother under article 185[59] was allowed to recover support from her biological father. The proof offered of biological paternity was the mother's testimony, defendant's malpractice suit naming the child as his, his attendance at her baptism, his acknowledgment of the daughter in depositions and interrogatories, his tendering of child support payments, and his payment of medical and hospital bills. Acknowledging no direct authority, only a developing trend, Judge Garrison quoted the following language from *Warren*:

> It was in reliance upon these U.S. Supreme Court decisions that the Louisiana Supreme Court determined in *Warren v. Richard*... that it was not necessary to determine to which class of illegimate filiation the child belonged. It sufficed to simply determine that the child was in fact the biological child of the alleged father. The fact that the law considered the child to be the legitimate child of another will not alter the result and cannot deprive her of a right which illegitimate children generally may have . . . .[60]

The judiciary in *Warren*, *Mitchell*, and *Poche* recognized that the presumption existed and that, until disavowed by the husband of the mother, the child could be considered legally the child of one father and biologically the child of another. Yet, in the Louisiana Supreme Court decision of *Tenneco Oil Co. v. Houston*,[61] in a concur-

56. *Id.* at 78.

57. *Id.* at 79.

58. 368 So. 2d 175 (La. App. 4th Cir.), *cert. denied*, 370 So. 2d 577 (La. 1979).

59. LA. CIV. CODE art. 185 provides in pertinent part: "A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage."

60. 368 So. 2d at 176-77.

61. 372 So. 2d 1194 (La. 1979).

sus proceeding to determine ownership of mineral royalties, evidence was introduced to establish a biological father-child relationship, resulting in a rebuttal of the presumption of paternity under article 184. The children were born during the existence of a legal marriage, the result of an adulterous connection of their mother with a man other than the husband. Subsequent to their birth, the mother married the biological father of her children without divorcing her husband. The court concluded that the children were *illegitimate* because they were born of an adulterous connection. Issues raised by the facts, although not discussed in the majority opinion,[62] included the following: the good or bad faith of the second husband, civil effects in favor of the good faith putative spouse and children of the marriage,[63] legitimation of the children by the subsequent putative marriage of parents,[64] jurisprudence holding that the presumption of paternity under article 184 applies to the legal husband when a second marriage is contracted in bad faith,[65] and constitutional issues concerning discrimination in succession law between legitimate and illegitimate children.[66] All of the issues mentioned, except the last, were raised in the brief by counsel representing the children. The effect of *Tenneco Oil Co.* is more far-reaching than its predecessors, since in *Warren* and *Mitchell* the court did not consider the presumption of paternity of the husband of the mother rebutted *legally* by evidence establishing different biological paternity. Even though *Tenneco Oil Co.* will be cited in the future as a significant property law decision,[67] its import for Louisiana family law is a change in the rules by which paternity is fixed.

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62. Some of the issues mentioned are discussed in the dissenting opinion authored by Justice Tate. 372 So. 2d at 1196-97.

63. LA. CIV. CODE arts. 117-18.

64. LA. CIV. CODE art. 198. *See also* R. PASCAL & K. SPAHT, LOUISIANA FAMILY LAW COURSE 330 (2d ed. 1979).

65. Burrell v. Burrell, 154 So. 2d 103 (La. App. 1st Cir. 1963).

66. *See, e.g.*, Succession of Thompson, 367 So. 2d 796 (La. 1979); Succession of Robins, 349 So. 2d 276 (La. 1977). *See also* Note, *All in the Family: Equal Protection and the Illegitimate Child in Louisiana Succession Law*, 38 LA. L. REV. 189 (1977) (cited in *Tenneco Oil Co.*).

67. Writs were granted in *Tenneco Oil Co.* to consider the correctness of the holding of the court of appeal that all the claimants traced their title back to a common author; *relying* upon Pure Oil Co. v. Skinner, 294 So. 2d 797 (La. 1974), the appellate court found that "proof of a more ancient title derived from a common author in title is not proof of ownership, that is, title good against the world, but merely proof of better title." 372 So. 2d at 1195, *quoting* Tenneco Oil Co. v. Houston, 364 So. 2d 1056 (La. App. 2d Cir. 1978). The property issue was avoided by a finding that all of the claimants did *not* trace title back to a common author because the Harp group of claimants were illegitimate.

ADOPTION—CONFIDENTIALITY OF RECORDS

Confidentiality of adoption records has had a varied legislative history. The emphasis of policy concerns surrounding restricted access to adoption records has shifted through the years from protection of the child and adoptive parents from contact with the biological parents[68] to protection of biological parents from contact with the child.[69] In 1977 the statute governing the opening of the sealed package which contains the original birth certificate and the certificate of the decree of adoption was amended[70] to allow the adopted child access only "for compelling reasons and only to the extent necessary to satisfy such compelling necessity."[71] Presumably, the amendment restricted access by the adopted child in an effort to insulate the parents from later discovery by the child. Furthermore, to accomplish this policy, the legislature amended the provision in 1978 to authorize the appointment of a curator ad hoc for the purpose of determining the extent to which access to the records may be necessary.[72] In the same year, the legislature mandated retroactive application of the statute.[73]

In examining the concern for protection of the parents' identity from the child, it is apparent that the amendment was intended to promote the surrender of children for adoption. This result would most frequently occur in cases of infant children born out of wedlock. With abortion as a legal and sometimes uncomplicated alternative[74] to the birth of an illegitimate child, insulating the biological parent from future contact with the child could make adoption a more attractive alternative. Judge Redmann rather accurately described the legislation as the product of the anti-abortion, pro-

68. LA. R.S. 40:81 (Supp. 1978); 1950 La. Acts, No. 316, § 11; 1950 La. Acts, Ex. Sess., No. 2, § 1; 1926 La. Acts, No. 228, §§ 2 & 4. For a discussion of the legislative history of confidentiality of adoption records, *see* Kirsch v. Parker, 375 So. 2d 693, 694 n.2 (La. App. 4th Cir. 1979).

69. LA. R.S. 40:81(A) (Supp. 1978) provides in pertinent part: "This sealed package may be opened only on the order of a competent court either upon its own motion, or upon the demand of the adopted child or the adoptive parent, or the state registrar, for compelling reasons and only to the extent necessary to satisfy such compelling necessity."

70. 1977 La. Acts, No. 659, *amending* LA. R.S. 40:81 (Supp. 1976).

71. LA. R.S. 40:81 (Supp. 1976), *as amended by* 1977 La. Acts, No. 659.

72. LA. R.S. 40:81(A) (Supp. 1977), *as amended by* 1978 La. Acts, No. 450, § 2, provides in pertinent part: "In satisfying the requirement that information shall be revealed only to the extent necessary to satisfy the compelling necessity shown, the court is authorized to use the services of a curator-ad-hoc appointed pursuant to Article 5091.2 of the Louisiana Code of Civil Procedure."

73. 1978 La. Acts, No. 450, § 2, *amending* LA. R.S. 40:80 (Supp. 1976).

74. *See* Roe v. Wade, 410 U.S. 113 (1973).

adoption forces.[75] Despite what appear to be the most laudable of goals—*i.e.*, encouraging adoption, discouraging abortion—the statute as amended presents problems in its application.

In *Massey v. Parker*[76] the Louisiana Supreme Court applied the statute retroactively to a suit which had already been tried. The child who had been adopted in 1947 sought court-ordered access to the sealed package containing his original birth certificate. Amici curiae briefs were filed on behalf of Associated Catholic Charities of New Orleans, Inc.; Adoptive Couples Together, Inc.; and New Orleans Right to Life Association.[77] In interpreting the statute, as amended, the court opined, "[t]he legislature has indicated that, even when a 'compelling necessity' is found, there are other factors which must be considered in determining to what extent information contained in sealed records will be disclosed."[78] Recognizing that the right to inherit from biological parents[79] may constitute a compelling reason, the court concluded that the reason is only compelling if there are present inheritance rights. To determine whether there are such inheritance rights, there is no compelling necessity for the *child* to see the sealed records, "but there is a compelling reason for *the court* to examine the records."[80]

In *Massey* the court remanded the case for the appointment of a curator ad hoc to examine the sealed records and assist the court in determining whether "there are any inheritance rights which presently exist."[81] If there are, "then the court shall have to determine a means by which plaintiff's rights may be assured, giving full consideration to protecting the confidentiality which may have been guaranteed to the blood parent or parents."[82] This language from the decision reflects a sensitivity in the balancing of the rights and interests of both the biological parents[83] and the adopted child.[84] Although not mentioned specifically, the court may have also been

75. Kirsch v. Parker, 375 So. 2d 693, 694 (La. App. 4th Cir. 1979).
76. 369 So. 2d 1310 (La. 1979).
77. *Id.*
78. *Id.* at 1314.
79. LA. CIV. CODE art. 214.
80. 369 So. 2d at 1314 (emphasis added).
81. *Id.* at 1315.
82. *Id.*
83. *See* Comment, *Confidentiality of Adoption Records: An Examination*, 52 TUL. L. REV. 817, 832-35 (1978) (discussing the possibility of the biological parents' constitutional right to privacy and, if such a right exists, its "knowing" waiver).
84. LA. CIV. CODE art. 214. For a discussion of confidentiality of adoption records, *see* Comment, *supra* note 83. The author of the Comment explores the adopted child's right or psychological need to know the identity of his biological parents and whether the need to know is "good cause." *Id.* at 845-52.

considering the effects of such litigation and subsequent revelations upon the adoptive parents.

In the dissenting opinion authored by Justice Tate, problems in the use of a curator ad hoc to determine the extent necessary to open the sealed records were examined. The curator, often perfunctorily appointed at a low fee, must determine "*at a given point in time*"[85] whether the child has any *present* inheritance rights from his biological parents. If there are present inheritance rights, the curator must determine what they are, which may also be difficult in light of the effects of recent constitutional decisions upon Louisiana's succession law.[86] If there are no present inheritance rights, presumably the child must bring suit periodically so that the issue may be reinvestigated to "vindicate his inheritance rights protected for him by our law."[87] According to Justice Tate,

> [T]he compelling need of the child to know his own parents, both for economic reasons of inheritance and for the *emotional sense of wholeness with the past* to which all individuals should be entitled, will always outweigh the interest of the blood parents in hiding their parentage from the child.[88]

A recent Fourth Circuit Court of Appeal decision refused to retroactively apply *Massey* or the amended statute to a child surrendered for adoption in 1947 at the age of three. The child was seeking access to her original birth certificate. The rationale of the court of appeal in *Kirsch v. Parker*[89] was that the 1978 legislation, making the provisions of the statute governing access to the adoption records retroactive, did not apply to the adoption of a three-year-old child. According to the court, the older child had already had "a significant history of conscious life before its adoption";[90] and, at the time the plaintiff child was adopted, there was a "lack of sealing against the parties."[91] As additional justification for the rationale of *Kirsch*, Judge Redmann concluded that to interpret the statute as retroactive would result in a denial of liberty without due process of law[92] and a denial of equal protection of the law.[93] Judge Redmann in dicta opined that the liberty involved was

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85. 369 So. 2d at 1316 (Tate, J., dissenting).

86. *See, e.g.*, Trimble v. Gordon, 430 U.S. 726 (1976); Succession of Thompson, 367 So. 2d 796 (La. 1979); Succession of Robins, 349 So. 2d 276 (La. 1977).

87. 369 So. 2d at 1316 (Tate, J., dissenting).

88. *Id.* (Emphasis added.)

89. 375 So. 2d 693 (La. App. 4th Cir. 1979).

90. *Id.* at 697.

91. *Id.*

92. U.S. CONST. amend. XIV; LA. CONST. art. I, § 2.

93. U.S. CONST. amend. XIV; LA. CONST. art. I, § 3.

> the freedom to relive one's past, to return to childhood scenes, to retrace one's consciously lived history, in addition to the liberty *perhaps claimable* by all adoptees to know the identity of one's parents and blood family tree and to have access to state-kept vital statistics records of one's self and one's family that are open to every non-adopted person.[94]

The language utilized by Judge Redmann concerning a constitutional right of adoptees to trace their identity is reminiscent of that used by Justice Tate in his dissenting opinion in *Massey*.

Consistently, the courts have recognized that the determination of present inheritance rights is a "compelling reason." Accepting the desirability of the policy sought to be accomplished in the "pro-adoption, anti-abortion legislation,"[95] the policy could be further strengthened by eliminating the child's right to inherit from his biological parents.[96] The right of the child to inherit did not exist before 1948,[97] and it is unnecessary as a protection for the adopted child. If adopted, the child is considered as a legitimate child and forced heir of the adoptive parents. He is not being denied inheritance rights; in fact, he enjoys more generous inheritance rights than other children. With increasing speculation as to the constitutionality of Louisiana's succession laws,[98] it has become more difficult to determine the extent of an illegitimate's succession rights. As difficulties in proving the paternity of an illegitimate child who was adopted are presented, the determination of inheritance rights of an adopted child will become increasingly burdensome. Eliminating the right to inherit from the biological parents would remove it as a "compelling reason" for access to confidential adoption records. Instead, proof of some strong psychological need to discover one's identity[99] or medical necessity would be required as proof of a "compelling reason." In the case of medical necessity, it would be appropriate and not too difficult for a curator ad hoc to determine the extent to which access to the records should be allowed to satisfy the compelling reasons.[100]

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94. 375 So. 2d at 699 (emphasis added).

95. *Id.* at 694 n.2.

96. LA. CIV. CODE art. 214.

97. For a legislative history of Civil Code article 214, which allows adopted children the right to inherit from their biological parents, *see* 1972 COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA art. 214 (J. Dainow ed.). The statutory language giving adopted children the right to inherit was added to article 214 by Act 454 of 1948.

98. See note 86, *supra*.

99. See note 84, *supra*.

100. *See* Comment, *supra* note 83, at 844-45. A suggested approach of the author of the Comment is that "[m]edical information concerning biological parents and adoptees should be disclosed to adoptees on request with identifying information about the biological parents deleted." *Id.* at 853.

If discovering one's identity is alleged as the "compelling reason," substantial proof should be required of the "psychological need." A repeal of the inheritance rights accorded an adopted child to the estate of his biological parents is consistent with the policy of protecting the anonymity of the parents and terminating *permanently* the relationship of parent-child which existed by nature.