

Louisiana's Presumption Paternity: The Bastardized Issue

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those congressional goals.⁸¹ As advocated in *Allen*⁸² the Court should emphasize goals rather than means, since "implying a cause of action may increase the likelihood of compliance with the statute by giving victims incentive to assist in its enforcement and potential violators, faced with an additional penalty, added reason to conform their conduct to it."⁸³

Walter Joseph Hryszko

LOUISIANA'S PRESUMPTION OF PATERNITY:
THE BASTARDIZED ISSUE

A concursus proceeding was brought by Tenneco Oil Company to determine the ownership of oil and gas royalties owed under certain mineral leases. The trial court ruled that the Houstons, possessors of the property, were entitled to payment of the royalties in dispute. The Second Circuit Court of Appeal affirmed,¹ interpreting article 3654(1) of the Louisiana Code of Civil Procedure²

81. See *Allen v. State Board of Elections*, 393 U.S. at 556-57; *J. I. Case Co. v. Borak*, 377 U.S. at 432-33. If Congress had explicitly indicated in the legislation that the courts were to determine the means of effectuating the goals established by the legislative branch, then the Court's implication of a private cause of action would not violate the doctrine of separation of powers. In fact, if Congress did leave this duty to the courts, the separation of powers doctrine would be violated if the courts were to shirk this responsibility. If the courts do err and imply a private cause of action when none was intended by the enactment, Congress may overrule the courts by denying the existence of such an implied action. Congress may also prevent judicial interference of an enforcement scheme by expressly denying private actions in the statute. 49 U.S.C. § 5(11) (1976) (remedies conferred by statute are exclusive, Interstate Commerce Act, part I).

82. 393 U.S. at 556-57. See notes 30-31, *supra* and accompanying text.

83. Note, *supra* note 2, at 291.

1. *Tenneco Oil Co. v. Houston*, 364 So. 2d 1056 (La. App. 2d Cir. 1978).

2. LA. CODE CIV. P. art. 3654 provides:

When the issue of ownership of immovable property or of a real right is presented in an action for a declaratory judgment, or in a concursus, expropriation, or similar proceeding, or the issue of the ownership of funds deposited in the registry of the court and which belong to the owner of the immovable property or of the real right is so presented, the court shall render judgment in favor of the party:

(1) Who would be entitled to the possession of the immovable property or real right in a possessory action, unless the adverse party makes out his title thereto; or

(2) Who proves better title to the immovable property or real right, when neither party would be entitled to the possession of the immovable property or real right in a possessory action.

to require the party out of possession in a petitory action to prove title good against the world, not merely better title under a common author.³ The supreme court affirmed this result but used a different rationale, declining to comment on the correctness of the lower court's interpretation of article 3654(1). Instead, the court held that the Harps, the parties out of possession, could make out no title whatsoever because they were illegitimate and, therefore, did not share a common author with the Houstons. *Tenneco Oil Co. v. Houston*, 372 So. 2d 1194 (La. 1979).⁴

Many rights and obligations established by the Civil Code are dependent on the parent-child relation;⁵ thus, the process for determining that relation is an important one. It has been suggested that the Code creates this legal relationship through a two-step process involving filiation and classification.⁶ Filiation is the means by which a child is recognized as the issue of a given set of parents.⁷ It establishes from whom the child derives certain rights and to whom the child owes specific obligations. The cornerstone of this process is

3. The court of appeal relied on *Pure Oil Co. v. Skinner*, 294 So. 2d 797 (La. 1974), which held that proof of a more ancient title under a common author only establishes better title and does not satisfy Code of Civil Procedure article 3654(1).

4. One writer suggests that the significance of *Tenneco* will arise from its determination of the property issue. *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Persons*, 40 LA. L. REV. 543, 552-53 (1980). It is possible that the decision will have little impact in this area. The supreme court did not discuss whether tracing title to a common author will defeat an adverse claim. In his dissent, Justice Tate stressed that *Pure Oil Co. v. Skinner*, 294 So. 2d 797 (La. 1974), is an aberration in our jurisprudence and that tracing title to a common author destroys the title of another party claiming under that author. He reached this conclusion by reasoning that the Harps were legitimate and therefore heirs of the common author. 372 So. 2d at 1196-97 (Tate, J., dissenting). The majority rendered the question moot when it determined that the Harps were illegitimate. Since the court did not even provide dicta on this issue of property law, it will not be discussed in detail in this casenote.

Recent Civil Code revision may help resolve the question of what a party out of possession must prove to make out his title against a possessor. LA. CIV. CODE art. 531, as amended by 1979 La. Acts, No. 180, provides: "One who claims ownership of an immovable against another in possession must prove he has acquired ownership from a previous owner or by acquisitive prescription. If neither party is in possession, he need only prove a better title." LA. CIV. CODE art. 532, as amended by 1979 La. Acts, No. 180, states that "when the titles of the parties are traced to a common author, he is presumed to be the previous owner."

5. See, e.g., LA. CIV. CODE arts. 215-45, 887; 902, 918-29 & 2317-18.

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

7. Louisiana Civil Code article 119 requires mutual fidelity of the spouses. This obligation implies that the husband and wife will share their sexual potential with each other and refrain from sharing their sexual potential with anyone else. Monogamy helps insure that the husband is the person responsible for conception. See Spaht & Shaw, *supra* note 6, at 66.

Civil Code article 184 which provides that "the husband of the mother is presumed to be the father of all children born or conceived during the marriage." From a careful comparison of Civil Code articles 184 and 119,⁸ it is evident that legal and biological paternity are intended to coincide. By assuming that the spouses will share their sexual potential exclusively with each other, it naturally follows that any children born during the union will be the husband's issue.

Application of the presumption in article 184 has significant effects. The child is spared the tedious process required to establish in law what probably exists in fact.⁹ Historically, absolute proof of biological paternity has been virtually impossible. Even those most knowledgeable in medicine could make only an educated guess as to biological paternity by determining access to the mother based on probable time of conception.¹⁰ In view of the lack of reliable scientific data, the redactors of the Code created a legal process for determining filiation.¹¹ Thus, the presumption of paternity established an effective legal solution to the difficult task of proving biological fatherhood.¹²

Use of the presumption also increases the number of children deemed legitimate, thereby reflecting a strong societal interest in promoting whole, stable families based on legitimate family ties. This preference for legitimacy is evident from the restricted nature

8. Although filiation is also used to establish the relationship between the child and the mother, maternity is rarely at issue since the identity of the mother is rarely in doubt. For purposes of this discussion, filiation is referred to as the legal process by which a child is linked with a father.

9. The Civil Code provides a means for proving filiation when it is not presumed. See, e.g., LA. CIV. CODE arts. 194-97 & 202-12. These articles illustrate that the process of proving paternity is greatly facilitated by the application of the legal presumption in article 184.

10. 1 T. BECK, ELEMENTS OF MEDICAL JURISPRUDENCE 591-617 (11th ed. 1860).

11. Although the legislature amended articles 184-90 in 1976, see 1976 La. Acts, No. 430, the presumption has been a part of the Code since its inception. See LA. CIV. CODE arts. 203-08 (1825).

12. Modern technology has now made it possible to determine who is not the father of a given child through the use of blood grouping tests. Louisiana recognized the validity of these tests in Act 521 of 1972, commonly known as the Uniform Act on Blood Tests to Determine Paternity. LA. R.S. 9:396-98, added by 1972 La. Acts, No. 521, §1.

Recent technological advances have now made possible positive identification of the father; however, these innovative procedures are not yet widely available because of their novelty. See, e.g., Beautyman, *Paternity Actions—A Matter of Opinion or the Trial of the Blood?*, 1976 LEGAL MED. ANN. 239, 243; Shaw & Kass, *Illegitimacy, Child Support and Paternity Testing*, 13 HOUS. L. REV. 41 (1975); Teraski, *Resolution by HLA Testing of 1000 Paternity Cases not Excluded by ABO Testing*, 16 J. FAM. L. 543 (1978).

of the disavowal action,¹³ which provides a remedy to the husband who seeks to disclaim responsibility for children who are not his. The right to disavow is limited in that only the husband, and in some instances his heirs or legatees, may bring the action.¹⁴ Since the right to disclaim paternity is reserved to the person best able to know that he, the husband of the mother, is not the father—thereby reducing unwarranted attacks on the paternity of legitimate children¹⁵—the stability of the family is preserved. In addition, the husband is protected from deprivation of the parenthood of children he wishes to claim as his own. The father, as well as the child, benefits from the bonds of legitimacy. The husband may consider that the burden of the legal responsibilities of parenthood is far outweighed by the advantages resulting from the custody and companionship of his children. The personal nature of the disavowal action insures that a vengeful mother or perhaps others motivated by greed cannot deny the husband these advantages.

The limited nature of the disavowal action,¹⁶ as construed by the jurisprudence, has made the presumption of paternity so difficult to rebut that it has been called "the strongest presumption known in the law."¹⁷ The presumption's reputation for being virtually irrebuttable is well deserved. Narrow judicial construction of the disavowal provisions in the Code has frequently prevented a husband from rightfully disclaiming paternity in situations in which simple logic dictates that the legal father could not have been the biological father.¹⁸ Such an approach is consistent, however, with a marked

13. See LA. CIV. CODE arts. 184-90, as amended by 1976 La. Acts, No. 430. The amendments allow a less restrictive action than that formerly provided in articles 184-92; however, an action to disavow paternity still requires a high burden of proof.

14. LA. CIV. CODE art. 190.

15. See 1 M. PLANIOL, CIVIL LAW TREATIES pt. 1, no. 1422, at 781 (12th ed. La. St. L. Inst. trans. 1959).

16. The restricted nature of this action is also evident in the relatively short prescriptive period applicable to the disavowal action. The husband has 180 days from the time he learns of the birth to institute the disavowal action; however, if he is unable to bring suit, the period lasts the duration of his inability. LA. CIV. CODE art. 189, as amended by 1976 La. Acts, No. 430. Prior to the 1976 revision of the paternity articles, the action had to be brought "within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time." LA. CIV. CODE art. 191 (as it appeared prior to 1976 La. Acts, No. 430).

The prescriptive period allowed to the husband's heirs extends for one year from the birth or one year from the husband's death, whichever is longer. LA. CIV. CODE art. 190, as amended by 1976 La. Acts, No. 430.

17. *Feazel v. Feazel*, 222 La. 113, 117, 62 So. 2d 119, 120 (1952).

18. See, e.g., *Tannehill v. Tannehill*, 261 La. 933, 261 So. 2d 619 (1972); *Williams v. Williams*, 230 La. 1, 87 So. 2d 707 (1956); *Feazel v. Feazel*, 222 La. 113, 62 So. 2d 119 (1952); *Succession of Saloy*, 44 La. 433, 10 So. 872 (1892); *Lewis v. Powell*, 178 So. 2d 769 (La. App. 2d Cir. 1965); *Burrell v. Burrell*, 154 So. 2d 103 (La. App. 1st Cir. 1963).

tendency in the jurisprudence to protect the child who is caught in the center of a paternity dispute. The supreme court stated in *Williams v. Williams*:¹⁹

It has always been the policy of the Louisiana law to protect innocent children, born during marriage, against scandalous attacks upon their paternity by the husband of the mother, who may be seeking to avoid his obligations, or by third persons unscrupulously claiming the estate of the husband after death.²⁰

The reluctance of the courts to allow disavowal in all but the most extreme situations has been criticized as being unduly prejudicial to the husband.²¹ No doubt, this injustice prompted the legislature to amend Civil Code articles 184-90 in 1976.²² Although there are only a few cases construing these new provisions,²³ the courts seem to recognize that the amendments are designed to strike a better balance between a policy favoring a finding of legitimacy and the need to prevent a husband from being unjustly burdened with paternity.

Once the link between father and child has been established, the classification process is used to determine what rights and obligations will flow from the relation created through filiation. The Code categorizes children into two classes: legitimate and illegitimate.²⁴ Illegitimacy still carries at least some social stigma, and the illegitimate child is denied many benefits legitimate children receive.²⁵ Accordingly, the courts, in assigning a classification, at-

19. 230 La. 1, 87 So. 2d 707 (1956).

20. *Id.* at 7-8, 87 So. 2d at 709.

21. See, e.g., Pascal, *Who is the Papa?*, 18 LA. L. REV. 685, 687-88 (1958) ("For over a century the unwillingness to label a child an illegitimate has led to decisions which imposed . . . [legitimacy] on children . . . in situations in which no geneticist or layman would even suspect him [the husband] of fatherhood in fact.").

22. 1976 La. Acts, No. 430. One feature of the more recent legislation is that a husband who wishes to disavow has a wider scope of evidence at his disposal. Since scientific methods for determining paternity are now more trustworthy than in the past, there is less need to rely on a presumption when paternity can be established by other means. See note 12, *supra*. Even when these new procedures are available, in some situations they may be of little value (for example, when the issue of paternity arises long after the death of the alleged parents). Since scientific tests will not resolve the question of paternity in many cases, the utility of a legal presumption remains substantial.

23. *Ogea v. Ogea*, No. 7201 (La. App. 3d Cir. Oct. 10, 1979); *Boudreaux v. Matt*, 370 So. 2d 139 (La. App. 3d Cir. 1979); *Circello v. Circello*, 369 So. 2d 722 (La. App. 1st Cir. 1979); *Thompson v. Thompson*, 367 So. 2d 1324 (La. App. 4th Cir. 1979); *Dufrene v. Dufrene*, 366 So. 2d 1016 (La. App. 1st Cir. 1978).

24. LA. CIV. CODE arts. 27 & 178-83.

25. See note 5, *supra*, and accompanying text.

tempt to shield children from the deprivations associated with illegitimacy whenever possible.²⁶

The policy favoring legitimate status is also evidenced by the courts' application of the putative marriage doctrine. This doctrine is based upon provisions of the Civil Code requiring that the civil effects of marriage flow to the child of the union even though the marriage is null, so long as one party is in good faith.²⁷ One civil effect of marriage, as construed by the courts, is the legitimacy of the children born during the union.²⁸ The presumption of good faith²⁹ reflects the belief that it is inappropriate to penalize the child for a parental error when at least one parent has made an honest effort to insure the child's legitimacy through marriage. The heavy burden of proof required by the courts to establish bad faith helps to ensure that the children of such marriages will be protected from illegitimacy.³⁰

Concern for the innocent offspring of illicit unions has, in part, motivated the United States Supreme Court to strive to protect such children from the harsh effects of illegitimacy. Several recent cases³¹ support the proposition that equal protection is denied to illegitimates who suffer deprivation solely because of their status.³²

26. See, e.g., *Succession of Robins*, 349 So. 2d 276 (La. 1977); *Succession of Mitchell*, 323 So. 2d 451 (La. 1975); *Warren v. Richard*, 296 So. 2d 813 (La. 1974).

27. This doctrine consists of a large body of jurisprudence construing Civil Code articles 117 and 118.

28. See, e.g., *Gathright v. Smith*, 368 So. 2d 679 (La. 1979); *Melancon v. Sonnier*, 245 La. 150, 157 So. 2d 577 (1963); *Succession of Marinoni*, 183 La. 776, 164 So. 797 (1935); *Succession of Buisiere*, 41 La. Ann. 217, 5 So. 688 (1889); *Succession of Fusilier*, 325 So. 2d 296 (La. App. 3d Cir. 1976).

29. See cases cited in note 28, *supra*.

30. The courts presume good faith unless the party alleging bad faith proves it affirmatively; thus, in cases of doubt, the issue is resolved in favor of the existence of good faith. See, e.g., *Gathright v. Smith*, 368 So. 2d 679 (La. 1979); *Melancon v. Sonnier*, 245 La. 150, 157 So. 2d 577 (1963); *Lands v. Equitable Life Assurance Soc'y of United States*, 239 La. 782, 120 So. 2d 74 (1960); *Prince v. Hopson*, 230 La. 575, 89 So. 2d 128 (1956); *Succession of Fusilier*, 325 So. 2d 296 (La. App. 3d Cir. 1976).

31. *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

32. The Louisiana Supreme Court has also been active in this area. See, e.g., *Succession of Thompson*, 367 So. 2d 796 (La. 1979); *Succession of Robins*, 349 So. 2d 276 (La. 1977). Article I, section 3 of the Louisiana constitution provides even greater protection to illegitimates than the federal equal protection clause since it specifically prohibits arbitrary, capricious, or unreasonable discrimination against a person because of birth. The court in *Succession of Thompson*, 367 So. 2d 796 (La. 1979), made it clear that this provision of the Louisiana constitution was designed to protect illegitimates against unreasonable discrimination. *Id.* at 797.

The Louisiana Supreme Court has not yet resolved whether the intestacy provisions in the Civil Code unreasonably discriminate against illegitimates. However, the

The Court seems particularly concerned with the injustice of making the child bear the burden of illegitimacy since he is not responsible for the circumstances surrounding his birth. As the Court stated in *Weber v. Aetna Casualty & Surety Co.*,³³

[v]isiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.³⁴

Equal protection provides a means for the Court to shield a child from the harsh effects of illegitimacy once that classification has been assigned. As discussed earlier,³⁵ Louisiana jurisprudence reflects the court's efforts to protect children from the disadvantages of illegitimacy by avoiding the classification. Although the approach of the two courts differs, both methods evidence a strong policy in which the protection of innocent children is of prime importance.

second circuit has recently ruled that this is the case with respect to acknowledged illegitimates who are precluded from inheriting intestate from their father because of the presence of legitimate heirs. *Succession of Brown*, No. 14,034 (La. App. 2d Cir. Jan. 22, 1980). The court held article 919 unconstitutional under both the federal Constitution, U.S. CONST. amend. XIV, and the Louisiana constitution, LA. CONST. art. I, § 3. The court stated that the state's interest in the preservation of stable land titles and the orderly disposition of property at death was not substantially served by discriminating against acknowledged illegitimates. Slip op. at 11. Since the paternity of the acknowledged illegitimates was not in dispute, their virtual exclusion from the father's succession was not necessary to prevent spurious claims. The decision draws heavily from the rationale of *Lalli v. Lalli*, 439 U.S. 259 (1978), and *Trimble v. Gordon*, 430 U.S. 762 (1977), both of which indicate that difficulty in proving paternity is not sufficient justification for barring all illegitimates from inheriting. The Supreme Court in *Trimble* stressed that a state can formulate a system for protecting the stability of land titles which does not unnecessarily trample the constitutional rights of an illegitimate child. *Id.* at 770-71. The court in *Brown* found this logic persuasive and noted that article 919 was an impermissible means of reaching the state's goal because it excluded "each and every acknowledged illegitimate child who happens to have the statistically probable misfortune of having his natural father survived by any legitimate descendant, any ascendant, any collateral relation, or a wife." Slip op. at 7.

For a thorough discussion of the constitutional implications of the succession rights of illegitimates, see Lorie, *Succession Rights of Illegitimates in Louisiana*, 24 LOY. L. REV. 1 (1978); Comment, *Can Louisiana's Succession Laws Survive in Light of the Supreme Court's Recent Recognition of Illegitimates' Rights?*, 39 LA. L. REV. 1132 (1979).

33. 406 U.S. 164 (1972).

34. *Id.* at 175.

35. See text at note 24-26, *supra*.

In *Tenneco Oil Co. v. Houston*,³⁶ the right of the Harps to the royalties in question principally depended upon their classification as the legitimate children of their mother. The mother, Lula Mae, married Granderson King in 1926, and one child was born of that union the next year. King left shortly thereafter, never to return. There was no evidence of judicial separation or divorce; thus, the marriage remained undissolved until King's death in 1974. The Harp children were born to Lula Mae between 1937 and 1952 as a result of her cohabitation with Ellis Harp. Lula Mae and Ellis Harp were married in 1957. When the court of appeal concluded that the Harps had only more ancient title under a common author, it impliedly recognized the Harps as the mother's legitimate children.³⁷ The supreme court, citing only one case,³⁸ concluded that the Harps were illegitimate. Offering little elaboration on the rationale supporting this conclusion, the court simply stated that the mother's undissolved marriage to King made the children illegitimate.

Since prior jurisprudence³⁹ has been very sympathetic to claims of legitimacy, the court's approach in the instant case seems quite incongruous. To conclude that the children were illegitimate, the court must have reasoned that they were in fact Harp's issue, but had resulted from a liaison which occurred while the mother was married to another, thus making the children the offspring of an adulterous connection. While the court's conclusion seems to be based on a logical perception of the facts, it is somewhat at odds with the presumption of paternity in article 184 and the cases construing that provision. Since the mother's marriage to King was undissolved and King had never disavowed the children,⁴⁰ the Harps should be presumed to be the legitimate children of King.

36. 372 So. 2d 1194 (La. 1979).

37. Under Civil Code article 918 the Harps would not be entitled to inherit from their mother if she had died intestate and they were considered illegitimate. Article 918 provides that illegitimate acknowledged children are excluded from their mother's succession when she dies leaving a legitimate descendant, which was the factual situation presented.

38. Succession of Robins, 349 So. 2d 276 (La. 1977).

39. See notes 17 & 23, *supra*.

40. As a result of King's failure to disavow the Harps during his lifetime, the suit could only be brought by his heirs. Concern over the retroactivity of the 1976 revision of the paternity articles is unnecessary. It appears that the action had already prescribed under either article. See note 16, *supra*. The facts indicate that King had only one heir and no legatees. This heir was the child who was born in 1927 of King's union with Lula Mae. Prior to the 1976 revision, the heirs were required to bring suit within six months after the time they were disturbed in their possession of the husband's estate. LA. CIV. CODE art. 192 (as it appeared prior to 1976 La. Acts, No. 430). The record contains no mention of a disavowal action being brought within the six month period following the initiation of the concursus proceeding, which appears to be

It is particularly puzzling that the court cited *Succession of Robins*⁴¹ to support its holding. In *Robins* the court held that Civil Code article 1488 was unconstitutional because it deprived adulterous bastards of the rights that other illegitimates have to inherit by testamentary disposition. Obviously, the issue in *Robins* is far removed from that in *Tenneco*. In addition, although it is dictum, there is specific language in *Robins* which explains that children born of the union of an unmarried man and a married woman are protected from the label "adulterous bastards" by the presumption of paternity found in Civil Code article 184.⁴² It is difficult to comprehend how *Robins* can be used to support the proposition that the Harps should not inherit.

With the exception of one footnote, the opinion provides no reasons why the court considered the Harps to be illegitimate. In that note, the court stated, "Regardless of whether the Harp claimants are considered to be the children of King (their mother's husband), they are illegitimate adulterous children of Lula Mae . . ." ⁴³ If, as the court suggests, King is considered the father of the children, his paternity could only be based on the presumption in article 184. Indeed, in this fact situation it would be hard to suspect King of any kind of paternity other than legal paternity. It is difficult to understand how the children could be considered the illegitimate issue of a married woman if her husband's paternity is presumed because of his marriage to her.

Assuming the presumption of paternity did apply, the Harps would be placed in the same position as children who had been disavowed by their mother's husband. Although the Code has always restricted this right to the husband,⁴⁴ it has been suggested that the court has more than once arrived at holdings which seem to create a right of disavowal in other parties.⁴⁵ This theory could serve as an explanation for the court's finding of illegitimacy in *Tenneco*. There is a distinction, however, between *Tenneco* and other cases which have allowed disavowal in this manner, such as *Succession of Mitchell*⁴⁶ and *Warren v. Richard*.⁴⁷ In these latter cases, the

the first disturbance. Under the 1976 revision, the longest possible period for bringing the action was one year after King's death in 1974. LA. CIV. CODE art. 190, as amended by 1976 La. Acts, No. 430. Any right on the part of the heir to disavow King's paternity expired in 1975, several years before the instant suit. Therefore, the presumption of paternity, as it applied to King, was conclusive.

41. 349 So. 2d 276 (La. 1977).

42. *Id.* at 280.

43. 372 So. 2d at 1195-96 n.2.

44. See notes 13-15, *supra*, and accompanying text.

45. Spaht & Shaw, *supra* note 6, at 78-79.

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

47. 296 So. 2d 813 (La. 1974).

court went beyond the provisions of the Code to ensure that the children would not be denied benefits from their biological father merely because they were not considered *his* legitimate children. The effect of the court's action in *Tenneco* is to deny the children benefits from either possible father and, more importantly, from their mother.

The court's conclusion is consistent with the theory that the presumption of paternity during marriage only applies when the children are recognized through reputation or registry as the offspring of the mother's husband.⁴⁸ Based upon this theory, the presumption would not apply to King, since the children were raised by Harp, bore his name, and had never seen King.⁴⁹ This analysis provides a possible explanation for the result in *Tenneco*; however, the theory has enjoyed so little recognition by the courts that it seems improbable that the court would employ it without explanation. If the court did adopt the construction which requires that the children be recognized as the husband's by reputation or registry,⁵⁰ such a change deserves comment. It seems more likely, however, that the court relied on the unproven biological fact that Harp had fathered the children.

A finding that the Harps are legitimate might not be precluded even though the presumption of paternity is inapplicable. When Lula Mae married Harp in 1957, she stated that she was divorced.⁵¹ There is no evidence that Harp was in bad faith;⁵² thus, by application of the putative marriage doctrine, the Harps could be considered legitimated by the subsequent marriage of their parents. But the court does not even allude to the possible application of this doctrine. Considering the expansive jurisprudential policy which favors legitimacy,⁵³ the court should have at least explored the possibility of legitimation resulting from the marriage of Lula Mae

48. Professor Pascal contends that this construction of the Code would provide a more effective means of having legal and biological paternity coincide. See R. PASCAL, *Louisiana Family Law Course* § 12.6 (1973). *Accord*, Spaht & Shaw, *supra* note 6, at 84-85.

49. 372 So. 2d at 1195.

50. See note 48, *supra*.

51. Brief for Appellant, *Tenneco Oil Co. v. Houston*, 372 So. 2d 1194 (La. 1979).

52. The courts have been willing to sustain a finding of good faith merely because of a lack of probative evidence of bad faith. See note 30, *supra*, and accompanying text. In situations in which one spouse claims a prior marriage was dissolved by divorce, the court has held the other spouse to a duty of inquiry only when other circumstances should arouse his suspicions. See *Gathright v. Smith*, 368 So. 2d 679 (La. 1979). For examples of facts which should put a putative spouse on notice, see *Prieto v. Succession of Prieto*, 165 La. 710, 115 So. 911 (1928); *Succession of Thomas*, 144 La. 25, 80 So. 186 (1918); *Succession of Taylor*, 39 La. Ann. 823, 2 So. 581 (1887).

53. See notes 27-30, *supra*, and accompanying text.

and Harp. Since the facts indicate good faith on the part of Harp, the putative marriage doctrine would have applied to protect the children from illegitimacy regardless of their mother's bad faith.⁵⁴ Furthermore, the jurisprudential construction of article 118 allows the civil effects to flow to the children from both parents, including the parent in bad faith. Therefore, the Harps could be considered their mother's legitimate issue and could inherit from her. Had the court pursued this theory, it is conceivable that the Harps could have been found to be the legitimate issue of their biological parents.⁵⁵ This result would satisfy the jurisprudential preference for having legal and biological parenthood coincide, while protecting the Harps' rights of inheritance, all within the confines of a process established by the Code. Such a potentially desirable result certainly should have justified the effort of investigation.

Even a finding of illegitimacy might not prevent the Harps from inheriting in light of the recent equal protection decisions.⁵⁶ In any equal protection case, it must be shown that the disadvantaged class is similarly situated with a privileged class so that discrimination arises out of the classification and not from a difference in circumstance. Whereas a traditional justification for restricting the rights of illegitimates to inherit intestate has been the difficulty of proving paternity,⁵⁷ the court in *Tenneco* was not faced with this problem, since the Harps sought to inherit from their mother, whose maternity was never in dispute. Moreover, the United States Supreme Court has stressed that the familial bonds between the illegitimate child and his parent are often as great as those of the legitimate child. This was certainly true of the Harps; they were reared by their mother while her legitimate child was not.⁵⁸

The absence of a well-articulated rationale makes an assessment of the significance of *Tenneco* unusually difficult. The decision seem-

54. See *Succession of Marinoni*, 183 La. 776, 164 So. 797 (1935).

55. Professor Pascal states that one possible construction of Civil Code article 117 would allow children born of an illicit union to reap the civil effects of a subsequent marriage of their parents, even though that marriage is null. R. PASCAL, *supra* note 48, at § 4.16.

56. See cases cited in note 31, *supra*.

57. See, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Labine v. Vincent*, 401 U.S. 532 (1971). See also Comment, *supra* note 32, at 1138-39.

58. The mother's legitimate child born of the union with King lived with, and was reared by, her maternal grandparents. The Harps lived with Lula Mae and Harp during their minority.

The rationale of *Succession of Brown*, No. 14,034 (La. App. 2d Cir. Jan. 22, 1980), if applied to the facts of *Tenneco*, gives rise to a strong inference that the Harps' illegitimate status would not bar their inheritance. See note 32, *supra*.

ingly provides an alternative to the provisions on filiation and classification in the Code, but the lack of explanation for this change gives rise to some disturbing implications. The process for establishing familial relations provided for by the Code has not been without problems in its utilization,⁵⁹ but it is at least a well-defined procedure which produces predictable results. This consistency in establishing familial ties does more than promote stable relations. The conclusiveness of legitimate filiation⁶⁰ has also been the basis for certainty in the disposition of property, a consideration which is especially important in a system of forced heirship.⁶¹ *Tenneco* suggests that other means for determining filiation are now available, but it does not define what those alternatives are. This lack of certainty could easily lead to many inconsistent and perhaps unjust results.

The decision in *Tenneco* may not prove to be of lasting significance, for it cannot be cited as absolute authority for any legal principle. While reaching a conclusion that is in obvious conflict with the result dictated by the Civil Code, the court offers no theoretical basis for circumvention of the pertinent codal provisions. In addition, *Tenneco* departs from the longstanding jurisprudential policy underlying the filiation and classification process, which should further limit its usefulness as authority. *Tenneco* is an unfortunate example of the haphazard results which can occur when established legal principles are cast aside. Return to the coherent system for establishing filiation provided by the Civil Code is essential to the stability and predictability of an area of the law that is in the process of radical change, constitutionally mandated.

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59. See notes 18-23, *supra*, and accompanying text.

60. See notes 16-21, *supra*, and accompanying text.

61. See notes 32 & 57, *supra*, and accompanying text. The courts have accorded great weight to the importance of the state's interest in establishing an orderly system for the disposition of property.