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PERSONS

*Katherine Shaw Spaht**

REHABILITATIVE ALIMONY

Recent decisions and attempted legislation reflect a change in attitude toward alimony. Unquestionably, the alimony statutes, as interpreted, have needed reassessment for years.¹ The current attitude towards alimony is best expressed in the language of Justice Blanche, concurring in *State v. Fuller*:²

The majority opinion convinces this writer that there is no longer any valid legislative purpose in requiring one spouse to support the other after the marriage has been dissolved.

Chivalry is dead if that was ever a historic reason. The "realities of the domestic relationship" as they are claimed to ex-

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1. The author has considered various aspects of alimony for the past five years and has suggested reevaluation. See *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Persons*, 34 LA. L. REV. 201 (1974); *The Work of the Louisiana Appellate Courts for the 1973—1974 Term—Persons*, 35 LA. L. REV. 259 (1975); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Persons*, 36 LA. L. REV. 335 (1976); *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Persons*, 37 LA. L. REV. 305 (1977); *The Work of the Louisiana Appellate Courts for the 1976-1977 Term—Persons*, 38 LA. L. REV. 322 (1978); *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Persons*, 39 LA. L. REV. 659 (1979); *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Persons*, 40 LA. L. REV. 543 (1980).

2. 377 So. 2d 335 (La. 1979). The Louisiana Supreme Court held that the criminal neglect statute which made neglect of the wife in destitute or necessitous circumstances a crime (R.S. 14:74 A[1]) was unconstitutional, a denial of equal protection of the law under the fourteenth amendment to the United States Constitution.

The court of appeal in *Sonfield v. Deluca* held that an ex-wife is not entitled to alimony after divorce where she had \$92,000 equity in a 19½-room house which she purchased after divorce. The court wrote:

An ex-wife cannot leave her sufficient means tied up in a house beyond her reasonable necessity, . . . and collect alimony indefinitely under a law allowing alimony only when she has not sufficient means, simply because her means are not liquid. Nonliquidity of otherwise sufficient means can at most be accepted as justifying post-divorce alimony only during the period reasonably necessary to convert in part into liquid assets.

377 So. 2d 380, 382 (La. App. 4th Cir. 1979).

Finding that the court of appeals decision would force the ex-wife to sell her home and exhaust the equity for her support, the Louisiana Supreme Court reversed. 385 So. 2d 232 (La. 1980).

ist is a myth as women do indeed contribute to the financial support by working outside the home, and it is a fact that the husband can take care of the children of the marriage just as well as the wife, especially if enough funds are generated to place them in a nursery or other child care establishment. Furthermore, the old notion that "generally, it is the man's responsibility to provide a home and its essentials" is just another way of portraying a woman as an inferior, or worse yet, a dependent.³

The dissatisfaction is, among other things, attributable to a sense of frustration evidenced by the expressions of Justice Blanche. However, deliberation and rational consideration are necessary in the reevaluation of alimony, not overreaction.

In *Monk v. Monk*,⁴ the wife in a partial community property settlement, executed after the judgment of separation, waived her right to permanent alimony. The court of appeal concluded that she had effectively waived her right to alimony.⁵ In distinguishing the Louisiana Supreme Court decision of *Holliday v. Holliday*,⁶ the court opined, "Although not stated by the Supreme Court, the reason for the differing views for waiver of permanent alimony and waiver of alimony pendente lite goes to the essence of the two types of alimony, viz., alimony pendent [sic] lite is the support between persons still married, and permanent alimony is simply a pension given by one spouse who is better off than the other."⁷ As authority for the validity of a waiver of permanent alimony in a post-separation community property settlement, the court of appeal cited *Nelson v. Walker*.⁸ In *Nelson* the Louisiana Supreme Court in *dicta*⁹ expressed the view that the right to claim alimony might be alienated by a person not under a contractual incapacity; the result being that a waiver of alimony was a relative, not absolute, nullity ratifiable after cessation of the disability. Yet, the court did observe that in the *Nelson* case there was no proof that the wife had ever been in

3. 377 So. 2d at 338.

4. 376 So. 2d at 552 (La. App. 3d Cir. 1979).

5. The court observed that the agreement was no longer a relative nullity due to the incapacity of husband and wife to contract under Civil Code article 1790. The article was amended to delete the reference to the incapacity of husband and wife to contract with each other.

6. 358 So. 2d 618 (La. 1978). The Louisiana Supreme Court found that a waiver of alimony pendent lite in an antenuptial matrimonial agreement was against public policy, thus unenforceable.

7. 376 So. 2d 552, 554 (La. App. 3d Cir. 1979).

8. 250 La. 545, 197 So. 2d 619 (1967).

9. The issue litigated in *Nelson v. Walker* concerned the validity of the partition agreement as a division of community assets and not a claim for alimony.

necessitous circumstances.¹⁰ Interestingly enough, at the 1980 session of the legislature, a bill was introduced to amend Civil Code article 160 to permit a spouse to waive the right to alimony only *after divorce*.¹¹ The proposed amendment was less liberal than the decision in *Monk v. Monk*, but the bill failed to pass.

Unfortunately, the court of appeal in *Monk* failed to consider the policy underlying alimony after divorce to determine if the public had an interest, and whether the interest of the public outweighed that of the spouses. The legislative purpose underlying alimony after divorce is not chivalry, as Justice Blanche suggested,¹² nor delictual, as it was historically.¹³ Instead, the reason for alimony after divorce 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."¹⁴ Obviously, the public has a strong interest in seeing that persons in need are supported; for otherwise, the burden falls upon the public at large through social programs supported by taxpayers. Alimony is *one* of

10. "There is no evidence of record that she was *ever* in necessitous circumstances or that she was at any time a potential charge of the State." 197 So. 2d at 625.

11. La. H.B. 725, 6th Reg. Sess. (1980).

12. See text at note 3, *supra*.

13. 1 M. PLANIOL, CIVIL LAW TREATISE, pt. 1, no. 1259 at 696 (12th ed. La. St. L. Inst. trans. 1959).

14. In theory, according to Planiol, alimony was not a continuance of the obligation of support which the spouses owe to each other mutually during the marriage, but was founded upon the delictual principle "[w]hatever act of man causes damage to another obliges him by whose fault it happened to repair it." 1 M. PLANIOL, *supra* note 13, at no. 1259. However, it would appear that the underlying practical reason for alimony is to provide support for those who need it, with a minimum amount of social dislocation, by extracting it from those who have provided similar maintenance in the past. As Planiol observes:

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 wrongful acts.

Id. It is clear that without the antecedent marital obligation of mutual support there could be no breach of a quasi-delictual obligation or resulting damage upon divorce. Moreover, under article 160 of the present Civil Code, the wife may be allowed alimony without proving the husband's fault. According to Justice Barham, the provision of this alimony is a

legislative attempt to fix economic responsibility for women who, having been deprived by divorce of their husband's earnings, are now without means or income for their maintenance. This socio-economic legislation is intended to assign responsibility for the dependency of such divorced women so as to relieve them from destitution and the State from their care.

Montz v. Montz, 253 La. at 907, 221 So. 2d at 44 (1969) (Barham, J., dissenting).
Loyacano v. Loyacano, 358 So. 2d 304, 309 n.12 (La. 1978).

the ways¹⁵ that the legislature has selected to distribute the societal obligation to support those in need. Therefore, it is imperative that the potential dependent not be permitted to contract with the obligor "to obtain absolute relief from his potential future obligation."¹⁶ The fear, of course, is that "[t]he dependent not presently in need might be induced to waive his future right in return for a present gain only to find later that he is much in need and must seek relief from public sources."¹⁷ Actually, in *Monk* such fears were realized, as the wife had waived her right to alimony in exchange for property, and then sought alimony after divorce when she subsequently needed support.

Although a waiver of alimony should be impermissible as a violation of public policy,¹⁸ the legislation, as a necessary accommodation to the obligor, should encourage the recipient to become self-supporting. Other states have accomplished the latter objective by means of "rehabilitative" alimony. The "rehabilitation principle," superimposed upon the "need principle"¹⁹ presently underlying Civil Code Article 160, would permit an award to a needy spouse sufficient to keep the spouse off the welfare rolls and to "rehabilitate" himself to the point that further alimony will not be needed."²⁰ Legislation introduced²¹ and a resolution²² passed at the 1980 legislative session reflect a desire to incorporate the notion of rehabilitation into alimony after divorce considerations. The joint

15. See, e.g., LA. CIV. CODE arts. 148, 227, 229-34, 238-45. One author comments that the family is the key institution for distributing wealth in society and that our Civil Code articles reflect such a view. J. AREEN, *CASES AND MATERIALS ON FAMILY LAW* 631 (1978).

16. Professor Robert A. Pascal expressed this view in a commentary on *Nelson v. Walker*, 250 La. 545, 197 So. 2d 619 (1967). See *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Persons*, 28 LA. L. REV. 312, 314-16 (1968).

17. *The Work of the Louisiana Appellate Courts for the 1966-1967 Term—Persons*, 28 LA. L. REV. 312, 315 (1968).

18. *Winegard v. Winegard*, 278 N.W.2d 505 (Iowa 1979), cert. denied, 100 S. Ct. 425 (1980).

19. According to this principle, a spouse is entitled to be supported by his or her ex-spouse at a level sufficient to stay off the welfare rolls. The principle's most obvious virtue is the savings to taxpayers; its chief drawback, the tendency to foster a life of continuing dependency by one spouse on the other.

J. AREEN, *supra* note 15, at 634.

20. *Id.*

21. La. S.B. 806, 6th Reg. Sess. (1980). The substance of the proposed amendment to Civil Code article 160 was, "In no event shall termination of such alimony occur later than five years after the date of final judgment of divorce, whether or not the spouse remarries." Termination of an award of alimony after five years without qualification was a relatively drastic solution to the problem of encouraging the recipient to become self-supporting.

22. La. S. Con. Res. No. 164, 6th Reg. Sess. (1980).

committee²³ created by the resolution is to study "the feasibility of terminating alimony pendente lite and alimony after divorce under specific circumstances after a certain period of time."²⁴ In the clauses of the resolution justifying the study by the joint committee, the following statement is made: "WHEREAS, the elimination of alimony under certain circumstances after a specific period of time may force individuals to become productive members of society and not become an undue burden upon divorced persons."²⁵

Without the necessity of additional legislation, such as that adopted in Florida,²⁶ authority exists for a judge in Louisiana to award "rehabilitative" alimony. In the list of factors that appear in Civil Code article 160, there appears: "the time necessary for the recipient to acquire appropriate education, training, or employment" In interpreting the Florida statute²⁷ which contains a list of factors and similar "rehabilitation" language, the judge is permitted *in proper circumstances* to award support to a needy spouse for a limited period of time, until the spouse gets back on his feet and becomes self-sustaining.²⁸ The criterion of "proper circumstances" presupposes that there exists a potential for self-support, for without this capacity there is nothing to which one can be rehabilitated. In *Lash v. Lash*,²⁹ applying Florida's rehabilitative alimony statute, the court found that in a marriage of long duration in which the wife had given up her career upon marriage to manage the home and to raise children and in which the husband had had the opportunity to enhance his working expertise over the entire period of his married life, different circumstances had to be considered. In such a case, the court concluded that he should be required to contribute to her support on a permanent basis.

Concerning the duration of an alimony award, one suggested legislative alteration is to provide that an alimony judgment shall only be effective for three years, but may be renewed upon proof of

23. The joint committee is to consist of members of the Senate Committee on Judiciary, section A, and the House Committee on Civil Law and Procedure.

24. La. S. Con. Res. No. 164, 6th Reg. Sess. (1980).

25. *Id.*

26. FLA. STAT. ANN. § 61.08 (1978): "In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. . . ."

"In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:"

"(e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment"

27. *Id.*

28. *Lash v. Lash*, 307 So. 2d 241 (Fla. App. 1975).

29. *Id.*

continuing need. A similar New Hampshire statute³⁰ applies the three-year duration to an award when there are no children or only major children of the marriage of the recipient and obligor. The three-year duration of an award does not automatically terminate it, as proposed in Senate Bill 806,³¹ yet the recipient bears the burden of proving need every three years. Presently under Louisiana law, the spouse seeking a change in alimony must prove a change of circumstances. Shifting the burden of proof to the recipient by statute in the two instances in which there are no children or major children seems particularly appropriate considering the underlying "need" and "rehabilitation" principles of alimony.

Nationally, as in Louisiana, "need," tempered by the notion of "rehabilitation," is "the leading candidate to take the place of fault as the key principle to guide the allocation of assets at divorce."³² Thus, as "need" replaces "fault," fault as a criteria for awarding alimony after divorce should be eliminated.³³ If fault is eliminated as a consideration in awarding alimony after divorce, the effect may necessitate reconsideration of the grounds for separation and divorce based upon fault.

SINGLE "NO FAULT" GROUNDS FOR SEPARATION

Complimentary to shifting policies underlying alimony is a reconsideration of the "fault" of a spouse as grounds for separation and divorce. If in determining entitlement to alimony after divorce, "fault" is no longer relevant, as previously discussed, the question may be posed, "What purpose is served by proof of 'fault' in the separation and divorce proceedings?" As this author has previously stated,³⁴ a conclusion that one spouse alone is at fault in the "breakdown of a marriage" is frequently unrealistic. Rarely are the "irreconcilable differences" of the spouses due to the fault of only one spouse. Eliminating the possibility (presently economic necessity)³⁵

30. N.H. REV. STAT. ANN. § 458:19 (1955).

31. See note 21, *supra*.

32. J. AREEN, *supra* note 15, at 634.

33. LA. CIV. CODE art. 160: "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"

34. *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Persons*, 34 LA. L. REV. 201, 203-04 (1974); *The Work of the Louisiana Appellate Courts for the 1973-1974 Term—Persons*, 35 LA. L. REV. 259, 265 (1975); *The Work of the Louisiana Appellate Courts for the 1974-1975 Term—Persons*, 36 LA. L. REV. 335, 337 (1976); *The Work of the Louisiana Appellate Courts for the 1977-1978 Term—Persons*, 39 LA. L. REV. 659, 665 (1979).

35. Under Civil Code article 160, it is necessary for the spouse seeking alimony to

of proving a spouse at fault in separation litigation would allow spouses to sever the ties of a deteriorating relationship, in itself psychologically traumatic, without a public trial in which the parties hurl accusations and recriminations at each other. Amending the existing Civil Code articles³⁶ to provide a *single* ground for separation—thirty days living separate and apart³⁷—is suggested.

Because of recent decisions, the only relief available for some couples seeking a separation or divorce is to live separate and apart for the required period of time—either six months or one year.³⁸ For example, in three decisions,³⁹ conduct by a spouse which would ordinarily constitute "fault" for separation purposes was excused because of mental illness and, in one instance, chronic alcoholism.⁴⁰ In other decisions,⁴¹ a reconventional demand for separation based upon abandonment without "lawful cause" was dismissed, even though the plaintiff failed to prove grounds for separation in the nature of "fault".⁴² In these situations the immediate alternative of the spouses whose suits are dismissed is to live separate and apart for either six months⁴³ or one year.⁴⁴

Under the jurisprudence the testimony of a psychologist or psychiatrist as to the nature of the mental or emotional disorder of a spouse might be sufficient to legally excuse the spouse of "fault". Yet, in at least one of the decisions considering the lack of culpability of a spouse afflicted with mental or emotional problems, the court concluded that the other spouse had "lawful cause" to abandon

prove that he is "not at fault." Furthermore, if both spouses are found "at fault" under Civil Code article 138 (grounds for separation) then neither may claim alimony after divorce by virtue of the statutory language of Civil Code article 141.

36. Civil Code articles 138 and 141 should be repealed.

37. See note 34, *supra*.

38. See LA. CIV. CODE art. 138 (9) & (10). See also LA. R.S. 9:301 (1950), as amended by 1979 La. Acts, No. 360, § 1.

39. *Bettencourt v. Bettencourt*, 381 So. 2d 538 (La. App. 4th Cir.), *cert. denied*, 383 So. 2d 12 (La. 1980); *Gipson v. Gipson*, 379 So. 2d 1171 (La. App. 2d Cir.), *cert. denied*, 383 So. 2d 799 (La. 1980); *Anderson v. Anderson*, 379 So. 2d 795 (La. App. 4th Cir. 1979).

40. *Anderson v. Anderson*, 379 So. 2d 795 (La. App. 4th Cir. 1979).

41. *Von Bechman v. Von Bechman*, 386 So. 2d 910 (La. 1980); *Mahmud v. Mahmud*, 384 So. 2d 823 (La. App. 4th Cir. 1980); *Levine v. Levine*, 373 So. 2d 1380 (La. App. 4th Cir. 1979).

42. LA. CIV. CODE art. 138. The problem of entertaining a reconventional demand for abandonment and the proof that should be required if plaintiff fails in his burden of proof is considered in R. PASCAL AND K. SPAHT, *LOUISIANA FAMILY LAW COURSE* 122-23 (2d ed. 1979).

43. LA. CIV. CODE art. 138(10).

44. LA. CIV. CODE art. 138(9). See LA. R.S. 9:301 (1950), as amended by 1979 La. Acts, No. 360, § 1.

her.⁴⁵ In *Anderson v. Anderson*,⁴⁶ in which the wife's habitual intemperance was excused because of her chronic alcoholism combined with diagnosed schizo-affective schizophrenia, depressed type, the husband nonetheless was considered as having had "cause" to constructively abandon her.⁴⁷ Legal analysis, in the *Anderson* case, of the proof required of "lawful cause" parallels that in the decisions mentioned above involving reconventional demands for abandonment when the plaintiff's suit has been dismissed.⁴⁸

If as a result of these decisions spouses are relegated to seeking as their only alternative a "no-fault" separation or divorce, the judiciary has accomplished what the legislature has not since first presented with the opportunity in 1948.⁴⁹ The legislature might still, however, contribute significantly. By recognizing that judicial decisions make "no-fault" separation the only relief available to many spouses, the legislature could respond by enacting legislation consistent with the development. A single "no-fault" ground for separation is surely not a novel idea nationally. Although the author advocates

45. *But see* *Gipson v. Gipson*, 379 So. 2d 1171, 1172 (La. App. 2d Cir.), *cert. denied*, 383 So. 2d 799 (La. 1980). The court found that the husband had been guilty of constructive abandonment and cruel treatment. According to the court, "Plaintiff (husband) admits telling defendant he no longer loved her during the month of August 1978 and a few days thereafter taking defendant and the children to her parents [sic] home and leaving them. At the time of trial he continued to admit he no longer cared for defendant and *did not want to resume the marriage relationship.*" (Emphasis added).

46. 379 So. 2d 795 (La. App. 4th Cir. 1979).

47. Simply because plaintiff did not prove his case for a separation based on the fault of defendant, did not relieve defendant in her reconventional demand from proving that his compelling her to leave the matrimonial domicile was "without a lawful cause." From the recitation of the facts already provided, it is clear that plaintiff had lawful cause for separating from his wife and she is not entitled to a judgment of separation against him for abandonment.

Id. at 797.

48. In *Levine v. Levine*, 373 So. 2d 1380, 1384 (La. App. 4th Cir. 1979), the court stated, "It is true that 'lawful cause' necessary to justify a spouse's leaving the matrimonial domicile need not be such as to constitute lawful grounds for separation."

In *Mahmud v. Mahmud*, 384 So. 2d 823, 825 (La. App. 4th Cir. 1980), the court opined, "However, the deep-rooted irreconcilable differences were such that living together became intolerable for both parties. Under these circumstances, we cannot conclude that a party who leaves or withdraws from the matrimonial domicile is without lawful cause."

49. The bill introduced would have:

"1. Declared living separate and apart for one year the only cause for divorce.

"2. Allowed proof of the living separate and apart only if one of spouses had recorded on the parish records, at least one year before the filing of suit, a declaration of his or her having begun to live separate and apart from the other with the intent of obtaining a divorce.

"3. Made recordation of the above declaration the equivalent of a judgment of separation from bed and board." R. PASCAL AND K. SPAHT, *supra*, note 42, at 128.

a single "no-fault" ground for separation, it is desirable to retain a substantial waiting period between the judgment of separation and that of divorce to encourage reflection and, for policy reasons, attempts at reconciliation.

ESTABLISHING FILIATION OF ILLEGITIMATE CHILDREN

With the continuing expansion of the rights of illegitimate children accomplished by judicial decision,⁵⁰ the proof necessary to establish filiation, the parent-child bond,⁵¹ assumes increased significance. In 1976, the author predicted that:

It is likely that future decisions of the United States Supreme Court will remove many of the remaining impediments imposed upon illegitimate children, particularly in successions law. Classification will in the future have less significance. It would still seem a basic goal to fix paternity on the basis of a biological connection, to relate in the father-child bond two persons who in fact possess that bond. Filiation will in the future retain its significance.⁵²

50. Most recently, Louisiana Civil Code article 919 permitting illegitimate children acknowledged by the father to inherit only if he failed to be survived by legitimate descendants, ascendants, collaterals, or surviving wife was declared unconstitutional as a denial of equal protection of the laws under the fourteenth amendment to the United States Constitution and article I, § 3 of the 1974 Louisiana Constitution. *Succession of Brown*, 388 So. 2d 1151 (La. 1980). In two previous decisions, the constitutionality of article 919 had been avoided. *Quiett v. Estate of Moore*, 378 So. 2d 362 (La. 1979); *Jackson v. Gordon*, 381 So. 2d 520 (La. App. 1st Cir. 1980). In *Succession of Brown, Trimble v. Gordon*, 430 U.S. 762 (1977), was cited as authority for the proposition that the fourteenth amendment of the United States Constitution prohibits difference in treatment of illegitimate and legitimate children absent considerations of the quality of proof of paternity. The decision of the court of appeal in *Brown*, 379 So. 2d 1172 (La. App. 2d Cir. 1980), contains an excellent analysis of the United States constitutional cases and application of the principles enunciated in those decisions to Civil Code article 919. The rationale discussed in the court of appeal decision may be utilized to determine the constitutionality of other Civil Code articles which draw distinctions in rights accorded to an individual on account of "his birth"—i.e., Civil Code articles 238 through 244 (support rights of illegitimate children) compared to articles 227, 229, and 230 through 234 (support rights and obligations of legitimate descendants); Civil Code articles 246-50 (natural tutorship of legitimate children) and article 256 (tutorship of illegitimate children); Civil Code articles 886-914 (regular successions, legitimate relations) and articles 917-33 (irregular successions, including illegitimate relations); Civil Code article 1493 (guaranteeing to legitimate children a forced portion of the estate of the parent) and article 1484 (permitting only certain dispositions in favor of illegitimate children).

51. Spacht & Shaw, *The Strongest Presumption Challenged; Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59, 65 (1976).

52. *Id.* at 82-83.

Proof of legitimate filiation continues to be made, by first identifying the mother and the fact of conception or birth of a child during her marriage. To avoid insuperable problems of proof of paternity adjudicated on a case-by-case basis, the law established a presumption that the husband of the mother is the father of the child.⁵³ The marriage contract confers upon the husband the right to exclusive sexual access to the wife and therefore provides a basis for the presumption.⁵⁴ The possibility of fraud or error in fixing paternity and thus legitimate filiation is diminished by moral constraints and the husband's vigilance.⁵⁵

In the case of filiation outside of marriage, proof has depended historically upon the reputed father's voluntary admission, either express or tacit, of paternity.⁵⁶ The unreliability of such proof and the

53. LA. CIV. CODE art. 184.

54. See W. HOOPER, *THE LAW OF ILLEGITIMACY* 2 (1911).

55. LA. CIV. CODE arts. 187-90.

56. Within the codal framework, historically, the class of illegitimate children was further subdivided into those illegitimate children who could not be acknowledged or legitimated, illegitimate children who obtained a judgment of paternity or maternity against the biological parent, LA. CIV. CODE arts. 208-12, illegitimates who were acknowledged by their biological parent, LA. CIV. CODE arts. 202-07, and illegitimate children who were legitimated, LA. CIV. CODE arts. 198-201.

Civil Code article 181 mentions two sorts of illegitimates: "Those who are born from two parents, who, at the moment when such children were conceived might have legally contracted marriage with each other; and those who are born from persons to whose marriage there existed at the time some legal impediment." Into the latter category fall (1) adulterous bastards, "those produced by an unlawful connection between two persons, who, at the time when the child was conceived, were, either of them or both connected by marriage with some other person," LA. CIV. CODE art. 182 and (2) incestuous bastards, "those who are produced by the illegal connection of two persons who are relations within the degree prohibited by law." LA. CIV. CODE art. 183. Adulterous and incestuous bastards, generally speaking, cannot be acknowledged or legitimated. LA. CIV. CODE arts. 198, 200, & 204. However, there are exceptions. In the case of adulterous bastards, if there is a subsequent legal marriage of the biological parents, after the impediment to the marriage is removed, the child may be acknowledged. LA. CIV. CODE art. 204. If he is so acknowledged, he is automatically legitimated. LA. CIV. CODE art. 198. Furthermore, once the impediment to the marriage is removed, a biological parent can in some instances legitimate the child by notarial act, LA. CIV. CODE art. 200, which necessarily includes the right to acknowledge the child by act. LA. CIV. CODE art. 203. See *Goins v. Gates*, 229 La. 740, 93 So. 2d 307 (1957). The latter right exists regardless of whether the biological parents contract a legal marriage. As to incestuous bastards, by virtue of the 1972 and 1974 legislative amendments to Civil Code article 95, certain children born during the existence of a marriage contracted between persons related within the prohibited degrees prior to 1974 are now to be considered legitimate. (The amendment in 1972, and again in 1974, ratified all marriages contracted in contravention of Civil Code article 95). But, note the specific prohibition contained in Civil Code article 198, prohibiting legitimation of incestuous bastards by subsequent marriage of the natural parents.

Despite the provisions prohibiting in certain instances the acknowledgment and/or

law's corresponding lack of confidence were the reasons for distinguishing the classification of children as legitimate or illegitimate. However, because of the effect of such classification, *i.e.*, inferior support and succession rights, Louisiana statutes have been susceptible to constitutional attack. Yet, even in the United States Supreme Court decisions, the interest the state has in the quality of proof necessary to establish filiation has been recognized as important,⁵⁷ particularly in view of the problems of stability of land titles and stale or spurious claims.

Anticipating the Louisiana Supreme Court decision in *Succession of Brown*,⁵⁸ the legislature passed a Senate bill amending Civil Code

legitimation of adulterous and incestuous bastards, there is no such specific prohibition contained in the articles regulating proof of paternity. See *In re Tyson*, 306 So. 2d 823 (La. App. 2d Cir. 1975). An illegitimate, under Civil Code article 208 who has "not been legally acknowledged, may be allowed to prove" his paternal descent by proof as outlined in Civil Code articles 209-10. Upon establishing paternal descent, the illegitimate becomes entitled to claim financial support in the form of alimony. LA. CIV. CODE arts. 240-45.

An illegitimate child who is acknowledged by his natural parent enjoys not only the right to claim alimony from the parent so acknowledging, LA. CIV. CODE art. 242, but also the restricted right of intestate inheritance. LA. CIV. CODE arts. 918-19. Under the codal scheme an illegitimate could only be acknowledged by one of two methods: (1) notarial act or (2) registering of the birth or baptism of such child. LA. CIV. CODE art. 203. However, the court in *Taylor v. Allen*, 151 La. 82, 91 So. 635 (1921), recognized an alternate method of acknowledgment, hereinafter referred to as informal acknowledgment. Proof of informal acknowledgment consisted essentially of the same proof required for paternal descent under Civil Code article 209. See *Minor v. Young*, 149 La. 583, 89 So. 757 (1921). Informal acknowledgment was legislatively recognized in a 1944 amendment to article 198.

Historically, the effect of legitimation upon the illegitimate's status was to accord to that child the same rights as a legitimate child, LA. CIV. CODE art. 199, to date from the last act required for legitimation. See 1 M. PLANIOL, *supra* note 13, no. 1567 at 869; LA. CIV. CODE 198 & 200.

57. *Trimble v. Gordon*, 430 U.S. 762, 770 (1977): "The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally."

Lalli v. Lalli, 439 U.S. 259, 271 (1978): "Even where an individual claiming to be the illegitimate child of a deceased man makes himself known, the difficulties facing an estate are likely to persist. Because of the particular problems of proof, spurious claims may be difficult to expose."

58. In the court of appeal opinion in *Succession of Brown*, 379 So. 2d 1172, 1178-79 (La. App. 2d Cir. 1980), the court observed:

Our legislature could and should protect the soundness of our land titles by evolving a test permitting illegitimates to inherit equally with legitimates under circumstances where such a rule does not endanger title soundness, and prohibiting their right to inherit equally when to do so would threaten the stability of titles. . . . We anticipate that the legislature will in the near future address itself to the problem

articles 208 and 209⁵⁹ on proof of filiation by unacknowledged illegitimates. Retaining certain express formal admissions by mother or father as sufficient proof of filiation (legitimation and formal acknowledgment⁶⁰), the amended legislation provides other circumstances which may establish a parent-child link. Some of the circumstances delineated in the statute parallel the conduct which the judiciary recognized in the past as express and *tacit* admissions of parentage.⁶¹

Initially, the statute distinguishes between illegitimate children who "may be entitled to a rebuttable presumption of filiation"⁶² and those who must establish filiation "by a civil proceeding instituted

59. LA. CIV. CODE art. 208: "Illegitimate children, who have not been legally acknowledged, may be allowed to prove their paternal descent."

LA. CIV. CODE art. 209:

In the case where the proof of paternal descent is authorized by the preceding article, the proof may be made in either of the following ways:

1. By all kinds of private writings, in which the father may have acknowledged the bastard as his child, or may have called him so;
2. When the father, either in public or in private, has acknowledged him as his child, or has called him so in conversation, or has caused him to be educated as such;
3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived.

The Louisiana Supreme Court held article 919 unconstitutional as violative of the equal protection guarantees of both the United States and Louisiana constitutions because of the absence of any legislative authority for illegitimates who have been discriminated against because of their status, to "remedy their loss of succession rights as the children of their father"

Civil Code articles 210 and 212 were repealed.

LA. CIV. CODE art. 210: "The oath of the mother, supported by proof of the cohabitation of the reputed father with her, out of his house, is not sufficient to establish natural paternal descent, if the mother be known as a woman of dissolute manners, or as having had an unlawful connection with one or more men (other than the man whom she declares to be the father of the child) either before or since the birth of the child."

LA. CIV. CODE art. 212: "Illegitimate children of every description may make proof of their maternal descent, provided the mother be not a married woman.

"But the child who will make such proof shall be bound to show that he is identically the same person as the child whom the mother brought forth."

60. LA. CIV. CODE art. 208, *as amended by* 1980 La. Acts, No. 549, § 1: "Illegitimate children who have not been acknowledged *as provided in Article 203*, may be allowed to prove their filiation." (Emphasis added).

LA. CIV. CODE art. 203, *as amended by* 1979 La. Acts, No. 607, § 1: "The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of such child."

61. See note 56, *supra*.

62. LA. CIV. CODE art. 209, *as amended by* 1980 La. Acts, No. 549, § 1:

An illegitimate child may be entitled to a rebuttable presumption of filiation

by the child or on his behalf . . . within the time limitation prescribed in this Article."⁶³ Distinguishing in the first paragraph between the use of the presumption of filiation and the necessity of a "civil proceeding" to establish filiation, two conclusions may logically be reached: 1) "Civil proceeding" means a particular type of proceeding for the sole purpose of establishing filiation, and this peculiar proceeding is subject to a special time limitation prescribed in the article.⁶⁴ 2) The "presumption" of filiation need not be asserted in this special "civil proceeding," as the statute does not require it; furthermore, its invocation is *not* subject to the time limitation prescribed in the article.⁶⁵

The statute establishes a presumption of paternity where the child is shown to be the child of a woman on an original certificate of birth, rebuttable by a preponderance of contrary evidence.⁶⁶ In the case of paternity, evidence that the mother and alleged father were known as living in a state of concubinage and resided as such at the time of the child's conception creates "a rebuttable presumption of filiation between the child and the alleged father."⁶⁷ As to paternal filiation, the statutory language creating the presumption is almost identical to the provision of former article 209 which provided that proof of paternal descent could be made when the mother was known as living in a state of concubinage with the father at the time of the child's conception.⁶⁸ However, the proof of paternal descent made by evidence of concubinage was not referred to in article 209 as a "presumption."

under the provisions of this article. *Or* any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf in the parish of his birth, or other proper venue as provided by law, within the time limitation prescribed in this Article.

(Emphasis added).

63. *Id.*

64. LA. CIV. CODE art. 209, as amended by 1980 La. Acts, No. 549, § 1:

5. *A civil proceeding to establish filiation* must be brought within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first. If an illegitimate child is born posthumously, a civil proceeding to establish filiation must be instituted within six months of its birth, *unless there is a presumption of filiation as set forth in Section 2 above.*

(Emphasis added). Reference to section 2 above did not include the section which established a presumption of paternity (section 4), but was an inadvertent mistake.

65. *Id.* Note particularly the emphasized language.

66. LA. CIV. CODE art. 209, as amended by 1980 La. Acts, No. 549, § 1.

67. 1980 La. Acts, No. 549, § 4.

68. LA. CIV. CODE art. 209, as amended by 1980 La. Acts, No. 549, § 1:

In the case where the proof of paternal descent is authorized by the preceding article, the proof may be made in either of the following ways: . . . 3. When the mother of the child was known as living in a state of concubinage with the father, and resided as such in his house at the time when the child was conceived.

Labelling such evidence as a presumption of paternity affects other statutes, most notably Civil Code article 186: "The husband of the mother is not presumed to be the father of the child if another man is presumed to be the father." Thus, by applying both article 209 (as amended) and article 186, if a wife is living in a state of concubinage at the time of conception of a child, the husband under article 186 is *not* presumed to be the father.⁶⁹ Under article 209, the paramour of the wife is "presumed" to be the father and it is unnecessary that the special "civil proceeding" establishing paternity be instituted within the prescribed time period. Yet, the amended legislation does not provide a mechanism for the paramour, presumed father, or his heirs to timely disavow paternity by a preponderance of evidence to the contrary. Presumably, the omission of the mechanism for disavowal of illegitimate filiation is explained by the fact that the authors of the legislation considered the institution of a "civil proceeding" necessary to invoke the rebuttable presumption. In other words, the legislators did not consider the presumption of illegitimate filiation self-operative, as in the case of the presumption of legitimate paternity absent timely disavowal. However, the language of section 1 of article 209, as amended, which introduces the remaining sections, distinguishes the presumption from the evidence necessary to establish legitimate filiation in a "civil proceeding."

Another problem created by the distinction between the "presumption" and a "civil proceeding" is the applicability of the time limit, a peremptive⁷⁰ period. Because of the statutory language,⁷¹ if

69. Article 186 was intended to apply where a child was conceived during one marriage but born during a second, thus creating "overlapping" presumptions under Louisiana Civil Code articles 184-85. Louisiana Civil Code article 184 reads: "The husband of the mother is presumed to be the father of all children *born or conceived* during the marriage." (Emphasis added). The solution offered by article 186 to the dilemma of "overlapping" presumptions is to apply the presumption to the first husband of the wife. Usually, although not always, the child is in actuality the biological child of the second husband. In France, the solution to the problem of conception and birth during different marriages is to consider the child legitimated by the subsequent (to conception) marriage of his parents (Louisiana Civil Code article 198), which automatically displaces the presumption of paternity of the wife's first husband. See discussion of French rule in Judge Tate's dissenting opinion in *George v. Bertrand*, 217 So. 2d 47, 49 (La. App. 3d Cir. 1968) (Tate, J., dissenting).

70. LA. CIV. CODE art. 209, as amended by 1980 La. Acts, No. 549, § 1: "5. If no proceeding is timely instituted, the claim of an illegitimate child or on its behalf to rights in the succession of the alleged parent shall be forever barred. The time limitation provided in this Article shall run against all persons, including minors and interdicts."

The time limitation provided for the husband's disavowal of a child born to his wife has been held to create a peremption. See LA. CIV. CODE arts. 189-90; *Pounds v. Schori*, 377 So. 2d 1195 (La. 1979).

71. LA. CIV. CODE art. 209, as amended by 1980 La. Acts, No. 549, § 1:

5. A civil proceeding to establish filiation must be brought within six months after

an illegitimate child is entitled to the presumption of filiation, he may invoke it in any proceeding at any time without the limitation of the peremptive period in article 209. Such an interpretation, however, violates the obvious legislative intent to avoid the problem of "stale" claims referred to by the court of appeal in *Succession of Brown*.⁷² In fact, two of the alternatives suggested by Professor Johnson in a report to the Louisiana Law Institute, which was cited in *Succession of Brown*, were adopted.⁷³ The time limitation for instituting the civil proceeding to establish filiation is "within six months after the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first."⁷⁴

If the alleged parent dies during the minority of the illegitimate child, presumably the surviving natural parent must qualify as natural tutor⁷⁵ and institute the proceeding on behalf of the minor. The mother is of right the natural tutrix; after her death, if the father did not acknowledge the child prior to the mother's death, the court is required to consider first either of the mother's parents or siblings who survive her, then the father. If the person entitled to claim the natural tutorship of the illegitimate child fails to qualify and institute the civil proceedings, the child possibly could have an action against him for the damages he suffered. The origin of such a claim does not lie in the failure of a tutor to perform his responsibilities⁷⁶ but possibly, by analogy, in a failure of the minor's "relations" to cause a tutor to be appointed.⁷⁷

the death of the alleged parent, or within nineteen years of the illegitimate child's birth, whichever occurs first. If an illegitimate child is born posthumously, a civil proceeding to establish filiation must be instituted within six months of its birth, unless there is presumption of filiation as set forth in Section 2 above

72. 379 So. 2d 1172 (La. App. 2d Cir. 1980).

73. *Id.* at 1178.

As suggested by H. Alston Johnson in his *Report To The Louisiana State Law Institute (Revision of the Louisiana Civil Code of 1870, Bk. III, Titles I & II, Successions and Donations, December 7, 1979)*, the Louisiana Legislature could require proof of filiation to be made (1) only during the lifetime of the father, (2) within six months of the father's death, or (3) within six months after the majority of the illegitimate claiming as heir.

379 So. 2d at 1178.

74. LA. CIV. CODE art. 209.

75. LA. CIV. CODE art. 256, as amended by 1979 La. Acts. No. 536, § 1.

76. LA. CODE CIV. P. art. 4171.

77. LA. CIV. CODE art. 310:

Relations who have neglected to cause a tutor to be *appointed*, are responsible for the damages which the minor may have suffered.

This responsibility is enforced against relations in the order according to which they are called to the inheritance of the minor, so that they are responsible only in case of the insolvency of him or them who precede them in that order, and this responsibility is not *in solidum* between relations who have a right to the inheritance in the same degree. (Emphasis added).

To further complicate application of the statute, which became effective upon signature of the Governor (July 23, 1980),⁷⁸ a special section provides:

Any illegitimate child nineteen years of age or older shall have one year from the effective date of this Act to bring a civil proceeding to establish filiation under the provisions of this Act and if no such proceeding is instituted within such time, the claim of such an illegitimate child shall be forever barred.⁷⁹

The purpose of the section is similar to a statute of repose because the legislature anticipated that *Succession of Brown* might be retroactive.⁸⁰ If the decision declaring article 919 unconstitutional were applied retroactively, an illegitimate could seek to annul a judgment of possession in a succession in which he was not recognized as an heir. Furthermore, he could seek to recover from third persons property alienated by the heirs within ten years of the judgment of possession.⁸¹ By including a one-year period ending July 23, 1981, within which illegitimates may bring a civil proceeding to establish filiation, the retroactive application of *Brown* would create fewer problems. An illegitimate child who has been formally acknowledged or possibly who is entitled to a rebuttable presumption of filiation is not affected, however, by the one-year statutory period. The one-year period provided an illegitimate to assert filiation in a civil proceeding seems reasonable except as applied to a child who is under the age of nineteen and whose alleged parent has been dead for more than six months. In the latter case, the child, or his tutor on his behalf, is effectively denied any succession rights possibly created by *Succession of Brown*.

Prospectively, the statute is a relatively liberal one in the proof acceptable to establish filiation absent a presumption. Evidence may include events, conduct, or other information such as an acknowledgement in a testament which occurred during the lifetime of the alleged parent,⁸² and the burden of proof to establish filiation is a preponderance of the evidence.⁸³ Assuming that filiation is established,

78. 1980 La. Acts, No. 549, § 3.

79. 1980 La. Acts, No. 549, § 4.

80. Other state courts faced with a similar problem, the retroactivity of *Trimble v. Gordon*, 430 U.S. 762 (1977), refused to apply retroactively a decision affecting the validity of their succession statutes. *Frakes v. Hunt*, 583 S.W.2d 497 (Ark. 1979), cert. denied, 100 S. Ct. 297 (1979); *Pendleton v. Pendleton*, 560 S.W.2d 539 (Ky. 1978); *Allen v. Harvey*, 568 S.W.2d 829 (Tenn. 1978).

81. LA. R.S. 9:5682 (Supp. 1975).

82. LA. CIV. CODE art. 209, as amended by 1980 La. Acts, No. 549, § 1.

83. LA. CIV. CODE art. 209, as amended by 1980 La. Acts, No. 549, § 1: "4. A child of a man may prove filiation by any means which establish, by a preponderance of the evidence, including acknowledgment in a testament, that he is the child of that man . . ."

the child will be entitled to succession rights—thus, more liberal than the New York statute as interpreted in *Lalli v. Lalli*.⁸⁴

84. 1 N.Y. EST., POWERS AND TRUSTS LAW § 4-1.2 (McKinney 1967). The United States Supreme Court upheld the statute which allowed an illegitimate to inherit from his father only if a court had, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother of within two years from the birth of the child. The court stated:

As the history of § 4-1.2 clearly illustrates, the New York Legislature desired to "grant to illegitimates *in so far as practicable* rights of inheritance on a par with those enjoyed by legitimate children," . . . while protecting the important state interests . . . Section 4-1.2 represents a carefully considered legislative judgment as to how this balance test could be achieved. Even if . . . § 4-1.2 could have been written somewhat more equitably, it is not the function of a court "to hypothesize independently on the desirability or feasibility of any possible alternative[s]" to the statutory scheme formulated by New York.

439 U.S. 259 (1978).