

Louisiana Law Review

Volume 77 | Number 4

Louisiana Law Review - Summer 2017

To Kill a Cuckoo Bird: Louisiana's Dual Paternity Problem

Henry S. Rauschenberger

Repository Citation

Henry S. Rauschenberger, *To Kill a Cuckoo Bird: Louisiana's Dual Paternity Problem*, 77 La. L. Rev. (2017)

Available at: <http://digitalcommons.law.lsu.edu/lalrev/vol77/iss4/11>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

To Kill a Cuckoo Bird: Louisiana's Dual Paternity Problem

INTRODUCTION

In addition to being the favorite bird of European clockmakers,¹ the cuckoo is also what is known as a “brood parasite.”² Cuckoos, rather than building their own nests, seize control of the nests of other birds.³ The cuckoo finds another bird's nest and then, while the other bird is away, lays its eggs in the nest.⁴ If the other bird fails to notice the deception, the cuckoo's egg will hatch and the cuckoo hatchling will take over the nest, hoisting the victim bird's eggs on its back and dropping them out of the nest to their destruction.⁵ The unknowing victim bird will continue to care for the cuckoo hatchling as though it were its own, nourishing the offspring of the cuckoo who has harmed it so greatly.⁶ Even if the victim bird discovers the deception, it is often compelled to continue to support and nourish the young cuckoo under threat of attack by the parent cuckoo who perches nearby.⁷

Much like the cuckoo's victim, men in Louisiana are also deceived into raising and supporting the biological children of other men and, even if they discover the deception, are often compelled by the force of law to continue to do so. In Louisiana, if a man is married to a woman who has an affair with another man resulting in the birth of a child, the husband, who is not the biological father of the child, will be presumed to be the legal father of the child.⁸ If the husband does not take legal action to disavow his paternity within one year of the child's birth, even if he has no reason yet to question his paternity, he will be considered the child's

Copyright 2017, by HENRY S. RAUSCHENBERGER.

1. For a history of the cuckoo clock see Jimmy Stamp, *The Past, Present and Future of the Cuckoo Clock*, SMITHSONIAN (May 17, 2013), <http://www.smithsonianmag.com/arts-culture/the-past-present-and-future-of-the-cuckoo-clock-65073025/?no-ist> [<https://perma.cc/AL2F-4GNF>].

2. Karl Schulze-Hagen, Bard G. Stokke & Tim R. Birkhead, *Reproductive Biology of the European Cuckoo Cuculus Canorus: Early Insights, Persistent Errors and the Acquisition of Knowledge*, J. ORNITHOLOGY, Jan. 2009, at 1, 1–2.

3. *Id.*

4. *Id.*

5. *Id.*

6. Rachael Winfree, *Cuckoos, Cowbirds and the Persistence of Brood Parasitism*, 14 TREE 338, 338 (1999).

7. *Id.* at 340.

8. LA. CIV. CODE art. 185 (2017).

legal father and will be responsible for the child's financial support.⁹ Even if the biological father of the child is identified and made legally responsible for the child, the legal father will remain legally responsible as well because, unique amongst the states, Louisiana allows for a child to have two legally recognized fathers through the doctrine of "dual paternity."¹⁰ Both the legal father and the biological father will be equally recognized as the child's father and dually responsible for the child's financial support.¹¹

Dual paternity has been the subject of fierce debate in Louisiana¹² and across the United States,¹³ particularly when, as in the majority of instances in Louisiana, it is forced upon the legal father due to the marital presumption of paternity.¹⁴ The primary argument against the doctrine is that it creates a "trifecta of insult and injury"¹⁵ to the wife's husband, who must now "suffer the betrayal by his wife, the shock of learning that his child is not biologically his, and now, the indignity of being forced to financially support a child born of his wife's adultery."¹⁶ In addition to this inherent unfairness, the courts of Louisiana have been inconsistent in dealing with the doctrine, particularly when it comes to the manner in which they have allocated child support obligations between dual fathers.¹⁷

9. *Id.* art. 189 (2015).

10. Sandi Varnado, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 628 (2006).

11. Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 228 (2010).

12. Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307, 321 (2007) [hereinafter *Who's Your Momma?*].

13. See Laura Nicole Althouse, *Three's Company? How American Law Can Recognize a Third Social Parent in Same-Sex Headed Families*, 19 HASTINGS WOMEN L.J. 171 (2008) (advocating the adoption of dual paternity and maternity schemes nationwide).

14. See, e.g., Jacinta M. Testa, *Finishing Off Forced Fatherhood: Does It Really Matter If Blood or DNA Evidence Can Rebut the Presumption of Paternity?*, 108 PENN. ST. L. REV. 1295, 1295 (2004); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 810 (2006).

15. Rachel L. Kovach, *Sorry Daddy—Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 653 (2010).

16. *Id.*

17. See, e.g., *Dep't of Soc. Servs. v. Williams*, 605 So. 2d 7 (La. Ct. App. 1992); *Dep't of Soc. Servs. ex rel. Munson v. Washington*, 747 So. 2d 1245 (La.

The Louisiana Supreme Court has clearly established the principle that a biological father owes a duty of support to his biological child, even if another man is the legal father of that child due to the presumption of paternity.¹⁸ The Court has, however, specifically declined to answer the question of whether the presumed legal father of the child also shares in this obligation of support,¹⁹ leading to wildly varying decisions by lower courts.²⁰

Recently, in *Department of Children and Family Services ex rel. A.L. v. Lowrie*, the Louisiana Supreme Court answered a portion of the question regarding the allocation of the support obligation between legal and biological fathers in dual paternity situations.²¹ In *Lowrie*, the Louisiana Supreme Court affirmatively held that a legal father is entitled to have the court consider the income of a child's biological father when calculating the legal father's child support obligation in dual paternity situations.²² Although this decision injects a small measure of fairness into the doctrine of dual paternity by requiring the consideration of a biological father's income in the legal father's child support determination, it does not go far enough.

Lowrie leaves the doctrine of dual paternity intact, meaning former husbands are still financially responsible for, and legally bound to, children who are products of their wives' adultery, against their will. Furthermore, although the decision requires consideration of the biological father's income, it provides no framework or methodology for lower courts to utilize in doing so, creating fertile ground for continued judicial confusion. The only way to solve the problem and the unfairness and confusion that result from it is legislative action aimed at eliminating the occurrence of forced dual paternity altogether.

Part I of this Comment provides an overview of Louisiana's law of filiation and how it has given rise to the doctrinal problem of dual paternity. Part II describes the Louisiana Supreme Court's attempt to

Ct. App. 1999); Louisiana *ex rel. Wilson v. Wilson*, 855 So. 2d 913 (La. Ct. App. 1992); *Fontenot v. Thierry*, 422 So. 2d 586 (La. Ct. App. 1982); *J.M.Y. v. R.R.*, 1 So. 3d 725 (La. Ct. App. 2008); *Starks v. Powell*, 552 So. 2d 609 (La. Ct. App. 1989); *Jones v. Rodrigue*, 771 So. 2d 275 (La. Ct. App. 2000).

18. *Gallo v. Gallo*, 861 So. 2d 168, 180 (La. 2003).

19. *Smith v. Cole*, 553 So. 2d 847, 854–55 (La. 1989). *See infra* Part I.B.

20. *See, e.g., Williams*, 605 So. 2d 7; *Washington*, 747 So. 2d 1245; *Wilson*, 855 So. 2d 913; *Fontenot*, 422 So. 2d 586; *J.M.Y.*, 1 So. 3d 725; *Starks*, 552 So. 2d 609; *Jones*, 771 So. 2d 275.

21. Dep't of Children & Family Servs. *ex rel. A.L. v. Lowrie*, 167 So. 3d 573, 585 (La. 2015).

22. *Id.*

mitigate the harm caused by the doctrine with its decision in *Lowrie*, by explaining the decision in full and discussing its effect. Part III details the problems that still remain with the doctrine of dual paternity post-*Lowrie*. Part IV suggests a solution for the problem of forced dual paternity through modification the legal provisions which give rise to it. Finally, the Addendum addresses changes made by the legislature to Louisiana's law of filiation after this Comment was accepted for publication.

I. DUAL PATERNITY HATCHES IN LOUISIANA

In Louisiana, the law of filiation is the foundation of the doctrine of dual paternity. Filiation refers to the legal relationship between parent and child, and the "law of filiation" is the method by which these legal relations are determined and established.²³ Dual paternity was created by the Louisiana Supreme Court in an attempt to align Louisiana's law of paternal filiation with changing legal and social reality.²⁴ The Court found it necessary to create the doctrine of dual paternity due to a conflict between the traditional manner in which the law of Louisiana determines paternity and modern science which can determine biological paternity with near certainty.²⁵ Later, the legislature chose to codify the doctrine.²⁶ Ultimately, the narrative of dual paternity begins with the legal creation of one father and ends with the judicial formation of a second.

A. *Fatherhood in Louisiana*

The Louisiana Civil Code defines filiation as "the legal relationship between a child and his parent."²⁷ Filiation is established in three ways: by proof of maternity; by proof of paternity; or by adoption.²⁸ Proof of maternity is conceptually straightforward²⁹ and is "established by a

23. John R. Trahan, *Glossae on the New Law of Filiation*, 67 LA. L. REV. 387, 388 n.1 (2007) ("Filiation is defined as 'the [juridical] line that unites a child to his father or to his mother: to his father, paternal filiation or paternity; to his mother, maternal filiation or maternity.'" (quoting GÉRARD CORNU, DROIT CIVIL: LA FAMILLE 313 (7th ed. 2001))).

24. See *infra* Part I.B.1.

25. See *infra* Part I.B.3.

26. See *id.*

27. LA. CIV. CODE art. 178 (2017).

28. *Id.* art. 179.

29. Modern technology has made this legal determination of maternity no longer such a conceptually straightforward matter, allowing for women to give birth to children with whom they share no biological relation. For a comparison of different legal approaches to establishing maternal filiation in light of new

preponderance of the evidence that the child was born of a particular woman, except as otherwise provided by law.”³⁰ This principle *mater semper certa est*, or “the mother is always certain,” is supported by the presumption *mater is est quem gestation demonstrant*, or “the mother is the woman whom the pregnancy points to.”³¹ This presumption has existed since Roman times and reflects the former biological certainty that a child born of a mother is her child.³²

In contrast, establishing the paternity of a child has historically been a more complex endeavor because of natural uncertainties that existed before the advent of paternity testing. Specifically, there is no physical event, such as the mother’s giving birth, with which to definitively establish the paternity of a particular man.³³ Given this uncertainty, the law in Louisiana and elsewhere created legal methods for establishing proof of paternity. Louisiana has two primary methods for establishing proof of paternity and thereby filiating child to father: presumptions of paternity³⁴ and judicial action.³⁵

advancements in reproductive technology see Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000).

30. LA. CIV. CODE art. 184.

31. Magdalena Duggan, *Mater Semper Certa Est, Sed Pater Incertus? Determining Filiation of Children Conceived via Assisted Reproductive Techniques: Comparative Characteristics and Visions for the Future*, 4 IRISH J. L. STUDIES 1, 4 (2014). This “biological certainty” that a woman is the mother of a child to whom she gives birth is not such a certainty given modern reproductive technology, but this issue is beyond the scope of this Comment. *See id.*

32. *Id.*

33. See Theresa Glennon, *Somebody’s Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000).

34. LA. CIV. CODE art. 185.

35. See *infra* Part I.A.2. In Louisiana, the methods of establishing paternity are: (1) the marital presumption, *id.* art. 185; (2) the contestation action, *id.* art. 191; (3) acknowledgement, *id.* art. 192; (4) the Father’s Action to Establish Paternity, *id.* art. 198; (5) the Child’s Action to Establish Paternity, *id.* art. 197; adult adoption, *id.* art. 199; and child adoption, governed by the provisions of the Children’s Code. Only the marital presumption, *id.* art. 185; the Father’s Action to Establish Paternity, *id.* art. 198; and the Child’s Action to Establish Paternity, *id.* art. 197, will be discussed fully in this a Comment as they are the most pertinent to the issue of dual paternity. For a complete discussion of all of the methods of establishing paternity, and other matters related to filiation see Trahan, *supra* note 23.

1. Establishing Legal Fatherhood Through the Presumption of Paternity

The marital presumption of paternity is a passive method of filiating a child to a father, as it requires no filing or affirmative act by any party. In Louisiana, the husband of the mother of a child is presumed to be the father of that child if that child is born during the marriage or within 300 days from the date of the termination of the marriage.³⁶ This method of establishing paternity can be traced to the Romans, who established the presumption *pater is est quem nuptiae demonstrant*, or “the father is the man whom the marriage points out,”³⁷ to address the uncertainty as to a child’s paternity that existed in an age before genetic testing.³⁸ In Louisiana, this marital presumption of paternity is considered the “strongest presumption in the law.”³⁹ However, Louisiana law does provide an opportunity for husbands to rebut this presumption by way of the disavowal action.⁴⁰

The disavowal action is a legal action by which a man, legally recognized as the father of a child, attempts to disestablish his legal fatherhood by disproving his paternity of the child.⁴¹ The action for disavowal of paternity is subject to a brief liberative prescription⁴² of one year, which runs from the day the husband learns or should have learned of the birth of the child.⁴³ Although former Louisiana Revised Statutes section 9:305 provided for a suspension of prescription in cases in which the father erroneously believed that he was the father of the child due to fraud, misrepresentation, or deceit on the part of the mother, this statute was repealed in 2006.⁴⁴ Currently, the only exception to this short prescriptive period occurs if the husband and mother have been living

36. LA. CIV. CODE art. 185.

37. See Duggan, *supra* note 31.

38. *Id.*

39. LA. CIV. CODE art. 185 cmt. b (first citing *Tannehill v. Tannehill*, 261 So. 2d 619 (La. 1972); and then citing *Williams v. Williams*, 87 So. 2d 707 (La. 1956)) (“[I]t has been said in the jurisprudence of this court that [the presumption that the husband of the mother is the father of the child] is the strongest presumption known in the law.”).

40. LA. CIV. CODE art. 187.

41. See generally Trahan, *supra* note 23; 14 C.J.S. *Children Out-of-Wedlock* § 30 (2015). To disavow is “[t]o disown; to disclaim knowledge of or responsibility for; to repudiate.” *Disavow*, BLACK’S LAW DICTIONARY 561 (10th ed. 2009).

42. For a general discussion of liberative prescription see *Bailey v. Khoury*, 891 So. 2d 1268 (La. 2005).

43. LA. CIV. CODE art. 189 (2015).

44. LA. REV. STAT. § 9:305 (1997), *repealed by* 2006 La. Acts. No. 344.

“separate and apart . . . continuously” for the 300 days immediately preceding the child’s birth.⁴⁵ In such cases, prescription for the disavowal action does not commence to run until the husband is notified in writing “that a party in interest has asserted that the husband is the father of the child.”⁴⁶

Both the legislature and the judiciary have justified the one-year prescriptive limit for disavowal actions as serving the state’s public policies of “(1) preserving the family unit, (2) protecting the individual child from emotional harm and the stigma of illegitimacy, and (3) the need to recognize biological fact.”⁴⁷ It is this prescriptive period that, in most instances, gives rise to dual paternity situations. This situation occurs when a husband becomes aware of his wife having given birth to a child but remains unaware of the possibility that his wife’s child may not be his until after this short prescriptive period of a year’s time has run. After this prescriptive window has “closed,” the husband will forever be prevented from disavowing his paternity of the child even if the child’s true biological father is identified and his biological paternity proven.⁴⁸

2. *Establishing Legal Fatherhood Through Judicial Action*

Proof of paternity may also be established through judicial action.⁴⁹ A man may institute an action to establish his paternity of a child.⁵⁰ If the child is presumed to be the child of another man, the action is subject to a peremptive period⁵¹ of one year from the day of the birth of the child.⁵² If the mother in bad faith deceives the father regarding his paternity, the peremptive period changes to one year from the day the father “knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.”⁵³ If the child is not presumed to be the child of another man, the man seeking to establish his paternity may

45. LA. CIV. CODE art. 189.

46. *Id.* (this situation most often arises in the context of child support or succession).

47. Kovach, *supra* note 15, at 679.

48. See *Who’s Your Momma?*, *supra* note 12.

49. LA. CIV. CODE art. 198 (2017). Louisiana law allows for paternity to be determined through the use of blood and tissue tests. LA. REV. STAT. §§ 9:396, 3398.2 (2017).

50. LA. CIV. CODE art. 198.

51. For a general discussion of peremption see *Ebinger v. Venus Const. Corp.*, 65 So. 3d 1279 (La. 2011).

52. LA. CIV. CODE art. 198.

53. *Id.*

institute the action at any time.⁵⁴ However, in all cases, the action is subject to a one-year peremptive period⁵⁵ from the day of the death of the child.⁵⁶

A child may also institute actions to prove paternity, even if presumed under the law to be the child of another man.⁵⁷ If the action is commenced against a living father, the fact of paternity must be proved by a preponderance of the evidence.⁵⁸ If the action is commenced after the death of the alleged father, clear and convincing evidence must be shown to prove paternity.⁵⁹ The law imposes a stricter burden of proof to establish filiation after the death of the alleged father to protect against fraudulent claims against the alleged father's succession.⁶⁰ For purposes of succession only, the action is subject to a peremptive period of one year, commencing to run from the day of the death of the alleged father.⁶¹ Thus, children are able to establish their filiative connection to a biological parent at any time, provided that the father has not been deceased for over one year.

Through these two actions a biological father may become filiated to a child, even though another man is presumed to be that child's father.⁶² When these two methods of establishing paternity—marital presumption of paternity and judicial action—operate in tandem, dual paternity occurs, and problems begin. Although the Civil Code now clearly provides for

54. *Id.*

55. Peremption is a period of time fixed by law for the existence of a right. LA. CIV. CODE art. 3458; *see also* WILLIAM E. CRAWFORD, TORT LAW § 10:11, *in* 12 LOUISIANA CIVIL LAW TREATISE (2d ed. 2015). This time period can be contrasted from liberative prescription, which is a bar to the bringing of a cause of action because of its untimely filing. LA. CIV. CODE art. 3447; *Liberative Prescription*, BLACK'S LAW DICTIONARY 1373 (10th ed. 2014).

56. LA. CIV. CODE art. 198. The one-year prescriptive period from the death of the child was enacted by the legislature under the theory that a father who has failed during the child's life to assume parental responsibilities should not be permitted unlimited time in which to institute an action to benefit from that child's death. *Id.* art. 198 cmt. d.

57. *Id.* art. 197.

58. *State v. Shaddinger*, 702 So. 2d 965, 970 (La. Ct. App. 1997), *writ denied*, 709 So. 2d 743 (La. 1998); *Dep't of Soc. Servs. v. Thomas*, 660 So. 2d 163, 165 (La. Ct. App. 1995) (citing *Litton v. Litton*, 624 So. 2d 472 (La. Ct. App. 1993) ("Simply stated, it must be shown that paternity . . . is more probable than not.")).

59. LA. CIV. CODE art. 197.

60. Katherine Shaw Spaht, *Persons*, 43 LA. L. REV. 535, 537 (1982) [hereinafter *Persons*].

61. LA. CIV. CODE art. 197.

62. *See id.* art. 185.

dual paternity, this was not always the case.⁶³ These articles codify a judicial doctrine whose creation was one of necessity, whose extension was born of confusion, and whose codification was the product of heated disagreement.

B. The Doctrine of Dual Paternity Arises

The path to Louisiana's current doctrine of dual paternity begins with the judiciary and ends in the legislature. The doctrine of dual paternity in Louisiana arose from the 1974 Louisiana Supreme Court case of *Warren v. Richard* in an attempt to reconcile Louisiana family law with then-recent United States Supreme Court precedent.⁶⁴ The Louisiana Supreme Court later extended its judicial creation to the realm of child support in *Smith v. Cole*, holding that a biological father owed support to his children even if those children were legally presumed to be the children of another man.⁶⁵ Finally, after heated debate, the doctrine was codified by the legislature, becoming fully entrenched in the law of Louisiana.⁶⁶

1. The Birth of the Doctrine

The Louisiana Supreme Court case of *Warren v. Richard* involved an attempt by an illegitimate child to recover for the wrongful death of her biological father when, at the same time, she was recognized under the law as the legitimate child of another man.⁶⁷ Citing then-recent United States Supreme Court decisions holding legal burdens placed on illegitimate children unconstitutional, the Louisiana Supreme Court reasoned that it could not hold that the biological child of the deceased man could not recover for his wrongful death merely because she was presumed to be the child of another man.⁶⁸ Such a holding, the Louisiana Supreme Court reasoned, "would run counter to the principles established in the decisions of the United States Supreme Court . . . and would ignore the existence of the child's biological father."⁶⁹ Attempting to reconcile Louisiana's law of

63. See *Who's Your Momma?*, *supra* note 12.

64. *Warren v. Richard*, 296 So. 2d 813 (La. 1974).

65. *Smith v. Cole*, 553 So. 2d 847, 848 (La. 1989), *superseded by statute on other grounds*, 2004 La. Acts No. 530 (amending Civil Code article 191).

66. See *infra* Part I.B.3.

67. *Warren*, 296 So. 2d at 815.

68. *Id.* at 817.

69. *Id.*

paternal filiation with the United States Supreme Court's recent rulings,⁷⁰ the Louisiana Supreme Court made Louisiana the first and only state in which a child could simultaneously have two legally recognized fathers.⁷¹

The Louisiana Supreme Court noted in its opinion that the result in *Warren* would allow the child to recover for the death of both her biological and legal fathers, but further noted that this concept was not unique in Louisiana law, as a similar result was specifically provided for in the case of adopted children.⁷² The Court specifically noted its "mindfulness" of the problems that a logical extension of its holding could create in regard to support and maintenance obligations, but believed that they were required to adhere to the constitutional principles announced by the United States Supreme Court.⁷³ The Louisiana Supreme Court's prediction of issues arising in support situations was in fact quite prophetic, as it was not long after the decision in *Warren v. Richard* that these issues began to arise.⁷⁴

2. Extension of the Doctrine

It took only a little over a decade for the doctrine of dual paternity to arise in the context of support. In *Smith v. Cole*, the Louisiana Supreme Court considered whether a mother could assert a paternity and support action against an alleged biological father, notwithstanding the fact that the child was conceived or born during the mother's marriage to another man and was thus presumed to be her husband's legitimate child.⁷⁵ Applying the concept of dual paternity arising from *Warren v. Richard*, the Court held that a biological father had an obligation to support his child regardless of whether that child was considered the legal child of another man.⁷⁶ The Court reasoned that "[s]ince [the legal father's] failure to

70. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glonn v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972).

71. See *Griffin v. Succession of Branch*, 479 So. 2d 324 (La. 1985); *Malek v. Yekani-Fard*, 422 So. 2d 1151 (La. 1982); *Succession of Mitchell*, 323 So. 451 (La. 1975).

72. *Warren*, 296 So. 2d at 817 (citing former article 214 of the Louisiana Civil Code, which held that adoption did not divest a child of his or her right to inherit from his or her biological parents).

73. *Id.*

74. See, e.g., *State ex rel. Poche v. Poche*, 368 So. 2d 175 (La. Ct. App. 1979), writ denied, 370 So. 2d 577 (La. 1979).

75. 553 So. 2d 847, 848 (La. 1989), superseded by statute on other grounds, 2004 La. Acts No. 530 (amending Civil Code article 191).

76. *Id.* at 854.

disavow paternity would not preclude [the biological father] from bringing an avowal action, it would be unjust to construe the presumption as to provide [the biological father] with a safe harbor from child support obligations.”⁷⁷ Because the legal father was not a named party, the Louisiana Supreme Court did not decide whether a legal father would share in a support obligation with a biological father in dual paternity situations.⁷⁸

The lower courts of Louisiana followed the decision in *Smith v. Cole* extensively,⁷⁹ which established as *jurisprudence constante*⁸⁰ both the doctrine of dual paternity and the companion principle that a biological father owes support obligations to his child even when the child has a different legally presumed father.⁸¹ The lower courts, having no clear guidance from the Louisiana Supreme Court, proceeded to allocate support obligations to both the legal and biological fathers of children in dual paternity situations, but the Court did so in a confused and haphazard manner, without using a clear formula.⁸² This lack of uniformity in child support was and remains a serious concern as it breeds inequity and runs contrary to federal mandates regarding child support.⁸³

3. Legislative Codification of the Doctrine

The doctrine of dual paternity moved from *jurisprudence constante* to statutory in 1991. In 1991, the Marriage–Persons Committee of the Louisiana Law Institute began a project that ultimately resulted in the complete overhaul of the Louisiana Civil Code articles on filiation in

77. *Id.*

78. *Id.* at 858.

79. See Dep’t of Soc. Servs. *ex rel.* P.B. v. Reed, 52 So. 3d 145 (La. Ct. App. 2010); J.M.Y. v. R.R., 1 So. 3d 725 (La. Ct. App. 2008); Jones v. Rodrigue, 771 So. 2d 275 (La. Ct. App. 2000); Smith v. Dison, 662 So. 2d 90 (La. Ct. App. 1995).

80. *Jurisprudence constante*, or the tendency of courts to decide particular cases in particular ways, is similar to the common-law concept of precedent though it is of persuasive authority rather than binding. GÉRARD CORNU, *DICTIONARY OF THE CIVIL CODE* 331 (Alain Levasseur & Marie-Eugénie Laporte-Legeais trans. 2014); see also BLACK’S LAW DICTIONARY 985 (10th ed. 2009). For a detailed discussion of the civilian doctrine of *jurisprudence constante* as it pertains to Louisiana law see CRAWFORD, *supra* note 55, § 1:15.

81. See Reed, 52 So. 3d 145; J.M.Y., 1 So. 3d 725; Jones, 771 So. 2d 275; Dison, 662 So. 2d 90.

82. Jacobs, *supra* note 11, at 288.

83. Louis I. Parley, *Deviation or Modification*, 16 FAM. ADVOC. 48, 48 (1993).

2005.⁸⁴ The most contentious issue faced by the Louisiana Law Institute during its 14-year process of revision was dual paternity.⁸⁵ The Council of the Law Institute debated six times whether the law should allow for the existence of dual paternity, and the debates often reached conflicting results.⁸⁶ Ultimately, the Law Institute opted for codification of the doctrine of dual paternity.⁸⁷ When the legislature adopted the recommended changes, the doctrine of dual paternity, as born in the *Warren* case and extended in *Smith*, became legislatively enshrined in Louisiana's law of filiation.⁸⁸

II. TWO BIRDS, ONE EGG: *LOWRIE*

After the legislature codified the doctrine of dual paternity, lower courts in Louisiana continued to struggle with the issue of child support allocations in dual paternity situations.⁸⁹ This unresolved issue has created confusion for parents, family law practitioners, and the judiciary.⁹⁰ The Louisiana Supreme Court attempted to resolve some of this confusion with its decision in *Department of Children and Family Services ex rel. A.L. v. Lowrie*.⁹¹

A. *Illicit Liaisons: The Background of Lowrie*

The latest change to the doctrine of dual paternity arose from a set of facts that are fairly common to most dual paternity situations. Thomas Robert Lowrie and Melissa Percy Lowrie were married in December of 2002.⁹² During the marriage, Mrs. Lowrie gave birth to two children, A.L.

84. *Who's Your Momma?*, *supra* note 12, at 307.

85. *Id.* at 321.

86. *Id.* at 307.

87. Kovach, *supra* note 15, at 659.

88. *Id.*

89. *See, e.g.*, *Dep't of Social Services v. Williams*, 605 So. 2d 7 (La. Ct. App. 1992); *Dep't of Social Services ex rel. Munson v. Washington*, 747 So. 2d 1245 (La. Ct. App. 1999); *State ex rel. Wilson v. Wilson*, 855 So. 2d 913 (La. Ct. App. 1992); *Fontenot v. Thierry*, 422 So. 2d 586 (La. Ct. App. 1982); *J.M.Y. v. R.R.*, 1 So. 3d 725 (La. Ct. App. 2008); *Starks v. Powell*, 552 So. 2d 609 (La. Ct. App. 1989); *Jones v. Rodrigue*, 771 So. 2d 275 (La. Ct. App. 2000).

90. *See, e.g.*, *Williams*, 605 So. 2d 7; *Washington*, 747 So. 2d 1245; *Wilson*, 855 So. 2d 913; *Fontenot*, 422 So. 2d 586; *J.M.Y.*, 1 So. 3d 725; *Starks*, 552 So. 2d 609; *Jones*, 771 So. 2d 275.

91. *Dep't of Children & Family Servs. ex rel. A.L. v. Lowrie*, 167 So. 3d 573 (La. 2015).

92. *Id.* at 576.

on February 4, 2003 and B.W. on May 4, 2009.⁹³ The Lowries divorced in October of 2010.⁹⁴ Mr. Lowrie, believing Stephen A. Wetzel to be the true biological father of the children, sought to disavow his paternity of both A.L. and B.W.⁹⁵ Mr. Lowrie successfully disavowed paternity of B.W. in January of 2011.⁹⁶ However, Mr. Lowrie's action to disavow A.L. was found to be untimely, and he therefore remained the legal father of A.L.⁹⁷

In September 2012, the State of Louisiana, Department of Children and Family Services ("DCFS") filed an action against Mr. Lowrie in the Jefferson Parish Juvenile Court seeking medical and child support for A.L.⁹⁸ DCFS filed the action under Louisiana's child support enforcement law,⁹⁹ which creates a cause of action in its favor, as DCFS was allegedly providing services for A.L.¹⁰⁰ On January 22, 2013, both Mrs. and Mr. Lowrie appeared before the juvenile court hearing officer on a rule for child support.¹⁰¹ The hearing officer, taking only Mr. Lowrie's income into account, granted a temporary order of support against Mr. Lowrie for \$500.00 per month.¹⁰² Mr. Lowrie filed a "Petition for Third Party Claim," alleging that Mr. Wetzel was a necessary and indispensable party to the support proceedings.¹⁰³ This third-party claim was dismissed by the juvenile court hearing officer.¹⁰⁴ At a subsequent hearing before the juvenile court judge, Mr. Lowrie presented a positive paternity test showing that Mr. Wetzel was A.L.'s biological father.¹⁰⁵ Mr. Lowrie also presented evidence showing that A.L. and Mrs. Lowrie were currently living with Mr. Wetzel.¹⁰⁶ Even after Mr. Lowrie's proffering of evidence, the juvenile court judge upheld the hearing officer's recommendation to dismiss Mr. Lowrie's third-party demand.¹⁰⁷

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. LA. REV. STAT. §§ 46:236.1.1–46:238 (2012).

100. *Lowrie*, 167 So. 3d at 576 (what services were being provided is not specified in the opinion).

101. *Id.*

102. *Id.* at 576–77.

103. *Id.* at 577.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

B. Untangling the Web: The Holding and Reasoning

The Louisiana Supreme Court granted Mr. Lowrie's application for writs in October of 2014, setting the stage for a potential paradigm shift in Louisiana law concerning dual paternity.¹⁰⁸ The Court had before it the opportunity to bring clarity, reason, and equity to the doctrine of dual paternity.¹⁰⁹ However, the Court's decision ultimately brought only a small measure of clarity and reason, while leaving the fundamental inequity of forced dual paternity intact.¹¹⁰

1. Holding

The Louisiana Supreme Court, in a six-to-one decision,¹¹¹ reversed the Jefferson Parish Juvenile Court's February 24, 2014 judgment of dismissal and remanded to the juvenile court.¹¹² In an opinion authored by Justice Hughes, the Court held first that Mr. Lowrie was entitled to raise the defense that he should be accorded a deviation from the child support guidelines to take into account Mr. Wetzel's income, if Mr. Wetzel's paternity of A.L. was proven;¹¹³ and second that Mr. Wetzel was a person who should be joined as a party in the action as complete relief could not be accorded in his absence.¹¹⁴

The Court noted that "it is well-settled that the legal father presumption should not be extended beyond its useful sphere."¹¹⁵ The Court also recognized that the presumption was created to prevent case-by-case paternity determinations and protect children from the stigma of illegitimacy.¹¹⁶ The presumption was not, according to the Court, "intended to shield biological fathers from their support obligations."¹¹⁷ If Mr. Wetzel could be proven to be A.L.'s biological father, then, the Court held, he would have an obligation to contribute to A.L.'s support.¹¹⁸

108. Dep't of Children & Family Servs. *ex rel.* A.L. v. Lowrie, 149 So. 3d 275 (La. 2014), *opinion after grant of writ*, 167 So. 3d 573 (La. 2015).

109. See Kovach, *supra* note 15, at 652.

110. *Lowrie*, 167 So. 3d at 590.

111. Justice John Weimer concurred in the judgement, writing separately to note his concern about the possibilities of harmful delays, which may inure to blameless children while parents hash out paternity disputes. *Id.* at 590.

112. *Id.*

113. *Id.* at 586.

114. *Id.* at 590.

115. *Id.* at 582 (citing *Smith v. Cole*, 553 So. 2d 847, 854 (La. 1989)).

116. *Id.*

117. *Id.*

118. *Id.*

2. Reasoning

In reviewing the jurisprudence, the Court acknowledged that lower courts in Louisiana had imposed child support obligations on biological fathers in the past even when the children had a legally presumed father.¹¹⁹ In the Court's view, it was clear that existing law provided procedures for determining an alleged biological father's paternity and his due contribution to that child's support, and that these types of determinations were in accord with "express legislative policy."¹²⁰ Therefore, the Court concluded that Mr. Lowrie's defense that he should have received a deviation in the mechanical application of the child support guidelines, taking into account Mr. Wetzel's income, should not have been summarily dismissed.¹²¹

The Court rejected the State's argument that courts should refrain from allowing legal fathers in dual paternity situations to assert defenses that require joinder of an alleged biological father due to the potential for causing delays in establishing support orders.¹²² The State asserted two reasons that the defense should not be allowed.¹²³ First, the State argued that allowing such defenses would result in delays in the award of support and in the cases of subsequent modifications of support orders.¹²⁴ Second, the State asserted that allowing such defenses would "open[] the door" for any presumed father being sued for child support to erroneously allege that some other man was the biological father, just so that his income would be considered in the child support calculation.¹²⁵ The Court held that the directives found in Civil Code articles 240 and 241,¹²⁶ which state that fathers must provide support for their illegitimate children in need, should prevail over any case management concerns that the State had.¹²⁷ The Court also noted that the sanctions provided for in Louisiana Code of Civil Procedure article 863 for the filing of unsubstantiated and frivolous claims would serve as a deterrent for the kind of activity that the State was concerned about.¹²⁸ Furthermore, the Court held that in the instant case

119. *Id.*

120. *Id.* at 585.

121. *Id.*

122. *Id.* at 585–86.

123. *Id.* at 586.

124. *Id.*

125. *Id.*

126. LA. CIV. CODE arts. 240, 241 (2015).

127. *Lowrie*, 167 So. 3d at 586.

128. *Id.*; *see also* LA. CODE CIV. PROC. art. 863 (2015).

“the mother’s admissions and the biological father’s DNA test results clearly provide a good faith basis for Mr. Lowrie’s pleadings.”¹²⁹

Addressing Mr. Lowrie’s assertion that Mr. Wetzel was a necessary party who should be joined as a defendant, the Court held that if Mr. Lowrie could establish Mr. Wetzel’s biological paternity of A.L. at trial, then the joinder of Mr. Wetzel would be necessary.¹³⁰ The Court reasoned that if Mr. Wetzel was proven to be A.L.’s biological father, he would owe a legal duty of support to A.L. and that this support obligation would have an effect on the calculation of Mr. Lowrie’s support obligation.¹³¹ The matter, therefore, could not be fully resolved without Mr. Wetzel’s joinder, making him, by definition, a necessary party.¹³²

The Court rejected the State’s argument that DCFS policy prohibits enforcement actions against alleged biological fathers when the mother has not named the biological father on her application for support services, as was the situation in the instant case.¹³³ The Court held that the statutory law governing child support overrode the agency’s internal policies and customs.¹³⁴ It stated in its decision that “regulations promulgated by an agency may not exceed the authorization delegated by the legislature.”¹³⁵ Administrative agencies may only assert and exercise their delegated authority to further the ends that the legislature was pursuing through its delegation of power to the agency.¹³⁶ The Court noted that “[t]he open-ended discretion to choose ends is the essence of legislative power.”¹³⁷

The Court further noted that “it is this power that the legislative body possesses, but its agents lack.”¹³⁸ The Court determined that it was in the best interest of children in “necessitous circumstances” to have their tie to their biological fathers legally recognized, as this recognition of biological paternity results in the biological father being obligated to contribute support.¹³⁹ According to the Court, the State had an additional interest in

129. *Lowrie*, 167 So. 3d at 586.

130. *Id.* at 587. The Second Circuit Court of Appeal of Louisiana has previously held that the presumed father of a child was an indispensable party in an action by a biological father to establish his paternity. *Ebey v. Harvill*, 647 So. 2d 461 (La. Ct. App. 1994).

131. *Lowrie*, 167 So. 3d at 587.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 587–88.

137. *Id.* at 588 (citing *State v. Alfonso*, 753 So. 2d 156, 161–62 (La. 1999)).

138. *Id.*

139. *Id.* (citing *Smith v. Cole*, 553 So. 2d 847, 854 (La. 1999)).

determining biological paternity in situations, such as the instant one, where the child was receiving services from the state, as this determination would help to relieve the financial burden of providing these services placed “upon the public fisc.”¹⁴⁰ The statutory provisions granting DCFS authority to enforce child support obligates DCFS to act in the child’s best interest, including filiating that child to a biological parent who can thereafter be compelled to provide child support.¹⁴¹ Therefore, the DCFS “policy” of not pursuing action against biological fathers where the mother has not named them actually contravened the law and was therefore unenforceable.¹⁴² The Court’s decision made it clear that both the biological and legal fathers in a dual paternity situation need to be part of the child support calculus, but left the remainder of the dual paternity problem unsolved.

III. CUCKOOS AND CUCKOLDS: THE PROBLEM OF FORCED DUAL PATERNITY

After the *Lowrie* decision, biological fathers must now be joined as necessary parties; their income is also to be considered when making child support determinations in dual paternity situations. However, many questions still remain regarding how, in practice, the biological father’s income is to be considered when making child support determinations. Furthermore, the fundamental inequity of dual paternity, which makes a presumed father financially responsible for the children of his wife’s infidelity against his will when a biological father has been identified, remains unresolved.

A. *Procedural Uncertainty Continues*

Although the Louisiana Supreme Court made it clear in *Lowrie* that a biological father in a dual paternity situation is a party who should be joined in the proceeding, and that his income should be considered in making the final support determinations, the Court did not provide any guidance to lower courts as to exactly how the income should be considered.¹⁴³ Without a formula or a framework for making these decisions, lower courts will continue, as they did before the *Lowrie* decision, to make haphazard and ad hoc determinations, leading to inconsistent child support determinations

140. *Id.*

141. *Id.* at 589.

142. *Id.*

143. *Id.*

across the state.¹⁴⁴ This creates a serious problem because consistency in child support awards is critical to Louisiana's child support regime.¹⁴⁵

Legislation is the "solemn expression of [the] legislative will"¹⁴⁶ and must be "applied and interpreted in a manner that is logical and consistent with the presumed fair purpose and intention the Legislature had in enacting it."¹⁴⁷ The express legislative intent in establishing the child support guidelines was to establish uniformity in child support awards.¹⁴⁸ The child support guidelines were in fact established in response to federal legislation mandating the establishment of such guidelines by states to promote, in part, uniformity among awards.¹⁴⁹

Child support in Louisiana is to be awarded based upon the need of the child and the ability of the parents to provide support.¹⁵⁰ Louisiana provides strict guidelines for courts to use when making child support determinations.¹⁵¹ These guidelines are intended to equitably appropriate the support of a child between that child's parents in an efficient, consistent, and adequate manner.¹⁵² The guidelines explicitly provide for the manner in which courts are to determine the need and income of the parties, providing worksheets for utilizing this information in the determination of child support awards.¹⁵³ If these mathematical formulas are followed, theoretically, similarly situated parents and children will receive identical support awards. It is a rebuttable presumption that the amount of support determined by the guidelines is the proper amount of

144. See, e.g., *Dep't of Social Servs. v. Williams*, 605 So. 2d 7 (La. Ct. App. 1992); *Dep't. of Social Servs. ex rel. Munson v. Washington*, 747 So. 2d 1245 (La. Ct. App. 1999); *State ex rel. Wilson v. Wilson*, 855 So. 2d 913 (La. Ct. App. 1992); *Fontenot v. Thierry*, 422 So. 2d 586 (La. Ct. App. 1982); *J.M.Y. v. R.R.*, 1 So. 3d 725 (La. Ct. App. 2008); *Starks v. Powell*, 552 So. 2d 609 (La. Ct. App. 1989); *Jones v. Rodrigue*, 771 So. 2d 275 (La. Ct. App. 2000).

145. Sue Nations, *Louisiana's Child Support Guidelines: A Preliminary Analysis*, 50 LA. L. REV. 1057, 1058 (1990).

146. LA. CIV. CODE art. 2 (2017); *Cat's Meow, Inc. v. City of New Orleans*, 720 So. 2d 1186, 1198 (La. 1998).

147. *Sultana Corp. v. Jewelers Mut. Ins. Co.*, 860 So. 2d 1112, 1116 (La. 2003) (citing *In re Succession of Boyter*, 756 So. 2d 1122, 1129 (La. 2000)).

148. KATHERINE SHAW SPAHT & JOHN RANDALL TRAHAN, *FAMILY LAW IN LOUISIANA* 327 (1st ed. 2009).

149. Katherine Shaw Spaht, *The ICS of the 2001 Louisiana Child Support Guidelines: Economics and Power*, 62 LA. L. REV. 709, 721 (2002) [hereinafter *The ICS of the 2001 Louisiana Child Support Guidelines*].

150. LA. CIV. CODE art. 141.

151. LA. REV. STAT. §§ 9:315–9:315.20 (2017).

152. *Walden v. Walden*, 835 So. 2d 513, 520 (La. Ct. App. 2002).

153. LA. REV. STAT. §§ 9:315–9:315.20.

support,¹⁵⁴ and courts may only deviate from the guidelines “if their application would not be in the best interest of the child or would be inequitable to the parties.”¹⁵⁵

Louisiana’s child support statutes do not contain a worksheet for dual paternity situations or any guidance as to how to deviate from the worksheets in these situations. The *Lowrie* decision is similarly silent in regard to how this deviation from the guidelines should be accomplished. Without guidance as to a method for making deviations in a legal father’s support obligation to take into account a biological father’s income, hearing officers and courts are likely to attempt to do so in any number of different ways. Any of the various methods that could be employed would undoubtedly result in varying child support awards, which would lead to a lack of uniformity, thereby frustrating one of the primary legislative goals.¹⁵⁶

Furthermore, a lack of uniform results would also, in some instances, undermine the primary purpose of the child support guidelines, which is to provide for the best interest of children in need.¹⁵⁷ If child support determinations vary for similarly situated children, one child will inevitably be receiving less in support than his similarly situated counterpart, leaving that child not only under-supported, but also inequitably treated. The best interests of a child are clearly not served by receiving less in support than another child in similar circumstances, nor will the interests of Louisiana be served, as the burden for providing for the under-supported child will undoubtedly fall on the shoulders of the state. Unless some clarity as to proper procedure in dual paternity situations is provided by the legislature or the judiciary, the child support regime of Louisiana will remain broken and unfair for the innocent children caught up in situations of their parents’ making. However, even if the legislature were to amend the child support guidelines to account for dual paternity situations, the inequity at the heart of dual paternity would still remain because even if the legal father’s support obligation is reduced because of the contribution of the biological father, at the end of the day the legal father is still financially on the hook for a child who is both not his and is the product of his former wife’s infidelity.

154. *Id.* § 9:315.1(A).

155. *Id.* § 9:315.1(B).

156. Nations, *supra* note 145, at 1058.

157. LA. REV. STAT. § 9:315.1; *see also* LA. CIV. CODE art. 141 (2017); Lisa Rogers Trammell, *A Lawyer’s Guide to Expedited Child Support Enforcement*, 44 LA. B.J. 20, 24 (1996) (“As in all child support matters, the overriding policy of the state in support enforcement is to represent the best interests of the child.”).

B. Fundamental Unfairness

In application, the doctrine of dual paternity often has “the end result . . . [of forcing] a bitter and confused man to care for and support a child that is the product of his ex-wife’s adultery.”¹⁵⁸ What results is not a maintained family unit, but rather enforced dysfunction,¹⁵⁹ in which a child is stuck in the middle of a contentious relationship among three adults. Even if the biological father’s income is considered in such a way as to reduce the legal father’s monetary support obligation, he is still on the financial “hook” for a child who is not biologically his, until that child reaches the age of majority.¹⁶⁰ The legal father will be subject to not only income assignment,¹⁶¹ but if he fails or refuses to pay, he may be subject to suspension of a professional license¹⁶² or punishment for contempt of court, which can include incarceration.¹⁶³ The state will effectively hover over the legal father, as the cuckoo does the purloined nest,¹⁶⁴ threatening him with dire consequences if he does not continue to support the child who he had no part in creating. This kind of forced dual paternity and the inequity and confusion that arise from it can be solved only by legislative action aimed at preventing it from occurring in the first place.

IV. TWO BIRDS WITH ONE STONE: SOLVING THE DUAL PATERNITY PROBLEM

The most effective way to resolve the uncertainty of forced dual paternity and its fundamental unfairness is to modify the laws that give rise to this unfortunate situation and prevent it from occurring in the first place. The legislature could solve the problem of forced dual paternity by

158. Kovach, *supra* note 15, at 680.

159. *Id.*

160. This support obligation could possibly extend for the child’s life in cases where the child is in need of lifetime support due to infirmity.

161. LA. REV. STAT. § 9:303. Louisiana law provides for child support to be taken directly from a payor’s paycheck through income assignment, unless certain criteria are met. *Id.* Income assignment requires participation by the payor’s employer, which could lead to the further embarrassment and shaming of a legal father in a dual paternity situation. *Child Support Enforcement: Employer’s Resource Guide*, DEP’T OF CHILD & FAM. SERVS., <http://www.dss.state.la.us/index.cfm?md=pagebuilder&tmp=home&nid=156&pnid=150&pid=225> [https://perma.cc/3BKN-6D8S] (last visited Feb. 3, 2017).

162. See LA. REV. STAT. §§ 9:315.30, 9:315.40.

163. LA. CODE CIV. PROC. art. 224 (2017); LA. REV. STAT. § 13:4611 (courts may punish those adjudged guilty of contempt with a fine or imprisonment).

164. Schulze-Hagen, *supra* note 2, at 1.

either abolishing the marital presumption of paternity that gives rise to dual paternity or modifying the prescriptive period associated with the disavowal action. Although both of these legislative actions would solve the problem of forced dual paternity, modifying the prescriptive period is the preferable choice as it represents a middle position between the often-conflicting goals of the state and the mixed emotions of the parties involved. Modification of the prescriptive period would serve to prevent the vast majority of dual paternity situations from arising while also mitigating some of the financial and emotional harms that a disavowal action could cause the child, and other parties, involved. Such a modification would prevent presumed fathers from being forced against their will to support children who are not biologically theirs, while allowing presumed fathers who wish to maintain their filiation with, and their obligation to support, children for whom they have assumed a parental role to do so.

A. Legislative Abandonment of the Presumption of Paternity

Abandoning the marital presumption of paternity is one way to solve the dual paternity problem.¹⁶⁵ The state could replace this method of establishing filiation with an intent-based method of filiation.¹⁶⁶ This method would not only solve the problem of dual paternity by eliminating forced fatherhood arising from the marital presumption of paternity, but would also be better adapted to the social and scientific changes which have occurred in our society.¹⁶⁷ However, abandonment of the presumption, though it would be effective at resolving the problem of dual paternity, would create other issues and problems of an arguably equally troubling nature.

An intent-based model of filiation assigns parenthood to the persons who “actively assume[] a parental role in a child’s life, regardless of marital status or genetic connection.”¹⁶⁸ The intent-based model “reflects

165. LA. CIV. CODE art. 185 (2017).

166. An intention-based method of filiation would assign parentage to those parties who manifested an intent to parent the child. For a discussion of such a model see Yehezkel Margalit, *Intentional Parenthood: A Solution to the Plight of Same-Sex Partners Striving for Legal Recognition As Parents*, 12 WHITTIER J. CHILD & FAM. ADVOC. 39 (2013).

167. Natalie Angier, *The Changing American Family*, N.Y. TIMES (Nov. 25, 2013), http://www.nytimes.com/2013/11/26/health/families.html?page_wanted=all&_r=0 [https://perma.cc/TP33-VEKT].

168. T. Vernon Drew, *Conceiving the Father: An Ethicist’s Approach to Paternity Disestablishment*, DEL. LAW., Spring 2006, at 18, 19.

the understanding that a child's best interests may be better served by assigning paternity to the [person] most willing and able to care for the child."¹⁶⁹ This alternative model of filiation focuses on volitional choice, manifested by an expression of intent, or by actions demonstrating intent to parent.¹⁷⁰ This approach would best serve the needs of children and families in Louisiana because it abandons the archaic notions underlying the current approach to determining filiation and is flexible in that it allows for changing parental roles over time. It is similar to a contract-based theory of filiation.¹⁷¹ In an age of fluid and blended family structures, flexibility in the legal parenthood would be of great benefit to the families of Louisiana. Under an intent-based model for assigning filiation, no longer would a child and the husband of the child's mother at the child's birth be forever legally linked against one, or both, of their wills as the model assigns paternity to the man most willing and able to care for the child. An intent-based approach would best account for the emotional health of children, as "[a] parent who intends to take care of a child will also better provide for the emotional security of a child."¹⁷²

Additionally, the intent-based model removes the focus on gender and genetic connection that is inherent in both the traditional and genetic models, thereby allowing for greater freedom for same-sex couples to establish stable and legally recognized family structures.¹⁷³ Providing for the establishment of parenthood by intent has, long before the *Obergefell v. Hodges* decision,¹⁷⁴ been suggested as a way to legitimize the parental relationship of same-sex parents to their non-biological children.¹⁷⁵

However, an intent-based filiation model would represent a radical departure from the current law in Louisiana and would require wide-ranging changes throughout the rest of the state family law regime. Furthermore, an intent-based model of filiation may not be constitutionally permissible given the United States Supreme Court's decision in *Troxel v. Granville*, holding that parents have a fundamental right, protected by the Fourteenth Amendment, to make decisions regarding the care and custody

169. *Id.*

170. Julie Shapiro, *Counting from One: Replacing the Marital Presumption with a Presumption of Sole Parentage*, 20 AM. U. J. GENDER SOC. POL'Y & L. 509, 516 (2012).

171. Drew, *supra* note 168, at 18–19.

172. Munonyedi Ugbo, *Who's Your Daddy?: Why the Presumption of Legitimacy Should Be Abandoned in Vermont*, 34 VT. L. REV. 683, 706 (2010).

173. Margalit, *supra* note 166, at 42–44.

174. 135 S. Ct. 2584 (2015).

175. See, e.g., Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2005).

of their children.¹⁷⁶ Some may also see such a change as devaluing the marital relationship because the change would remove the marital relationship of the parents from the determination of their children's parentage.

The most troubling issue with an intent-based model of filiation is the possibility that there could be a child whom no father¹⁷⁷ expresses the intent to parent. This could lead to situations where a child was left fatherless and possibly without needed support. Clearly it would not be in the best interest of a child to rely on a single parent for support, nor would it be in the best interest of the state, as it would likely have to provide services to the child lacking adequate support.¹⁷⁸ Such a radical paradigm shift in Louisiana's law of filiation is unlikely to occur given the current climate of the legislature¹⁷⁹ and may potentially raise more issues than it resolves.¹⁸⁰ Such a change is also inadvisable given the existence of a simpler, less radical solution to the dual paternity problem. Although as society and technology continue to progress and intent plays an ever-increasing role in the ordering of family relationships it may make more sense to remold Louisiana's family law regime along intent-based lines, now is not that time and the problem of dual paternity does not necessitate such a solution.

B. Statutory Abolition of Dual Paternity

A potential solution to the confusion dual paternity creates would be the abolition of the doctrine through a modification of the pertinent articles of the Louisiana Civil Code. If the father's action to establish paternity¹⁸¹ and the child's action to establish paternity¹⁸² were modified to prohibit an establishment of paternity when that child is already presumed to be the child of another man, dual paternity would effectively be abolished.

176. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

177. In the same-sex context, this parent need not necessarily be a "father," only a second parent who expresses the intent to parent.

178. See Steve Hargreaves, *Deadbeat Parents Cost Taxpayers \$53 Billion*, CNN (Nov. 5, 2012), <http://money.cnn.com/2012/11/05/news/economy/unpaid-child-support/> [<https://perma.cc/T3BZ-HR7S>].

179. See, e.g., Julia O'Donoghue, *Louisiana House Votes 27-67 to Keep Unconstitutional Anti-Sodomy Law on the Books*, TIMES-PICAYUNE (Apr. 15, 2014), http://www.nola.com/politics/index.ssf/2014/04/post_558.html [<https://perma.cc/DYV5-WX94>].

180. See discussion *supra* Part IV.A.

181. LA. CIV. CODE art. 198 (2017).

182. *Id.* art. 197.

However, though this type of legislative change would end dual paternity, it would not end the inequity underlying the doctrine, namely the obligations forced upon the legal father against his will. If dual paternity were abolished by the legislature in such a manner, legal fathers would be perpetually obligated to support the children of their former wife's adultery without being able to raise the issue of the paternity of the child's true biological father, as it would no longer be permissible. Although the confusion surrounding dual paternity would be "solved," the inequities foisted upon the legal father would be increased and made concrete.

Another modification of the Code that could theoretically solve the problem of dual paternity would be to make biological paternity, when proven, legally "trump" and effectively override legal paternity created through the marital presumption. This would theoretically resolve the confusion surrounding the doctrine and prevent a presumed father from being forced to support children who are not his biologically, but would have its own serious and negative consequences. Such a modification would prevent any legal father, even one who may have served in a paternal role for the child for an extended number of years, from maintaining any legal relationship with that child¹⁸³ once a biological father had been identified, even if he wished to do so. Allowing biological paternity to "trump" legal paternity could serve to effectively break-up existing, healthy father-child relationships. Additionally, such a change could be seen to be devaluing the marital relationship in the same manner as intent-based filiation. Finally, such a biology-focused approach to filiation could have negative ramifications for same-sex and heterosexual couples who resort to surrogacy to have children, as the third party who contributed the genetic material to the surrogacy arrangement would possess potential parental rights in the child that could "trump" any parental rights afforded to the couple by their marriage. This sort of change would cause more confusion and uncertainty than exists in the law currently, effectively replacing the problem of dual paternity with a myriad of other problems.

Legislative abolition of dual paternity seems like a simple solution to the problem of dual paternity, but it is, in reality, merely a path to different problems. The most effective way to solve the dual paternity problem, while limiting the potential problems which may arise, is through a more subtle modification to the Civil Code articles on paternal filiation, namely a modification of the prescriptive periods contained in the articles. This solution would largely solve the problem of dual paternity while also

183. The only method available would be adoption, which is expensive, complex, and beyond the scope of this Comment.

balancing the competing and often-conflicting interests of all of the parties involved.

C. Modifying Prescription for Disavowal

A less radical approach to solving the problem of dual paternity would be a modification of the prescriptive period for disavowal actions. Currently, a husband has a short one-year window from the birth of his wife's child to seek disavowal.¹⁸⁴ This short prescriptive period is the cause of almost all dual paternity situations, and a slight modification to this period could effectively solve the majority of the dual paternity problem.

1. Changing the "Trigger"

One modification that could solve the problem would be to change the event that begins the tolling of the prescriptive clock for disavowal actions. Currently, prescription begins to run on the disavowal action in Louisiana when the father learns or should have learned of the birth.¹⁸⁵ However, the husband may have no reason to suspect that the child is not his within the first year of the child's life. If the husband has no reason to suspect his wife's infidelity, and the newborn child does not possess features that are radically different than his own, there may be no reason for the husband to suspect his paternity in the first year of the child's life. This prescription regime effectively leaves husbands whose suspicions arise on the 366th day of the child's life out of luck, as prescription has run on their action.

The triggering event for prescription could be changed from when the husband "learn[ed] or should have learned" of the child's birth¹⁸⁶ to when the husband learned or should have learned of information that would reasonably cause him to suspect his paternity.¹⁸⁷ This change would allow more trusting husbands, whose suspicions did not arise until after the first year, an opportunity to seek disavowal if they timely sought it, and would eliminate the vast majority of dual paternity situations. This would also allow legal fathers who did not wish to disavow the child to remain filiated to the child. However, there are significant practical problems with such a change. It would be difficult, if not impossible, to exactly determine when the husband began to suspect his paternity, as a mental impression

184. LA. CIV. CODE art. 189 (2015).

185. *Id.*

186. *Id.*

187. Other jurisdictions currently apply such a prescriptive rule. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 45/8 (West 2016); P.R. LAWS ANN. tit. 31, § 465 (2016).

produces no physical evidence.¹⁸⁸ Furthermore, the husband in such a situation would clearly have an incentive to lie, adding more deception and uncertainty into an already confused situation.

2. Making Disavowal Imprescriptible

Alternatively, the liberative prescription for disavowal actions could be removed altogether, thereby eliminating all instances of forced dual paternity,¹⁸⁹ or lengthened considerably, thereby eliminating most of such instances. Louisiana currently has the most restrictive prescriptive period of any state in this sort of action, and the presumption of paternity is considered the “strongest presumption in the law” of Louisiana.¹⁹⁰ In other jurisdictions, the action to disavow paternity by a presumed father, or its equivalent in that state, commonly prescribes at the child’s attainment of majority or a few years after majority.¹⁹¹ Some states go even further, making the action by the presumed father to disavow a child imprescriptible.¹⁹² If Louisiana were to make the disavowal action imprescriptible or lengthen the prescriptive period to the attainment of the age of majority of the child, it would

188. It is certainly true that, under the doctrine of *contra non valentem*, Louisiana law currently applies a similar standard to the commencement and running of prescription in tort actions. See *Watters v. Dep’t of Soc. Servs.*, 102 So. 3d 118 (La. Ct. App. 2012), *writ denied*, 99 So. 3d 32 (La. 2012).

189. The qualifier “forced” is used here as it would be foreseeable that some husbands, having assumed a parental role in the child’s life, may not seek disavowal even if able as they may wish to continue a relationship with the child.

190. LA. CIV. CODE art. 185 cmt. b (2017) (first citing *Tannehill v. Tannehill*, 261 So. 2d 619 (La. 1972); and then citing *Williams v. Williams*, 87 So. 2d 707 (La. 1956)) (“The presumption that the husband of the mother is the father of the child has been referred to as the strongest presumption in the law.”).

191. See, e.g., 750 ILL. COMP. STAT. ANN. 45/8 (West 2016) (“[b]arred if brought later than 2 years after the child reaches the age of majority”); IOWA CODE ANN. § 600B.41A (West 2016); KY. REV. STAT. ANN. § 406.031 (West 2017) (within 18 years after birth); NEV. REV. STAT. ANN. § 126.081 (West 2016) (“An action brought under this chapter to declare the existence or nonexistence of the father and child relationship is not barred until 3 years after the child reaches the age of majority.”); OHIO REV. CODE ANN. § 3111.05 (West 2016) (five years after the child reaches 18); WIS. STAT. ANN. § 893.88 (2017) (“within 19 years of the date of the birth of the child”) (explaining that an action must be filed prior to child reaching majority).

192. See, e.g., MO. ANN. STAT. § 210.828 (West 2016); MONT. CODE ANN. § 40-6-108 (West 2017); ALA. CODE § 26-17-606 (2017); UTAH CODE ANN. § 78B-15-607 (West 2016) (may be raised by the presumed father at any time prior to filing an action for divorce).

effectively solve the support aspect of the dual paternity problem.¹⁹³ Presumed fathers would thus be allowed, if they wished, to disavow minor children who they discovered were not biologically theirs at any time up until majority or beyond. However, such a change is not advisable and could have serious negative consequences for the child at the center of the action.

Both changing the “trigger” on the prescriptive clock and making disavowal imprescriptible may open the door for persons who had fulfilled the parental role for years, possibly decades, to attempt to disavow paternity. Imagine, for example, the harm that would be done to family harmony, and the psychological wellbeing of all involved, by a disavowal action being filed by a husband against his adult children. Imagine the even greater harm done to a child beyond the “tender years,” who is capable of discernment, if disavowed by a man whom he had recognized all his life as his father. Both of these “solutions” may also lead to children who are legally “fatherless” and thereby denied support that they may desperately need. Such a result would not be in the best interest of the child and would contravene settled public policy.

The issue of “fatherless” children could, perhaps, be resolved by permitting disavowal by a presumed father only if and when a biological father was identified and confirmed. Such a change would prevent a presumed father from disavowing his presumed child, and thereby ending his support obligation to the child, until the child’s biological father could be made responsible. This change would prevent a child from losing necessary support as the obligation would be transferred from the legal father to the biological father, though the amount of support may vary depending upon differences in income between the two men. Furthermore, this solution would take into account the child’s need for support while placing the financial burden on the proper party.¹⁹⁴ However, this may still lead to situations in which a father who has assumed a parental role in a child’s life for a number of years, to the point that he is recognized by both the child and the community as the child’s father, will be able to successfully disavow the paternity of the child if he can identify a

193. If such a change were to be made, provisions would have to be put into place for those instances where a child, because of disability or other reasons, requires support beyond majority. *Id.*

194. Of interest, but beyond the scope of this Comment, are the possible delictual theories of recovery that a former legal father may have for child support payments previously made. See Joana L. Grossman, *When Your Daddy Is Not Really Your Daddy: A Man Successfully Sues His Ex-Wife for Paternity Fraud Damages*, JUSTIA: VERDICT (Oct. 16, 2012), <https://verdict.justia.com/2012/10/16/when-your-daddy-is-not-really-your-daddy> [<https://perma.cc/65CM-FPXM>]. See also Gallo v. Gallo, 861 So. 2d 168 (La. 2003).

biological father. The emotional, social, and psychological impact that the pursuit of such an action would have on a child who is intellectually capable of understanding what is occurring would likely be devastating whether or not the action were successful. A better balance between possible inequity suffered by a legal father and the best interest of children should be reached in resolving the problem of dual paternity.

3. *A Peremptive Solution*

A fairer, more equitable solution to the problem of dual paternity would be to abandon the current prescriptive limit governing disavowal actions¹⁹⁵ and replace it with something akin to the peremptive period for the father's action to establish paternity when the child is presumed to be the child of another man.¹⁹⁶ Currently, Louisiana Civil Code article 198 provides that if a child is presumed to be the child of another man, a father must institute an action to establish his paternity of the child within one year from the day of the birth of the child, unless the mother of the child deceived the father in bad faith regarding his paternity, in which instance he has one year from when he "knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs."¹⁹⁷ If the disavowal action were subject to a similar peremptive period, with an extension for bad-faith deception on the part of the mother and a ten-years-from-birth outward limit, most dual paternity issues would be resolvable without any great harm or inequity being suffered by any party involved.¹⁹⁸ As a further protection against the possibility of fatherless children, in adapting this peremptive period to the disavowal action the legislature should add a further restriction prohibiting the bringing of a disavowal action unless or until a biological father has been identified and can be made legally responsible for the child. This change would result in the resolution of the dual paternity problem without necessitating a complete overhaul of Louisiana's family law regime.

Furthermore, and very importantly, such a change would allow a legal father an opportunity to make a decision regarding whether he wanted to continue in a parental role with his presumed child. Currently, the law provides no opportunity for choice, forcing presumed fathers to remain

195. LA. CIV. CODE art. 185 (2017).

196. *Id.* art. 198.

197. *Id.*

198. Such an extension for bad-faith deception and fraud is the approach taken by a number of other states. *See, e.g.*, S.D. CODIFIED LAWS § 25-8-59 (2017) (extension of 60 days from the creation of presumption except in cases where there are allegations of fraud, duress, or material mistake of fact).

legally connected to, and therefore obligated to, children who are not biologically their own. Such a change would not, however, force a legal father to pursue a disavowal action if he did not wish to do so and would not allow his legally, and socially, established fatherhood to be trumped by the biological paternity of another man who may have little to no connection to the child. Such a change would actually allow the presumed father the opportunity to forever establish his filiation by his conscious choice to allow the peremptive period to run. If the legislature were to make this relatively minor modification to the law of paternal filiation, children would not be left fatherless and without support, and presumed fathers would not be forced into a continuing paternal role unless they chose to do so of their own free will.

CONCLUSION

Every month, ex-husbands across Louisiana are forced to write checks for child support payments to their ex-wives for the support of children that are the biological progeny of another man.¹⁹⁹ These legal fathers must suffer this financial burden or be faced with penalties, including imprisonment.²⁰⁰ This inequity should not be tolerated. Louisiana should amend its law to solve the problem of dual paternity once and for all rather than chipping away at the doctrine slowly through judicial decision-making. Although the need to address this problem is great, the interest and needs of innocent children must also be considered and protected. The problem of forced dual paternity requires a solution that will result in no man being forced, against his will, into dual paternity and no child being left without needed support. The modifications proposed to Civil Code article 185 present such a solution. The modifications would both remove the inequity and harm forced upon the legal father while also ensuring that children are not left fatherless and therefore without much-needed financial support. By making this change, Louisiana will be placing its law in line with the majority of other jurisdictions and the family law regime of Louisiana will more closely align with the social and legal realities of the state and country. When the hour has been struck, the wooden cuckoo retreats into the clock and the door closes behind him. The hour has now struck, and it is time to slam the door on forced dual paternity.

199. See *Child Support Enforcement SFY 2015-2016: Cases - Obligations - Paternities*, DEPT. OF CHILD & FAM. SERVS., (last visited Feb. 3, 2017), http://www.dcf.louisiana.gov/assets/docs/searchable/OFS/Statistics/Stats15-16/CSE/fy1516_SES_Cases.pdf [<https://perma.cc/U5PQ-4NS6>].

200. LA. REV. STAT. § 13:4611 (2017) (punishment for contempt of court).

ADDENDUM

After this Comment was accepted for publication, Louisiana State Representative Patrick Jefferson introduced House Bill 388 in the Louisiana House of Representatives during the 2016 Regular Session.²⁰¹ House Bill 388, introduced on the recommendation of the Louisiana Law Institute, made numerous changes to the law of filiation in Louisiana.²⁰² One of these changes was to amend and reenact Civil Code article 189 to change the liberative prescriptive period for disavowal actions brought by presumed fathers from “one year . . . [commencing] to run from the day the husband learns or should have learned of the birth of the child”²⁰³ to “one year . . . [commencing] to run from the day of the birth of the child, or the day the husband knew or should have known that he may not be the biological father of the child, whichever occurs later.”²⁰⁴ This change was sought to eliminate the previously discussed inequities associated with dual paternity and put an end to what some observers considered an “epidemic” of women purposefully taking advantage of the law to make men legally and financially responsible for children who were not biologically theirs.²⁰⁵ After being passed by both the Louisiana House and Senate with no amendments to the recommended changes to the language of Civil Code article 189, the act was signed by Governor John Bel Edwards on June 2, 2016, becoming effective that day.²⁰⁶

Although this change to Civil Code article 189 is similar to the solution proposed by this Comment, it differs in one significant way in that the new article 189 retains the designation of the one-year period as prescriptive rather than preemptive.²⁰⁷ Although liberative prescription and preemption are related concepts, they differ in two fundamental ways: first, whereas the running of liberative prescription prevents only the enforcement of a right by legal action,²⁰⁸ the termination of a preemptive period destroys the cause of action itself,²⁰⁹ and second, whereas the

201. Kevin Litten, *How Long Should a Husband Have to Challenge Paternity? Bill Seeks to Change 1-Year Limit*, TIMES-PICAYUNE (Apr. 4, 2016), http://www.nola.com/politics/index.ssf/2016/04/husband_paternity_time_periods.html [https://perma.cc/7M6K-MH9A].

202. 2016 La. Acts 388.

203. LA. CIV. CODE art. 189 (2015).

204. LA. CIV. CODE art. 189 (2017).

205. Litten, *supra* note 201.

206. 2016 La. Acts 388.

207. LA. CIV. CODE art. 189.

208. *Id.* art. 3447.

209. *Id.* art. 3458.

running of liberative prescription is subject to interruption²¹⁰ and suspension,²¹¹ peremption is not.²¹² When dealing with an issue as personally and socially sensitive as the paternity of children, the certainty and finality of a peremptive period are preferable to the uncertainty and contestability of the running of prescription.

Additionally, this Comment recommended an outward peremptive limit of ten years from the birth of the child for the institution of a disavowal action by a presumed father.²¹³ The new article 189 contains no such outward limit in which to bring such an action, triggering the running of prescription from the latter of the birth of the child or the moment when the father knew or should have known that he may not be the biological father of the child.²¹⁴ This opens the door for disavowal actions to be brought against older and adult children. Whereas a younger child who is below the age of understanding may not be emotionally harmed by his presumed father's disavowal, a child of a more advanced age will be cognizant of what is occurring and more likely to suffer both socially and emotionally by the commencement of such an action. Furthermore, to permit such an action to be brought against adult children, who may have known no other father in their lives and whom society already recognizes as the children of the presumed father, does the disservice of injecting a heightened level of uncertainty and instability into what is one of the most sensitive relationships in our society—that between parent and child. The ten-year outward peremptive limit suggested by this Comment would strike a balance between the rights of the presumed father, the rights of the child, and the societal and personal needs of all and would ensure that these sensitive and important relationships are determined and settled with certainty.

Although the recent changes the Louisiana Legislature made to Civil Code article 189 provide presumed fathers a greatly increased opportunity to escape the unjust burdens of forced dual paternity, they have done so at the expense of the innocent children involved in these situations. By further amending article 189 to place a peremptive rather than a prescriptive period on disavowal actions brought by presumed fathers and to place a reasonable peremptive outward limitation on such actions, the legislature could better protect the rights and needs of the children at issue

210. See, e.g., *id.* art. 3462. See also Douglas Nichols, *Contra Non Valentem*, 56 LA. L. REV. 337, 338 (1995).

211. See, e.g., LA. CIV. CODE art. 3469.

212. *Id.* art. 3461; see also *Ebinger v. Venus Const. Corp.*, 65 So. 3d 1279, 1286 (La. 2011).

213. See discussion *supra* Part IV.B.3.

214. LA. CIV. CODE art. 189.

while still allowing presumed fathers the opportunity to avoid the legal duty to support children who are not biologically theirs.

*Henry S. Rauschenberger**

* J.D./D.C.L., 2017, Paul M. Hebert Law Center, Louisiana State University. Thank you to Professor Andrea Carroll and Associate Professor Grace Barry whose edits and mentorship were essential in this process. Thank you to my parents, Steven and Betty Rauschenberger, and my in-laws, Shaun and Tammy Davis, for their encouragement and support. Thank you to Stephen Angelette, a true friend and a poet in the truest sense. Thank you to Jade Shaffer and Ryan King, for being the best friends and colleagues imaginable. Thank you to Hunter Tynan Davis for naming an imaginary dog after me. Most of all, thank you to my wife, Abby Davis Rauschenberger, who has labored and suffered alongside me through it all. You are the conduit through which the beauty of creation is revealed to me.