A PRIMER ON BIOLOGICAL FILIATION IN LOUISIANA

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This Article is the eighth in a series of primers on Louisiana Family Law. The Louisiana Civil Code of 1870, as amended to date, operates as the primary source of law, with other ancillary statutes and codes on particular subject matters. The law of 2018 biological filiation appears in Chapter 1 in Title VII on Parent and Child to define filiation and prescribe the avenues by which a parent and child may be filiated under Louisiana law, along with the legal consequences thereof.

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INTRODUCTION

Filiation is defined as "the legal relationship between a child and his parent."[1] The law of filiation carries numerous consequences, as many rights and obligations accompany this legal parent-child relationship. The law of filiation has been revised significantly over the years, with the most significant revisions enacted from 2004–2006[2] after a decade of debate and modification by the Louisiana State Law Institute.[3]

The impetus for revision of the law of filiation goes back to the 1960s with the judicial demand to end discrimination against illegitimate children.[4] Historically, Louisiana discriminated against children born outside of marriage, primarily in the world of successions, where the law either denied or severely restricted

1. LA. CIV. CODE ANN. art. 178. This article was first enacted in 2009, but the comment makes clear that the definition contained within it is consistent with that offered by doctrine. *Id.* cmt.

2. *See* Act No. 26, 2004 La. Acts 936–54 (eliminating the terminology of illegitimate and legitimate children); Act No. 192, 2005 La. Acts 1444–59 (revising all of the laws on filiation in the Civil Code); Act No. 344, 2006 La. Acts 1528–35 (implementing legislation that finalized the revision in the Civil Code ancillaries).

3. *See* Katherine S. Spaht, *Who's Your Momma, Who Are Your Daddies: Louisiana's New Law of Filiation*, 67 LA. L. REV. 307, 307 (2007).

4. *See* Harry D. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana: First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 338 (1969).

such a child's inheritance rights.[5] The then-existing filiation regime played a significant role in this discrimination because it included an elaborate ranking system for all children born outside of marriage,[6] labeling them as "adulterous bastards"[7] or "natural children."[8] It also outlined the procedural devices that, if the certain facts were present, could elevate the child's rank in this hierarchy. Ultimately, the child's label or rank under the filiation scheme determined their rights in the law of intestate succession.

However, in *Levy v. Louisiana*, the United States Supreme Court held that Louisiana, in its wrongful death statute, had no rational basis for discriminating against children born outside of marriage.[9] Other cases followed, and in 1980, the Louisiana Supreme Court decided the landmark case of *Succession of Brown*, in which the lower court had denied intestate inheritance rights to four illegitimate heirs of the decedent, due to a higher-ranking adopted illegitimate child of the decedent.[10] The *Brown* court, and numerous cases to follow, determined that Louisiana's distinction between children born of marriage and those born outside of marriage was unconstitutional.[11] Thus, the law of filiation needed a total overhaul. Before *Brown* was even rendered, though, the Louisiana Legislature began amending the filiation laws.[12] A thorough revision occurred in 1980 and 1982, and through it, the discrimination against children born outside of marriage in the realm of succession and donation rights ended.[13] However, despite these revisions to inheritance law, the laws of filiation needed further reform.

The Louisiana Legislature finally began to heed the challenge in 2004 by officially removing the terms "illegitimate" and "legitimate" from Louisiana law; it enacted this change by revising Article 3506, an article that defines terms of art in the Louisiana

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5. *See* KATHRYN V. LORIO, SUCCESSIONS AND DONATIONS § 3:5, in 10 LOUISIANA CIVIL LAW TREATISE (2d ed. 2022).

6. *See generally* LA. CIV. CODE ANN. arts. 180–204 (1870); *see also* Lorio, *supra* note 5.

7. LA. CIV. CODE ANN. art. 182 (1870), *repealed by* Act No. 607, 1979 La. Acts 1643–47.

8. LA. CIV. CODE ANN. art. 202, *repealed by* Act No. 607, 1979 La. Acts 1643–47.

9. Levy v. Louisiana, 391 U.S. 68, 72 (1968).

10. *See* Succession of Brown, 388 So. 2d 1151 (La. 1980).

11. *See, e.g.*, *id.* at 1154.

12. *See* LA. CIV. CODE ANN. arts. 208–09 (Supp. 1984).

13. *See* Lorio, *supra* note 5.

Civil Code.[14] Article 3506 now defines "children" as either a child "born of marriage" or "born outside of marriage."[15] More significant revisions followed in 2005, which totally overhauled the Civil Code's chapter on Filiation. The 2005 revision updated the law and aligned it with the recent jurisprudence and other federal standards.[16] The next year, the legislature revised the associated filiation provisions in Louisiana's Revised Statutes to ensure correlation between the two bodies of law.[17] The revisions solved many controversial issues (as discussed herein) and also improved the presentation of Louisiana's filiation laws.

Current law provides two avenues to establish filiation between a parent and child: (1) proof of maternity or paternity; or (2) adoption.[18] The Parts below explore filiation through proof of maternity or paternity,[19] sometimes referred to as "biological filiation."[20] However, this term is actually a misnomer. While it might seem intuitive to assume that biology is the sole impetus for the filiation of a parent and child, this is not necessarily always the case under Louisiana law.[21] Filiation is a question of fact,[22] and the standard of appellate review of facts is manifest error.[23]

I. MATERNAL FILIATION

Historically, maternal filiation in Louisiana was straightforward. Prior to 2005, maternal filiation followed from the child's birth which was almost always documented.[24] However, because of the increased use of assisted reproductive technology, proving maternity has become more nuanced. In some instances, multiple women are involved in the reproductive process, so Louisiana has had to decide which will be the child's legal mother:

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14. *See* LA. CIV. CODE ANN. art. 3506 cmt.

15. *Id.* art. 3506(8).

16. *See* KERRY TRICHE, HANDBOOK ON LOUISIANA FAMILY LAW 362 (Thomson Reuters/West 2009).

17. Act No. 344, 2006 La. Acts 1528–35.

18. LA. CIV. CODE ANN. art. 179.

19. Filiation by adoption is not covered in this article, as it arises from the juridical act of adoption. *Id.* art. 199.

20. LA. CIV. CODE ANN. arts. 184–85.

21. *See, e.g.*, State *ex rel.* C.C., 18-440 (La. App. 5 Cir. 10/12/18), 256 So. 3d 565.

22. Succession of Gussman, 288 So. 2d 665, 668 (La. Ct. App. 3 Cir. 1974).

23. Succession of Pruitt, 96-534, p. 5 (La. App. 5 Cir. 1/15/97), 688 So. 2d 103, 105.

24. *See* Spaht, *supra* note 3, at 309.

the one providing the egg, the one carrying and delivering the child, or the one who intends to be the mother.[25]

A. GENERAL RULES

Currently, Louisiana law provides that "[m]aternity may be established by a preponderance of the evidence that the child was born of a particular woman, except as otherwise provided by law."[26] Thus, in most cases, the woman who gives birth to a child is, by law, the mother of that child. Any evidence may be used to prove maternity at any time, and this evidence "includes all facts and circumstances establishing that the child was born of a particular woman," for example, witness testimony as "to the fact of the birth, documentary evidence (including formal or informal acknowledgment), and scientific evidence."[27] In *Succession of Gore*, the decedent's purported adopted son petitioned to be appointed as succession administrator, but the decedent's biological daughters excepted, arguing that he had no right of action.[28] While the son had no judicial decree of adoption and thus could not qualify as an adopted child, he did have a birth certificate with the decedent's name listed as his mother.[29] The court cited Louisiana Revised Statutes § 40:42(A)[30] for the notion that "[e]xcept for delayed or altered certificates, every original certificate on file in the vital records registry is prima facie evidence of the facts therein stated."[31] Because the daughters were unable to offer evidence to controvert that prima facie evidence, their exception was overruled.[32]

B. SURROGACY CONTRACTS

While birth is typically the determining factor, Civil Code Article 184 contains the qualifier, "except as otherwise provided by law."[33] This signals that Louisiana law recognizes instances in which someone other than the woman who gives birth to the child

25. Sandi Varnado, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609, 630 (2006); *see also* Triche, *supra* note 16, at 365–66; Spaht, *supra* note 3, at 309.

26. LA. CIV. CODE ANN. art. 184.

27. *Id.* cmts. (a)–(b).

28. Succession of Gore, 17-68, p. 2 (La. App. 5 Cir. 5/31/17), 223 So. 3d 628, 630.

29. *Id.*

30. LA. STAT. ANN. § 40:42(A) (2022).

31. *Gore*, 223 So. 3d at 632.

32. *Id.* at 633.

33. LA. CIV. CODE ANN. art. 184.

is the legal mother of that child. This happens in a couple of situations. First, Louisiana allows for a married couple to adopt human embryos created by the gametes of another man and woman.[34] In such a situation, the embryo is implanted into the married woman who then delivers the child. This adoptive mother is the child's legal mother, despite the lack of genetic relation to the child.[35] Second, Louisiana allows for certain forms of surrogacy contracts, under which the woman who carries and delivers the child is not the legal mother, despite the fact of birth.[36]

From a scientific standpoint, a surrogacy relationship can exist in a variety of forms, depending on the surrogate's role and the contributors of sperm and egg.[37] However, Louisiana's surrogacy law is extremely limited in scope. The evolution of Louisiana's surrogacy law has been extremely slow in comparison to that of other states.[38] Prior to 2016, the only form of surrogacy that Louisiana law recognized was one under which a married couple provided the egg and sperm to create a child who would be carried and delivered by a surrogate who was related by blood or affinity to one of them.[39] In other words, only gestational surrogacy arrangements were enforced and only for married couples with viable sperm and egg who were able to secure a relative to serve as the surrogate. Additionally, the law prohibited the surrogate's compensation.[40]

The Louisiana Legislature introduced surrogacy bills in its 2013 and 2014 sessions, but in spite of support in both chambers, then-Governor Bobby Jindal vetoed them.[41] Both chambers passed

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34. *See* LA. STAT. ANN. § 9:130 (2022).

35. *Id*.

36. *See id*. § 9:2720.

37. For example, a "traditional" surrogacy arrangement involves the surrogate as both the contributor of the egg (to be fertilized by the sperm of a man (either the intended father or a donor)), as well as the one to carry and deliver the child. By contrast, a "gestational" surrogacy arrangement involves the surrogate as only the one to carry and deliver the child; the egg is supplied by another woman—either the intended mother or a donor—and then fertilized by the sperm of a man (either the intended father or a donor). Nayana H. Patel et. al., *Insight into Different Aspects of Surrogacy Practices*, J. HUM. REPROD. SCIS. July–Sept. 2018, at 212.

38. *See Guide to State Surrogacy Laws*, AM. PROGRESS (Dec. 17, 2007), http://www.americanprogress.org/article/guide-to-state-surrogacy-laws/.

39. LA. STAT. ANN. § 40:34(B)(1)(a)(viii), (B)(1)(h)(v), (B)(1)(i), (B)(1)(j) (Supp. 2012).

40. LA. STAT. ANN. § 9:130 (1986).

41. Governor Jindal suggested that Louisiana citizens were free to enter informal surrogacy agreements, but such agreements were actually not legally enforceable and

subsequent surrogacy legislation in 2016, and Governor John Bel Edwards signed it into law, effective August 1, 2016.[42] Entitled "Genetic Carrier Contracts," the legislation is housed in Louisiana Revised Statutes §§ 9:2718–2720.15.[43]

As was the case under prior law, a contract for a genetic gestational carrier—when the surrogate provides the egg—is absolutely null under the new legislation.[44] Simply put, a traditional surrogacy arrangement, pursuant to which the surrogate supplies the egg, renders the contract unenforceable. This rule reflects Louisiana's longstanding disapproval of such contracts, as well as the public policy against allowing a mother to agree to relinquish her biological child in advance.[45] To prevent circumvention of this rule, the law allows a court to order genetic testing,[46] and if it finds a violation, then the surrogate will be the legal parent of the child[47] leaving the other parties no legal protection.[48]

Whereas genetic gestational surrogacy is prohibited, a contract for a gestational carrier—when a woman attempts to carry and give birth to a child born as a result of an in utero transfer of a human embryo to which she makes no genetic contribution[49]—is enforceable.[50] What distinguishes this type of

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did not create a legal relationship between the intended parents and the child. Emily Lane, *Bobby Jindal again vetoes bill allowing for legal surrogacy births in Louisiana*, NOLA.COM (May 31, 2014), https://www.nola.com/news/politics/article_91d70d5a-2367-5bfc-9285-dd67ac0ae718.html.

42. *See* H.R. 1102, 2016 Leg., Reg. Sess. (La. 2016).

43. *See* LA. STAT. ANN. §§ 9:2718–20.15 (2022). At the same time, the legislature revised Louisiana Revised Statutes §§ 40:34 and 14:286 and enacted Louisiana Revised Statutes §§ 40:93–96 and 44:4.1. H.R. 1102, 2016 Leg., Reg. Sess. (La. 2016).

44. LA. STAT. ANN. § 9:2719 (2022). "Genetic gestational carrier" is defined as "the process by which a woman attempts to carry and give birth to a child using her own gametes and either the gametes of a person who intends to parent the child or donor gametes, when there is an agreement to relinquish the custody of and all rights and obligations to the child. *Id.* § 9:2718.1(3).

45. LA. STAT. ANN. § 9:2719 cmt. (a) (2022).

46. "If any party refuses to submit to such tests, the court may resolve the question of filiation against such party or enforce its order if the rights of others and the interest of justice so require." *Id.* § 9:2720.14.

47. *Id*. The issue of filiation may be raised in a filiation, disavowal, or contestation action. *Id.* cmt. (a).

48. LA. STAT. ANN. § 9:2719 cmt. (b) (2022).

49. An "in utero embryo transfer" is a "medical procedure whereby the genetic mother's egg is fertilized with the sperm of the genetic father, with the resulting embryo transferred into the uterus of the gestational carrier. *Id.* § 9:2718.1(5).

50. *See id.* § 9:2720.

surrogacy agreement is that the intended parents provide the gametes.[51] Of course, this is not the only requirement for these types of contracts, as the statutes set forth many more substantive and formal requirements.

First, all of the parties to the gestational carrier contract—the intended parents, gestational carrier, and her spouse (if married)—must undergo various background checks.[52]

Second, the gestational carrier contract must set forth the obligations of the surrogate.[53] To start, she must be between twenty-five and thirty-five years old and have given birth to at least one child.[54] Additionally, she must agree to: (1) "become pregnant through in utero embryo transfer, using the gametes of the intended parents" and to deliver the child; (2) seek "reasonable medical evaluation and treatment during the . . . pregnancy" and comply with "reasonable medical instructions about prenatal health," as well as "execute medical records releases . . . in favor of the intended parents;" (3) certify attendance in at least two counseling sessions, separated by at least thirty days; (4) certify that she will relinquish all rights and duties as the parent of the resulting child;[55] and (5) agree to at least one counseling session after the child's birth but no more than six months thereafter.[56] The contract may not require the surrogate to terminate the resulting pregnancy, and any such provision is absolutely null and unenforceable as against public policy.[57]

Third, the gestational carrier contract must set forth the obligations of the intended parents. They must: (1) acknowledge that the surrogate has sole authority to make medical decisions during the pregnancy, as would a pregnant woman carrying a biological child; (2) agree to accept custody and full parental rights and obligations for the child once born; (3) "agree to be recognized

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51. "Intended parents" is defined as a "married couple who each exclusively contribute their own gametes to create their embryo and who enter into an enforceable gestational carrier contract . . . with a gestational carrier pursuant to which the intended parents will be the legal parents of the child resulting from an in utero embryo transfer. *Id.* § 9:2718.1(6).

52. *Id.* § 9:2720.4.

53. *See id.* § 9:2720.2(A).

54. LA. STAT. ANN. § 9:2720.1 (2022).

55. If the surrogate is married, her spouse must also make this certification. *Id.* § 9:2720.2(A)(4).

56. *Id.* § 9:2720.2(A).

57. *Id.* § 9:2720(D).

as the legal parents of the child;" and (4) have a valid will or succession plan establishing custody of the child should both intended parents die before the child's birth.[58]

Fourth, the surrogate is not allowed to accept compensation, defined as "a payment of money, objects, services, or anything else having monetary value."[59] Any contract violating this rule is absolutely null and unenforceable as against public policy.[60] Nonetheless, the surrogate is allowed "reimbursement of actual expenses."[61] These include:

> (a) Actual medical expenses, including hospital, testing, nursing, midwifery, pharmaceutical, travel, or other similar expenses, incurred by the gestational carrier for prenatal care and those medical and hospital expenses incurred incident to the birth.
>
> (b) Actual expenses incurred for mental health counseling services provided to the gestational carrier prior to the birth and up to six months after birth.
>
> (c) Actual lost wages of the gestational carrier, not covered under a disability insurance policy, when bed rest has been prescribed for the gestational carrier for some maternal or fetal complication of pregnancy and the gestational carrier, who is employed, is unable to work during the prescribed period of bed rest.
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> (d) Actual travel costs related to the pregnancy and delivery, court costs, and attorney fees incurred by the gestational carrier.
>
> (e) Payment of a judicially sanctioned settlement or judgment rendered in favor of the gestational carrier or her heirs as a result of her death, loss of reproductive organs or capability, or any other health complication caused by the in utero embryo transfer, pregnancy or resulting childbirth, miscarriage, or termination of pregnancy.[62]

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58. *Id.* § 9:2720.2(B).
59. *Id.* §§ 9:2720(C), 9:2718.1(1) (2022).
60. LA. STAT. ANN. § 9:2720(C).
61. *Id.* § 9:2718.1(1).
62. *Id.* § 9:2720.5(B)(3).

Additionally, the contract must include a preliminary estimate of anticipated expenses and how the parties will allocate them.[63]

Finally, the gestational carrier contract must meet form requirements. Per the statutes, it must be "in writing and signed by the gestational carrier, her spouse if she is married, and both of the intended parents."[64]

Even assuming all of those requirements are met, the contract must still be approved by a court in advance of the in utero embryo transfer.[65] The procedure for approval is detailed in Louisiana Revised Statutes § 9:2720.3(B), which requires that an obstetrician/gynecologist or reproductive endocrinologist who has treated the intended mother submit a signed affidavit indicating that the in utero embryo transfer with a gestational carrier is medically necessary to assist in reproduction.[66] Before approving, the court must find that all of the following are satisfied: (1) compliance with the requirements of Louisiana Revised Statutes §§ 9:2720–2720.3 and that there is no risk of harm to the child or the gestational carrier after assessing the criminal records, child abuse or neglect complaints, and Louisiana Protective Order Registry; (2) "provisions have been made for all reasonable healthcare and legal expenses associated with the gestational carrier contract until the birth of the child, including responsibility for those expenses if the contract is terminated;" (3) the gestational carrier will receive no compensation other than that specifically allowed by the statute; (4) the parties understand and freely consent to the contract.[67] The court conducts its proceedings in chambers or a closed hearing, and the only attendees are the parties in interest, their attorneys, and officers of the court (unless the court grants a petitioner's request to allow others to be present).[68] To further protect the privacy of the proceedings, the court records and parties' identities are sealed and are only subject to disclosure, release, or inspection" upon application to the court

63. *Id.* § 9:2720.2(C).

64. *Id.* § 9:2720(A).

65. LA. STAT. ANN. § 9:2720(B) (2022).

66. *Id.* § 9:2720.3(B)(4). "'Medically necessary' means that the intended mother has been diagnosed to be infertile, or to have a physical condition such that a pregnancy would create serious risk of death or substantial and irreversible impairment of a major bodily function beyond the risk customary to pregnancy and child birth." *Id.* § 9:2720.3(B)(5).

67. LA. STAT. ANN. § 9:2720.5(B) (2022).

68. *Id.* § 9:2720.7.

and in conformity with the confidentiality requirements applicable to adoptions found in the Louisiana Children's Code.[69]

Other provisions of the legislation provide rules for jurisdiction,[70] multiple embryo transfer attempts,[71] termination of the surrogacy contract,[72] remedies,[73] subsequent marriage of the surrogate,[74] post-birth orders,[75] and time limitations.[76] The surrogacy legislation also prompted amendments to the vital statistics law and the criminal code.[77]

II. PATERNAL FILIATION

While the maternal filiation rules tie the legal relationship to biology in instances other than assisted reproductive technology, the same is not true of paternal filiation. Paternity cannot be proven by the child's birth. In fact, other than scientific testing, there is no direct proof of the identity of the male participant in a child's conception. As a result, the law relies first on presumptions, most of which apply in the context of marriage and are based on the reciprocal obligation of fidelity between spouses.[78] Additionally, Louisiana law allows filiation between the father and the child by judicial action.[79] These two avenues differ in that the presumptions operate as a matter of law and may be rebutted,[80] whereas a judicial action requires a successful court proceeding yielding a judgment of paternity.

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69. *Id.* § 9:2720.7.

70. *Id.* § 9:2720.8.

71. *Id.* § 9:2720.6.

72. LA. STAT. ANN. §§ 9:2720.9, 9:2720.11 (2022).

73. *Id.* § 9:2720.10.

74. *Id.* § 9:2720.12.

75. *Id.* § 9:2720.13.

76. *Id.* § 9:2720.15.

77. S*ee* LA. STAT. ANN. § 40:34(B) (Supp. 2012), *amended by* Act No. 1118, 2001 La. Acts 2371–73; LA. STAT. ANN. §§ 40:93–96 (2022), *added by* Act No. 494, 2016 La. Acts 1603–15; *id.* § 14:286(B), *amended by* Act No. 562, 2018 La. Acts 1649–63.

78. *See* LA. CIV. CODE ANN. art. 98.

79. The court may order the mother, child, and alleged father, or the mother's husband or former husband to submit to the collection and testing of blood or tissue samples in any civil action that involves paternity. The court may do so on its own or at the request of a party to the proceeding or a person whose blood or tissue is involved. LA. STAT. ANN. § 9:396(A) (2022). The details surrounding such tests are set forth in Louisiana Revised Statutes §§ 9:397–397.3. *See id.* §§ 9:397–97.3 (2022).

80. *See generally* LA. CIV. CODE ANN. arts. 187–95.

A. PRESUMPTIONS OF PATERNITY

Louisiana law resorts to presumptions of paternity because outside of scientific testing, a man's participation in conception generally cannot be proven. There are five presumptions of paternity under Louisiana law. Below is a presentation of each presumption, including the methods through which each presumption may be rebutted by certain interested parties.

1. MARRIAGE (PRESUMPTION 1)

The first presumption, which is referred to as the strongest presumption in the law,[81] is based on the timing of the marriage of the mother and her husband, who is the presumed father. This presumption provides that "[t]he husband of the mother is presumed to be the father of a child born during the marriage or within 300 days from the date of the termination of the marriage."[82] In either instance, the presumption hinges on the well-established reciprocal duty of fidelity owed by spouses.[83] The 300-day extension is designed to filiate children who were conceived during the marriage but actually born outside of marriage.[84] Absent assisted reproductive technology or an extramarital sexual relationship, this presumption aligns with the reality of most married couples: that the husband of the mother is actually the biological father of the child. However, in some instances this presumption leads to results that conflict with obvious biological facts,[85] i.e., reality, causing the Louisiana Supreme Court to admit that the presumption is not without its

81. *Id.* art. 185 cmt. (b).

82. *Id.* art. 185. Note that a marriage terminates not only upon divorce but also upon the death of either spouse, the issuance of a court order authorizing the spouse of a person who is presumed dead to remarry, or a judicial declaration that it is relatively null. *Id.* art. 101. An absolutely null marriage is null from its inception and requires no declaration of nullity to be terminated. *Id.* arts. 2033, 94, 101 cmt. (d).

83. *See* LA. CIV. CODE ANN. art. 98.

84. *See* JESSICA G. BRAUN, HANDBOOK ON LOUISIANA FAMILY LAW 460 (West 2021–2022). Of course, this rule sometimes captures children who are not fathered by the husband, especially if the mother and husband live separate and apart for a significant length of time prior to the termination of the marriage.

85. Robert A. Pascal, *Civil Code and Related Subjects: Persons*, 14 LA. L. REV. 114, 124 (1953).

flaws.[86] In these instances, the presumption may be rebutted by the presumed father, his successors, or the mother of the child.[87]

a. Rebuttal by Disavowal Action

The presumed father is the person most likely to rebut the presumption, given the serious legal effects of being responsible for all parental obligations for the child; the avenue by which he does so is a disavowal action.[88] Note, though, that if the presumed father consented to an assisted reproductive technology to create the child, he is prohibited from disavowing that child.[89]

Successfully disavowing a child is sometimes a difficult task.[90] The articles on this action are strictly construed to further the policy of protecting innocent children born during marriage against scandalous attacks on their paternity.[91] To ensure that the proceedings are fair to the child, in an action to disavow paternity, the judge must appoint an attorney to represent the child, and that appointed attorney is not permitted to represent any other party in the litigation.[92] The presumed father must prove by clear and convincing evidence that he is not the biological father of the child.[93] While he may testify on the issue, to meet his burden that testimony must be corroborated by other evidence, which could include scientific or medical evidence, evidence of physical impossibility due to location at the probable time of conception, the testimony of lay witnesses, or any other admissible evidence.[94]

The presumed father must file the disavowal action in timely fashion; otherwise, the presumption becomes irrebuttable.[95] Prior

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86. Smith v. Cole, 553 So. 2d 847, 850 (La. 1989).

87. The court may order the mother, child, and alleged father, or the mother's husband or former husband to submit to the collection and testing of blood or tissue samples in any civil action that involves paternity. The court may do so on its own or at the request of a party to the proceeding or a person whose blood or tissue is involved. LA. STAT. ANN. § 9:396(A) (2022). The details surrounding such tests are set forth in Louisiana Revised Statutes §§ 9:397–397.3. *See id.* §§ 9:397–97.3 (2022).

88. *See generally* LA. CIV. CODE ANN. arts. 187–89.

89. *Id.* art. 188.

90. Rachel L. Kovach, *Sorry Daddy-Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 667 (2010).

91. Gallo v. Gallo, 2003-0794, p. 7 (La. 12/3/03), 861 So. 2d 168, 173.

92. LA. CODE CIV. PROC. ANN. art. 5091.1.

93. LA. CIV. CODE ANN. art. 187.

94. *Id.*, cmt. (b).

95. Modisette v. Phillips, 31,905, pp. 6–7 (La. App. 2 Cir. 5/5/99), 736 So. 2d 983, 987.

to 2016, the liberative prescriptive[96] period was one year, commencing on the day that the presumed father knew or should have known of the birth of the child.[97] This rule led to cases of deception of the presumed father by the child's mother.[98] For example, in *Fontenot v. Fontenot*, a man learned nine years after the children's birth and five years after his divorce from their mother that those children—all born during that marriage—were not his biological progeny.[99] The mother knew all along, but she never informed him.[100] Under the law at that time, his disavowal action was prescribed.[101] As the Louisiana Supreme Court had previously explained, the determining factor for commencing prescription is not whether the husband had knowledge of the mother's deceit, but rather if he had knowledge of the child's birth.[102] The law was amended to address such situations.[103] Under current law, a disavowal action is still subject to a liberative prescriptive period of one year, but as a general rule, it begins on the later of the day (1) the child is born or (2) the presumed father knew or should have known that he may not be the biological father of the child, like when he has knowledge of the mother's adultery, for example.[104]

There is an additional exception to the prescription rules in situations where the mother and the presumed father lived separate and apart continuously during the 300 days immediately preceding the birth of the child.[105] In this factual scenario, the husband still enjoys the right to a disavowal action, and that claim

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96. "Liberative prescription is a mode of barring of actions as a result of inaction for a period of time." LA. CIV. CODE ANN. art. 3447. Prescription must be contrasted with peremption, which is "a period of time fixed by law for the existence of a right. Unless timely exercised, the right is extinguished upon the expiration of the peremptive period." *Id.* art. 3458. Both refer to the passing of time to preclude claims. However, peremption actually extinguishes rights, whereas prescriptive simply bars the right to exercise it. *Id.* art. 3458 cmt. (b). Further, peremption may not be renounced, interrupted, or suspended, whereas prescription may. *Id.* art. 3461, cmt. (c); *see generally id.* arts. 3449–3451, 3462–3472.

97. LA. CIV. CODE ANN. art. 189 cmt. (rev. cmt. 2016).

98. *Id.*

99. Fontenot v. Fontenot, 2000-1057, p. 1 (La. App. 3 Cir. 12/6/00), 774 So. 2d 330, 331.

100. *Id.*

101. *Id.* at 334.

102. *Gallo*, 861 So. 2d at 174.

103. LA. CIV. CODE ANN. art. 189 cmt. (rev. cmt. 2016).

104. *Id.* art. 189.

105. *Id.*

has a one-year prescriptive period. However, the period commences only once the husband is notified in writing that a party in interest has asserted that he is the child's father.[106]

In 2013, the Louisiana Supreme Court was called upon to interpret this exception in *Pociask v. Moseley*.[107] In that case, the parties physically separated on April 30, 2006, and the child in question was born more than 300 days later, on March 15, 2007.[108] The presumed father received notice to trigger the one-year prescriptive period under the exception on July 15, 2008, and filed a disavowal action a little over a month later.[109] However, the mother argued that because the presumed father had stayed overnight at the former matrimonial domicile in May of 2006, the requisite 300 days were "interrupted," rendering the exception inapplicable and his action untimely under the general rule in effect at that time.[110]

The Louisiana Supreme Court disagreed.[111] Using the existing jurisprudence for divorce law, it held that "the phrase 'living separate and apart continuously' in the divorce articles and the disavowal action article found in our Civil Code should be read *in pari materia*."[112] In doing so, the court decided that "one overnight visit in the former matrimonial domicile when both parties were present did not interrupt the three-hundred-day time period required for the former husband to live separate and apart continuously from the mother to avail himself of the exception to the running of prescription set forth in Art. 189."[113] As the court pointed out, there was no evidence indicating that the parties did not hold themselves out to the community as living separate and apart; in fact, there were no allegations of cohabitation, sexual relations, or reconciliation that might defeat or interrupt the 300-day requirement.[114]

In any case, the presumed father is allowed to petition a court for an order directing the mother, child, and petitioner himself to

106. *Id.*
107. Pociask v. Moseley, 2013-0262, p. 6 (La. 06/28/13), 122 So. 3d 533, 537–538.
108. *Id.* at 535.
109. *Id.*
110. *Id.* at 536.
111. *Id.* at 543.
112. *Pociask*, 122 So. 3d at 543.
113. *Id.* at 542.
114. *Id.*

submit to the collection of blood or tissue samples, or both, for a determination of paternity.[115] If he does so prior to filing a disavowal action but within his prescriptive period, then his petition will operate to suspend the period for one year from the date it is filed.[116] The court may not make a paternity determination based on the test results and conclusions of the experts, but the test results are admissible in any subsequent action filed relating to the filiation of the child.[117]

The disavowal action is heritable.[118] Thus, if the presumed father dies before asserting a timely disavowal action, any of his successors whose interests are adversely affected may assert it in his stead.[119] In such a situation, the burden of proof is still clear and convincing, and the prescriptive period is still one year.[120] However, the commencement of this prescriptive period hinges on whether prescription had begun to run against the presumed father before his death.[121] If it had, the successor's one-year prescriptive period begins at the death of the presumed father.[122] If not, the successor's one-year period begins on the day the successor is notified in writing that a party in interest has asserted that the deceased husband is the child's father.[123]

"A judgment of disavowal terminates existing child support and visitation orders."[124] It also "terminates the obligation to pay child support and revokes any court order enforcing that obligation."[125] It does not, however, "affect any child support payment or arrearages paid, due, or owing prior to the date" of the

115. LA. STAT. ANN. § 9:389.2(A)(1) (2022). The court may order the mother, child, and alleged father, or the mother's husband or former husband to submit to the collection and testing of blood or tissue samples in any civil action that involves paternity. The court may do so on its own or at the request of a party to the proceeding or a person whose blood or tissue is involved. *Id.* § 9:396(A). The details surrounding such tests are set forth in Louisiana Revised Statutes §§ 9:397–397.3. *See id.* §§ 9:397–97.3 (2022).

116. LA. STAT. ANN. § 9:398.2(A) (2022).

117. *Id.* § 9:398.2(E).

118. *See* LA. CIV. CODE ANN. art. 190.

119. *Id.*

120. *Id.*, art. 187.

121. *See id.* art. 190.

122. *Id.*

123. *Id.*

124. LA. STAT. ANN. § 9:402 (2022).

125. *Id.*

filing of the disavowal action.[126] Note that a legal father who does not disavow the child (or break the filial link to the child in some other fashion) will obtain no relief from parental obligations, including child support. For example, in *Gallo v. Gallo*, a husband who learned that he was not the child's biological father sued the mother to recover the child support that he had paid for years.[127] The court denied his claim because he had never disavowed paternity, reiterating: "Fatherhood rests on something more than genes."[128] Similarly, in *J.M.Y. v. R.R.*, the legal father who never disavowed the child brought an action against the alleged biological father for reimbursement of child support that he (the legal father) had paid.[129] The court granted the alleged biological father's exception of no cause of action, noting that even if the child was fathered by him, which had never been proven, this would not extinguish the legal father's obligation to support the child.[130] Simply put, the "legal tie of paternity will not be affected by subsequent proof of the child's actual biological tie."[131]

With that said, while the legal father may not escape his obligations without disavowing the child, that does not necessarily mean that the biological father escapes his obligations. Courts have clearly stated that this presumption "was not intended to shield biological fathers from their support obligations."[132] After all, certain state agencies have the authority to bring an action to determine filiation and fix child support against a biological father, despite this presumption of paternity.[133] Also, as discussed *infra* in Section II.B, biological fathers may become filiated to a child, and in situations where that child already has a legal father, the biological father becomes the child's second legal father, also referred to as dual paternity.[134] This concept allows a child to seek

126. *Id.*

127. *Gallo*, 861 So. 2d at 170.

128. *Id.* at 178.

129. J.M.Y. v. R.R., 2008-805, p. 1 (La. App. 3 Cir. 12/11/08), 1 So. 3d 725, 726.

130. *Id.* at 728.

131. *Smith*, 553 So. 2d at 854.

132. *E.g.,* Dep't of Child. & Fam. Servs. *ex rel.* A.L. v. Lowrie, 2014-1025, p. 11 (La. 5/5/15), 167 So. 3d 573, 582.

133. *See, e.g.*, Dep't of Soc. Servs. *ex rel.* Munson v. Washington, 32,550, p. 1 (La. App. 2 Cir. 12/8/99), 747 So. 2d 1245, 1247.

134. Smith v. Jones, 566 So. 2d 408, 410 (La. Ct. App. 1 Cir. 1990).

support from the biological father notwithstanding the existence of the child's legal father.[135]

b. Rebuttal by Contestation and Establishment Action

Like the presumed father and his successors, the mother of a child may seek to rebut the presumption set forth in Article 185. Until 2005, the Louisiana Civil Code did not grant her the right to do so,[136] and jurisprudential efforts to establish such a claim were typically unsuccessful.[137] However, as part of the sweeping 2005 revision, the mother is now allowed to bring a contestation and establishment action to rebut the presumption, provided certain requirements are satisfied.[138] The purpose of this action is "to align more closely biological and legal paternity in instances when the child's status will not be adversely affected by the social stigma" of being born outside of marriage; such is the case only where the contestation action will "establish legally the child as a member of an intact family, whose stability is marked by the marriage of the mother and alleged father."[139]

As such, the threshold requirement for the mother to bring the contestation and establishment action is that the mother must be married to someone who has executed an authentic act acknowledging the child.[140] She must also seek, in the contestation and establishment action, a judgment that her former husband is not the father of the child and that her current husband is the father of the child.[141] In other words, the mother, in using the contestation and establishment action, must simultaneously disprove her former's husband paternity while proving her present

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135. *E.g.*, Dep't of Soc. Servs. *ex rel.* Williams v. Howard, 2003-2865, p. 3 (La. App. 1 Cir. 12/30/04), 898 So. 2d 443, 444.

136. Lucie R. Kantrow, *Presumption Junction: Honey, You Weren't Part of the Function–A Louisiana Mother's New Right to Contest Her Husband's Paternity*, 67 LA. L. REV. 633, 635 (2007). Louisiana lagged behind many jurisdictions in this regard. *Id.*

137. *See, e.g.*, Leger v. Leger, 2002-428, p. 3 (La. App. 3 Cir. 10/30/02), 829 So. 2d 1101, 1104.

138. *See* LA. CIV. CODE ANN. arts. 191–94.

139. *Id.* art. 191 cmt. (b).

140. *See id.* art. 191. Note that prior to 2016, the mother's husband could acknowledge the child by signing the child's birth certificate. However, in the 2016 legislative session, Act Number 309 amended Article 191 to require that the acknowledgement be in the form of an authentic act. *See* Act No. 309, 2016 La. Acts 1145–49.

141. LA. CIV. CODE ANN. art. 191.

husband's paternity.[142] As such, the mother is the proper party plaintiff, and her former and present husbands are the proper party defendants in such an action.[143] The mother's burden of proof is clear and convincing evidence, and her testimony must be corroborated by other evidence.[144] Any judgment rendered in a contestation and establishment action must decree that the former husband is not the child's father while also decreeing that the present husband is the child's father.[145]

The mother must bring the contestation and establishment action within the two peremptive periods provided in Article 193. First, the mother must bring the action within 180 days of the marriage to her current husband; second, the action must be instituted within two years of the child's birth.[146] By keeping the time period short, the mother is encouraged to act quickly, which is in the interest of all parties, particularly the child who may form an emotional attachment to the presumed father otherwise.[147]

If the mother succeeds in her contestation and establishment action, child custody and visitation orders affecting the former husband are terminated unless the court finds extraordinary circumstances justifying reasonable visitation to him in the child's best interest.[148] Additionally, the judgment terminates the former husband's child support obligation and revokes any court order enforcing that obligation.[149] By contrast, it does not affect any child support payment or arrearages paid, due, or owing prior to the date that the contestation and establishment action was filed.[150]

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142. *Id.* cmt. (c).

143. LA. STAT. ANN. § 9:403(A) (2022).

144. LA. CIV. CODE ANN. art. 192. The court may order the mother, child, and alleged father, or the mother's husband or former husband to submit to the collection and testing of blood or tissue samples in any civil action that involves paternity. The court may do so on its own or at the request of a party to the proceeding or a person whose blood or tissue is involved. LA. STAT. ANN. § 9:396(A) (2022). The details surrounding such tests are set forth in Louisiana Revised Statutes §§ 9:397–397.3. *See id.* §§ 9:397–97.3 (2022).

145. LA. CIV. CODE ANN. art. 194.

146. *Id.* art. 193.

147. *Id.* cmt.

148. LA. STAT. ANN. § 9:403(C)(1) (2022).

149. *Id.* § 9:403(C)(2).

150. *Id.* § 9:403(C)(3).

2. DUELING PRESUMPTIONS (PRESUMPTION 2)

Presumption 2 was enacted to resolve an unintended consequence of Presumption 1—the issue of "dueling" or "overlapping" presumptions. To illustrate, suppose that Woman gets pregnant in January while married to Spouse 1. In March, Woman and Spouse 1 divorce. In May, Woman marries Spouse 2. In October, Woman gives birth to a child. Under Presumption 1, both Spouse 1 and Spouse 2 would be presumed fathers. This is because the child is born during the marriage of Woman and Spouse 2. However, the child is also born within 300 days of the termination of the marriage of Woman and Spouse 2.

Presumption 2 resolves the question of paternity in such situations. It provides that if a child is born within 300 days of the termination of one marriage and the mother has remarried before the child's birth, then the prior husband (Spouse 1) is presumed to be the father.[151] If the prior husband or his successor successfully disavows the child, then the current husband (Spouse 2) is automatically presumed to be the child's father,[152] which operates to protect the child from the social stigma of illegitimacy.[153] Some argued that the rule should be the opposite, i.e., that the current husband should be presumed to be the child's father.[154] After all, this would better align with the likely reality that when a man marries a pregnant woman, he is the father of her child. However, crafting the rule this way would require the law to presume that the mother committed adultery during her first marriage.[155]

a. Rebuttal by Disavowal Action

The prior husband (the child's first presumed father) may file a disavowal action to rebut this presumption, as may his successors. This claim is identical to the one available to a presumed father under Presumption 1.[156] Note, however, that the current husband must be made a party to the disavowal action filed by the prior husband and served with process.[157]

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151. LA. CIV. CODE ANN. art. 186.
152. *Id.*
153. *Id.* cmt. (c).
154. Braun, *supra* note 84.
155. LA. CIV. CODE ANN. art. 186 cmt. (b).
156. *See id.* arts. 187–90.
157. LA. STAT. ANN. § 9:401(A) (2022).

If the prior husband successfully disavows the child, this means that the current husband is presumed to be the child's father as discussed above. With that said, as a matter of fairness, the current husband or his successors may also file a disavowal action.[158] This disavowal action is the same in all respects as the one granted to the prior husband but for the time limit attached to it. The current husband must file the disavowal action within a peremptive period of one year from the day that the prior husband's judgment of disavowal is final and definitive,[159] which is when it is final and no longer subject to appeal.[160] Like so many time limitations in the parent-child arena, the reason that the period is peremptive is because of the "desirability of a relatively short period of time for resolving paternity, and thus the status of the child."[161]

b. Rebuttal by Contestation and Establishment Action

The mother of the child can rebut Presumption 2 as to either presumed father through a contestation and establishment action. That action is identical for this presumption as it would be for Presumption 1.[162]

3. MARRIAGE + FORMAL ACKNOWLEDGMENT (PRESUMPTION 3)

Presumption 3 was enacted as part of the 2005 revision to address the circumstances of former Civil Code Article 198. That article recognized the legitimation of a child by the subsequent marriage of the parents if the man formally or informally[163] acknowledged the child.[164] Presumption 3 changed this by creating a presumption of paternity instead and requiring formal acknowledgment by authentic act or signing the birth certificate.[165] In 2016, the article was amended to remove signing the child's birth certificate as a mode of acknowledgment;[166] however, it still

158. LA. CIV. CODE ANN. art. 186, cmt. (d).

159. *Id.* art. 186.

160. *Id.* cmt. (d).

161. *Id.* cmt. (e).

162. *See supra* text accompanying notes 141–57.

163. Informal acknowledgment came in several forms, like a writing where the father referred to the child as his or conversations and other similar conduct to that effect. LA. CIV. CODE ANN. art. 195 cmt. (d).

164. *Id.* art. 195, cmt. (d).

165. *Id.* art. 195, cmt. (d).

166. This amendment was a result of Act 309 of the 2016 legislative session. *See* Act No. 309, 2016 La. Acts 1145–49.

applies to birth certificates signed prior to August 1, 2016, the effective date of the amendment.[167]

Like the first two presumptions, Presumption 3 involves marriage—namely, one occurring after the child is born. This presumption provides that a man who marries the mother of the child and also acknowledges the child by authentic act, with the mother's concurrence, is presumed to be the child's father, as long as the child is not filiated to another man.[168] For this presumption to be triggered, the first requirement is that a man must marry the child's mother, meaning that the child must already be born.[169] The second requirement is that this man must execute an authentic act in which he acknowledges the child.[170] The authentic act may be signed either before or after the marriage.[171] The third requirement is that the mother must concur in the acknowledgment by a juridical act, which is a voluntary act intended to cause legal consequences.[172] In many cases, the mother will concur in the father's authentic act of acknowledgment. The fourth and final requirement is that the child cannot be filiated to another man, i.e., the child was not born or conceived during a prior marriage or if so, the presumption was successfully rebutted.[173] All four must be satisfied; otherwise, the presumption is inapplicable.[174] Note, however, that if the child is filiated to another man, the child and the biological father may become filiated through an avowal or paternity action, leading to a possible dual paternity scenario.[175]

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167. LA. CIV. CODE ANN. art. 195, cmt. (b) (rev. cmt. 2016).

168. LA. CIV. CODE ANN. art. 195.

169. *Id.* art. 185. If the man marries the mother before the child's birth, Presumption 1 would be triggered, and he would be the child's presumed father thereunder. *Id.*

170. LA. CIV. CODE ANN. art. 195. The acknowledgment may be executed before or after the child's birth. *Id.* cmt. (d).

171. LA. CIV. CODE ANN. art. 195. In child support, custody, and visitation cases, an acknowledgment via authentic act is deemed to be a legal finding of paternity and establishes the obligation to support the child and to establish visitation without the need for a judgment of paternity. LA. STAT. ANN. §§ 9:392.1, 9:405 (2022).

172. *See* LA. CIV. CODE ANN. art. 2347 cmt. (c).

173. *Id.* art. 195.

174. *Id.* cmt. (b) (rev. cmt. 2016) ("The elimination of signing the birth certificate as a means of accomplishing a formal acknowledgment is intended to have prospective effect only. Formal acknowledgments that were accomplished prior to the effective date of the 2016 revision will therefore remain effective.").

175. *See infra* Section II.B.1.

A question has arisen as to the effect of an acknowledgment executed by a man who is not the biological father but who has satisfied the other requirements of Presumption 3. Louisiana jurisprudence indicates that this man is still presumed to be the child's father.[176] However, in the context of a different presumption not involving marriage, the Louisiana Supreme Court relied on the treatise of renowned civil law scholar Planiol to hold that an acknowledgment made by someone other than the biological parent is null.[177] As he explained: "A fact cannot be avowed when it has never existed."[178] Thus, according to the court, "If the acknowledgment is null, it produces no effects."[179]

a. Rebuttal by Disavowal Action

Like the prior presumptions, Presumption 3 may be rebutted by the presumed father or his successors, and he must do so "as provided in Article 187," i.e., in a disavowal action.[180] While an authentic act of acknowledgment may be revoked under certain circumstances,[181] Article 195 specifically provides that "[r]evocation of the authentic act of acknowledgment alone is not sufficient to rebut the presumption of paternity created by this Article."[182] An authentic act of acknowledgment may also be annulled under certain circumstances,[183] and while the article and comments are silent on the effect of this, at least one Louisiana appellate court has clearly held that an annulment of the authentic act of acknowledgment will not rebut the presumption either.[184] Simply put, the only way for a presumed father or his successors to rebut this presumption is through a disavowal action. The

176. *See, e.g.*, Wesley v. David, 2013-1500, p. 4 (La. App. 1 Cir. 2/18/14), 2014 WL 651784, at *4.

177. Succession of Robinson, 94-2229, p. 4 (La. 5/22/95), 654 So. 2d 682, 684 (citing MARCEL PLANIOL, 1 TREATISE ON THE CIVIL LAW § 1490(2) (La. State L. Inst. trans., 12th ed. 1959)).

178. *Id.*

179. *Id.* at 684.

180. LA. CIV. CODE ANN. art. 195.

181. LA. STAT. ANN. § 9:406 (2022).

182. LA. CIV. CODE ANN. art. 195. The article does not specifically address the effect of annulment of the authentic act of acknowledgment. *See* LA. STAT. ANN. 9:406(B) (2022). However, comment (b) to Article 195 seems to indicate that it would not suffice to break the filial link. It provides that to rebut the presumption, "a timely disavowal action must be brought." LA. CIV. CODE ANN. art. 195 cmt. (b) (rev. cmt. 2016).

183. LA. STAT. ANN. § 9:406 (2022).

184. Wetta v. Wetta, 2021-92, p. 8 (La. App. 3 Cir. 6/2/21), 322 So. 3d 365, 372, *writ denied*, 2021-0940 (La. 10/19/21), 326 So. 3d 255.

disavowal action for Presumption 3 differs from the others mentioned in one major respect: it has a very short peremptive period of 180 days.[185] The period begins to run from the later of either the date of marriage or the acknowledgment.[186]

b. Rebuttal by Contestation and Establishment Action

It is technically possible that all of the facts would align to trigger a mother's contestation and establishment action for Presumption 3. For example, suppose Woman has a child outside of marriage. She then marries Man 1 who fulfills the requirements necessary to trigger Presumption 3.[187] However, it turns out that Man 1 is not the father of the child; Man 2 is. If Woman and Man 1 (now Husband 1) divorce and Woman thereafter marries Man 2 (now Husband 2), she may be inspired to pursue a contestation and establishment action to simultaneously break the filial link between the child and Husband 1 and establish a filial link between the child and Husband 2. However, given that all of this would have to occur within the strict peremptive period of two years from the child's birth, it seems very unlikely. The issue has never been confronted by a Louisiana court, and based on comment (e) to Louisiana Civil Code Article 191, providing that the contestation action was designed to rebut the presumptions of Article 185 (Presumption 1) and Article 186 (Presumption 2), it seems that the Louisiana Legislature did not consider the possibility.[188]

4. FORMAL ACKNOWLEDGMENT (PRESUMPTION 4)

Presumption 4 was enacted as part of the 2005 revision to replace former Civil Code Article 203. The previous version of that article created a presumption of paternity when a man acknowledged the child by signing the registry of birth or baptism.[189] By contrast, in the 2005 revision, Presumption 4 required the man to formally acknowledge the child by executing an authentic act or signing the child's birth certificate.[190] In 2016, the article was amended to remove acknowledgment via signing

185. LA. CIV. CODE ANN. art. 195, cmt. (c) (rev. cmt. 2005).
186. *Id.* art. 195.
187. *See supra* Section II.A.3.
188. *See* LA. CIV. CODE ANN. art. 191, cmt. (e).
189. LA. CIV. CODE ANN. art. 203 (Supp. 1997).
190. *Id.* art. 195, cmt. (d) (rev. cmt. 2005).

the child's birth certificate;[191] however, it still applies to birth certificates signed prior to August 1, 2016, the effective date of the amendment.[192]

Unlike the other presumptions, Presumption 4 does not involve marriage. It provides that a man who, by authentic act, acknowledges a child is presumed to be the father of that child, as long as that child is not filiated to another man.[193] Prior to the execution of such an authentic act of acknowledgment of paternity, the notary is required to provide in writing all of its legal ramifications, including how one may challenge or revoke the acknowledgment (discussed below).[194]

As to what exactly will suffice as an authentic act, the Louisiana Fifth Circuit has held that a consent judgment does not meet the criteria of an authentic act and will not suffice to trigger this presumption.[195] Similarly, the Louisiana Second Circuit has held that the filing of a statement alleging paternity in a request for a Medical Review Panel will not either.[196]

This presumption is unique in that it may be invoked only on behalf of the child in most instances.[197] The acknowledgment does not create a presumption in favor of the man who acknowledges the child except as provided in custody, visitation, and child support cases.[198] In those cases, an acknowledgment via authentic act is "deemed to be a legal finding of paternity" and establishes the "obligation to support the child and to establish visitation without" the need for a judgment of paternity.[199] In other types of situations, like the child's wrongful death and succession, the man does not enjoy the benefit of filiation and would need to file an avowal action.[200] This has led preeminent Louisiana family law scholar, Katherine Shaw Spaht, to opine that this presumption

191. Act No. 309, 2016 La. Acts 1145–49.

192. LA. CIV. CODE ANN. art. 196 cmt. (b) (rev. cmt. 2016).

193. *Id.* art. 196.

194. *See* LA. STAT. ANN. § 9:392 (2022).

195. Morgan v. Foster, 20-363, p. 11 (La. App. 5 Cir. 4/7/21), 2021 WL 1287694, at *7.

196. Flintroy v. State of Louisiana Health Sci. Ctr.-Monroe, 53,777, pp. 11–12 (La. App. 2 Cir. 3/3/21), 315 So. 3d 395, 400–01.

197. LA. CIV. CODE ANN. art. 196.

198. *Id.*

199. LA. STAT. ANN. §§ 9:392.1, 9:405 (2022).

200. *See infra* Section II.B.1; *see* Spaht, *supra* note 3, at 322–23.

does not "operate in the same manner and with the same strength as the other two presumptions."[201]

A question has arisen regarding the biological father's intent to filiate a child. In *Succession of Dangerfield,* the biological father donated immovable property to a woman, whom he declared to be his daughter in the act of donation, which was in authentic form.[202] The court ruled that this document indeed triggered the presumption; it also affirmatively stated that the biological father's intent to filiate the child is not a requirement for a formal acknowledgment.[203]

Questions have also arisen as to the effect of an acknowledgment executed by a man who is not the biological father, but who satisfies the other requirements of Presumption 4. Unlike Presumption 3, Louisiana jurisprudence indicates that this man is not presumed to be the child's father.[204] As explained by renowned civil law scholar Planiol, cited by the Louisiana Supreme Court in *Succession of Robinson*:

> Under [Louisiana Civil Code Article] 203 [R.C.C. 196], an illegitimate child is acknowledged by a declaration executed before a notary public, in the presence of two witnesses, by the "mother" or "father." Although [Article] 203 does not expressly preclude executing an acknowledgment where no biological relationship exists, this conclusion is self-evident and definitional of an acknowledgment. An acknowledgment is an avowal emanating from the "mother" or "father" to establish maternal or paternal filiation. The word "filiation" describes the fact of biological parentage. Thus, through the acknowledgment, the "mother" or "father" provides proof of maternal or paternal filiation, that is, biological parentage. Absent a biological relationship, the avowal is null. A fact cannot be avowed when it has never existed. If the acknowledgment is null, it produces no effects.[205]

Simply put, when a man other than the biological father acknowledges the child, for purposes of this presumption, the

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201. Spaht, *supra* note 3, at 319.

202. Succession of Dangerfield, 2016-0293, pp. 4–5 (La. App. 1 Cir. 10/31/16), 207 So. 3d 427, 430.

203. *Id.* at 435.

204. State *ex rel.* A.L., 2009-1565, p. 5 (La. App. 3 Cir. 4/7/10), 34 So. 3d 416, 419.

205. *Robinson*, 654 So. 2d at 684 (citing MARCEL PLANIOL, *supra* note 177, §§ 1476, 1490(2) (other citations omitted)).

acknowledgment is null, and thus, the presumption is not triggered in the first place.

a. Revoking and Annulling the Authentic Act of Acknowledgement

A person who executes an authentic act of acknowledgment[206] is allowed to revoke it without cause within sixty days of its execution.[207] To do so, he must submit a sworn statement refuting paternity in a judicial hearing for the limited purpose of revoking the acknowledgment, or in a judicial hearing relating to the child wherein the acknowledging person is a party to the proceeding.[208] Of course, this does not preclude him from later initiating a claim to establish paternity, i.e., an avowal action,[209] nor does it preclude an action against him to establish paternity, i.e., a paternity action.[210]

Absent a timely revocation, the person who executed the authentic act of acknowledgment may petition the court to annul it.[211] He bears the burden of proving, by clear and convincing evidence, that the act was induced by fraud, duress, material mistake of fact or error, or that he is not the biological parent of the child.[212] While he may testify as to this, his testimony must be corroborated by other evidence.[213] He faces no time limitation to annul the acknowledgment because of the logic that if the authentic act is an absolute nullity, an action to annul it is imprescriptible by nature.[214] If the court finds a substantial likelihood that he is not the biological parent of the child, or that

206. Given this language, it is arguable that this claim is strictly personal. *See generally*, LA. CIV. CODE ANN. arts. 1765–66.

207. LA. STAT. ANN. § 9:406(A)(1) (2022).

208. *Id.* § 9:406(A).

209. *See infra* Section II.B.1.

210. *See infra* Section II.B.2; LA. STAT. ANN. § 9:406(D)(1) (2022).

211. LA. STAT. ANN. § 9:406(B)(1) (2022).

212. *Id.*

213. *Id.* § 9:406(B)(5). The court may order the mother, child, and alleged father, or the mother's husband or former husband to submit to the collection and testing of blood or tissue samples in any civil action that involves paternity. The court may do so on its own or at the request of a party to the proceeding or a person whose blood or tissue is involved. *Id.* § 9:396(A). The details surrounding such tests are set forth in Louisiana Revised Statutes §§ 9:397–397.3. *See id.* §§ 9:397–97.3 (2022).

214. LA. STAT. ANN. § 9:406 cmt. (rev. cmt. 2016). Prior to the statute's amendment by Act 309 in 2016, there was a prescriptive period of two years. Act No. 309, 2016 La. Acts 1145–49.

the act was induced by fraud, duress, material mistake of fact or error, then the court shall order genetic tests.[215] If these tests lead to an annulment of the acknowledgment and no support order has been established, no further action may be initiated against the man.[216]

Comment (d) to Louisiana Civil Code Article 196 seemingly conflicts with the rules set forth above. It indicates that there is no limitation on who may rebut the presumption and no applicable time bar to doing so.[217] However, its accuracy is debatable. After all, Article 681 of the Louisiana Code of Civil Procedure provides that "an action can be brought only by a person having a real and actual interest which he asserts[,]"[218] and personal actions are, by default, subject to a ten-year liberative prescriptive period.[219] Furthermore, legislation is a primary source of law in Louisiana, whereas the comments to the code articles are merely persuasive, so comment (d)'s authority has always been questionable.[220] The latest revisions to the law of filiation only heighten the scrutiny surrounding comment (d). Under current law, Presumption 4 is created only by authentic act, and Louisiana Revised Statutes § 9:406 details how to revoke or annul it,[221] possibly eliminating any other avenue to rebut the presumption.

b. Rebuttal by Contestation and Establishment Action

It is possible that all of the facts would align to trigger a mother's contestation and establishment action. For example, suppose Woman has a child outside of marriage, and Man 1 fulfills the requirements necessary to trigger Presumption 4. She then marries Man 1 (now Husband 1). However, it turns out that Man 1 is not the father of the child; Man 2 is. If Woman and Man 1 divorce and Woman thereafter marries Man 2 (now Husband 2), she may be inspired to pursue a contestation and establishment action to break the filial link between the child and Husband 1 and to simultaneously establish a filial link between the child and

215. LA. STAT. ANN. § 9:406(B)(3) (2022). These tests may be ordered pursuant to Louisiana Revised Statutes § 9:396. *See id.* § 9:396 (2022).

216. LA. STAT. ANN. § 9:406(D)(2) (2022).

217. LA. CIV. CODE ANN. art. 196 cmt. (d).

218. LA. CODE CIV. PROC. ANN. art. 681.

219. LA. CIV. CODE ANN. art. 3499.

220. *See id.* arts. 1–5; *but see In re* Succession of Loustalot, 2015-0631, pp. 5–6 (La. App. 1 Cir. 11/6/15), 183 So. 3d 556, 559 (citing the comment with approval).

221. *See* LA. STAT. ANN. § 9:406 (2022).

Husband 2. However, given that all of this would have to occur within the strict peremptive period of two years from the child's birth, it seems very unlikely. The issue has never been confronted by a Louisiana court, and based on comment (e) to Louisiana Civil Code Article 191, providing that the contestation action was designed to rebut the presumptions of Article 185 (Presumption 1) and Article 186 (Presumption 2), it seems that the Louisiana Legislature did not consider the possibility.[222]

5. THREE-PARTY ACKNOWLEDGEMENT (PRESUMPTION 5)

In its 2018 session, the Louisiana Legislature enacted Louisiana Civil Code Article 190.1.[223] Like the mother's contestation and establishment action,[224] this article allows for a break in the child's filial link to one man while simultaneously creating a presumption of paternity for another man.[225] This presumption requires the action of three people—the child's mother, presumed father, and biological father.[226]

Article 190.1 provides:

> If blood or tissue sampling indicates by a ninety-nine and nine-tenths percentage point threshold probability that the biological father is the father of the child and he is not the husband or former husband presumed to be the father of the child, then the husband or former husband presumed to be the father of the child, the mother, and the biological father of the child may execute a three-party acknowledgment in authentic form declaring that the husband or former husband is not the father of the child and that the biological father is the father of the child.[227]

Per this article, upon obtaining blood or tissue sampling affirming the biological father's paternity, the child's mother, biological father, and presumed father may execute an authentic act attesting both that the presumed father is not the father and that the biological father is the father—otherwise known as a three-party acknowledgment. Following these steps creates a

222. LA. CIV. CODE ANN. art. 191 cmt. (e).
223. Act No. 21, 2018 La. Acts 28–32.
224. *See supra* Section II.A.1.
225. LA. CIV. CODE ANN. art. 190.1.
226. *Id.*
227. *Id.*

presumption of paternity in favor of the biological father and a presumption against the paternity of the presumed father. Although the law is not express, the results of the blood and tissue sampling should be attached to the three-party acknowledgment to ensure its validity.

The three-party acknowledgment of paternity carries several effects. For one, it terminates the obligation of the presumed father to pay child support and "revokes any court order enforcing that obligation."[228] However, it does not affect any child support payments paid, due, or owed prior to the date the three-party acknowledgment was executed.[229] Additionally, it allows for the child's birth certificate to be changed to reflect the change in paternity by following the procedure set forth in Louisiana Revised Statutes § 40:34.5.1.

Parties seeking to avail themselves of this presumption must execute the three-party acknowledgment by the child's tenth birthday and never more than one year from the child's death.[230] The time periods are peremptive.[231]

6. LIMITED PRESUMPTIONS

Louisiana law references a couple of other presumptions. For example, Louisiana Revised Statutes § 9:397.3(B)(2)(b) provides that a presumption is created when a blood or tissue sampling indicates a ninety-nine and nine-tenths percent threshold probability that the alleged father is the father of the child.[232] However, this is not actually a presumption of paternity; it is proof of paternity. To the contrary, an actual presumption is created if the mother of a child born outside of marriage identifies a man as the father, notice is given to him, and he fails to contest the identification.[233] Note, however, that this presumption applies for support purposes only.[234]

228. LA. STAT. ANN. § 9:402.1 (2022).
229. *Id.*
230. LA. CIV. CODE ANN. art. 190.1.
231. *Id.*
232. LA STAT. ANN. § 9:397.3(B)(2)(b) (2022).
233. *See id.* § 40:34(E) (Supp. 2012).
234. *Id.*

B. BY JUDICIAL ACTION

Besides the presumptions of paternity (which occur as a matter of law), children and their biological fathers may filiate through one of two judicial actions.[235] The first is an avowal action, an action initiated by the biological father to filiate himself to the child. The second is a paternity action, an action initiated by the child, if old enough to have procedural capacity,[236] or their representative to filiate the child to the biological father.

1. AVOWAL ACTION

As mentioned, the avowal action is the vehicle by which the biological father may filiate to the child. Although it was not codified until the 2005 revision, Louisiana jurisprudence had consistently allowed the biological father to avow the child, rationalizing that he may be liable for child support and also that the child may assert paternity to sue for his wrongful death or to inherit from him.[237] As the Louisiana Supreme Court noted, the biological father should be allowed to avow the child, given his obligations to the child and the benefits that the child receives.[238]

Per Louisiana jurisprudence,[239] a biological father was allowed to assert an avowal action even if the child already had a

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235. In a filiation or paternity proceeding, the child's mother, the husband of the mother, and the biological father, if known, shall be joined as parties "except that joinder is not required of a person whose parental rights have been terminated, or who is deceased, or whose joinder is determined otherwise not to be feasible." *Id.* § 9:408 (2022). Uncontested proceedings to establish paternity may be proven by affidavits if allowed by the local rule of the court with jurisdiction. *Id.* § 9:407. Except for a good cause, a court shall award attorney's fees costs to the prevailing party in an action seeking to establish paternity. *Id.* § 9:398.1. Louisiana Revised Statutes § 9:399.1 provides information on how and under what circumstances a judgment of paternity may be set aside or vacated by an adjudicated father, the child, or the mother of the child. *See id.* § 9:399.1.

236. *See* LA. CODE CIV. PROC. ANN. arts. 682–83 (providing that only competent majors and competent emancipated minors have capacity to sue and excluding unemancipated minors from procedural capacity).

237. *See* T.D. v. M.M.M., 98-0167, p. 3 (La. 3/2/99), 730 So. 2d 873, 876.

238. *Id.*

239. *See* Succession of Mitchell, 323 So. 2d 451 (La. 1975); Finnerty v. Boyett, 469 So. 2d 287 (La. Ct. App. 2 Cir. 1985); *Smith*, 553 So. 2d at 851; Katherine Shaw Spaht & William Marshall Shaw Jr., *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 LA. L. REV. 59, 79 (1997). *Cf.* Warren v. Richard, 296 So. 2d 813 (La. 1974) (child's right to recover from biological father despite legal paternity of another man); Griffin v. Succession of Branch, 479 So.

presumed father. In such a situation, if the biological father successfully established his paternity in an avowal action and the presumed father was no longer able to disavow paternity, the child would have two legal fathers giving rise to dual paternity. In other words, an avowal action by the biological father did not simultaneously act as a disavowal action by the presumed father, as the two actions are distinct and separate.[240]

The Louisiana Supreme Court first recognized the concept of dual paternity in *Warren v. Richard*.[241] In that case, the court addressed the issue of whether a child born outside of marriage could recover for the wrongful death of the biological father, despite the fact that the child already had a legal father.[242] The court held that the child could have two fathers in Louisiana. As it explained:

> To say that the child . . . had no right to recover for her biological father's wrongful death because the law presumed her to be the legitimate child of another man 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.[243]

The court also noted that dual paternity was not novel to Louisiana, as its adoption law already recognized it by allowing an adopted child to inherit from both their biological and adopted families.[244] With that said, the court was "not unmindful of the problems a logical extension of these holdings may create, such as a child in these circumstances recovering from both fathers for support and maintenance, or, conversely, requiring the child to support both fathers in a proper case."[245] Later cases indeed addressed some of these problems. In the world of dual paternity, both men are liable to support the child and may inherit from the child, and the child may inherit from both men.[246] Although the legislature attempted to eliminate the potential for dual paternity

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2d 324 (La. 1985) (children's right to avowal action despite legal paternity of another man).

240. *Finnerty*, 469 So. 2d at 292.

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

242. *Id.*

243. *Id.* at 817.

244. *Id.*

245. *Id.*

246. *Smith*, 553 So. 2d at 854; *see also* Monica Hof Wallace, *A Primer on Child Custody in Louisiana*, 65 LOY. L. REV. 1 (2019).

through statutory revisions, the Louisiana Supreme Court continued interpreting the law to permit it.[247]

The issue of dual paternity was hotly debated and very contentious in the 2005 revision. Members of the Louisiana State Law Institute, in conjunction with the state legislature, debated whether to codify or overrule the jurisprudence allowing dual paternity.[248] At the time the decision was made, Louisiana became the first state to formally adopt the concept of dual paternity.[249] While the Louisiana Civil Code does not explicitly refer to it, its existence is recognized through the codification of the avowal action (and also through the paternity action, discussed in Section II.B.2). Dual paternity sometimes leads to interesting issues in a legal system that presupposes that a child has only one father. For example, in *Cerwonka v. Baker*, a court awarded joint custody to a mother, legal father, and biological father but named the legal father as the domiciliary parent because he was best at facilitating communication with everyone involved.[250]

Under current law, the avowal action is a strictly personal right of the biological father, meaning that he is the sole person allowed to assert it.[251] In an avowal action, the biological father bears the burden of proving his paternity by a preponderance of the evidence, and he may use any relevant evidence, such as blood tests,[252] informal acknowledgment, and cohabitation with the

247. *See Griffin*, 479 So. 2d at 326–28; *Louisiana State Law Institute Revision of the Louisiana Civil Code of 1870, Book I - Of Persons, Title VII Parent and Child: Policy Issues Before the Marriage-Pers. Comm.*, La. State L. Inst. Couns. Meeting Oct. 14–15, 1994 (prepared for meeting by Katherine S. Spaht, Rptr., and Kerry Triche, Staff Att'y) ("[D]espite the intention to end dual paternity in 1981 the Louisiana Supreme Court confirmed its concept by its interpretation of the Civil Code articles.").

248. Spaht, *supra* note 3, at 321 ("Of all the issues presented for deliberation by the Council of the Law Institute that concerned filiation, the most contentious, and the issue that produced the most vacillating results, was 'dual paternity.'").

249. LA. CIV. CODE ANN. art. 197 cmt. (b); *see also* Varnado, *supra* note 25, at 628.

250. *See* Cerwonka v. Baker, 2006-856, pp. 6–7 (La. App. 3 Cir. 11/2/06), 942 So. 2d 747, 752–753.

251. LA. CIV. CODE ANN. art. 198. For a detailed explanation of the term "strictly personal," see *id.* art. 1766.

252. The court may order the mother, child, and alleged father, or the mother's husband or former husband to submit to the collection and testing of blood or tissue samples in any civil action that involves paternity. The court may do so on its own or at the request of a party to the proceeding or a person whose blood or tissue is involved. LA. STAT. ANN. § 9:396(A). The details surrounding such tests are set forth in Louisiana Revised Statute §§ 9:397–397.3. *See id.* §§ 9:397–97.3.

mother at the time of conception to do so.[253] Of course, before instituting the avowal action, the biological father may petition the court for an order for blood testing to establish biological paternity.[254] Note, however, that the statute forbids the court from making a paternity determination based on the test results and conclusions of the experts filed in the record.[255] Instead, the test results are simply admissible in a *subsequent action* filed by a party relating to the child's filiation.[256] This premise is illustrated in *State ex rel. C.C.*, wherein the sister of the biological father was granted custody by the juvenile court judge.[257] The Louisiana Fifth Circuit determined that the juvenile court had committed legal error by allowing possible DNA results to equate to filiation under Louisiana law.[258]

Article 198 provides the time limitations on the avowal action, and all of the relevant time periods are peremptive.[259] The man may institute the action at any time as a general rule.[260] For example, in a subsequent appellate review by the Fifth Circuit in *State ex rel. C.C.*, even though the avowal action was filed approximately four years after the child's birth, it was not perempted.[261] No facts existed to trigger the time constraints set forth in Article 198, which are discussed below.

When the child has a presumed father, though, the biological father must assert the avowal action within one year of the child's birth.[262] According to comment (e), this one-year period was implemented "to protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father."[263] However, the one-year period provides an exception for situations in which the mother in

253. LA. CIV. CODE ANN. art. 198 cmt. (b).
254. LA. STAT. ANN. 9:398.2(A)(2) (2022).
255. *Id.* 9:398.2(E).
256. *Id.* 9:398.2(E).
257. State *ex rel.* C.C., 18-440, pp. 5–9 (La. App. 5 Cir. 10/12/18), 256 So. 3d 565, 568–71.
258. *Id.* at 572.
259. LA. CIV. CODE ANN. art. 198.
260. *Id.*
261. State *ex rel.* C.C., 20-307, p. 10 (La. App. 5 Cir. 3/17/21), 316 So. 3d 154, 163.
262. LA. CIV. CODE ANN. 198.
263. *Id.* 198 cmt. (e).

bad faith deceived the biological father regarding his paternity.[264] In such a scenario, the biological father must bring the avowal action within the earlier of one year from the day he knew or should have known of his paternity or ten years from the child's birth.[265]

The peremptive periods of Article 198 were intently argued and discussed in *Kinnett v. Kinnett*, a case in which a married woman gave birth to a child conceived with her paramour.[266] Their last sexual contact was in November 2014, during which the two used contraception.[267] The child was born on August 5, 2015, and allegedly looked like the woman's husband.[268] In September, the mother told her paramour that she had had sexual intercourse with her husband and had given birth to his child.[269] Over a year later, on December 9, 2016, the mother called her now-former paramour and told him that she had learned, through DNA tests on her two children, that her husband was actually not the father of the child at issue.[270] Additional testing revealed that her ex-paramour was the child's biological father.[271] Once the mother informed her husband of that fact, she filed for divorce in January 2017, and the biological father intervened to establish paternity in February 2017 (approximately eighteen months after the child's birth).[272] The presumed father and the mother excepted to the biological father's avowal action on grounds, among other things, of peremption.[273] The trial court granted their exception, reasoning that because the child had a presumed father and because the mother did not in bad faith deceive the biological father, the one-year peremptive period applied, thereby perempting the avowal action.[274]

The appellate court reversed, holding that the mother in bad faith deceived the biological father, explaining that "there is no set of circumstances wherein a woman—who has had sexual relations with more than one man during the period of possible conception—

264. *Id.* art. 198.
265. *Id.*
266. Kinnett v. Kinnett, 17-625, pp. 2–3 (La. App. 5 Cir. 8/6/20), 302 So. 3d 157, 163.
267. *Id.*
268. *Id.* at 164.
269. *Id.*
270. *Id.*
271. *Kinnett*, 302 So. 3d at 165.
272. *Id.*
273. *Id.*
274. *Id.*

may have an 'honest belief' that one man, and not the other, is the father."[275] Furthermore, the court held that "a married woman—whose husband is presumed to be the father of her child—who knows that it is possible that another man is the child's biological father has a duty to inform that man of his possible paternity[,]" and failure to do so constitutes bad faith deception.[276] Because of the mother's deception, the biological father's knowledge of his paternity did not occur until December 9, 2016, making his February 10, 2017 avowal action timely.[277]

The Louisiana Supreme Court granted writ applications[278] and subsequently reversed the appellate court, holding that the mother did not in bad faith deceive the biological father; thus, his avowal action was perempted under the one-year period.[279] The court rejected "the notion that a woman who has sex with more than one man during the period of conception cannot have an honest belief that one man and not the other is the father."[280] As it noted: "[A] credible belief may exist without factual certainty."[281] In the case at bar, the mother believed that her husband was the child's father, given her use of contraception with the biological father and the child's looks mirroring her husband's at birth.[282] The court explained then that "[a] mother who knows another man is possibly the father of her child, can also honestly believe that her husband is the father."[283] Although the mother may have been mistaken, her error did not translate to a finding of bad faith or deception on her part.

One more peremptive period applies to the avowal action: in every case, the biological father's avowal action must be brought within one year of the child's death.[284] The reasoning is that "a father who failed during a child's life to assume his parental responsibilities should not be permitted unlimited time to institute an action to benefit from the child's death."[285] In *Udomeh v.*

275. *Id.* at 181.
276. *Kinnett*, 302 So. 3d at 179.
277. *Id.* at 182–87.
278. Kinnett v. Kinnett, 2020-01156, p. 1 (La. 2/9/21), 309 So. 3d 738, 738.
279. Kinnett v. Kinnett, 2020-01156, p. 12 (La. 12/10/21), 332 So. 3d 1149, 1157.
280. *Id.* at 1155.
281. *Id.*
282. *Id.* at 1156.
283. *Id.*
284. LA. CIV. CODE ANN. art. 198.
285. *Id.* cmt. (d).

Joseph, the Louisiana Supreme Court confronted the issue of how a biological father must frame his avowal action.[286] In that case, after the death of his child, the man did not file an avowal action but, instead, asserted his paternity in a wrongful death and survival petition within one year of the child's death.[287] The court held that under Louisiana's fact-pleading system, the man's petition contained sufficient facts to assert an avowal action and stated that the requisite facts need not be in a petition that "specifically request[s] a judgment of paternity."[288] Following *Udomeh*, Louisiana courts have liberally construed petitions as stating enough to preserve the claim of paternity as long as they allege that the plaintiff is the child's father.[289]

With that said, it must be noted that those claims were filed in district courts that had subject matter jurisdiction to determine paternity. In *Thomas v. Ardenwood Properties*, the district court lacked that jurisdiction because exclusive jurisdiction for establishing paternity had been granted to the Family Court in that judicial district.[290] However, the appellate court raised the issue of peremption on its own motion and decided that the man's amended petition requesting a judgment of paternity did not relate back to his original petition, which only had asserted his paternity.[291] In *Flintroy v. State of Louisiana Health Science Center*, a man filed a timely request for Medical Review Panel (MRP) with the Division of Administration within a year of his alleged daughter's death.[292] After that body issued its opinion two years later—finding no breach of the standard of care—the man filed a medical malpractice petition three months thereafter.[293] The court held that his request to the MRP did not constitute a paternity claim because the Division of Administration had no

286. *See* Udomeh v. Joseph, 2011-2839, p.1 (La. 10/26/12), 103 So. 3d 343, 344.

287. *Id.* at 343.

288. *Id.* at 348.

289. *Flintroy*, 315 So. 3d at 399 (citing Miller v. Thibeaux, 2014-1107 (La. 1/28/15), 159 So. 3d 426; Caceras v. Work, 2012-1097 (La. App. 4 Cir. 2/27/13), 110 So. 3d 275; Jackson v. McNeal, 2015-0067 (La. App. 1 Cir. 7/13/15), 180 So. 3d 376). *See also Jackson*, 180 So. 3d 376.

290. Thomas v. Ardenwood Properties, 2010-0026, p. 2 (La. App. 1 Cir. 6/11/10), 43 So. 3d 213, 214.

291. *Id.* at 217–18. Note that two years after the *Thomas* decision, the Louisiana Supreme Court announced in *Udomeh* that the pleading need not specifically request a judgment of paternity. *Udomeh*, 103 So. 3d at 348.

292. *Flintroy*, 315 So. 3d at 397.

293. *Id.*

authority to decide paternity.[294] Additionally, while a request to the MRP may interrupt prescription, the time bar on an avowal action is peremptive and may not be interrupted.[295]

The constitutionality of the peremptive periods in Article 198 has been challenged. In *Leger v. Leger*, the alleged father intervened in the mother's divorce proceeding in order to determine the paternity of a minor child born during her marriage.[296] Because the intervention was filed more than one year after the child's birth, the trial court sustained the legal father's exception of peremption.[297] After this ruling was affirmed on appeal, the alleged father filed a petition challenging Article 198 on constitutional grounds.[298] He argued that the time period was too short, interfered with his rights as a parent, and violated the Equal Protection Clause of the United States Constitution because mothers have more time to establish paternity in the contestation and establishment action.[299] The court rejected his argument, noting that the biological father and the mother are not presented with similar circumstances and that the "nature, interests and consequences" of the parent's respective actions are different.[300] Thus, it upheld the constitutionality of Article 198.[301] In *Kinnett v. Kinnett*, both the biological father and attorneys appointed on behalf of the child raised the constitutionality of Article 198.[302] As to the child's challenge, the Louisiana Supreme Court held that the child lacked standing.[303] The court noted Article 198 affects the alleged biological father's rights, not the child's.[304] As to the biological father's challenge, the Louisiana Fifth Circuit Court of Appeal on remand decided that the article was unconstitutional as applied to the facts of the case at bar.[305]

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294. *Id.* at 400. Its authority is limited and extends only to the review of a malpractice claim (and no other civil matters) and to the suspension of prescription (and not peremption). *Id.*

295. *Id.* at 400–01.

296. *Leger*, 258 So. 3d at 625.

297. *Id.*

298. *Id.*

299. *Id.* at 626–27.

300. *Id.* at 631.

301. *Leger*, 258 So. 3d at 631.

302. *Kinnett*, 332 So. 3d at 1152–53.

303. *Id.* at 1157.

304. *Id.* The child's claim is governed by Article 197, as discussed in Section II.B.2.

305. *Kinnett v. Kinnett*, 17-625, pp. 24–25 (La. App. 5 Cir. 12/28/22), 2022 WL 17974657, at *14.

2. PATERNITY ACTION

The other judicial action is the paternity action, the vehicle by which the child, or their legal representative if they are a minor, may filiate to the biological father.[306] Although it was not codified until the 2005 revision, Louisiana jurisprudence had consistently allowed for a paternity action.[307] Just like the avowal action, the paternity action may be asserted even if the child already has a presumed father,[308] and as such, may lead to a dual paternity situation.

For example, in *Smith v. Cole*, the Louisiana Supreme Court allowed a mother to assert a paternity action against an alleged biological father, notwithstanding that the child in question was the legitimate child of another man.[309] Relying on the concept of dual paternity, the court explained that a biological father is obligated to support his child even if they are the legitimate child of another man and stated: "Since [the legal father's] failure to disavow paternity would not preclude [the biological father] from bringing an avowal action, it would be unjust to construe the presumption so as to provide [the biological father] with a safe harbor from child support obligations."[310]

In a paternity action, the child bears the burden of proving the biological father's paternity. The standard of proof depends upon the timing of the institution of the action. If the child brings the action during the alleged father's lifetime, the standard is a preponderance of the evidence; by contrast, if the child brings the action after the alleged father's death, the standard is elevated to clear and convincing evidence.[311] As explained in comment (d) to Article 197, the standard is more onerous after the alleged father's death to protect his estate from fraudulent claims.[312] The Louisiana Supreme Court upheld the constitutionality of the varying burdens of proof in *Sudwischer v. Estate of Hoffpauir*.[313]

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306. LA. CIV. CODE ANN. art. 197; *see, e.g.*, O'Bannon *ex rel.* O'Bannon v. Azar, 506 So. 2d 522, 524 (La. Ct. App. 1 Cir. 1987).

307. *See, e.g., Smith*, 553 So. 2d at 849.

308. LA. CIV. CODE ANN. art. 197.

309. *Smith*, 553 So. 2d at 848.

310. *Id.* at 854.

311. LA. CIV. CODE ANN. art. 197 cmt. (d).

312. *Id.* (citing Katherine Shaw Spaht, *Developments in the Law, 1981–1982—Persons*, LA. L. REV. 535, 537 (1982)).

313. Sudwischer v. Estate of Hoffpauir, 705 So. 2d 724, 733 (La. 1991).

All relevant evidence is admissible in the paternity action. Comment (c) to Article 197 gives examples such as blood tests,[314] informal acknowledgment, and cohabitation of the mother and father at the time of conception.[315] Cases have further explained that this evidence could also "include the alleged father's acknowledgment of the child in formal writings or in public or private conversations, [supporting] the education of the child as his own," living with the mother "at the time of the child's conception, rearing the child in his home, naming the child in his will, giving the child his surname, and holding the child out in the community as his own."[316]

Much like the avowal action, issues have arisen as to how to frame the paternity action. For example, in *Succession of Morris*, a child received social security benefits on his alleged father's account after averring in his application that he was born out of wedlock.[317] When the child subsequently intervened in the succession of his alleged father's relative, the court had to determine if the previously-filed application for social security benefits sufficed as an "action" to establish paternity.[318] The court focused on Louisiana Code of Civil Procedure Article 421, which provides that "[a] civil action is a demand for the enforcement of a legal right" that "is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction"[319] to determine that the social security application did not qualify.[320] By contrast, in *Succession of Harrison*, the court held that the alleged child's motion to compel turnover of succession property—in which he alleged the decedent's paternity—and his introduction of filiation evidence during the proceedings constituted the

314. LA. CIV. CODE ANN. art. 197 cmt. (c). The court may order the mother, child, and alleged father, or the mother's husband or former husband to submit to the collection and testing of blood or tissue samples in any civil action that involves paternity. The court may do so on its own or at the request of a party to the proceeding or a person whose blood or tissue is involved. LA. STAT. ANN. § 9:396(A) (2022). The details surrounding such tests are set forth in Louisiana Revised Statutes §§ 9:397–397.3. *See id.* §§ 9:397–97.3.

315. La. CIV. CODE ANN. art. 197 cmt. (c).

316. Ladmirault v. Succession of Humphrey, 2016-0525, p. 4 (La. App. 4 Cir. 12/7/16), 206 So. 3d 987, 989–90; *see also* Jenkins v. Mangano Corp., 2000–0790, p. 3–4 (La. 11/28/00), 774 So.2d 101, 103.

317. *In re* Succession of Morris, 13-533, pp. 2–3 (La. App. 5 Cir. 12/12/13), 131 So. 3d 274, 275.

318. *Id.* at 276.

319. LA. CODE CIV. PROC. ANN. art. 421.

320. *Morris*, 131 So. 3d at 276.

institution of legal proceedings to prove filiation for purposes of applicable one-year peremptive period.[321]

Under current law, the child may assert the claim at any time as a general rule.[322] However, for succession purposes only, the child has a peremptive period of one year from the alleged father's death.[323] Prior to the 2005 revision, Louisiana Civil Code Article 209 applied and required the child to institute the paternity action by the earlier of their nineteenth birthday and a year from the alleged father's death,[324] both of which were peremptive periods.[325] A question has arisen as to whether to apply former Article 209 or current Article 197 to cases in which the child celebrated their nineteenth birthday prior to the amendment, but their alleged father died after the amendment. Obviously, if courts apply the prior law (Article 209), then the claim is barred, but if they apply the current law (Article 197), it is not—assuming, of course, that the action is filed within a year of the biological father's death. The legislative act stated that the timing provisions in Article 197 applied only to "claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date."[326] Until 2022, circuits were split on how to handle this issue.[327]

For example, in *Succession of Pelt*, the Louisiana Third Circuit held that Article 197 applies, such that a claim is not perempted as long as it is brought within a year of the alleged father's death.[328] The court used four bases for its decision.[329] First, it reasoned that in interpreting identical language on the applicability of a new law, the Louisiana Supreme Court had held

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321. *In re* Succession of Harrison, 48,432, p. 7 (La. App. 2 Cir. 11/8/13), 129 So. 3d 681, 685.

322. LA. CIV. CODE ANN. art. 197.

323. *Id.*

324. LA. CIV. CODE ANN. art. 209 (Supp. 1984).

325. Matherne v. Broussard, 2006-0838, p. 8 (La. App. 1 Cir. 2/14/07), 959 So. 2d 975, 980.

326. Act. No. 192, 2005 La. Acts 1444–59.

327. For a recent and comprehensive discussion of the jurisprudence on this topic, see Emily M. Gauthier, *Let Louisiana's Bastards Beat the Clock: It's Time to Amend Article 197*, 80 LA. L. REV. 1437 (2020).

328. Succession of Pelt, 2017-860, p. 13 (La. App. 3 Cir. 4/11/18), 244 So. 3d 476, 486; *see also* Succession of Younger, 50,876 (La. App. 2 Cir. 9/28/16), 206 So. 3d 1088; *Harrison*, 129 So. 3d at 685.

329. *See Pelt*, 244 So. 3d at 481–84.

that the law applied retroactively.[330] Second, it noted that Louisiana Civil Code Article 870 provides that succession rights are governed by the law in effect at the decedent's death.[331] Third, it pointed to comment (e) of Article 197, which explained that the former article led to "a harsh result not justified by any policy consideration."[332] Finally, it explained that applying Article 197 would not disrupt any vested rights.[333]

By contrast, in *Succession of James*, the Louisiana First Circuit held that Article 209 applies, such that a post-revision claim is perempted.[334] That court explained that Article 197 applies only to viable causes of action.[335] Because peremption extinguished the child's claim on their nineteenth birthday, no viable cause of action existed thereafter.[336] Furthermore, the court noted that no legislative intent existed for Article 197 to revive an extinguished filiation claim.[337]

In March of 2022, the Louisiana Supreme Court granted an application for supervisory writs in *Succession of Lewis* to address and resolve the circuit split,[338] and in October 2022, it handed down its decision.[339] In *Lewis*, the decedent, John Charles Lewis, had a relationship with another woman during his marriage, allegedly resulting in the birth of two children.[340] One of those children, Cherie Jefferson, filed a paternity action in Mr. Lewis's succession proceedings.[341] After thoroughly discussing the rationale and holdings of numerous, conflicting appellate decisions, the court held that Article 197 applies retroactively, and thus, Ms. Jefferson's claim was timely.[342] The court began by noting no ambiguity in the article, and specified that it would constitute a

330. *Id.* at 481–82.
331. *Id.* at 482.
332. *Id.* at 484.
333. *Id.*
334. *In re* Succession of James, 2007-2509, p. 8 (La. App. 1 Cir. 8/21/08), 994 So. 2d 120, 125.
335. *Id.*
336. *Id.*
337. *Id.*
338. Succession of Lewis, 2022-00079, p. 1 (La. 3/22/22), 334 So. 3d 746.
339. Succession of Lewis, 2022-00079, p. 1 (La. 10/21/22), 351 So. 3d 336.
340. *Id.* at 338.
341. *Id.*
342. *Id.* at 349–50.

change in the law.[343] Next, the court explained that because the time period is peremptive (and remedial in nature), it should be given retroactive application absent contrary legislative intent, of which the court found none; in fact, the court found that the clear language of the article, combined with Article 870 (providing for the applicability of law in effect at a decedent's death to apply), evidenced the legislature's intent for retroactive application of Article 197.[344] As the court noted, "[T]he prior law (former La. C.C. art. 209) 'was a harsh result not justified by any policy considerations.'"[345] Therefore, it found that not applying Article 197 retroactively would defeat the purpose of enacting the article.[346] Additionally, the court explained that retroactive application of the law would lead to constant results and comport with the legislature's intent to abandon the "harsh and unjustified peremptive period of former [Louisiana Civil Code Article] 209."[347] Finally, the court provided that its decision to apply the article retroactively would not deprive the other potential heirs of a vested right, because such a right did not arise until Mr. Lewis died.[348]

Another issue affecting the retroactive application of Article 197 is the interplay between paternity actions and wrongful death/survival actions, i.e., tort claims. Prior to 2005, Article 209 allowed a child who had already reached their nineteenth birthday to nonetheless bring a paternity action within a year of that parent's death for the sole purpose of establishing standing to sue under Louisiana Civil Code Article 2315.[349] Under current law (Article 197), a child may bring a paternity action at any time except for succession purposes.[350] In *Ratliff v. LSU Board of Supervisors*, the Fourth Circuit reviewed available legal actions for non-filiated alleged children after Charles Ratliff died in May 2007.[351] Six months later, the alleged children sought damages for wrongful death and survival.[352] In June of 2008, the trial court allowed the children to file supplemental and amending petitions

343. *Id.* at 349.

344. *Lewis*, 351 So. 3d at 349–50.

345. *Id.* at 349 (quoting LA. CIV. CODE ANN. art. 197 cmt. (e) (2005)).

346. *Id.* at 349–50.

347. *Id.* at 350.

348. *Id.*

349. LA. CIV. CODE ANN. art. 209 (Supp. 1984).

350. LA. CIV. CODE ANN. art. 197.

351. Ratliff v. LSU Bd. of Supervisors, 2009-0012, p. 3 (La. App. 4 Cir. 5/7/10), 38 So. 3d 1068, 1072.

352. *Id.* at 1073.

to establish paternity.[353] Under Article 197, the paternity action would be timely because the claim sounded in tort—and faced no time bar—rather than in succession, which would face the one-year time bar.[354] However, under Article 209, the claim would be untimely because it was asserted in a tort suit that was not instituted within one year of the alleged father's death.[355] The appellate court allowed the paternity action to relate back to the timely filed survival and wrongful death action that alleged paternity, reasoning that the original claim for damages provided fair notice to the defendants and arose out of the same facts as the later filed filiation pleading.[356] By contrast, in *Washington v. Magnolia Manor Nursing Home and Rehabilitation, L.L.C.*, the Louisiana Third Circuit declined to follow *Ratliff*, explaining that the Fourth Circuit in that case had failed to consider Article 197.[357] Instead, the *Washington* court determined that as long as the tort petition is filed timely, the child has no peremptive period within which to assert a paternity claim in a non-succession case.[358]

III. MODERN FILIATION ISSUES

With the rapid increase in the use of assisted reproductive technology (ART), along with the United States Supreme Court's recognition of marriage equality in *Obergefell v. Hodges*,[359] Louisiana's filiation laws have struggled to keep pace. When applying Louisiana's filiation laws to these scenarios, the potential issues are many, and in some instances, the laws lead to bizarre legal conclusions.[360] Although the Louisiana Legislature created a task force to study the impact of ART decades ago,[361] current legislation on the topic is scant.

A. ASSISTED REPRODUCTIVE TECHNOLOGY AND FILIATION

The Louisiana Criminal Code addresses the use of gametes donated or provided to create human embryos. This law prohibits

353. *Id.*

354. *See id.* at 1075.

355. *See id.* at 1076.

356. *Ratliff*, 38 So. 3d at 1076.

357. Washington v. Magnolia Manor Nursing Home and Rehab., L.L.C., 51,899, p. 9 (La. App. 2 Cir. 3/28/18), 247 So. 3d 156, 162.

358. *Id.*

359. Obergefell v. Hodges, 576 U.S. 644 (2015).

360. Varnado, *supra* note 25, at 611.

361. Spaht, *supra* note 3, at 330.

any person from "knowingly us[ing] a sperm, ovum, or embryo, through the use of assisted reproduction technology, for any purpose other than that indicated by the sperm, ovum, or embryo provider's signature on a written consent form."[362] Likewise, "[n]o person shall knowingly implant a sperm, ovum, or embryo, through the use of [ART], into a recipient who is not the sperm, ovum, or embryo provider, without the signed written consent" of both the provider and recipient.[363] Violators face immediate revocation of their professional licenses.[364] This legislation is aimed at doctors and other professionals working in clinics that perform ART procedures.

However, the aforementioned law does not apply to children who are posthumously conceived through ART after the death of one of the participating parties, provided the child was born in accordance with Louisiana Revised Statutes § 9:391.1.[365] While this statute addresses an important issue, it is somewhat limited. It only applies to married couples, and the deceased party must have specifically authorized in writing for their deposited gametes to be used by their surviving spouse.[366] Additionally, the child must be born after the deceased party's death and also within a three-year window thereof.[367] If all of the statutory requirements are satisfied, the child shall be deemed the child of the decedent with all rights, including inheritance. [368]

The Human Embryo Statute is another piece of legislation, and it provides the legal status, rights, and regulation of an in vitro fertilized human ovum.[369] This law prohibits the sale of a human ovum or the farming of human ova for research purposes, and it also confines the use of such solely for the support and development of an in utero embryo.[370] Any viable in vitro fertilized human ovum is a juridical person and, therefore, cannot be destroyed, even by the gamete donors.[371] If the ovum has been cryopreserved, the fertilized ovum cannot be discarded and must remain frozen

362. LA. STAT. ANN. § 14:101.2 (2022).
363. *Id.*
364. *Id.*
365. *Id.* § 9:391.1.
366. *Id.*
367. LA. STAT. ANN. § 9:391.1 (2022).
368. *Id.*
369. *See id.* §§ 9:121–33.
370. *Id.* § 9:122.
371. *Id.* § 9:129.

indefinitely.[372] If the sperm and egg donors express their identity, they will have rights as parents,[373] but the separate juridical personality of the ovum remains intact.[374] With that said, a viable in vitro fertilized ovum may be adopted for implantation in another person in accordance with the facility's procedures; in such a situation, the in vitro fertilization patients must formally renounce rights to the fertilized ovum by notarial act.[375] Upon the adoption, the adopting couple are the legal parents of the ovum, which retains no inheritance rights from the in vitro fertilization patients.[376] In the event of a conflict surrounding the fertilized ovum, courts must consider the best interest of the in vitro fertilized ovum.[377]

Although Louisiana has taken some steps to legislate in the area of ART, the current law in Louisiana is insufficient. It addresses only the most traditional circumstances—a married couple who desires a child but who is unable to have one via sexual intercourse. However, as recent Louisiana cases demonstrate, ART may assist a variety of people who want children, including single individuals, unmarried couples, and married same-sex couples. Therefore, the lack of relevant ART legislation creates a major hurdle to the right of some individuals to procreate.

It also leads to many unanswered legal questions. Louisiana law is silent on issues that arise when a woman uses donor gametes to become pregnant.[378] This, in turn, means that Louisiana courts have no legislative guidance when it comes to balancing the competing interests of the prospective parents, the donors of sperm and eggs, and the resulting child, whose interests carry the greatest weight.[379] Although donors rarely seek rights to the resulting child, cases across the country show that is not always true.[380] Some donors are demanding the right to interact with their biological children, and the child's "parents" are responding by demanding financial support from such donors.[381]

372. *See* LA. STAT. ANN. § 9:129 (2022).
373. *Id.* § 9:126.
374. *Id.* § 9:129.
375. *Id.* § 9:130.
376. *Id.* §§ 9:130, 9:133.
377. LA. STAT. ANN § 9:131 (2022).
378. Varnado, *supra* note 25, at 613.
379. *Id.*
380. *Id.* at 616.
381. *Id.*

ART allows for numerous people to be involved in a child's conception, but Louisiana law does not address the rights of all of these parties, leaving many unanswered questions, some of which include:

Who are the "parents" of a child born under these circumstances? What rights, if any, does a donor have to develop a relationship with that child? What obligations, if any, does a donor owe to that child? Most importantly, what rights does the child have? Does such a child have a right to know the identity of his or her biological parents and to demand support from them? Does such a child and his or her intended parent(s) have a right to be protected from unwanted interference from donors, who might seek to claim parental rights?[382]

For example, because Louisiana permits dual paternity, a child born of ART could be filiated to their intended father (the husband of the mother) and also his sperm donor (the biological father).[383] Ultimately, Louisiana faces a number of unresolved legal issues, leaving the courts to decide res novo issues based on the state's public policy and constitutional restraints.

The scarcity of legislative guidance has forced Louisiana's state courts to address sensitive issues without legislative guidance.[384] It seems that in some instances, courts are hesitant to undertake the task. For example, in *Hall v. Fertility Institute of New Orleans*, a man deposited semen at a fertility clinic.[385] He later died of cancer, and his mother and the woman who accompanied him to the clinic both sought possession of his frozen semen.[386] The woman claimed that the deceased had donated it to her by authentic act prior to his death.[387] The court clearly explained that its decision would be limited to the validity of the donation and the public policy behind it.[388] Ultimately, the court

382. *Id.* at 612.

383. Varnado, *supra* note 25, at 631.

384. Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1676 (1984).

385. Hall v. Fertility Inst. of New Orleans, 94-1135, p. 2 (La. App. 4 Cir. 12/15/94), 647 So. 2d 1348, 1349.

386. *Id.* at 1348–49.

387. *Id.* at 1348.

388. *Id.* at 1351.

decided that the donation was valid and found that the woman's proposed artificial insemination was not contra bonos mores.[389]

In *Black v. Simms*, two unmarried women involved in a same-sex relationship were artificially inseminated using the sperm of the same donor.[390] Ms. Simms gave birth to Braelyn, and, a couple years later, Ms. Black gave birth to Eli.[391] The couple raised the children together in one family unit, with the help of Ms. Black's parents.[392] Eventually, though, the couple ended their relationship.[393] Later, Ms. Simms moved to Lake Charles to be with her new partner.[394] Initially, Ms. Simms and the Black family agreed on visitation of Braelyn; however, after a confrontation, even Ms. Black was precluded from seeing Braelyn.[395] When Ms. Black subsequently sought custody of the child, the court applied the rules on a non-parent seeking custody against a parent.[396] That law provides that the non-parent must show substantial harm to the child by the parent.[397] Although Ms. Black argued that the legislature had been silent on the issue of children raised by same-sex couples and asked the court to act in equity to protect the rights and best interests of the children involved, the court found that Ms. Black had failed to meet the requisite standard to award her custody.[398] This was true despite Ms. Black's argument that she shared a parent-child bond with Braelyn and had been involved in the child's life since she was born.[399] Because Ms. Simms was the biological mother of Braelyn, the court determined that she had the right to direct how the child was raised, even if her choices were harsh and inconsiderate of Braelyn's attachment to Eli and the Black family.[400]

Less than a year after the *Black* case was decided, another Louisiana appellate court addressed a similar set of facts in the

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389. *Id.*

390. Black v. Simms, 2008-1465, p. 1 (La. App. 3 Cir. 6/10/09), 12 So. 3d 1140, 1141.

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.*

395. *Black*, 12 So. 3d at 1141.

396. *Id.*

397. LA. CIV. CODE ANN. art. 133.

398. *Black*, 12 So. 3d at 1145.

399. *Id.* at 1144.

400. *Id.* at 1145; *see also* Wallace, *supra* note 246, at 74–81 (discussing custody issues for same-sex couples).

case of *In re Melancon*.[401] This case also involved a woman who conceived a child through artificial insemination and wished to share custody of the child with her same-sex partner.[402] The two women signed a consent judgment agreeing to such, but the trial court refused to sign it, citing *Black v. Simms*.[403] On appeal, the Louisiana First Circuit affirmed the lower court's holding,[404] possibly reluctantly, given the concurring judge's opinion that stated: "I am constrained to follow the law as it presently exists in the State of Louisiana . . . I further note that if there is going to be any change of the existing law, it should be addressed by the Louisiana State Legislature."[405]

B. MARRIAGE EQUALITY AND FILIATION

In 2015, the United States Supreme Court legalized marriage equality in *Obergefell v. Hodges*,[406] yet the Louisiana Legislature has done nothing since then to revise its filiation laws to account for marriage equality.[407] Again, the Louisiana courts are left to make decisions as to how to apply existing and insufficient filiation laws to same-sex married couples. In doing so, they have relied upon the *Obergefell* rationale that the "constellation of benefits" associated with marriage should also apply to same-sex couples.[408]

For example, in *Chiasson v. State*, Ms. Chiasson and Ms. Nelson were legally married in New York in 2011, and Ms.

401. *See In re* Melancon, 2010-1463 (La. App. 1 Cir. 12/22/10), 62 So. 3d 759.

402. *Id.* at 763.

403. *Id.*

404. *Id.* at 764.

405. *Id.* (Pettigrew, J. concurring).

406. *See Obergefell*, 576 U.S. 644.

407. During the 2016 legislative session, the Louisiana Senate passed Resolution 143, in which it urged and requested that the Marriage-Persons Committee of the Louisiana State Law Institute study and make recommendations regarding state law post-*Obergefell*. *See* Louisiana State Law Inst., Annual Report to the Legislature in Response to SR No. 143 of the 2016 Regular Session (2019), https://lsli.org/files/reports/2019/2016%20SR%20143%20SameSex%20Marriage%20Annual%20Report.pdf. That committee offered its recommendations to the Law Institute's Council in January of 2017. The Council approved the project, and the Committee submitted its recommendations to the Louisiana Legislature. Nevertheless, no legislation was proposed during the 2017 session. In the 2018 session, Senate Bill 98 was introduced; this bill proposed defining marriage as "a legal relationship between two natural persons that is created by civil contract." Senate Bill 98 progressed only to the Committee on Judiciary A. The committee made further recommendations in 2019, but no legislation was enacted. To date, this is still true.

408. *Obergefell*, 576 U.S. at 670.

Chiasson gave birth to a child conceived via artificial insemination in New Orleans in 2014.[409] In 2017, after the *Obergefell* decision, Ms. Nelson individually applied for an amendment to the child's birth certificate to list her name as a parent.[410] After she provided a copy of the marriage certificate, the Registrar of the Office of Vital Statistics made the amendment.[411] Later that month, Ms. Chiasson filed a petition to restore the original birth certificate and to strike the amended one from the state's vital statistics records.[412] Relying on laws addressing the rights of a heterosexual man to request a birth certificate amendment, Ms. Chiasson argued that the amendment was improper without an affidavit of acknowledgment or court order.[413] The court disagreed, explaining that this is only the case for birth certificates of children born outside of marriage.[414] For children born of marriage, a birth certificate may be amended based on the presumption set forth in Civil Code Article 185 (Presumption 1), such that one must show only proof of marriage and that the child was born during the marriage or within 300 days of its termination.[415] Therefore, the court applied Presumption 1 to the same-sex marital couple and allowed for the amendment.[416] Although Ms. Chiasson argued that Ms. Nelson had no biological relationship with the child, the court importantly emphasized that the spousal presumption in Civil Code Article 185 is not based on biology but instead on the marriage contract existing at the child's birth.[417]

Similarly, in *Boquet v. Boquet*, Brittany and Nicole Boquet married on December 18, 2015, when Nicole was pregnant, a fact that Brittany well knew.[418] The child was born during their marriage on February 5, 2016.[419] The court held that a same-sex spouse should be treated the same as an opposite-sex spouse would have been.[420] Thus, under Presumption 1, Brittany, as the spouse of the mother of a child born during their marriage, was presumed

409. Chaisson v. State, 2017-0642, p. 2 (La. App. 4 Cir. 3/7/18), 238 So. 3d 1074, 1076.
410. *Id.* at 1077.
411. *Id.*
412. *Id.*
413. *Id.* at 1079.
414. *Chaisson*, 238 So. 3d at 1079.
415. *Id.*
416. *Id.*
417. *Id.* at 1081–82.
418. Boquet v. Boquet, 2018-798, p. 1 (La. App. 3 Cir. 4/10/19), 269 So. 3d 895, 897.
419. *Id.*
420. *Id.* at 899–900.

to be the child's parent.[421] Brittany filed a disavowal action on April 28, 2017.[422] However, because Brittany knew or should have known all along that she was not the biological parent of the child, the one-year prescriptive period began to run on the date of the child's birth.[423]

Until the Louisiana Legislature amends the state's filiation laws, issues such as these will continue to arise for same-sex married couples, leaving courts to analogize and extend existing laws. Such a result is problematic, particularly in a civil law jurisdiction like Louisiana, where judicial activism is discouraged.[424]

CONCLUSION

Louisiana law provides for a legal relationship for a parent and child who are filiated. Filiation occurs through proof of maternity or paternity or adoption. This Article has set forth the various means of filiating through proof of maternity, as well as through proof of paternity. Proof of maternity rests on the child's birth, except for the very limited surrogacy exception. Paternity hinges, instead, on a variety of presumptions and judicial actions. All of the presumptions of paternity may be rebutted by various stakeholders, but judgments rendered in an avowal action or paternity action definitively determine paternity. While the existing filiation laws raise numerous unresolved legal issues, this is only exacerbated when considering the interplay of filiation and assisted reproductive technology and marriage equality.

421. *Id.*

422. *Id.* at 897.

423. *Boquet*, 269 So. 3d at 900.

424. Laura Tracy, *Presumption Junction What's That Function: Louisiana Marriage and Parenthood Laws Post-Obergefell*, 81 LA. L. REV. 1524, 1527 (2021).