

COMMENTS

SORRY DADDY—YOUR TIME IS UP: REBUTTING THE PRESUMPTION OF PATERNITY IN LOUISIANA

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I. INTRODUCTION

In Louisiana, both mothers and fathers have the “obligation of supporting, maintaining, and educating their children.”¹ This is a natural duty, as well as a fundamental right protected by the United States Constitution.² However, because it is “the fact of biological paternity or maternity which obliges parents to nourish their children,” should the law impose the heavy burden of parenting in the absence of a biological link?³ This Comment criticizes an existing anomaly in Louisiana law, whereby a man is legally bound to financially support a child to which he has no biological connection without giving him a choice in the matter. The

1. LA. CIV. CODE ANN. art. 227 (2010).

2. *See Troxel v. Granville*, 530 U.S. 57, 65-66, 75 (2000) (holding that the Fourteenth Amendment protects a parent’s right to direct the care, custody, and control of her children). *See also* U.S. Const., amend. XIV.

3. *Yolanda F.B. v. Robert D.R.*, 2000-958 (La. App. 3 Cir. 12/6/00); 775 So. 2d 1107, 1109.

predicament arises when a married woman engages in adulterous conduct, and her infidelity results in the birth of a child. The husband, in reliance on the presumed loyalty of his wife, has no reason to believe that he should question his paternity of the child.⁴ One short year later, the husband is subject to Louisiana's "strongest presumption in the law," as he becomes legally filiated and financially responsible for this child biologically born of another man.⁵

The legal relief intended to remedy this predicament—the disavowal action, whereby the husband severs filiation to a child with whom he shares no biological relationship—prescribes one year after the child's birth.⁶ In other words, if a husband knows or strongly suspects that he is not the father of his wife's child, then he *must* file the disavowal action *before* the child's first birthday.⁷ However, what if during the first year of the child's life, the husband is completely unaware of his wife's betrayal and the child's true paternity? In Louisiana, the ignorant husband loses his only avenue of legal relief because the disavowal action expires before the husband ever realizes that he needs it.⁸ Why would our laws force a man to pay for the sins of his wife by parenting a child that is not biologically his own?

The answer is that the relief provided by law, the disavowal action, is granted with deference to the innocent child.⁹ Louisiana family law is guided by public policy, which aims to preserve the family unit, promote the sanctity and stability of marriage, and zealously protect the best interests of the child.¹⁰ Louisiana's reliance on this public policy is the

4. See LA. CIV. CODE ANN. art. 98 (2010) ("Married persons owe each other fidelity, support, and assistance.").

5. *Id.* art. 185; see *id.* at cmt (b) (citing *Tannehill v. Tannehill*, 261 So. 2d 619 (La. 1972); *Williams v. Williams*, 87 So. 2d 707 (La. 1956)) ("The presumption that the husband of the mother is the father of the child has been referred to as the strongest presumption in the law.").

6. *Id.* arts. 187, 189.

7. *Id.* art. 189.

8. *Id.*

9. See *Gallo v. Gallo*, 2003-0794 (La. 12/3/03); 861 So. 2d 168, 173 (explaining that the state's public policy demands a restricted disavowal action); *Williams v. Williams*, 587 So. 2d 112, 114 (La. App. 2 Cir. 1991).

10. See LA. CIV. CODE ANN. art. 131 (2010) ("In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child."); *Id.* arts. 88-90 (providing three impediments to a valid marriage: bigamy, same-sex marriage, and incest); *Gallo*, 861 So. 2d at 173 (explaining that the state's public policy demands a restricted disavowal action). Family solidarity is one of the three ideological pillars of the Code Napoleon, and the "drafters of the [Louisiana] Civil Code considered the family the basic cell of society and the protector of the future of society." SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* 38 (1993). For example, Louisiana law has traditionally imposed familial support obligations beyond the point of common-law states. *Id.* at 53-54; see

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cornerstone of legislation forming the disavowal action.¹¹

Thus, while the disavowal action is the remedy available for this unfortunate situation, a husband's opportunity to avail himself of this relief is strictly limited by the state's interest in protecting the child. This may be the theory behind the law; however, in reality it actually contravenes the original purpose of the state's public policy. Rather, the story ends in a trifecta of insult and injury to the innocent husband, who must suffer the betrayal by his wife, the shock of learning that his child is not biologically his, and now, the indignity of being forced to financially support a child born of his wife's adultery.¹² The final consequence is delivered courtesy of the laws that are intended to protect the innocent child, but instead inadvertently increase the potential for emotional harm.

Nevertheless, due to Louisiana's public policy and moralistic reasoning, husbands must bear the inequities resulting from their wives' infidelity and deceit. Louisiana scholar Robert Pascal recognized this injustice over sixty years ago when he questioned why:

[W]e must shut our eyes to the obvious immorality of life in our times to such an extent as both to impose unjustly on a man the status and obligations of legitimate paternity, with all they imply in terms of [support] and succession, and to add insult to injury by stamping him officially with the mark of the cuckold. This cannot but produce a feeling of contempt for both legislation and the administration of justice.¹³

The disavowal action permits a man to rebut the presumption of paternity,

also LA. CIV. CODE ANN. art. 229 (2010) (requiring reciprocal alimentary duties between parents and children).

11. See Gallo v. Gallo, 2003-0794 (La. 12/3/03); 861 So. 2d 168, 173; Williams v. Williams, 587 So. 2d 112, 114 (La. App. 2 Cir. 1991); Phillips v. Phillips, 467 So. 2d 132, 133, 136 (La. App. 3 Cir. 1985); Tannehill v. Tannehill, 261 So. 2d 619, 623 (La. 1972); Succession of Saloy, 10 So. 872, 876 (La. 1892). The court in *Succession of Saloy* explained:

The sanctity with which the law surrounds marital relations and the reputation and good fame of the spouse and of the children born during their marriage is of such inviolability that the mother and the children can never brand themselves with declarations of adultery, illegitimacy, and bastardy, and their character is not permitted lightly to be thus aspersed, however true in themselves the stern and odious facts may unfortunately be.

Saloy, 10 So. at 876.

12. Although, the legal father is also subject to the child's delictual liability and succession claims, this Comment will focus primarily on the legal father's burden to financially support the child. LA. CIV. CODE ANN. art. 237 (2010) ("Fathers and mothers are answerable for the offenses or quasi-offenses committed by their children . . ."); *Id.* art. 1494 (entitling children who classify as forced heirs to a mandatory portion of their parents' succession).

13. Robert A. Pascal, *The Work of the Louisiana Supreme Court for the 1952-1953 Term*, 14 LA. L. REV. 62, 126 (1953-54). "Cuckold" is a man whose wife is unfaithful. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 329 (Robert B. Costello et al. eds. 1991).

and this Comment analyzes the consequences that surface when a husband's ignorance causes his failure to timely file the disavowal action.¹⁴

The purpose of this Comment is two-fold. First, it provides presumptive fathers with a legal argument when their ignorance prevents the discovery of their non-paternity, preventing the timely filing of the disavowal action. This argument is based on the equitable doctrine of *contra non valentem agree non currit praescriptio* (contra non valentem), which literally means prescription does not run against those who cannot act.¹⁵ Second, this Comment proposes that the legislature should amend the time periods on the disavowal action by implementing a discovery rule, so that prescription on the action will not begin to run until the husband's reasonable discovery of facts that indicate his paternity is in question.

Part II of this Comment provides the legal background of the pertinent areas of Louisiana's filiation law and explains the doctrine of contra non valentem. Part III analyzes the legislative intent behind the 2005 revision of the filiation laws and discusses the proposed alternative solution. Part IV briefly concludes by suggesting that although legislative action on this issue would provide the greatest solution, until then, an equitable judicial interpretation of the law can offer adequate legal relief.

II. BACKGROUND

The law of filiation defines the legal relationship that exists between the parent and the child and also resolves the issues that arise when children are born outside of marriage.¹⁶ For example, when a child is born outside

14. LA. CIV. CODE ANN. arts. 187, 189 (2010). Although the paternal presumption has been criticized in other scholarly articles, this Comment criticizes the disavowal action and its attached time limits, not the presumption itself. See, e.g., Robert A. Pascal, *supra* note 13, at 121-26; Robert A. Pascal, *Civil Code and Related Subjects*, 17 LA. L. REV. 303, 310 (1957); Robert A. Pascal, *Who is the Papa: (The Husband in Louisiana; The Paramour in France)*, 18 LA. L. REV. 685 (1958); Robert A. Pascal, *The Work of the Louisiana Appellate Courts for the 1963-1964 Term*, 25 LA. L. REV. 291, 297 (1965); Robert A. Pascal, *The Work of the Louisiana Appellate Courts for the 1965-1966 Term*, 26 LA. L. REV. 459, 461-63 (1966).

15. See generally 1 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW §§ 2704-2705 (La. State Law Inst. trans., 12th ed. 1939); 2 MARCEL PLANIOL, TREATISE ON THE CIVIL LAW § 678 (La. State Law Inst. trans., 12th ed. 1939) (exploring the scope of contra non valentem). Contra non valentem "prevents prescription from running against one who is ignorant of the facts upon which his cause of action is based." Allain D. Favrot, Comment, *The Scope of the Maxim Contra Non Valentem in Louisiana*, 12 TUL. L. REV. 244 (1938). The doctrine is "based in equity and fairness . . . [and] prevent[s] the running of liberative prescription . . ." LA. CIV. CODE ANN. art. 3467 ed. note (2010).

16. LA. CIV. CODE ANN. arts. 178-179 (2010); see generally 10 KATHRYN VENTURATOS LORIO, CIVIL LAW TREATISE § 3:6 (2d ed. 2009) (discussing the filiation provisions as revised in 2005). Filiation is governed by the laws found in Book I, Title VII of the Louisiana Civil Code entitled Parent and Child. Filiation is established by proving the maternity and paternity of a child

of wedlock, the filiation laws provide legal actions so that the child can be filiated to his natural father.¹⁷ The following legal concepts will be discussed in detail to provide the reader with an overview of the legal hurdles facing presumptive fathers who seek to disavow: (A) the paternal presumptions that create legal fathers; (B) the legislature's adoption of dual paternity; (C) the prescriptive and preemptive time limits that cause the disavowal action to expire; (D) the development of the disavowal action; and (E) the concept of *contra non valentem*.

A. THE PATERNAL PRESUMPTIONS

The paternal presumption is “both *ubiquitous*—nearly every Western legal system recognizes some version of the presumption—and *ancient*—it can be traced at least as far back as Rome.”¹⁸ Louisiana has recognized a presumption of paternity from the first time its laws were codified.¹⁹ The presumption of paternity attaches—as a matter of law and in the context of marriage—to the husband of the mother in the following three circumstances: (1) child born during marriage; (2) child born within 300 days of termination of marriage; and (3) child born with subsequent marriage by biological parents.²⁰ The paternal presumption is rebuttable;

or by showing the adoption of a child. LA. CIV. CODE ANN. arts. 178-179 (2010). Although issues of maternity arise with the current use of assisted conception and surrogacy contracts, those problems are small in number compared to the legal problems that take place with determining paternity. *Id.* art. 184; see Katherine Shaw Spaht, *Who's Your Momma, Who are Your Daddies: Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007). Note that Louisiana does not recognize surrogacy contracts, which are null and void, unless contracted under the particular circumstances provided by legislation. See LA. REV. STAT. ANN. §§ 9:121-133 (2008); LA. REV. STAT. ANN. § 40:32 (2001).

17. LA. CIV. CODE ANN. arts. 196-198 (2010).

18. J.-R. Trahan, *Glossae on the New Law of Filiation*, 67 LA. L. REV. 387, 400 n.15 (2007) (emphasis added). The Roman juriconsults expressed it in the maxim: “*pater is est quem nuptiae demonstrant* (‘the father is he whom marriage points out’).” *Id.*

19. LA. CIV. CODE ANN. art. 185 (2010). “The presumption was first manifested in Louisiana law in Article 7 of Chapter II of Title VII of the 1808 Digest of the Civil Law, which read ‘[t]he law considers the husband of the mother as the father of all children conceived during the marriage.’” T.D. v. M.M.M., 98-0167 (La. 3/2/99); 730 So. 2d 873, 880 (Kimball, J., dissenting) (citing Chapter II, art. 7, Civil Laws of the Treaty of Orleans (1808)), *abrogated by* Fishbein v. State *ex rel.* La. State Univ. Health Sciences Ctr., 2004-2482 (La. 4/12/05); 898 So. 2d 1260.

20. See LA. CIV. CODE ANN. arts. 185, 195-196 (2010). A presumption of paternity also occurs in favor of the child *only* if the biological father formally acknowledges the child. *Id.* art. 196. However, the formal acknowledgment falls outside the scope of this Comment, because it is not rebutted by the disavowal action. *Id.* The formal acknowledgment only protects the child's rights, with the exception of the father's rights to child custody, visitation and support. See *id.* For example, should the child predecease the father, he would not be able to inherit from the child, even though the formally acknowledged child could inherit from the father should the father predecease the child. See *id.*; Spaht, *supra* note 16, at 318-21 (discussing the distinction of a formally acknowledged child and child filiated by paternal presumption).

however, it is called “the strongest presumption in the law” because, if the time limit on the disavowal action expires, the presumption becomes forever *irrebuttable*.²¹

When a child is born during the marriage or within 300 days of the marriage’s termination, the husband is presumed to be the father of that child.²² According to the logic behind this presumption, it is reasonable to assume that any child born or conceived during a marriage is the product of the husband and wife.²³ Because the presumption attaches as a matter of law, it removes the need to prove legal filiation between the husband and child.²⁴

However, this paternal presumption creates a predicament in situations where a divorced woman quickly remarries within 300 days from the end of her first marriage.²⁵ To demonstrate the problem, consider the following hypothetical. Jill and Jacob are married and do not have any children. The couple gets divorced in January 2009, but unbeknownst to Jacob, Jill is two months pregnant at the time of this divorce judgment. Soon after, Jill marries her boyfriend Dave in April and gives birth to her child, Emma, in July.

Emma was born during Jill’s marriage to her second husband, Dave, and because he is her current husband he would be the child’s presumed father. However, the child was also born within 300 days of Jacob and Jill’s divorce, thus, Jacob is also presumed to be the father. This overlapping paternity is resolved by attaching the paternal presumption to the first husband, Jacob.²⁶ The Louisiana State Law Institute recognized that this result is contrary to reality, because a child born soon after the second marriage “is more likely than not to have been the product of [the mother’s] adulterous activity with her second husband while she was still married to the first.”²⁷ The contrary conclusion was reached for

21. LA. CIV. CODE ANN. art. 185 cmt. (b) (2010); *see supra* note 5.

22. LA. CIV. CODE ANN. art. 185 (2010). Under prior law, the presumption was more limited because it only attached if the father also recognized the child as his own in the community. *See generally* Harold J. Brouillette, Comment, *Presumption of Legitimacy and the “Action en Desaveu”*, 13 LA. L. REV. 587 (1953); Harold J. Brouillette, Comment, *Presumption of Legitimacy and the “Action en Desaveu”*, 14 LA. L. REV. 401 (1954).

23. Harold J. Brouillette, Comment, *Presumption of Legitimacy and the “Action en Desaveu”*, 13 LA. L. REV. 587 (1953); Harold J. Brouillette, Comment, *Presumption of Legitimacy and the “Action en Desaveu”*, 14 LA. L. REV. 401 (1954).

24. LA. CIV. CODE ANN. art. 185 (2010).

25. *See* Spaht, *supra* note 16, at 310-11 (referring to this problem as “[o]verlapping paternity” which is resolved by article 186 of the Louisiana Civil Code).

26. LA. CIV. CODE ANN. art. 186 (2010).

27. Memorandum from Leonard W. Martin to Stanford Raborn 3 (May 5, 1993) (regarding

“moralistic” concerns against the law’s inadvertent recognition and sanction of adultery.²⁸ For example, Dave cannot be legally presumed as Emma’s father, because such a result would be inadvertently writing Jill’s adultery into the code—a result that was considered “morally repulsive” by the drafters.²⁹

Nevertheless, Jacob is not without recourse, because the law allows him to rebut the presumption of paternity by timely bringing a disavowal action.³⁰ If Jacob successfully disavows the child, then without any further action, Dave is automatically presumed to be the father.³¹ If Dave has doubts about his paternity, he must then rebut the subsequent presumption by bringing a timely disavowal action.³² Again, the danger is that an untimely disavowal by either man results in the paternal presumption becoming forever irrebuttable—despite any evidence in science or fact to prove otherwise.³³

The next paternal presumption occurs as a result of a marriage by the child’s biological parents that takes place after the child is born.³⁴ A man is the presumptive father of a child if he marries the mother *and* formally acknowledges the child as his own, either by signing the birth certificate or through an authentic act.³⁵ This presumption is valid so long as the child is not filiated to another man (he does not already have a legal father) *and* the mother concurs with the formal acknowledgment.³⁶ Thus, even though Dave married Jill after Emma was born, he is not presumed to be Emma’s father because Emma is already legally filiated to Jacob. This presumption is equally as strong as the presumption of paternity that attaches when a child is born during a marriage because it can be rebutted only by a

discussions during the meeting of the Marriage-Persons Committee of the Louisiana State Law Institute) (on file with author).

28. Trahan, *supra* note 18, at 404.

29. *Id.*

30. LA. CIV. CODE ANN. arts. 186-187 (2010).

31. LA. CIV. CODE ANN. art. 186 (2010).

32. *Id.*; see Spaht, *supra* note 16, at 312-13 (explaining that the time period for disavowal by the second husband is preemptive because of rationales of public policy, such as “the interest of the child demands resolution of its paternity within a reasonable period of time.”).

33. LA. CIV. CODE ANN. art. 189 (2010); see, e.g., Demery v. Hous. Auth. of New Orleans, 96-1024 (La. App. 4 Cir. 2/12/97); 689 So. 2d 659, 665-66; Melancon v. Sonnier, 157 So. 2d 577 (La. App. 3 Cir. 1963) (explaining the conclusive presumption of paternity); see *supra* note 5.

34. LA. CIV. CODE ANN. art. 195 (2010).

35. *Id.* “An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed.” *Id.* art. 1833.

36. *Id.* art. 195. Concurrence by the mother under this article requires a juridical act. See *Id.* art. 2347 cmt. (c).

successful and timely disavowal action.³⁷

This Comment focuses on the problems that arise when the law's presumption of paternity is wrong, and the husband of the mother is not the child's biological father. In this instance, the child has two fathers: one recognized by the law's presumption and one recognized by DNA. The legislature and judiciary were left to decide whether Louisiana law should permit such a result.

B. DUAL PATERNITY

The filiation laws were completely revised in 2005.³⁸ This fourteen-year project began at the Louisiana State Law Institute (LSLI). LSLI members deliberated over many important and controversial changes needed in the laws of filiation.³⁹ One of these highly debated topics was Louisiana's formal adoption of "dual paternity."⁴⁰

Prior to the 2005 revision, Louisiana jurisprudence permitted that a child could have two legally recognized fathers: (1) the legal father (the husband of the mother) and (2) the biological father.⁴¹ Not only was

37. LA. CIV. CODE ANN. art. 195 (2010).

38. 2005 La. Acts 1444.

39. See 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, 637-42 (2007); Spaht, *supra* note 16, at 308; Trahan, *supra* note 18, at 387. The 2006 legislative session enacted further provisions that were made necessary by the previous year's enactment; however, this Comment will refer to the entire filiation project as the 2005 Revision. 2006 La. Acts 1528-35. The project began when the Louisiana legislature asked the LSLI to determine any necessary changes in the filiation laws and to recommend a revision. Spaht, *supra* note 16, at 307-08. Accordingly, the Marriage-Persons [Book I] Committee at the Law Institute (Persons Committee) was assigned the task. *Id.* The Council of the Louisiana State Law Institute is an arm of the legislature dedicated to law revision, law reform, and legal research. See Louisiana State Law Institute, <http://www.lsl.org> (last visited Oct. 28, 2010). At the Institute, there are numerous Committees dedicated to different areas of the law. *Id.* The Committees prepare revisions of the law, which are presented to the Council at the Law Institute before being presented to the legislature. *Id.*

40. Spaht, *supra* note 16, at 321 ("Of all the filiation issues presented for deliberation by the Council of the Law Institute, the most contentious, and the issue that produced the most vacillating results, was 'dual paternity.'").

41. See *Smith v. Cole*, 553 So. 2d 847, 848, 855 (La. 1989) (finding a child support action, brought against biological father, successful even though the child was presumed to be the child of the husband of the mother); *Griffin v. Succession of Branch*, 479 So. 2d 324, 326 (La. 1985) (confirming the concept of dual paternity); *Succession of Mitchell*, 323 So. 2d 451, 457 (La. 1975); *Warren v. Richard*, 296 So. 2d 813, 815-17 (La. 1974); *Finnerty v. Boyett*, 469 So. 2d 287, 289 (La. App. 2 Cir. 1985) (considering visitation sought by alleged biological father even though the child was presumed to be the child of the husband of the mother); see generally 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 (1977).

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Louisiana the only state permitting dual paternity, the legislature unsuccessfully attempted to take the concept out of law; however, the Louisiana Supreme Court continued to permit dual paternity.⁴² The Persons Committee at the LSLI met on six separate occasions to consider whether the filiation revision would overrule or codify the jurisprudence permitting dual paternity.⁴³ The committee was asked to consider: "Is it best for society to protect and preserve the marital unit, to provide for the individual child's needs or to recognize biological fact?"⁴⁴ After considering the alternatives and balancing the competing policies, Louisiana became the first (and only) state to formally adopt the concept of dual paternity.⁴⁵

Although the LSLI proposed codifying a chapter on dual paternity in the Civil Code, the legislature ultimately decided for statutory recognition of the concept through the paternity *and* avowal actions.⁴⁶ These filiation actions are distinct from the paternal presumptions, which occur as a matter of law.⁴⁷ On the contrary, the paternity and avowal actions must be properly invoked *and* clearly establish biological fact to be successful.⁴⁸ Thus, in the event that a presumption of paternity is wrong, either of these actions can filiate a child to his biological father, despite the fact that the child is already filiated to his legal father.⁴⁹

The paternity suit provides the child with a legal course of action to establish his father's paternity; the avowal action performs the same function but is instead brought by the biological father.⁵⁰ Notably, the law provides more protection for a biological father who was ignorant of his true paternity than it does for a legal father who was also ignorant as to his

42. See Griffin v. Succession of Branch, 479 So. 2d 324, 326-28 (La. 1985); KATHERINE S. SPAHT, LOUISIANA STATE LAW INSTITUTE REVISION OF THE LOUISIANA CIVIL CODE OF 1870, BOOK I—OF PERSONS, PARENT AND CHILD: POLICY ISSUES 2 (Oct. 14-15, 1994) ("[D]espite the intention to end dual paternity in 1981 the Louisiana Supreme Court confirmed its concept by the interpretation of the Civil Code articles.").

43. Spaht, *supra* note 16, at 308-09.

44. *Id.* at 353-54.

45. *Id.*; see Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547, 602-03 ("One state has clearly recognized dual paternity, and decisions in two other states point toward the possibility of the recognition of dual paternity."). Under the Uniform Parentage Act, adopted by many of the common law states, the link between the legal father and child is cut once biological paternity is timely established. See Unif. Parentage Act §§ 4(b), 6 (1973).

46. LA. CIV. CODE ANN. arts. 197-198 (2010); see also Spaht, *supra* note 16, at 321-22 (providing the alternative solutions to dual paternity deliberated at the LSLI).

47. LA CIV. CODE ANN. arts. 195, 197-198 (2010).

48. *Id.* arts. 197-198 cmt. (b).

49. *Id.* arts. 197-198 (2010); see generally Spaht, *supra* note 16.

50. LA CIV. CODE ANN. arts. 197-198 (2010).

non-paternity.⁵¹ Recall Jacob and Jill and consider the following scenario.

During Jill's marriage to Jacob, she becomes pregnant as a result of her adulterous relationship with Dave. Jacob is completely ignorant to his wife's betrayal with Dave, and believes that he is the child's father. Although Dave is aware that he could be the father, Jill convinces him otherwise. One year after the child's birth, the truth is discovered. Dave wishes to establish his paternity to the child, while Jacob wishes to establish his non-paternity.

Unfortunately, legal relief is only available to Dave via the avowal action.⁵² The law excuses a belated avowal action for up to ten years when it is the result of the mother's deceit to the biological father.⁵³ In contrast, although Jacob's ignorance was the cause of his expired disavowal action, he will be unable to establish his non-paternity because the law does not excuse his ignorance in the same manner that it did for Dave.⁵⁴ Therefore, Jacob is left to pay the price of parenthood to a child that is not his.

A child keeps his dual paternity unless either the legal father brings a successful disavowal action *or* the mother brings a successful contestation and establishment action.⁵⁵ Dual paternity allows the child, or his mother, to demand support from both fathers.⁵⁶ Although the mother will not actually receive double support for the child, she has an additional source of revenue in the event that the other fails to pay or is financially insufficient.⁵⁷ Thus, when the law presumes the wrong man as father, if he should fail to timely file a disavowal action, he is financially liable for a child that is not his. The following section explains the doctrines of preemption and prescription, which establish the time limit on the husband's ability to fix

51. Compare LA. CIV. CODE ANN. art. 187 (2010) (providing for the legal father to meet clear and convincing burden of proof to disavow paternity), and LA. CIV. CODE ANN. art. 189 (2010) (providing for a one year prescriptive period to disavow paternity), with LA. CIV. CODE ANN. art. 198 (2010) (requiring a preponderance of the evidence burden of proof and allowing the action to be brought later than a year after the birth of the child presumed to be the child of another man if the mother in bad faith deceived the biological father).

52. LA. CIV. CODE ANN. art. 198 (2010). The biological father can bring the avowal action at any time if the child is not already filiated to another man. *Id.* However, if the child already has a presumed legal father, the avowal action must be instituted within the requisite time limits. *Id.*

53. *Id.*

54. *Id.* art. 189.

55. LA. CIV. CODE ANN. arts. 187, 191; Rousseve v. Jones, 97-1149 (La.12/2/97); 704 So. 2d 229, 232 (reserving disavowal actions to defendants who are "presumed [to be] the father of a legitimate child based on being the husband or former or subsequent husband of the child's mother").

56. Smith v. Cole, 553 So. 2d 847, 854 (La. 1989); Smith v. Dison, 95-0198 (La. App. 4 Cir. 9/28/95); 662 So. 2d 90, 94.

57. See, e.g., Dison, 662 So. 2d at 95.

the incorrect presumption by filing a disavowal action.

C. PRESCRIPTION AND PEREMPTION

Liberative prescription is the civil law equivalent of common-law statutes of limitation and bars untimely claims from being pursued in court.⁵⁸ Although prescription will terminate a person's right to seek legal redress, this harsh penalty is balanced by the need to promote social and legal finality and stability.⁵⁹ Prescriptive periods are subject to interruption and suspension, which both effectively stop time from running against a claimant when either legislation or general principles of equity so require.⁶⁰ The principles of interruption and suspension recognize that a plaintiff should not lose his legal claim during a period of time when his enforcement of the claim was prevented.⁶¹

Peremption on the other hand can be neither suspended nor interrupted; once the peremptive period has run, the claim is lost forever.⁶² The common-law equivalent of peremption is a statute of repose.⁶³ The legislature enacts peremptive periods when public policy requires that the exercise of certain rights, such as the disavowal action, be strictly limited to a specific period of time.⁶⁴ Furthermore, statutes are generally peremptive in nature when the legislature's intent is "to remove the action from the

58. See LA. CIV. CODE ANN. art. 3447 (2010); FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *LOUISIANA TORT LAW* § 10-6 (1996); see also *Feltus v. Feltus*, 210 So. 2d 388 (La. App. 4 Cir. 1968) (finding that a father who brought a timely disavowal action rebutted the presumption of paternity).

59. *LeBreton v. Rabito*, 97-2221 (La. 7/8/98); 714 So. 2d 1226, 1228; James F. Shuey, Comment, *Legal Rights and the Passage of Time*, 41 LA. L. REV. 220, 228 (1980-81); see also Baudry-Lacantinerie & Tissier, *Prescription: Traite Theorique Et Pratique De Droit Civil*, in 5 CIVIL LAW TRANSLATIONS § 29, at 19 (La. State Law Inst. trans. 1972) ("In terms of its social utility, prescription can be compared with the rule of res judicata. Their function is analogous. There comes a moment when it is necessary to say the last word, where the uncertainty of the law is more burdensome than injustice.").

60. See *LeBreton v. Rabito*, 97-2221 (La. 7/8/98); 714 So. 2d 1226, 1228. When a prescriptive period is interrupted, a new prescriptive period begins to run on the date the interruption ceases. See LA. CIV. CODE ANN. art. 3466 (2010). Suspension also stops prescription from running; however, once suspension ceases, the prescriptive clock continues to run, in addition to the time that had accumulated before the suspension occurred. See LA. CIV. CODE ANN. art. 3472 (2010).

61. See *LeBreton*, 714 So. 2d at 1229.

62. LA. CIV. CODE ANN. art. 3461 (2010); *Hebert v. Doctors Mem'l Hosp.*, 486 So. 2d 717, 723 (La. 1986) (explaining the doctrine of peremption), superseded by LA. REV. STAT. ANN. § 9:5628 (1988).

63. See *Black's Law Dictionary* 1546 (9th ed. 2009).

64. See *Pounds v. Schori*, 377 So. 2d 1195, 1200 (La. 1980) (finding that disavowal actions are subject to peremptive periods due to the strict public policy that favors legitimacy of children); *Guillory v. Avoyelles Ry. Co.*, 28 So. 899, 901 (La. 1900).

limits of ordinary prescription.”⁶⁵ For example, the Louisiana Supreme Court explained that exceptions to the running of *prescription*, such as suspension and interruption, are inapplicable in cases of *peremption*.⁶⁶

The distinction between peremption and prescription becomes difficult to determine when the legislature does not specifically define the nature of the time period for that particular claim.⁶⁷ In these instances, the distinction must be made “in each case in the light of the purpose of the provision and the intent of the Legislature either to bar an action or to limit the duration of the right.”⁶⁸ The confusion regarding peremption and prescription did not escape the legislature or the courts with regard to the time limits attached to the disavowal action.

The Louisiana Supreme Court held that the disavowal action was subject to a *peremptive* time period (which by doctrine cannot be suspended); nevertheless, the legislature enacted explicit statutory suspensions of the peremptive period.⁶⁹ For example, in 1976, the legislature *suspended the peremptive period* if the husband, for reasons beyond his control, was not able to timely file the disavowal action.⁷⁰

The Persons Committee at the LSLI recognized the confusion caused by having legislation that incorrectly suspended a peremptive period. The Persons Committee described the concept as “an uneasy amalgam of a peremption and prescription.”⁷¹ Nevertheless the LSLI “decided to retain the provisions making the time period a hybrid in order to insure that considerations of suspension and interruption . . . did not enter into the application of [the] article.”⁷² To clarify any confusion resulting from the hybrid time limit, the revision comments in the Civil Code explained that the peremptive period could only be suspended in cases where legislation explicitly allowed for it to be suspended.⁷³

65. See Shuey, *supra* note 59, at 248.

66. *Id.*

67. 1 FRANK L. MARAIST, LOUISIANA CIVIL LAW TREATISE: CIVIL PROCEDURE § 6:7 (2d. ed. 2008).

68. *Id.*; see LA. CIV. CODE ANN. art. 3458 cmt. (c) (2010); see also *State ex. rel. Div. of Admin. v. McInnis Bros. Constr.*, 97-0742 (La. 10/21/97); 701 So. 2d 937, 940.

69. *Pounds v. Schori*, 377 So. 2d 1195, 1200 (La. 1980) (finding that disavowal actions are subject to peremptive periods due to the strict public policy that favors legitimacy of children); LA. CIV. CODE ANN. art. 3458 (2010); LA. REV. STAT. ANN. § 9:305 (2005) (repealed 2006); LA. CIV. CODE ANN. art. 189 (1977).

70. See LA. CIV. CODE ANN. art. 189 (1977).

71. Memorandum from Leonard W. Martin to Stanford Raborn 4 (May 5, 1993) (regarding the meeting of the Marriage-Persons Committee on Mar. 26, 1993).

72. *Id.*

73. LA. CIV. CODE ANN. art. 189 (2004). The revision comments stated that the disavowal

Although the legislative intent was to continue allowing suspension of peremption, jurisprudence demonstrates that the unclear time limit caused confusion regarding when the preemptive period would in fact be suspended.⁷⁴ For example, the Louisiana circuit courts disagreed on whether the suspension for the husband's inability to file suit would apply in cases where the husband was ignorant because the mother lied to him regarding the child's true paternity.⁷⁵ The third circuit has consistently held that the mother's fraud did not qualify the husband to take advantage of the suspension of peremption; however, in *Naquin v. Naquin*, the first circuit found otherwise.⁷⁶

Wanda Naquin lied to her husband, Harold, about obtaining a final divorce, and she also falsely informed him that she remarried a man in Texas, Mr. Bozzelle.⁷⁷ While in Texas, the unmarried couple had a child, who took Mr. Bozzelle's last name.⁷⁸ As part of Wanda's ongoing deception, she visited Harold's mother and told her that Mr. Bozzelle was her new husband and the father of her child.⁷⁹ Harold eventually secured his divorce to Wanda in 1974.⁸⁰ However, it was not until three years later, when Wanda filed suit against Harold for child support, that he had any "inkling" that his paternity was an issue.⁸¹

The first circuit held that "because of the representations of the mother that the child was issue of a second marriage, the suit could not be filed

action was subject to "a period of peremption, which cannot be suspended or interrupted except as especially provided [for in legislation]" LA. CIV. CODE ANN. art. 189 cmt. (2004).

74. See *Fontenot v. Fontenot*, 2000-1057 (La. App. 3 Cir. 12/06/00); 774 So. 2d 330, 332 (finding that that a mother's misrepresentations regarding children's paternity were not reasons beyond the husband's control that could suspend time for filing suit to disavow paternity under general code provision for disavowal of children born of a marriage); *Hall v. Hall*, 96-954 (La. App. 3 Cir. 2/5/97); 689 So. 2d 532, 534 (finding that mother's fraud in convincing husband that he was child's biological father did not show reasons beyond his control that prevented him from filing timely suit to disavow); *Naquin v. Naquin*, 374 So. 2d 148, 149 (La. App. 1 Cir. 1979) (finding that the mother's fraud did suspend the time period on the disavowal action).

75. *Fontenot v. Fontenot*, 2000-1057 (La. App. 3 Cir. 12/06/00); 774 So. 2d 330, 332 (finding that the mother's misrepresentations regarding her children's paternity were not reasons beyond the husband's control that could suspend time for filing suit to disavow); *Hall*, 689 So. 2d at 534; *Naquin*, 374 So. 2d at 149 (finding that the mother's fraud did suspend the time period on the disavowal action). Compare *Robertson v. Young*, 433 So. 2d 421, 423 (La. App. 4 Cir. 1983) (finding that a husband was not barred by the prescriptive period when he did not have actual or constructive knowledge of the child's birth) with *Naquin*, 374 So. 2d at 149.

76. See *Fontenot*, 774 So. 2d at 332; *Hall*, 689 So. 2d at 534; *Naquin*, 374 So. 2d at 149.

77. *Naquin*, 374 So. 2d at 148.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

prior to plaintiff's being put on notice that these statements were not true."⁸² Thus the court excused Harold's ignorance, refusing to punish him for Wanda's deceit.⁸³

Although, this is the only case supporting a suspension due to the husband's ignorance, the first circuit's reasoning and holding in *Naquin* was in line with the legislature's subsequent enactment of the second *suspension of peremption* in 1993.⁸⁴ This suspension was found in Title 9, § 305 of the Louisiana Revised Statutes and stated:

[I]f the husband, or legal father who is presumed to be the father of the child, erroneously believed, because of misrepresentation, fraud, or deception by the mother, that he was the father of the child, then the time for filing suit for disavowal of paternity shall be suspended during the period of such erroneous belief or for ten years, whichever ends first.⁸⁵

This statute was conditionally retroactive in allowing previously expired disavowal actions to be resurrected if filed within a 180-day window.⁸⁶ For example, if Jacob's disavowal action expired in 1990, he had 180 days from the date that the statute became effective to file a new disavowal action.⁸⁷ The only deadline on the § 9:305 action was that it could not be filed after the child in question reached the age of ten.⁸⁸

The suspension of peremption found in § 9:305 was helpful to husbands who did not learn about their wives' adulterous offspring until well after the child's first birthday. For example in *Burke v. Ledig*, the

82. *Naquin v. Naquin*, 374 So. 2d 148, 149 (La. App. 1 Cir. 1979).

83. *Id.* at 149.

84. LA. REV. STAT. ANN. § 9:305 (1994) (amended 1997).

85. *Id.* The statute was amended in 1997 to add a second paragraph, which provided that this statute would not affect any child support payments paid or any outstanding amounts owed. See *Brannan v. Talbott*, 31,632 (La. App. 2 Cir. 2/24/99); 728 So. 2d 1023, 1026. Thus, a legal father could not use this action to obtain reimbursement of paid child support, nor could he avoid paying any judgments already against him prior to filing the action. *Id.* at 1027.

86. See *Mills v. Mills*, 626 So. 2d 1230, 1231-33 (La. App. 3 Cir. 1993). Citing the law and jurisprudence existing at the time, the trial judge correctly found Mr. Mills' paternity action was untimely. *Id.* However, the court reversed this portion of the judgment because Louisiana Civil Code article 189 was modified by § 9:305, which now provides the "presumed" father in child support cases may file an ancillary petition to disavow paternity. *Id.* at 1232-33; see *Whiddon v. Whiddon*, 98-1844 (La. App. 3 Cir. 5/5/99); 736 So. 2d 296, 299 (holding that: (1) amended statute governing disavowal of paternity allowed the former husband a 180-day window to bring previously prescribed disavowal action ancillary to child support proceeding; (2) prior dismissal of petition was untimely and did not have res judicata effect).

87. See LA. REV. STAT. ANN. § 9:305 (1997). This 180-day window of retroactivity was also available in 1997, beginning on August 15th, when § 9:305 was amended. *Id.*

88. LA. REV. STAT. ANN. § 9:305 (2004) (including a ten-year peremptive cap).

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court referred to § 9:305 as the legal father's "saving grace."⁸⁹ Mr. and Mrs. Ledig were married for nine years, during which time two children were born.⁹⁰ After their divorce, Mr. Ledig was ordered to pay a thousand dollars a month in child support.⁹¹ His ex-wife later admitted that the two children were a result of her extramarital affairs; nevertheless, she attempted to increase the child support amount she was already receiving.⁹² Because § 9:305 applied retroactively, Mr. Ledig was able to successfully disavow the children and avoid paying any more child support.⁹³

The Louisiana courts were also careful not to apply this suspension too liberally.⁹⁴ For example, when a wife informed her husband that she had an affair during the same year the child was born and often informed him that the child was not his, the court found that he was put on notice that his paternity was in question.⁹⁵ Furthermore, when § 9:305 was inapplicable, the judiciary fervently enforced the jurisprudential recognition of dual paternity by demanding child support from both the legal father and biological fathers.⁹⁶

Although the *Naquin* decision and the legislature's enactment of § 9:305 seemed to suggest that a husband's ignorance caused by the mother's fraud would suspend the preemptive time period, the Louisiana Supreme Court disagreed in 2003.⁹⁷ In *Gallo v. Gallo*, the husband paid over twenty thousand dollars in child support before finding out that he was

89. *Burke v. Ledig*, 94-2044 (La. App. 1 Cir. 5/5/95); 655 So. 2d 546, 548.

90. *Id.* at 547.

91. *Id.*

92. *Id.*

93. *Id.* 547-48.

94. The presumed father was required to prove a high burden in actions brought under § 9:305 before he was granted relief. In *Smith v. Smith*, the mother confessed to her husband, who was in prison when the child was born, that he was not the child's biological father. *Smith v. Smith*, 95-2291 (La. App. 4 Cir. 4/3/96); 672 So. 2d 1075, 1076. However, because the husband was aware of the circumstances and did nothing, the court did not excuse his ignorance. *Id.* at 1077. The same result was reached in a case in which the only evidence presented by the wife's former husband were second-hand hearsay statements concerning rumors about the child's paternity. *See Hall v. Hall*, 96-954 (La. App. 3 Cir. 2/5/97); 689 So. 2d 532, 534-35.

95. *Hernandez v. Hernandez*, 99-1914 (La. App. 3 Cir. 5/3/00); 763 So. 2d 36, 38.

96. *See Smith v. Dison*, 95-0198 (La. App. 4 Cir. 9/28/95); 662 So. 2d 90, 94-95. In this case it was undisputed that the mother's former husband, Lionel, was not the child's biological father. *Id.* at 92. However, fourteen years after the child was born, the mother demanded that Lionel pay child support despite the fact that the biological father was already paying her. *Id.* Lionel attempted to bring a disavowal action but his action had prescribed, even under § 9:305. *Id.* Lionel unsuccessfully argued that the obligation of child support lies solely with the biological father. *Id.* at 91-92.

97. *Gallo v. Gallo*, 2003-0794 (La. 12/3/03); 861 So. 2d 168, 180.

not the child's father.⁹⁸ After court-ordered DNA testing confirmed the husband's suspicions, he sought reimbursement of the monies that he had paid to the mother for this child.⁹⁹ However, the court found that because the action to disavow was preempted at the time suit was filed, "any action which is predicated upon disavowal of the child, such as a claim for reimbursement of child support, was likewise unavailable to him at that time."¹⁰⁰ The court found that the one-year preemption began at the moment the child was born and not "when the husband becomes aware of the wife's alleged fraud and allegedly learns that he is not the father of the child."¹⁰¹ Thus, the court held that being ignorant of the mother's fraud does not suspend the preemptive period.¹⁰² In *Gallo*, the court clarified that the determining factor is not when the husband discovers the mother's deceit, but rather whether the husband had knowledge of the child's birth.¹⁰³

In addition, the court in *Gallo* discussed the legislature's enactment of the suspension found in § 9:305 and stated that it "appears to be a modification of the concept of dual paternity" and a reflection of the legislature's "concern for an equitable solution to the unfortunate situation of a man paying child support for a child who is not his biological child, but was born during the marriage to the mother."¹⁰⁴ Because the husband in *Gallo* fell outside the ten-year preemptive time limit, § 9:305 was inapplicable. Thus, the husband was required to continue supporting the child in accordance with his status as the child's legal father.¹⁰⁵ Subsequent to this Louisiana Supreme Court decision, and as part of the 2005 revision of the filiation laws, the legislature repealed § 9:305.¹⁰⁶

Although the nature of the time period on the disavowal action remained preemptive with suspensions, the length of the time period was extended multiple times. These liberal modifications demonstrate a

98. *Gallo v. Gallo*, 2003-0794 (La. 12/3/03); 861 So. 2d 168, 177-78.

99. *Id.* at 173-72.

100. *Id.* at 176.

101. *Id.* at 174.

102. *Id.*

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

104. *Id.* at 175 n.14 (citing *Dep't of Soc. Servs. v. Bradley*, 95-872 (La. App. 5 Cir. 4/30/96); 673 So. 2d 1247). This reasoning is in line with the legislature's discussion of this statute throughout the enactment process. See 1993 La. Acts 173-74. In Committee, Senator Jordan asked, "[§ 9:305] sort of applies to the poor slob who's been paying child support all this time and they go get a DNA test and found out it wasn't his kid all along, right?" See Minutes from Senate Committee 40 (May 11, 1993) (on file with author).

105. *Gallo*, 861 So. 2d at 176, 180.

106. See 2006 La. Acts 1528-35. Although the repeal took place in 2006, the statute would have been repealed in 2004, had the legislature not requested the filiation revision to be split across two years (due to its massive size). See Trahan, *supra* note 18, at 387.

legislative trend to make this avenue of legal relief more accessible to non-biological legal fathers.

D. THE DISAVOWAL ACTION: LEGISLATIVE TREND OF "LIBERALIZING" DISAVOWAL

The disavowal action has undergone much reform, the focus of which has consistently been to make the action more accessible to the legal father.¹⁰⁷ However, although the disavowal action is more attainable than it was in the past, it continues to fall short in providing ignorant husbands with proper relief.

Traditionally, the disavowal action had exceptionally narrow and restrictive rules.¹⁰⁸ The historical position of Louisiana jurisprudence has been to zealously uphold and strictly enforce the paternal presumption, despite the injustice placed on the legal father.¹⁰⁹ Consequently, Louisiana's need to uphold public policy has consistently led to court decisions that conflicted with practical knowledge and clear biological fact.¹¹⁰

From 1808 to 1975, a presumed father was required to show legal grounds before he was allowed to disavow.¹¹¹ Moreover, the grounds for disavowal were limited and did not include natural impotence or adultery as sufficient causes for disavowal.¹¹² For example, although a woman lived in open adultery and gave birth to a child known in the community to be her paramour's child, the husband was still legally presumed the father.¹¹³

If the legal father could establish cause for disavowal, then he still needed to bring the action within the relatively short peremptive time

107. The disavowal action was liberally revised in 1976, 1989, 1999, and 2005. *See Spaht, supra* note 16, at 314-15.

108. Brouillette, *supra* note 22, at 587-89; *see generally* Trahan, *supra* note 18 (providing a comparison of the old and new laws).

109. *Fruge v. Fruge*, 96-344 (La. App. 3 Cir. 11/6/96); 682 So. 2d 932; *see also* *Beard v. Vincent*, 141 So. 2d 862, 864-65 (La. 1932) (finding that the policy in favor of a child is so strong that even judicial confessions by the mother are insufficient to defeat the presumption); *Tannehill v. Tannehill*, 226 So. 2d 185, 189 (La. App. 3 Cir. 1969) (reasoning that the purpose is to protect helpless children born during marriage from being labeled illegitimate by one or both of their parents or by others for their own selfish aims).

110. *See infra* note 118 (listing cases where courts were obligating to hold contrary to biological fact).

111. Brouillette, *supra* note 22. Moreover, the only two legal causes available were: (1) remoteness between the husband and wife at the time of conception, and (2) the mother's concealment of the child's birth from the husband. *Id.*

112. LA. CIV. CODE ANN. art. 185 (1870); *see* LA. CIV. CODE ANN. art. 189 (1870).

113. *Eloi v. Mader*, 1 Rob. 581 (1841).

limit.¹¹⁴ For example, prior to 1968, depending on the circumstances, the husband was given only one to two months from the child's birth to disavow.¹¹⁵ After the 1968 revision, the preemptive period was extended to six months.¹¹⁶ As always, in the event that the preemptive period expired on the disavowal action, the husband was forever "barred from making any objection to the legitimacy of such child."¹¹⁷

Because of the presumed father's need to show legal grounds and the short preemptive period during which he had to do so, a number of husbands were legally unable to rebut the paternal presumption, despite the fact that "non-paternity [could] be demonstrated beyond any reasonable doubt."¹¹⁸ Jurisprudence demonstrates that the state's public policies of protecting innocent children and honoring the family unit were motivation for the establishment of a virtually irrebuttable presumption of paternity.¹¹⁹ The law was heavily criticized by scholars who argued that the court decisions were consistently "contrary to the obvious biological facts and the common sense judgment of men" and "have plagued our jurisprudence and [made] our legislation . . . objects of ridicule."¹²⁰ This criticism prompted

114. LA. CIV. CODE ANN. art. 191 (1870).

115. *Id.*; see Succession of Mitchell, 323 So. 2d 451, 454 (La. 1975) (finding that if the husband was in a different parish (county) than he was 'absent' for purposes of this article). If the husband was present when the child was born, he had only *one month* from the child's birth to contest his paternity. See LA. CIV. CODE ANN. art. 191 (1967). If he was absent at the time of birth, he had two months to file the disavowal upon his return. *Id.* However, if the child's birth was concealed from the husband, he was given two months to file the action, which did not begin to run until after *discovery* of the child's birth. *Id.*

116. See LA. CIV. CODE ANN. art. 191 (1969). The preemptive period commenced depending on the circumstances—the husband was given six months from: (a) the birth of the child, (b) the husband's return if he was absent, or (c) the discovery of the wife's fraud if the birth was concealed. *Id.*

117. LA. CIV. CODE ANN. art. 191 cmt. (1870); see Modisette v. Phillips, 31-905 (La. App. 2 Cir. 5/5/99); 736 So. 2d 983, 987.

118. See Robert A. Pascal, *Who is the Papa: (The Husband in Louisiana; The Paramour in France)*, 18 LA. L. REV. 685, 689 (1958); see also *Eloi*, 1 Rob. 581 (declaring a man the legal father of child, despite the mother's open adultery and the biological father's acknowledgment of the child). The *Eloi* court stated, "From the moment of his birth, his condition was fixed; it was acquired to him under that great conservative and moral rule which has descended from the Roman Jurisprudence into ours . . ." *Eloi*, 1 Rob. 581; see also Succession of Saloy, 10 So. 872, 876 (La. 1892). In *Succession of Saloy*, the decedent's mother, Dolores Morales, was the wife of Juan Gestal, of Cuba, when she eloped with Antonio Carcagno, settled in New Orleans, and had three children. *Id.* According to the law, Juan was the children's father, not Antonio. *Id.*; see generally *Feazel v. Feazel*, 471 So. 2d 851 (La. App. 2 Cir. 1985) (presuming that a child born to a man's wife eleven and a half months after they were separated was his); *Williams v. Williams*, 87 So. 2d 707, 708 (La. 1956); *Ezidore v. Cureau*, 37 So. 773 (La. 1904).

119. See *Gallo v. Gallo*, 2003-0794 (La. 12/3/03); 861 So. 2d 168, 180; *Tannehill v. Tannehill*, 226 So. 2d 185, 189 (La. App. 3 Cir. 1969).

120. Pascal, *supra* note 13, at 125.

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the legislature to revise the Civil Code articles on disavowal in 1976 by providing the legal father with more realistic relief.¹²¹

In 1976, the need to show legal cause for disavowal was eliminated, and the action was revised to state: "The husband can disavow paternity of a child if he proves by a preponderance of the evidence any facts which reasonably indicate that he is not the father."¹²² Louisiana courts interpreted the preponderance of the evidence standard as a "heavier than usual . . . burden" that was also "significantly more liberal than before the 1976 amendment of the paternity articles of the Civil Code."¹²³ The 1976 revision also liberalized the preemptive period by adding the previously discussed suspension of preemption for the husband's inability to file suit.¹²⁴ Moreover, in 1976 the state, acting under authority of the Department of Social Services, gained the ability to bring suit and establish paternity to enforce and collect child support payments.¹²⁵ One of the justifications for this authority is the state's "valid interest in conservation of its public assistance fund."¹²⁶ The state took advantage of this authority against a legal father, even though he was not the biological father in the

121. 1976 La. Acts 1129-31; see Helen Johnson, Comment, *Louisiana's Presumption of Paternity: The Bastardized Issue*, 40 LA. L. REV. 1024, 1028 (1979-1980) ("No doubt, this injustice prompted the legislature to amend Civil Code articles 184-90 in 1976.").

122. LA. CIV. CODE ANN. art. 187 (1977). In corroboration with the disavowal action was article 188, which stated that husbands lost the right to bring a disavowal action if he married a woman he knew to be pregnant or if the child was born due to consensual artificial insemination. LA. CIV. CODE ANN. art. 188 (1977).

123. *Welch v. Welch*, 465 So. 2d 945, 947 (La. App. 2 Cir. 1985); see *Mock v. Mock*, 411 So. 2d 1063, 1066 (La. 1982). For example in *Hall v. Hall*, the husband instituted a combined action for divorce and disavowal in December 1980. *Hall v. Hall*, 404 So. 2d 1328, 1329-30 (La. App. 2 Cir. 1981). Mr. Hall alleged that he and his wife were separated during the time of conception; thus, he could not be the father. *Id.* The record contained thirteen pages of the testimony of three witnesses, and evidence that his ex-wife was "involved" with another man. *Id.* However, the court held that in light of evidence of "numerous opportunities for cohabitation at the probable time of conception," the father had not met his burden of proving the impossibility of his paternity. *Id.*

124. LA. CIV. CODE ANN. art. 189 (1977).

125. LA. REV. STAT. ANN. § 46:236.1 (1976) (repealed and reenacted in LA. REV. STAT. ANN. § 46:236.1.2 et seq. (2003)).

126. LA. REV. STAT. ANN. § 46:236.1 (1976) (repealed and reenacted in LA. REV. STAT. ANN. § 46:236.1.2 (2003)); *Lastrapes v. Willis*, 93-1417 (La. App. 3 Cir. 4/6/94); 635 So. 2d 1281, 1283. This process begins when the mother applies for services from the Support Enforcement Services for the State of Louisiana, and the Louisiana Department of Social Services provides such service by filing suit against whoever is liable for the child support (in most instances delinquent fathers). LA. REV. STAT. ANN. § 46:236.1.2 (2003); see, e.g., Office of Family Support *ex rel.* *Munson v. Washington*, 32550 (La. App. 2 Cir. 12/8/99); 747 So. 2d 1245, 1246-47; *State v. Walker*, 97-0330 (La. 10/21/97); 700 So. 2d 496. The Department is allowed to filiate children with their biological father, even if the child already has a legal presumptive father. See *Washington*, 747 So. 2d at 1246-47. Thus the department is given the authority to establish dual paternity of the child. *Id.* at 1246-47; see LA. REV. STAT. ANN. § 46:236.1.2 (2003).

case of *State v. Walker*.¹²⁷

In *Walker*, the husband and wife separated in 1977, never obtained a divorce, and the wife had a child in 1979.¹²⁸ The mother knew that her husband was not the father, so she never asked for his support, and the husband was ignorant to the fact that he needed to file a disavowal action.¹²⁹ However, after the mother died, her sister acquired custody of the child and sought support from the Department of Social Services.¹³⁰ The State brought suit against the husband seeking funds for the child's financial support.¹³¹

The juvenile court ordered DNA tests, which would have proved the truth regarding the husband's paternity, but the State appealed to deny the husband the testing opportunity.¹³² The Louisiana Supreme Court held that the husband was irrebutably presumed to be child's father under state law, and thus blood testing was not warranted.¹³³ The Court noted that "[a]lthough genetic testing now makes paternity determinations virtually certain, given the presumption's long history and laudable purposes, the legislature must manifest explicit intent to overrule the article . . . if it so chooses."¹³⁴

As a result of the *Walker* decision, a member of the Persons Committee at the LSLI, Judge Harold Brouillette, took it into his own hands to address the inherent unfairness in the law. He wrote a letter to the Persons committee and Legislature noting the following concerns:

I think it is a mistake to recommend a law which denies a husband, in obvious situations such as in *Walker*, the right to use the science which is now available to prove he is not the father only because he failed to disavow promptly [I]n my opinion, supporting someone else's children until they are eighteen years old is too severe a penalty for ignorance of the law or the failure to exercise good judgment.¹³⁵

127. *State v. Walker*, 97-0330 (La. 10/21/97); 700 So. 2d 496.

128. *Id.* at 497.

129. *Id.* at 497-98. It seemed that the mother in this case was aware that her husband was not the child's biological father because the husband and mother began living apart two years before the child was born and allegedly never had sexual relations after their separation. *Id.* Moreover, she never asked him for child support. *Id.*

130. *Id.* at 497.

131. *Id.*

132. *Id.* at 497; *State v. Walker*, 96-1238 (La. App. 4 Cir. 12/27/96); 685 So. 2d 705 (affirming juvenile court opinion to allow DNA testing).

133. *Walker*, 700 So. 2d at 498 n.1.

134. *State v. Walker*, 97-0330 (La. 10/21/97); 700 So. 2d 496, 498 n.1.

135. La. State Law Inst., Request for Consideration of Article 189: Time Limit for Disavowal of Paternity 7, 9 (May 14-15, 2009) (Judge Brouillette's letter dated August 21, 1998) (on file with

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Judge Brouillette pointed to three other Louisiana circuit court decisions where the judiciary “in an effort to render what they considered fair decisions, have struggled with the presumption and particularly with the period for bringing the disavowal action.”¹³⁶

He relied on *Gnagie v. Department of Health & Human Resources*, in which the court stated, “[w]here the evidence is so overwhelming that the legal father is not the actual biological father . . . this court will allow the *legal fiction* to be overcome in the interest of justice.”¹³⁷ Judge Brouillette also relied on *Naquin* and *Succession of Cosse*, where the First Circuit held that the preemptive period did not begin to run until circumstances pointed to the possibility of an assertion of paternity against the alleged father.¹³⁸ Although Judge Brouillette recognized that all three of these decisions were arguably incorrect applications of the existing law, he agreed with the courts’ desire to seek a fair and equitable result.¹³⁹

In 1999, Judge Brouillette recommended that the legislature immediately amend the law, during the current session, rather than wait until the revision was submitted by the LSLI.¹⁴⁰ As a result of the Judge’s urgent concerns, the disavowal action was immediately amended.¹⁴¹ The attached preemptive period was lengthened from six months to one year.¹⁴² In addition, a suspension was added for husbands that lived separate and apart from the mother for 300 days immediately preceding the child’s birth—delaying the commencement of preemption until the husband is notified in writing that an interested party has asserted his paternity.¹⁴³

Although Judge Brouillette successfully convinced the legislature to liberalize the time limits on the disavowal action, the Louisiana Supreme

author).

136. La. State Law Inst., Request for Consideration of Article 189: Time Limit for Disavowal of Paternity 7, 9 (May 14-15, 2009) (Judge Brouillette’s letter dated August 21, 1998) (on file with author).

137. *Gnagie v. Dep’t of Health & Human Res.*, 603 So. 2d 206, 214 (La. App. 1 Cir. 1992) (emphasis added).

138. *Succession of Cosse*, 608 So. 2d 1092, 1095 (La. App. 4 Cir. 1992); *Naquin v. Naquin*, 374 So. 2d 148, 149 (La. App. 1 Cir. 1979).

139. See La. State Law Inst., Request for Consideration of Article 189: Time Limit for Disavowal of Paternity 10 (May 14-15, 2009) (Judge Brouillette’s letter dated August 21, 1998) (on file with author). Judge Brouillette wrote, “I know you are familiar with (and presumably disagree with) the holdings in [*Naquin*, *Gnagie*, and *Cosse*] Even if we all disagree with their interpretation of existing law, I think those and other similar cases . . . illustrate how the courts . . . have struggled” *Id.*

140. *Id.*

141. 1999 La. Acts 1-2.

142. LA. CIV. CODE ANN. art. 189 (2000).

143. *Id.*

Court did the opposite in its *Gallo* decision.¹⁴⁴ Recall that in *Gallo*, the Court found that a husband's ignorance due to the mother's fraud does not suspend the peremptive period on the disavowal action.¹⁴⁵ The disavowal action and the suspension laws went unchanged from 1999 until the 2005 revision, which brought about the current law.¹⁴⁶ Thanks to the urgent 1999 revision promoted by Judge Brouillette, the law now permits a suspension for ignorant husbands who are unaware of the child's birth. Nevertheless, due to *Gallo* and the repeal of § 9:305, there is no suspension for ignorant husbands who, although aware of the child's birth, remain unaware of facts indicating non-paternity.

Under current law, a legal father can disavow a child if he proves by clear and convincing evidence that he is not the child's father.¹⁴⁷ Although the higher burden of proof was a conservative step in light of all the liberal amendments, it was implemented because of the "continuing strong policy of favoring the legitimacy of children"¹⁴⁸ Also, in any disavowal action, the court has the authority to order DNA tests, which assist in meeting the clear and convincing standard.¹⁴⁹

However, for purposes of this Comment, the most significant effect of the 2005 revision was the legislature's decision to explicitly change the nature of the time period on the disavowal action from peremption to prescription.¹⁵⁰ The prescriptive clock begins to run on the day that the husband has actual or constructive knowledge of the child's birth.¹⁵¹ The 2005 revision comments indicate that the special "suspensions" of the time period that formerly appeared are "no longer necessary because the time period is prescriptive *subject as a general rule to both suspension and interruption.*"¹⁵²

This Comment contends that (1) the legislature made a deliberate change from peremption to prescription and (2) the Louisiana courts have recognized that prescription is suspended where the plaintiff was unaware of the existence of the claim, under the discovery rule of *contra non valentem*. Thus, when a legal father is ignorant of his need to file the

144. *Gallo v. Gallo*, 2003-0794 (La. 12/3/03); 861 So. 2d 168, 173-75.

145. *Id.* at 174.

146. 2005 La. Acts 1-2.

147. LA. CIV. CODE ANN. art. 187 (2010).

148. *Id.* cmt. (a).

149. *See* LA. REV. STAT. ANN. §§ 9:396, 9:397.3 (2010).

150. LA. CIV. CODE ANN. art. 189 (2010), *overruling*, *Pounds v. Schori*, 377 So. 2d 1195 (La. 1979), which found that the disavowal action was subject to peremption.

151. *Id.*

152. *Id.* cmt. (a) (emphasis added).

disavowal action, the prescriptive period should be suspended until his discovery of facts indicating that his paternity is in question. The following section will discuss the doctrine of *contra non valentem* to explain how it should apply to the prescriptive period on disavowal actions and how it could serve to overrule *Gallo*.

E. *CONTRA NON VALENTEM*

A potentially unfair consequence of prescription occurs when a plaintiff does not discover the basis for his legal claim until it is too late.¹⁵³ In many instances the plaintiff could not have reasonably known that the claim existed within the short time limit, and was thus ignorant to the fact that a claim needed to be filed.¹⁵⁴ Imagine the patient who does not discover that a foreign object was left inside her body during surgery until many years after the fact and is now unable to bring an otherwise valid malpractice suit. Because the running of prescription will extinguish a person's right to pursue an otherwise valid claim, functional doctrines have evolved to allow for equitable solutions.¹⁵⁵ Louisiana jurisprudence has all but codified the doctrine of *contra non valentem* to avoid this type of inequity.¹⁵⁶

Contra non valentem is the "suspension of prescription" due to the inability of the claimant, against whom prescription would ordinarily run, "to bring an action to interrupt it."¹⁵⁷ Four categories of *contra non valentem* are recognized by Louisiana courts; however, only the fourth category is relevant for purposes of this Comment.¹⁵⁸ This category allows suspension under *contra non valentem* when "the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance

153. See *Reeder v. North*, 97-0239 (La. 10/21/97); 701 So. 2d 1291, 1296 (discussing the inequities of prescription).

154. *Id.*

155. See LA. CIV. CODE ANN. art. 3467 cmt. (2010).

156. *Id.* (discussing the jurisprudential adoption of *contra non valentem*).

157. *Perrodin v. Clement*, 254 So. 2d 704, 707 (La. App. 3 Cir. 1971).

158. See, e.g., *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1054-56 (La. 1987); *Corsey v. State ex rel. Dep't of Corrections*, 375 So. 2d 1319, 1321-22 (La. 1979) (laying out the four categories of *contra non valentem*). The third category of *contra non valentem* is "where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action." *Plaquemines Parish Comm'n Council*, 502 So. 2d at 1055 (citing *Hyman v. Hibernia Bank & Trust Co.*, 71 So. 598 (1916)). Particularly under circumstances where "acts (including concealment, fraud, misrepresentation, or other 'ill practices') . . . tend to hinder, impede or prevent the plaintiff from asserting his cause of action . . ." *Nathan v. Carter*, 372 So. 2d 560, 562 (La. 1979). Arguably, when the mother's fraud prevents the husband from timely disavowing, the third category would apply; however, this Comment does not address this argument.

is not induced by the defendant.”¹⁵⁹ Application of *contra non valentem* under the fourth category is commonly known as the “discovery rule.”¹⁶⁰ The Louisiana Supreme Court has accepted this equitable doctrine and stated that it is “applied to ameliorate the harshness which would result from the strict application of prescription in certain situations.”¹⁶¹

However, after the discovery rule was adopted by Louisiana jurisprudence, the legislature feared that the courts might begin applying the suspension to claims in which public policy demanded strict and inexcusable deadlines.¹⁶² To deal with this fear, the legislature began amending statutes to include *peremptive* caps.¹⁶³ One such amendment occurred in 1990, when the legal malpractice statute was revised to include a one-year discovery rule, subject to a maximum three year peremptive period.¹⁶⁴ The same change was made to the medical malpractice statute.¹⁶⁵ The Louisiana Supreme Court explained that although the peremptive cap on these actions “may seem unfair in that a person’s claims may be extinguished before he realizes the full extent of his damages, the enactment of such a statute of limitations is exclusively a *legislative prerogative*.”¹⁶⁶

The Louisiana Supreme Court discussed the legislature’s decision to modify the nature of time limits allowed on claims, and stated “[i]t is not our role to consider the policy or the wisdom of the [Legislature] in adopting [t]he statute.”¹⁶⁷ Moreover, “[t]he legislature, enacting or amending a statute, is presumed to act deliberately and with full knowledge of all existing laws on the same subject.”¹⁶⁸ The legislature is well aware of the effects of prescription—suspension, interruption, and *contra non valentem*—as evidenced by the its intentional revision of statutes to avoid such effects by adding peremptive caps.¹⁶⁹

159. *Corsey v. State ex rel. Dep’t of Corrections*, 375 So. 2d 1319, 1322 (La.1979).

160. *Wimberly v. Gatch*, 93-2361 (La. 4/11/94); 635 So. 2d 206, 211 (referring to the fourth category as the discovery rule).

161. *State ex rel. Div. of Admin. v. McInnis Bros. Const.*, 97-0742 (La. 10/21/97); 701 So. 2d 937, 940.

162. *See Reeder v. North*, 97-0239 (La. 10/21/97); 701 So. 2d 1291, 1298.

163. *See* LA. REV. STAT. ANN. §§ 9:5605, 9:5628 (2009) (actions for legal malpractice).

164. LA. REV. STAT. ANN. § 9:5605 (2009).

165. *Id.* § 9:5628.

166. *Reeder v. North*, 97-0239 (La. 10/21/97); 701 So. 2d 1291, 1296 (emphasis added).

167. *Id.* at 1297 (citing *Chamberlain v. State ex rel. Dep’t of Dev. & Transp.*, 624 So. 2d 874, 879 (La. 1993)).

168. *Jungina v. Stafford*, 535 So. 2d 794, 795 (La. App. 2 Cir. 1988) (citing *Turner v. City of Shreveport*, 437 So. 2d 961 (La. App. 2 Cir. 1983)).

169. *See, e.g., Jungina*, 535 So. 2d at 795; *Turner v. City of Shreveport*, 437 So. 2d 961 (La. App. 2 Cir. 1983).

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Furthermore, the Louisiana jurisprudence evidences that whether a time period will be either peremptive or prescriptive is based on the state's public policy to restrict certain claims.¹⁷⁰ If public policy demands quick resolution of the suit, either the legislature or the courts through interpretation will label the timeline as *peremptive* to avoid the liberal effects of *prescription*.¹⁷¹

More particularly, the legislature is aware of the effects of prescription on the disavowal action, because the 2005 revision comments explicitly state that the disavowal action is now subject to suspension and interruption.¹⁷² Accordingly, in 2005 when the legislature decided to change the time period on the disavowal action from peremptive to prescriptive, it did so intending to liberalize the time limits and open the door to the effects of prescription, including the equitable doctrine of *contra non valentem*.

Although implementing a discovery rule in the disavowal action may seem like an extreme step for Louisiana, other states have been allowing legal fathers additional time to bring disavowal actions under the discovery rule for over thirty years now.¹⁷³ As early as 1976, the Uniform Parentage Act, which has been adopted by a number of the common-law states, implemented the discovery rule by allowing a disavowal action to be filed "within a reasonable time after obtaining knowledge of relevant facts"¹⁷⁴ Thus, Louisiana actually lags behind the trend of allowing

170. See *Reeder v. North*, 97-0239 (La. 10/21/97); 701 So. 2d 1291, 1296; see generally *Parish of Caddo v. Durham*, 35,557 (La. App. 2 Cir. 5/8/02); 817 So. 2d 1173.

The clear wording of the statute [of limitation applicable to legal malpractice claims] leaves no doubt that Legislature intended that three years after the "act, omission, or neglect," the cause of action is extinguished, regardless of when the negligence is discovered and regardless of whether a malpractice action may be brought within that three-year period.

Id. at 1185 (citing *Reeder*, 701 So. 2d 1291); *Fenner v. DeSalvo*, 2001-2223 (La. App. 4 Cir. 4/17/02); 826 So. 2d 39, 43-44 (citing *Reeder*, 701 So. 2d at 1296) ("Statutes of limitation are exclusively a legislative prerogative."); *Seaux v. Doucet*, 96-854 (La. App. 3 Cir. 12/11/96); 685 So. 2d 537, 540 (explaining that even *contra non valentem* cannot save a claim that has been extinguished due to an expired peremptive cap).

171. See *Reeder v. North*, 97-0239 (La. 10/21/97); 701 So. 2d 1291, 1296 (discussing the legislator's reasoning behind regulating the statute of limitations on malpractice claims); see also *Pounds v. Schori*, 377 So. 2d 1195, 1200 (La. 1980) (finding that disavowal actions are subject to peremptive periods due to the strict public policy that favors legitimacy of children).

172. LA. CIV. CODE ANN. art. 189 cmt. (2010).

173. See Unif. Parentage Act § 6 (1976); WASH. REV. CODE ANN. § 26.26.060(1)(b) (West 1997); *In re Paternity of K.*, 752 P.2d 393 (Wash. Ct. App. 1988) (reversing trial court's rejection of presumed father's petition to declare nonexistence of father-child relationship as untimely for failure to ascertain the time at which presumed father became aware of facts which would lead him to question his biological paternity).

174. See Unif. Parentage Act § 6 (1976). In the same respect, other courts have prevented disavowal actions where presumed fathers had knowledge of the relevant facts yet waited too

extra time to disavow.

III. ANALYSIS

The following section analyzes the legislature's intent behind the 2005 changes made to the disavowal action. Accordingly, a solution is proposed for future legislative action to render disavowal actions subject to the discovery rule of *contra non valentem*. The final section of the analysis justifies this proposed solution by illustrating the illusory character of the public policy restricting the disavowal action, resulting in consequences that are contrary to the law's original purpose.

A. READING BETWEEN THE LINES OF LEGISLATIVE INTENT

Due to the massive size of the bill that was submitted to revise the filiation laws, analyzing the legislative history behind the 2005 revision was a difficult task. The LSLI's Persons Committee dedicated much time and deliberation to this project, and the disavowal action was only one of the many areas of discussion. Needless to say, the legislative history does not provide a direct answer as to whether the 2005 revision intended to allow for suspension when the husband is ignorant of his non-paternity. To determine the purpose behind the changes to the disavowal action, it becomes necessary to read between the lines of legislative intent.

The Louisiana Supreme Court has recognized that the "report of the Law Institute is entitled to great weight as reflecting legislative intent" particularly when the legislature adopts and enacts the Law Institute's amendments.¹⁷⁵ The Chair and Reporter for the Persons Committee at the LSLI, Professor Katherine S. Spaht, witnessed and worked firsthand on the revision of the filiation articles.¹⁷⁶ The following excerpt, from an article written by Spaht on Louisiana's new law of filiation, testifies as to the Persons Committee's intent behind changing the nature of the time limit on the disavowal action.

many years to bring their action to disavow paternity. *See Arvizu v. Fernandez*, 902 P.2d 830, 834 (Ariz. Ct. App. 1995) (applying laches where presumed father waited twelve years and neglected several opportunities to bring his claim to the court's attention); *In re Marriage of Boer*, 559 P.2d 529, 539 (Or. Ct. App. 1977) (finding that presumed father was barred by laches where he knew at the time of child's birth that he was not biological father, yet failed to raise non-parentage as defense at divorce).

175. *Baten v. Taylor*, 386 So. 2d 333, 337 (La. 1979).

176. Katherine Shaw Spaht is a Jules F. and Frances L. Landry Professor of Law, Paul M. Hebert Law Center, Louisiana State University. Among many other selected memberships in the legal community, Spaht's dedicated work at the LSLI has promoted many developments in Louisiana family law. A list of her accomplishments and scholarly works are available at <http://faculty.law.lsu.edu/katherinespaht>.

[O]ne clearly stated objective of the revision of the law of filiation: to more closely align biological and legal paternity . . . [but] this alignment must pose the least possibility of potential harm to the child and the family. The objective of aligning biological and legal paternity principally reflects dissatisfaction with the historical application of the presumption that the husband of the mother is the father of the child conceived or born during marriage. *The presumption had become virtually irrebuttable.* Even before the Law Institute revision passed in 2005, legislative changes to the time period for instituting a disavowal action markedly *liberalized* the rebuttal of the presumption of the husband's paternity **[T]he revision took an additional liberalizing step by converting what was arguably a peremptive time period for instituting the action into an explicitly prescriptive period, subject to both suspension and interruption.** Thus, the potential for more closely aligning legal and biological paternity exists by virtue of the continued liberalization of the rules regulating the disavowal action by the husband¹⁷⁷

The LSLI foresaw that, to limit the cases of dual paternity, the new filiation laws should function to promote biological fact. To accomplish this goal, the 2005 revision continued "liberalizing" the disavowal action by changing to a prescriptive period. The LSLI recognized that, if it kept the strict one-year peremptive deadline on the disavowal action, the paternal presumption would remain "virtually irrebuttable."¹⁷⁸

Although the filiation revision removed the explicit exception for the mother's fraud found in § 9:305, the repeal of this statute was not intended to make the disavowal action more difficult to attain. Rather, the 2005 Revision comments explain that by switching to prescription, the need for any explicit statutory suspensions (§ 9:305) was eliminated, since the disavowal action would be subject, as a general rule, to the effects of prescription.¹⁷⁹ This intent is confirmed by members of the Persons Committee, who note that "the significance of this change [to prescription] has to do with whether the running of the time period can be interrupted [or] suspended"¹⁸⁰ It follows that the LSLI intended to make the disavowal action more accessible to legal fathers to avoid court decisions that would be contrary to biological fact. This Comment contends that the judiciary now has the authority and discretion to suspend the time limit on a

177. Spaht, *supra* note 16, at 314-15 (emphasis added) (footnotes omitted).

178. *Id.*

179. LA. CIV. CODE ANN. art. 189 cmt. (2010).

180. Spaht, *supra* note 16, at 314-15; Trahan, *supra* note 18, at 410. Professors Trahan and Spaht are both members of the Persons Committee at the LSLI and worked on the 2005 revision to the filiation laws.

disavowal action under the discovery rule of *contra non valentem*.

Under the prior law of *Gallo* and the peremptive time period, the court is limited in its ability to help legal fathers. However, the 2005 revision provided an avenue for judicial discretion and equitable relief, which can protect legal fathers against the ill effects of innocent ignorance and wives' betrayal. Nevertheless, to make this legal relief clearly available to those who need it, the legislature should amend the time limits on the disavowal action to include the discovery rule.

B. THE PROPOSED SOLUTION

Under the current law, some argue that prescription does not begin to run on a disavowal action until the legal father discovers relevant facts regarding his alleged paternity. This Comment proposes that Louisiana Civil Code article 189, which contains the time limits for the disavowal action, should attach the following exception to the current article:

If the husband is ignorant and unaware of facts that indicate his paternity of the child is in question, then the action shall be instituted within one year from the husband's reasonable discovery of such relevant facts.

This change would implement the discovery rule to protect the interests of the presumed father, while allowing the court to exercise its discretion to determine whether the husband's ignorance was reasonable. Moreover, by allowing courts to exercise discretion in these cases, they may consider all of the necessary facts in order to assure an equitable result. Without this exception, judges remain obligated to uphold the "legal fiction" of paternity and render holdings that are unfair and inconsistent with biological fact.

Although this proposed law is supported by legislative intent, it faces an unanswered counter-argument: If the legislature intended to implement a discovery rule in disavowal actions, then why didn't the legislature do so in the 2005 revision, as was done for the avowal action? This is another question to which legislative history provides no clear answer. Perhaps the massiveness of the filiation revision (a fourteen-year project which the legislature requested to be split over two sessions) resulted in legislative oversight. Another possibility is that the legislature was relying on the public policy supported in jurisprudence, which demanded a strict one-year limit for legal fathers to disavow. If the latter is the case, then reliance on this public policy has proven futile, because reality shows that the existing law actually contravenes the historical purpose of the public policy.

C. THE ILLUSORY PUBLIC POLICY

The legislature and judiciary have consistently been concerned with the following three public policies in keeping disavowal actions restricted to one year: (1) preserving the family unit, (2) protecting the individual child from emotional harm and the stigma of illegitimacy, and (3) the need to recognize biological fact. However, in light of changing times, this enduring public policy must be balanced with reality, which the existing law fails to do.

Admittedly, “most if not all scholars agree that on average a child who is reared in the home of his or her biological parents united in marriage prospers in ways unattained by children reared in other family structures.”¹⁸¹ Thus, it is rational that Louisiana would attempt to have laws to promote this so-called traditional family unit. However, statistics show that the number of children raised in this “traditional” family unit is slimming. For example, between 1970 and 2004, the percentage of all children in the United States born to unmarried mothers escalated from 10.7% to 35.8%.¹⁸² In fact, in 2002, “Louisiana was among the ten states with the highest percentage of children born out of wedlock, with 47% of its children having that distinction.”¹⁸³ Furthermore, somewhere between forty to fifty percent of marriages currently end in divorce.¹⁸⁴ Accordingly, it is a statistical fact that a large number of children are raised in homes that are, as a matter of definition, not traditional. Thus, while society aims to promote a healthy and stable family unit, the law must also function equitably for the other half of Louisiana families that do not fit within this “traditional” category.

Moreover, it should be noted that in all disavowal cases, the mother and legal father are either already divorced or are in the process of divorcing. The Louisiana Supreme Court has admitted that, “once the bonds of matrimony are dissolved by [divorce], the State’s interest in

181. Spaht, *supra* note 16, at 315 (2007) (“These results obtain across a wide array of social measurements, such as high school drop-out rates, teen pregnancy, alcohol and drug experimentation, and criminal behavior, to mention but a few.”); see MAGGIE GALLAGHER & JOSHUA BAKER, DO MOTHERS AND FATHERS MATTER?: THE SOCIAL SCIENCE EVIDENCE ON MARRIAGE AND CHILD WELL BEING (2004), available at <http://www.marriedebate.com/pdf/MothersFathersMatter.pdf>; see also WILLIAM BRADFORD WILCOX, WHY MARRIAGE MATTERS: TWENTY-SIX CONCLUSIONS FROM THE SOCIAL SCIENCES (2d ed. 2005).

182. LORIO, *supra* note 16, § 3:1 (citing NAT’L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES 2007, WITH CHARTBOOK ON TRENDS IN THE HEALTH OF AMERICANS 143 (2007)).

183. *Id.* (citing *Trends in Characteristics of Births by State: 1990, 1995, and 2000–2002*, 52 U.S. NAT’L VITAL STATISTICS REPORT no. 19, table 7 (2004)).

184. National Statistics are available at <http://www.divorcerate.org>.

preserving the marital family disappears.”¹⁸⁵ Thus, once a legal father brings a disavowal action, any attempt to preserve that family unit is futile. Furthermore, when legal fathers are prevented from disavowing, the result is not a stable family unit, but an unhealthy father-child relationship marked by the mother’s disharmony and distrust. Forcing legal fathers to pay child support may help guarantee financial stability for the child and reduce the taxpayer burden, but it can never guarantee a stable parental relationship. Such a goal is beyond the scope of any government’s reach.

Rather, the end result is that the law forces a bitter and confused man to care for and support a child that is the product of his ex-wife’s adultery. Although the law can force the legal father to pay child support, it cannot force him to maintain a positive relationship under such difficult circumstances. Needless to say, the policy that is attempting “to preserve the traditional family unit” is in effect facilitating dysfunction.

Furthermore, the argument that disavowal actions create a social stigma of illegitimacy against the disavowed child is unfounded. The Louisiana Supreme Court has admitted that “[t]oday’s realities are that illegitimacy and ‘broken homes’ have neither the rarity nor the stigma as in the past.”¹⁸⁶ Statistics indicate that almost half of the children born in Louisiana are born outside of wedlock; accordingly, it is an exaggeration to assume that disavowed children will suffer from any shame from illegitimacy. Furthermore, the stigma that could potentially arise from dual paternity is unknown, since it is a concept that effectively labels the child’s biological parents as adulterers, and ultimately binds the legal father as a resentful source of income.

The law naturally requires that parents be responsible for their children. However, “[i]t is the fact of biological paternity or maternity which obliges parents to nourish their children.”¹⁸⁷ When DNA tests can prove both non-paternity and biological paternity, it is irrational that such testing should be prohibited simply because it will successfully rebut “the strongest presumption in the law.” Time has shown that barring disavowal actions in support of this irrebuttable presumption of paternity leads to results that actually contravene the law’s original purpose.

The proposed solution, on the other hand, would not force the court’s

185. T.D. v. M.M.M., 98-0167 (La. 3/2/99); 730 So. 2d 873, 878 (Knoll, J., concurring), *abrogated by* Fishbein v. State *ex rel.* La. State Univ. Health Sciences Ctr., 2004-2482 (La. 4/12/05); 898 So. 2d 1260.

186. T.D. v. M.M.M., 98-0167 (La. 3/2/99); 730 So. 2d 873, 878 (Knoll, J., concurring), *abrogated by* Fishbein v. State *ex rel.* La. State Univ. Health Sciences Ctr., 2004-2482 (La. 4/12/05); 898 So. 2d 1260.

187. Yolanda F.B. v. Robert D.R., 2000-958 (La. App. 3 Cir. 12/6/00); 775 So. 2d 1107, 1109.

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hand by obligating it to rely on the strongest presumption in the law when obvious circumstances and common sense can show that the presumption is wrong. Moreover, the proposed law removes the burden currently placed on the husband to investigate his wife's potential disloyalty. The institution of marriage creates a strong presumption that a spouse will be honest and loyal; yet this presumption works against the spouse who does not question every act of the other for infidelity.¹⁸⁸ It is the very institution of marriage and the legal expectations that accompany it that may "blind" the husband to the truths and thus prevent him from seeing the facts indicating uncertain paternity. The proposed law would lighten this burden by giving the husband the necessary time to learn of his wife's betrayal.

In most cases, the mother is able to determine the child's biological father and could properly filiate the child. Nevertheless, in cases where the mother cannot determine the child's biological father, the law should not punish the innocent husband for his wife's indiscretion. Rather, it is more equitable to burden the adulterous mother, who must either determine the child's biological father or rely on state and federal financial aid. Also, the Department of Social Services should not be allowed to take advantage of the legal fiction of paternity to fund its public assistance programs. Again, the financial burden is currently placed on the innocent victim, when it would be more suitable to allocate this cost to the biological father, thereby enforcing his inherent parental duty to support the child.

Moreover, the proposed law prevents the unintentional sanctioning and encouragement of adulterous affairs by eliminating the "reward" created by the current law.

It is apparent from its legislative history that the Code does not envision that a child born while his mother was living in open concubinage should have two fathers to look to for support . . . whereas a child born to a chaste mother should have only a single father to support him.

Nevertheless, this is the result under the existing law, if the discovery rule is rejected. Currently a child born to an adulterous mother is allowed to "double-dip" into the pockets of two fathers, while other children are limited by their mother's fidelity. Professor Randy Trahan, Louisiana family law scholar and member of the LSLI, argued that the law effectively discriminates *in favor* of children born of an adulterous union, while other children "must rest content with having one and only one father."¹⁸⁹ He

188. See LA. CIV. CODE ANN. art. 98 (2010) (stating that married couples owe one another fidelity).

189. Trahan, *supra* note 18, at 442.

stated, “I fail to understand why a child who has been born of such an ignominious union should be able to profit from it by getting an extra father.”¹⁹⁰

Furthermore, as compared to the existing law, the proposed law actually reduces the potential for emotional and psychological harm to the child. There is no doubt that if the child is old enough to have become attached to his legal father, then emotional harm is going to occur when the child learns that this man is not actually his father. However, this emotional harm is almost certain to worsen when the law attempts to force the wrong man to be the “father” and support the child against his will. Although it is true that the child will have better financial protection, how is the child supposed to cope with the truth if the law continues to ignore it?

The legislature balanced similar interests between innocent father and innocent child when it drafted the current avowal action. It decided that in cases where the mother’s fraud prevented a timely avowal action, the biological father could filiate to the child within one-year from discovery of his paternity or within ten years from the child’s birth, whichever occurs first.¹⁹¹ The legislature created an exception to the strong public policy that demands quick resolution of paternity disputes by protecting the biological father’s right to establish a relationship with his child. After the child reaches the age of ten, the scale tips back in favor of protecting the child’s emotional health by barring the biological father from intruding on the child’s established relationship with his legal father.

This Comment proposes a discovery rule without a peremptive cap because the consequences arising from a disavowal action are considerably different from those of an avowal action. For example, an avowal action allows the biological father to choose to establish a relationship with his child and allows the child to create potentially a healthy relationship with his natural father. A disavowal action is also intended to give the legal father a choice: either to remain in the child’s life as his legal father or to

190. Trahan, *supra* note 18, at 440.

What I find objectionable are the consequences that the law attaches to such an attempt when it succeeds, in particular, that the child is allowed to “keep” his old father in addition to his new one. In my judgment, this rule gives the child a windfall that is neither logical nor prudent. I see no reason why such a child should be able to eat his cake and have it too. Other children, notably, those who have not been born of an adulterous liaison, must rest content with having one and only one father. I fail to understand why a child who has been born of such an ignominious union should be able to profit from it by getting an extra father. What I would propose, then, is that the child who discovers that he is filiated to the “wrong” man be given a choice to (1) stick with the one you have and forget the other, or (2) filiate to the other and forget the one you have.

Trahan, *supra* note 18, at 440.

191. LA. CIV. CODE. ANN. art. 198 (2010).

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sever filiation to the child by disavowal.

However, this choice is stripped from the ignorant husband who loses his disavowal action to prescription before deciding to invoke it. Not only does the law strip the legal father of this choice, it makes the decision for him. The law should not make this decision for the legal father, especially since it cannot promise a happy ending for the child. Regardless of the child's age, if the legal father wishes to walk away but is not allowed, the relationship will be tainted by the legal father's resentment.

Nevertheless, if the legislature decides it is best to add a peremptive cap, this decision should be made based on what age the state feels would fairly balance the interests of the innocent child and the innocent legal father. For example, the Uniform Parentage Act includes a discovery rule with a five-year peremptive cap, while other states have found that a two or three year peremptive period is best.¹⁹²

The proposed law provides legal fathers with a similar exception that is currently given to biological fathers under an avowal action, thereby rendering the laws of disavowal and avowal more consistent. In addition, the proposed law creates a clear rule that the courts could easily apply. In exercising its discretion, the courts can evaluate the applicability of the discovery rule by considering the reasonableness behind the legal father's ignorance of relevant facts. Judicial discretion is common in resolving family law matters because blanket rules are difficult to apply to the various factual circumstances that arise within family disputes.

The LSLI clearly intended to liberalize the disavowal action, while continuing to protect the innocent child. This intent was motivated by the legal scholars and judges who recognized the inherent unfairness against the legal father in the existing law. Because barring disavowal actions contradicts the state's public policy, the law should be refocused to promote the policy's original intent. The proposed law accomplishes the goals of the legislature, promotes biological fact, and protects society's concern for both the interests of the innocent child and legal father.

IV. CONCLUSION

Thanks to the 2005 filiation revision, men incorrectly presumed as legal fathers and whose ignorance has caused their disavowal action to expire should know that there is hope under the doctrine of *contra non*

192. See Unif. Parentage Act § 6 (1973). Oklahoma limits actions to establish or disestablish paternity to two years where the child lived for those two years with the mother and husband as a member of family. See OKLA. STAT. ANN. tit. 10, § 3 (West 1998). Colorado provides five years. See *R.E.H. v. J.M.H.*, 736 P.2d 1226, 1227 (Colo. Ct. App. 1986).

valentem. While this Comment asserts that the courts would accept this argument as valid, the legislature should act first to make the laws of disavowal more equitable by implementing the discovery rule into law. This Comment's proposed solution would address the current inequities in the law, while honoring this state's ever-enduring public policy.

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