Louisiana Law Review

Volume 23 | Number 4
June 1963

Action En Desaveu - Challenging the Presumption of the Husband's Paternity

Karl W. Cavanaugh

COMMENTS

ACTION EN DESAVEU — CHALLENGING THE PRESUMPTION OF THE HUSBAND'S PATERNITY

The Civil Code provides three alternative methods for a child to prove filiation to a married woman and establishes an almost irrefutable presumption of paternity by her husband.[1] Because the husband is usually in fact the father of children born to his wife, application of the presumption achieves just results in most cases. However, if biological fact is contrary to the presumption, indiscriminate application of it is questionable.[2] In theory the *action en desaveu*, whereby a husband disavows paternity of his wife's child, is available as a remedy if biological fact and the presumed paternity are incongruent;[3] in practice it is difficult for a husband to succeed in an *action en desaveu*. Recent decisions concerning this action provoke inquiry into the scope and strength of this presumption of the husband's paternity. This Comment examines two aspects of this troublesome area: requirements of proof and admissibility of evidence to rebut the presumption of the husband's paternity; and the possibility of judicial remedy other than the *action en desaveu*.

REQUIREMENTS OF PROOF AND ADMISSIBILITY OF EVIDENCE TO REBUT THE PRESUMPTION OF THE HUSBAND'S PATERNITY

The Louisiana Civil Code has been thought to provide five separate grounds for an *action en desaveu*:[4] if the wife has committed adultery and concealed the child's birth from the husband;[5] if the child is born less than 180 days after marriage;[6]

1. See LA. CIVIL CODE arts. 193-196, 184 (1870).
2. Louisiana courts are not unique in producing controversial decisions on questions of filiation. Courts employing the common law presumption that a child born in lawful wedlock is legitimate sometimes reach startling conclusions. In a recent California case, the court held the husband was the father of the child, although blood group tests conclusively proved that he was not; the child's conception occurred under circumstances from which California conclusively presumes legitimacy. Wareham v. Wareham, 195 Cal. App. 2d 64 (1961). The dissenting judge commented: "This whole situation is a perfect example of what occurs when truth and justice are not equated. Any law which bypasses, ignores, or disregards a manifest truth should be forthwith changed." *Id.* at 88.
3. See LA. CIVIL CODE arts. 186-192 (1870).
4. Comments, 13 LA. L. REV. 587 (1952), 14 LA. L. REV. 401 (1953).
5. LA. CIVIL CODE art. 185 (1870).
6. *Id.* art. 186. See also *id.* art. 190.

if the child is born 300 or more days after the dissolution of the marriage,[7] or separation from bed and board;[8] or if the "remoteness" of husband from wife has made cohabitation physically impossible.[9]

Certain recent decisions suggest that "remoteness" is not only a separate ground for an *action en desaveu* but also an element the husband must prove to disavow paternity for adultery and concealment.[10] An analysis of the jurisprudence to consider the validity and status of this idea is in order.

Interpretation of Articles 185 and 189

The courts' interpretation of Article 185[11] and Article 189[12] has manifested a progressive retreat from evidence.[13] Proof of

7. *Id.* art. 187. Whether the heirs of a deceased husband must bring an *action en desaveu* against a child born to his widow more than 300 days after his death has been questioned. Comment, 13 LA. L. REV. 587 (1952). In Succession of Israel, 146 So. 2d 53 (La. App. 4th Cir. 1962), *cert. denied*, the court, without recourse to dialectics, treated as illegitimate a child born two years after the husband's death.

8. LA. CIVIL CODE arts. 187, 188 (1870); Kaufman v. Kaufman, 146 So. 2d 199 (La. App. 4th Cir. 1962); Singley v. Singley, 140 So. 2d 546 (La. App. 1st Cir. 1962). The cases are the first reported Louisiana cases allowing a disavowal of paternity for any reason. The court in *Singley* declared that the child born 300 days after separation is presumed to be illegitimate. 140 So. 2d at 553. The court in *Kaufman* said more precisely that the child is presumed not to be the husband's child in the absence of proof of cohabitation after a decree of separation from bed and board. 146 So. 2d at 201. In this situation, the presumption of the husband's paternity is defeated by his judicial denial of paternity. See 1 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1429 (1959) [hereinafter cited as PLANIOL]. But he must bring a timely *action en desaveu*. Kuhlman v. Kuhlman, 137 La. 263, 68 So. 604 (1915); McNeely v. McNeely, 147 La. Ann. 1321, 17 So. 928 (1895).

9. LA. CIVIL CODE art. 189 (1870). Remoteness has been interpreted to mean physical distance. See Ellis v. Henderson, 204 F.2d 173 (5th Cir. 1953); Williams v. Williams, 230 La. 1, 87 So. 2d 707 (1956); Feazel v. Feazel, 222 La. 113, 62 So. 2d 119 (1952); Lejeune v. Lejeune, 184 La. 837, 167 So. 747 (1936); Succession of Barth, 178 La. 847, 152 So. 543 (1934); Switzer v. Switzer, 170 La. 550, 128 So. 477 (1930); Succession of Ledet, 122 La. 220, 47 So. 506 (1908); Vernon v. Vernon's Heirs, 6 La. Ann. 242 (1851); Tate v. Penne, 7 Mart.(N.S.) 548 (La. 1829); Singley v. Singley, 140 So. 2d 546 (La. App. 1st Cir. 1962); Harris v. Louisiana Oil Ref. Corp., 127 So. 40 (La. App. 2d Cir. 1930). *But see* Gillies v. Gillies, 144 So. 2d 893 (La. App. 4th Cir. 1962).

10. See Williams v. Williams, 230 La. 1, 87 So. 2d 707 (1956); Gillies v. Gillies, 144 So. 2d 893 (La. App. 4th Cir. 1962); Trahan v. Trahan, 142 So. 2d 571 (La. App. 3d Cir. 1962).

11. LA. CIVIL CODE art. 185 (1870) (disavowal for adultery and concealment).

12. *Id.* art. 189 (disavowal for remoteness).

13. Article 185: Williams v. Williams, 230 La. 1, 87 So. 2d 707 (1956); Feazel v. Feazel, 222 La. 113, 62 So. 2d 119 (1952); Lejeune v. Lejeune, 184 La. 837, 167 So. 747 (1936).

Article 189: Succession of Ledet, 122 La. 220, 47 So. 506 (1908) (husband disappeared in Mexico; wife remained in Louisiana); Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892) (husband remained in Cuba; wife lived in open concubinage in Louisiana); Vernon v. Vernon's Heirs, 6 La. Ann. 242 (1851)

adultery in *Lejeune v. Lejeune*[14] was sufficient to gain the husband a divorce, but his attempt to disavow paternity failed. The court reasoned that he knew of his wife's pregnancy — judicially admitted in divorce proceedings — and therefore the child's birth had not been concealed although the husband did not know precisely when it was born.[15] *Feazel v. Feazel*[16] held that adultery at a time corresponding with the child's conception must be conclusively proven *without* the wife's testimony and that concealment must be shown by evidence indicating not only the husband's ignorance of the child's birth but also the wife's intent to conceal it.[17] The later case of *Williams v. Williams*,[18] however, suggested that the husband's proof of adultery and concealment was insufficient to disavow the child; he must also prove "remoteness" sufficient to make cohabitation physically impossible.[19] *Trahan v. Trahan*[20] is the most recent illustration of what evidence is insufficient to rebut the presumption of the husband's paternity.

Statements of the Wife. — *Trahan* continued the flight from evidence and closed several doors *Feazel* left open.[21] *Feazel* had suggested that the wife's registering the child as born of father

(husband in South Carolina; wife in Kentucky). In all cases the children were declared to be the offspring of the husband, the remoteness being insufficient to make cohabitation impossible. None of these cases, however, was an *action en desaveu*, and in none had the husband disavowed the child. Under the jurisprudence cited in note 72 *infra*, the legitimacy of the children was not open to challenge.

14. 184 La. 837, 167 So. 747 (1936).

15. For the proposition that successful concealment of pregnancy was necessary, the court relied on Baudry-Lacantinerie. See 1 BAUDRY-LACANTINERIE, PRECIS DE DROIT CIVIL n° 781 (14th ed. 1926) [hereinafter cited as BAUDRY-LACANTINERIE]. Modern French doctrine and practice is *contra*. See text accompanying note 53 *infra*.

16. 222 La. 113, 62 So. 2d 119 (1952).

17. The court demanded explicit proof of time, place, and accomplice to show adultery. The court relied in part on 1 BAUDRY-LACANTINERIE n° 781. The case was criticized in *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Persons*, 14 LA. L. REV. 114, 121 (1953).

18. 230 La. 1, 87 So. 2d 707 (1956).

19. The case has been understood to mean that exclusionary blood tests cannot be used as evidence at all in an *action en desaveu*. Note, 17 LA. L. REV. 494 (1957).

20. 142 So. 2d 571 (La. App. 3d Cir. 1962).

21. In *Trahan* the child was born eighteen months after a voluntary separation. Although the husband had visited his children twice each month, the testimony of both husband and wife that they had not cohabited since the separation was confirmed by her parent's testimony that the husband and wife had never been alone together during his visits. The wife, a large woman whose pregnancy was not obvious, never told her husband that she was pregnant and denied it when questioned by her mother and employer. She registered the child as born of father unknown.

unknown was strong evidence of concealment of birth.[22] *Trahan* held that neither this act by the wife nor her denials of pregnancy can be used as evidence of concealment since they are "statements" and a wife is not permitted to bastardize her issue by her statements.[23]

The soundness of the supposed rule is debatable.[24] There is no legislative basis for the rule advanced in *Trahan*.[25] The original doctrine was taken from Toullier[26] and introduced into Louisiana in the curious case of *Tate v. Penne*,[27] in which a mother attempted to revoke a donation to her daughter by alleging the child's illegitimacy. The original concept was that a child's status was fixed by operation of law at the moment of the child's birth and therefore was unalterable by any device of human will.[28] To the original concept was added the thought that the husband alone has a right to bring an *action en desaveu*; and if he decides not to do so, neither the wife nor anyone else may

22. 222 La. 113, 62 So.2d 119 (1952). The court relied on 1 BAUDRY-LACANTINERIE n° 781 and said that by naming her husband as the child's father on the birth certificate the wife refutes any notion of concealment. There is a further hint that if the child is delivered in a hospital there is no concealment of birth.

23. 142 So.2d 571, 574 (La. App. 3d Cir. 1962).

24. See *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Persons*, 14 LA. L. REV. 114, 121 (1953).

25. The mother's testimony is definitely evidence in certain cases to prove natural paternal descent. See LA. CIVIL CODE art. 210 (1870). Her testimony apparently would be admitted to prove legitimate filiation under Article 196. The rule that the wife's statements cannot bastardize her issue is similar to the Lord Mansfield rule at common law. The Lord Mansfield rule forbids either spouse to testify to their nonaccess if the child's legitimacy is at issue. Other testimony by the parents is permitted, even if it establishes the illegitimacy of the child. See 97 C.J.S. *Witnesses* § 90 (1957). JACOBS & GOEBEL, DOMESTIC RELATIONS 850 (4th ed. 1961) lists Smith v. Smith, 214 La. 881, 39 So.2d 162 (1949) as a perversion of the Lord Mansfield rule. 7 WIGMORE, EVIDENCE § 2064 (3d ed. 1940) severely criticizes the rule, and it is slowly yielding in common law jurisdictions. For cases admitting the wife's testimony, see Nulman v. Cooper, 120 Colo. 98, 207 P.2d 814 (1949); Peters v. District of Columbia, 84 A.2d 115 (D.C. 1951); Evans v. State *ex rel.* Freeman, 165 Ind. 369, 75 N.E. 651 (1905); Commonwealth v. Leary, 185 N.E.2d 641 (Mass. 1962); Moore v. Smith, 178 Miss. 383, 172 So. 317 (1937); *In re* Wray's Estate, 93 Mont. 525, 19 P.2d 1051 (1933); Loudon v. Loudon, 114 N.J. Eq. 242, 168 Atl. 840 (1933).

26. 1 TOULLIER, DROIT CIVIL FRANCAIS n° 859 (6th ed. 1846) (hereinafter cited as TOULLIER).

27. 7 Mart.(N.S.) 548 (La. 1829).

28. 1 TOULLIER n° 859. Toullier was speaking of extrajudicial declarations and may have meant nothing more than an *action en desaveu* or some other form of judicial action was essential to establish the illegitimacy of a child born of a married woman. The French commentators reject the wife's confession to prove adultery on the theory that passion or a spirit of vengeance may cause her to lie. See 1 BAUDRY-LACANTINERIE n° 781; 1 CARBONNIER, DROIT CIVIL n° 156 (1955) [hereinafter cited as CARBONNIER]; 1 PLANIOL n° 1436; 1 TOULLIER n° 814. No statement by a Louisiana court suggesting this as a reason for excluding the wife's testimony was found.

thereafter question the child's paternity.[29] *Feazel* severed the rule from its rationale and applied it for the first time to an *action en desaveu*.[30] *Trahan* widened the separation by holding in effect that a child's birth certificate may not be used as evidence of its illegitimacy.[31] It is submitted that the rationale of the rule that a wife's statements cannot bastardize her issue makes it inapplicable to the *action en desaveu*,[32] and its use should be restricted to cases in which a child, never disavowed, is asserting or defending its legitimacy against attack by one other than the husband of the mother.

Remoteness. — *Trahan* recognized in dictum that Article 188 of the Civil Code permits an *action en desaveu* if the child is born 300 days after voluntary separation, provided the husband proves non-cohabitation during the separation.[33] However, the court then severely restricted this possibility by declaring that non-cohabitation can be proved only as provided in Article 189: showing sufficient "remoteness" between husband and wife to make cohabitation physically impossible.[34] As primary authority for the latter proposition the court relied upon the early case of *Tate v. Penne*,[35] which may no longer accurately reflect the law.

29. In this form it has been applied in a variety of cases. *E.g.*, State v. Randall, 219 La. 578, 53 So. 2d 689 (1951) (criminal neglect of family); Smith v. Smith, 214 La. 881, 39 So. 2d 162 (1949) (custody of child); Evans v. Roberson, 176 La. 280, 145 So. 539 (alimony for illegitimate child); Succession of Barth, 178 La. 847, 152 So. 543 (1934); Beard v. Vincent, 174 La. 869, 141 So. 862 (1932); Succession of Flynn, 161 La. 707, 109 So. 395 (1926); Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892); Dejol v. Johnson, 12 La. Ann. 853 (1857); Eloi v. Mader, 1 Rob. 581 (La. 1841) (successions).

30. 222 La. 113, 62 So. 2d 119 (1952). The court, without indicating it was making an entirely new application of the rule, cited Smith v. Smith, 214 La. 881, 39 So. 2d 162 (1949); Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892); Tate v. Penne, 7 Mart.(N.S.) 548 (La. 1829).

31. *But see* Succession of Jacobsen, 182 La. 151, 161 So. 185 (1935). A German birth certificate labelled the child illegitimate. Although the child had a reputation of legitimacy, the court declared the child illegitimate, because there was no proof that its mother was married. That the birth certificate might be a "statement" of the mother apparently did not concern the court.

32. That the husband alone has a right to bring an *action en desaveu* may be a sound reason to exclude testimony of the wife which would controvert his paternity in cases in which the child is asserting his legitimacy or in child custody cases such as Smith v. Smith, 214 La. 881, 39 So. 2d 162 (1949); but it seems illogical to say the same reason forbids use of her testimony in an *action en desaveu* when the husband is exercising his right to bring it.

33. 142 So. 2d 571, 575 (La. App. 3d Cir. 1962). The possibility was apparently first suggested in *The Work of the Louisiana Supreme Court for the 1952-1953 Term — Persons*, 14 LA. L. REV. 121, 123 (1953).

34. 142 So. 2d at 576.

35. 7 Mart.(N.S.) 548 (La. 1829). The court in *Trahan* commented that as far as it could discover the *Tate* case had never been overruled, and quoted as follows: "The legal presumption of the husband being the father, and of access

Tate was based on the Civil Code of 1808,[36] and it was not until the 1825 Code that a husband was allowed to disprove paternity if the wife committed adultery and concealed the birth of the child.[37] Moreover, a concept mentioned in *Tate* — "moral impossibility" of cohabitation — had a precise nineteenth century meaning related to disavowal for adultery and concealment: after proving adultery and concealment, the husband must introduce evidence to establish a "moral impossibility" of cohabitation, for the "moral impossibility" disproved his paternity and justified the disavowal.[38] *Tate* refused to allow a "moral impossibility" to rebut the presumption of cohabitation during voluntary separation, and properly so since the 1808 Code allowed disavowal only for physical impossibility of conception during the marriage. Such a refusal in *Trahan* cannot be so explained, however, for "moral impossibility" of cohabitation as a basis for disavowal of paternity was introduced by the 1825 Code and continued in Article 185 of the 1870 Code.

The Trahan Incongruity. — Not only is the origin of the doctrine that remoteness is an essential element of an *action en desaveu* for adultery and concealment suspect, but also the consequences of the doctrine may be undesirable. *Trahan* is a model illustration, for in a companion suit the husband was awarded a separation from bed and board on grounds of living separate and

being presumed in cases of voluntary separation can only be destroyed by evidence bringing the parties within the exception the law has created to the rule, namely the physical impossibility of cohabitation — the moral will not do. [Tate v. Penne, 7 Mart.(N.S.) 548, 555 (La. 1829)]." 142 So. 2d at 576. The physical impossibliity to which *Tate* refers is separation by physical distance. The moral impossibility would be any evidence, in the absence of physical impossibility, which created a moral certainty that there had been no cohabitation.

36. 7 Mart.(N.S.) at 554. Apparently the court applied the law as expressed by the 1808 Code because it was in force at the time of the child's birth. The cited articles read as follows: La. Civil Code, p. 45, art. 7 (1808): "The law considers the husband of the mother as the father of all children conceived during the marriage. The law admits neither the exception of the wife's adultery nor the allegation of the husband's natural or accidental impotence." *Id.* art. 10: "The legitimacy of the child born three hundred days after the separation from bed and board has been decreed, may be contested, unless it be proved that access has taken place between the husband and wife, since such decree, because it is always presumed that the parties have obeyed the sentence of separation. But in case of voluntary separation, access is always presumed unless the contrary be proved." *Id.* art. 11: "The presumption of paternity as an incident to marriage is also at an end, when the remoteness of the husband from the wife has been such that co-habitation has been physically impossible."

The present code provisions on disavowal of paternity come from the English text of La. Civil Code arts. 203-211 (1825).

37. La. Civil Code art. 204 (1825).

38. See 1 TOULLIER n°° 801-803, 812, 817. See also 1 PLANIOL no. 1437. The term is seldom used by modern French writers.

apart for *more than one year, i.e.*, 365 days.[39] The two cases are contradictory. In order for the child to be legitimate, there must be cohabitation between husband and wife no more than 300 days before the child's birth.[40] Thus, if the child is legitimate, there was cohabitation in fact within the year, necessarily excluding a living separate and apart which would permit a separation from bed and board.[41] Conversely, if there was in fact the requisite living separate and apart, then ipso facto there was no cohabitation and the child is illegitimate. The decisions can be reconciled only by a complete divorce of the concept of legitimacy from biological fact.

The Gillies Solution. — *Gillies v. Gillies*[42] presented the same problem as that involved in *Trahan*. The trial court had sustained an exception of no cause of action to the husband's suit to disavow paternity of a child born 290 days after a divorce granted for two-years separation on the rationale that the husband could disavow paternity only by proving "remoteness"—in this case a legal impossibility because he and his wife had continued to live in the same city during the voluntary separation.[43] The appellate court, perhaps recognizing the incongruity which would result if the child were now declared legitimate, solved the problem by interpreting "remoteness" to mean distance in human relations rather than physical distance.[44] The court should be supported in its efforts to avoid the incongruity of such cases as *Trahan*, but its holding should be resisted insofar as it suggests that the husband must prove "remoteness," however this term be interpreted, in all *actions en desaveu*. Although the concept of "distance in human relations" should have a place in Louisiana law, its use in *Gillies* is contrary to prior jurisprudence relative to the interpretation of "remoteness."[45] The concept seems more properly applicable to rebut the presumption of co-

39. Trahan v. Trahan, 142 So. 2d 577 (La. App. 3d Cir. 1962).

40. Three hundred days is the legal maximum for pregnancy. See LA. CIVIL CODE arts. 187, 188 (1870).

41. *Id.* art. 138. There would have been a reconciliation. See *id.* arts. 152-154; Collins v. Collins, 194 La. 446, 193 So. 702 (1940). Even if the wife did not urge the defense, it seems that the court on its own motion could dismiss the suit as collusive.

42. 144 So. 2d 893 (La. App. 4th Cir. 1962).

43. *Id.* at 895.

44. *Id.* at 896: "The aloofness and coldness of either party makes the remoteness of the husband from the wife such that cohabitation is a physical impossibility."

45. See note 13 *supra*.

habitation during voluntary separation than for use to prove "remoteness" as used in Article 189.[46]

"Remoteness" Reconsidered

Apparently, the concept that the husband must prove "remoteness" to disavow for adultery and concealment was introduced by dictum in *Williams v. Williams*.[47] The concept reflects the idea that the code provisions not only establish *when* a husband may disavow paternity but also *how* he must disprove it. It is submitted that this is a misconception. The present Article 185 suggests that upon proof of adultery and concealment the husband is permitted to disprove his paternity. The article does not indicate how he must do so. Both the French text of Louisiana's 1825 Code and the modern interpretation of the corresponding articles of the French Code Civil support the conclusion that once adultery and concealment are proved the husband may present *all* credible evidence to disprove his paternity.[48]

Action en Desaveu in France. — Disavowal for adultery and concealment is interpreted to include three elements: adultery, concealment of birth, and evidence indicating nonpaternity of the husband.[49] Rejecting the argument that each element must be proved independently,[50] the French courts and modern writers

46. See text accompanying note 33 *supra*.

47. 230 La. 1, 7, 87 So. 2d 707, 709 (1956): "While an action en desaveu may be based upon adultery in certain cases, the father contesting legitimacy must prove that the 'remoteness of the husband from the wife has been such that cohabitation is physically impossible.'" The court refers to Article 189 and to *Feazel*, *Lejeune*, and *Tate*. In both *Feazel* and *Lejeune* the husband sought to disavow paternity on grounds of adultery and concealment *and* on grounds of remoteness. The applicability of *Tate* has already been considered in text accompanying note 35 *supra*.

48. The French text, "*[I]l sera admis à proposer tous les faits propres à justifier qu'il n'est pas le père,*" is translated in the English text to read: "[H]e will be permitted to prove that he is not its father," losing the force of the French text. A more literal translation is: "[H]e will be permitted to present all appropriate facts to prove that he is not its father." For the interpretation of the corresponding French Code provisions see text accompanying note 49 *infra*.

49. See FRENCH CIVIL CODE art. 313; 3 BEUDANT, COURS DE DROIT FRANCAIS n° 1014 (1936) [hereinafter cited as BEUDANT]; CARBONNIER n° 154; 1 COLIN ET CAPITANT, COURS ÉLÉMENTAIRE DE DROIT CIVIL n° 455 (11th ed. 1945) [hereinafter cited as COLIN ET CAPITANT]; 1 MAZEAUD, LECONS DE DROIT CIVIL n° 887 (1955) [hereinafter cited as MAZEAUD]; 1 PLANIOL no. 1435; 2 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANCAIS n°s 802-805 (2d ed. 1952) [hereinafter cited as PLANIOL ET RIPERT].

50. *Contra*, 1 BAUDRY-LACANTINERIE n° 781 which reflects the view of the nineteenth century commentators. *Cf.* 3 HUC. COMMENTAIRE DE CODE CIVIL no 12 (1893); 2 MARCADÉ, EXPLICATION DU CODE CIVIL n° 10 (1873); 1 TOULLIER n°s 812, 815.

consider concealment to be the crucial element of the action:[51] if the husband proves concealment and nonpaternity, in that order, adultery is presumed.[52] To prove concealment, the husband has only to show that his wife attempted to conceal her pregnancy from him — regardless of her success — or that she registered the child as born of a father unknown.[53] To disavow for adultery and concealment, the husband is never required to prove "remoteness" in the sense of physical distance.[54] Evidence that the husband is not the father of the child includes the husband's advanced age or his bad health, domestic strife at the time of the child's conception, a separation in fact,[55] exclusionary blood tests,[56] and any other credible evidence the husband can produce.[57] Furthermore, the French reasonably interpret their provision for disavowal for remoteness;[58] they do not re-

51. They reason that the birth of a legitimate child is a happy event, and therefore if the wife conceals the birth of the child, she admits its adulterous origin. See 3 BEUDANT n° 1014; 1 CARBONNIER n° 154; COLIN ET CAPITANT n° 455; 1 MAZEAUD n° 887; 1 DE LA MORANDIERE, DROIT CIVIL no 714 (1956) [hereinafter cited as DE LA MORANDIERE]; 1 PLANIOL no. 1435; 2 PLANIOL ET RIPERT n° 805; ENCYCLOPEDIE DALLOZ, *filiation legitime*, § 4, n° 152 (1952) and *mise a jour* 1962, *filiation legitime*, § 4, n° 150; Desbois, *Jurisprudence Francaise-Personnes et droits de famille*, 58 REVUE TRIMESTRIELLE DE DROIT CIVIL 86, 93 (1960); *cf.* 1 BAUDRY-LACANTINERIE n° 781.

52. See 3 BEUDANT n° 1015; 1 MAZEAUD n° 887; 1 DE LA MORANDIERE n° 714; 1 PLANIOL no. 1435; 2 PLANIOL ET RIPERT n° 805; ENCYCLOPEDIE DALLOZ, *filiation legitime*, § 4, n° 152 (1952); Desbois, *Jurisprudence Francaise-Personnes et droits de famille*, 59 REVUE TRIMESTRIELLE DE DROIT CIVIL 466, 472 (1961); *cf.* 1 CARBONNIER n° 154 (judge should reject husband's offer to prove non-paternity if it appears concealment of birth was not inspired by adultery).

53. See 1 CARBONNIER n° 154; 1 COLIN ET CAPITANT n° 455; 1 MARTY ET REYNAUD, DROIT CIVIL n° 485 (1956) [hereinafter cited as MARTY ET REYNAUD]; 1 MAZEAUD n° 887; 1 DE LA MORANDIERE n° 714; 1 PLANIOL no. 1435; 2 PLANIOL ET RIPERT n° 805; ENCYCLOPEDIE DALLOZ, *filiation legitime*, § 4, n° 166 (1952); *cf.* Cour de cassation (ch. civ. lre sect. civ.) 30 oct 1961, D.1962.J.702, note Holleaux; Desbois, *Jurispurdence Francaise-Personnes et droits de famille*, 60 REVUE TRIMESTRIELLE DE DROIT CIVIL 290, 294 (1962) (proof of fraudulent intention by wife is indispensable but sufficient condition of proving concealment).

54. Cour de cassation (civ. lre sect. civ.) 21 oct 1958, D.1959.S.41.

55. 1 COLIN ET CAPITANT n° 455; 1 DE LA MORANDIERE n° 714; 1 PLANIOL no. 1437; 2 PLANIOL ET RIPERT no 804; *cf.* 1 BAUDRY-LACANTINERIE no 781.

56. 1 CARBONNIER no 154; 1 MARTY ET REYNAUD no 485; 1 MAZEAUD no 887; 1 DE LA MORANDIERE n° 714; 2 PLANIOL ET RIPERT n° 804. Mazeaud reports that the Court de cassation has directed the triers of fact to reject the sereological tests as the only evidence if the test is scientifically questionable. Apparently the French courts do not allow an *action en desaveu* based on blood tests alone. This parallels the holding of Williams v. Williams, 230 La. 1, 87 So. 2d 707 (1956), which could be interpreted to permit use of blood group tests in the same circumstances as the French courts permit their use. It was reported in Note, 17 LA. L. REV. 494, 497 (1957) that the use of blood tests in France was specifically authorized by legislation in 1955. The French courts anticipated the legislation by nearly twenty years. See ENCYCLOPEDIE DALLOZ, *filiation legitime*, § 4, n° 185 (1952), reporting cases as early as 1937.

57. One irate husband was allowed to allege that the child resembled his wife's lover. 1 COLIN ET CAPITANT n° 455.

58. FRENCH CIVIL CODE art. 312.

quire such physical separation that it was impossible for the spouses to meet but only that the spouses in fact did not meet.[59]

It is submitted that the French interpretation, which operates to receive evidence, is more realistic than the Louisiana interpretation, which operates to exclude evidence.[60] By the French interpretation there seems small danger that any legitimate child will be disavowed. By the Louisiana interpretation there seems great probability that children not in fact those of the husband will join his legitimate children as forced heirs. Was not the *action en desaveu* devised to prevent such an event? The husband who brings an *action en desaveu* is not a moral monster; he is an injured party attempting to protect himself and his legitimate children from the pretensions of spurious offspring. His evidence should be heard and a remedy provided without requiring of him the impossible task of proving remoteness in every case.

POSSIBLE REMEDY OTHER THAN ACTION EN DESAVEU

Since the requirements of proof in an *action en desaveu* are so formidable, it may be asked if the husband has any other remedy if he is not in fact the father of his wife's child. The *action en desaveu* clearly is not the only mode of contesting *legitimacy*. Legitimacy requires a valid marriage, proven filiation to a married woman, and paternity by her husband.[61] The *action en desaveu* is applicable only to the third element; the first two may be challenged in suits other than an *action en desaveu*.[62] Whether paternity may be challenged in another action

59. See 1 CARBONNIER n° 154; 1 COLIN ET CAPITANT n° 454; 1 MAZEAUD n° 885; 1 DE LA MORANDIERE n° 713; 1 PLANIOL no. 1432; 2 PLANIOL ET RIPERT n° 800. Carbonnier lists incarceration, service in the army, or abandonment of the conjugal domicile as productive of sufficient remoteness, provided the spouses did not in fact meet.

60. The clearest policy statement from a Louisiana court on the basis of their severe interpretation of the Code is: "It has always been the policy of the Louisiana law to protect innocent children, born during marriage, against scandalous attacks upon their paternity by the husband of the mother, who may be seeking to avoid his obligations, or by third persons unscrupulously claiming the estate of the husband after his death." Williams v. Williams, 230 La. 1, 7, 87 So. 2d 707, 709 (1956). *Query*: If the husband is not in fact the father of the child, what is his obligation toward it? Is not his paternity rather than the child's innocence the foundation of his obligations?

61. Problems of legitimation and putative marriages are excluded from this Comment.

62. See Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892) on the *action en contestation d'etat*. Legitimacy was disproved in Succession of Jacobsen, 182 La. 151, 161 So. 185 (1935) by showing there had been no marriage; and in Succession of O'Neil, 52 La. Ann. 1754, 28 So. 259 (1900) by showing lack

depends on the scope of the presumption of the husband's paternity. By its terms, Article 184 applies to "all children conceived during the marriage";[63] but Article 197 allows proof against legitimate filiation by evidence that the child is not that of the husband of the mother.[64] Unless the two articles are contradictory, each must be applicable in some situations. Both Louisiana and French interpretations of these provisions will be examined in search of a solution.

The Louisiana Interpretations of Articles 184 and 197

Logically the husband need bring the *action en desaveu* only if the child is within the statutory presumption of paternity.[65] To gain protection of the presumption the child must at least be able to prove filiation to the husband's wife.[66] The Code allows proof of maternal filiation by evidence from the public records,[67] by reputation of status,[68] or by testimony.[69] The jurisprudence allows proof of filiation by reputation of status only if evidence from the public records is not available.[70] For proof of filiation, only the recitation of maternity — the mother's name — is significant in the registry of birth; for, regardless of the paternity there alleged, the husband of the mother is presumed to be the father of the child;[71] unless he timely disavows by judicial action, the child's paternity is unassailable notwithstanding Ar-

of filiation to the alleged mother. See generally 1 PLANIOL nos. 1380-1381.

63. LA. CIVIL CODE art. 184 (1870): "The law considers the husband of the mother as the father of all children conceived during the marriage."

64. *Id.* art. 197: "Proof against legitimate filiation may be made by evidence that the plaintiff is not the child of the mother whom he pretends to be his, and the maternity being proved, that he is not the child of the husband of the mother." The present article is an inexact translation of the French text of La. Civil Code art. 216 (1825). The French text "*tous les moyens propres à constater*" is rendered by the single word "evidence." "All appropriate means to establish" is a more literal translation which preserves the force of the French text.

65. See LA. CIVIL CODE art. 184 (1870).

66. See Succession of Anderson, 176 La. 66, 145 So. 270 (1932); Boykin v. Jenkins, 174 La. 335, 140 So. 495 (1932); 1 PLANIOL no. 1413.

67. LA. CIVIL CODE art. 193 (1870). See also LA. R.S. 40:159 (1950).

68. LA. CIVIL CODE arts. 194, 195 (1870). The articles read as if proof by reputation is complete proof both of maternal and paternal filiation. *Accord*, 1 PLANIOL nos. 1387-1390.

69. LA. CIVIL CODE art. 196 (1870).

70. See Succession of Rockwood, 231 La. 521, 91 So. 2d 779 (1956); Succession of Gaudinse, 187 La. 844, 175 So. 595 (1937); Succession of Jacobsen, 182 La. 151, 161 So. 185 (1935).

71. See Succession of Flynn, 161 La. 707, 109 So. 395 (1926) (wife's paramour registered as father; court declared child to be offspring of husband). *Cf.* Ezidore v. Cureau's Heirs, 113 La. 839, 37 So. 773 (1904); (child baptized as child of paramour; held to be offspring of husband); Eloi v. Mader, 1 Rob. 581 (La. 1841) (same).

ticle 197.[72] It should be remembered that the *action en desaveu* prescribes in either one or two months according to the circumstances.[73] The Louisiana interpretation compels a regular *action en desaveu* regardless of the circumstances of the child's birth.

Interpretation of the Corresponding Articles of the French Code

French law parallels Louisiana law in modes of proving maternal filiation and in presuming paternity by the husband of the mother whenever the mother is identified by the act of birth.[74] If the child's act of birth and reputation of status both import legitimacy, his status can be challenged only by a timely *action en desaveu.*[75] However, if the child who can prove maternal filiation neither by act of birth nor by reputation of status brings an action asserting his legitimacy, the French permit the husband to defend by what amounts to an *action en desaveu,* but which need not be brought within the prescriptive period of the regular *action en desaveu.*[76] This defense is permitted under

72. See Succession of Verrett, 224 La. 461, 70 So. 2d 89 (1954); State v. Lemoine, 224 La. 200, 69 So. 2d 15 (1954); State v. Randall, 219 La. 578, 53 So. 2d 689 (1951); Smith v. Smith, 214 La. 881, 39 So. 2d 162 (1949); Evans v. Roberson, 176 La. 280, 145 So. 539 (1933); Beard v. Vincent, 174 La. 869, 141 So. 862 (1932); Succession of Flynn, 161 La. 707, 109 So. 395 (1926); Succession of Ledet, 122 La. 220, 47 So. 506 (1908); Ezidore v. Cureau's Heirs, 113 La. 839, 37 So. 773 (1904); McNeely v. McNeely, 47 La. Ann. 1321, 17 So. 982 (1895); Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892); Dejol v. Johnson, 12 La. Ann. 853 (1857); Eloi v. Mader, 1 Rob. 581 (La. 1841); Jenkins v. Aetna Cas. & Surety Co., 158 So. 217 (La. App. Orl. Cir. 1935); Favre v. Celotex Co., 139 So. 904 (La. App. 1st Cir. 1932). "If a man can make himself legally the father of a child by adoption or by acknowledgment of one illegitimate, we can see no reason why he cannot do so by failing to disavow paternity of his wife's child within the time allowed by law" was the comment of a federal court in an extreme case. Ellis v. Henderson, 204 F.2d 173, 177 (5th Cir. 1953). But see Texas Co. v. Stewart, 101 So. 2d 222 (La. App. Orl. Cir. 1958) for the proposition that if the wife enters a bigamous second marriage, Article 184 cannot be invoked to establish paternity of the first husband for a child born during the second marriage. Thus, if the woman lives in open concubinage her children have her husband for father; but if she goes through a bigamous marriage and the man is in good faith, her children have the putative spouse for father.

73. LA. CIVIL CODE arts. 191, 192 (1870).

74. The act of birth is roughly equivalent to the Louisiana birth certificate. It is enough to prove filiation if the mother's maiden name appears on the act of birth. If further evidence proves she was married when the child was born, the presumption of her husband's paternity applies. See 3 BEUDANT n° 977; 1 COLIN ET CAPITANT n° 445; 1 MARTY ET REYNAUD n° 467; 1 DE LA MORANDIERE n°s 688, 705; 1 MAZEAUD n° 828; 1 PLANIOL nos. 1385, 1413; 2 PLANIOL ET RIPERT n° 741; ENCYCLOPEDIE DALLOZ, *filiation legitime,* § 3, n°s 68, 70 (1952), *mise a jour 1962, filiation legitime,* § 3, n° 67.

75. FRENCH CIVIL CODE art. 322. The article provides that if the child's reputation of status conforms to his act of birth, the child cannot prove a contrary status, nor may his status be challenged save by an *action en desaveu.* See ENCYCLOPEDIE DALLOZ, *filiation legitime* § 3, n°s 106-114 (1952). If the child's reputation of status does not conform to his act of birth, he may offer to prove either filiation and his status may be challenged by interested parties. However, paternity cannot be made an issue in such an action. *Ibid.*

76. See 3 BEUDANT n° 1025; 1 CARBONNIER n° 154; 1 COLIN ET CAPITANT

French Code Article 325 (of which Louisiana Civil Code Article 197 is an almost exact translation) on the rationales that a child unable to prove maternal filiation by an act of birth was either reported born of parents unknown or not registered at all;[77] that adultery is the most plausible explanation of such mysterious maternity;[78] that inability to prove maternal filiation either by act of birth or by reputation of status demonstrates the child's birth has been concealed.[79] In essence, the disavowal in defense is a special case of disavowal for adultery and concealment,[80] differing from the regular *action en desaveu* as it is not governed by the short prescriptive period. Thus in France the aggrieved husband is not obliged to bring a timely *acton en desaveu* if the child can prove maternal filiation only by testimony.[81]

It is unsettled in France to what extent the presumption of the husband's paternity can be employed if there are conflicting presumptions of paternity. The problem arises if the child cannot prove maternal filiation by act of birth or reputation of status, but has been acknowledged by a third party.[82] The Cour de Cassation refused to allow one husband to employ the presumption in a case in which husband, wife, and her paramour were all certain that the child was not the husband's child;[83] but on referral, the Cour d'Appel de Lyon allowed application of the presumption because it was biologically possible that the husband was the father of the child.[84] In a later case, the Cour de

nº 458; 1 MARTY ET REYNAUD nºs 490-492; 1 MAZEAUD nº 888; 1 DE LA MORANDIERE nº 717; 1 PLANIOL no. 1459; 2 PLANIOL ET RIPERT nº 814. This interpretation of Article 325 appears as early as 1 TOULLIER nºs 893-896.

77. The writers do not mention the possibility of lost records in this respect. In such case, however, a legitimate child probably would enjoy a reputation of legitimacy.

78. 1 CARBONNIER nº 154.

79. 1 MAZEAUD nº 888.

80. See *ibid.* However, the husband has only the present evidence of his nonpaternity. He does not have to prove adultery, concealment, or physical impossibility of cohabitation. 2 PLANIOL ET RIPERT nº 814.

81. 3 BEUDANT nº 1028; 1 MARTY ET REYNAUD nº 493; 1 MAZEAUD nº 888; 1 DE LA MORANDIERE nº 718; 1 PLANIOL no. 146. French doctrine has been notably unenthusiastic about the anticipatory disavowal, but it is well established in the jurisprudence. See ENCYCLOPEDIE DALLOZ, *filiation legitime* § 5, nºs 437-439, and § 6, nºs 494-500 (1952).

82. See 1 MAZEAUD nº 895.

83. Cour de cassation (Ire sect. civ.) 28 mai 1957 (Duran C. Mouchotte) D.1958.J.89, note Tallon, and S.1958.J.81, note. The child had been registered as born of father and mother unknown, after which the paramour had acknowledged the child as his natural child. The husband was asserting his paternity and the child's legitimacy — the reverse of an *action en desaveu.* See generally Pascal, *Who Is the Papa?*, 18 LA. L. REV. 685 (1958).

84. Cour d'Appel de Lyon, 3 juin 1958 (Mouchotte C. Duran) D.1959.J.580,

Cassation again refused to allow a husband to utilize the presumption, holding that there was such discrepancy between fact and presumption that its application would be a fraud on the law.[85]

Applicability of Article 197 in Louisiana

In *Trahan v. Trahan*[86] the plaintiff prayed to be adjudged not the father of the child on the theory that the child's lack of reputation of legitimacy enabled him to challenge its legitimacy by any credible evidence under Article 197.[87] In essence the husband urged that a regular *action en desaveu* was unnecessary. The court held that Article 197 applied only when a child asserted its legitimacy and could not be used in an *action en desaveu*.[88] The result can be supported on the facts of the case; the child could prove filiation to the husband's wife by its birth certificate, and in such circumstances both Louisiana and France apply the presumption of the husband's paternity.[89] It is suggested, however, that the interpretation of Article 197 should be the same as the interpretation of French Code Article 325, and the husband or his heirs should be allowed to disprove paternity in defense to a child's claim of legitimacy without resorting to the regular *action en desaveu* if the child cannot prove maternal filiation either from the public records or by reputation of status.[90] The claim of legitimacy is so suspicious in such circumstances that the husband should not be required to bring

note Nerson. Nerson concludes that the trier of fact will utilize the presumption only if there is some verisimilitude between presumption and fact.

85. Cour de cassation (ch. civ., lre sect. civ.) 14 Jan 1959 (Decagny C. Moret) D.1959.J.15, note de la Manierre. The facts were similar to *Duran C. Mouchotte*, note 83 *supra*. De la Manierre defends the *Duran* decision against various criticisms, arguing that they were all based on a nineteenth century conception of family which is out of touch with modern realities. *Cf.* Texas Co. v. Stewart, 101 So. 2d 222 (La. App. Orl. Cir. 1958) for disposition of a Louisiana conflict-of-paternity case.

86. 142 So. 2d 571, 576 (La. App. 3d Cir. 1962).

87. Plaintiff's argument above appears in his brief; the court did not discuss it in the opinion.

88. Trahan v. Trahan, 142 So. 2d 571, 576 (La. App. 3d Cir. 1962).

89. Louisiana: see notes 70 and 71 *supra;* France: see note 74 *supra.*

90. Such interpretation would form an exception to the jurisprudential rule, established by the cases cited in note 72 *supra*, that if the husband does not disavow paternity, the child's legitimacy may not thereafter be questioned. Indeed, it can be argued that the redactors of the Code intended Article 197 to have a still wider scope, for they refrained from drafting any equivalent to Article 322 of the French Civil Code. See note 75 *supra.* As the Louisiana Code lacks any equivalent article, there seems no legislative impediment to allowing a disavowal in defense if the child can prove maternal filiation from the public records but lacks a reputation of legitimacy. Justice might be better served by so doing in cases such as Succession of Flynn, 161 La. 707, 109 So. 395 (1926) (child's birth certificate named wife's paramour as father).

a timely *action en desaveu.*[91] The suggested interpretation would make Articles 184 and 197 complementary instead of contradictory, and allow a reasonable disposition of extreme cases in which the husband in all probability never learned of the child's birth,[92] instead of making them monuments to the intransigence of the law.

Karl W. Cavanaugh

CONSTITUTIONALITY OF STATE STATUTES PROHIBITING THE DISSEMINATION OF BIRTH CONTROL INFORMATION

The current widespread attention given the continuing population growth by news media[1] and a growing interest among a large segment of the married population in spacing family development has lent new impetus to examination of the controversial subject of birth control. Current state statutory provisions on the subject of contraceptives stem mainly from the influence of the Federal Comstock Act of 1873,[2] the first important legislative effort in this area.[3] The federal provisions seem absolute in their prohibitions on interstate distribution of contraceptive devices,[4] but judicial interpretation has created many exceptions in favor of certain activities.[5] A ma-

91. LA CIVIL CODE art. 209(3) may be the basis of another exception to Article 184 in cases in which the wife is living in open concubinage with a third party at the time of the child's conception.

92. *E.g.*, Ellis v. Henderson, 204 F.2d 173 (5th Cir. 1953); Succession of Ledet, 122 La. 220, 47 So. 506 (1908); Succession of Saloy, 44 La. Ann. 433, 10 So. 872 (1892). If the husband in fact never learns of the child's birth, his heirs should be permitted to bring a regular *action en desaveu.* See LA. CIVIL CODE art. 192 (1870).

1. *E.g.*, United States News & World Report, p. 68 (May 6, 1963).

2. 18 U.S.C. §§ 1461-1462 (1958).

3. See Stone & Pilpel, *The Social and Legal Status of Contraception*, 22 N.C.L. REV. 212, 219-20 (1944), wherein the authors contend the Comstock Act was archaic when passed, but that Congress was influenced by claims that the nation was falling into the clutches of organized vice.

4. 18 U.S.C. § 1461 (1958): ". . . Every article or thing designed . . . for preventing conception . . . [and] every description calculated to induce or incite a person to so use or apply any such article . . . is declared to be nonmailable matter. . . ." *Id.* § 1462: "Whoever . . . knowingly uses any . . . common carrier, for [carriage in interstate commerce any article for preventing conception]."

5. See Stone & Pilpel, *The Social and Legal Status of Contraception*, 22 N.C.L. REV. 212, 221 (1944). When the Comstock Act was introduced it contained exceptions for articles of contraception when prescribed by a physician. The law as passed, however, did not contain this exception. Judicial interpretation has read many exceptions back into the law. *E.g.*, United States v. One Package, 86 F. 2d 737 (2d Cir. 1936) (physicians allowed to import or ship by