Louisiana Law Review

Volume 67 | Number 2
Winter 2007

Glossae on the New Law of Filiation

J.-R. Trahan
Louisiana State University Law Center

Glossae on the New Law of Filiation

J.-R. Trahan[*]

Through the enactment of Act 192 of 2005 ("2005 Act 192"), effective June 29, 2005, and Act 344 of 2006 ("2006 Act 344"), effective June 13, 2006, the Louisiana Legislature comprehensively revised those parts of Louisiana's legislation that establish the law of "filiation by nature"[1]—Chapters 1, 2, and 3 of Title VII of Book I of the Civil Code as well as the correlative Civil Code Ancillaries. Like nearly all (indeed, all but one[2]) of the "comprehensive revisions" of the Civil Code that have been accomplished over the last three decades, this one ("Revision") grew out of the work of the Louisiana State Law Institute ("Institute"), more precisely, its Persons Committee ("Committee").[3] Though the Committee had produced but a single projet ("Projet") for the Revision, the Projet, for reasons of legislative strategy, was later split into two parts, the first of which consisted of the proposed revisions to the Civil Code and the second of which consisted of the proposed revisions to the Civil Code Ancillaries. The former formed the basis for 2005 Act 192; the latter, the basis for 2006 Act 344.[4]

My aim in this article is to present to the reader the revised Civil Code articles and the most important of the revised Civil Code Ancillaries, with a view to assisting him in understanding how this new legislation does and does not "change the law." To this end, I shall follow a format for the presentation of revisions to the Civil Code that Dean Symeon Symeonides pioneered some years back and that I have since then followed,[5] namely, that of (1) visually juxtaposing the texts of the new and old legislation, and (2) "glossing" (footnoting) the text of the old legislation or that of the new legislation, as might be appropriate, to signal what has been changed and what has not. In referring to the old and new legislation, I shall, following the practice first established by Dean Symeonides, use the abbreviations "OA" (old article) and "NA" (new article), respectively.

---

* James Carville Alumni Associate Professor of Law, Paul M. Hebert Law Center, Louisiana State University.

** The Board of Editors of the *Louisiana Law Review* has relaxed its rules of citation to enhance the readability of Professor Trahan's in-depth analysis of the new law of filiation. Additionally, like previous scholarship by Professor Trahan, this article features citations to numerous sources of foreign law. Unless otherwise indicated, the translations of those sources are his own.

1. Filiation is defined as "the [juridical] line that unites a child to his father or to his mother: to his father, paternal filiation or paternity; to his mother, maternal filiation or maternity." Gérard Cornu, DROIT CIVIL: LA FAMILLE No. 195, at 313 (7th ed. 2001); *see also* Francesco Messineo, 2 MANUALE DI DIRITTO CIVILEE COMMERCIALE: DIRITTI DELLA PERSONALITÀ, DIRITTI DELLA FAMIGLIA, DIRITTI REALI § 62, No. 1, at 145 (9th ed. 1965) ("Filiation is the [juridical] relation that exists between the progeny and the progenitor (or progenitors), by virtue of which the former is called the child of the latter . . . , that is, whereby the status of child is attributed to him and he acquires the rights (in addition to being the subject of the duties) that are inherent in this status. The relation of filiation is symmetrical with that of paternity and, respectively, that of maternity, by virtue of which the progenitor acquires the status of father or mother of the progeny."); Eduardo A. Zannoni, 2 DERECHO CIVIL: DERECHO DE FAMILIA § 793, at 283 (2d ed. 1989) ("The term 'filiation'—from the Latin *filius*, son—signifies the conjunction of juridical relations, determined by paternity and by maternity, that bind parents to their children within the family."); Caio Mário da Silva Pereira, 5 INSTITUIÇÕES DE DIREITO CIVIL: DIREITO DE FAMÍLIA No. 410, at 173–74 (7th ed. 1991) ("[F]iliation is the juridical relation that ties the child to his parents. It is established between persons one of whom descends from the other and is considered as filiation *properly so called* when seen from the side of the child; conversely, considered from the side of the father, it is called 'paternity' and from that of the mother, 'maternity.'").

Two different kinds of filiation can be distinguished. *See generally* Jean Carbonnier, DROIT CIVIL: LA FAMILLE: L'ENFANT, LE COUPLE 181–82 (20th ed. 1999) (distinguishing filiation "according to the flesh" from adoptive filiation); DROIT DE LA FAMILLE No. 1193, at 387 (Jacqueline Rubellin-Devichi dir., 1999) (distinguishing filiation "by procreation" from adoptive filiation). First, there is filiation "by nature." This kind of filiation arises by virtue of an actual or presumed biological relationship between the parent and the child, namely, the relationship of progenitor and progeny. *See* Cornu, *supra*, No. 198, at 315. Second, there is filiation "by law." This kind of filiation, sometimes also called "adoptive" filiation, for it requires an act and a judgment of adoption, "arises from the legislative will to create something identical to this [natural] filial line so as to attach the adopted child to an individual or to the spouses that the law institutes as parent(s)." DROIT DE LA FAMILLE, *supra*, No. 1194, at 389.

The literature on the law of filiation is abundant. That, in Louisiana, includes the following: Christopher L. Blakesley, PARENT AND CHILD §§ 5.01–5.21, *in* LOUISIANA FAMILY LAW 5-1–5-38 (1997); Sandi Varnado, Comment, *Who's Your Daddy?: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609 (2006); June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295 (2005); Brianne M. Star, Comment, *A Matter of Life and Death: Posthumous Conception*, 64 LA. L. REV. 613 (2004); Kathryn Venturatos Lorio, *The Louisiana Civil Law Tradition: Archaic or Prophetic in the Twenty-First Century?*, 63 LA. L. REV. 1, 13–19

(2002); Jean-Louis Baudouin, *Science, Ethics and Civil Law*, 61 LA. L. REV. 423, 425–26 (2001); Kathryn Venturatos Lorio, *Pushing the Boundaries: An Interdisciplinary Examination of New Reproductive Technologies: The Process of Regulating Assisted Reproductive Technologies: What We Can Learn from Our Neighbors—What Translates and What Does Not*, 45 LOY. L. REV. 247 (1999); Christopher L. Blakesley, *Scientific Testing and Proof of Paternity: Some Controversy and Key Issues for Family Law Counsel*, 57 LA. L. REV. 379 (1997); Kathryn Venturatos Lorio, *Successions and Donations: From Cradle to Tomb: Estate Planning Considerations of the New Procreation*, 57 LA. L. REV. 27 (1996); Ellen J. Garside, Comment, *Posthumous Progeny: A Proposed Resolution to the Dilemma of the Posthumously Conceived Child*, 41 LOY. L. REV. 713 (1996); Kathryn Venturatos Lorio, *Roman Sources and Constitutional Mandates: The Alpha and Omega of Louisiana Laws on Concubinage and Natural Children*, 56 LA. L. REV. 317, 326–31, 333–35 (1995); J.E. Cullins, Jr., Note, *Should the Legitimate Child Be Forced to Pay for the Sins of Her Father?:* Sudwischer v. Estate of Hoffpauir, 53 LA. L. REV. 1675 (1993); Dee O'Neil Andrews, Comment, *DNA and Dads: Considerations for Louisiana in Using DNA Blood Tests to Determine Paternity*, 38 LOY. L. REV. 425 (1992); Timothy S. Cragin, Note, Sudwischer v. Estate of Hoffpauir*: The Constitutional Right to Prove Filiation and the $670,000 Blood Test*, 38 LOY. L. REV. 493 (1992); C.B. Poché, *Recent Development*, Chatelain v. State*: Defending the Wrongful Death Action by Asserting the Existence of an Illegitimate Child of the Decedent*, 66 TUL. L. REV. 2057 (1992); Barbara L. Keller, Comment, *Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?*, 49 LA. L. REV. 143 (1988); Valerie Seal Meiners, Comment, *The Child with Two Fathers: Updating the Wisdom of Solomon*, 46 LA. L. REV. 1211 (1986); Kathryn Venturatos Lorio, *Family Law: Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641 (1984); Katherine Shaw Spaht, *Developments in the Law, 1983–1984: Persons*, 45 LA. L. REV. 467, 467–68 (1984); Roy Edward Blossman, Note, *An Unborn Child's Right to Prove Filiation:* Malek v. Yekani-Ford, 44 LA. L. REV. 1777 (1984); Katherine Shaw Spaht, *Developments in the Law, 1981–1982: Persons*, 43 LA. L. REV. 535 (1982); Katherine Shaw Spaht, *Developments in the Law, 1980–1981: Persons*, 42 LA. L. REV. 403 (1982); Katherine Shaw Spaht, *Developments in the Law, 1979–1980: Persons*, 41 LA. L. REV. 372 (1981); Helen Scott Johnson, Note, *Louisiana's Presumption of Paternity: The Bastardized Issue*, 40 LA. L. REV. 1024 (1980); Katherine Shaw Spaht, *Work of the Louisiana Appellate Courts for the 1978–1979 Term, Private Law: Persons*, 40 LA. L. REV. 543 (1980); 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 (1976); Neil S. Hyman, *Louisiana's New Disavowal Legislation: A Critical Appraisal*, 22 LOY. L. REV. 963 (1976); Durinda L. Robinson, Note, *Presumption of Paternity: An Imposition on the Husband of the Mother*, 3 S.U. L. REV. 102 (1976); Malcolm S. Murchison, *The Work of the Louisiana Legislature for the 1976 Regular Session, Private Law: Persons*, 37 LA. L. REV. 95, 98–103 (1976); Katherine Shaw Spaht, *The Work of the*

Louisiana Appellate Courts for the 1973–1974 Term, Private Law: Persons, 35 LA. L. REV. 259, 261–63 (1975); W. Thomas Tête, *The Work of the Louisiana Appellate Courts for the 1968–1969 Term, Private Law: Persons*, 30 LA. L. REV. 171 (1970); Glenn G. Goodier, Note, *Presumption of Paternity Under Louisiana Civil Code Article 184*, 16 LOY. L. REV. 235 (1969); P. Terrance J. Leach, Comment, *The Status of Illegitimates in Louisiana*, 16 LOY. L. REV. 87 (1969); Lee Hargrave, *The Work of the Louisiana Appellate Courts for the 1967–1968 Term, Private Law: Persons*, 29 LA. L. REV. 171, 171–72 (1969); Robert A. Pascal, *The Work of the Louisiana Appellate Courts for the 1965–1966 Term, Private Law: Persons*, 26 LA. L. REV. 459, 461–63 (1966); Robert A. Pascal, *The Work of the Louisiana Appellate Courts for the 1963–1964 Term, Private Law: Persons*, 25 LA. L. Rev. 291 (1965); Karl W. Cavanaugh, Comment, *Action en Desaveu— Challenging the Presumption of the Husband's Paternity*, 23 LA. L. REV. 759 (1963); Robert A. Pascal, *Persons*, 20 LA. L. REV. 211 (1960); Charles Lindsey, Note, *Family Law: Determination of Paternity of Child of Putative Marriage*, 19 LA. L. REV. 706 (1959); Robert A. Pascal, *Who is the Papa?*, 18 LA. L. REV. 685 (1958); Robert A. Pascal, *Persons*, 18 LA. L. REV. 18, 25 (1957); William H. Cook, Jr., Note, *Family Law: Use of Blood Tests in Actions en Desaveu*, 17 LA. L. REV. 494 (1957); Robert A. Pascal, *Persons*, 17 LA. L. REV. 303, 310 (1957); Robert J. Jones, Note, *Family Law—Illegitimate Children—Proof of Paternity*, 15 LA. L. REV. 218 (1954); Harold J. Brouillette, Comment, *Presumption of Legitimacy and the "Action en Desaveu,"* 13 LA. L. REV. 587 (1953); Robert A. Pascal, *The Work of the Louisiana Supreme Court for the 1952–1953 Term: Persons*, 14 LA. L. REV. 114, 121–29 (1953); Robert A. Pascal, *The Work of the Louisiana Supreme Court for the 1945–1946 Term: Persons*, 7 LA. L. REV. 217, 224–25 (1947); Leonard Oppenheim, *Acknowledgment and Legitimation in Louisiana—Louisiana Act 50 of 1944*, 19 TUL. L. REV. 325 (1945); Betty Ann Gremillion, Comment, *What Effect Has Proof of Maternity*, 6 LA. L. REV. 268 (1945); Ashton Phelps, Note, *Bastards and Natural Children—Legitimation by Subsequent Marriage—Article 198, Louisiana Civil Code of 1870*, 11 TUL. L. REV. 309 (1937); Helen S. Kohlman, Note, *Successions: Acknowledgement of Miscegenous Illegitimates*, 13 LOY. L. REV. 189 (1966); Robert Moureaux, *The French Case-Law As to Disavowal of Paternity*, 6 TUL. L. REV. 445 (1932); L. Julian Samuel, Comment, *Acknowledgment of Illegitimate Children*, 6 TUL. L. REV. 120 (1931). In France, from whose law of filiation much of Louisiana's was derived, the topic is treated at length in the civil law treatises. *See, e.g.*, Alain Bénabent, DROIT CIVIL: LA FAMILLE Nos. 551–795, at 313–441 (10th ed. 2001); Gérard Cornu, DROIT CIVIL: LA FAMILLE Nos. 195–306, at 313–469 (7th ed. 2001); Patrick Courbe, DROIT DE LA FAMILLE Nos. 632–1009, at 253–392 (2d ed. 2001); Jean Carbonnier, DROIT CIVIL: LA FAMILLE: L'ENFANT, LE COUPLE 179–336 (20th ed. 1999); Henri Mazeaud & Léon Mazeaud, 1–3 LEÇONS DE DROIT CIVIL: LA FAMILLE Nos. 820–984, at 193–401 (Laurent Leveneur rev., 7th ed. 1995); Charles Aubry & Charles Rau, 9 DROIT CIVIL FRANÇAIS §§ 542–46, 554–72, at 165–303 (Paul Esmein rev., 6th ed. 1953); Marcel Planiol & Georges Ripert, 2 TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS: LA FAMILLE Nos. 709–1073, at

585–929 (André Rouast rev., 2d ed. 1952); Gabriel Baudry-Lacantinerie & G. Chéneux, 3 TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL: DES PERSONNES Nos. 399–746, at 271–726 (2d ed. 1902); Victor Marcadé, 2 EXPLICATION THÉORIQUE ET PRATIQUE DU CODE CIVIL Nos. 1-122, 1-126 (8th ed. 1886); François Laurent, 3 PRINCIPES DE DROIT CIVIL FRANÇAIS Nos. 359–493, at 422–630 (2d ed. 1876); François Laurent, 4 PRINCIPES DE DROIT CIVIL FRANÇAIS Nos. 1–254, 5–340 (2d ed. 1876); C.-B.-M. Toullier, 1 DROIT CIVIL FRANÇAIS Nos. 784–1038, at 183–232 (nouv. ed. 1837). French legal periodical articles also treat the law of filiation in great detail. *See, e.g.*, Anne Lefebvre Teillard, *"Pater Is Est Quem Nuptiae Demonstrant": Jalons pour une Histoire de la Présomption de Paternité*, 69 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 331 (1991); Louis Amiable, *De la Paternité du Mari en Droit Romain et dans l'Ancienne Jurisprudence Française*, 8 REVUE HISTORIQUE DE DROIT FRANÇAIS ET ÉTRANGER 5 (1862).

2. The sole exception to this generalization is the revision of the part of the Civil Code that pertains to "marital donations," namely, Titles IX and X of Book III. On that revision, see generally J.-R. Trahan, *Glossae on the New Law of Marital Donations*, 65 LA. L. REV. 1059 (2005).

3. Though I have served on the Committee for several years now (since 2001), I had only a small hand in the preparation of the Projet. That was so because, by the time I was appointed to the Committee, the Projet was already nearly complete.

4. As a general rule, Civil Code revisions that originate in the Institute have a two-fold purpose: (1) to bring the prior law "up to date"; and (2) to correct technical deficiencies in the prior law. *See* Trahan, *supra* note 2, at 1060–61. This Revision is no exception. For more on the purposes behind the Revision, see Katherine Shaw Spaht, *Who's Your Momma, Who are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307 (2007).

5. *See* Trahan, *supra* note 2.

Tit. VII. Parent and Child	*Tit. VII.* Parent and Child[6]

6. *Glossa* on *Tit. VII. Parent and Child.* After the Revision, Title VII of Book I remains, as it was before, subdivided into several chapters. But the Revision has altered the schema of subdivision in part, as the following chart reveals:

Tit. VII. Parent and Child	*Tit. VII.* Parent and Child
Ch. 1. Of Children in General	*Ch. 1.* Proof of Maternity
Ch. 2. Of Legitimate Children	*Ch. 2.* Proof of Paternity
Sec. 1. Of Legitimacy Resulting from Marriage	*Sec. 1.* The Presumption of Paternity of the Husband;

Sec. 2. Of the Manner of Proving Legitimate Filiation
Ch. 3. Of Illegitimate Children
Sec. 1. Of Legitimation
Sec. 2. Of the Acknowledgment of Illegitimate Children
Ch. 4. Of Adoption
Ch. 5. Of Parental Authority

Disavowal of Paternity; Contestation; Establishment of Paternity
Subsec. A. The Presumption
Subsec. B. Disavowal
Subsec. C. Contestation and Establishment of Paternity
Sec. 2. Presumption of Paternity by Subsequent Marriage and Acknowledgment
Sec. 3. Other Methods of Establishing Paternity
Ch. 3. [Blank]
Ch. 4. Of Adoption
Ch. 5. Of Parental Authority

It will be noted that the changes to Title VII made by the Revision pertain only to what had been the first three chapters: these have been replaced by two new chapters that, at least in terms of their structure, are significantly different. The remaining two chapters of Title VII, Chapters 4 and 5, by contrast, have not been changed in the least. With the exception noted in the next *glossa*, the subject matter of the two new chapters is the same as that of the three old chapters that they replace, namely, the law of "filiation by nature." The subject matters of the fourth and fifth chapters, by contrast, are "adoptive filiation" and "parental authority," respectively. On the distinction between filiation by nature and adoptive filiation, see *supra* note 1, first paragraph.

Chapter 1. Of Children in General[7]	No corresponding chapter heading

Art. 178. Classification of children Children are either legitimate or illegitimate.	No corresponding article

Art. 179. Legitimate children Legitimate children are those who are either born or conceived during marriage or who have been legitimated as provided hereafter.	No corresponding article

Art. 180. Illegitimate children Illegitimate children are those who are conceived and born out of marriage.	No corresponding article

Art. 181. Legitimation Illegitimate children may be legitimated in certain cases, in the manner prescribed by law.	No corresponding article

7. *Glossa* on old Chapter 1 "in toto." Chapter 1 of the old legislation, entitled "Of Children in General," has been completely suppressed. That chapter established a fundamental distinction, within the law of filiation, between legitimate and illegitimate children, a distinction that, at least at one time, had significant implications in the law of parent-child relations and the law of intestate succession. That time, however, has long since passed. *See generally* Succession of Brown, 388 So. 2d 1151 (La. 1980) (declaring unconstitutional former Civil Code article 919 (1980), which excluded illegitimates from participating in the succession of their father when he was survived by legitimate descendants, ascendants, collateral relatives, or a surviving spouse).

This is not to say that the law, including the law of filiation, draws no distinctions whatsoever between children who, under former Chapter 1, would have qualified as legitimate and children who, under former Chapter 1, would have qualified as illegitimate. Such distinctions continue to exist (e.g., several of the presumptions of paternity arise only under circumstances in which the child's mother is or was married at the time of the child's conception or birth or marries the child's father after the child's birth, in other words, where the child, under former Chapter 1, would have been considered "legitimate"). What is different now is that the rules that establish these distinctions are no longer cast in terms of "legitimate" and "illegitimate" or any others that might call to mind the stigma that was and, to some degree, still is associated with the latter.

Arts. 182, 183.[8] Repealed by 1979 La. Acts No. 607	No corresponding articles

8. *Glossa* on OAs 182, 183 "in toto." These articles, which were repealed years ago, had defined, respectively, "adulterous bastards" and "incestuous bastards."

No corresponding chapter	*Ch. 1.* Proof of Maternity[9]

9. *Glossa* on new Chapter 1 "in toto." The heading of this chapter, like its content, is new. *See infra* note 10.

No corresponding article	**Art. 184. Maternity**[10] Maternity may be established by a preponderance of the evidence that the child was born of a particular woman,[11] except as otherwise provided by law.[12]

10. *Glossae* on NA 184 "in toto."

a. As it stood at the moment when 2005 Act 192, § 1 took effect, Title VII of Book I of the Civil Code did not directly provide for proof of *maternity*. That had not, however, always been the case. Until 1980, Title VII had made some such provision, though one whose scope had been limited to proof of maternity by illegitimate children. The provision had been made in article 212, which had read as follows:

> Illegitimate children of every description may make proof of their maternal descent, provided the mother be not a married woman.
>
> But the child who will make such proof shall be bound to show that he is identically the same person as the child whom the mother *brought forth*.

LA. CIV. CODE ANN. art. 212 (1870), *repealed by* 1980 La. Acts No. 549, § 2 (emphasis added).

Though NA 184 is, then, "new" in the sense that it speaks to an issue that the previous legislation did not, in another sense NA 184 is not new at all. There were no reported cases under the old legislation in which the question of "who's my momma?" was ever addressed. But one must suppose that had the issue ever been presented to them, the courts, applying general principles of proof, would have concluded (1) that the burden of proof rested on the person claiming that *this* woman was the mother of *that* child, and (2) that the claimant's standard of proof was a preponderance of the evidence. These rules, of course, are precisely those that NA 184 embodies. It is for this reason that comment (a) to NA 184 indicates that the article merely "clarifies" (as opposed to "changes") the law.

b. That the old legislation made no provision for proof of maternity is not difficult to explain. The term "maternity" was until recent times unequivocal. The mother was, and could only have been, considered to be the woman who gave birth to the child, see *infra* note 11; therefore, the answer to the question "who's my momma?" was, in practice, only rarely in doubt. As the Roman

jurisconsults put it, *mater semper certa est, etiam si vulgo conceperit* ("the mother is always certain, even if she has conceived the child promiscuously"). *See* DIG. 2.4.5 (Paulus, Ad Edictum 4); *see generally* Carbonnier, *supra* note 1, at 280–81; Baudry-Lacantinerie, *supra* note 1, No. 430, at 315 & n.1; Laurent, *supra* note 1, No. 360, at 423–24; Toullier, *supra* note 1, No. 786, at 184. Now that the term maternity has become equivocal, see *infra* note 11, that question will undoubtedly arise with greater frequency in the future than it did in the past.

c. Provisions for maternal filiation are quite common in modern civil codes. *See, e.g.*, Argentine CÓDIGO CIVIL art. 242 ("Maternity will be established, even without acknowledgment, by proof of the birth and the identity of the child."); German BÜRGERLICHES GESETZBUCH § 1591 ("The mother of the child is the woman who gives birth to it."); Luxembourgeois CODE CIVIL art. 341 ¶¶ 1, 2 ("Maternity outside of marriage can be judicially declared. The child who exercises the action must prove, by any means whatsoever, that he was born from the supposed mother."); Mexican Federal CÓDIGO CIVIL art. 360 ("Filiation of children born outside of marriage results, in relation to the mother, from the sole act of birth."); Portuguese CÓDIGO CIVIL art. 1796(1) ("With respect to the mother, filiation results from the fact of birth and is established in the terms of [other articles]."); Swiss CODE CIVIL art. 252(1) ("In regard to the mother, filiation results from the birth."); Venezuelan CÓDIGO CIVIL art. 197 ("Maternal filiation results from the birth and is proved by means of an act of declaration of birth inscribed in the books of the civil registry, with the identification of the mother.").

11. *Glossae* on *child born of a particular woman* . . . .

a. In earlier times, everyone knew what "maternity" meant. That was so (1) because, given the state of reproductive technology, it was impossible for two distinct women, on the one hand, to supply the egg from which the child would be created and, on the other, to carry and give birth to the child and (2) because, given the state of social mores regarding reproductive relationships, it was considered immoral for one woman to produce a child that, from the very beginning, she did not intend to rear herself but, rather, intended to turn over to some other woman to be reared by her. Thus, the "mother" of the child was she who, at once, wanted the child for herself, supplied the egg from which the child had been created, and carried and gave birth to the child.

Today things are no longer so simple. The cause of the complexity is two-fold. First, there is the development of modern assisted reproductive technology ("ART"), which has made it possible to dissociate the act of supplying the egg from which a child is made from the acts of carrying and giving birth to the child. It can, and does, now happen that an egg will be extracted from one woman—the "egger"—and, once it has been fertilized *ex utero*, that the resulting embryo will be implanted into the uterus of another woman—the "incubator-birther"—who will then carry and deliver the child. Which of these women, the egger or the incubator-birther, is the child's "mother"? Second, there is the development of new forms of reproductive relationships that have made it permissible for a woman to agree to create a child that will not be "hers" but will, instead, be "another woman's." It can, and does, now happen that a

married or cohabiting couple, having discovered that the woman is infertile, will enter into a so-called "surrogate mother" contract with another woman whereby the latter will agree to become impregnated with the man's sperm, to carry and to give birth to the resulting child, and finally to turn the child over to them so that they may rear it as their own. Which of these women, the egger-incubator-birther (the surrogate) or the woman who *willed* to bring the child into existence, *intending* to nurture it as her own, and for whom the child was *destined* (what might be called the mother by "will" or "intent" or "destination") is the child's "mother"?

The use of the phrase "was born of," as comment (a) to NA 184 indicates, is intended to resolve these uncertainties. According to that comment, the new article "clarif[ies]" the law by "establishing that the mother of a child is the woman who gives birth to the child." Thus, the notion of "motherhood by will" is rejected in favor of biological motherhood and, among possible candidates for the status of "biological" mother, the incubator-birther is chosen in preference to the egger. This understanding of maternity is consistent with that reflected in OA 212 (repealed 1980), see *supra* note 10(*a*), which had referred to the mother as the woman from whose body the child had been "brought forth." It is also consistent with the understanding of maternity reflected in the codes of other civil law jurisdictions. *See, e.g.*, German BÜRGERLICHES GESETZBUCH § 1591 ("The mother of the child is the woman who gives birth to it."); Portuguese CÓDIGO CIVIL art. 1796(1) ("With respect to the mother, filiation results from the fact of birth and is established in the terms of [other articles]."); Quebec CIVIL CODE art. 523 ¶ 1 ("Paternal filiation and *maternal filiation* are proved by the act of birth, regardless of the circumstances of the child's birth.") (emphasis added); Swiss CODE CIVIL art. 252(1) ("In regard to the mother, filiation results from the birth."); Venezuelan CÓDIGO CIVIL art. 197 ("Maternal filiation results from the birth and is proved by means of an act of declaration of birth inscribed in the books of the civil registry, with the identification of the mother.").

b. As comment (b) to NA 184 correctly indicates, proof of maternity (i.e, that *this* child was "born of" *that* woman) may be made by means of any and every kind of evidence. It is, of course, the general rule that any and all evidence, provided it be relevant and otherwise admissible, may be introduced to prove or disprove any fact in issue. *See generally* LA. CODE EVID. ANN. arts. 402, 403 (2006). And nothing in NA 184 indicates that, with respect to the subject matter of this article, the legislature intended to depart from the general rule. *Ubi lex no distinguit, ne nos distinguere debemus.*

12. *Glossae* on *except as otherwise provided by law.* The rule that the incubator-birther is the mother of the child is a general, not an absolute, rule; that is to say, the rule admits of exceptions. There are at least two.

a. One such case is that of "surrogate motherhood." Understanding Louisiana's legislation regarding "surrogacy contracts" requires a prior acquaintance with the peculiar terminology and taxonomy of such agreements. These agreements can be classified on the basis of at least two different lines of comparison. First, they can be classified according to their cause. If the surrogate receives payment or some other *quid pro quo* for her services, then her

surrogacy is called "onerous" or, more commonly, "compensated"; if she does not, it is called "gratuitous." Second, they can be classified according to the varying roles of the surrogate. One possibility is that the surrogate might agree not only that she will carry and give birth to the child, but also that she will supply the egg whence the child will be created. In such a case, the child must be created by the artificial insemination of the surrogate. Because this was the first kind of surrogacy arrangement to be developed, it is called "traditional." The other possibility is that the surrogate might agree merely to carry and to give birth to the child. In such a case, the child must be produced by in vitro fertilization, followed by surgical implantation of the resulting embryo in the surrogate's uterus. Because the surrogate's role is limited to that of incubator-birther, this kind of surrogacy is called "gestational." *See generally* Amy Garrity, Comment, *A Comparative Analysis of Surrogacy Law in the United States and Great Britain: A Proposed Model Statute for Louisiana*, 60 LA. L. REV. 809, 809 (2000) (discussing differences between "traditional" and "gestational" surrogacy). Gestational surrogacy agreements, in turn, can be subdivided according to the nature of the relationship between the egger, on the one hand, and the incubator-birther, on the other. One possibility is that the two women might be relatives; the other, that they might not.

Now, let us proceed to the legislation. One piece of it is Louisiana Revised Statutes Section 9:2713, which provides as follows:

> A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.
>
> B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.

The others are Louisiana Revised Statutes Sections 40:32, 34, which provide the following:

> § 32. Definition of terms
>
> As used in this Chapter, the following terms shall have the meanings ascribed to them in this Section unless otherwise provided for or unless the context otherwise indicates:
>
> (1) "Biological parents" means a husband and wife, joined by legal marriage recognized as valid in this state, who provide sperm and egg for in vitro fertilization, performed by a licensed physician, when the resulting fetus is carried and delivered by a surrogate birth parent who is related by blood or affinity to either the husband or wife.
>
> . . .
>
> § 34. Vital records forms
>
> B. The forms shall be printed and supplied or provided by electronic means by the state registrar and the required contents are:

(1) Contents of birth certificate. The certificate of birth shall contain, as a minimum, the following items:
(a) Full name of child.
(i)
. . .
(viii) In the case of a child born of a surrogate birth parent who is related by blood or affinity to a biological parent, the surname of the child's biological parents shall be the surname of the child.
. . .
(h)(i)
. . .
(v) In the case of a child born of a surrogate birth parent who is related by blood or affinity to a biological parent, the full name of the biological parent who is proven to be the father by DNA testing shall be listed as the father.
(i) Maiden name of mother; however, if the child was born of a surrogate birth parent who is related by blood or affinity to a biological parent, the maiden name of the biological parent who is proven to be the mother by DNA testing shall be listed as the mother and the name of the surrogate birth parent is not required.
(j) In the case of a child born of a surrogate birth parent who is related by blood or affinity to a biological parent, the biological parents proven to be the mother and father by DNA testing shall be considered the parents of the child.

To call this legislation "patchy" is to indulge in understatement. The first statute deals only with one kind of surrogacy contract—an "onerous" contract for "traditional" surrogacy. It is this one kind of contract, and this one alone, that falls under the prohibition of that statute. The second statute deals only with one kind of surrogacy contract, a different kind—a "gratuitous" contract for "gestational" surrogacy "between relatives."

Obviously enough, this legislation leaves many important questions unanswered. In doubt is the enforceability of the following kinds of surrogacy agreements: (1) a "gratuitous" contract for "traditional" surrogacy; (2) any contract, be it "gratuitous" or "onerous," for "gestational" surrogacy "between strangers"; and (3) an "onerous" contract for "gestational" surrogacy "between relatives."

Be that as it may, this much is clear: where a child is produced pursuant to a gratuitous contract for gestational surrogacy between relatives (the only kind of surrogacy contract that the legislation clearly authorizes), the mother of that child is its egger rather than its incubator-birther, the general rule of NA 184 to the contrary notwithstanding.

b. Another such case is that of "human embryos." Consider this provision of Louisiana's so-called "Human Embryos" statute:

If the in vitro fertilization patients renounce, by notarial act, their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation in accordance

> with written procedures of the facility where it is housed or stored. The in vitro fertilization patients may renounce their parental rights in favor of another married couple, but only if the other couple is willing and able to receive the in vitro fertilized ovum. No compensation shall be paid or received by either couple to renounce parental rights. Constructive fulfillment of the statutory provisions for adoption in this state shall occur when a married couple executes a notarial act of adoption of the in vitro fertilized ovum and birth occurs.

LA. REV. STAT. ANN. § 9:130 (2000). To say that "*in vitro* fertilization patients" may renounce their "parental rights" is, of course, to imply that those patients are "parents." At least one of these parents must be a woman, for (1) the "*in vitro* fertilization patients," according to the Human Embryos statute, can only be a married couple, and (2) a married couple, according to the Louisiana Constitution and the Civil Code, can consist only of a man and a woman. "Woman parent" is, of course, another name for "mother." But this mother is not and, indeed, cannot be the "incubator-birther" of the child (that would be impossible, given that the child has not yet been implanted, much less born), but is and, indeed, can only be the "egger" of the child. Thus, the mother of a human embryo is its egger, the general rule of NA 184 to the contrary notwithstanding.

No corresponding chapter	*Ch. 2.* Proof of Paternity[13]

13. *Glossa* on new Chapter 2 "in toto." Though the heading of this chapter is new, its content, with only a few exceptions, is not. *See infra* notes 14–19.

Art. 184. Presumed paternity of husband The husband of the mother is presumed to be the father of all children born or conceived during the marriage. **Art. 185. Presumption of paternity, date of birth** A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage. A child born three hundred days or more after the dissolution of the marriage is not presumed to be the child of the husband.	**Art. 185. Presumption of paternity[14] of husband[15]** The husband of the mother is presumed to be the father of a child born during the marriage[16] or within three hundred days from the date of the termination of the marriage.[17, 18, 19]

14. *Glossa* on *[p]resumption of paternity* . . . . Like several of the articles in old Chapters 2 and 3, several of those in new Chapter 2 establish various "presumptions" of paternity. It is important to understand the nature of these presumptions. First, they are "evidentiary presumptions," not "conclusive presumptions" (which are really substantive legal rules disguised as evidentiary presumptions), nor "presumptions" of the genre to which "the presumption of innocence" belongs (which are really rules for allocating the burden of persuasion). *See generally* LA. CODE EVID. ANN. arts. 301–08 (2006); Keith B. Hall, *Evidentiary Presumptions*, 72 TUL. L. REV. 1321 (1998); Stephen I. Dwyer, Comment, *Presumptions and Burden of Proof*, 21 LOY. L. REV. 377, 390–94 (1975); Geoffrey J. Orr, Comment, *Toward a Workable Civil Presumptions Rule in Louisiana*, 53 LA. L. REV. 1625, 1632–35 (1993). Second, they are "legal presumptions," not "presumptions of fact" (which are really just reasonable inferences of fact). *See generally* LA. CIV. CODE ANN. arts. 2285, 2288 (1870); Saúl Litvinoff, OBLIGATIONS §§ 12-121, 12-122, 12-125, *in* 5 LOUISIANA CIVIL LAW TREATISE 384–86, 389–90 (2d ed. 2001); Dwyer, *supra*, at 394–401; Orr, *supra*, at 1627–31.

15. *Glossa* on *[p]resumption of paternity of the husband.* NA 185 reproduces OAs 184 and 185 without substantive change, as I will explain in the following *glossae*. The presumption established in these articles 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. The Roman jurisconsults expressed it in the maxim *pater is est quem nuptiae demonstrant* ("the father is he whom marriage points out"). *See* DIG. 2.4.5 (Paulus, Ad Edictum 4); *see also* Courbe, *supra* note 1, No. 716, at 286–87; Carbonnier, *supra* note 1, at 223; Bénabent, *supra* note 1, No. 603, at 344–45;

Rubellin-Devichi, *supra* note 1, Nos. 1348–50, at 444–45; Mazeaud, *supra* note 1, No. 871, at 270; Aubry & Rau, *supra* note 1, § 545, at 45 & n.1; Baudry-Lacantinerie, *supra* note 1, Nos. 432–33, at 317–19; Laurent, *supra* note 1, No. 361, at 427 & n.1; Planiol, *supra* note 1, Nos. 769–70, at 643–45; Toullier, *supra* note 1, Nos. 787–90, at 184. For the historical development of the presumption *pater is est* . . . , see Teillard, *supra* note 1; Amiable, *supra* note 1.

16. *Glossa* on *[t]he husband of the mother is presumed to be the father of a child born during the marriage* . . . . The first part of NA 185 reproduces without change the part of OA 185, which provided that "[t]he husband of the mother is presumed to be the father of all children born . . . during the marriage." In this regard, NA 185 does not change the law.

17. *Glossa* on *[t]he husband of the mother is presumed to be the father of a child born . . . within three hundred days from the date of the termination of the marriage.* The second part of NA 185 reformulates rules that were formerly set out in OA 184 ("The husband of the mother is presumed to be the father of all children . . . conceived during the marriage.") and OA 185 ("A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage."). Like the other part of NA 185, see *supra* note 16, this part of NA 185 does not change the law. That is so even though this part of NA 185 does not reproduce the last sentence of OA 184: "A child born three hundred days or more after the dissolution of the marriage is not presumed to be the child of the husband." The rule set forth in that sentence was superfluous in that it was redundant of what is perhaps the most basic of all the general principles of proof, which is that nothing is presumed. The sole reason for suppressing that sentence was, quite simply, to improve the technical quality of the legislation. On the list of vices of legislative technique, redundancy appears near the top.

18. *Glossa* on *marriage.* The term "marriage," as used in both the first and the second clauses of NA 185, refers not only to a marriage that is valid, but also to one that (1) is relatively null, see LA. CIV. CODE ANN. art. 97 (2006) ("A relatively null marriage produces civil effects until it is declared null."), or (2) though absolutely null, is nonetheless "putative," see LA. CIV. CODE ANN. art. 96 ¶ 3 (2006) ("A[n absolutely null] marriage contracted by a party in good faith [i.e., a putative marriage] produces civil effects in favor of a child of the parties."). *See* Harrington v. Barfield, 30 La. Ann. 1297 (1878) (ruling that the child of a marriage that was absolutely null on account of bigamy was nevertheless "legitimate" thanks to the wife-mother's good faith); Lindsey, *supra* note 1, at 706 ("The child of an invalid marriage contracted in good faith by at least one of the spouses is legitimate as to both."); *see also* Planiol, *supra* note 1, No. 325, at 254 ("The children born of a putative marriage remain legitimate . . . ."); Gabriel Baudry-Lacantinerie & Maurice Houques-Fourcade, 2 TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL: DES PERSONNES No. 1913, at 471 (2d ed. 1900) ("[T]he children born during the marriage or at least conceived before its annulment, whether they have been [so] born or conceived before or after the spouses have discovered the error that they have committed, should be reputed to be legitimate in regard to the two spouses and their

relatives, even when only one of the spouses is found to have been in good faith."); Charles Aubry & Charles Rau, 7 DROIT CIVIL FRANÇAIS § 460, at 74 (Paul Esmein rev., 6th ed. 1948) ("Provided that good faith existed in the two spouses or one of them only, a putative marriage always produces, in favor of the children that issue from their intercourse, all the effects of a valid marriage."). On putative marriage in general, see Monica Hof Wallace, *The Pitfalls of a Putative Marriage and the Call for a Putative Divorce*, 64 LA. L. REV. 71 (2003).

19. *Glossa* on NA 185: *miscellaneous*. The presumptions established by this article (unlike, say, the presumption established by NA 196, see *infra* note 74) can be "invoked" not only on behalf of the child, but also on behalf of the father. This conclusion rests on three considerations. First, there is an argument from general principles. That a presumption may, as a general rule, be invoked by anyone for any purpose is one of those "general principles" of the law that, though it is never stated (undoubtedly because it is so obvious), nevertheless cannot be doubted. Had the legislature intended to deviate from so fundamental a principle, it undoubtedly would have said so. Second, there is an exegetical argument. Given that the legislature, in the case of the presumption of paternity established by NA 196, specifically excepted that presumption from the general rule (in particular, provided that the presumption could be invoked only on behalf of one party) but, in the cases of the other presumptions of paternity established by the Revision, remained silent on this score, it follows *a contrario* that the legislature did not want to except those other presumptions from that general rule. Third, there is a historical argument. As has already been noted, see *supra* note 15, the presumptions of NA 185 are mere reproductions of the presumptions of OAs 184 and 185. No one ever doubted that the presumptions of OAs 184 and 185 could be invoked by the father no less than by the child. *See, e.g.*, Cosey v. Allen, 316 So. 2d 513 (La. App. 1st Cir. 1975) (Shortess, J.) (permitting a presumed father to bring an action to recover damages for the wrongful death of his presumed children).

Art. 185. Presumption of paternity, date of birth A child born less than three hundred days after the dissolution of the marriage is presumed to have been conceived during the marriage. A child born three hundred days or more after the dissolution of the marriage is not presumed to be the child of the husband. **Art. 186. Presumption of paternity, negation** The husband of the mother is not presumed to be the father of the child if another man is presumed to be the father.	**Art. 186. Presumption if child is born after divorce or after death of husband; effect of disavowal** If a child is born within three hundred days from the day of the termination of a marriage and his mother has married again before his birth, the first husband is presumed to be the father.[20, 21] If the first husband, or his successor, obtains a judgment of disavowal of paternity of the child,[22] the second husband is presumed to be the father.[23] The second husband, or his successor, may disavow paternity[24] if he institutes a disavowal action within a peremptive period of one year from the day that the judgment of disavowal obtained by the first husband is final and definitive.[25]

20. *Glossae* on NA 187 paragraph 1 "in toto."

a. The first paragraph of NA 186 reformulates the substance of OA 186, though in quite different terms. Thanks to the cryptic formulation of OA 186, its meaning was not immediately clear. That does not mean, however, that its meaning was in doubt. To the contrary, with just a little bit of interpretive coaxing, one could fairly easily get that meaning to show itself. The proper interpretation of the old article is reflected in the following doctrine and jurisprudence:

> Although not clearly revealed, the article apparently is intended to apply where the wife, married to her second husband, gives birth to a child less than three hundred days after the dissolution of her previous marriage. In that instance the husband of the first marriage is presumed father of the child.

Murchison, *supra* note 1, at 100–01.

> [S]tanding alone, La.Civ.Code. art. 186, which provides an exception to Article 184 when "another man is presumed to be the father," is ambiguous concerning whether "another man" refers to the first husband . . . or the current husband . . . [A]n analysis of the statutory scheme, *in pari materia*, clarifies these ambiguities, yielding the conclusion that a child conceived during one marriage and born into

> another is a "child of the marriage" between the two people who were married at the time of conception, rather than at birth.

Dupre v. Dupre, 834 So. 2d 1272, 1281–82 (La. App. 3d Cir. 2002) (Woodard, J., dissenting in part and concurring in part). This same meaning, formerly hidden beneath the obscure wording of OA 186, is now made manifest in the much more straightforward wording of NA 186 paragraph 1.

b. In this paragraph we find one of the few changes that the legislature made to the Projet. In the Projet, that paragraph had read as follows:

> If a child is born within three hundred days from the day of the termination of a marriage and his mother has married again before his birth:
>
> (1) The second husband is presumed to be the father if the previous marriage was terminated by judgment of divorce, declaration of nullity, or declaration of death under Article 54.
>
> (2) The first husband is presumed to be the father if the previous marriage was terminated by death.

Under that paragraph, the presumption of paternity would not have operated in favor of the mother's first husband in all cases, as it does under the paragraph as it was finally enacted; rather, depending on the circumstances, in particular, the cause of the dissolution of the mother's first marriage, the presumption would sometimes have operated in favor of the mother's first husband (where the first marriage had been dissolved by death) and sometimes in favor of the mother's second husband (where the first marriage had been dissolved by divorce, etc.).

The amendment to the Projet came at the request of Senator Derrick Shepherd. The basis for his amendment was, quite simply, "moralistic." As he correctly concluded, the proposed presumption in favor of the second husband presupposed that the mother had had sexual relations with that man—he who would later become her "second husband"—at a time at which she had still been married to another man—her "first husband." In other words, the mother had committed adultery. This presupposition the senator found morally repulsive.

Though I concur in the senator's assessment of this presupposition and, further, approve of the amendment that he offered up to correct the perceived problem (in fact, I "ghost wrote" the amendment for him and prepared talking points for him to assist him in explaining his concerns to Senate Judiciary Committee A), I must admit that his and my "moralism" on this point comes at a price. In the situation to which the proposed presumption in favor of the second husband would have applied, the child in question will be born into a family that consists of the mother and this second husband. To provide, as does the amendment, that another man—the first husband—is presumed to be the child's father will, of necessity, complicate things for this otherwise intact family. As long as the presumption in favor of the first husband stands, this family will remain vulnerable to interference from him, specifically, to his assertion of his right, as presumed father, to custody of or at least visitation with the child. For this threat of interference to be eliminated, some sort of litigation will be necessary: either a disavowal action by the first husband or a contestation action by the mother against the first husband. *See* NAs 191–94. *See also* Murchison,

supra note 1, at 101–02 & n.47. In either case, the mother and her new husband will be forced to suffer the inconveniences that are inherent in any litigation—the lost time and the financial cost—as well as one other inconvenience that is unique to this specific litigation, namely, that to get the relief they seek, they will, in effect, have to confess their adultery in their pleadings and perhaps even in open court. Even so, any "disutility" that may result from these inconveniences is, in my judgment, a small price to pay for avoiding the unseemliness inherent in presuming adultery. And the adulteress and her accomplice will hardly be in a position to complain: given the magnitude of the evil they have committed, these inconveniences are a lenient penalty indeed, especially when compared to those of times gone by. On the harms caused by adultery, see William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985 (2001); on the punishments formerly meted out to those who caused these harms, see Daniel E. Murray, *Ancient Laws on Adultery—A Synopsis*, 1 J. FAM. L. 89 (1961).

21. *Glossa* on NA 187 paragraph 1: *miscellaneous*. The presumption established by this article (unlike, say, the presumption established by NA 196, see *infra* note 74) can be "invoked" not only on behalf of the child, but also on behalf of the father. For the rationale underlying this conclusion, see *supra* note 18.

22. *Glossa* on *[i]f the first husband, or his successor, obtains a judgment of disavowal of paternity of the child . . .* . This first part of the first sentence of the second paragraph of NA 186, clearly enough, presupposes that the first husband of the mother, or his successor, may bring an action to disavow paternity in such a situation, that is, where, before the child was born, the mother took a second husband. This presupposition is correct. *See* NA 187, sentence 1.

23. *Glossa* on *the second husband is presumed to be the father*. The provision in the first sentence of the second paragraph of NA 186 that a successful disavowal action by the first husband or his successor triggers a presumption of paternity *vis-à-vis* the mother's second husband is new. Though the old law permitted the first husband or his successor to bring such an action and, further, specified the effect that a successful judgment in such an action would have on the relationship between the mother's *first* husband and the child, that law was silent regarding the effect, if any, that such a judgment would have on the relationship between the mother's *new* husband and the child. The proper interpretation to be given this legislative silence, in my view, is that the legislature intended for there to be *no* such effect. If I am right about that, then the part of NA 186 under examination changes the law on this point and changes it rather profoundly.

The rationale underlying this change in the law is not difficult to divine. In such cases, if the mother's first husband is not, in fact, the child's father, then chances are the mother's new husband is. That is to say, if the presumption that the mother's first husband is the father has been rebutted, then presuming that the mother's new husband is the child's father will more often than not capture the "biological truth."

24. *Glossa* on *[t]he second husband, or his successor, may disavow paternity* . . . . Given the scope of NA 187, which is undoubtedly broad enough to apply to a second husband who is presumed to be the child's father, it was, perhaps, unnecessary to include this statement in NA 186. The revisers, however, judged that a little bit of redundancy was a small price to pay for the benefit of leaving no possible room for doubt.

25. *Glossae* on *institutes a disavowal action within a peremptive period of one year from the day that the judgment of disavowal obtained by the first husband is final and definitive.*

a. One can, and I would, argue that the rule set forth in this part of NA 186 is "in the wrong place" within the schema of the new legislation. Because it concerns a "[t]ime limit for disavowal by the husband" (rubric of NA 189), the proper place for it would be in NA 189 or, perhaps, in a separate article immediately after NA 189. In a civilian codification, rules on the same subject matter ought to be collected in the same place.

b. This part of NA 186 carves out an exception to NA 189, which establishes the general rule regarding the "[t]ime limit for disavowal by the husband" (rubric of NA 189). The rule of NA 186 paragraph 2 differs from the general rule of NA 189 in two respects. First, there is a difference in the nature of the period: whereas the time limit of NA 189 is prescriptive, that of NA 186 paragraph 2 is peremptive. Second, there is a difference in the "trigger" that starts the period running: whereas the period of NA 189 ordinarily starts to run from the date on which the presumed father knows or ought to know of the child's birth, that of NA 186 paragraph 2 starts to run from the date on which the judgment of disavowal obtained by the mother's first husband becomes final and definitive. In all other respects, the two rules are alike, including the length of the period: one year.

Art. 187. Action in disavowal, burden of proof	**Art. 187. Disavowal action; proof**[26]
The husband can disavow paternity of a child if he proves by a preponderance of the evidence facts which reasonably indicate that he is not the father. However, these facts must be susceptible of independent verification or of corroboration by physical data or evidence, such as scientific tests and verifiable physical circumstance of remoteness, including but not limited to any one of the following: (1) Negative blood tests. (2) Unmatched DNA prints. (3) Sterility. (4) Physical impossibility because of location during the time of conception. (5) Any other scientific or medical evidence which the court may deem relevant under the circumstances.	The husband may disavow paternity of the child by clear and convincing evidence that he is not the father. The testimony of the husband shall be corroborated by other evidence.[27]

26. *Glossae* on NA 187 "in toto."

a. Like OA 187, NA 187 permits the presumed father to bring a judicial action to overturn the presumption. To this extent, the substance of OA 187 has not been changed.

b. Though the new article does not change the answer to the question "whether" the presumed father may disavow, it does change, at least partly and subtly, the answer to the question "how" he may disavow. To understand this element of the new article—what might be called the "proof" element—one must, of course, be able to distinguish that which has been changed from that which has not.

i. What has *not* been changed is the "end" toward which the "proof" element of the legislation is directed. The common objective of the proof element in both the old and the new articles is this: to require that the presumption of paternity be rebutted by means of evidence that is in some sense more substantial than that which is sufficient to establish a contested fact in ordinary private-law litigation.

ii. What *has* been changed are the "means" employed to achieve that end. The means employed by OA 187 consisted simply of a restriction on the *kinds of evidence* that could be used to rebut the presumption, specifically, a restriction

that identified several different highly reliable kinds of evidence that might well suffice. So it was that that article required the disavower to produce evidence that was "susceptible of independent verification or corroboration by physical data or evidence, such as scientific tests and verifiable physical circumstance of remoteness . . . ." By contrast, the means employed by NA 187 involve, at once, a restriction on the *kinds of evidence* that can be used to rebut the presumption and an elevation of the *standard of proof* whereby the presumption can be rebutted. Let us start with the restriction. Unlike the restriction of OA 187, which identified various kinds of highly reliable evidence that might suffice, the restriction of NA 187 identifies one highly suspect kind of evidence that, standing alone, will not suffice: the uncorroborated testimony of the presumed father. *See infra* note 27. Next, let us consider the elevated standard of proof. Under the new article, proof by a "preponderance of the evidence" is no longer enough; now the disavower must prove his case by "clear and convincing evidence."

27. *Glossae* on *[t]he testimony of the husband shall be corroborated by other evidence.*

a. Standing alone, the testimony of the husband is, as a matter of law, deemed to be insufficiently weighty to rebut the presumption that he is the child's father.

b. The "other evidence" that must be used to supplement the husband's testimony could include not only those kinds of evidence that, to use the language of OA 187, are "susceptible of independent verification," but also various kinds of evidence that are not, including documentary evidence (for example, a letter written by the mother in which she asserts that the child is "not his") and even testimonial evidence (for example, testimony by the mother's paramour that he had sexual relations with the mother around the probable time of conception).

Art. 188. Husband's loss of right to disavowal	**Art. 188. Disavowal precluded in case of assisted conception**
A man who marries a pregnant woman and who knows that she is pregnant at the time of the marriage cannot disavow the paternity of such child born of such pregnancy. However, if the woman has acted in bad faith and has made a false claim of fatherhood to the marrying spouse, he may disavow paternity provided that he proves such bad faith on the part of the mother, and he proves by a preponderance of the evidence that the child is not his. If another man is presumed to be the father, however, then the provisions of Article 186 apply.[28] The husband also cannot disavow paternity of a child born as the result of artificial insemination of the mother to which he consented.	The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented.[29]

28. *Glossa* on OA 188 sentences 1–3 "in toto." The first three sentences of OA 188 provided that (1) a man who marries a woman whom he knows is pregnant could not disavow her child (the general rule) unless, (2) the woman had induced him to marry her by deceiving him into believing that he was the child's father (the exception). The revisers, perhaps because they feared that the case contemplated by the exception was not, in fact, exceptional, decided to suppress the general rule and, with it, the exception. *See* NA 188. Thanks to this change in the law, a man who marries a woman whom he knows is pregnant may now freely disavow her child, regardless of whether he had been duped into believing that he was the child's father.

29. *Glossa* on NA 188 "in toto." NA 188 reproduces the substance of the rule that was set out in the *last* sentence of OA 188, but, in so doing, expands that rule's scope. Unlike the last sentence of OA 188, the rule of which applied to *only one* form of assisted conception—artificial insemination—the rule of NA 188 applies, in principle, to *any and every* form of assisted conception, including, in addition to artificial insemination, *in vitro* fertilization followed by surgical implantation.

But there is at least one form of assisted conception as to which the application of the rule of NA 188 is problematic, namely, surrogate motherhood.

The problem arises from uncertainty regarding the meaning of the phrase "child *born to* his wife." One possibility is that "born to" is equivalent to "born of," as that expression is used in NA 184. If that is so, then the rule in question strips the husband of his disavowal right where his wife, with his permission, serves as a surrogate (for then the child would be "born of" the wife), but not where his wife, with his permission, engages another woman to serve as their surrogate (for then the child would not be "born of" the wife). Where the surrogacy agreement involved is lawful (that is, the surrogacy is gratuitous, gestational, and intrafamilial), such results are absurd: in the former case, though the other woman, not the wife, would be regarded as the mother *per* Louisiana Revised Statutes Sections 40:32, 34, see *supra* note 12(*a*), the husband, *per* NA 188, would have no disavowal right; in the latter case, though the wife, not the other woman, would be regarded as the mother *per* Louisiana Revised Statutes Sections 40:32, 34, see *supra* note 12(*a*), the husband would have a disavowal right. Such a result is absurd for it frustrates what was undoubtedly the purpose behind NA 188, namely, to assure that whenever the wife ends up being considered the mother as a result of acts to which her husband consents, he must be considered (or, at the very least, must be presumed to be) the father. And so, another possible interpretation must be sought. Would it not be permissible to read the phrase "child born to his wife" as if it meant "child born under circumstances such that his wife is considered the mother?" In other words, might not "born to [woman X]" be understood as a shorthand expression for "maternal filiation to [woman X]"? Such an interpretation of the new article not only avoids the absurdity to which the other possible interpretation leads, but also, in contrast to that other, consistently furthers the article's purpose. *See* LA. CIV. CODE ANN. art. 10 (2006) ("When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.").

Art. 189. Time limit for disavowal by the husband	**Art. 189. Time limit for disavowal by the husband**[30]
A suit for disavowal of paternity must be filed within one year after the husband learned or should have learned of the birth of the child; but, if the husband for reasons beyond his control is not able to file suit timely, then the time for filing suit shall be suspended during the period of such inability. Nevertheless, the suit may be filed within one year from the date the husband is notified in writing that a party in interest has asserted that the husband is the father of the child, if the husband lived continuously separate and apart from the mother during the three hundred days immediately preceding the birth of the child.	The action for disavowal of paternity is subject to a liberative prescription[31] of one year.[32] This prescription commences to run from the day the husband learns or should have learned of the birth of the child.[33] Nevertheless, if the husband lived separate and apart from the mother continuously during the three hundred days immediately preceding the birth of the child, this prescription does not commence to run until the husband is notified in writing that a party in interest has asserted that the husband is the father of the child.[34]

30. *Glossa* on NA 189 "in toto." For the most part, NA 189 simply reproduces the substance of OA 189. There is, however, at least one exception to this generalization, that is, one respect in which NA 189 changes OA 189. *See infra* note 31(*a*).

31. *Glossae* on *liberative prescription* . . . .

a. Unlike the delay period that OA 189 gave the presumed father for bringing his disavowal action, which the jurisprudence had concluded was "peremptive," see, e.g., *Pounds v. Schori*, 377 So. 2d 1195, 1200 (La. 1979), the delay period that NA 189 gives him for that purpose is "prescriptive." The significance of this change has to do with whether the running of the time period can be interrupted, suspended, or renounced: whereas prescription is susceptible of interruption, suspension, or renunciation, peremption is not. *See* LA. CIV. CODE ANN. art. 3461 (2006).

b. In tallying up the various possible causes for suspending the liberative prescription established by the first paragraph of NA 198, one will no longer need to include that of Louisiana Revised Statutes Section 9:305, which had provided as follows:

> Notwithstanding the provisions of Civ. Code art. 189 and for the sole purpose of determining the proper payor in child support cases, if 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.

In 2006 Act 344, the legislature abrogated this revised statute.

32. *Glossa* on *one year*. Though NA 189 changes the *nature* of the delay period within which the presumed father must bring his disavowal action, see *supra* note 31(*a*), it does not change the *length* of that delay period. As was true under OA 189, so also under NA 189—the delay lasts "one year."

33. *Glossae* on *[t]his prescription commences to run from the day the husband learns or should have learned of the birth of the child.*

a. Just as NA 189 does not change the length of the delay period, it also does not change the trigger that starts the period running. Under NA 189, as under OA 189, the period starts running as soon as—but no sooner than—when the presumed father learns of the child's birth.

b. The "knowledge" of the child's birth that is required to trigger the running of the period may be either subjective/actual ("learns") or objective/constructive ("should have learned"). The following hypothetical illustrates this latter possibility. While X and Y, wife and husband, respectively, are still living together, they learn that X is pregnant and, further, is by then "three months" into her pregnancy. Three months later (six months into the pregnancy), X and Y, who have since had a falling out, separate. Y, to "get away from it all," takes an extended work assignment out of the country. Three months later (nine months into the pregnancy), X gives birth to the child, Z. Y does not actually learn of Z's birth until he returns to Louisiana some fifteen months later. Under these circumstances, Y's right to disavow paternity of Z will have prescribed. Though he had no actual knowledge of Z's birth until recently, Y will be charged with constructive knowledge of the birth as of the latest possible date on which, given what he knew about the progress of the pregnancy when he had last seen X, he could have expected Z to have been born. Because Y knew, when he had last seen X, that she was then already six months along and, further, knew or should have known that the normal length of human gestation is, at the outside, 280 days from conception, the latest he could have expected Z to have been born would have been three and a half months or so after he had last seen X. Since that time, more than a year has passed.

34. *Glossa* on NA 189 paragraph 2 "in toto." NA 189 paragraph 2 reproduces the substance of OA 189 paragraph 2 with only slight stylistic variations.

Art. 190. Time limit for disavowal by heir or legatee	**Art. 190. Time limit for disavowal by heir or legatee**[35]
If the husband dies within the delays for filing suit to disavow paternity without having instituted such action, an heir or legatee whose interest in the succession will be reduced shall have one year from the death or one year from the birth of the child, whichever is longer, within which to bring such an action. Nevertheless, the heir or legatee may file suit within one year from the date the heir or legatee is notified in writing that a party in interest has asserted that the husband is the father of the child, if the husband lived continuously separate and apart from the mother during the three hundred days immediately preceding the birth of the child.	If the prescription has commenced to run and the husband dies[36] before the prescription has accrued,[37] his successor whose interest is adversely affected may institute an action for disavowal of paternity. The action of the successor is subject to a liberative prescription of one year. This prescription commences to run from the day of the death of the husband.[38] If the prescription has not yet commenced to run, the action of the successor is subject to a liberative prescription of one year. This prescription commences to run from the day the successor is notified in writing that a party in interest has asserted that the husband is the father of the child.[39]

35. *Glossae* on NA 190 "in toto."

a. Like OA 190, NA 190 permits certain persons who, upon the death of the presumed father, succeed to his interests to bring the disavowal action posthumously in his stead. To this extent, NA 190 does not change the law.

b. Unlike OA 190, which had referred to an "heir or legatee" of the presumed father, NA 190 refers to a "successor" of the presumed father. This change in terminology does not import a change in the law. Since at least 1981, the Civil Code has used "successor" as an umbrella term that covers both "heirs" (also called "intestate successors") and "legatees" ("testate successors"). *See* LA. CIV. CODE ANN. art. 876 (2006). The substitution of "successor" for "heir or legatee," then, simply brings the terminology of the rule in line with more modern usage.

c. If one were to follow "general principles," then one would permit anyone and everyone who has an interest in doing so to challenge any and every presumption of paternity, even those that arise from marriage (e.g., those established by NAs 185 and 186). *See* Laurent, *supra* note 1, No. 435, at 548 ("In general, all those who have an interest [therein] can bring actions concerning the status of persons. That is the application of the common law.").

In regard to the presumptions of paternity that arise from marriage, however, the legislature has chosen to depart from general principles. *See id.* ("The legislation derogates [from this common law] for the action *en desaveu*."). Recognizing that the presumed father in such a case has a uniquely personal stake in whether the presumption stands or falls, the legislature has, in principle, restricted the class of persons who may challenge the presumption to the father alone. *See, e.g.*, Baudry-Lacantinerie, *supra* note 1, No. 541, at 447 ("It is also necessary to consider it [the right to disavow] as attached exclusively to the person of the husband."); Planiol, *supra* note 1, No. 785, at 656 ("The action *en desaveu* belongs, in principle, only to the husband.") & No. 788, at 658 ("The exclusive attribution of the action *en desaveu* to the husband does not permit any exception other than those that have just been indicated [e.g., the exception in favor of the presumed father's successors]."); Laurent, *supra* note 1, No. 435, at 548–50 ("This action belongs, in principle, only to the husband . . . . Even to his successors, the action does not pass in full right . . . . Article 1166, which authorizes the creditors to exercise the rights and actions of their debtor, except those that are exclusively attached to the person. We will see, under the title 'Of Obligations,' that the legislation means by this non-material [*moral*] rights and those in which the immaterial element predominates over the pecuniary interest. Now, disavowal is essentially a non-material right: that decides the question.") & 551–52 ("It will be said that we prove too much, that the legislation gives the action to the successors . . . . That is, in the end, an exceptional disposition . . . ."); *see also* Carbonnier, *supra* note 1, at 234 ("The plaintiff [in a disavowal action] is, in principle, the husband, *and him alone* . . . .") (emphasis added). But what the legislature "hath taken away" it nevertheless "hath given back" in some small measure, by way of various "exceptions to the exception." One of these exceptions to the exception—that in favor of the presumed father's "successors"—is found here in NA 190; the other—that in favor of the child's mother—is found in NA 191.

i. (1) Under the reformulated limitations of NA 190, the particulars of the limitations vary somewhat depending on whether, as of the time of the presumed father's death, prescription on the presumed father's own right to disavow paternity had *begun to run*. If it had, then the successor's rights are governed by the first paragraph of NA 190; if it had not, then the successor's rights are governed by the second paragraph of NA 190.

(2) This notion—that the limitations applicable to the successor's disavowal rights should vary depending on whether prescription had begun to run on the presumed father's disavowal rights—is "new," at least in the sense that it had not been explicitly set forth in the text of OA 190. But this notion had, in fact, been there in OA 190, if only behind the text. For under OA 190, the successor had faced one set of limitations if prescription had begun to run on the presumed father's disavowal rights and another if it had not. Thus, the introduction of this notion into the text of NA 190 does not, in reality, change the law.

ii. (1) Though the limitations rules of the first paragraph of NA 190 differ from those of the second in certain respects, they do not differ in all respects.

To the contrary, those two sets of rules share two points in common: in one as in the other, the successor's disavowal rights are subject to a "liberative prescription," and the period of this prescription is "one year." That this is so becomes clear when one juxtaposes the second sentence of the first paragraph of NA 190—"[t]he action of the successor is subject to a liberative prescription of one year"—which governs the first case, against the second clause of the first sentence of the second paragraph of NA 190—"the action of the successor is subject to a liberative prescription of one year"—which governs the second case. Thus, whatever may differentiate the two cases, it is neither the nature of the limitations period nor its length.

(2) In terms of their relationship to the "common elements" of the limitations rules of OA 190, the common elements of the limitations rules of NA 190 are a "mixed bag." Consider, first, the nature of the limitations period. On this point, the law has been changed. Whereas under NA 190 it is "prescriptive," under OA 190 it had been "peremptive." Consider, next, the length of the period. On this point, the law has not been changed: as is true now under NA 190, under OA 190 the length of period was set at one year.

iii. (1) If the two sets of limitations rules found in the first and second paragraphs of NA 190 do not differ in terms of the nature of the limitations period or its length, then how do they differ? The difference lies in the trigger that starts the one-year prescriptive period running. *See infra* notes 38, 39.

(2) This "difference" between the two sets of limitations rules is not new. As is true now under NA 190, under OA 190 the real difference between the two sets of rules had lain in the trigger.

36. *Glossa* on *dies* . . . . Just like the term "death" as used in OA 190, the term "death" as used in NA 190 undoubtedly refers not only to actual death, see LA. REV. STAT. ANN. § 9:111 (2000 & Supp. 2006), but also to presumed death, see, e.g., LA. CIV. CODE ANN. arts. 30, 54 (2006).

37. *Glossa* on *[i]f the prescription has commenced to run and the husband dies before the prescription has accrued* . . . . If, at the time of the presumed father's death, prescription on the presumed father's own right to disavow paternity had already begun to run, then the presumed father's successor can bring a disavowal action only if, at the time of the presumed father's death, prescription on the presumed father's own right to disavow paternity had not also *finished* running. If that is not so, i.e., if the presumed father's own right to disavow paternity had prescribed before the presumed father died, then the presumed father's successor will be precluded from bringing a disavowal action. On this point, NA 190 does not change the law.

38. *Glossa* on *[t]his prescription commences to run from the day of the death of the husband.* Under NA 190 the trigger for the one-year prescriptive period is the date of the presumed father's death where prescription had *not* already begun to run against the presumed father's right to disavow before his death. This "trigger rule" changes the law in part. In contrast to NA 190, which establishes a single trigger in such cases—the date of the presumed father's death—OA 190 had established two alternative triggers: the date of the

presumed father's death or the date of the child's birth, whichever was later. NA 190 lacks this second alternative trigger.

39. *Glossa* on *[t]his prescription commences to run from the day the successor is notified in writing that a party in interest has asserted that the husband is the father of the child.* NA 190 provides that where prescription *had* already begun to run against the presumed father's right to disavow before the presumed father's death, the trigger for the one-year prescriptive period is the date on which the successor is notified in writing that someone who has an interest in doing so has claimed that the presumed father was the father in fact. This provision merely reformulates the second paragraph of OA 190. *See supra* note 35(*c*)(*i*)–(*iii*). On this point, then, NA 190 does not change the law.

No corresponding subsection heading	Subsection C. Contestation and Establishment of Paternity[40]

40. *Glossae* on *Subsection C. Contestation and Establishment of Paternity.*

a. The heading of this subsection, like its content, is entirely new.

b. The articles in this section, NAs 191–94, break new ground in Louisiana legal history by permitting someone other than the husband of the mother or his successor to rebut the presumption *pater is est quem nuptiae demonstrant.* This "someone other" is the child's mother.

c. Inspiration for these new articles was drawn from several foreign law sources, as comment (a) to NA 191 reveals. *See* French CODE CIVIL arts. 318 (repealed 2006) ("Even in the absence of disavowal, the mother can contest the paternity of the husband, but only for the purpose of legitimating the child, where, after the dissolution of the marriage, she has married the true father of the child.") & 318.1 (repealed 2006) ("On pain of its being dismissed, the action that is conducted against the husband or his heirs is joined to a demand for legitimation formed before the court of grand instance. It must be introduced by the mother and her new spouse within six months of their marriage and before the child has attained the age of seven years."); UNIF. PARENTAGE ACT § 6(a), 9 U.L.A. 410–11 (1973) ("A child, his natural mother, or a man presumed to be his father under Paragraph (1), (2), or (3) of Section 4(a), may bring an action . . . (2) for the purpose of declaring the non-existence of the father and child relationship presumed under Paragraph (1), (2), or (3) of Section 4(a) only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than [five] years after the child's birth. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party."); Quebec CIVIL CODE art. 531 ("Any interested person, including the father or the mother, may, by any means, contest the filiation of a person . . . ."); CALIF. FAM. CODE § 7630(2) ("For the purpose of declaring the nonexistence of the father and child relationship presumed under subdivision (a), (b), or (c) of Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by

another man may be determined in the same action, if he has been made a party."). Even a casual comparison of NAs 191–94, on the one hand, and these various sources, on the other, reveals that one of the sources was far more influential than the others, namely, the French Code Civil articles.

d. The list of the sources of the new articles given in comment (a) to NA 191 is incomplete. The author of the comment should have listed not only articles 318 and 318.1, but also article 318.2, of the French Code Civil. That third article reads as follows: "The two demands are disposed of by one and the same judgment, which cannot accept the contestation of paternity [of the first husband] unless the legitimation [as to the second husband] is admitted." French CODE CIVIL art. 318.2 (repealed 2006).

e. In terms of the mass of foreign civil law legislation that permits the mother to contest paternity, that cited in the comment is just the tip of the iceberg. *See, e.g.*, Belgian CODE CIVIL art. 332 ¶ 1 ("Paternity established by means of [the presumptions of paternity] can be contested by the husband, by the mother, and by the child."); Dutch CIVIL CODE art. 198(1). By a declaration made before the officer of civil status, the mother can disavow that a child born to her within 306 days of the dissolution of the marriage is that of her former husband, on the condition that another man recognizes the child . . . . If the marriage is dissolved by death, the mother can make this declaration only if she was legally separated from or lived separate and apart from her deceased husband from the 306th day before the birth of the child."); German BÜRGERLICHES GESETZBUCH § 1600 ("The following persons are entitled to contest paternity: 1. The man whose paternity stands according to [the presumptions of paternity] . . . 3. The mother and 4. The child."); Italian CODICE CIVILE art. 235 ¶ 6 ("The action of disrecognition can be exercised by the mother or by the child, once he has attained major status, in all cases in which it can be exercised by the father."); Portuguese CÓDIGO CIVIL art. 1839(1) ("The paternity of the child can be impugned by the husband of the mother, by the other, or by the child, or . . . by the Public Minister."); Spanish CÓDIGO CIVIL art. 137 ¶ 2 (Julio Romanach, Jr. trans., 1994) ("The [child's] right to bring the action [to disavow paternity], in the interest of a minor or incapacitated child, pertains, in the same manner, during the year following the recordation of filiation, to the mother with parental authority . . . .").

No corresponding article	**Art. 191. Contestation and establishment of paternity by mother**[41] The mother of a child[42] may institute an action to establish both that her former husband is not the father of the child[43] and that her present husband is the father.[44, 45] This action may be instituted only if the present husband has acknowledged the child by authentic act or by signing the birth certificate.[46]

41. *Glossae* on NA 191 "in toto."

a. NA 191 is entirely new. It changes the law.

b. Though it is likely that, in the course of time, the action established in and regulated by this and the succeeding articles of Subchapter 3 will come to be referred to as simply the "contestation action" (the comments to the articles use this shorthand expression), one should be aware that that term, as used in reference to this action, is something of a misnomer. To contest something is to engage in an act that is negative—to show that something is not—and destructive—"to tear something down." To be sure, the action entails such an element, for the plaintiff must establish that a certain man is not the child's father or, what amounts to the same thing, must tear down the presumptive bond of filiation between that man and the child. But the action also entails—and, by law, has to entail—something more, an additional element, one that is affirmative and constructive. To be specific, the plaintiff must prove that a certain other man is the child's father or, what amounts to the same thing, must "build up" an actual bond of filiation between that other man and the child. Without this affirmative-constructive element, the action is incomplete. In the interest of accuracy, then, it might be better to refer to the NA 191 action as one of "contestation *and establishment.*" *See* French CODE CIVIL art. 318 (repealed 2006) ("Even in the absence of disavowal, the mother can contest the paternity of the husband, but only for the purpose of legitimating the child, where, after the dissolution of the marriage, she has married the true father of the child.").

42. *Glossa* on *[t]he mother of a child* . . . . The "contestation and establishment" action is available only to the mother herself. It may not be brought by anyone else, not even the mother's successors.

This conclusion rests on two interrelated considerations, both of them exegetical arguments. First, as has already been noted, see *supra* note 40(*b*), the rule that the mother may contest the presumption that her former husband is the father of her child represents a new and extraordinary departure from the old and once absolute, but now merely general, rule that only the husband (or one of his successors) could challenge that presumption. As an exceptional provision, this

rule must be strictly construed. *Exceptio est strictissimae interpretationis.* The text of NA 191 mentions only the mother; it says nothing about her successors. Second, given that the legislature, in the case of the disavowal action established by NAs 187–90, specifically provided that the action can be brought by the presumed father's successors, see NA 190, but, in the case of the "contestation and establishment" action remained silent on this point, it follows *a contrario* that the legislature did not want to make the same provision for the latter as it had for the former.

43. *Glossa* on *that her former husband is not the father of the child.* This language clearly presupposes that the would-be plaintiff-mother finds herself in the face of circumstances in which her former husband is presumed to be the child's father. And, in this regard, there are only two possibilities: (1) the child was born during her marriage to her former husband; or (2) the child was born within 300 days of the dissolution of her marriage to her former husband. *See* NAs 185, 186.

44. *Glossa* on NA 191 sentence 1 "in toto." When one considers the first sentence of NA 191 as a whole, it becomes clear that the circumstances in which the "contestation and establishment" action is available are narrow indeed. These circumstances include: (1) that the plaintiff-mother has been twice married; (2) that she is no longer married to her first husband and is still married to her second; (3) that her first husband is presumed to be the child's father *per* NA 185 or 186; and (4) that her second husband is, in fact, the child's father.

45. *Glossa* on *her present husband is the father.* To carry the affirmative-constructive element of her burden of proof, see *supra* note 41(*b*), the plaintiff must show not that just any man is the child's father, but that the very man who is her new husband is the child's father. If she has happened to take as her new husband a man other than the child's father, then she will not be in a position to bring the "contestation and establishment" action.

46. *Glossae* on *acknowledged the child by authentic act or by signing the birth certificate.*

a. On "acknowledgment" by these means, which was formerly and still is known as "formal acknowledgment," see NA 196.

b. It might be (and, indeed, has been) argued that the requirement of NA 191 that the child be acknowledged by authentic act or by signing the birth certificate contradicts the requirements of formal acknowledgment as set out in NA 196. The supposed contradiction consists of this: that whereas NA 196 limits acknowledgment by authentic act or by signing the birth certificate to a child who is not already paternally filiated, thereby impliedly forbidding such an acknowledgment where the child is already paternally filiated, NA 191 permits such an acknowledgment for a child who, by definition, is already paternally filiated, in particular, is filiated to the mother's first husband.

This argument rests on a misunderstanding of the point of NA 196 and of the point of NA 191 sentence 2. In truth, neither provision is concerned to limit, forbid, or permit formal acknowledgments in this or that set of circumstances, at least not in the sense in which those terms are used in this argument. No, the point of these provisions is to specify the varying effects of formal

acknowledgments made in certain varying circumstances. The point of NA 196 may, then, be expressed this way: (1) If the child who is formally acknowledged is not already filiated to another man, then the acknowledgment gives rise to a presumption that the acknowledger is the child's father. (2) But if that child is already filiated to another man, then the acknowledgment has no such effect. Similarly, the point of NA 191 sentence 2 may be expressed this way: If the husband of the mother has formally acknowledged a child that is presumptively filiated to the mother's ex-husband, then the mother may bring a "contestation and establishment" action to rebut the presumption that her ex-husband is the child's father and to prove that her new husband is the father. Thus, whereas NA 196 specifies one effect for a formal acknowledgment made under one set of circumstances, NA 191 sentence 2 specifies a different effect for a formal acknowledgment made under another set of circumstances. Between these propositions there is, of course, no contradiction whatsoever.

No corresponding article	**Art. 192. Contestation action; proof** The mother shall prove by clear and convincing evidence both that her former husband is not the father and that her present husband is the father.[47] The testimony of the mother shall be corroborated by other evidence.[48]

47. *Glossa* on NA 191 sentence 1 "in toto." The contesting mother must prove both (1) that her former husband is not the father, and (2) that her new husband is the father. Proof of this first fact, by itself, is insufficient. This two-fold burden of proof corresponds to, indeed, flows out of, the two-fold nature of the "contestation and establishment" action itself, which, as was noted earlier, is not only an action to contest the paternity of one man, but also an action to establish the paternity of another. *See* NA 191; *see also supra* note 41; French CODE CIVIL art. 318.1 ¶ 1 (repealed 2006) ("On pain of its being dismissed, the action that is conducted against the husband or his heirs is joined to a demand for legitimation formed before the court of grand instance.").

48. *Glossa* on NA 191 sentence 2 "in toto." Just as the (self-serving) testimony of the presumed father is insufficient for an avowal action, see NA 187 sentence 2, so also, the (self-serving) testimony of the mother is insufficient for a "contestation and establishment" action. In both cases, the rationale behind the rule is the same. *See supra* note 27(*a*).

No corresponding article	**Art. 193. Contestation and establishment of paternity; time period** The action by the mother shall be instituted within a peremptive period[49] of one hundred eighty days from the marriage to her present husband and also within two years from the day of the birth of the child,[50] except as may otherwise be provided by law.[51]

49. *Glossa* on *[t]he action by the mother shall be instituted within a peremptive period* . . . . The temporal limitations established in this new article are peremptive, not liberative. For the significance of this designation, see *supra* note 31(*a*).

50. *Glossa* on *within . . . one hundred eighty days from the marriage to her present husband and also within two years from the day of the birth of the child* . . . . Despite the use of the singular number here—"period" rather than "periods"—there are, in fact, two peremptive periods for the "contestation and establishment" action, both of which must be satisfied (that is to say, they are cumulative rather than alternative). The mother must bring the action (1) within 180 days of the day on which her current marriage was contracted, and (2) within two years of the day on which the child was born. If the mother brings the action within two years of the day on which the child was born, but later than 180 days from the day on which her marriage was contracted, or within 180 days of the day on which her marriage was contracted, but later than two years from the day on which the child was born, then her action is perempted. *See* French CODE CIVIL art. 318.1 ¶ 2 (repealed 2006) ("It [the contestation action] must be introduced by the mother and her new spouse within six months of their marriage and before the child has attained the age of seven years.").

51. *Glossa* on *except as may otherwise be provided by law.* This provision seems to be a vestige of an early version of the Projet, one in which some exception to the general rule of NA 193 had been proposed, set out, no doubt, in some proposed new revised statute. That proposed new revised statute, however, did not make it into the final version of the Projet. When it was rejected, this provision of NA 193 should have been removed. That it was not is undoubtedly the result of an oversight. In any event, this provision is, at present, superfluous.

No corresponding article	**Art. 194. Judgment in contestation action** A judgment shall not be rendered decreeing that the former husband is not the father of the child unless the judgment also decrees that the present husband is the father of the child.[52]

52. *Glossae* on NA 194 "in toto."

a. The judgment in the "contestation and establishment" action must contain two elements: (1) that the mother's former husband is not the father; and (2) that the mother's new husband is the father. A judgment consisting of the first element alone would be defective. This two-fold judgment requirement corresponds to, indeed, flows out of, the two-fold nature of the "contestation and establishment" action itself, which, as noted earlier, is not only an action to contest the paternity of one man but also an action to establish the paternity of another. *See* NA 191; *see also supra* note 41; French CODE CIVIL art. 318.2 (repealed 2006) ("The two demands are disposed of by one and the same judgment, which cannot accept the contestation of paternity [of the first husband] unless the legitimation [as to the second husband] is admitted.").

b. The judgment that the mother's new husband is the child's father can, of course, be "invoked" not only on behalf of the child, but also on behalf of the new husband. Under the new law of filiation, it is only "presumptions," as opposed to "judgments," whose "invocability" is ever "relativized" and then only in one instance, namely, under NA 196. *See infra* note 74.

Art. 198. Legitimation by subsequent marriage of parents Illegitimate children are legitimated by the subsequent marriage of their father and mother, whenever the latter have formally or informally acknowledged them as their children, either before or after the marriage. **Art. 199. Rights of children legitimated by subsequent marriage** Children legitimated by subsequent marriage are legitimate.	**Art. 195.[53] Presumption by marriage and acknowledgment; child not filiated to another man; proof; time period** A man who marries[54] the mother of a child not filiated to another man[55] and who, with the concurrence of the mother,[56] acknowledges[57] the child by authentic act[58] or by signing the birth certificate[59] is presumed to be the father of that child.[60, 61] The husband may disavow paternity of the child[62] as provided in Article 187.[63] The action for disavowal is subject to a peremptive period[64] of one hundred eighty days.[65] This peremptive period commences to run from the day of the marriage or the acknowledgment, whichever occurs later.[66]

53. *Glossa* on NA 195 "in toto." This article reproduces in re-conceptualized form the ancient institution of "legitimation by subsequent marriage plus acknowledgment." This institution, a Roman imperial innovation, see Codex Just. 5.27.5, that was later taken up and extended by the canonists, see the Decretal of Pope Alexander III entitled *"Extra qui filii sint legitime,"* and Toullier, *supra* note 1, No. 919, at 214, has been a part of Louisiana's law of filiation from the beginning. *See* LA. CIV. CODE ANN. art. 217 (1825); LA. CIV. CODE ANN. art. 21 (1808); LAS SIETE PARTIDAS, part. IV, tit. XIII, law 1; Codex Just. 5.27.5; *see also* Charles Giraud, PRÉCIS DE L'ANCIEN DROIT COUTUMIER FRANÇAIS 14–15 (2d ed. 1875) (noting that the institution of legitimation by subsequent marriage plus acknowledgment was recognized in the law of *le pays de droit coutumier* during the *ancien régime*). The "re-conceptualization" that the institution has undergone in the Revision consists of this: whereas "subsequent marriage plus acknowledgment" was formerly understood to be a mode of "legitimating" an illegitimate child, it is now understood to be simply a mode of "filiating" an un-filiated child.

54. *Glossa* on *marries* . . . . On the meaning of the term "marriage" as it is used in NA 195 and the rest of the Revision, see *supra* note 18.

55. *Glossae* on *a child not filiated to another man* . . . .

a. The presumption created by NA 195 arises only if the child in question is not already filiated to another man. This restriction on the scope of the presumption changes the law or, at the very least, the regnant jurisprudential interpretation of the law.

As OA 198 (1948) had been (mis)interpreted by the jurisprudence, the mode of legitimation established therein could operate not only in favor of a child who was not yet filiated to another man, but also in favor of a child who was already filiated to another man, indeed, was already another man's "legitimate" child. *See, e.g.*, Succession of Mitchell, 323 So. 2d 451 (La. 1975) (child who was presumed to be the legitimate child of the first husband of the mother per the presumption *pater is est* . . . became legitimated as to the mother's second husband where the second husband, after marrying her, acknowledged the child). In such a situation, the courts ruled, the child enjoyed dual paternity, that is, had not one, but two, fathers.

Thanks to the insertion of the restriction "a child not filiated to another man" into NA 195, it is no longer possible for "subsequent marriage plus acknowledgment" to result in dual paternity. Under this article, a man who marries a woman whose child is already filiated to another man and acknowledges that child as his own does not thereby filiate that child to himself. To the contrary, such a child remains filiated to one man and one man only—the man to whom the child had theretofore been filiated.

b. It is clear that if, at the time at which the "subsequent marriage plus acknowledgment" takes place, the child in question is already filiated to another man, then the presumption of filiation established by NA 195 is not triggered at that time. There is, however, another case in which the correct solution is not so clear. Suppose that, at the time at which the "subsequent marriage plus acknowledgment" takes place, the child is then filiated to another man, but that after the time at which the "subsequent marriage plus acknowledgment" takes place, the child becomes un-filiated to that other man. In such a case, will the presumption of paternity established by NA 195 arise?

Before I try to resolve this question, let me first explain how such a seemingly strange transformation in the child's filiation status might take place. In order for the child to be filiated to another man, either of two things must be true: (1) he must be presumed to be the child of another man, see NAs 184, 185, 195, 196; or (2) he must have been adjudged to be the child of another man, see NAs 197, 198. If the prior filiation arose in the former of these two ways (i.e., by presumption), then the prior filiation can and will cease if ever the presumption on which the prior filiation rests is rebutted. Consider this example. Child C is born to woman Y who is then married to man X. Six months later, X and Y are divorced. Immediately thereafter Y marries man Z, who promptly acknowledges C as his own child. At that moment, the NA 195 presumption has not been triggered, for C is still presumed to be the child of X. But suppose that X then brings a successful disavowal action against C. Once that judgment is rendered, the child will no longer be "filiated to another man." In short, the child will have gone from being "filiated to another man" *before* his mother's remarriage to un-filiated to another man *after* his mother's remarriage.

At that point, should we say that the child, *per* NA 195, is now presumed to be the child of Z?

In resolving the question presented here, there would seem to be two possibilities. First, it may be that the child being un-"filiated to another man" must occur at a particular time, namely, at the moment at which his mother marries the man who has acknowledged him. In that case, a post-marriage change on the part of the child from filiated to another man to un-"filiated to another man" would be of no moment. The child would remain outside the ambit of NA 195. Second, it may be that the time at which the child is un-"filiated to another man" is a matter of indifference, so long as, at some point, the child's being un-filiated to another man coincides temporally with his mother's being married to a man who has acknowledged him. Which alternative represents the correct interpretation of NA 195?

For several reasons, I favor the alternative of indifference. First, there is an exegetical argument: neither the text of NA 195 nor that of any other legislation requires, by its terms, that the child already be un-filiated to another man before the marriage and/or the acknowledgment. *Ubi lex non distinguit, nec nos distinguere debemus*. Second, there is what might be called a "logical-analytic" argument. In principle, a court judgment that a presumption of filiation has been rebutted has retroactive effects; in other words, when such a judgment is rendered, the child is deemed never to have been filiated or, to put it another way, to have been un-filiated from the beginning. In regard to the rebuttal of presumptions based on marriage, see Bénabent, *supra* note 1, No. 623, at 354 ("When the disavowal action succeeds, the effect of the judgment is to set aside very line of filiation between the husband of the mother and the child of the mother. This exclusion is, one must understand, retroactive: the child is thought never to have been related to the husband of his mother . . . ."). *See also* Carbonnier, *supra* note 1, at 236 ("The judgment [of disavowal] is declarative and, therefore, retroactive; legitimacy disappears *ab ovo*, from the egg . . . ."); Mazeaud, *supra* note 1, No. 906, at 301 ("The disavowed child loses the character of a legitimate child. He becomes, retroactively, from the moment of his conception, a 'natural child' [i.e., illegitimate child] of his mother . . . ."). In regard to presumptions based on acknowledgment, see Bénabent, *supra* note 1, No. 681, 382 ("If the action [to contest an acknowledgment] is successful, the line of filiation is retroactively annihilated . . . ."); Courbe, *supra* note 1, No. 809, at 319 ("A judgment upholding the contestation [of an acknowledgment], just like a judgment that upholds an action for annulment [of an acknowledgment], has the effect of retroactively annihilating the line of filiation that had been established between the child and the author of the acknowledgment."); Planiol, *supra* note 1, No. 847, at 715 ("The annulment of an acknowledgment on the ground that it was a 'lie' has the effect of retroactively breaking the line of filiation that resulted from it . . . ."). If that is so, then one can say, in reference to the hypothetical case I posed above and others like it (that is to say, cases in which, after the child is acknowledged, the presumption that another man was the child's father ends up being rebutted), that the child was not, after all, filiated to another man when the

acknowledgment was made; indeed, that the child had never been filiated to another man. In short, the fiction of retroactivity takes care of the temporal problem by eliminating it.

56. *Glossa* on *with the concurrence of the mother.* The acknowledgment required under NA 195 is effective only if the mother concurs in it. Because the article says nothing about what, if any, form this concurrence must take, one must suppose that the question is governed by general principles. Insofar as the form of juridical acts is concerned, the general rule is that of consensualism, that is, the act is considered to be complete and effective merely by consent, without the actor's needing to express this consent in any particular form. Jean Carbonnier, DROIT CIVIL: INTRODUCTION No. 168, at 270 (22d ed. 1994); Saúl Litvinoff & W. Thomas Tête, LOUISIANA LEGAL TRANSACTIONS: THE CIVIL LAW OF JURIDICAL ACTS 127–28 (1969); Henri Mazeaud & Léon Mazeaud et al., LEÇONS DE DROIT CIVIL: INTRODUCTION À L'ÉTUDE DU DROIT No. 266, at 394 (François Chabas rev., 12th ed. 2000). Whatever else the mother's concurrence may be, it is undoubtedly a juridical act. *See* NA 195 cmt. (e). It would seem, then, that the mother's concurrence could be oral or even implied.

57. *Glossae* on *acknowledges* . . . .

a. One of the most significant differences between the old institution of legitimation by "subsequent marriage plus acknowledgment" and the new institution of filiation by "subsequent marriage plus acknowledgment" lies in the recognized means of acknowledgment. Under OA 198, there were two possibilities: the acknowledgment could be either formal or informal. The former required the acknowledger to do one of three things: (1) make out an authentic act of acknowledgment; (2) sign the child's birth certificate; or (3) sign the baptismal registry for the child. The latter required the acknowledger to engage in some behavior whereby he held the child out to the community as his own. Under NA 195, the possibilities are much more limited, and this at two levels. First, the second possibility noted above—informal acknowledgment—has been suppressed entirely. Second, thanks to the revisers' redefinition of formal acknowledgment, about which I shall have more to say later, see *infra* note 71(*a*), the first possibility noted above—formal acknowledgment—has been narrowed in that the alternative of formal acknowledgment by signing the baptismal registry has been suppressed. Thus, for "subsequent marriage plus acknowledgment" to produce its effects under NA 195, the acknowledgment must be formal, which, as that term is now defined, means that it must be done by authentic act or by birth certificate.

b. Though the authority on this point is, I admit, indirect at best, it seems clear to me that an acknowledgment that is false can have no effect under NA 195. The doctrine and jurisprudence that have interpreted OA 203, which provided for filiation by formal acknowledgment, have concluded that a false acknowledgment is no acknowledgment at all, that it is, to the contrary, an absolute nullity and, as such, produces no filiative effects. *See infra* note 76(*a*). As I will explain later on, this interpretation of that old article has been carried over into the new article that replaces it, NA 196. *See id.* Because formal acknowledgment, as outlined in NA 196, is an element of filiation by

"subsequent marriage plus acknowledgment," as outlined in NA 195, what is true of formal acknowledgment under the former must in general be true of formal acknowledgment under the latter.

58. *Glossa* on *authentic act* . . . . On the meaning of authentic act, see *infra* note 71(*b*)(*i*).

59. *Glossa* on *signing the birth certificate* . . . . On the meaning of "signing the birth certificate," see *infra* note 71(*b*)(*ii*).

60. *Glossa* on *is presumed to be the father of that child.* Under NA 195, "subsequent marriage plus acknowledgment" gives rise to a "presumption" that the subsequent-marrier/acknowledger is the father of the child. In this regard, NA 195 changes the law, or at least the prevailing interpretation of the law. As the jurisprudence had (mis)interpreted OA 195, "subsequent marriage plus acknowledgement" did *not* give rise to such a presumption. *See, e.g.*, Chatelain v. State, 586 So. 2d 1373 (La. 1991) (man who, after the birth of a child, married the child's mother and acknowledged the child was nevertheless not presumed to be the child's father). In revising OA 195, the revisers deliberately chose to repudiate the *Chatelain* rule.

61. *Glossa* on NA 195 paragraph 1 "in toto." Filiation by "subsequent marriage plus acknowledgment," obviously enough, requires (1) a marriage subsequent to the child's birth, and (2) acknowledgment of the child. But there is no requirement that these two events take place in any particular order. It is possible and, one would suppose will usually be the case, that the subsequent marriage will precede the acknowledgment. But it is also possible that the acknowledgment will precede the marriage. In either case, the requirements of NA 195 paragraph 1 will be satisfied.

The rationale that leads me to this conclusion is as follows. First, there is an exegetical argument. Neither the text of NA 195 paragraph 1 nor of any piece of legislation, by its terms, requires that the subsequent marriage and the acknowledgment take place in any particular order. Second, there is an historical argument. OA 195 expressly provided that the required acknowledgment could take place "either before or after the marriage." *See* Henry v. Jean, 112 So. 2d 171, 174–75 (La. App. 1st Cir.), *aff'd*, 115 So. 2d 363 (La. 1959); Oppenheim, *supra* note 1, at 339–40. Though those who created NA 195, did, as I have already explained, intend to change a number of the elements of OA 195, nothing in the relevant legislative history (including the records of the Institute) indicates that *this* element—that the subsequent marriage and acknowledgment can occur in any sequence—was among them.

62. *Glossae* on *[t]he husband may disavow paternity of the child as provided in Article 187.*

a. Having provided that "subsequent marriage plus acknowledgment" would henceforth give rise to a presumption of paternity, the revisers then went on to provide that this presumption of paternity, like all the others, could be rebutted. The procedural vehicle provided for the rebuttal of this presumption is the same as that provided for the rebuttal of the others: a disavowal action. This disavowal action, of course, is entirely new.

b. It seems that only the subsequent-marrier/acknowledger himself, to the exclusion of his successors and the child's mother, is permitted to rebut the presumption of paternity established by NA 195. This surmise (I will not call it a conclusion, for reasons I will provide in the next paragraph) rests on several considerations, both of them exegetical arguments. First, there is the apparent plain meaning of the terms of the text. NA 195 *in haec verba* speaks only of the husband; it says nothing, not even by implication, about his successors or the child's mother. Second, there is an *a contrario* argument. Given that the legislature, in the case of the presumptions established by NAs 185 and 186, specifically provided that the presumption action can be challenged by the presumed father's successors and by the child's mother, but, in the case of the presumption of paternity established by NA 195, remained silent on this point, it follows *a contrario* that the legislature did not want to make the same provision for the latter as it had for the former. *Compare* NA 190, *and* NA 191, *with* NA 185, *and* NA 186.

Though this interpretative argument is certainly plausible, I nevertheless question whether it is correct in its entirety. If the argument is correct, then there is a fundamental difference between the presumptions of paternity established by NAs 185 and 186, on the one hand, and that established by NA 195, on the other: whereas the former can be challenged not only by the presumed father himself but also by his successors and by the child's mother, the latter can be challenged only by the presumed father, to the exclusion of his successors and the child's mother. Insofar as the *mother's* right to challenge these various presumptions is concerned, the distinction makes sense. In order for the NA 195 presumption to arise, the mother must concur in the father's acknowledgment, something she need not do in order for the presumptions of NAs 185 or 186 to arise. This concurrence constitutes a confession by the mother that the acknowledger is, in fact, the father. Since she has made such a confession, it is perhaps appropriate, morally speaking, that she should be (if the reader will permit me to speak as a common lawyer for a moment) "equitably estopped" from contradicting it later on. But insofar as the right of the presumed father's *successors* to challenge these various presumptions is concerned, the distinction makes little sense, at least to my mind. One of the reasons that the presumed father's successors are permitted to challenge the presumption of NA 185 or NA 186, as the case might be, is to enable them to act for the presumed father—to do what one must suppose he himself would have done, had he still been able—in situations in which evidence that he was not, in fact, the father comes to light only after he has died. But might not this problem arise as well and no less in a case governed by NA 195? Suppose that the father marries the mother and acknowledges the child in reliance on the mother's false representation that the child is his; that the presumed father then goes to his grave erroneously believing that the child is his; but that, after his death, it comes out that the child was not his. Should not one assume that this man, no less than a man presumed to be the father under NA 185 or NA 186, might have wanted to challenge the filiative bond between the child and himself? And, if the answer to that question is "yes," as I think it must be, then why should not

his successors be permitted to act for him, just as they would have been permitted to act for him had the presumption of paternity arisen under NA 185 or NA 186 instead of NA 195? Perhaps the answer to this question is supposed to have something to do with the fact that in a NA 195 case, the father, in addition to being married to the mother, which is for the most part all that NA 185 and 186 require, must acknowledge the child. If he has taken this affirmative act, then maybe that should be considered to be "his business," and his alone, and perhaps his successors should not be allowed to "stick their noses in it." But this explanation for the distinction, in addition to being a patent *non sequitur*, is fundamentally at odds with the law of filiation by (formal) acknowledgment, which is the subject matter of the next article (NA 196). As we shall see when we examine that article, anyone and everyone who has an interest in doing so, and not just the presumed father's successors, is entitled to challenge the presumption of paternity that that article establishes. If the presumed father's acknowledgment does not somehow "cut off" his successors' ability to challenge the presumption under NA 196, then why should the father's acknowledgment have such a preclusive effect under NA 195?

In view of the considerations recited above, I am forced to reach the following conclusions. First, I am not at all sure that NA 195, properly interpreted, precludes the presumed father's successors from challenging the presumption of paternity that that article establishes. Yes, I acknowledge, as I have already indicated, that the "plain meaning" of the article's text, as well as various other exegetical considerations, suggests the contrary. But one must never forget that the "plain meaning" rule is subject to an important exception: one need not and, indeed, should not interpret a legislative text "as written" if doing so would "lead to absurd consequences." *See* LA. CIV. CODE ANN. art. 9 (2006). I can think of nothing more absurd than a distinction without a reason. Second, if NA 195, properly interpreted, does preclude the father's successors from challenging the presumption of paternity that that article establishes, then this aspect of the article should be immediately suppressed. Arbitrariness is one of the great banes of legislative technique.

63. *Glossa* on *as provided in Article 187.* By virtue of this *renvoi* to NA 187, a subsequent-marrier/acknowledger, if he is to succeed in rebutting the presumption that he is the child's father, (1) must prove that he is not the father by "clear and convincing evidence," and (2) must put on more evidence than just his own self-serving testimony. *See supra* note 26(*b*)(*ii*).

64. *Glossa* on *a peremptive period* . . . . Like the disavowal actions established by NA 187 and NA 186, that established by NA 195 is subject to a temporal limitation. But unlike the temporal limitations on those other disavowal actions, which are prescriptive, see *supra* note 31(*a*), the temporal limitation on the disavowal action of NA 195 is peremptive. For the significance of this classification, see *supra* note 31(*a*).

65. *Glossa* on *one hundred eighty days.* Another difference between the temporal limitations on the disavowal actions established by NA 187 and NA 186, on the one hand, and that on the disavowal action established by NA 195, on the other, lies in the length of the limitations period. Whereas the length of

the period is one year in the case of a disavowal action brought under NA 187 or NA 186, see NA 189 ¶ 1, sentence 1; NA 186 ¶ 2, the length of the period is only half that long—180 days (about six months)—in the case of a disavowal action brought under NA 195.

66. *Glossa* on *the day of the marriage or the acknowledgment, whichever occurs later.* There is yet another difference between the temporal limitations on NA 187 and NA 186 disavowal actions, on the one hand, and that on the NA 195 disavowal action, on the other: the triggering mechanism. For the NA 195 disavowal action, there is a unique alternative trigger: the 180-day period starts to run upon the occurrence of the *later* of (1) the day on which the subsequent marriage is celebrated, or (2) the day on which the subsequent-marrier/acknowledger makes the acknowledgment.

Art. 200. Legitimation by notarial act[67] A father or mother shall have the power to legitimate his or her illegitimate children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children.	No corresponding article

67. *Glossa* on OA 200 "in toto." The institution of "legitimation by notarial act" has been suppressed. As I explained earlier, one of the goals of the revisers was to eliminate the historic subdivision of filiation into legitimate filiation and illegitimate filiation. *See supra* note 7. The suppression of the various modes of legitimating children born illegitimate was part of that larger project.

Art. 201. Legitimation of deceased children[68] Legitimation may even be extended to deceased children who may have left issue, and in that case it inures to the benefit of such issue.	No corresponding article

68. *Glossa* on OA 201 "in toto." OA 201, which permitted the legitimation of deceased children, has been suppressed. For an explanation of why the revisers decided to suppress it, see *supra* note 67.

Art. 202. Repealed by 1979 La. Acts No. 607[69]	No corresponding article

69. *Glossa* on OA 202 "in toto." This article had established two subcategories of the illegitimate children category: (1) natural children, i.e., those who had been acknowledged by their fathers; and (2) bastards, i.e., those who had not.

Art. 203. Methods of making acknowledgment; legal effect A. The acknowledgment of an illegitimate child shall be made by a declaration executed before a notary public, in the presence of two witnesses, by the father and mother or either of them, or it may be made in the registering of the birth or baptism of such child. B. (1) An acknowledgment or declaration by notarial act is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support an illegitimate child without the necessity of obtaining a judgment of paternity. (2) An acknowledgment by registry creates a presumption of paternity which may be rebutted if the alleged father proves by a preponderance of the evidence facts which reasonably indicate that he is not the father, provided such facts are susceptible of independent verification or of corroboration by physical data or evidence.	**Art. 196. Formal acknowledgment; presumption**[70] A man may, by authentic act or by signing the birth certificate,[71] acknowledge a child not filiated to another man.[72] The acknowledgment creates a presumption that the man who acknowledges the child is the father.[73] The presumption can be invoked only on behalf of the child.[74] Except as otherwise provided in custody, visitation, and child support cases,[75] the acknowledgment does not create a presumption in favor of the man who acknowledges the child.[76]

70. *Glossae* on NA 196 "in toto."

a. Like OA 203, NA 196 permits a man, under certain circumstances, to filiate a child to himself by means of "formal acknowledgment." To this extent, NA 196 does not change the law.

Though the new law of formal acknowledgment has not been changed on this point, it has been changed on a few others, as will be noted and explained in the *glossae* that follow. These changes concern *inter alia* (1) the modes whereby formal acknowledgment may be accomplished, and (2) the legal effects of formal acknowledgment.

b. To appreciate fully the new law regarding the legal effects of formal acknowledgment, one must recognize, at the outset, that NA 196 contains only part of that law. The rest of that law has been relegated to the Civil Code Ancillaries, in particular, Louisiana Revised Statutes Sections 9:392.1 and 405, which read as follows:

§ 392.1. Acknowledgment; obligation to support; visitation

> In child support, custody, and visitation cases, the acknowledgment of paternity by authentic act is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.

§ 405. Legal effect of acknowledgment

> In child support, custody, and visitation cases, the acknowledgment of paternity by authentic act is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.

When one reads these two statutes alongside NA 196 and compares them in their ensemble to OA 203, one discovers that the law regarding the legal effects of formal acknowledgment has not been changed as profoundly as would appear to be the case were one to read only NA 196 and compare it alone to OA 203. For example, despite what NA 196, read in isolation, seems to suggest, the new law has not eliminated the very important two-fold variation in effects that had been established under the old law, namely, that in some circumstances and for some purposes, a formal acknowledgment results in a "presumption" of paternity and in others, a "legal finding" of paternity. To be sure, the new law changes, albeit only slightly, these "circumstances" and these "purposes," as I will explain shortly. But the two-fold variation in effects itself nevertheless remains part of the new law.

71. *Glossae* on *by authentic act or by signing the birth certificate.*

a. OA 203 recognized three different modes of formal acknowledgment. The acknowledger could (1) make out an authentic act of acknowledgment, (2) sign the child's birth certificate, or (3) if the child was baptized, sign the baptismal registry (as "father"). NA 196 changes the law by reducing the permissible modes of formal acknowledgment to two: (1) making out a formal act of acknowledgment; or (2) signing the child's birth certificate. Under NA 196, then, signing the baptismal registry no longer affects a formal acknowledgment.

b i. "Authentic act" as used in NA 196 (and in the rest of the new legislation on filiation) has the meaning assigned to it in Louisiana Civil Code article 1833.

ii. The "birth certificate" referred to here is that contemplated by Louisiana Revised Statutes Section 9:3521. Pursuant to authority granted by that statute, the Registrar of Vital Statistics has developed a birth certificate form that, among other things, includes a signature line for the newborn's "father."

72. *Glossae* on *a child not filiated to another man.*

a. The presumption created by NA 196 arises only if the child in question is not already filiated to another man. This restriction on the scope of the presumption changes the law or, at the very least, the established jurisprudential interpretation of the law.

As OA 203 had been (mis)interpreted by the jurisprudence, the mode of filiation established therein could operate not only in favor of a child who was not yet filiated to another man, but also in favor of a child who was already filiated to another man. *See, e.g.*, Griffin v. Branch, 479 So. 2d 324, 328 (La. 1985) (implying that a man can, by formal acknowledgment, filiate a child to himself even if that child is already filiated to, indeed, is the legitimate child of, another man). In such a situation, the courts ruled, the child enjoyed dual paternity, that is, had not one, but two, fathers.

Thanks to the insertion of the restriction "a child not filiated to another man" into NA 196, it is no longer possible for formal acknowledgment to result in dual paternity. Under this article, a man who acknowledges a child as his own does not thereby filiate that child to himself. To the contrary, such a child remains filiated to one and only one man—the man to whom the child had theretofore been filiated.

b. Though NA 196 requires that the child not be "filiated to another man," the article does not specify when he must be so un-filiated, in particular, whether it is necessary that he be un-filiated at the time of the acknowledgment or, instead, whether it would suffice were he to become un-filiated after the acknowledgment. This question parallels the question raised earlier, see *supra* note 55(*b*), regarding NA 195. The conclusions I reached there are equally *a propos* here. The timing of the child's being un-filiated to another man is a matter of indifference under NA 196, so long as, at some point in time, the child's being so un-filiated coincides with the existence of an acknowledgment. Thus, whether the child is un-filiated to another man at the time of the acknowledgment or, though filiated to another man at the time of the acknowledgment, later becomes un-filiated to that man, the requirements of NA 196 are satisfied.

73. *Glossae* on *[t]he acknowledgment creates a presumption that the man who acknowledges the child is the father.*

a. This part of NA 196 specifies the legal effect of a formal acknowledgment: a presumption that the acknowledger is the child's father.

b. Though one would not know it from reading the text of NA 196, there is, in fact, an exception to this effects-of-acknowledgment rule. This exception

is signaled only in the texts of the new Civil Code Ancillaries that, together with NA 196, make up the new law of the legal effects of formal acknowledgment, namely, Louisiana Revised Statutes Sections 9:392.1 and 405. *See supra* note 70(*b*). The exception is this: that whereas a formal acknowledgment, as a general rule, produces a "presumption of paternity," such an acknowledgment, provided it is done by the making of an authentic act (as opposed to the signing of a birth certificate), produces a "legal finding of paternity" in cases of child support, custody, and visitation.

Though this distinction in effects between a presumption of paternity, on the one hand, and a legal finding of paternity, on the other, is not new, see *supra* note 70(*b*), the dividing line between those cases that produce one effect and those that produce the other is new, at least in part. Under OA 203, the dividing line was drawn simply in terms of modes of formal acknowledgment: if the formal acknowledgment was done by authentic act, then the effect was a legal finding of paternity; but if the formal acknowledgment was done by birth certificate (or baptismal registry), then the effect was a presumption of paternity. Under Louisiana Revised Statutes Sections 9:392.1 and 405, by contrast, the dividing line, as we have seen, is drawn in terms that are rather more complex. As before, the mode of formal acknowledgment is still relevant; but to that old factor a new one has now been added, namely, the kind of case or, if one prefers, the ultimate issue that is to be decided.

74. *Glossa* on *[t]he presumption can be invoked only on behalf of the child.* Unlike the other presumptions of paternity established by the Revision, that which arises from a formal acknowledgment, at least as a general rule, is relative to the child: whereas the child can rely on it in his attempts to asserts rights against the father (or the father's estate), the father cannot rely on it in his attempts to assert rights against the child (or the child's estate). This "relativization" of the presumption changes the law.

75. *Glossae* on *[e]xcept as otherwise provided in custody, visitation, and child support cases . . . .*

a. To the general rule that the presumption of paternity that arises from a formal acknowledgment is relative to the child, NA 196 carves out a broad exception, one so broad, in fact, that it comes close to swallowing up the general rule: the presumption benefits the father no less than the child in any case in which the ultimate issue to be decided is one of child custody, child visitation, or child support. Thanks to this exception, the supposed general rule will, with few exceptions, be operative in only two classes of cases: those in which the ultimate issue to be decided is one of (1) succession rights, or (2) survival-action/wrongful-death-action rights.

b. When one takes into account both the exceptional effects-of-acknowledgment rule described in note 73(*b*) and that described in note 75(*a*), one recognizes that cases of custody, visitation, and child support are doubly exceptional. First, in such cases, the effect of a formal acknowledgment, provided the acknowledgment is done by authentic act, is exceptional—a legal finding of paternity rather than a presumption of paternity. Second, in such cases, the beneficiaries of this effect, regardless of how the acknowledgment is

done, are exceptional—the father as well as the child, rather than the child alone. The end result of the interaction between these two exceptional rules and the general rules to which they are related can be described as follows: (1) if the formal acknowledgment was accomplished by the signing of a birth certificate, then the acknowledgment produces a presumption of paternity, regardless of the ultimate issue to be decided; (2) if the formal acknowledgment was accomplished by making an authentic act, then the acknowledgment (a) produces a legal finding of paternity in cases in which the ultimate issue to be decided is one of custody, visitation, or support, or (b) a presumption of paternity in all other cases.

76. *Glossae* on NA 196 "in toto."

a. Though the text of OA 203 did not expressly say so, the judges and scholars who undertook to interpret that article unanimously concluded that a false acknowledgment, that is, one made by a man who is not, in fact, the child's biological father, could produce no effect. *See, e.g.*, Succession of Robinson, 654 So. 2d 682, 684 (La. 1995); Linda A. Verlander, Comment, Succession of Robinson*: Clarification of Illegitimates' Succession Rights*, 42 LOY. L. REV. 169, 176 (1996). In reaching this conclusion, these judges and scholars relied upon the scholarship of French authors who have interpreted French Code Civil article 334 (repealed), one of the sources of OA 203. *See, e.g.*, Aubry & Rau, *supra* note 1, at § 568, at 212 ("Intrinsic conditions for acknowledgment . . . . 4° Truth—The acknowledgment must be the expression of the truth . . . ."); Laurent, *supra* note 1, No. 75, at 113 ("As a matter of law, an acknowledgment is non-existent when it is made by him who is not the father . . . . As a matter of logic, no one can create paternity which does not exist, save by way of adoption . . . ; thus, if the acknowledgment is false, in can produce no effect . . . ."). The argument underlying this interpretation of OA 203 is, in large part, simply analytic: to acknowledge something is, by definition, to admit that that something is true; it follows, then, that an acknowledgment of that which is false is a logical impossibility.

This interpretation of OA 203 must, in my judgment, be extended to NA 196. The logic behind the interpretation—that a false acknowledgment is a contradiction in terms—is no less persuasive as applied to the new article than it was as applied to the old. And there is no evidence whatsoever in the legislative history (including the records of the Institute) that the revisers, when they transformed OA 203 into NA 198, wished to repudiate this interpretation of the former.

b. Unlike the new articles that pertain to the other presumptions of paternity established by the Revision, NA 196 makes no provision for when the presumption it creates must be challenged. According to comment (d) to NA 196, that variation between the other new articles, on the one hand, and NA 196, on the other, is not an accident. The revisers understood that, in the absence of any special stipulation regarding who may challenge the presumption, the question would be decided by general principles. And the revisers judged, correctly, that the general principle applicable to the "when" question is that the

challenge may be brought at "any time." *See* LA. CIV. CODE ANN. art. 3457 (2006) ("There is no prescription other than that established by legislation.").

Art. 204.[77] Repealed by 1979 La. Acts No. 607	No corresponding article

77. *Glossa* on OA 204 (1979) "in toto." This article had prohibited the acknowledgment of children "whose parents were incapable of contracting marriage at the time of conception." Inasmuch as the incapacities in question included the impediments of a prior undissolved marriage and incest, the principal effects of this prohibition included that so-called "adulterous bastards" and "incestuous bastards" could never be acknowledged.

Art. 205. Acknowledgment by father alone[78] The acknowledgment made by the father without the concurrence or consent of the mother, shall have effect only with respect to the father.	No corresponding article

78. *Glossa* on OA 205 "in toto." OA 205 has been suppressed. That does not mean, however, that the law has been changed. The proposition for which it stood is consistent with general principles, so consistent, in fact, that one is tempted to call it self-evident. The sole reason for suppressing the article, then, was technical: to eliminate redundancy.

Art. 206. Rescission of notarial act; with and without cause[79] A. A person who executed a notarial act of acknowledgment or declaration may, without cause, rescind it before the earlier of: (1) Sixty days of the signing of the notarial act of acknowledgment or declaration, in a judicial proceeding for the limited purpose of rescinding the acknowledgment or declaration. (2) A judicial hearing relating to the child, including a child support proceeding, wherein the affiant to the notarial act of acknowledgment or declaration is a party to the proceeding. B. At any time, a person who executed a notarial act of acknowledgment or declaration may petition the court to void such acknowledgment or declaration only upon proof, by clear and convincing evidence, that such act was induced by fraud, duress, or material mistake of fact, or that the person is not the biological parent of the child. Except for good cause shown, the court shall not suspend any legal responsibilities or obligations, including a support obligation, of the person during the pendency of this proceeding.	No corresponding article

79. *Glossa* on OA 206 "in toto." Though OA 206 has not been reproduced in the form of a new Civil Code article, it has been reproduced in the form of a new revised statute, namely, Louisiana Revised Statutes Section 9:406. This new revised statute provides as follows:

§ 406. Revocation of authentic act; with and without cause

A. A person who executed a notarial act of acknowledgment may, without cause, revoke it before the earlier of:

(1) Sixty days of the signing of the notarial act of acknowledgment, in a judicial proceeding for the limited purpose of rescinding the acknowledgment or declaration.

(2) A judicial hearing relating to the child, including a child support proceeding, wherein the affiant to the notarial act of acknowledgment is a party to the proceeding.

B. At any time, a person who executed a notarial act of acknowledgment or declaration may petition the court to rescind such acknowledgment only upon proof, by clear and convincing evidence, that such act was induced by fraud, duress, or material mistake of fact or error, or that the person is not the biological parent of the child.

C. Except for good cause shown, the court shall not suspend during the pendency of this proceeding any legal responsibilities or obligations, including a support obligation, of the person who petitions the court to revoke or rescind the authentic act of acknowledgment under this Section.

Between the text of OA 206, on the one hand, and new section 406, on the other, there are a number of variations. Here is a catalogue of the changes, together with the reasons therefor:

Change	*Reason*
1. In the rubric, "rescission" has been replaced by "revocation."	To improve the accuracy of the rubric: this change accommodates one of the textual changes noted below. (see *infra* #4)
2. In the rubric and throughout the text, "notarial act" has been replaced by "authentic act."	To improve technical precision: though the terms are often used interchangeably, "authentic act" is the preferred form.
3. Throughout the text, "acknowledgment or declaration" has, with one curious exception (an oversight, perhaps?), been abridged to "declaration."	To improve technical quality: the term "declaration" was redundant of the term "acknowledgment."
4. In paragraph A, "rescind" and "rescinding" have been replaced by "revoke" and "revoking," respectively.	To improve technical precision: to "rescind" is to upset some juridical act for some "cause"; to upset a juridical act without cause is to "revoke": what is contemplated here is upsetting a juridical act—acknowledgment without cause.

5. In paragraph B, "void" has been replaced by "rescind."	To improve technical quality: "void" is a "common law" term, one that has no particular meaning in Louisiana law; in the civil law, "rescind" is a rough equivalent.
6. In paragraph B, "or error" has been added to "material mistake of fact."	To clarify: "material mistake of fact" is a common law term, one that has no particular meaning in Louisiana law; in the civil law, "error" is a rough equivalent.
7. The final sentence of paragraph B of OA 206 has been set off in a separate paragraph (C) of new section 406.	To improve technical quality: the rule set forth in the last sentence of OA 206 paragraph B was no less connected to the rules of OA 206 paragraph A than it was to that of OA 206 paragraph B, first sentence.

As this chart makes clear, all of the changes to OA 206 that are reflected in new section 406 fall under the heading of "stylistic" or "clarificatory." The substance of OA 206, then, has not been changed.

Art. 207. Contestation of claims of acknowledged children[80] Every claim, set up by illegitimate children, may be contested by those who have any interest therein.	No corresponding article

80. *Glossa* on OA 207 "in toto." Though the revisers decided to suppress OA 207, they did not, in so doing, understand themselves to be changing the law. As that article had been interpreted by the courts, its chief function was to enable anyone who had an interest in doing so to challenge the truth of a formal acknowledgment made under OA 206. This same understanding of who, under the new law, is entitled to challenge the truth of a formal acknowledgment finds clear expression in comment (d) to NA 196, the pertinent part of which reads as follows: "The presumption created by this Article must be distinguished from the presumptions under Sections 1 and 2 of this Chapter. There is *no similar limitation in this Section as to who may bring the action* to rebut the presumption created by this Article."

How it is that the revisers believed they could suppress OA 207 and yet leave the law the same is not difficult to fathom. The revisers understood that,

in the absence of any special stipulation regarding who may challenge the presumption of NA 196, the question would be decided by general principles. And the revisers judged that the general principle applicable to this "who" question is the principle that any person may contest any assertion or presumption of fact that adversely affects his "interest." This judgment, it bears noting, finds support in French doctrine. *See, e.g.*, Marcadé, *supra* note 1, No. 76, at 69 (noting that the rule of French Code Civil article 334 (repealed), a source of OA 207, is "merely the application of the common law, of general principles"); *see also* Laurent, *supra* note 1, No. 75, at 113 ("It [the rule of French Code Civil article 339] is based on law and on reason. As a matter of law, an acknowledgment is non-existent when it is made by him who is not the father; now, every interested person can avail himself of the non-existence of a juridical fact. As a matter of reason, no one can create paternity that does not exist, save by way of adoption . . . ; thus, if the acknowledgment is false, it can produce no effect to the prejudice of anyone and, as a result, any person can repudiate it when it is opposed to him or attack it when he has an interest in doing so."). For the revisers, then, suppressing OA 207, far from changing the law, simply removed a redundancy from it.

Art. 208. Requirement to prove filiation In order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must institute a proceeding under Article 209.	**Art. 197.Child's action to establish paternity; proof; time period**[81] A child[82] may institute an action to prove paternity even though he is presumed to be the child of another man.[83] If the action is instituted after the death of the alleged father, a child shall prove paternity by clear and convincing evidence.[84] For purposes of succession only,[85] this action is subject to a peremptive period[86] of one year.[87] This peremptive period commences to run from the day of the death of the alleged father.[88]
Art. 209. Proof of filiation A. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged living parent by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article. B. A child not entitled to legitimate filiation nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation as to an alleged deceased parent by clear and convincing evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this article. C. The proceeding required by this article must be brought within one year of the death of the alleged parent or within nineteen years of the child's birth, whichever first occurs. This time limitation shall run against all persons, including minors and interdicts. If the proceeding is not timely instituted, the child may not thereafter establish his filiation, except for the sole purpose of establishing the right to recover damages under Article 2315. A proceeding for that purpose may be brought within one year of the death of the alleged parent and may be cumulated with the action to recover damages. D. The right to bring this proceeding is heritable.[89]	

81. *Glossa* on NA 197 "in toto." NA 197 reproduces the substance of OAs 208 and 209, but with a number of modifications.

82. *Glossa* on *[a] child* . . . . If the child is an unemancipated minor, then he lacks judicial capacity, and, for that reason, cannot bring the action on his own. *See* LA. CODE CIV. PROC. ANN. art. 683(A) (2006). In such a case, the action will have to be brought on his behalf by his legal representative, namely, one of his parents, if the child is subject to parental authority, see LA. CIV. CODE ANN. art. 235 (2006); LA. CODE CIV. PROC. ANN. arts. 683(C), 4501–02 (2006), or his tutor, if the child is not, see LA. CODE CIV. PROC. ANN. arts. 683(B), 4262 (2006). Even so, it is the child himself, not his representative, who is the true party plaintiff.

83. *Glossa* on *even though he is presumed to be the child of another man.* As OAs 208 and 209 had been (mis)interpreted by the jurisprudence, the mode of filiation established therein could operate not only in favor of a child who was not yet filiated to another man, but also in favor of a child who was already filiated to another man. *See, e.g.*, Griffin v. Branch, 479 So. 2d 324, 328 (La. 1985) (holding that a child who is already filiated to one man may establish his filiation to another man by means of an OA 209 filiation action). Were such an action to be successful, the courts ruled, the child would enjoy dual paternity, that is, would have not one, but two, fathers. This rule, notwithstanding how manifestly inane it is in its conception and how mischievous it sometimes is in its effects, has not been changed.

The blame for the retention of this bizarre rule rests squarely on the shoulders of the Institute's Council. The Committee had proposed that this instance of dual paternity, just like the others, see *supra* notes 55, 72, be eliminated. In this one instance, however, the Institute's Council balked.

Lest I be misunderstood here, let me explain precisely why I find dual paternity in this context to be so obnoxious. It is not because I believe that, once a child is filiated to one man, he should forever thereafter be "stuck" with that man and that man alone as his father. No, I am prepared to allow such a child, if that man is not, in fact, his biological father and if that child has a mind to do so, to attempt to establish his filiation to the man who is, in fact, his biological father. 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.

84. *Glossae* on *[i]f the action is instituted after the death of the alleged father, a child shall prove paternity by clear and convincing evidence.*

a. NA 197 leaves intact the standard of proof rules of OA 209. For cases in which the alleged father has already died, NA 197 provides, as had OA 209, that the standard of proof is clear and convincing evidence, the intermediate standard between that of proof beyond a reasonable doubt and proof by a preponderance of the evidence. Though NA 197, in contrast to OA 209, does not expressly provide that the standard of proof shall be proof by a preponderance of the evidence in cases in which the alleged father is still alive, there can be no doubt that that remains the law. By not specifying a standard of proof rule for such cases, NA 197 allows them to fall under the scope of the ordinary standard of proof rule, which requires proof by a preponderance of the evidence.

b. The rationale behind the variation in the standard of proof as between cases in which the father is still alive and those in which he is not is well-known. As Professor Spaht has explained, "[a]fter the death of the alleged parent, whose knowledge concerning the fact or probability of his filiation to the child is superior [to that of all other persons], the [estate's] vulnerability to fraudulent claims is significantly increased." Spaht, *Developments, 1981–1982*, *supra* note 1, at 537.

85. *Glossa* on *[f]or purposes of succession only* . . . . Any and every filiation action brought under OA 209, regardless of the kind of case in which it was brought (regardless, in other words, of the ultimate issue that was to be decided), was subject to a temporal limitation of one kind or another. Not so under NA 197. This new article subjects the filiation action to a temporal limitation in only one kind of case: that in which the ultimate issue to be decided concerns the child's right to inherit from his alleged father. In other kinds of cases, for example, where the ultimate issue to be decided concerns the child's right to support from the alleged father or to collect damages for his father's wrongful death, or the father's right to obtain custody of or to visit the child or to collect damages for the child's wrongful death, the filiation action can now be brought at any time.

86. *Glossa* on *a peremptive period* . . . . The temporal limitation established by NA 197 is peremptive rather than prescriptive, just as were those established by OA 209. *See* Talley v. Succession of Stuckey, 614 So. 2d 55 (La. 1993). For the significance of this distinction, see *supra* note 31(*a*).

87. *Glossa* on *one year*. The periods of the temporal limitations established by OA 209 varied in length: in some instances, the length was one year; in others, it was nineteen years. NA 197 simplifies the law by establishing one single period the length of which is one year.

88. *Glossa* on *[t]his peremptive period commences to run from the day of the death of the alleged father*. The trigger mechanism for the running of the temporal limitations periods established by OA 209 was fairly complex: in some instances (where the pertinent period was one year), the trigger was the date of the alleged father's death; in others (where the pertinent period was nineteen years), it was the date of the child's birth. NA 197 simplifies the law by establishing a single trigger for all cases: the date of the alleged father's death.

89. *Glossa* on OA 209(D) "in toto." This paragraph of OA 209, which provided that the child's filiation action was heritable, has not been reproduced in the Revision. There is some question regarding what, if any, significance one should attribute to this legislative omission.

One might be tempted to think that the revisers intended to change the law, that is, to render the child's filiation action non-heritable. When a legislature, in the course of revising a body of law, reproduces some but not all of that law, it is usually reasonable, at least where there's no evidence to the contrary, to assume that the legislature wished to get rid of that part of the law that it declined to reproduce.

But given the great magnitude of the change in question here—switching an action from heritable to non-heritable—one has to suppose that, if the revisers had really intended to make the change, someone, somewhere, sometime in the larger legislative process (including the drafting of the Projet by the Institute) would have said something about it. The trouble is that no one did. Nowhere in the legislative record, including the records of the Institute, is there any indication that it even occurred to anyone that the law on this point might be changed, much less that anyone actively intended that such a change be made.

We find ourselves, then, in the face of a curiosity: legislative action that seems to import a change in the law taken under circumstances in which no one who had anything to do with that action believed any such change would occur. How can this curiosity be explained? It is possible that the revisers believed (1) that, by suppressing OA 209(D), the heritability *vel non* of the child's filiation action would come to be governed by general principles, and (2) that under those general principles, this action would be heritable. The first of these beliefs is undoubtedly correct. Though the second belief may, perhaps, be questioned, it at least has the support of some French doctrine, see, e.g., Laurent, *supra* note 1, No. 435, at 549 ("In general, all those who have an interest [therein] can bring actions concerning the status of persons. That is the application of common law."), and is arguably consistent with the principles that underlie Louisiana's legislation regarding heritability. *See* LA. CIV. CODE ANN. art. 1765 ¶ 2 (2006).

However that may be, the revisers' intent was clear enough. And that intent, once again, was that the law not be changed. For that reason, my opinion is that the child's filiation action remains heritable.

Art. 191. Father's right to establish paternity; time period	**Art. 198. Father's action to establish paternity; time period**[90]
A. A man may establish his paternity of a child presumed to be the child of another man even though the presumption has not been rebutted. B. This action shall be instituted within two years from the date of birth of the child, except as may otherwise be provided by law. Nonetheless, if the mother in bad faith deceives the father of the child regarding his paternity, the action shall be instituted within one year from the date the father knew or should have known of his paternity, but no more than ten years from the date of birth of the child.	A man may institute an action to establish his paternity of a child at any time[91] except as provided in this Article.[92] The action is strictly personal.[93] If the child is presumed to be the child of another man,[94] the action shall be instituted within one year from the day of the birth of the child.[95] Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity,[96] the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.[97] In all cases, the action shall be instituted no later than one year from the day of the death of the child.[98] The time periods in this Article are peremptive.[99]

90. *Glossa* on NA 198 "in toto." NA 198 reproduces the substance of OA 191, but with a number of modifications.

91. *Glossa* on *at any time*. In contrast to OA 191, which required that the avowal action be brought within two years of the child's birth in all cases, NA 198 provides, as general rule, that the avowal action is not subject to any temporal limitation.

92. *Glossa* on *except as provided in this Article*. To the general rule that an avowal action may be brought at any time, see *supra* note 91, there are no exceptions other than those established by NA 198. As we shall shortly see, there are only two such exceptions. *See infra* notes 95(*a*), 98.

93. *Glossa* on *[t]he action is strictly personal*. The expression "strictly personal," as used in NA 198 paragraph 2, has the same meaning assigned to it in Louisiana Civil Code article 1766, which speaks of "strictly personal" obligations. The implications of characterizing the disavowal action in this way include that it is not heritable, so that it cannot be brought by the successors of

the supposed father, and not transferable, so that it cannot be brought by his creditors.

94. *Glossa* on *[i]f the child is presumed to be the child of another man . . . .* The reference here is exclusively to the presumptions of paternity established in the preceding new articles, namely, those of NA 185 (a presumption based on marriage), NA 186 (another presumption based on marriage), NA 195 (a presumption based on subsequent marriage plus formal acknowledgment), and NA 196 (a presumption based on formal acknowledgment alone).

95. *Glossae* on *[i]f the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child.*

a. In this the first sentence of NA 189 paragraph 2, we encounter the first of the two exceptions to the general rule that an avowal action may be brought at any time. This exception applies where the child, who is the target of the avowal action, is already presumed to be the child of another man. In such a case, the avowal action is subject to a short temporal limitation of one year. And the trigger for the running of that period is the child's birth.

b. The rationale behind providing such a short time fuse for the avowal action under these circumstances, such as it is, seems to run like this. Where the child is presumed to be the child of another man, it will usually be because that other man is the husband of the child's mother. If the child is *still* presumed to be that man's child, that means that that man, at least for now, has not disavowed paternity. And, if that is true, then chances are that that man, the child's mother, and the child are still together, that the three of them form a still-intact family. If another man is to be allowed to establish his filiation to such a child, something that is likely to disrupt significantly, if not outright destroy, the child's already-intact family, then that other man must, in the child's interest, be required to act sooner rather than later. The longer the child remains in his already-intact family, the more he will bond with his presumed father and, consequently, the greater will be the psychological blow he will suffer when that bond is weakened or broken.

If this is, in fact, the rationale that underlies the rule of NA 198 paragraph 2, then the rule is open to objection on several scores. First, the rule is, in certain respects, overly broad. Yes, it will usually be the case that when a certain man is presumed to be the father of a certain child, it is because that man is married to the mother. But that will not always be the case. A presumption of paternity, as we have seen, can also arise from a mere acknowledgment, apart from any marriage. *See* NA 196. Now, when the presumption arises from that cause, it will not necessarily or even usually be the case that the presumed father, the child's mother, and the child form an intact family. For that matter, even when the presumption does arise from marriage, there is no guarantee that, at the time the "real" father contemplates bringing a NA 198 action, the presumed father, the mother, and the child will still form an intact family. Thus, as the rule is written (it applies to *any* case in which there is *any* sort of presumed father), it will end up being applied in many situations in which there is no intact family to protect. Second, the rule is, in certain respects, overly restrictive. It is true that the longer a child remains with a certain man whom he thinks is his father, the

greater will be the bond that develops between them; however, the rate of this bonding varies over time. When the child is young, the bonding takes place slowly; as the child ages, the pace of bonding accelerates. For this reason, it is unlikely that much additional bonding beyond what has already taken place in the first year will occur in the second year or even the third or perhaps even the fourth. And, if that is so, it might be possible to disrupt or even sever the bond between the child and his first father as late as the child's second or third or maybe even fourth birthday without thereby doing him much psychological damage. (It is, in fact, precisely for this reason that the "old" Uniform Parentage Act accorded the would-be avower five years within which to bring his action if the child in question is part of an intact family. *See* UNIF. PARENTAGE ACT § 6(a), 9 U.L.A. 410–11 (1973)). Thus, as the rule is written (it imposes a peremptive period of only *one year*), it will foreclose the avowal action in cases in which it could be brought without much, if any, harm to the child.

Looking at the "disconnects" between the rule of NA 198 paragraph 2, on the one hand, and the rationale that has been offered in support of it, on the other, one might begin to wonder if that rationale is genuine, or if, in fact, there is not something else going on here that explains how the rule came to be. This speculation, it turns out, is justified. The rule of NA 198 paragraph 2 is the result of a compromise, worked out by the Institute, between the proponents of two opposing points of view. First, some within the Institute were, indeed, committed to the notion that intact families should be protected against the disruptive effects of avowal actions. To this end, they proposed that the avowal action be entirely foreclosed when the child who is its target is part of such a family, for as long as he remains a part of such a family. Second, others within the Institute cared far less (if at all) about protecting intact families against the risk of disruption than they did about protecting the would-be avower against the risk of being cut off from his child. To this end, they proposed that the avowal action be permitted under all circumstances, even when the child who is its target is part of an intact family, and, further, proposed that this action not be subjected to any temporal limitation. By allowing the would-be avower to avow even when the child is part of an intact family, the compromisers "threw a bone" to the second group; by attaching a short time fuse to such a would-be avower's avowal action, they "threw another bone" to the first group. Both groups were content to take what they could get.

This explanation of "what is really going on here," I recognize, leaves unexplained why, in the compromise, the prerequisite for the application of the short peremptive period was cast not in terms such as "if the child, his mother, and his presumed father form an intact family," but rather in the terms "if the child is presumed to be the child of another man." For this, I am afraid, I have no explanation.

96. *Glossa* on *[n]evertheless, if the mother in bad faith deceived the father of the child regarding his paternity* . . . . The second sentence of OA 191 paragraph B carved out an exception to the general temporal-limitation rule for the avowal action based on the mother's "bad faith deception" of the father

regarding the child's paternity. NA 198 paragraph 2 reproduces the substance of that exception, albeit in somewhat different form.

97. *Glossa* on *the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.* Like OA 191(B), NA 198 paragraph 2 requires that the avowal action be brought by the *earlier* of (1) one year, reckoning from the date on which the supposed father gains actual or constructive knowledge of the child's birth, or (2) ten years, reckoning from the date of the child's birth. On this point the law remains unchanged.

98. *Glossa* on *[i]n all cases, the action shall be instituted no later than one year from the day of the death of the child.* In this, the penultimate paragraph of NA 198, we encounter the second exception to the general rule that an avowal action may be brought at any time. This exception applies where the child, who is the target of the avowal action, has already died. In such a case, the action is subject to a temporal limitation of one year. And the trigger for the running of this period is the child's death.

99. *Glossa* on *[t]he time periods in this article are peremptive.* Though OA 191 was less than clear regarding the nature of the temporal limitation that it imposed on the avowal action—whether the limitation was peremptive or prescriptive—the jurisprudence resolved the issue in favor of the former alternative. *See* W.R.M. v. H.C.V., 923 So. 2d 911, 914 (La. App. 3d Cir. 2006); Mouret v. Godeau, 886 So. 2d 1217, 1221 (La. App. 3d Cir. 2004). NA 198 paragraph 4 expressly provides that the same is true of the temporal limitations established in NA 198 paragraphs 2 and 3. In this regard, then, the law has not been changed.

Art. 210.[100] Repealed by 1980 La. Acts No. 549	No corresponding article

100. *Glossa* on OA 210 "in toto." This article provided that the testimony of the mother to the effect that her cohabitor was the child's father was not sufficient to establish paternity in an action brought under OA 209 where it could be proved that the mother was sexually promiscuous; specifically, that the mother was "a woman of dissolute manners or . . . had an unlawful connection with one or more men" other than her cohabitor.

Art. 211. Proof of paternity in case of rape[101] In case of rape, whenever the time of such rape shall agree with the time of conception, the ravisher may, at the suit of the parties concerned, be declared to be the father of the child.	No corresponding article

101. *Glossa* on OA 211 "in toto." This article, which established a special rule of filiation for the case in which a child is born following a rape, has been suppressed. Now filiation in such cases must be sorted out on the basis of the standard rules of filiation.

Art. 212.[102] Repealed by 1980 La. Acts No. 549	No corresponding article

102. *Glossa* on OA 212 "in toto." This article authorized illegitimate children to "make proof of their maternal descent, provided the mother be not a married woman."

Art. 213.[103] Repealed by 1948 La. Acts No. 227	No corresponding article

103. *Glossa* on OA 213 (1948) "in toto." This article prohibited the parents of a "foundling" who had been reared by strangers from claiming him as their own, except upon proof that he had been taken from them "by force, fraud, or accident."
