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Comments

Presumption of Legitimacy and the "Action en Desaveu"

The purpose of this comment is to evaluate the existing Louisiana law relating to the determination of legitimacy and illegitimacy of offspring and to reflect on the problems created by the language of the Civil Code and the decisions of the courts of this state. The first two parts of this comment, an analysis of the pertinent articles of the Civil Code and of the problems presented by their texts, appear below. The third and fourth parts, a review of the jurisprudence and a critical appraisal of the Louisiana situation, will appear in a subsequent issue of this REVIEW.

I. ANALYSIS OF CIVIL CODE ARTICLES 179, 184-192

The articles which are important in the first stage of this inquiry¹ are:

Book I, Title VII, Chapter 1—Of Children In General:

"Art. 179. Legitimate children are those who are born during the marriage."

Book I, Title VII, Chapter 2, Section 1—Of Legitimacy Resulting From Marriage:

"Art. 184. The law considers the husband of the mother as the father of all children conceived during the marriage."

"Art. 185. The husband can not by alleging his natural impotence, disown the child; he can not disown it even for cause of adultery, unless its birth has been concealed from him, in which case he will be permitted to prove that he is not its father."

"Art. 186. The child capable of living, which is born before the one hundred and eightieth day after the marriage is not presumed to be the child of the husband; every child

1. The modifications which Articles 196, 197 and 960 of the Civil Code may make on these articles will be considered in Part 2 of this comment.

born alive more than six months after conception is presumed to be capable of living."

"Art. 187. The same rule applies with respect to the child born three hundred days after the dissolution of the marriage, or after the sentence of separation from bed and board.

"Art. 188. The legitimacy of the child born three hundred days after the separation from bed and board has been decreed, may be contested, unless it be proved that there had been cohabitation between the husband and wife since such decree, because it is always presumed that the parties have obeyed the sentence of separation.

"But in case of voluntary separation, cohabitation is always presumed, unless the contrary be proved."

"Art. 189. The presumption of paternity as an incident to the marriage is also at an end, when the remoteness of the husband from the wife has been such that cohabitation has been physically impossible."

"Art. 190. The husband can not contest the legitimacy of the child born previous to the one hundred and eightieth day of marriage, in the following cases:

"1. If he was acquainted with the circumstances of his wife being pregnant previously to the marriage.

"2. If he was present at the registering of the birth or baptism of the child and signed the same, or if not knowing how to sign, he put his ordinary mark to it, in the presence of two witnesses."

"Art. 191. In all the cases above enumerated, where the presumption of paternity ceases, the father, if he intends to dispute the legitimacy of the child, must do it within one month, if he be in the place where the child is born, or within two months after his return, if he be absent at that time, or within two months after the discovery of the fraud, if the birth of the child was concealed from him, or he shall be barred from making any objection to the legitimacy of such child."

"Art. 192. If the husband die without having made such objection, but before the expiration of the time directed by law, two months shall be granted to his heirs to contest the

legitimacy of the child, to be counted from the time when the said child has taken possession of the estate of the husband, or when the heirs shall have been disturbed by the child, in their possession thereof."

It may be observed at the outset that it would be unreasonable to construe Article 179 literally to mean that all children born during marriage (and none born after its dissolution) are legitimate. This would be contrary to the natural expectations of people who would at least want their posthumous children to be considered legitimate. And such a strict interpretation would be inconsistent with Articles 184-192, under which, as will be shown, children born less than three hundred days after dissolution of marriage usually are to be considered legitimate and children born during marriage sometimes are subject to disavowal by the husband of the mother or his heirs. The meaning of Article 179, therefore, must be that legitimate children are those born of the marriage, that is to say, those born of a married woman and her husband. It may be noted that the French text of Article 198 of the Civil Code of 1825, of which Article 179 is a translation, reads in terms of the children *nés dans le mariage*, which probably is translated better as "born of the marriage" than as "born during marriage." If "during" had been intended, the draftsmen probably would have used "pendant" instead of "dans." "Dans" literally means "in" but in this article of the Civil Code it probably was used in much the same sense in which the Anglo-American law uses "born in wedlock."

Turning now to an analysis of the plan of Articles 184-192, it can be shown that the matter of legitimacy is approached in terms of the paternity of a child either conceived by or born of a woman while married. For the first case, that of a child conceived during a marriage, Article 184 establishes the basic presumption that the husband of the mother is the father of the child conceived by her. The date of conception is thus important, and yet because it is so difficult to ascertain, Articles 186 and 187 establish presumptions and non-presumptions of conception *during marriage*. Actually the articles are worded in terms of presumptions of paternity in the husband, but the criteria are the dates of marriage, birth, separation from bed and board, and dissolution of marriage. Yet the child conceived during marriage is not necessarily conceived by the husband of the mother; hence,

Articles 185, 187 and 189 name the few specific situations in which the presumption of paternity in the husband ceases, though the child is admittedly conceived during the marriage. The second case, that of a child born during marriage though presumably conceived before the marriage, is dealt with in Articles 186 and 190. These articles, like those discussed above, prescribe rules in terms of presumptions and non-presumptions of paternity in the husband. Finally, Articles 191 and 192 give the husband of the mother, or in the case of his death, his heirs, the right to bring an action to disavow the child whenever the presumption of paternity ceases and give them certain delays in which to exercise this right. This action is known to civilians as the *action en desaveu*.

From the above analysis three important conclusions follow:

- (1) Articles 184-192 have no application unless the child is born or conceived of a married woman.
- (2) When a child is born or conceived of a married woman, only the husband or his heirs may bring the action of disavowal.
- (3) If they do not bring the action within the time allowed, they will not be permitted to do so at all, and the child will be considered that of the husband of the mother.

The plan of the articles having been explained, their provisions may be examined to determine exactly in what instances they do or do not presume the husband to be the father.

The Child Born Less Than 180 Days After Marriage

Article 186 provides that a child born "capable of living" and before the 180th day after marriage is not presumed to be the child of the husband. Thus, it would seem that the child which is born prior to the 180th day and which is capable of living must be disavowed if the husband of the mother does not wish to be regarded as the father; but it would seem that the husband would not be required to disavow the child which is born during that time but which is not capable of living. Thus the determination of "capable of living" would seem extremely important. The article, however, does not help in this regard. It defines a child born capable of living as one born alive more than six months after conception. Obviously, this definition is unsatisfactory, for it requires a determination of the time of conception while the

main purpose of the article in its entirety is to raise a presumption to avoid the necessity of making such a determination in fact. The definition being useless, it would seem that the husband must act to disavow any child which is born alive prior to the 180th day after the marriage if he wishes to avoid being considered its father.

There are two instances, however, in which the husband may not disavow the child born less than 180 days after marriage, both provided by Article 190. The first is that a husband may not contest the legitimacy of such a child if he knew of the pregnancy of his wife at the time of marriage; the second is that he may not do so if he was present at the registry of the birth of the child and signed the same. The rationale of such a rule is probably that, even conceding the child was not conceived in wedlock, it should enjoy legitimate status if the husband by his acts has impliedly admitted that he is the father. Such a rule is very similar to that of Article 198, in the section "Of Legitimation," under which the subsequent marriage of the parents of a child born out of marriage legitimates the child if the parents have admitted it to be their own.

*The Child Born 300 or More Days After
Separation from Bed and Board*

Article 187, by referring to Article 186, says that the non-presumption of paternity in the husband of the mother "applies with respect to the child born 300 days . . . after the sentence of separation from bed and board"; but the husband's right to bring the action in this case is denied him by Article 188 if it is shown that he has cohabited with his wife since the judgment of separation. That article explains *why* the presumption of paternity ceases when a child is born 300 or more days after judicial separation; it is "because it is always presumed that the parties have obeyed the sentence of separation." While possibly desirable for the sake of explanation, the clause is not necessary to the article. Nor was it necessary to provide in the last sentence that cohabitation is always presumed in the case of voluntry separation.

*The Child Born 300 or More Days After
Dissolution of Marriage*

Article 187 also provides that "the same rule applies with respect to the child born 300 or more days after dissolution of

the marriage." Must the husband institute an *action en desaveu* under those circumstances? It would be highly illogical to require a former husband to institute the action if a child be born five years after divorce—or even worse, to require the heirs of the husband to disavow a child born five years after his death. Nevertheless, the articles on this subject in the French Civil Code are substantially the same as ours, and there is French doctrine and jurisprudence to the effect that a former husband under those circumstances must institute an action to disavow the child or it will be presumed conclusively to be his.² In the opinion of the writer, however, the reasoning of the French is not compelling. As shown before, Articles 184-192 deal only with the child who is born or conceived of a married woman. This being so, there is no need to extend the rule requiring the husband of the mother to disavow the child whenever the presumption of paternity ceases to those cases in which the child is neither born nor conceived while the mother is a married woman. This rule, established by Article 191, certainly must be considered limited by the context in which it appears.

*Circumstances Other Than Date of Birth or of Conception
Which Destroy the Presumption of Paternity*

Article 185 excludes impotence of the husband as a ground for disavowal of his wife's child. It also provides that the mere proof of adultery on the part of the wife will not be a cause for such action, but provides further that adultery together with concealment of the birth of the child may be grounds. The reasoning behind such a provision must be that a mother has no reason to conceal the birth of a child from her husband if he is the father. Such a concealment is in the nature of an admission of her wrong and such an admission entitles the husband to institute an action to disavow the child. The article makes no requirement that the time of adultery correspond with the period of conception of the child, although it quite obviously should be interpreted that way. It must be noted that the express denial of the action of disavowal because of impotence of the husband or adultery of the wife not accompanied by a showing of concealment of the birth of the child is merely out of an abundance of caution, for certainly these provisions add nothing to the general scheme of Articles 184-192.

2. 2 Planiol et Ripert, *Traité Pratique de Droit Civil Français* § 733 (2 ed. 1952); Bailly, 47 *Revue Trimestrielle de Droit Civil* 372 (1949).

Article 189 states another factor which destroys the presumption that the husband is the father of the child, namely, "when the remoteness of the husband from the wife has been such that cohabitation has been physically impossible." The rule of the article is understandable only if it is taken to mean that cohabitation has been impossible at the time of the conception of the child.

Delays for Bringing the Action en Desaveu

Article 191 requires that the husband bring the action within one month after the birth of the child "if he be in the place where the child is born" or within two months after returning "if he be absent at that time." He is given two months "after the discovery of the fraud, if the birth of the child was concealed from him." Under Article 192 the heirs of the husband may institute the action if the husband dies without having brought the action during the period within which he is permitted so to do. They are allowed two months to bring the action "to be counted from the time when the said child has taken possession of the estate of the husband, or when the heirs shall have been disturbed by the child, in their possession thereof."

Having examined the plan of Articles 184-192 and discussed their content in detail, it is now possible to restate them in such a manner as better to expound their approach to the subject without altering their substance in any way.

Article A. The husband of the mother is considered the father of a child born during the marriage or within 299 days after its dissolution unless he or his heirs have cause to disavow such child and do so successfully.

Article B. There is cause for disavowal if the child is born before the 180th day after marriage, unless the husband knew of the pregnant condition of his wife at the time of marriage or was present at the registration of the birth or baptism of the child and signed (or, not knowing how to sign, placed his mark on) the registry in the presence of two witnesses.

Article C. There is cause for disavowal if the child is born 300 or more days after a judgment of separation from bed and board unless it is proved that the

husband and wife cohabited after such judgment.

- Article D. There is cause for disavowal if the wife has committed adultery and concealed the birth of the child from her husband.
- Article E. There is cause for disavowal if the remoteness of the husband from his wife has been such that their cohabitation has been physically impossible.
- Article F. Where there is cause for disavowal, the father must institute the action of disavowal within one month after the birth of the child if he was present when the child was born, or within two months after his return, if he was absent at the time, or within two months after discovery of the fraud if the child's birth was concealed from him.
- Article G. If the husband die without having instituted an action of disavowal, but before the expiration of the time within which he is permitted so to do, his heirs shall be granted two months to institute the action, which two months are to be counted from the time when the child either takes possession of the estate of the husband or disturbs the heirs in their possession of it.

II. LACUNAE AND PROBLEMS

Even after careful analysis the articles leave the reader with important problems unsolved.

Presumption of Paternity in Two Persons

In the case of a child born during a second marriage and less than 300 days after the dissolution of a prior marriage, if Articles 184-192 were to be applied literally, there would sometimes be a presumption of paternity in both the former and present husbands. The child born 180 days or more after the second marriage would not be subject to disavowal by either. Ordinarily, the child born less than 180 days after the second marriage could be disavowed by the second husband; but where he fails to bring a timely action, or is precluded from bringing it by the provisions of Article 190, then again there would be a double presumption of paternity. It may be that Article 960, which is found under the title "Of Successions" and in the chapter on the "Incapacity and

Unworthiness of Heirs" may be determinative of some of these situations; it reads as follows:

"If the mother marry again within two months after the death of her husband, and a child is born five months after the second marriage, if the child be born capable of living, it is considered the issue of the first marriage, and is admitted to the succession of the first husband."³

As the above article is found in the title "Of Successions," it may be asked whether it applies to determine paternity and legitimacy as well as to determine succession rights. The mere fact that the article contains the words that the child "is considered the issue of the first marriage" is not of itself determinative in the light of the context in which the language appears. If Article 960 is not determinative of paternity and legitimacy, then the problem here raised remains. If, however, the article is determinative of paternity and legitimacy as well, then it will be necessary to determine whether it applies to cases of dissolution of the first marriage by divorce as well as by death of the husband. Since the article is worded in terms of "the death" of the first husband and is in the title on successions, it could be applied in the case of divorce only (1) by analogy, or (2) by regarding Article 960 as being in *pari materia* with Articles 184-192, or (3) by considering Article 960 as being a specification of the "natural law and reason" to which the judge may resort on authority of Article 21 when there is no law covering the situation. In any event, the fact that divorce was not part of our law when the article was first inserted into the Civil Code would be argument to extend its application to that case today.⁴

Assuming that the article applies to paternity and legitimacy, there would remain other problems of interpretation. These may be considered in terms of specific fact situations in each of which it must be assumed that the second marriage has taken place within two months after the dissolution of the first.

In the case of a child born five months or less after the second marriage and less than 300 days after dissolution of the first, Article 960 makes it plain that the child is considered the issue

3. There is no article in the French Civil Code corresponding to Article 960 and consequently there is no French doctrine or jurisprudence to aid in its interpretation.

4. Article 960 first appeared in the Civil Code of 1825. Divorce was first authorized in Louisiana by La. Acts of 1827, p. 130.

of the first husband. If it is within the scope of the article to determine paternity, it would seem that the second husband is relieved from the necessity of disavowing such a child.

In the case of a child born more than five months after the second marriage and less than 300 days after dissolution of the first, Article 960 may well be interpreted as implying that the child is to be deemed the child of the second husband and not that of the first. If this period of more than five months after the second marriage is in fact less than 180 days, then the result might be that the husband is precluded from the possibility of bringing the action to disavow—even though apparently he is specifically permitted to bring such an action by Article 186. This would be a very harsh rule, for probably the child would be that of the first husband.

Another possible interpretation of Article 960 would be that the redactors of the code intended to give a solution for the situation in which there is a presumption of paternity in two persons because the second husband fails to bring an action of disavowal by relieving the second husband of the necessity of so doing in the case of a child born five months or less after the second marriage. It should be recalled that the article has no application to the case of a child born after that period even though less than 180 days after the second marriage, and that in any event the second marriage must have taken place within two months of the dissolution of the first.

Possible Limitation on Applicability of Articles 184-192

The question may be raised whether Articles 184-192 are to be applied in all cases in which the child is born to or conceived by a married woman. To make the question clear, it need only be asked whether the articles should be applied to the child of a married woman living in open concubinage with a man other than her husband and rearing the child as that of her paramour. If so, then in spite of the general practical knowledge to the contrary, the child legally will be considered the child of the husband and not of the paramour if the husband fails to or cannot successfully disavow it. It may be noted that the French, whose Civil Code articles on the subject are substantially the same as ours, hold the view that the rules of Articles 184-192 are applicable only to the child who is in possession of the apparent status or reputation of legitimacy, and not to the child who does

not have the apparent status or reputation of being the child of the husband of the mother. The basis for this view is found in Articles 323 and 325 of the French Civil Code, which for practical purposes are identical with Articles 196 and 197 of the Louisiana Civil Code. These articles read as follows:

“Art. 196. If there be neither register of birth or baptism, nor this general reputation, or if the child has been registered under a false name, or as born of unknown parents, also if the child has been exposed or abandoned, or if his condition has been suppressed, the proof of his legitimate filiation may be made either by written or oral evidence.”

“Art. 197. Proof against the legitimate filiation may be made by evidence that the plaintiff is not the child of the mother whom he pretends to be his, and the maternity being proved, that he is not the child of the husband of the mother.”

It will be noted that Article 197 might indicate that in some instances a person may be allowed to prove that another is not the child of the husband of the mother. This would seem to be in conflict with Articles 184-192. The French, however, find no conflict. They point out that Articles 196 and 197 are in the section of the code entitled “Of the Manner of Proving Legitimate Filiation” and that all the articles in this section relate to the situation in which a person is forced to prove he is the legitimate child of certain parents. From this the French argue and conclude that Articles 184-192, under the preceding section of the code, deal only with the child who possesses the apparent status or reputation of legitimacy and who therefore will be regarded as legitimate if the husband of the mother does not disavow him.⁵ Thus the French contend that any time a child is not in enjoyment of the appearance or reputation of legitimate status and must prove his legitimate filiation, persons interested in proving otherwise may do so even if it is necessary to show that the husband of the mother is not the father. Under this view there can be no doubt that the husband of a woman living in concubinage would not have to disavow her children, for since there would be no reputation of apparent status of legitimacy, Articles 184-192 would not be applicable.⁶

5. 1 Ripert, *Traité Élémentaire de Droit Civil de Marcel Planiol*, n° 1396 (1948).

6. The jurisprudence has reached the contrary result. See, for example, *Eloi v. Mader*, 1 Rob. 581, 38 Am. Dec. 192 (1841) and *Succession of Saloy*,

Another possible interpretation of the article, however, is that after the child who seeks to establish legitimate filiation has proved his maternity, his opponents might prove "that he is not the child of the husband of the mother" in the sense that the mother was not married to the alleged father at the time of his birth or conception. Under such an interpretation, there would be no conflict with Articles 184-192.

Commencement of Delay Periods

A different type of problem is presented by Article 191, which allows the husband one month within which to bring the *action en desaveu* if he is "in the place" where the child is born and two months if he is absent. The meaning of "in the place" in itself presents difficulties; but, in addition, it may be asked whether the delay runs as long as the husband is "in the place where the child is born" even though he does not know of the birth. A possible answer is that the redactors of the code intended that the delay begin running at the time of birth only if the husband knew of such birth. This argument is strengthened by noting that the article in dealing with the case where the birth has been concealed from the husband specifically provides that the delay does not begin to run until "after the discovery of the fraud." There is no valid reason for saying that knowledge of the birth is less important in situations other than concealment. The provision permitting a two month delay from the day of the return of the husband if he was absent at the time of the birth might logically be said to presuppose that absence means ignorance of the birth because it would be inconsistent with the spirit of the article to permit a long delay to a husband who knew of the birth but who was some distance away from his wife.

The wording of Article 192 gives rise to another problem. It provides that if the husband die within the period in which he is permitted to bring an action to disavow his wife's child, the heirs are given two months to institute the action "to be counted from the time when the said child has taken possession of the estate of the husband, or when the heirs shall have been disturbed by the child, in their possession thereof." Thus the article would seem to require that the heirs wait until the child has taken possession of the estate or has disturbed them in their possession before instituting the action. But what would be the position of

44 La. Ann. 433, 10 So. 872 (1892). This jurisprudence will be discussed in Parts 3 and 4 of this comment.

an heir who has inherited property from the deceased husband, which property would belong to the child if legitimate? Would there be no way for that heir to determine ownership? Would a declaratory judgment on the legitimate status of such child be permitted when an action to determine that status is not? The language of the Louisiana Declaratory Judgments Act⁷ is quite broad, but the writer does not express any opinion on the possibility of its being so used. A prospective purchaser who is well informed would not be satisfied to rely on the public records in purchasing from such an heir.⁸ If the heir sells, the vendee is clearly not subrogated to the heir's right to institute the *action en desaveu* in the event that the heir disturbs the purchaser in his possession. Possibly the vendee could call the heir in warranty in such a situation and the heir could then institute the action, assuming that it is done within the two month delay. But the fact remains that a careful buyer would not purchase under such doubtful conditions. Here is a notable conflict of policies. It is certainly undesirable to refuse a party the right to determine the ownership of property, but it is contrary to the spirit of Articles 191 and 192 to allow a long indefinite period of time to the heirs to institute the *action en desaveu*.

The analysis of the texts of the Civil Code made in Parts I and II of this comment above show that their interpretation is not free from difficulty. It now remains to consider the Louisiana jurisprudence on the subject and to make an appraisal of the whole. This will be the subject of Parts III and IV of this comment, which will appear in a subsequent issue of this REVIEW.

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7. La. R.S. 1950, 13:4231-4246.

8. See *Long v. Chalain*, 187 La. 507, 175 So. 42 (1937), which stands for the general proposition that the public records doctrine does not defeat the rights of forced heirs.