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Use It or Lose It: Revising Louisiana's Process to Establish Paternity

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TABLE OF CONTENTS

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INTRODUCTION

Establishing paternity is crucial to acquiring rights associated with the parent-child relationship because, without it, a father is legally unable to care for, have custody of, or manage his child.[1] Suppose that Betty married Dan in 2015. Two years later, their marriage rapidly deteriorated, and the two decided to separate. However, Betty and Dan opted not to get a divorce when they separated. Betty then began dating Andrew in 2021, and Betty gave birth to the couple's daughter Caroline that year. At the time of Caroline's birth, Betty had not spoken to Dan in four years. While the ordinary person may assume that Andrew is Caroline's legal father, under current Louisiana law, this is not the case.[2] Louisiana's marital presumption of paternity presumes Dan is Caroline's father because he is the husband of Caroline's mother, which potentially leaves Andrew with no legal relationship with his daughter.[3]

In Louisiana, the legal relationship between a parent and child is called *filiation*.[4] A parent may establish filiation by proof of maternity, proof of paternity, or adoption.[5] *Paternity* is the relationship between a father and his child.[6] Filiation gives rise to various rights and obligations for both parent and child, including recovery in wrongful death actions, child support, and inheritance rights.[7] Without filiation, neither parents nor children acquire a number of significant rights associated with the parent-

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1. LA. CIV. CODE ANN. art. 197 cmt. a (2023) ("If the child establishes paternity under this Article, all of the civil effects of filiation apply to both the child and the father. Civil effects of filiation include the right to support, to inherit intestate, and to sue for wrongful death.").

2. LA. CIV. CODE art. 185 (2023).

3. *See id.* Louisiana law distinguishes between a biological father and a legal father in certain circumstances. In this hypothetical, there is no doubt Andrew is Caroline's biological father, but Louisiana Civil Code article 185 presumes Dan is the legal father of Caroline because he is the husband of Betty, Caroline's mother. This leaves Andrew without a legal relationship with Caroline unless he or Caroline takes legal action to establish his paternity. *See id*. arts. 197–98.

4. *Id.* art. 178.

5. *Id.*

6. *See Paternity*, BLACK'S LAW DICTIONARY (11th ed. 2019). A father's paternity may arise in various ways, but this Comment focuses on a biological father's right to establish paternity of his child where the child has a presumed father. For the other methods of establishing paternity, *see* LA. CIV. CODE arts. 186–98.

7. *See* Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. REV. 307, 329–30 (2022).

child relationship.[8] A father may become filiated to his child in various ways, but filiation often arises automatically through presumptions of paternity.[9]

Under Louisiana's law of filiation, a father's right to establish paternity depends on whether the child is filiated to another man.[10] When a child is born during a marriage or within 300 days of the termination of a marriage, Louisiana law presumes that the husband of the mother is the father of the child.[11] Thus, because Betty and Dan merely separated but did not divorce in the hypothetical above, the law presumes Dan is Caroline's father.[12] Legal scholars know filiation in this manner as the *marital presumption* and consider it to be one of the oldest and strongest presumptions in Louisiana law.[13] However, Louisiana Civil Code

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8. *See* La. CIV. CODE ANN. art. 197 cmt. a (2023) ("If the child establishes paternity under this Article, all of the civil effects of filiation apply to both the child and the father. Civil effects of filiation include the right to support, to inherit intestate, and to sue for wrongful death."); Jackson v. McNeal, 180 So. 3d 376, 381 (La. Ct. App. 1st Cir. 2015) (requiring a biological father not filiated to his child to bring an avowal action before being able to recover in a wrongful death and survival action arising out of the child's death); Thomas v. Ardenwood Props., 43 So. 3d 213, 218 (La. Ct. App. 1st Cir. 2010), *writ denied*, 46 So. 3d 1271 (La. 2010) (the biological father had no cause of action when he had not established paternity within the first year of his child's life); Feinberg, *supra* note 7, at 329–30.

9. *See* LA. CIV. CODE art. 185. This Comment focuses on establishing paternity when the child has a presumed father through marriage. For a full discussion of the ways a child may become filiated to his or her father, *see* KATHRYN VENTURATOS LORIO & MONICA HOF WALLACE, SUCCESSIONS AND DONATIONS §§ 3:6–7, *in* 10 LOUISIANA CIVIL LAW TREATISE 1 (2d ed. 2022).

10. Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307, 323 (2007).

11. LA. CIV. CODE art. 185.

12. *See id.* art. 101 ("Marriage terminates upon: [t]he death of either spouse[;] [d]ivorce[;] [a] judicial declaration of its nullity, when the marriage is relatively null[; and t]he issuance of a court order authorizing the spouse of a person presumed dead to remarry, as provided by law.").

13. La. CIV. CODE ANN. art. 185 cmt. b; *see* T.D. v. M.M.M., 730 So. 2d 873, 880 (La. 1999) (Kimball, C.J., dissenting) (detailing the history of the marital presumption back to the Code Napoleon of 1804); Smith v. Jones, 566 So. 2d 408, 409 (La. Ct. App. 1st Cir. 1990), *writ denied sub nom.* Kemph v. Nolan, 569 So. 2d 981 (La. 1990) ("Historically, the presumption of the husband's paternity was so strong as to be 'absolute and irrefutable (excepting only the right of disavowal under proper circumstances) and precludes application of any rule, principle or theory which would admit of proof that such a child is the offspring of anyone other than the lawful husband of the mother which bore such child.'").

article 198 gives the biological father Andrew an opportunity to establish his paternity of Caroline when there is a presumed father.[14] If successful, a *dual paternity* situation arises, whereby Caroline would have two fathers—a legal one and a biological one.[15]

Article 198 provides for an *avowal action*, wherein a man may institute an action to establish paternity of a child presumed to be the child of another man within one year of the child's birth.[16] Article 198 includes an exception, which gives a man an additional year from the day he knew or should have known of his paternity to institute his avowal action if the mother deceived him in bad faith regarding his paternity of the child.[17] This exception is commonly known as the *bad faith exception*.[18] However, in all circumstances with a presumed father, a man may not bring an avowal action after the child's tenth birthday.[19] Thus, in the hypothetical above, Andrew must bring an avowal action prior to Caroline's first birthday to establish his paternity unless he can show Betty deceived him in bad faith regarding his paternity.[20] Article 198's time limitations are arguably the most significant limit on a biological father's right to establish paternity of his child because each time period is peremptive.[21]

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14. *See* LA. CIV. CODE art. 198. *Putative father* is defined as "[t]he alleged biological father of a child born out of wedlock." *Father*, BLACK'S LAW DICTIONARY (11th ed. 2019).

15. LA. CIV. CODE ANN. art. 185 cmt. b; Rachel L. Kovach, *Sorry Daddy—Your Time Is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 658–59 (2010).

16. LA. CIV. CODE art. 198. Generally, a man may bring an avowal action at any time when the child is not filiated to another man. *Id.*

17. *Id. See* Leger v. Leger, 215 So. 3d 773, 776 (La. Ct. App. 3d Cir. 2015) (the bad faith exception did not apply when the father knew of his paternity but did not bring an avowal action within one year of learning of his paternity because the father believed the mother and child's safety would be at risk if he brought the avowal action); Kinnett v. Kinnett, 332 So. 3d 1149, 1155 (La. 2021) (the bad faith exception did not apply when the mother honestly believed her husband was the father and did not tell the biological father anything regarding his paternity that she knew was false); Louisiana House Floor Debate, H.B. 368, at 1:48:48–1:50:02 (May 11, 2004), *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/may/0511_04_Day26_2004RS [https://perma.cc/H2PD-XSRX] (statement by Representative Ansardi, the author of Louisiana's bills revising the law of filiation, comparing *bad faith* to *deceit*). For a discussion of the bad faith exception, *see infra* Part I.C.

18. For a discussion of the bad faith exception, *see infra* Part I.C.

19. LA. CIV. CODE art. 198.

20. *See id.*

21. *Id.*

A *peremptive period* is a period of time during which a legal right exists.[22] If the person holding the right associated with the peremptive period fails to assert that right by the end of the time period, the right is extinguished and no longer exists.[23] For Andrew, unless the bad faith exception applies, this means that he is no longer able to bring an avowal action after Caroline's first birthday. Upon extinguishment of Andrew's right to paternity, all correlative rights such as the care, custody, and management of his child are extinguished too.[24]

The Louisiana legislature has expressed two goals for article 198's time periods to bring an avowal action.[25] First, the legislature intended to prevent the upheaval of a child's life through litigation.[26] Second, the legislature intended to promote existing intact families where the child may have formed a strong relationship with the presumed father.[27] However, in cases like the hypothetical above, article 198 results in the exact opposite situation from what the legislature intended.[28] Rather, the article requires the biological father, Andrew, to initiate litigation to establish his paternity and acquire the associated rights.[29] The litigation puts Andrew, Betty, and Caroline's seemingly intact family at an increased risk of strife. The hypothetical above is just one scenario where article 198 is ineffective.[30]

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22. *Id.* art. 3458.

23. *Id. Contra id.* art. 3447 ("Liberative prescription is a mode of barring of actions as a result of inaction for a period of time.").

24. La. CIV. CODE ANN. art. 197 cmt. a (2023) ("If the child establishes paternity under this Article, all of the civil effects of filiation apply to both the child and the father. Civil effects of filiation include the right to support, to inherit intestate, and to sue for wrongful death.").

25. *See* H.B. 368, 2004 Leg., Reg. Sess., at 13 (La. 2004) (failed House final passage); Act No. 192, 2005 La. Acts 1444, at 13 (codified at LA. CIV. CODE art. 198 (2005)).

26. *See* H.B. 368, 2004 Leg., Reg. Sess., at 13 (La. 2004) (failed House final passage); Act No. 192, 2005 La. Acts 1444, at 13 (codified at LA. CIV. CODE art. 198 (2005)).

27. *See* Act No. 192, 2005 La. Acts 1444, at 13 (codified at LA. CIV. CODE art. 198 (2005)); Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40.

28. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40; LA. CIV. CODE ANN. art. 198 cmt. e.

29. *See* LA. CIV. CODE art. 198 (2023).

30. *See generally* Kinnett v. Kinnett, 332 So. 3d 1149 (La. 2021); Suarez v. Acosta, 194 So. 3d 626 (La. Ct. App. 5th Cir. 2016) (affirming exceptions of prescription and peremption when there was conflicting testimony at trial about when the biological father learned of his paternity).

Litigants and legal scholars have recently called the constitutionality of article 198 into question.[31] In 2022, the Louisiana Fifth Circuit Court of Appeal held that article 198, as applied in *Kinnett v. Kinnett*, violated a biological father's right to due process under article 1, § 2 of the Louisiana Constitution.[32] In *Kinnett*, the biological father, Mr. Andrews intervened in a divorce proceeding to establish paternity of a child born during that marriage.[33] However, he instituted the action 18 months after the child's birth and thus had to rely on the bad faith exception.[34] Ultimately, the trial and appellate courts held that the exception did not apply and declared his avowal action untimely.[35] On remand from the Louisiana Supreme Court with instructions to address whether article 198 was unconstitutional, the Fifth Circuit held that Mr. Andrews had a constitutionally protected right to parent his child because he had consistent interactions with the child.[36] Utilizing a three-part procedural due process test enumerated by the United States Supreme Court in *Mathews v. Eldridge* and later adopted by the Louisiana Supreme Court, the Fifth Circuit concluded that Louisiana afforded parental rights to biological fathers.[37] This is true even when the child is born into an intact family, through Louisiana's unique doctrine of dual paternity.[38] Thus, Mr. Andrews deserved the due process protections of the Louisiana Constitution, which article 198 did not afford him.[39] The legislature's goals expressed above were not sufficiently compelling to justify denying Mr. Andrews the right to establish his paternity.[40] Thus, the court held that article 198 was unconstitutional as applied to Mr. Andrews.[41]

Subsequently, the Louisiana Supreme Court addressed the constitutionality of article 198, as applied to Mr. Andrews, and ultimately reversed the Louisiana Fifth Circuit Court of Appeal's decision.[42] The

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31. *See* Gianluca S. Cocito-Monoc, *Biological Paternity Perempted: A Substantive Due Process Challenge to Louisiana's Limitation on the Avowal Action*, 96 TUL. L. REV. 347, 363 (2021); *see generally* Kinnett v. Kinnett, 366 So. 3d 25 (La. 2023).

32. Kinnett v. Kinnett, 355 So. 3d 181, 185 (La. Ct. App. 5th Cir. 2022).

33. *Id.*

34. *Id.*

35. *Id.* at 189.

36. *Id.* at 200.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Kinnett v. Kinnett, 366 So. 3d 25 (La. 2023).

court examined six United States Supreme Court Cases, which, in the Louisiana Supreme Court's opinion, established a clear line of cases that distinguished between a putative father's right to a relationship with his child from the rights of a father in an intact family unit who had an established relationship with the child.[43] The court noted that Mr. Andrews did not comply with the statutory method for a putative father to establish paternity, but the court did not mention Mr. Andrews efforts to establish a relationship with his child or the mother's actions that may have prevented Mr. Andrews from establishing such a relationship.[44] Thus, the court held that article 198 is constitutional, as applied to Mr. Andrews, and stated that it is up to the people of Louisiana and the Louisiana legislature to change a putative father's ability to establish paternity.[45]

Regardless of whether Louisiana Civil Code article 198 is constitutional, the article does not fulfill the legislature's stated goals for the article.[46] To better promote those goals, the Louisiana legislature should repeal portions of the article and adopt three changes. First, the legislature should adopt DNA testing as a threshold requirement for avowal actions instituted after the child's first birthday. This requirement, which is currently in use in a different method of filiation, ensures that only biological fathers with a legitimate claim to paternity can institute an avowal action after the child's first birthday. Second, the legislature should repeal the bad faith exception in article 198 and incorporate an alternative standard—the best-interest standard—which would utilize five of the six factors of the Uniform Parentage Act (UPA) test to adjudicate competing claims of parentage.[47] Such a modification would shift control of the ability to establish paternity from the mother, who may have adverse motives, to the biological father.[48] Louisiana currently uses a best-interest test in child custody actions, the framework for which is set out in

43. *Id.* at 32.

44. *Id.* at 29.

45. *Id.* at 32.

46. The Louisiana legislature intended to prevent the upheaval of a child's life through litigation and promote existing intact families where the child may have formed a strong relationship with the presumed father. *See* Act No. 192, 2005 La. Acts 1444, at 13 (codified at LA. CIV. CODE art. 198 (2005)); Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40; LA. CIV. CODE ANN. art. 198 cmt. e (2023).

47. *See* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017). For ease of reference, the best-interest-of-the-child standard will be referenced as the best-interest test hereinafter.

48. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:40:05–1:41:30; *see generally* Kinnett v. Kinnett, 332 So. 3d 1149 (La. 2021).

article 134.[49] Although the UPA and article 134 tests are strikingly similar, the UPA tailors the factors to the avowal action context.[50] Thus, the relevant provisions of the UPA best-interest test would provide a useful guide to the best-interest test for avowal actions.

Finally, the legislature should adopt a new Civil Code article that codifies an exception from UPA article 6, § 608. Adopting the proposed article 190.2, a two-party acknowledgment, addresses situations like the introductory hypothetical where the presumed father is absent from the child's life while utilizing characteristics of Louisiana's current law of filiation.[51] The drafters of the UPA intended to protect established parent-child relationships and prevent upheaval of the child's life through unwarranted litigation.[52] Similarly, the drafters of Louisiana Civil Code article 198 intended to promote intact families and prevent the upheaval of a child's life through unnecessary litigation.[53] Proposed article 190.2 provides biological fathers an opportunity to establish paternity of their children when the presumed father is absent from the child's life without the time restrictions of article 198 and without the need for instituting judicial action.[54] Thus, the proposed two-party acknowledgement significantly reduces the risk of upending a child's life through litigation. Additionally, proposed article 190.2 utilizes characteristics of the methods to establish paternity currently in use in Louisiana, specifically the formal acknowledgment under article 196 and the three-party acknowledgment under article 190.1.[55] Proposed article 190.2 would achieve the legislature's intentions for article 198 through a familiar framework, including the doctrine of dual paternity. Thus, in addition to amending article 198, the Louisiana legislature should adopt proposed article 190.2.

Part I of this Comment will provide a thorough overview of establishing paternity in Louisiana and outline the gaps in Louisiana Civil Code article 198. Part II will discuss Louisiana's use of peremptory

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49. *See* LA. CIV. CODE art. 134 (2023).

50. *Compare* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017), *with* LA. CIV. CODE art. 134.

51. *See* UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. L. COMM'N 2017); *see* discussion *infra* Part IV.D.

52. *Why Your State Should Adopt the Uniform Parentage Act (2017)*, UNIF. L. COMM'N, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=68c4bc24-8833-25d0-4813-832f60819127&forceDialog=0 [https://perma.cc/Q7XK-67VH] (last visited Oct. 12, 2022).

53. *Compare id.*, *with* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40, *and* LA. CIV. CODE ANN. art. 198 cmt. e (2023).

54. *See* discussion *infra* Part IV.D.

55. *See* LA. CIV. CODE arts. 196, 190.1.

periods to extinguish a biological father's right to establish paternity and the constitutional concerns regarding such periods. Part III will introduce the UPA and its goals. Part IV will show why the Louisiana legislature's intentions for Louisiana Civil Code article 198 are aligned with the goals of the UPA and urge the Louisiana legislature to amend article 198 and adopt proposed article 190.2. Finally, this Comment will call on the Louisiana legislature to amend Louisiana's law of filiation to resolve situations like the introductory hypothetical and *Kinnett*, in addition to eliminating any constitutional concerns.

I. BACKGROUND AND HISTORY OF ARTICLE 198

In Louisiana, the law presumes the husband of the mother is the father of the child when the child is born during a marriage.[56] Known as the marital presumption of paternity, the presumption is traceable to Roman law, where Roman jurisconsults expressed the presumption in the maxim *pater is est quem nuptial demonstrant*, meaning "the father is he whom marriage points out."[57] Louisiana, like many common law states, has recognized a presumption of paternity since the inception of its laws.[58] The paternal presumption is in line with Louisiana's duty of fidelity, which is one of only three marital duties recognized in Louisiana.[59] Married couples in Louisiana have a duty to refrain from adultery, commonly known as the negative duty of fidelity, but they also have a reciprocal obligation to "submit to each other's reasonable and normal sexual desires," commonly known as the positive duty of fidelity.[60] When a husband and wife have such duties of fidelity, a presumption that the husband is the father of any children born during or shortly after the marriage makes sense.[61] The presumption is not perfect, however, and it may be rebutted within limits.[62] While an avowal action does not rebut the presumption, it gives rise to a dual paternity situation, where a biological father is able to establish

56. *Id.* art. 185.

57. J.R. Trahan, *Glossae on the New Law of Filiation*, 67 LA. L. REV. 387, 400 n.15 (2007).

58. *See* Kovach, *supra* note 15, at 655; Feinberg, *supra* note 7, at 312.

59. *See* LA. CIV. CODE art. 98. The negative duty of fidelity is a spouse's marital duty to refrain from adultery. Sandi S. Varnado, *A Primer on Claims of Spouses in Louisiana*, 68 LOY. L. REV. 263, 265 n.13 (2022).

60. *See* LA. CIV. CODE ANN. art. 98 cmt. b (2023).

61. *See* Kovach, *supra* note 15, at 656; Feinberg, *supra* note 7, at 312.

62. *See* LA. CIV. CODE art. 198. While outside the scope of this Comment, the presumed father may also rebut the paternal presumption. *Id.* art. 187.

paternity of his child even when the child has a presumed father.[63] However, to further understand the implications of avowal actions, a look at Louisiana's legislative history regarding filiation and dual paternity is necessary.

A. A Legislative Reconstruction of Louisiana's Law on Filiation

Louisiana's reformation of the law of filiation began in 1991 when the Louisiana State Law Institute (LSLI) Marriage-Persons Committee began meeting on a project to enact legislation in response to decisions by the United States and Louisiana Supreme Courts in the 1970s and 1980s.[64] Led by the Marriage-Persons Committee reporter Katherine Spaht and on the recommendation of the LSLI, House Bill 368 of 2004 was the legislature's first attempt to enact a comprehensive revision of Louisiana's law of filiation.[65] During the same legislative session, Representative Ronnie Johns introduced House Bill 842, which proposed a single Civil Code article on dual paternity identical to the language of House Bill 368's proposed article 198.[66] Representative Johns introduced House Bill 842 as a precautionary measure in case House Bill 368 failed.[67]

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63. *See id.* art. 198. In Louisiana, paternity may be established in a number of ways, including the marital presumption, the contestation action, acknowledgment, the Father's Action to Establish Paternity, the Child's Action to Establish Paternity, adult adoption, and child adoption. *See id.* arts. 185, 191–92, 197–99; LA. CHILD. CODE arts. 1170–1279.7 (2023). The primary focus of this Comment is the marital presumption and the Father's Action to Establish Paternity. *See* LA. CIV. CODE arts. 185, 198.

64. Spaht, *supra* note 10, at 308 (citing Trimble v. Gordon, 430 U.S. 763 (1977); Succession of Clivens, 426 So. 2d 585 (La. 1983); Succession of Brown, 388 So. 2d 1151 (La. 1980) as examples of United States and Louisiana Supreme Court decisions).

65. *See* H.B. 368, 2004 Leg., Reg. Sess. (La. 2004) (failed House final passage); Louisiana House of Representatives, Civil Law Committee, H.B. 368, at 48:13 (Apr. 4, 2004) (statement of Katherine Shaw Spaht), *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/apr/0405_04_CL [https://perma.cc/YZ97-7ANL]. House Bill 368 included a number of revisions to Louisiana's law of filiation, but this Comment focuses on the introduction of the avowal action. *See* H.B. 368, 2004 Leg., Reg. Sess. (La. 2004).

66. Louisiana House of Representatives, Civil Law Committee, H.B. 842, at 2:47:00–2:47:30 (Apr. 4, 2004) (statement of Rep. Johns), *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/apr/0405_04_CL# [https://perma.cc/B6Y4-PH95].

67. *Id.* C*ompare* H.B. 842, 2004 Leg., Reg. Sess. (La. 2004) (original) (enacted as Act No. 530 § 1, 2004 La. Acts 1870, effective June 25, 2004)

Under the original drafts of both bills, a man could bring an avowal action only if the marriage between the mother and the presumed father of the child had terminated.[68] House Bill 368 imposed no time limitations on filing an avowal action while the child was alive.[69] House Bill 842, however, imposed a two-year peremptory period on a man's right to bring an avowal action, commencing on the date of the birth of the child.[70] Just days after the introduction of House Bill 368, the Committee on Civil Law and Procedure amended proposed article 198 in House Bill 368 to require a man to bring his avowal action within a two-year peremptory period, identical to House Bill 842.[71] The legislature implemented this change in response to previous instances where biological fathers waited more than a decade to bring a filiation action.[72] The amendment attempted to require the biological father to act quickly to establish his paternity.[73]

Subsequently, the House voted to remove House Bill 368's requirement that the mother and presumed father's marriage must have terminated for a man to bring an avowal action.[74] This amendment allowed a man to bring an avowal action subject to a two-year peremptory period

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repealed by Act No. 192 § 1, 2005 La. Acts 1444, effective June 29, 2005), *with* H.B. 368, 2004 Leg., Reg. Sess. (La. 2004) (original).

68. H.B. 368, 2004 Leg., Reg. Sess. (La. 2004) (original); H.B. 842, 2004 Leg., Reg. Sess. (La. 2004) (original) (enacted as Act No. 530 § 1, 2004 La. Acts 1870, effective June 25, 2004) *repealed by* Act No. 192 § 1, 2005 La. Acts 1444, effective June 29, 2005.

69. H.B. 368, 2004 Leg., Reg. Sess. (La. 2004) (original). Upon death of the child, however, the father's avowal action was subject to a one-year peremptory period. *Id.*

70. H.B. 842, 2004 Leg., Reg. Sess. (La. 2004) (original) (enacted as Act No. 530 § 1, 2004 La. Acts. 1870, effective June 25, 2004) *repealed by* Act No. 192 § 1, 2005 La. Acts 1444, effective June 29, 2005).

71. *See* H.B. 368, 2004 Leg., Reg. Sess. (La. 2004) (engrossed); H.R. Comm. on Civ. L. & Proc. Amend. No. 368, La. H.R. 203, 30th Leg., Reg. Sess., 2 Off'l J. H.R., Apr. 6, 2004, at 9 [hereinafter Two-Year Peremptory Period Amendment]; H.B. 842, 2004 Reg. Sess. (La. 2004) (original).

72. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:39:00–1:40:09; LA. CIV. CODE ANN. art. 198 cmt. e (2023).

73. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:39:00–1:40:09; LA. CIV. CODE ANN. art. 198 cmt. e.

74. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:37:50–1:47:27; H.R. Comm. On Civ. L. & Proc. Amend. No. 368, La. H.R. 993, 30th Leg., Reg. Sess., 3 Off'l J. H.R., May 11, 2004, at 30 [hereinafter Marriage Requirement Amendment].

regardless of the mother's marital status.[75] Representative Robby Carter, who introduced this amendment, expressed concern that the termination of the marriage requirement conditioned a biological father's ability to establish paternity of his child on the status of the mother's marriage, something completely outside of the father's control.[76]

Representative Derrick Shepherd questioned whether the two-year peremptory period was insufficient in situations where the biological father was unaware of his paternity until after the two-year period passed.[77] To combat these concerns, Representative Glenn Ansardi introduced an amendment now known as the bad faith exception.[78] The exception allowed a man whom the mother deceived regarding his paternity one additional year from the date he knew or should have known of his paternity to institute an avowal action.[79] The legislature made a policy decision to impose a ten-year cap on the bad faith exception in an attempt to balance the best interest of the child with the "hard, hard penalty" of destroying an established family.[80] Allowing a man to bring an avowal action after the child's tenth birthday would increase the likelihood of disrupting the child's life when the child had been living in a stable environment and had created a strong bond with the presumed father.[81] The House overwhelmingly voted to adopt the bad faith exception.[82]

Ultimately, however, the House voted 52 to 45 against passing House Bill 368.[83] Just one day after striking down House Bill 368, the House voted to amend House Bill 842, the stand-alone dual paternity article, to mirror the previously proposed article 198 of House Bill 368.[84] That same day, the House passed House Bill 842 by a vote of 91 to 6.[85] Governor

75. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:37:50–1:47:27; Marriage Requirement Amendment, *supra* note 74, at 30.

76. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:38:00–1:41:30.

77. *See id.* at 1:40:05–1:41:30.

78. *See id.* at 1:47:30–1:58:35.

79. Marriage Requirement Amendment, *supra* note 74, at 30; Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:47:30–1:58:35.

80. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:40:40–1:40:47.

81. *See id.*

82. Marriage Requirement Amendment, *supra* note 74, at 30.

83. *Id.* at 31.

84. *Id.* at 40.

85. *Id.*

Kathleen Blanco signed the bill on June 25, 2004, creating Louisiana Civil Code article 191.[86] Article 191, as enacted, read,

> 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.
> 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.[87]

Just one year later during the 2005 Regular Session, the LSLI again recommended comprehensive changes to Louisiana's law on filiation through House Bill 91, which contained largely the same language as the amended House Bill 368 from the year prior.[88] After a number of amendments, the House and Senate voted to pass House Bill 91 with little opposition.[89] The proposed article 198 replaced Civil Code article 191 as enacted in 2004 with one major substantive change that shortened the two-year peremptory period to a one-year peremptory period.[90] Thus, culminating with the Act of the Louisiana Legislature No. 192 of 2005, the Louisiana legislature implemented a comprehensive overhaul of the law of filiation.[91]

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86. Act No. 530, 2004 La. Acts 1870 (codified at LA. CIV. CODE art. 191 (2004)).

87. LA. CIV. CODE art. 191 (2004).

88. *Compare* H.B. 91, 2005 Leg., Reg. Sess. (La. 2005) (original), *with* H.B. 368, 2004 Leg., Reg. Sess. (La. 2004) (engrossed).

89. *See* H.R. Comm. on Civ. L. & Proc. Amend. No. 91, La. H.R. 567, 31st Leg., Reg. Sess., 1 Off'l J. H.R., May 11, 2005, at 81; S. Floor Amend. No. 91, La. S. 1, 31st Leg., Reg. Sess., 1 Off'l J.S., June 14, 2005, at 28–29; H.R. Comm. On Civ. L. & Proc. Amend. No. 91, La. H.R. 1065, 31st Leg., Reg. Sess., 1 Off'l J. H.R., June 15, 2005, at 44.

90. *Compare* Act No. 192, 2005 La. Acts 1444 (codified at LA. CIV. CODE art. 198 (2005)), *with* LA. CIV. CODE art. 198 (2004).

91. *See* Act No. 192, 2005 La. Acts 1444 (codified at LA. CIV. CODE art. 198 (2005)).

B. Louisiana's Approach to Dual Paternity

Throughout the duration of the LSLI's project, the most hotly contested issue concerning filiation was dual paternity.[92] Dual paternity arises when a biological father establishes paternity of his child while the law presumes a different man is the father of the child.[93] The child then has two fathers, a biological one and a legal one.[94] However, both fathers have all the rights and obligations of a legal father.[95] Additionally, the child has all rights associated with the parent-child relationship, such as inheritance rights and the ability to recover in wrongful death actions.[96] In a dual paternity situation, the child has two full-fledged fathers.[97]

The LSLI grappled with whether the law should permit a child to have more than one legally recognized father following the United States Supreme Court's decision in *Michael H. v. Gerald D.*[98] In *Michael H.*, the Court held that a California statute preventing a father from establishing paternity when the child had a presumed father did not violate the father's due process rights.[99] Relying on that decision, the LSLI determined that Louisiana law could deny a biological father the right to establish paternity of his child when the child had a presumed father.[100] The LSLI debated numerous solutions on how to handle a father's attempt to establish paternity of his child while weighing the father's interests against the child's interests.[101]

Louisiana jurisprudence first recognized the concept of dual paternity in 1974.[102] The Louisiana legislature unsuccessfully attempted to remove

92. *See* Spaht, *supra* note 10, at 349 (a document distributed at LSLI Council meetings posing the question of whether Louisiana should recognize dual paternity); *see, e.g.*, Civil Law Committee, H.B. 368, *supra* note 65, at 1:28:25 (testimony regarding concerns about implementing dual paternity in Louisiana).

93. *See* LA. CIV. CODE art. 198 (2023); Spaht, *supra* note 10, at 321.

94. *See* LA. CIV. CODE art. 198; Spaht, *supra* note 10, at 321.

95. *See* Spaht, *supra* note 10, at 322.

96. *See* Feinberg, *supra* note 7, at 329–30.

97. *See* Spaht, *supra* note 10, at 322.

98. *Id.* at 321 (citing LSLI Council "[m]inutes in which there is reference to the discussion and the resolution of the issue of dual paternity [] in the personal files of [Katherine Shaw Spaht].").

99. Michael H. v. Gerald D., 491 U.S. 110, 156 (1989).

100. Spaht, *supra* note 10, at 321.

101. *Id.* at 322.

102. *See generally* Warren v. Richard, 296 So. 2d 813 (La. 1974).

the concept from the law in 1981.[103] However, through its interpretation of the Civil Code articles, the Louisiana Supreme Court continued to recognize dual paternity.[104] Over three decades later, the LSLI Council decided that dual paternity was the right solution.[105] Previously, the Louisiana Supreme Court stated several policy rationales that supported the recognition of dual paternity.[106] First, a mother could seek child support from a biological father even when he was not filiated to the child.[107] Second, dual paternity allows a child to receive wrongful death benefits and inheritance rights from his or her biological father.[108] Prior to the comprehensive revision of Louisiana's law of filiation, Louisiana law classified children as *legitimate*, *illegitimate*, or *legitimated*.[109] Much of the intention behind the marital presumption of paternity was to prevent a child from being without a legal father, which would result in a lack of support and negate any inheritance rights or ability to recover wrongful death benefits.[110] Thus, the legislature adopted the concept of dual paternity "due to concern principally for the child," making Louisiana the first state in the country to legislatively recognize dual paternity.[111]

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103. *See* Act No. 720, 1981 La. Acts 1392 (amending then Louisiana Civil Code Articles 208 and 209 from allowing any child to establish filiation to allowing only illegitimate children to bring such an action).

104. Spaht, *supra* note 10, at 322 ("[D]espite the intention to end dual paternity in 1981 the Louisiana Supreme Court confirmed the concept by its interpretation of the Civil Code articles."). *See* Griffin v. Succession of Branch, 479 So. 2d 324, 327 (La. 1985) (recognizing the concept of dual paternity even after Act No. 720 of 1981); Smith v. Cole, 553 So. 2d 847, 850 (La. 1989) (child support case brought against the biological father even though the child was presumed to be the child of the husband of the mother).

105. *See* Spaht, *supra* note 10, at 322.

106. T.D. v. M.M.M., 730 So. 2d 873, 876 (La. 1999), *abrogated by* Fishbein v. State ex rel. La. State Univ. Health Scis. Ctr., 898 So. 2d 1260 (La. 2005).

107. *Id.*

108. *Id.*

109. *See generally* P. Keith Daigle, *All in the Family: Equal Protection and the Illegitimate Child in Louisiana Succession Law*, 38 LA. L. REV. 189 (1977).

110. *See T.D.*, 730 So. 2d at 876.

111. *See* Act No. 530, 2004 La. Acts 1870 (codified at LA. CIV. CODE art. 191 (2004)); Act No. 192, 2005 La. Acts 1444 (codified at LA. CIV. CODE art. 198 (2005)); Spaht, *supra* note 10, at 308 (citing Trimble v. Gordon, 430 U.S. 763 (1977))*; see* Feinberg, *supra* note 7, at 329.

C. Louisiana's Bad Faith Exception to Establishing Paternity

Louisiana Civil Code article 198's bad faith exception provides a biological father additional time to bring his avowal action if the mother of the child deceived him in bad faith regarding his paternity.[112] If deceived, the biological father has an additional year from the time he knew or should have known of his paternity, but he must bring the action before the child turns ten years old.[113] While few Louisiana courts have interpreted the exception, whether the bad faith exception applies can have a significant impact on the outcome of the case.[114] For example, in *Kinnett v. Kinnett*, the biological father did not institute his avowal action until after the child's first birthday.[115] Because the one-year peremptive period had run, the law forced him to rely on the bad faith exception.[116] However, as evidenced by the disagreement between the trial and appellate courts in *Kinnett*, determining what constitutes bad faith is challenging.[117] Two Louisiana courts have attempted to define bad faith for the purpose of article 198's exception.[118]

In *Mouret v. Godeaux*, the Louisiana Third Circuit Court of Appeal reasoned that the bad faith exception in article 191, the predecessor to article 198, did not apply when there was no evidence that the mother "concealed information about [the child] from [the father]" or "actively or passively created a misimpression about the child's paternity."[119] More recently in *Kinnett*, the Louisiana Supreme Court defined the exception by looking to the Black's Law Dictionary definition of *bad faith* and *deception*.[120] Relying on the dictionary definitions, the Court concluded that the bad faith exception applies if the mother "made a deliberate representation to [the biological father] regarding his paternity that she knew was false."[121] The Louisiana Supreme Court added that a mother

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112. *See* LA. CIV. CODE art. 198 (2023).

113. *Id.*

114. *See, e.g.*, Kinnett v. Kinnett, 332 So. 3d 1149 (La. 2021); Leger v. Leger, 215 So. 3d 773 (La. Ct. App. 3d Cir. 2015).

115. *Kinnett*, 332 So. 3d at 1151.

116. *Id.* at 1158.

117. *See, e.g.*, *id.* at 1156.

118. *See* Mouret v. Godeaux, 886 So. 2d 1217, 1222 n.2 (La. Ct. App. 3d Cir. 2004); *Kinnett*, 332 So. 3d at 1155.

119. *Mouret*, 886 So. 2d at 1222 n.2.

120. *Kinnett*, 332 So. 3d at 1155.

121. *Id.* at 1155 (footnote omitted). *Bad faith* is a "[d]ishonesty of belief, purpose, or motive." *Bad Faith*, BLACK'S LAW DICTIONARY (11th ed. 2019). Although *deceived* is not in Black's Law Dictionary, *deception* is defined as "[t]he act of deliberately causing someone to believe that something is true when the

may trigger the exception by silence.[122] In the Court's view, a mother is not automatically in bad faith under article 198 when she participates in an adulterous affair and knows of the possibility that someone other than her husband may be the father of the child but does not disclose such information.[123] Such an instance is heavily dependent upon facts such as the timing of intimate contacts, the timing of ovulation, and the use of contraception.[124] Recall Representative Carter's concerns during the discussion of House Bill 368 in 2004 about leaving the father's ability to bring an avowal action primarily in the hands of the mother.[125] Unlike in avowal actions, a father has significant control over his ability to obtain custody of his child under a defined standard—the best-interest test.[126]

D. Louisiana's Child Custody Approach

Determining the best interest of the child is the basic inquiry in all child custody determinations in Louisiana.[127] Louisiana Civil Code article 134 instructs courts to consider 14 factors when determining the best interest of the child for child custody, including a number of factors relating to each parent's effort and ability to provide and care for the child.[128] These factors are intended to serve as a guide for the court and are

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actor knows it to be false." *Deception*, BLACK'S LAW DICTIONARY (11th ed. 2019).

122. *Kinnett*, 332 So. 3d at 1155 n.3.

123. *Id.* at 1156.

124. *See id.*

125. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:38:00–1:41:30.

126. *See* LA. CIV. CODE art. 131 (2023) ("In a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child."); *id.* art. 132 (applying the "best interest of the child standard" in awards of custody to the parents of a child); *id.* art. 134 (listing factors to consider in determining the best interest of the child in child custody cases); *id.* art. 133 (applying a substantial harm standard in third-party child custody cases).

127. *Id.* art. 131 ("[T]he court shall award custody of a child in accordance with the best interest of the child.").

128. *See id.* art. 134. These factors are:

> (1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration.
>
> (2) The love, affection, and other emotional ties between each party and the child.

not exclusive.[129] Rather, courts are given great discretion on the amount of weight to give each factor because of the fact-intensive nature of child custody disputes.[130] As shown by *Kinnett*, establishing paternity is also a heavily fact-dependent inquiry.[131]

> (3) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
> (4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
> (5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
> (6) The permanence, as a family unit, of the existing or proposed custodial home or homes.
> (7) The moral fitness of each party, insofar as it affects the welfare of the child.
> (8) The history of substance abuse, violence, or criminal activity of any party.
> (9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.
> (10) The home, school, and community history of the child.
> (11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
> (12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party.
> (13) The distance between the respective residences of the parties.
> (14) The responsibility for the care and rearing of the child previously exercised by each party.

Id. art. 134. For a full discussion of the application of these factors, *see* Monica Hof Wallace, *A Primer on Child Custody in Louisiana*, 65 LOY. L. REV. 1 (2019).

129. Langford v. Langford, 138 So. 3d 101, 104 (La. Ct. App. 2d Cir. 2014).

130. *Id.* at 104.

131. *See generally* Kinnett v. Kinnett, 332 So. 3d 1149 (La. 2021); Smith v. Jones, 566 So. 2d 408 (La. Ct. App. 1st Cir. 1990), *writ denied sub nom.* Kemph v. Nolan, 569 So. 2d 981 (La. 1990); Putnam v. Mayeaux, 645 So. 2d 1223 (La. Ct. App. 1st Cir. 1994); Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 3d Cir. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996).

The Louisiana legislature implemented the best-interest standard in the child custody context in 1979.[132] However, Louisiana courts have used the principle since at least 1921.[133] Louisiana law has employed 12 of the 14 factors of article 134 since at least 1992.[134] In 2018, the legislature added two factors to address family and domestic violence, thus bringing the number of factors from 12 to 14.[135] Louisiana courts are accustomed to applying the best-interest standard, and as shown below, the UPA tailors these factors to work better in the context of an avowal action.[136]

E. Louisiana's Use of DNA Testing in the Filiation Context

Louisiana's law of filiation currently employs DNA testing as proof of paternity in a method of filiation called a *three-party acknowledgement*.[137] Parents may take advantage of a three-party acknowledgement in situations like *Kinnett* and the introductory hypothetical—when the child has a presumed father other than the biological father.[138] In such a situation, if blood or tissue sampling shows by a 99.9% probability that a man who is not mother's husband is the father of the child, the mother, presumed father, and biological father may execute a three-party acknowledgement.[139] The three-party acknowledgment is an authentic act that declares the husband or former husband is not the father of the child and that the biological father is the father of the child.[140] The effect of such an acknowledgement breaks the filial link between the presumed father and the child and establishes the biological father as the presumed father.[141] While this method of filiation is rather new to Louisiana law, it is evidence that the Louisiana legislature

132. *See* LA. CIV. CODE ANN. art. 131 cmt. a (2023); Act No. 718, 1979 La. Acts 1962 (codified at LA. CIV. CODE art. 146 (1962)).

133. *See generally* Kieffer v. Heriard, 58 So. 2d 836 (La. 1952); Brewton v. Brewton, 105 So. 307 (La. 1925); Act No. 38, 1921 La. Acts 42 (codified at LA. CIV. CODE art. 157 (1921)).

134. Act No. 261, 1993 La. Acts 610 (codified at LA. CIV. CODE art. 134 (1993)).

135. Act No. 412, 2018 La. Acts 1277 (codified at LA. CIV. CODE art. 134 (2018)).

136. *Id.*

137. LA. CIV. CODE art. 190.1 (2023).

138. *Id.*

139. *Id.*

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

141. *Id.* art. 190.1.

is open to taking advantage of modern scientific advances regarding DNA testing.[142]

F. Formal Acknowledgments

DNA evidence is not required, however, when a man executes a formal acknowledgment by authentic act.[143] When a child is not filiated to another man, a man may acknowledge the child by authentic act, which creates a presumption that the man who acknowledges the child is the child's father.[144] However, a man who formally acknowledges a child by authentic act under article 196 does not obtain full filial rights.[145] Rather, the article 196 acknowledgment only establishes the presumption on behalf of the child, except as otherwise provided for in custody, visitation, and child support cases.[146] Because the formal acknowledgment is only available when the child is not filiated to another man, the article is inoperative when there is a presumed father regardless of whether the presumed father is active in the child's life, such as in the introductory hypothetical.[147] Additionally, without the need for any DNA or testimonial proof of paternity, any man may execute a formal acknowledgment.[148] In such a case, the man that comes forward is accepting the responsibility of being the child's father regardless of whether he is the biological father of the child.[149] The formal acknowledgment is a useful tool for unwed biological fathers to establish paternity of their children in an efficient manner.

II. USE OF PEREMPTORY PERIODS AND THEIR CONSTITUTIONAL CHALLENGES

Peremption and liberative prescription are closely intertwined—so much so that courts often confuse and misapply the two distinct

142. *See* Act No. 21, 2018 La. Acts 28 (codified at LA. CIV. CODE art. 190.1 (2018)).

143. *See* LA. CIV. CODE art. 196.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See id. See id.* art. 198.

148. *See* Wetta v. Wetta, 322 So. 3d 365, 374 (La. Ct. App. 3d Cir. 2021), *writ denied*, 326 So. 3d 255 (La. 2021) (a non-biological father who executed a formal acknowledgement was prevented from revoking the formal acknowledgment because he did not timely disavow the child).

149. *See id.*; *see* LA. CIV. CODE art. 196.

doctrines.[150] Peremption is like prescription, except that prescription is subject to renunciation, interruption, and suspension while peremption is not.[151] Thus, because peremption is rooted in prescription, an overview of prescription is necessary to understand peremption.[152]

Roman law created liberative prescription, and Louisiana law adopted the doctrine in the early nineteenth century.[153] A liberative prescription period bars a particular cause of action as a result of inaction during a period of time.[154] For example, if a cause of action is subject to a one-year liberative prescription period, the person holding the right associated with that action loses the ability to bring that action upon expiration of the liberative prescriptive period.[155] The right associated with the cause of action, however, is not extinguished.[156] In contrast, *peremption* is "a period of time fixed by law for the existence of a right."[157] Thus, the expiration of a peremptive period extinguishes a right—meaning the right is destroyed.[158] Once the right is destroyed, a person cannot revive that right.[159]

Another distinguishing factor between peremption and prescription is the rigidity of the time periods.[160]A party may interrupt a prescriptive period by filing an action or by acknowledging a particular right.[161] When interruption occurs, the prescriptive time period is reset, and the period commences to run anew upon cessation of the interruption.[162] For example, if six months have passed in a one-year prescriptive period when the interruption occurs, the clock is reset to zero, and the prescriptive period will start to run again from the time the interruption stops.[163] Thus,

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150. *See* Sally Brown Richardson, *Buried by the Sands of Time: The Problem with Peremption*, 70 LA. L. REV. 1179, 1181–82, 1195 (2010).

151. *See* Rando v. Anco Insulations, Inc., 16 So. 3d 1065, 1082 (La. 2009) (citing Flowers, Inc. v. Rausch, 364 So. 2d 928, 931 (La. 1978)) ("Peremption has been likened to prescription; namely, it is prescription that is not subject to interruption or suspension."); *see* LA. CIV. CODE art. 3461.

152. Richardson, *supra* note 150, at 1181–82.

153. *Id.* at 1183.

154. LA. CIV. CODE art. 3447.

155. Such a one-year prescriptive period applies in tort actions. *See id.* art. 3492 ("Delictual actions are subject to a liberative prescription of one year.").

156. Richardson, *supra* note 150, at 1188.

157. LA. CIV. CODE art. 3458.

158. LA. CIV. CODE ANN. art. 3458 cmt. b (2023).

159. *See id.*

160. *See* Richardson, *supra* note 150, at 1188–90.

161. *See* LA. CIV. CODE arts. 3462, 3464.

162. *See* Richardson, *supra* note 150, at 1189.

163. *See id.*

the cause of action would not expire for an additional year upon cessation of the interruption.[164]

Suspension, like interruption, stops the running of the prescriptive period, but the time period does not reset.[165] When the suspension ceases, the time period continues running where it stopped.[166] Thus, in the one-year prescriptive period above, if suspension occurred at the six-month mark, six months of the prescriptive period would still remain when the suspension ceased.[167] One instance in which suspension may occur is through the doctrine of *contra non valentum*. Under that doctrine, "prescription does not run against one who is ignorant of the facts upon which their cause of action is based . . . ."[168] Thus, when a plaintiff is unable to exercise his or her right to bring an action when it accrues, the doctrine of *contra non valentum* may suspend the running of prescription.[169]

Renunciation, unlike interruption and suspension, does not stop the running of prescription.[170] Rather, renunciation arises upon the accrual of the prescriptive period.[171] When the prescriptive period accrues and a party renounces prescription, he or she abandons the right to assert prescription as a defense to the action.[172] By renouncing the effects of prescription, a party alters the time limit for bringing an action.[173] Thus, similar to interruption and suspension, renunciation does not apply to peremptory periods because it alters the running of the time period.[174] Problems arise because peremptive periods are unalterable periods of time, unlike prescriptive periods.[175]

A. Constitutional Challenges to Article 198

In *Kinnett v. Kinnett*, Louisiana courts faced the issue of whether article 198 violated a biological father's procedural due process rights

164. *See id.*
165. *See id.* at 1190.
166. *See id.*
167. *See id.*
168. Eastin v. Entergy Corp., 865 So. 2d 49, 57 (La. 2004).
169. *Id.*
170. *See* LA. CIV. CODE art. 3449 (2023); *see* Richardson, *supra* note 150, at 1189.
171. *See* LA. CIV. CODE art. 3449.
172. LA. CIV. CODE ANN. art. 3449 cmt. c (2023).
173. *See* LA. CIV. CODE art. 3449.
174. *See* Richardson, *supra* note 150, at 1189.
175. *Id.* at 1194.

under the Louisiana Constitution.[176] In *Kinnett*, Keith Andrews struggled to establish paternity of his child because of article 198's peremptive periods, even though DNA tests showed him to be the biological father of the child to a scientific certainty of 99.999999998%.[177] In 2017, Keith Andrews intervened in the divorce proceedings of Karen Cohen Kinnett and Jarred Brandon Kinnett asserting that he was the biological father of Ms. Kinnett's youngest child.[178] About four years into Karen and Jarred Kinnett's marriage, Ms. Kinnett began having an extramarital affair with Mr. Andrews.[179] Prior to the affair, the Kinnetts had a young child born of the marriage.[180] Mr. Andrews and Ms. Kinnett continued their affair for about a year, and the two had their last intimate encounter on November 15, 2014.[181] Nearly ten months later, Ms. Kinnett texted Mr. Andrews explaining that "she had sexual relations with her husband, got pregnant, and had a baby with her husband" and that she planned to remain married to Mr. Kinnett.[182] Fifteen months later, on December 9, 2016, Ms. Kinnett informed Mr. Andrews that DNA tests confirmed Mr. Kinnett was not the biological father of the child born after their affair.[183] After learning the youngest child was not biologically his, Mr. Kinnett filed for divorce on January 14, 2017.[184] At this point, 18 months after the birth of the child, Mr. Andrews intervened in the divorce proceedings to establish paternity and obtain custody of his biological child.[185]

When Mr. Andrews intervened, Mr. Kinnett pled the exception of peremption, among other things.[186] Mr. Kinnett claimed that Mr. Andrews's failure to file his avowal action within one year of the youngest child's birth extinguished his right to establish paternity of the child under

176. *See* Kinnett v. Kinnett, 355 So. 3d 181, 194–95 (La. Ct. App. 5th Cir. 2022). The Fifth Circuit found it appropriate to address whether article 198 was unconstitutional under the Louisiana State Constitution rather than the United States Constitution. *Id.* ("When constitutional challenges are made under both the federal and state constitutions, we must first consider whether the case may be resolved on state constitutional grounds.").

177. Kinnett v. Kinnett, 332 So. 3d 1149, 1152 (La. 2021). Because the child is a minor, the Louisiana Supreme Court did not use the child's name in the opinion. *See generally id.*

178. *Id.* at 1151.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 1152.

185. *Id.*

186. *Id.*

article 198.[187] Mr. Andrews argued that the bad faith exception of article 198 should apply because Ms. Kinnett knew Mr. Andrews could possibly be the father of the youngest child, and thus she deceived him regarding his paternity.[188] In ruling on the exceptions, the trial court judge held that Mr. Andrews did not prove Ms. Kinnett was in bad faith and that he filed his avowal action more than one year from the time he knew or should have known of his paternity.[189] Thus, the court held Mr. Andrews's avowal action perempted and dismissed the action.[190] While Mr. Andrews argued article 198 as applied violated his constitutional due process rights, the trial court declined to rule on the issue.[191] Mr. Andrews subsequently appealed to the Louisiana Fifth Circuit Court of Appeal, which stayed the appeal and remanded to the trial court to give Mr. Andrews an opportunity to amend his petition and challenge the constitutionality of the article.[192]

On remand, Mr. Andrews claimed he had taken a fatherly role in the child's life.[193] Mr. Kinnett filed a motion to strike the factual claims, arguing they were not relevant to the question of whether article 198 was unconstitutional, but the trial court judge denied the motion.[194] Ms. Kinnett subsequently filed a motion *in limine* in an attempt to preclude Mr. Andrews from presenting any witnesses on the constitutionality issue.[195] She argued, as Mr. Kinnett did, that the relationship between Mr. Andrews and the child was irrelevant to the constitutionality of article 198.[196] With a new trial judge presiding over the case, the court granted the motion.[197] The judge noted that Mr. Andrews could present witnesses with "highly specialized knowledge of the legislative history" of article 198 that could testify as to whether the article met due process requirements.[198] However, the judge determined that none of Mr. Andrews's witnesses, including Mr. Andrews himself, met that standard.[199] After hearing and considering oral arguments only, the trial judge held that article 198 was constitutional and that Mr. Andrews failed to present any evidence to support his argument

187. *Id.*
188. *Id.* at 1155.
189. Kinnett v. Kinnett, 355 So. 3d 181, 185 (La. Ct. App. 5th Cir. 2022).
190. *Kinnett*, 332 So. 3d at 1152.
191. *Id.* at 1157.
192. *Kinnett*, 355 So. 3d at 185.
193. *Id.*
194. *Id.*
195. *Id.* at 186.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*

that the article was unconstitutional.[200] Again, Mr. Andrews appealed to the Louisiana Fifth Circuit Court of Appeal.[201]

On appeal, the Fifth Circuit overturned the trial court's initial ruling, holding that the bad faith exception applied.[202] The Fifth Circuit held that, as matter of law, Ms. Kinnett deceived Mr. Andrews in bad faith "by not telling him he was possibly [the father of the child], because she could not have honestly believed her husband was the father."[203] The Louisiana Supreme Court, however, disagreed with the Fifth Circuit.[204] Ms. Kinnett testified that she believed the child was her husband's, she and Mr. Andrews used contraception during their last intimate encounter, and the child looked exactly like Mr. Kinnett at the time of the child's birth.[205] The Louisiana Supreme Court held that the bad faith exception did not apply because Ms. Kinnett honestly believed her husband was the father, and she did not tell Mr. Andrews anything that she knew was false regarding his paternity.[206] Her belief, albeit a mistaken one, that her husband was the father of the child was insufficient to trigger the bad faith exception.[207] Thus, the Louisiana Supreme Court vacated the Fifth Circuit's judgment and affirmed the trial court's dismissal of Mr. Andrews's avowal action.[208] After bouncing back and forth between the Fifth Circuit and the Louisiana Supreme Court regarding the evidentiary issues, the Fifth Circuit considered whether article 198 was constitutional as applied to Mr. Andrews.[209]

The Louisiana Constitution of 1974 prohibits depriving a person of life, liberty, or property except by due process of law.[210] The Fourteenth Amendment to the United States Constitution and article 1, § 2 of the 1974 Louisiana Constitution both guarantee due process of law.[211] When a challenge is made to both the federal and state constitutions, courts first

200. *Id.*
201. *Id.* at 187.
202. Kinnett v. Kinnett, 332 So. 3d 1149, 1155 (La. 2021).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.* at 1156.
207. *Id.*
208. *Id.*
209. *See generally* Kinnett v. Kinnett, 355 So. 3d 181 (La. Ct. App. 5th Cir. 2022).
210. LA. CONST. art. I, § 2.
211. U.S. CONST. amend. XIV, § 1; LA. CONST. art. I, § 2.

consider whether they can resolve a case on state constitutional grounds.[212] Here, the Fifth Circuit determined the issue could be resolved under the Louisiana Constitution.[213] When state action may affect a person's rights, the Louisiana Constitution entitles that person to notice and an opportunity to be heard "at a *meaningful time* and in a *meaningful manner*."[214] To be entitled to the protections of the due process clause, the right affected must be constitutionally cognizable.[215] When a fundamental right is at stake, due process is satisfied only if the government has a legitimate interest that justifies infringing upon the right, and the law uses the least restrictive means possible to achieve the government's objective.[216] In *Kinnett*, the Louisiana Fifth Circuit Court of Appeal analyzed whether article 198 gave Mr. Andrews sufficient due process by applying a three-factor, procedural due process test set forth by the United States Supreme Court in *Mathews v. Eldridge*, which the Louisiana Supreme Court later adopted.[217]

First, the court looked at whether article 198 affected a private interest—that is, whether Mr. Andrews had a constitutionally cognizable interest deserving of due process protections.[218] The Fifth Circuit concluded that, based on federal and state case law, a parent has a constitutionally protected right to the companionship, care, custody, and control of his child.[219] However, the Fifth Circuit acknowledged that this right is not absolute.[220] The right does not arise simply by the child's birth.[221] Rather, a father's constitutionally protected right to parenthood arises when he shows a full commitment to participating in raising his child.[222]

The court acknowledged *Michael H. v. Gerald D.*, which had a seemingly more narrow view of the right to parenthood than its predecessor cases.[223] In *Michael H.*, Michael fathered a child with a

212. *Kinnett*, 355 So. 3d at 194–95 ("When constitutional challenges are made under both the federal and state constitutions, we must first consider whether the case may be resolved on state constitutional grounds.").

213. *Id.*

214. *Id.*

215. *Id.* at 195.

216. *Id.*

217. *Id.* at 192 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).

218. *Id.*

219. *See id.* (citing Santosky v. Kramer, 455 U.S. 745, 758–59 (1982); In re Adoption of B.G.S., 556 So. 2d 545, 550 (La. 1990); Troxel v. Granville, 530 U.S. 57, 65; In re Interest of J.A., 752 So. 2d 806, 811 (La. 2000)).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 192–93.

married woman and later filed an action to establish paternity of his child.[224] However, a California statute provided that a child born to a married woman living with her husband who is neither impotent nor sterile is presumed to be a child of the marriage, and the presumption may only be rebutted in limited circumstances.[225] After the California Superior Court dismissed the case on summary judgment, Michael claimed the statute violated his due process rights under the Fourteenth Amendment to the United States Constitution "because he ha[d] established a parental relationship with [h]is daughter."[226] Justice Scalia argued that courts should view the liberty interest or right in question through the "most specific" lens available, and within that framing, the Court should look to whether society traditionally and historically recognized such a liberty interest.[227] Thus, the Court framed the issue in *Michael H.* as whether an adulterous biological father has a right to establish paternity, rather than whether a father has a right to parenthood in general.[228] In a plurality opinion, the United States Supreme Court held that Michael had no fundamental right deserving protection under the Fourteenth Amendment because there was no evidence that society had traditionally allowed an unwed biological father to establish paternity.[229]

In the Louisiana legislature's view, *Michael H.* did not afford a guaranteed constitutionally protected right to parenthood, even when the father formed a relationship with the child.[230] The Fifth Circuit, however, pointed to the *Michael H.* Court's emphasis on whether the states give substantial rights to biological fathers of children born into intact families.[231] The Fifth Circuit determined that Louisiana grants biological fathers substantial parental rights through its unique dual paternity

224. Michael H. v. Gerald D., 491 U.S. 110, 113–14 (1989).
225. *Id.*
226. *Id.* at 121.
227. *Id.* at 127 n.6.
228. *See id.*
229. *Id.* at 126–29. In the decades since *Michael H.*, many scholars, including those in Louisiana, have criticized Justice Scalia's "most specific" framing approach of the interest at stake in actions by an adulterous father to establish paternity. *See generally* L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 2 (1992).
230. Spaht, *supra* note 10, at 321 (citing LSLI Council "[m]inutes in which there is reference to the discussion and the resolution of the issue of dual paternity [] in the personal files of [Katherine Shaw Spaht].").
231. Kinnett v. Kinnett, 355 So. 3d 181, 192–93 (La. Ct. App. 5th Cir. 2022) (citing Michael H. v. Gerald D., 491 U.S. 110, 127 (1989)).

scheme, even for children with a presumed father.[232] Thus, the court held that a biological father "who steps forward and *grasps the opportunity* to parent his child" has a constitutionally protected interest deserving of the protections of the due process clause.[233] Noting that Mr. Andrews grasped every opportunity he could to develop a relationship with his child, including efforts to interact with the child on a consistent basis and provide for the child financially, the court held Mr. Andrews grasped the opportunity to parent his child.[234] Thus, Mr. Andrews had a fundamental right deserving of the Louisiana Constitution's procedural due process clause protections.[235]

Next, the Fifth Circuit analyzed "the risk of erroneous deprivation of a biological father's right to parent under the procedures or safeguards provided in [a]rticle 198."[236] The court noted article 198's lack of a notice requirement and lack of a duty imposed on the mother to inform the biological father of his potential paternity.[237] Additionally, the court stated that the bad faith exception was too narrow and placed the decision-making authority regarding establishing paternity in the hands of the mother, who potentially has adverse motives.[238] Together, the procedures and safeguards in place did not provide Mr. Andrews adequate due process after the child's first birthday.[239]

Finally, the court considered whether the governmental interest at stake was sufficiently compelling to justify infringing upon Mr. Andrews's fundamental right to parent his biological child.[240] To determine Louisiana's interest at stake, the court turned to article 198's comments, which stated that the peremptory periods are intended to prevent the upheaval of the child's life through litigation and promote the intact family.[241] However, Louisiana jurisprudence has consistently held that a divorced family is not an intact family.[242] Additionally, the court stated that many of the traditional reasons for the marital presumptions are withering.[243] Rather, modern law and science have made proof of paternity

232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 193.
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.* at 194.
243. *Id.*

simple and no longer justify the use of the marital presumption.[244] Thus, the Fifth Circuit held that Louisiana Civil Code article 198 was unconstitutional as applied in *Kinnett* because the governmental interest at stake was not compelling enough to justify depriving Mr. Andrews of his constitutional right to parent his child.[245]

In sum, the Louisiana Fifth Circuit Court of Appeal held that, while Louisiana's interest in protecting the child is important, the peremptory period in article 198 was not sufficiently related to achieving that interest to outweigh the risk of erroneous deprivation of Mr. Andrews's constitutionally protected right to establish a relationship with his child.[246] The court limited its holding to the specific facts of *Kinnett* where Mr. Andrews intervened in a divorce proceeding when his biological child was 18 months old, his child had no significant attachment to the presumed father, and he consistently attempted to establish a relationship with his child.[247]

The Kinnett's subsequently sought writs at the Louisiana Supreme Court, and the court granted Mr. Kinnett's writ application.[248] In reviewing the constitutionality of article 198, the court framed the issue as whether Mr. Andrews, as the biological father, has a fundamental, unqualified constitutional right to parent his child.[249] The court answered this question in the negative, and held that a putative biological father has no fundamental constitutional right to parent a child born to a mother, who was married to and living with another man at the time of the child's conception and birth.[250] To reach this conclusion, the court analyzed six United States Supreme Court cases on the issue, which the Louisiana Supreme Court found to create a clear distinction between the rights of parents who are a part of a family unit and those of putative biological fathers who are not.[251]

First, the Louisiana Supreme Court examined *Stanley v. Illinois*, which involved a father who was attempting to maintain his existing relationship with his children at a time when Illinois law provided that the

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244. *Id.*

245. *Id.*

246. *Id.* at 199–200.

247. *Id.*

248. Kinnett v. Kinnett, 355 So. 3d 1094 (La. 2023); Kinnett v. Kinnett, 355 So. 3d 1098 (La. 2023). The Louisiana Supreme Court did not consider Ms. Kinnett's writ application because she did not timely file the application. *Id.*

249. Kinnett v. Kinnett, 366 So. 3d 25, 27 (La. 2023).

250. *Id.* at 26. The court noted that there was no record of a final divorce between the Kinnetts. *Id.*

251. *Id.*

children of an unwed mother become wards of the state if the mother died.[252] The parents of the children at issue lived and supported the children together for 18 years at the time of the mother's passing, but the parents never married.[253] The father in *Stanley* was not a legal parent, and, upon the mother's passing, his children were set to become wards of the state.[254] The *Stanley* court concluded that Illinois law did not give the father at issue equal protection of the laws guaranteed by the 14th Amendment without giving him a hearing to determine his fitness as a parent.[255] The *Stanley* court reasoned that a man who has "sired and raised" a child deserves significant deference, "absent a powerful countervailing interest."[256] The Louisiana Supreme Court determined that the language "absent a powerful countervailing interest," in addition to language such as the "integrity of the family unit" and "family relationships," implied that the *Stanley* result may have been different if the court was trying to determine legal paternity or if there was not an established parent-child relationship.[257]

The court next took up *Quillon v. Walcot*, which involved two, unwed individuals who had a child together, but the father did not legitimate the child.[258] The father was not involved in the child's life, and the mother raised the child.[259] The mother later married a man, who filed a petition to adopt the child.[260] At the time, Georgia only required the father's consent for adoption if the father was the legal parent of the child, which the child's biological father in *Quillon* was not a legal parent because he never legitimated the child.[261] The biological father opposed the petition for adoption, sought legitimation and visitation rights, and claimed the Georgia law was unconstitutional under the equal protection clause.[262] The Louisiana Supreme Court emphasized the United States Supreme Court's use of language such as "family life" and "natural family," in addition to

252. *See generally* Stanley v. Illinois, 405 U.S. 645 (1972); *see Kinnett*, 366 So. 3d at 26.
253. *Kinnett*, 366 So. 3d at 27.
254. *Id.*
255. *Id.* at 28 (citing *Stanley*, 405 U.S. at 649).
256. *Id.* (citing *Stanley*, 405 U.S. at 651).
257. *Id.*
258. *See generally* Quillon v. Walcot, 43 U.S. 246 (1978); *see Kinnett*, 366 So. 3d at 27.
259. *Quillon*, 43 U.S. at 246; *Kinnett*, 366 So. 3d at 28.
260. *Kinnett*, 366 So. 3d at 28.
261. *Id.*
262. *Id.* at 29.

the biological father's lack of effort to participate in the child's life.[263] The United States Supreme Court placed an emphasis on the biological father's lack of responsibility "'with respect to the daily supervision, education, protection, or care of the child.'"[264] Accordingly, the United States Supreme Court upheld the Georgia law, as it applied to the biological father in *Quillon*.

The court then turned to *Caban v. Mohammed*, where the biological parents lived together but were not married.[265] The couple later separated, and the mother married a different man.[266] The biological father, however, continued to stay in contact with his biological children.[267] The mother and stepfather later petitioned the court to allow the stepfather to adopt the two children, which the court granted.[268] The biological father appealed the decision and argued that a New York statute that permitted an unwed mother, but not an unwed father, to block an adoption was unconstitutional under the Equal Protection Clause of the 14th Amendment.[269] The United States Supreme Court declared that, when a father has not come forward to participate in the upbringing of his child, a state does not violate the Equal Protection Clause by preventing him from vetoing an adoption.[270] However, the father's parental relationships with his children in *Caban* were substantial.[271] The *Caban* court stated that the New York statute was an attempt to "discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child."[272] Thus, the United States Supreme Court held that the New York statute was unconstitutional as applied.[273]

Next, the Louisiana Supreme Court analyzed *Santosky v. Kramer*, which the court stated is often asserted for the proposition that the parental right to parent a child is "fundamental."[274] However, the court stated that right is heavily fact dependent.[275] *Santosky* also made clear that due process requires burden of proof for a state to completely sever a

263. *Id.*
264. *Id.* (quoting *Quillon*, 43 U.S. at 256).
265. *Id. See generally* Caban v. Mohammed, 441 U.S. 380 (1979).
266. *Kinnett*, 366 So. 3d at 29.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.* at 31 (quoting Caban v. Mohammed, 441 U.S. 380, 394 (1979)).
273. *Id.*
274. *Id. See generally* Santosky v. Kramer, 455 U.S. 745 (1982).
275. *Kinnett*, 366 So. 3d at 31.

biological parent to be "clear and convincing evidence," rather than the standard "preponderance of the evidence" burden.[276] To reach that conclusion the *Santosky* Court noted that "freedom of personal choice in matters of *family life* is a *fundamental liberty interest* protected by the Fourteenth Amendment."[277] The Louisiana Supreme Court determined that the *Santosky* Court's use of the term "natural parents" implied that legal parent relationships had already been established.[278] However, Mr. Andrews was trying to establish paternity, rather than continue enjoying a previously established right.

The Louisiana Supreme Court then turned to *Lehr v. Robertson*, which involved two un-wed individuals who had a child together.[279] After the child's birth, the biological father made no attempts to marry the mother or provide for and support the child.[280] The mother later married another man, and the stepfather filed a petition to adopt the child.[281] New York had a "putative father registry," whereby a man could identify himself and his intent to claim paternity of a child born out of wedlock, which would entitle him to receive notice of any proceeding to adopt that child.[282] The biological father did not register, but, when he learned the stepfather adopted the child, he filed an avowal action and asserted he was entitled to notice and a hearing prior to the adoption under the constitution.[283] The Louisiana Supreme Court again focused on the *Lehr* Court's use of language that emphasized recognized family units.[284] The Louisiana Supreme Court quoted *Lehr*, which stated:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution

276. *Id.* (citing *Santosky*, 455 U.S. at 747–48).
277. *Id.*
278. *Id.*
279. *Id. See generally* Lehr v. Robertson, 463 U.S. 248 (1983).
280. *Kinnett*, 366 So. 3d at 31.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.*

> will not automatically compel a state to listen to his opinion of where the child's best interests lie.[285]

In the Louisiana Supreme Court's opinion, the *Lehr* Court was not focused on whether terminating a biological father's already established relationship with his child, but whether the law provided him an adequate opportunity to establish such a relationship.[286] The *Lehr* Court upheld the constitutionality of the statute because the biological father did not register with the putative registry and did not seek to establish a relationship with his child.[287] The Louisiana Supreme Court analogized this case to Mr. Andrews by stating that Louisiana has a procedure similar to the putative registry in *Lehr*, which Mr. Andrews did not comply with.[288] However, the court did not mention Mr. Andrews efforts to establish a relationship with his child or Ms. Kinnett's actions.[289]

Finally, the Louisiana Supreme Court looked to *Michael H. v. Gerald D.*, discussed in Part II.A.[290] The court found this case "on point" and factually similar to Mr. Andrews' situation.[291] Once again, the court focused on children born into existing family units.[292] The court noted that, to give rights to a putative father, the court would have to take away rights from the father in the familial unit.[293] According to *Michael H.*, it is not unconstitutional for a state to give preference to the latter of those two fathers.[294] As the *Michael H.* court concluded, the Louisiana Supreme Court held that it is up to the people of Louisiana to determine who should receive preference in Mr. Andrews situation.[295] By the enactment of article 198, the people of Louisiana "have spoken," and it is their intent to give a putative father a limited window to establish paternity.[296] Thus, the Louisiana Supreme court concluded that *Michael H.* and other United States Supreme Court jurisprudence established different rights for

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285. *Id.* at 32 (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at 30. *See generally* Michael H. v. Gerald D., 491 U.S. 110 (1989); *see* discussion *supra* Part II.A.
291. *Kinnett*, 366 So. 3d at 30.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*

putative fathers and those of an intact family.[297] The Louisiana Supreme Court held that "[article] 198 constitutionally provides a putative biological father an opportunity to establish paternity, when another man is presumed to be a child's father."[298] In reversing the Louisiana Fifth Circuit Court of Appeal's decision, the Louisiana Supreme Court left any modifications of article 198 to the people of Louisiana and the Louisiana legislature.[299]

B. A Proposed Solution for Article 198

While *Kinnett* was ongoing, one Louisiana scholar argued Louisiana Civil Code article 198 was unconstitutional on substantive due process grounds.[300] Substantive due process analyzes "whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose" without regard for procedure.[301] Generally, a state law need only be rationally related to a legitimate government interest to satisfy substantive due process.[302] However, when the government infringes upon a person's fundamental right, defined as one "deeply rooted in this Nation's history and tradition," the court applies the strict scrutiny standard of review.[303] To survive strict scrutiny and thus survive invalidation, the legislation must be "narrowly tailored to serve a compelling state interest."[304] After determining Mr. Andrews had a fundamentally protected right to a relationship with his child, scholar Gianluca S. Cocito-Monoc argued that article 198's peremptory periods do not achieve Louisiana's interest in preventing the upheaval of a child's life and that prescriptive periods are a less restrictive alternative.[305] The

297. *Id.*
298. *Id.*
299. *Id.*
300. *See* Cocito-Monoc, *supra* note 31, at 363.
301. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501 (1999).
302. Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) (quoting Washington v. Glucksberg, 521 U.S. 702, 728 (1997)).
303. *Washington*, 521 U.S. at 721; Foucha v. Louisiana, 504 U.S. 71, 115 (1992) (Thomas, C., dissenting).
304. Reno v. Flores, 507 U.S. 292, 302 (1993).
305. *See* Cocito-Monoc, *supra* note 31, at 363. Mr. Cocito-Monoc framed the constitutionally protected right in a slightly different manner than the Louisiana Fifth Circuit Court of Appeal, arguing that Mr. Andrews had a right to a relationship with his child rather than a right to parent his child. *Id. See supra*, Part II.A.1 for a short discussion on framing the constitutionally protected right.

scholar cited *Kinnett* as a prime example of when peremptory periods are inadequate to achieve the legislature's interests because of the more-than-five-year history of the case.[306] During that time, the scholar argued, the child in question could have established a strong relationship with the presumed father, Mr. Kinnett.[307] Additionally, the scholar noted the potential for upheaval of the child's life by a biological father's attempt to establish a relationship with the child outside of the judicial system, which would have no time limit.[308] Therefore, the scholar advocated for the Louisiana legislature to amend article 198 by changing the peremptive periods to prescriptive periods because prescriptive periods are subject to interruption and suspension.[309] The doctrine of *contra non valentum*, a cause of suspension, would have been most likely to provide relief for Mr. Andrews in *Kinnett* or Andrew in the introductory hypothetical.

A plaintiff interrupts prescription by commencing an action in a court of competent jurisdiction and venue, or if commenced in an incompetent court or improper venue, upon service on the defendant.[310] In situations like *Kinnett* and the introductory hypothetical, interruption would not provide relief to the biological father because he would not have instituted his avowal action within the applicable time period.[311] If he had, his action would not be perempted. Similarly, prescription may be suspended between certain parties who have unique and protected relationships during the existence of those relationships, but none of those relationships could apply to avowal actions.[312] Courts use the doctrine of *contra non valentum* to prevent the running of prescription in four situations.[313] One

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The framing of the right has little effect on the application of article 198 in *Kinnett*, as Mr. Andrews had an established relationship with his child. *Id.*

306. *See* Cocito-Monoc, *supra* note 31, at 363.

307. *See id.*

308. *See id.*

309. *See id.* at 364–65.

310. *See* LA. CIV. CODE art. 3469 (2023) ("Prescription is suspended as between: the spouses during marriage, parents and children during minority, tutors and minors during tutorship, and curators and interdicts during interdiction, and caretakers and minors during minority.").

311. *See id.* art. 198 (providing a one-year peremptive period for avowal actions).

312. *See id.* art. 3469.

313. Kirby v. Field, 923 So. 2d 131, 135 (La. Ct. App. 1st Cir. 2005) ("There are four recognized categories of this doctrine: (1) where there was some legal cause which prevented the courts or their officers from taking cognizance of or acting on the plaintiff's action; (2) where there was some condition coupled with the contract or connected with the proceedings which prevented the creditor from suing or acting; (3) where the debtor himself has done some act effectually to

of those situations prevents the running of prescription "where the cause of action is not known or reasonably knowable by the plaintiff," and this situation may have provided Mr. Andrews in *Kinnett* some relief.[314] However, in a case like *Kinnett*, Mr. Andrews arguably knew of the facts that could give rise to his avowal action because of the timing of his intimate encounters with Ms. Kinnett and her pregnancy.[315] Thus, the doctrine of *contra non valentum* would likely not have provided him any relief.

C. A Return to Louisiana's Prior Approach

As noted above, Louisiana has not always employed peremptory periods in avowal actions to limit a father's ability to filiate his child.[316] However, at one point, Louisiana did not recognize a right to bring an avowal action at all.[317] In the mid-1980s, two Louisiana courts recognized a biological father's right to bring an avowal action when the child had a presumed father despite the lack of any statutory authorization for the father to bring such an action.[318] Shortly after those cases, courts began implementing time restrictions on the right to avow.[319]

In *Smith v. Jones*, the Louisiana First Circuit Court of Appeal held that if a biological father fails to institute an avowal action within a significant period of time despite actual or constructive knowledge of his possible paternity, he loses the right bring such an action.[320] The First Circuit found that the determinative factor was whether the father formed an actual relationship with the child.[321] The biological father in *Smith* had no relationship with his child, but he instituted the action to establish his paternity within three months of the child's birth.[322] Thus, because of his

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prevent the creditor from availing himself of his cause of action; and (4) where the cause of action is not known or reasonably knowable by the plaintiff, even though this ignorance is not induced by the defendant.").

314. *Id.* at 135.

315. *See* Kinnett v. Kinnett, 332 So. 3d 1149, 1152 (La. 2021).

316. *See* Act No. 530, 2004 La. Acts 1870 (codified at LA. CIV. CODE art. 191 (2004)).

317. *See* Durr v. Blue, 454 So. 2d 315, 319 (La. Ct. App. 3d Cir. 1984).

318. *See id.* Finnerty v. Boyett, 469 So. 2d 287, 292 (La. Ct. App. 2d Cir. 1985).

319. *See* Smith v. Jones, 566 So. 2d 408 (La. Ct. App. 1st Cir. 1990), *writ denied sub nom*. Kemph v. Nolan, 569 So. 2d 981 (La. 1990).

320. *Id.*

321. *Id.*

322. *Id.* at 414.

swift action, the First Circuit held that Smith timely instituted his action to establish his paternity.[323]

A few years after *Smith* in *Putnam v. Mayeaux*, Allen Ray Putnam brought an avowal action to establish paternity of James E. "Trey" Mayeaux, III, a child born into the marriage of Karen Rene Putnam Mayeaux and James E. Mayeaux, Jr.[324] Mr. Putnam alleged that he and his ex-wife had an ongoing sexual relationship during the Putnam's marriage that corresponded with the timing of Trey's birth.[325] Mr. Mayeaux filed an exception of prescription claiming that Mr. Putnam's avowal action prescribed because he filed it one year and three days after Trey's birth, even though "there [was] no applicable prescriptive period for an avowal action" at the time.[326] Mr. Mayeaux contended that he was conclusively the father of Trey, as he was the presumed father and had not disavowed Trey.[327] The trial court overruled Mr. Mayeaux's exception.[328]

In *Putnam*, the Louisiana First Circuit Court of Appeal considered two issues.[329] The court considered whether Mr. Putnam timely filed his avowal action and whether he could establish evidence of his paternity by taking advantage of a statute that allowed for blood testing.[330] For the timeliness of the avowal action, the court quoted *Smith* by stating that a biological father who fails to assert his paternity within a significant period of time may not later come forward to establish his paternity.[331] For the blood tests, the court quoted *Smith* again.[332] However, the *Smith* court stated that to take advantage of the blood test statute, a biological father must institute the avowal action within a reasonable time and have at least attempted to form a relationship with the child.[333] The court noted Mr. Putnam's unsuccessful attempts to see Trey, offers to provide for the child, and efforts to have Mrs. Mayeaux and Trey submit to blood tests to establish paternity within the first year of Trey's life.[334] Relying on the facts of the case and *Smith*, the Louisiana First Circuit Court of Appeal held that Mr. Putnam timely filed his avowal action and allowed him to

323. *Id.*
324. Putnam v. Mayeaux, 645 So. 2d 1223, 1224 (La. Ct. App. 1st Cir. 1994).
325. *Id.*
326. *Id.* at 1226.
327. *Id.*
328. *Id.*
329. *Id.* at 1225.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at 1225–26.

take advantage of the blood testing statute.[335] Thus, a significant period of time had not passed when Mr. Putnam instituted his avowal action one year and three days after Trey's birth.[336] The *Putnam* decision occurred just over a decade before the introduction of peremptory periods to Louisiana's avowal action, but it is evidence that courts are capable of balancing the interests of both the parent and the child.[337]

Just one year after *Putnam*, in *Geen v. Geen*, the Louisiana Third Circuit Court of Appeal addressed the issue of whether a father timely asserted his avowal action in a child custody dispute.[338] Prior to marrying Kevin Geen, Donna Geen Robertson was sexually involved with Kevin Robertson.[339] About eight months after the Geen's marriage, Ms. Robertson gave birth to a child, Ryan Geen.[340] The child's birth occurred nine months after Ms. Robertson's last sexual encounter with Mr. Robertson.[341] Mr. Geen and Ms. Robertson ultimately separated one and one-half years after the birth of Ryan.[342] Upon separation, the trial court awarded Mr. Geen and Ms. Robertson joint legal custody.[343] Since his birth, Ryan lived with Mr. Geen, but he also spent a substantial amount of time with Ms. Robertson and Mr. Robertson "with [Mr.] Geen's blessing and encouragement."[344] The Robertsons ultimately married two years after Ryan's birth.[345]

During the Robertsons's marriage, two separate DNA blood tests showed with a 99.76% probability that Mr. Robertson was the biological father of Ryan.[346] The Robertsons subsequently filed a petition to establish Mr. Robertson's paternity and for custody of Ryan.[347] Mr. Geen contended that Mr. Robertson's action to establish his paternity was untimely because he filed it 19 months after he allegedly knew or should have known of his

335. *Id.*
336. *See id.*
337. *See* Spaht, *supra* note 10, at 308.
338. Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 3d Cir. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996).
339. *Id.* at 1193.
340. *Id.*
341. *Id.*
342. *Id.* at 1192.
343. *Id.* at 1194.
344. *Id.*
345. *Id.*
346. *Id.*
347. *Id.*

paternity, which was not within a reasonable time.[348] The trial court disagreed, and the Third Circuit came to the same conclusion.[349]

Citing *Putnam*, the Third Circuit stated that "a biological father who knows or has reason to know of the existence of his biological child, and who fails to assert his rights for a *significant* period of time, cannot later come forward and assert paternity."[350] In Mr. Robertson's situation, the trial court determined that there was a lapse of 15 to 19 months between the time Mr. Robertson knew or should have known of his paternity and the time he attempted to establish paternity.[351] The Third Circuit held that Mr. Robertson timely filed his avowal action because of Ms. Robertson's persistent equivocations regarding Mr. Robertson's paternity, Ms. Robertson's refusal to contact Mr. Robertson for an extended period of time, Mr. Geen's assumption that he was Ryan's father, and Mr. Robertson's swift action to file a paternity suit upon receipt of the DNA blood test results.[352] As is clear by *Smith*, *Putnam*, and *Geen*, prior to the implementation of peremptory periods, Louisiana courts gave a biological father an opportunity to show that he acted timely while considering all relevant factors.[353] Like the Louisiana courts, the UPA also employs a test that considers all relevant factors to establish paternity.[354]

III. THE UNIFORM PARENTAGE ACT

The Uniform Law Commission (ULC) has addressed the subject of parentage for over a century.[355] Originally enacted in 1937, the Uniform Parentage Act (UPA) provides a comprehensive, uniform legal framework for establishing parent-child relationships.[356] The ULC is the non-profit

348. *Id.*
349. *Id.* at 1194–95.
350. *Id.* at 1194.
351. *Id.* at 1194–95.
352. *Id.* at 1195.
353. Kinnett v. Kinnett, 302 So. 3d 157, 203 (La. Ct. App. 5th Cir. 2020) (Wicker, J., concurring), *writ granted*, 309 So. 3d 735 (La. 2021), and *writ granted*, 309 So. 3d 735 (La. 2021), and *writ granted*, 309 So. 3d 738 (La. 2021), and *rev'd in part*, 332 So. 3d 1149 (La. 2021).
354. *See* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017).
355. *See* UNIF. PARENTAGE ACT, Prefatory Note (UNIF. L. COMM'N 2002).
356. *Why Your State Should Adopt the Uniform Parentage Act (2017)*, *supra* note 52. The UPA is a comprehensive act covering a variety of parent-child relationship issues that fall outside the scope of this Comment. *See generally* UNIF. PARENTAGE ACT (UNIF. L. COMM'N 2017). This Comment focuses on specific provisions of article 6, part 2 of the UPA regarding adjudicating parentage of a child with a presumed parent. *See id.* § 608.

group responsible for drafting the UPA and other uniform legislation, and it has amended the UPA a number of times since its enactment, most recently in 2017.[357] A total of 22 states have adopted some version of the UPA, including seven states that have adopted the language of the 2017 revision and 15 states that have adopted the language of previous versions.[358] The 2017 revision dealt mainly with updating the UPA to include necessary changes regarding same-sex marriage after *Obergefell v. Hodges* and also to modernize provisions lagging behind scientific advancements, such as advancements in genetic testing and assisted reproduction.[359] The ULC originally introduced uniform legislation about establishing paternity when the child has a presumed father in the 2002 revision; however, the ULC carried over much of the substance of the 2002 revision to the 2017 revision.[360] Under the UPA, a marital presumption of paternity arises when the child is born into a marriage or within 300 days after the termination of the marriage, which is identical to the presumption in Louisiana Civil Code article 185.[361]

Article 6 of the UPA concerns proceedings to adjudicate parentage.[362] Part 1, § 608 of article 6 details the requirements for adjudicating

357. *See About Us*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/3ZD8-J7EK] (last visited Oct. 12, 2022); *see also* UNIF. PARENTAGE ACT, Prefatory Note (UNIF. L. COMM'N 2017).

358. *See Parentage Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=c4f37d2d-4d20-4be0-8256-22dd73af068f [https://perma.cc/H3KD-MPX5] (last visited Oct. 31, 2022). The states that have adopted the 2017 revision are Washington, California, Colorado, Connecticut, Rhode Island, Vermont, and Maine. *Id.* The states that have enacted a previous version of the UPA are Nevada, Montana, Wyoming, Utah, New Mexico, North Dakota, Kansas, Oklahoma, Texas, Minnesota, Missouri, Illinois, Alabama, Ohio, New Jersey, and Delaware. *Id.* Three additional states—Hawaii, Pennsylvania, and Massachusetts—have introduced legislation to adopt the UPA, but those states have not enacted the legislation yet. *Id.*

359. *See* UNIF. PARENTAGE ACT, Prefatory Note (UNIF. L. COMM'N 2017) ("UPA (2017) updates the act to address this potential constitutional infirmity by amending provisions throughout the act so that they address and apply equally to same-sex couples. These changes include broadening the presumption, acknowledgment, genetic testing, and assisted reproduction articles to make them gender-neutral.").

360. *See id.* § 608.

361. *Id.* § 204(a)(1)(B).

362. *See id.* §§ 601–23. Article 6 details a number of situations for adjudicating parentage, but this Comment focuses on the provisions relevant to adjudicating parentage where there is a presumed parent.

parentage of a child with a presumed parent.[363] Section 608 details two scenarios where the mother of the child may rebut the paternal presumption.[364] The first scenario is when the presumed father is absent from the child's life.[365] Once a presumption of parentage arises, the UPA does not allow an action to establish paternity after the child's second birthday unless the court determines that either "the presumed parent is not a genetic parent, never resided with the child, and never held out the child as the presumed parent's child" or the child has more than one presumed parent.[366] When the individual challenging the paternity of the presumed parent is someone other than the child's mother, such as a putative father, § 613 of the UPA governs.[367]

Section 613 addresses adjudication of competing claims of parentage.[368] In situations such as these, the UPA utilizes a six-factor test to adjudicate parentage in the best interest of the child.[369] The UPA instructs courts to balance the best interests of the child using the following six factors:

> (1) the age of the child;
> (2) the length of time during which each individual assumed the role of parent of the child;
> (3) the nature of the relationship between the child and each individual;
> (4) the harm to the child if the relationship between the child and each individual is not recognized;
> (5) the basis for each individual's claim to parentage of the child; and
> (6) other equitable factors arising from the disruption of the relationship between the child and each individual or the

363. *See id.* § 608.
364. *See id.* §§ 601, 608.
365. *Id.* § 608(b)(1). A complete rebuttal of the presumption would not be necessary in Louisiana because of dual paternity. *See generally* Spaht, *supra* note 10. Additionally, Louisiana's law of filiation provides a mechanism for the mother to rebut the presumption of paternity through a contestation action. *See* LA. CIV. CODE art. 191 (2023). However, the UPA exception is useful, and biological fathers should be given the opportunity to establish paternity through a similar mechanism.
366. UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. L. COMM'N 2017).
367. *Id.* § 608(d).
368. *Id.* § 613.
369. *See id.* § 613(a).

likelihood of other harm to the child.[370]

Finally, § 613 provides two alternatives regarding dual paternity—one for states that do not recognize dual paternity and one for those that do.[371] For states like Louisiana that do recognize dual paternity, the UPA provides that the court may establish dual paternity if a failure to do so would be detrimental to the child.[372] To determine whether there would be detriment to the child, the court must consider all relevant factors, including the resulting harm to the child if the court removed the child from a stable living environment where an individual has fulfilled the child's physical and psychological needs for a substantial period of time.[373] Such a finding does not require the court to determine that the person seeking an adjudication of parentage is unfit.[374] A finding of substantial harm only relates to whether the court should establish more than two parents, which would create a dual paternity situation in Louisiana.[375] If the court finds that a failure to recognize more than two parents would be detrimental to the child, the court would establish dual paternity.[376]

The underlying policy rationales and goals of the UPA are evident throughout the act, both implicitly and explicitly.[377] At its core, the UPA attempts to protect established parent-child relationships while providing safeguards to ensure the Act does not result in unwarranted litigation.[378] Explicit in § 613 is the notion that the court should adjudicate parentage in the best interest of the child.[379] These goals are generally similar to the Louisiana legislature's goals in avowal actions, but the substantive provisions of the UPA more effectively meet these goals.[380]

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370. *Id.* To better align with current Louisiana law and particularly the best-interest-of-the-child factors enumerated in Louisiana Civil Code article 134, a few alterations to these factors are necessary. Altering some factors to be more aligned with article 134 would also provide for more judicial efficiency.

371. *See id.* § 613(c).

372. *Id.* § 613(c), Alternative B (emphasis added).

373. *Id.*

374. *Id.*

375. *See id.*

376. *See id.*

377. *See Why Your State Should Adopt the Uniform Parentage Act (2017)*, *supra* note 52.

378. *Id.*

379. UNIF. PARENTAGE ACT § 613(b) (UNIF. L. COMM'N 2017).

380. *Compare Why Your State Should Adopt the Uniform Parentage Act (2017)*, *supra* note 52, *with* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40, *and* LA. CIV. CODE ANN. art. 198 cmt. e (2023).

IV. REVISING LOUISIANA CIVIL CODE ARTICLE 198

Three changes to Louisiana's law of filiation are necessary to fulfill the legislature's intentions for Louisiana Civil Code article 198.[381] First, the legislature should adopt a DNA testing requirement for article 198 as a threshold condition for avowal actions instituted after the child's first birthday. Second, the legislature should incorporate an alternative to article 198's peremptory periods by introducing a new standard to the law of filiation—the best-interest standard—which would utilize five of the six factors of the UPA test to adjudicate parentage after the child's first birthday.[382] Such a test places control of the right to establish paternity firmly in the biological father's hands.[383] Thus, the Louisiana legislature should amend Louisiana Civil Code article 198 to read:

> Art. 198. Father's action to establish paternity; time period
> A man may institute an action to establish his paternity of a child at any time except as provided in this article. The action is strictly personal.
> If 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. Nevertheless, *a man may institute the action after one year from the day of the birth of the child, but before ten years, if blood or tissue sampling indicates by a ninety-nine and nine-tenths percentage point threshold probability that the man is the biological father of the child. If the action is instituted after one year from the day of the birth of the child, the plaintiff must show that establishing his paternity is in the best interest of the child based on:*
> *(1) the age of the child;*
> *(2) the length of time during which the biological father assumed the role of parent of the child;*
> *(3) the nature of the relationship between the child and the biological father;*
> *(4) the harm to the child if the relationship between the child and the biological father is not recognized; and*
> *(5) other equitable factors arising from the disruption of the relationship between the child and the parents or the likelihood of other harm to the child.*

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381. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40; *see also* LA. CIV. CODE ANN. art. 198 cmt. e.

382. *See* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N).

383. *See, e.g.*, Kinnett v. Kinnett, 332 So. 3d 1149 (La. 2021).

> In all cases, the action shall be instituted no later than one year from the day of the death of the child.[384]

Finally, the legislature should adopt a new Civil Code article that codifies an exception to § 608 of the UPA. Proposed article 190.2, a two-party acknowledgment, addresses situations like the hypothetical from the introduction to this Comment where the presumed father is absent from the child's life while utilizing characteristics of the current framework for Louisiana's law of filiation.[385] The two party-acknowledgment would operate as an intermediate solution to establishing paternity between a formal acknowledgment and a three-party acknowledgment.[386] Thus, the Louisiana legislature should adopt a new Civil Code provision, proposed article 190.2, to read:

> Art. 190.2. Two-party acknowledgement; child filiated to another man
>
> Notwithstanding the time limitations of article 198, if a child is presumed to be the child of another man, a biological father who is not presumed to be the father of the child may, with the mother, execute a two-party acknowledgment in authentic form that establishes the biological father's paternity when:
>
> (1) blood or tissue sampling indicates by a ninety-nine and nine-tenths percentage point threshold probability that the biological father is the father of the child;
>
> (2) the presumed father has never resided with the child; and
>
> (3) the presumed father has never held out the child as his own.
>
> To have effect, this acknowledgment shall be executed no later than ten years from the day of the birth of the child but never more than one year from the day of the death of the child.
>
> When a two-party acknowledgment is executed, the presumed father shall have one year from the day of the execution of the two-party acknowledgement to institute an action to rebut the declaration of paternity.[387]

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384. UNIF. PARENTAGE ACT §§ 608, 613(a) (UNIF. L. COMM'N 2017); LA. CIV. CODE art. 198 (2023). Any proposed changes to article 198 or language adopted from the UPA are signified in italics.

385. *See* UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. L. COMM'N 2017).

386. *See* LA. CIV. CODE arts. 190.1, 196.

387. *See id.* UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. L. COMM'N 2017).

A. DNA Testing

A DNA testing requirement for avowal actions instituted after the child's first birthday achieves the legislature's interest in preventing the upheaval of the child's life through litigation. Adoption of the proposed DNA testing for avowal actions would not lose sight of the legislature's goals for peremptory periods, which are the article's current timing mechanism.[388] The Louisiana legislature's expressed intention regarding the peremptory periods of article 198 is to require a man to act quickly to establish paternity.[389] Similarly, under the proposed standard, a father is still incentivized to act swiftly to establish paternity or else he will be subject to a heightened burden of proof: a DNA test requiring a near certainty of paternity. A heightened standard would prevent unwarranted avowal actions. Parents would have the ability to secure such a test prior to instituting the avowal action, possibly eliminating the need for such an action at all. Additionally, the current use of DNA testing for three-party acknowledgements would allow for a seamless transition to the use of the DNA testing in avowal actions.[390]

B. The Best Interest of the Child and the UPA

The Louisiana legislature should adopt a new standard regarding the timing of an avowal action—the best-interest standard—through a modification of the UPA six-factor test. Adopting significant portions of the UPA six-factor test addresses many of the issues created by Louisiana Civil Code article 198's bad faith exception. The Louisiana legislature's intentions for the bad faith exception in article 198 failed in *Kinnett* because the exception did not prevent the upheaval of the child's life through litigation.[391] In *Kinnett*, Mr. Andrews and Ms. Kinnett's child was about 18 months old at the beginning of the litigation.[392] Years later, the child's paternity status remained unsettled.[393] This failure largely stemmed from the use of the bad faith exception in the avowal action, but it also stemmed from the question of whether article 198 was constitutional.[394] The bad faith exception creates the need for unnecessary litigation because

388. *See* LA. CIV. CODE ANN. art. 198 cmt. e (2023).
389. *Id.*
390. *See id.* art. 190.1.
391. *See* Cocito-Monoc, *supra* note 31, at 363.
392. Kinnett v. Kinnett, 332 So. 3d 1149, 1152 (La. 2021).
393. *See* Kinnett v. Kinnett, 355 So. 3d 181, 182 (La. Ct. App. 5th Cir. 2022).
394. *See, e.g.*, *Kinnett*, 332 So. 3d at 1149.

Louisiana courts struggle to define and identify bad faith.[395] This struggle is evidenced by the trial and appellate courts' disagreement over whether Ms. Kinnett's ambiguous actions constituted bad faith.[396] Thus, in avowal actions instituted after the child's first birthday, like the facts that gave rise to *Kinnett*, Louisiana law should require courts to employ a balancing test that weighs the interests of both parent and child.

While not in use in the filiation context, Louisiana courts are accustomed to applying the best-interest standard in child custody proceedings.[397] Adopting five of the six factors of the UPA test protects children when there is an increased chance of the child living in an established, stable home environment.[398] As children become older, the potential of a strong family bond increases.[399] Thus, as the child ages, a man who knew of his paternity and delayed bringing an action would be required to show that he took timely action to participate in the upbringing of the child. As is clear from federal and Louisiana cases, the right to parenthood is not absolute.[400] In the Louisiana Fifth Circuit Court of Appeal's view, the right may be limited to situations like *Kinnett* where the child is not part of an intact family.[401] However, the Louisiana Supreme Court disagreed with the Fifth Circuit's view that the Kinnetts were not an intact family when it noted that there was no record of a final divorce.[402] Subsequently, the Louisiana Supreme Court held that putative fathers, like Mr. Andrews, do not have a constitutionally protected right to paternity when the child lives in an intact familial unit.[403] Under Cocito-Monoc's view, however, a father should have the right to parenthood regardless of the family situation.[404] Regardless of article 198's constitutionality, the proposed best-interest standard affords a father an opportunity to show he has taken timely action to establish a relationship with his child. However,

395. *See* CP Marine Offloading, LLC v. Miller, No. 21-247, 2021 WL 3417797 (La. Ct. App. 3d Cir. 2021), *writ denied*, 329 So. 3d 827 (La. 2021) (previous versions of the Louisiana Civil Code defined "bad faith," but the current version does not.).

396. *See id.*

397. *See* LA. CIV. CODE arts. 131–34 (2023).

398. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40 (discussing the need for a ten-year cap on the bad faith exception because of the increased likelihood of a stable family home environment).

399. *See id.*

400. *See* Kinnett v. Kinnett, 355 So. 3d 181, 192 (La. Ct. App. 5th Cir. 2022).

401. *Id.*

402. Kinnett v. Kinnett, 366 So. 3d 25, 26 (La. 2023).

403. *Id.*

404. *See* Cocito-Monoc, *supra* note 31, at 363.

when the father cannot show an established relationship or at least an attempt to establish a relationship, the law affords him fewer rights.[405] Ultimately, a balancing test provides a more equitable solution to both parent and child.[406] However, some revisions and modifications to the UPA six-factor best-interest test are necessary to better align the UPA with existing Louisiana law.

The Louisiana legislature should adopt five of the six factors of the UPA best-interest test, specifically excluding factor five of the UPA. Factor five is "the basis for each individual's claim to parentage of the child," and this factor does not have a comparable equivalent in Louisiana Civil Code article 134.[407] Factor five addresses competing claims of parentage, which is not a necessary consideration in Louisiana with dual paternity.[408] While the remaining factors of the UPA test are similar to those of article 134, the article 134 factors are tailored to the child custody context.[409] The UPA factors, however, provide guidance on the types of things that the court should consider in the filiation analysis.[410] The interpretation of the two sets of factors would be nearly identical where they overlap, except that the proposed factors do not require a comparison between the parents like in the child custody context.[411] Rather, the UPA factors are tailored to guide the court's analysis on whether the biological father has taken sufficient steps to participate in the upbringing of the child while considering any potential harm to the child if a second father is established. Thus, in keeping with the legislature's intentions and child custody actions, adopting the best-interest standard provides a workable solution while affording a man an opportunity to establish paternity.

A balancing test would not be new to Louisiana.[412] Under the approach used prior to the legislature's enactment of peremptory periods, Louisiana

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405. *See generally* Putnam v. Mayeaux, 645 So. 2d 1223 (La. Ct. App. 1st Cir. 1994); Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 3d Cir. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996).

406. *Why Your State Should Adopt the Uniform Parentage Act (2017)*, *supra* note 52.

407. *See* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017 2017); LA. CIV. CODE art. 134 (2023).

408. *See* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017). Additionally, little guidance is available regarding how courts interpret the factor.

409. *See* LA. CIV. CODE art. 134.

410. *See* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017).

411. *Compare* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017), *with* LA. CIV. CODE art. 134.

412. *See* Putnam v. Mayeaux, 645 So. 2d 1223 (La. Ct. App. 1st Cir. 1994); Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 3d Cir. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996).

courts gave a biological father an opportunity to show that he asserted his right to paternity before a significant amount of time passed.[413] For example, in *Smith v. Jones*, the Louisiana First Circuit Court of Appeal allowed a father who had not established a relationship with his child to bring an avowal action because he swiftly instituted the action upon learning of his possible paternity.[414] In *Putnam v. Mayeaux*, the First Circuit considered factors such as the biological father's attempts to see the child, offers to provide for the child, and efforts to establish paternity through DNA testing within the first year of the child's life.[415] Similarly, in *Geen v. Geen*, the Louisiana Third Circuit Court of Appeal held that a biological father timely filed his avowal action when he filed it 15 to 19 months after the time the father knew or should have known of his paternity.[416] In that case, the court noted relevant factors for holding that the biological father timely filed his suit, including the mother's persistent equivocations regarding the father's paternity, her refusal to contact the father for an extended period of time, and the father's quick action to file an avowal action upon receipt of the DNA blood test results.[417] In *Putnam* and *Geen*, the biological father made significant efforts to establish a relationship with his child, but he failed to establish such a relationship for reasons that were outside of his control.[418] The Louisiana First and Third Circuit Courts of Appeal came to an equitable decision regarding paternity that likely would not have occurred under the current bad faith exception.

In *Kinnett v. Kinnett*, Ms. Kinnett acted rather ambiguously regarding Mr. Andrews's potential paternity.[419] While she did not tell Mr. Andrews anything that she knew was false, she knew Mr. Andrews could potentially be the father of her child.[420] The Louisiana Fifth Circuit Court of Appeal noted that the bad faith inquiry is heavily fact-dependent upon issues like the timing of intimate encounters and the use of contraception.[421]

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413. *See* Smith v. Jones, 566 So. 2d 408, 414 (La. Ct. App. 1st Cir. 1990), *writ denied sub nom.* Kemph v. Nolan, 569 So. 2d 981 (La. 1990); *Putnam*, 645 So. 2d at 1225–26; *Geen*, 666 So. 2d at 1194–95.

414. *Smith*, 566 So. 2d at 414.

415. *Putnam*, 645 So. 2d at 1225–26.

416. *Geen*, 666 So. 2d 1192.

417. *See id.* at 1195.

418. *See Putnam*, 645 So. 2d at 1224–25; *Geen*, 666 So. 2d at 1194–95.

419. *See* Kinnett v. Kinnett, 332 So. 3d 1149, 1157 (La. 2021) (quoting Mr. Andrews recalling a text message from Ms. Kinnett, which stated, "I got together with [my husband] one random night, I ended up pregnant, I had a baby and I'm staying in the marriage for the sake of the kids.") (alteration in original).

420. *Id.* at 1155.

421. *Id.* at 1156.

However, the lack of a clear standard creates inequitable results.[422] If *Kinnett* was before the First Circuit or Third Circuit in the 1990s, the result likely would have been different.[423] Mr. Andrews attempted to have a relationship with the child and promptly brought an avowal action upon learning by DNA evidence of his paternity.[424] Thus, the First or Third Circuit, prior to Louisiana's comprehensive revisions to the law of filiation, likely would have held that Mr. Andrews filed suit in a timely manner considering all relevant factors, including the best interest of the child.[425] Allowing Mr. Andrews to establish paternity in such a situation is certainly a more equitable result.

Louisiana's recognition of dual paternity mitigates much of the risk of disrupting the child's life through litigation, the first of the legislature's two goals for article 198.[426] If Louisiana did not recognize dual paternity, the risk of upending a child's life through litigation would be significant because the court could only adjudicate one man to be the child's legal father.[427] However, with dual paternity, the litigation is not as likely to become contentious because the court may recognize the child's legal and biological fathers as full-fledged fathers.[428] Ultimately, the focus would be on the child's best interests. The UPA test shifts the focus from the mother's actions to both the father's actions and the child's best interests. Recall Representative Carter's concerns about article 198 leaving a father's right to establish paternity in the hands of the mother, completely outside of the biological father's control.[429] Adoption of the proposed best-interest test solves these concerns by placing the focus on the father's relationship with the child.[430] Thus, a father's right to establish paternity would lie completely within his control.

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422. *See, e.g.*, *id.*

423. For a discussion of Louisiana's prior method of adjudicating parentage, *see supra* Part II.C.

424. *See* Putnam v. Mayeaux, 645 So. 2d 1223 (La. Ct. App. 1st Cir. 1994); Geen v. Geen, 666 So. 2d 1192, 1195 (La. Ct. App. 3d Cir. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996).

425. *See generally Putnam*, 645 So. 2d 1223; *Geen*, 666 So. 2d 1192.

426. *See* Kinnett v. Kinnett, 302 So. 3d 157, 201–02 (La. Ct. App. 5th Cir. 2020) (Wicker, J., concurring), *writ granted*, 309 So. 3d 735 (La. 2021), and *writ granted*, 309 So. 3d 735 (La. 2021), and *writ granted*, 309 So. 3d 738 (La. 2021), and *rev'd in part*, 332 So. 3d 1149 (La. 2021).

427. *See id.*

428. *See id.*

429. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:38:00–1:41:30.

430. *See* UNIF. PARENTAGE ACT § 613(a) (UNIF. L. COMM'N 2017).

Additionally, adoption of the proposed best-interest test is in line with the Louisiana legislature's second goal of protecting the intact family.[431] Each factor that the courts considered in *Putnam* and *Geen* would have a correlating factor under the proposed revised language to Louisiana Civil Code article 198.[432] For example, the court in *Putnam* considered Mr. Putnam's unsuccessful attempts to see his child and his offers to provide for the child.[433] The proposed amendment would also look at these or similar facts under factor two.[434] Factor two would favor Mr. Putnam because his attempts to see his child and provide for him would show that he spent time trying to assume the role of father of his child.[435] The fact that Louisiana courts previously considered factors similar to the proposed language of article 198 strongly supports the notion that courts are capable of applying a balancing test to adjudicate parentage.[436] However, under the current bad faith exception, Louisiana courts do not have a clear standard to apply.[437] Adopting five of the six factors from § 613 of the UPA solves the problem and gives Louisiana courts proper guidance to adjudicate parentage.

C. Adopting the proposed best interest of the child standard resolves any constitutional concerns.

In addition to better meeting the legislature's goals, adopting the proposed best-interest standard for actions instituted after the child's first birthday also solves any underlying constitutional concerns of Louisiana Civil Code article 198 in situations with putative fathers like *Kinnett*. In *Kinnett*, the Louisiana Fifth Circuit Court of Appeal held that Mr. Andrews had a fundamental constitutional right to parent his biological child.[438] Thus, he deserved the procedural protections of the due process clause of the Louisiana Constitution.[439] However, the Louisiana Supreme Court reversed the Fifth Circuit's decision and held that article 198 was constitutional as applied to Mr. Andrews.[440] Thus, under Louisiana law, a

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431. *See* LA. CIV. CODE ANN. art. 198 cmt. e (2023).
432. For the proposed factors, *see supra* Part I.
433. Putnam v. Mayeaux, 645 So. 2d 1223 (La. Ct. App. 1st Cir. 1994).
434. *See supra* Part IV.
435. *See supra* Part IV.
436. *See, e.g.*, *Putnam*, 645 So. 2d 1223; Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 3d Cir. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996).
437. *See generally Putnam*, 645 So. 2d 1223; *Geen*, 666 So. 2d 1192.
438. Kinnett v. Kinnett, 355 So. 3d 181, 199 (La. Ct. App. 5th Cir. 2022).
439. *Id.*
440. Kinnett v. Kinnett, 366 So. 3d 25, 26 (La. 2023).

biological father who does not comply with the requirements of article 198 loses the ability to establish paternity of his child after the child's first birthday if the mother does not deceive him of his paternity and the child lives in an intact family.[441] The Louisiana Supreme Court noted that the Kinnetts divorce was not final.[442] If the Kinnetts had finalized their divorce prior to the time of the court's decision, would the court have reached a different conclusion? If so, such a decision takes the ability to establish paternity out of the biological father's hands and places it with people who potentially have adverse motives. This should not be the interpretation of article 198. Prior to the child's first birthday, the current article 198 provides a biological father an opportunity to establish his paternity.[443] However, the article automatically takes away that right after the child's first birthday subject to the bad faith exception.[444] The Louisiana Supreme Court held article 198 was constitutional, as applied to Mr. Andrews.[445] However, there may be other situations, such as the introductory hypothetical, where article 198 is unconstitutional because of its lack of procedural safeguards.

The current language of Louisiana Civil Code article 198 provides no procedural due process rights for biological fathers who attempt to establish their paternity once the peremptory period expires.[446] The peremptory periods do not afford a biological father an opportunity to be heard.[447] However, under the proposed article 198, a biological father is guaranteed an opportunity to be heard regarding his paternity if he so chooses. This is because of the adoption of the best-interest standard. Adopting the standard requires courts to have a hearing in avowal actions instituted after the child's first birthday when DNA testing shows to a near certainty that the man is the biological father of the child. If he fails to show that he has established or attempted to establish a relationship with his child or that he acted swiftly to institute an avowal action, the court may choose not to award him such a relationship. However, in all circumstances, proposed article 198 gives a biological father an

441. *Id.*
442. *Id.*
443. *See* LA. CIV. CODE art. 198 (2023).
444. *See Kinnett*, 355 So. 3d at 199; LA. CIV. CODE art. 198.
445. *Kinnett*, 336 So. 3d at 26.
446. *See* Kinnett v. Kinnett, 302 So. 3d 157, 201–02 (La. Ct. App. 5th Cir. 2020) (Wicker, J., concurring), *writ granted*, 309 So. 3d 735 (La. 2021), and *writ granted*, 309 So. 3d 735 (La. 2021), and *writ granted*, 309 So. 3d 738 (La. 2021), and *rev'd in part*, 332 So. 3d 1149 (La. 2021).
447. *See id.*

opportunity to be heard regarding his paternity. Adopting the best-interest standard resolves any underlying constitutional due process concerns.

As discussed previously, when the government infringes upon a fundamental constitutional right, the government's actions must pass strict scrutiny.[448] To pass the strict scrutiny test, the regulation infringing upon the fundamental constitutional right must be narrowly tailored to further a compelling state interest.[449] Cocito-Monoc, the scholar who argued that article 198's peremptory periods are unconstitutional on substantive due process grounds, claimed that prescriptive periods are a less restrictive alternative that still accomplishes Louisiana's interests.[450] Cocito-Monoc argued that the legislation is not narrowly tailored to further a compelling governmental interest because there is a significant alternative to the use of peremptory periods.[451] Thus, he concluded that article 198's peremptory periods violate substantive due process requirements of the Fourteenth Amendment to the United States Constitution.[452] Cocito-Monoc further argued that replacing the peremptory periods used in article 198 with prescriptive periods would solve these constitutional issues because prescriptive periods are subject to suspension, specifically *contra non valentum*.[453] While that is true, the proposed article 198 is even less restrictive than prescriptive periods and still achieves the legislature's goals. For the reasons detailed above, the proposed article achieves all of the Louisiana legislature's intentions, such as incentivizing a biological father to act quickly to establish his paternity to prevent upheaval of the child's life though litigation.[454] However, using the best-interest standard also ensures that a biological father has the opportunity to assert his constitutionally protected right to parent his child when he can show that he acted in a timely manner and at least attempted to establish a relationship with his child.[455] Thus, because adopting the best-interest standard furthers the legislature's goals while satisfying other procedural and substantive constitutional concerns, the Louisiana legislature should adopt proposed article 198.

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448. Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Foucha v. Louisiana, 504 U.S. 71, 115 (1992) (Thomas, J., dissenting).

449. Reno v. Flores, 507 U.S. 292, 302 (1993).

450. *See* Cocito-Monoc, *supra* note 31, at 363.

451. *See id.*

452. *See id.*

453. *See id.*

454. *See* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:38:00–1:41:30; LA. CIV. CODE ANN. art. 198 cmt. e (2023).

455. *See* Cocito-Monoc, *supra* note 31, at 363.

D. Codifying an Absent Father Exception

Recall the hypothetical that served as the introduction to this Comment. Louisiana Civil Code article 198 fails to address this circumstance because the article requires Andrew, the biological father, to bring judicial action to establish his paternity.[456] Requiring Andrew to bring such an action is in direct contention with the Louisiana legislature's intention of preventing the upheaval of the child's life through unnecessary litigation and promoting intact families.[457] Outside of Andrew rightfully establishing his paternity, the only possible result is the upheaval of Caroline's life. This is where adoption of the proposed two-party acknowledgment would be beneficial. The proposed article adopts the absent father exception of article 6, part 1, § 608 of the UPA while utilizing characteristics of other methods of establishing paternity currently in use in Louisiana that would not require a biological father to institute judicial action to establish his paternity. Rather, the two-party acknowledgment would give Andrew and Betty a discrete method of establishing Andrew's paternity that would significantly decrease the risk of upheaving Caroline's life through litigation. Additionally, it would give Andrew an opportunity to establish his paternity even after the child's first birthday when a presumed father such as Dan is completely absent from the child's life.

Section 608 specifically provides for circumstances where the presumed father of the child is absent from the child's life.[458] The UPA allows a mother to challenge the presumed father's paternity when: (1) the presumed parent is not a genetic parent; (2) the presumed parent has never resided with the child; and (3) the presumed parent never held the child out as his or her own.[459] However, the proposed language deviates from the UPA language by allowing a biological father rather than the mother to take advantage of such an exception when the child has a presumed parent.[460] Louisiana law currently gives the mother of a child the ability to rebut the presumption of paternity through a contestation action.[461] Under the proposed language of article 190.2, the exception would not allow the

456. *See* LA CIV. CODE art. 198 (2023). Louisiana law provides an opportunity to establish paternity through subsequent marriage. *See id.* art. 195 However, assume for this hypothetical that Andrew and Betty have no intention of entering into marriage.

457. LA. CIV. CODE ANN. art. 198 cmt. e.

458. UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. L. COMM'N 2017).

459. *Id.*

460. *See supra* Part IV.

461. *See* LA. CIV. CODE art. 191; *supra* Part I.

biological father to rebut the presumption of paternity, but rather, it would create dual paternity.[462]

The proposed article 190.2 would operate as a middle ground between a formal acknowledgment under article 196 and a three-party acknowledgment under article 190.1.[463] When a man executes a formal acknowledgment, the rights established are established only in favor of the child except for custody, visitation, and child support.[464] Additionally, a man may only use a formal acknowledgment when the child does not have a presumed father.[465] The heightened DNA requirements and consent of the mother in proposed article 190.2 justifies allowing the biological father to obtain all of his filial rights.[466] Conversely, the lack of consent from the presumed father, as required in a three-party acknowledgement, justifies the establishment of a dual paternity situation rather than the breaking of the filial link between the child and presumed father.[467] The absent father would not lose any rights or obligations that existed prior to a biological father's execution of a two-party acknowledgment unless he timely disavowed the child.[468]

Like the three-party acknowledgment, the DNA testing requirement of the two-party acknowledgment ensures that only a biological father executes the two-party acknowledgment.[469] The two-party acknowledgment would establish full filial rights for the biological father, so such a safeguard is necessary to prevent men who share no biological link with the child from gaining full filial rights. Requiring the biological father to execute the authentic act in conjunction with the mother provides additional insurance that the man executing the two-party acknowledgment is the true father of the child.

The requirements of residence and holding the child out as the presumed parent's own are factual inquiries that would likely be easily satisfied in the case of absent, presumed fathers. Additionally, the inclusion of such requirements prevents any attempts to circumvent the time limitations of article 198 in situations where the presumed father is present in the child's life.[470] If the presumed father is present and wishes to challenge the two-party acknowledgment, the presumed father would

462. *See supra* Part IV.
463. *See* LA. CIV. CODE arts. 196, 190.1.
464. *Id.* art. 190.1.
465. *Id.*
466. *See id.*
467. *See id.* art. 196.
468. *See id.* art. 197.
469. *See id.*
470. *See id.* art. 198.

have the opportunity to rebut the establishment of paternity. In such a situation, the action would operate as an avowal action for the man who executed the two-party acknowledgment where, after the presentation of evidence to establish paternity, either the presumed father would rebut the establishment of paternity or a dual paternity situation would remain. The proposed article 190.2 would not affect the presumed father's ability to disavow paternity.[471] After all, the goal is to protect the best interest of the child.[472] Extinguishing a biological father's right to establish paternity, even when the presumed father is absent from the child's life, does not protect the child. The two-party acknowledgment promotes the intact family and ensures that the child will not be left without a father.[473] By codifying the two-party acknowledgment, a biological father can more easily establish his paternity when the child has a presumed, absent father with little risk to upending the child's life through litigation. Thus, the two-party acknowledgment for absent, presumed fathers is a necessary addition to the Louisiana Civil Code.

CONCLUSION

The introductory hypothetical and the facts which gave rise to *Kinnett* are two prime examples of situations where Louisiana Civil Code article 198 poses issues. Regardless of whether the article is constitutional, the article infringes upon a biological father's ability to establish paternity of his child. Adopting a DNA testing requirement for avowal actions instituted after the child's first birthday is necessary to ensure that only biological fathers with a legitimate claim to paternity institute the action. The proposed best-interest standard, a standard with clearly defined factors and a history of successful application, is a necessary alternative to the bad faith exception currently in use in article 198.[474] Such a change places control of the ability to establish paternity solely in a father's hands, and Louisiana courts have proven they are capable of applying a best-interest test. Finally, the legislature should adopt the proposed two-party acknowledgment to address situations like the introductory hypothetical where the presumed father is absent from the child's life.[475] The adoption of proposed article 190.2 would give a biological father a significant

471. *See id.* art. 187.

472. LA. CIV. CODE ANN. art. 198 cmt. e (2023).

473. *See id.*

474. *See, e.g.*, Putnam v. Mayeaux, 645 So. 2d 1223 (La. Ct. App. 1st Cir. 1994); Geen v. Geen, 666 So. 2d 1192 (La. Ct. App. 3d Cir. 1995), *writ denied*, 669 So. 2d 1224 (La. 1996).

475. *See* UNIF. PARENTAGE ACT § 608(b)(1) (UNIF. L. COMM'N 2017).

opportunity to establish paternity of his child with full filial rights while substantially reducing the risk of upheaval of the child's life through litigation. As shown above, the UPA and the Louisiana legislature had similar motives for their legislation.[476] The proposed articles fill the gaps in the current article 198 and better meet the legislature's goals for the article in addition to solving any underlying constitutional concerns. Thus, for the reasons detailed above, the Louisiana legislature should adopt proposed articles 198 and 190.2 and include the language proposed by this Comment.

476. *Compare Why Your State Should Adopt the Uniform Parentage Act (2017)*, *supra* note 52, *with* Louisiana House Floor Debate, H.B. 368, *supra* note 17, at 1:50:05–1:50:40, *and* LA. CIV. CODE ANN. art. 198 cmt. e.