



LOUISIANA STATE LAW INSTITUTE

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November 12, 2014

Representative Charles "Chuck" Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, Louisiana 70804-9062

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, LA 70804

RE: HCR 140 of 2012

Dear Mr. Speaker and Mr. President:

The Louisiana State Law Institute respectfully submits herewith its report to the legislature in response to 2012 House Concurrent Resolution No. 140, relative to dual paternity and child support.

Sincerely,

William E. Crawford
Director

WEC/puc

Enclosure

cc: Representative Neil Abramson

email cc: David R. Poynter Legislative Research Library
drplibrary@legis.la.us

Secretary of State, Mr. Tom Schedler
admin@sos.louisiana.gov

Professor Andrea B. Carroll, Reporter for the Marriage-Persons Committee
Professor Katherine S. Spaht, Chair for the Marriage-Persons Committee

LOUISIANA STATE LAW INSTITUTE

Marriage-Persons Committee

**Report to the Louisiana Legislature
in Response to HCR 140 of the 2012 Regular Session Relative to
Dual Paternity and Child Support**

November 12, 2014

Baton Rouge, LA

Katherine S. Spaht, Chair

Andrea B. Carroll, Reporter

James J. Carter, Jr., Staff Attorney

MP-Dual-Paternity-Report-to-Legislature-2014-11-Nov-12-A-Draft-2014-11-12

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Katherine S. Spaht, Chair

Andrea B. Carroll, Reporter

James J. Carter, Jr., Staff Attorney

ENROLLED

Regular Session, 2012

HOUSE CONCURRENT RESOLUTION NO. 140

BY REPRESENTATIVE ABRAMSON

A CONCURRENT RESOLUTION

To authorize and request the Louisiana State Law Institute to study the potential impact of creating a child support calculation system in cases of "dual paternity" on other areas of the law and to report its findings and recommendations in the form of specific proposed legislation at least sixty days prior to the convening of the 2013 Regular Session of the Legislature of Louisiana.

WHEREAS, in accordance with the provisions of R.S. 9:315.16, the child support guidelines were reviewed by the Child Support Review Committee; and

WHEREAS, the committee considered the subject matter of the application of the guidelines to instances of dual paternity, now legislatively provided for in Articles 197 and 198 of the Civil Code; and

WHEREAS, as part of the research memorandum on the subject, the committee examined and discussed the few appellate cases in which the court applied the guidelines when the child had two legally recognized fathers; and

WHEREAS, the committee was satisfied that the judiciary properly applied the guidelines by considering the income of all three parents resulting in a proportionate responsibility for each, as in *State v. Wilson*, 855 So.2d 913 (La. App. 2nd Cir. 2003); and

WHEREAS, issues presented by "dual paternity" extend beyond child support to such areas of the law as parental authority, tutorship, alimentary obligation owed by ascendants to

descendants over the age of eighteen, wrongful death and survival actions, immunity from suit, bars to suit, and successions; and

WHEREAS, the impact of providing specifically by statute for "dual paternity" in child support cases but not in other areas of the law could create results by implication; and

WHEREAS, since the charge of the Child Support Review Committee is to study the child support guidelines and make recommendations for modification and the charge of the Marriage and Persons Committee is to consider all other areas of the law impacted by "dual paternity", the review and consideration of both committees is desirable.

THEREFORE, BE IT RESOLVED that the Legislature of Louisiana does hereby request that the Louisiana State Law Institute Marriage and Persons Advisory Committee consider statutory proposals in the areas of the law in which "dual paternity" may have an impact not otherwise resolvable and to make specific recommendations for legislation.

BE IT FURTHER RESOLVED that the Marriage and Persons Advisory Committee report its findings to the Child Support Review Committee at least sixty days prior to presentation of the Marriage and Persons Committee report to the legislature.

BE IT FURTHER RESOLVED that the committee report its findings and recommendations in the form of specific proposed legislation to the legislature at least sixty days prior to the beginning of the 2013 Regular Session of the Legislature of Louisiana.

BE IT FURTHER RESOLVED that a suitable copy of this Resolution be transmitted to the Marriage and Persons Advisory Committee of the Louisiana State Law Institute.

SPEAKER OF THE HOUSE OF REPRESENTATIVES

PRESIDENT OF THE SENATE

November 12, 2014

To: Representative Chuck Kleckley
Speaker of the House of Representatives
P.O. Box 94062
Baton Rouge, LA 70804-9602

Senator John A. Alario, Jr.
President of the Senate
P.O. Box 94183
Baton Rouge, LA 70804

From: Andrea Carroll, Reporter
Marriage-Persons Committee of the Louisiana State Law Institute

**Report to the Louisiana Legislature
in Response to HCR 140 of the 2012 Regular Session Relative to
Dual Paternity and Child Support**

During the meetings of the Child Support Review Committee prior to the 2012 Regular Session of the Legislature, one of the topics reviewed for potential legislation was the proper treatment of the issue of dual paternity for purposes of application of the child support guidelines. Upon the enactment of the new Civil Code Articles on filiation in 2006, the existence of dual paternity was legislatively recognized and its principles contained in Civil Code Articles 197 and 198. There is very little appellate jurisprudence applying the child support guidelines to instances of dual paternity and difficult issues surrounding support possibilities when a child has both a presumed and biological father led the Child Support Review Committee to conclude that the matter should be studied by the Marriage-Persons Committee of the Louisiana State Law Institute. The Child Support Review Committee was particularly concerned that any legislation which may resolve the application of principles of dual paternity in the child support context may create legal issues in other areas. These concerns prompted the introduction and passage of HCR 140 of the 2012 Regular Session, which precedes this report. With this background in mind, the Marriage-Persons Committee began deliberations as to what, if any, legislative proposals might be needed to address the multitude of issues surrounding dual paternity and child support in Louisiana.

Review of the Louisiana jurisprudence on child support and dual paternity

As an initial matter, the Louisiana jurisprudence, both before and after the most recent large-scale revision of the filiation articles, has remained consistent in applying the principles of dual paternity to find a legal duty of support in both biological and legal fathers. In the first Louisiana Supreme Court case to address child support and dual paternity, *Smith v. Cole*,¹ the Court held that a biological father was obligated to provide support for his minor child notwithstanding the fact that the child “was conceived or born during the mother’s marriage to another person and thus the legitimate child of that other person.” The *Smith* court applied the principles of dual paternity to bind the biological father. In response to the biological father’s complaint that he should not be held to support a child in the face of an existing legal (and supporting) father, the Supreme Court held that “the presumed father’s acceptance of paternal responsibilities, either by intent or default, does not enure to the benefit of the biological father. It is the fact of biological paternity or maternity which obligates parents to nourish their children,” and biological parents may not escape support responsibilities merely because others may share them.²

In *Smith*, then, the child’s biological father was held for support, and the court specifically noted that “the biological father and the mother share the support obligation of the child.” The court expressly declined to take up the question of whether the legal father also shares the support obligation, reserving that question for another day.³

In 2011, the Second Circuit took up the question *Smith* declined to address in *State v. Drew*.⁴ In this case, mother and the child’s presumed/legal father were married when she gave birth to the child. Years later, they divorced and legal father was ordered to pay support for the child as a result of a rule filed by the Department of Children and Family Services. At that time, the child’s legal father requested DNA testing, which subsequently revealed that legal father was not, in fact, the child’s biological father. Mother testified that she had genuinely believed that the child’s legal father was his biological father, and the child’s legal father admitted that he also did not question his biological relationship with the child until the rule for child support was filed. The court noted the Civil Code requirement that an action to disavow be brought within a year of the day the husband of the mother knew or should have known of the birth of the child, and that the time period for disavowal had long since passed here, as the child was more than four years old when legal father first contested paternity. Consistent with Louisiana’s long-standing rules on disavowal, the Second Circuit reaffirmed the notion that “the legal tie of paternity will not be affected by subsequent proof of the child’s actual biological tie . . . If the presumed father fails to bring a timely disavowal action, disavowal is barred by prescription, and

¹ 553 So. 2d 847 (La. 1989).

² *Id.*, at 854.

³ *Id.*, at 854-55.

For the notion that the biological father of a child shares responsibility with the mother for the child’s support, see also *State v. Howard*, 898 So.2d 443 (La. App. 1st Cir. 2004); *State v. Washington*, 747 So.2d 1245 (La. App. 2d Cir. 1999); *State v. Guichard*, 655 So.2d 1371 (La. App. 1st Cir. 1995); *State v. Williams*, 605 So.2d 7 (La. App. 2d Cir. 1992); *State v. Poche*, 368 So.2d 175 (La. App. 4th Cir. 1979).

⁴ 70 So. 3d 1011 (La. App. 2d Cir. 2011).

the presumption of paternity is irrebuttable . . . Furthermore, the fact that [another man] has been proven to be the child's biological father does not affect [the legal father's] status."⁵

The *Drew* court seemed to sympathize with the legal father's predicament, but nonetheless reiterated the well-established policy, previously articulated by the Louisiana Supreme Court in *Gallo v. Gallo*, that the intent of firm disavowal prescriptive periods is to "protect innocent children, born during marriage, from scandalous attacks on their paternity by the husband of the mother, who may be seeking to avoid paternal obligations to the child."⁶ Public policy continues to support a relatively short time period for attacks on paternity through the disavowal action. The legislature has even repealed provisions that would suspend prescription in favor of the legal father for a time period during which he has been defrauded or deceived by the child's biological mother, further evidencing the continued desire of the Louisiana legislature to protect children's interests over that of legal fathers'.⁷

The combination of the *Smith* and *Drew* lines of cases produces the inescapable conclusion that in dual paternity scenarios, both the child's legal and biological fathers owe duties of support. As a result, the Marriage-Persons Committee began its deliberations with the understood assumption that both fathers would be responsible (with the mother) for support under Louisiana's child support guidelines. The difficult questions, of course, surround the precise parameters of that responsibility, and very few Louisiana cases address those issues.

In *State v. Reed*,⁸ the Fifth Circuit became the first court of appeals to attempt to allocate child support between the mother, the legal father, and the biological father of a child. The Fifth Circuit first explained the trial court's duty under the child support guidelines as one to administer child support in a manner fairly apportioned between parents in accordance with both the needs of the children, and the means available to the child's parents. Specifically, the court noted that "children are entitled to share in the current income of both parents, and the children should not be the economic victims of divorce or out-of-wedlock birth."⁹ In order to fairly apportion support between parents, the child support guidelines require that the court be presented with verified income statements and other documents, including pay stubs and tax returns, showing each party's income.¹⁰ The *Reed* trial court rendered an award of child support with only two paycheck stubs from the mother, an unauthenticated list of bank deposits and a lone 1099 form for the biological father, and no documents for the legal father. The Fifth Circuit found the rendition of a judgment in the face of such documentary deficiencies an abuse of discretion, and remanded to the trial court for collection of proper documentation from all three parties. Noting its desire to bring an end to this "matter of first impression" in the Fifth Circuit, the court simply found itself unequipped to render judgment under the guidelines in the absence of the necessary documentation.

⁵ *Id.*, at 1013.

⁶ 860 So. 2d 168 (La. 2003).

⁷ For cases similar to *State v. Drew*, see *J.M.Y. v. R.R.*, 1 So.3d 725 (La. App. 3d Cir. 2008); *Smith v. Smith*, 672 So.2d 1075 (La. App. 4th Cir. 1996); and *Smith v. Dison*, 662 So.2d 90 (La. App. 4th Cir. 1995).

⁸ 52 So. 3d 145 (La. App. 5th Cir. 2010).

⁹ LA. REV. STAT. ANN. §9:315(A).

¹⁰ LA. REV. STAT. ANN. §9:315.2(A).

The only appellate court to actually undertake the analysis that was not possible in *Reed* was *State v. Wilson*.¹¹ In *Wilson*, the Second Circuit was required to allocate child support between a mother, legal father, and biological father of a child. The court began by noting the previously-established support duties of both legal and biological fathers of a child, even when the child's biological father previously played no role in the child's life. It then detailed the methodology followed by the trial court in allocating support among the three parents:

The trial court combined the adjusted gross incomes of Claude [biological father] and Hollis [legal father], and with that sum, along with Angela's [mother's] income, utilized Louisiana's child support guidelines to derive the paternal support obligation of \$519.88.¹² To determine Claude's portion of support, the trial court compared Claude's and Hollis's percentage share of income, and determined that Claude was responsible for 65 percent of the paternal obligation, or \$339.00 per month.

Ultimately, the Second Circuit affirmed the judgment of the trial court, rejecting biological father's argument that the support he was mandated to pay was excessive under the guidelines. The court specifically noted that "the actual calculation of child support in a dual paternity case is not addressed by the guidelines or in the jurisprudence." Nonetheless, it concluded that the trial court's calculation was both proper and compliant with the spirit of the guidelines. As between mother and father, the guidelines require that the parties' adjusted gross incomes be combined, and that each party's percentage share of child support then be determined by "his or her proportionate share of the combined amount."¹³ Moreover, child support is to be calculated with reference to child need and parental ability to pay. Thus, "if the intent of the guidelines is to fairly apportion each parent's support obligation as to a mother and father by considering their proportionate incomes, we cannot see how a calculation similarly made where two fathers exist could not be concluded to be equally fair."¹⁴

Marriage-Persons Committee analysis and recommendations

After reviewing the entirety of the existing Louisiana law on this matter, the Marriage-Persons Committee determined that it was not appropriate to recommend any legislative change at this time. Rather, the Committee approved of the jurisprudential development in the area of child support and dual paternity, and determined that a legislative solution would be both overly complicated, requiring the creation of an entire new scheme of child support for relatively infrequently occurring events, and may create serious negative and unintended consequences.

Although it was sensitive to the difficulties created when mothers dupe legal fathers as to issues of paternity, thereby potentially inhibiting their ability to timely disavow, the Marriage-

¹¹ 855 So. 2d 913 (La. App. 2d Cir. 2003).

¹² "Specifically, this figure was derived by considering Angela's monthly income of \$1,680.00 and the monthly income of a "fictional father," i.e., a combination of Claude's and Hollis's incomes. The "fictional father's" monthly income was derived by taking the sum of Claude's monthly income of \$2,264.00 and Hollis's monthly income of \$1,209.00. for a total of \$3,473.00 a month. Using the combined monthly adjusted gross income of the parents (that being \$5,153.00) and considering the guidelines, the basic monthly child support obligation for [the child] was determined to be \$711.36. After adding in [the child's] health insurance premium, which Angela paid, the total child support obligation for [the child] came to \$771.36, of which the "fictional father" was responsible for 67.40 percent or \$519.88." *Id.*, at 915 n. 5.

¹³ LA. REV. STAT. ANN. § 9:315.2.

¹⁴ *Id.*, at 916.

Persons Committee approved of the jurisprudence binding both legal and biological fathers as in the best interest of Louisiana's children. Some Committee members expressed concern that *Wilson* may reward an adulterous mother, insofar as combining the incomes of the two fathers will have the effect of reducing the mother's support obligation. Nonetheless, the Committee generally approved of the *State v. Wilson* approach for allocating support as between dual fathers. Representatives from the Department of Children and Family Services and from the District Attorney's Association spoke in support of the *Wilson* principles. Still, all agreed that codification of *Wilson* (or any other approach to allocating support between dual fathers) would be undesirable.

The Committee began with the shared view that the biological father of the child, rather than the legal father, should bear *primary* responsibility for the child's support. Juvenile and family court judges reported to the Committee that when Louisiana trial judges are able to determine the identity of a child's biological father, he is typically ordered to pay support, and the presumptive father is not. Legislatively prescribing such a result, however, would prove problematic.

If the legislature were to codify principles of dual responsibility for child support, the question of precisely how dual fathers are liable must also be answered. Are dual fathers liable *in solido*, or jointly, and to what extent? If the legal father is called upon to pay child support, should he receive contribution? Indemnity? And in what amount? Serious procedural issues arise, depending upon the choice of how the responsibility of the two fathers is to be shared, including the necessity of a scheme regulating the order of suit and of which parties are necessary and indispensable to child support litigation.

Moreover, although a legislative solution could, in theory, be crafted to apply only in the child support context, it carries implications for a whole host of related areas of law. Wrongful death suits, support for ascendants and descendants, intestate inheritance, forced heirship, parental authority, and natural tutorship are just a few of the implicated areas.

A legislative approval of *Wilson* would require an entire scheme of child support statutes which are not only unnecessary, given the positive impact of the case development on this issue at the present time, but also may create unanticipated problems. As a result, it is the recommendation of the Marriage-Persons Committee that no legislation be addressed to the issue of child support and dual paternity at the present time. The Committee intends to monitor the issue as it continues to develop and to apprise the legislature via the Council of the Institute if and when it believes any legislative action becomes warranted.

Respectfully submitted,

Andrea Carroll, Reporter
Marriage-Persons Committee
Louisiana State Law Institute