

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

September 5-6, 2014

Friday, September 5, 2014

Persons Present:

Alston, Elizabeth A.	Landry, Ron J.
Baker, Katherine	Lavergne, Luke
Bergstedt, Thomas	Levy, H. Mark
Braun, Jessica	Little, F. A.
Breard, L. Kent	Lonegrass, Melissa T.
Brister, Dorrell J.	Medlin, Kay C.
Burris, William J.	Morris, Glenn G.
Carroll, Andrea	Norman, Rick J.
Carter, James J., Jr.	Odinet, Christopher K.
Crawford, William E.	Pohorelsky, Peter
Crigler, James C.	Reed, Angelique
Cromwell, L. David	Richard, Herschel, Jr.
Curry, Kevin C.	Richard, Thomas
Curry, Robert L., III	Richardson, Sally
Davidson, James J., III	Riviere, Christopher H.
Dawkins, Robert G.	Samuel, Cynthia
Di Giulio, John E.	Scalise, Ronald J., Jr.
Dimos, Jimmy N.	Storms, Tyler
Doguet, Andre	Stuckey, James A.
Domingue, Billy J.	Thibeaux, Robert P.
Ellison, David M., Jr.	Trahan, J. Randall
Freel, Angelique	Tucker, Zelda W.
Garrett, J. David	Wallace, Monica Hof
Hamilton, Leo C.	Weems, Charles S., III
Haymon, Cordell	White, H. Aubrey, III
Hogan, Lila T.	White, Roederick
Holdridge, Guy	Wilder-Doomes, Erin
Jewell, John Wayne	Wilson, Evelyn
Knighten, Arlene D.	Woodruff-White, Lisa
Kostelka, Robert "Bob" W.	Ziober, John David

President James C. Crigler, Jr. opened the Friday session of the September 2014 Council meeting at 10:00 AM on September 5, 2014 at the Monteleone Hotel at New Orleans, LA. During today's session, Professor J. Randall Trahan represented the Birth Certificates Committee and presented: Revision of the Vital Statistics Laws that Pertain to Filiation Avant-Projet # 13.

Revision of the Vital Statistics Laws that Pertain to Filiation Avant-Projet # 13

1. The Reporter began by reminding the Council of what they had decided at the meeting on September 27, 2013 when they last heard a presentation of these materials. The committee has met twice since the last council meeting and their revised proposal, developed in response to those decisions of the Council, is AJ#13.

2. The Reporter asked the Council to look at page 9, lines 11-20 and proposed R.S.40:46.3 on page 21. He explained that present law allows a birth certificate to reflect information relative to the surname of a child that does not comply with present filiation law. The Reporter pointed out the competing policies of the birth certificate law, namely, (1) to provide an accurate reflection of the child's true filiative situation versus (2) to protect the child and/or his parents from social embarrassment. The committee, having decided that the birth certificate should reflect the true filiation of the child regardless of the adverse social consequences, proposed to delete this provision from the present law that pertains to how the birth certificate should originally be filled out and to drop the parallel provision that the committee had once proposed pertaining to how to "change" birth certificates in the light of changes in filiation. After discussions regarding child support, saving money, and the use of DNA by the courts, the Council rejected the committee's proposal, voting to keep lines 11-20 on page 9 and approved proposed R.S. 40:46.3.

3. Due to the above discussions, the Council approved a motion directing the Marriage-Persons Committee to study all of the filiation laws and make recommendations to bring them in line with present practices by the courts, technology, and modern day circumstances.

4. The Reporter next asked the Council to look at Civil Code Articles 191, 195 and 196 starting on page 3 of the materials. The Reporter reminded the Council that due to advances in technology, no one actually signs a birth certificate anymore. Therefore, the Council approved the deletion of the words "or by signing the birth certificate" from these three articles.

5. The Reporter began discussions of maternal filiation by explaining that when there is a change in maternal filiation, there can also be a resulting change in paternal filiation. The committee felt that more guiding principles on maternity may be needed to reform the birth certificate law when these changes occur. The Reporter had the Council look at Article 184 on the first page of the materials. Although the proposed changes to this article were not up for adoption at this meeting, the Reporter wanted the Council to have an idea of what the revised article might look like, once the committee has dealt with certain issues it still needs to address. The committee will come back to another Council meeting with a full proposal for revising this article.

6. Next, the Reporter moved the discussion to proposed Civil Code Articles 184.1 and 184.2. During this discussion, the Reporter agreed to rewrite the comment to Art. 184.1 regarding dual maternity to take surrogacy situations into account and to add language similar to comment D of Article 197 regarding the burden of proof when the mother is still alive. After the Reporter noted that Article -- 184.1 is modeled on current Article 197 the Council began a discussion of the merits of various aspects of the law of filiation. At the end of the discussion, the Council voted to direct the Marriage-Persons Committee to review this law. In light of that decision, the Council further voted to recommit proposed Article 184.1 to the Birth Certificates Committee.

7. The Council next engaged in much discussion regarding proposed Article 184.2, which is modeled on present Article 198. The Reporter gave an example for the circumstances that paragraph two is trying to address. The Reporter pointed out that the language in the proposed second paragraph may cause problems with our adoption and voluntary surrender laws and the Council felt it may affect our custody provisions. The Council understood the need for a preemptive period because they value intact families and the need to have certainty in succession proceedings, but without a presumption of maternity, this creates problems. Ultimately, the Council voted to delete the second paragraph of the proposed article.

8. Looking at the remainder of proposed Article 184.2, a member made a motion to limit the application to successions. Further discussion revealed that tight time periods are a problem for the courts as well as the proposed Article 198 presumption. A substitute motion was made and adopted to recommit Article 184.2 back to the Birth Certificates Committee, with instructions that this committee re-visit this article once the Marriage-Persons Committee has completed its review of the law of filiation and, on the basis of that review, make appropriate adjustments.

9. Turning the Council's attention to proposed Article 189, the Reporter gave a hypothetical to highlight problems with present Civil Code Article 189 and show why the suggested language was needed. A member pointed out that due to the paternal boomerang effect, a man with a claim under the first paragraph would have a longer time period to sue than a man under the second paragraph. The Reporter agreed to have the committee look at this issue. The Council voted to adopt the proposal as written.

LUNCH

1. The Council adjourned for lunch at 12:04 PM.

2. The Council resumed its consideration of the Birth Certificates Committee material at 1:40 PM.

3. The Reporter began by presenting to the Council the comment to Civil Code Article 190 on page 3 of the materials and with little discussion, the Council adopted the comment.

4. The Council next looked at the proposed comment to Civil Code Article 195, which concerns filiation by subsequent marriage plus formal acknowledgment. The Reporter explained that he thought the comment was necessary because there is uncertainty in the law. What is required to disavow a child once filiated in accordance with this Article? Could the man simply revoke or annul his formal acknowledgment or would a disavowal action be necessary? In contrast, it is clear that under present Article 196 all that is required is a revocation. The committee wanted an Article 195 father to be required to bring a disavowal action. Concerned that the comment might be "changing the law", the Council voted to send the Article to the Marriage-Persons Committee for further review and clarification.

MATERNAL FILIATION

1. The Reporter then asked the Council to turn to page 14 of the materials as he explained the two circumstances involving a change in maternal filiation which cause a change to the birth certificate. The Reporter accepted a modification to change "that man" on line 10 to "the man to whom she was married". The Reporter also realized that he had left out a certain circumstance and he agreed to provide for it in his next draft. Essentially he will add the following between lines 15 and 16:

"(dd) If the adjudged mother was not married at the time of the birth of the child, but was married to a man as recently as three hundred days prior to the birth of the child, the surname of the child shall be the surname of her former husband."

2. The Council adopted a motion directing the Committee to draft language to allow the mother of the child to use her married name for the surname of her child if her husband has died and she has retained his name.

3. The Reporter agreed to change the terms “deletions” and “line out” throughout the entire proposal to “strike through”.

4. The Reporter began explaining proposed 46.2(B)(2)(bb) and why the committee did not include Civil Code Article 196 situations in this section. Situations of that kind are different from the others: under Article 196, the presumption of paternity arises from a mere formal acknowledgment; under Articles 185, 186 and 195, the presumption of paternity arises from marriage. A member asked why the problem in an Article 196 situation (as in the other situations) doesn't just take care of itself, because if there is a new mother, then, of course, the prior father information will become incorrect. The Reporter disagreed. In this portion of the proposal, the Reporter explained, the contemplated changes to the birth certificate become necessary because of a change in maternal filiation. If the father's paternity is based on his marital relationship to the woman who theretofore had been thought to be the mother, then his paternity would, without more, be automatically undone by the discovery of the true maternal filiation. But in a case where the father's paternity is based, instead, on a formal acknowledgment, the discovery of the true maternal filiation has no such automatic effect: to the contrary, the formal acknowledgment under Article 196 would still be effective despite the change in maternal filiation, and would remain so until there was a revocation or a court order of nullification. Several members then suggested that the committee provide for nullification by operation of law as to the father, even when paternal filiation rests on Article 196 only, when a new mother is identified. Another member asked whether the situation under Article 195 is really any different than that under Article 196: after all, in order to become a father under Article 195, one must not only marry the mother, but also make a formal acknowledgment; though the filiative effect of the “marriage” is automatically undone when it's discovered that the woman thought to be the mother is not, the filiative effect of the acknowledgment is not undone. Agreeing with this argument, the Council voted to delete the reference to Article 195 on page 15, line 23 and the Reporter agreed to change comment C on page 21 to remove references to Articles 195 and Article 196. The Council determined that the requirements to revoke or annul an acknowledgment need more study and recommitted this issue to the Marriage-Persons Committee. In that motion, the Council also expressed that they want the Committee to change R.S. 9:406 so that this action never prescribes.

Continuing on page 16, line 3 and line 16, the Reporter accepted a modification to change “that man” to “the man to whom she was married”. The Reporter will also add the following between lines 8 and 9:

“(IV) If the adjudged mother was not married at the time of the birth of the child, but was married to a man as recently as three hundred days prior to the birth of the child, the surname of the child shall be the surname of her former husband.”

6. The Council adopted a motion to approve Subsection B as amended.

PATERNAL FILIATION

1. The Reporter began discussing changes in paternal filiation. The Reporter agreed to include language in this section to allow the mother to use her married surname for the name of the child.

2. A member suggested the cite on page 17, line 3, was inaccurate. The Reporter will change the reference “Subparagraph (1)(b)” to “Subsection (C)(1)(a)(ii)(bb)”. The Reporter also accepted a change on page 17, line 21. “This man” will be changed to “the second husband of the mother”. With these amendments, the Council approved 46.2(C)(1).

3. Discussion moved to 46.2(C)(2) concerning a contestation action and the establishment of paternity. During the course of this discussion, the council asked the Birth Certificates Committee to think about moving the proposed provisions concerning judgments pertaining to paternity (i.e., judgments of disavowal, of contestation, of filiation, and of avowal) to the Code of Civil Procedure (or related revised statutes), and direct judges (rather than the Office of Vital Statistics, to provide in judgments what the surname of the child shall be and what parent information shall be included on the birth certificate. Another suggestion the Reporter agreed to consider was using the phrase "in the absence of a judgment, the registrar shall" in order to prevent the Office of Vital Statistics from ignoring or second-guessing court judgments or making decisions without full knowledge of the substantive laws on filiation. Finally, the Reporter agreed to divide these proposals up into more separately enumerated statutes to make this area of the law easier to follow.

4. On page 18, line 14, the Reporter agreed to change "this man" to "the present husband", and the Council approved 46.2(C)(2).

5. The Reporter skipped 46.2(C)(3) at this point and asked the Council to look at 46.2(C)(4) which is formal acknowledgment, found on page 19 in the materials. The Reporter will change "this man" on lines 9 and 10 to "the man that made the acknowledgment". Noting that elements of the proposal as they appeared on lines 11-17 (address the situation where someone acknowledges and then revokes the acknowledgment) did not conform to what he had recalled he and the committee had had in mind, he asked that this part of the proposal be recommitted.

6. The Council next looked at R.S. 9:406 on page 4 of the materials. The Reporter agreed to add to the title of the statute the words "or annulment" and to change the word "mover" to "petitioner" or "the person who executed the authentic act of acknowledgment", as appropriate. The Reporter was reminded that lines 28-29 were recommitted to the Marriage-Persons Committee for a full review of all the prescription and preemption periods in the law of filiation.

7. The Council adopted R.S. 9:406(B)(2)(b) as amended. Next, the Council asked the Reporter to reword the proposal on page 5, lines 6-7, to include the situation where the petitioner may have passed away and the successor is bringing the action. The reporter also agreed to move this part of the proposal to the end of line 19. Thereafter, the Council approved the entirety of R.S. 9:406.

8. The Reporter began presenting the committee's recommendation regarding dual paternity. The Reporter pointed out the problems the Office of Vital Statistics anticipates they will have if two people are listed as the father on a birth certificate, for example, questions from federal agencies regarding which of the two is "really" the father for purposes of receiving federal benefits. However, due to our present substantive law regarding dual paternity, the committee felt that there was no choice but to include both fathers.

9. After much discussion, it was suggested that the Council take time at an upcoming meeting to engage in a policy discussion relative to the issue of dual paternity and if there is support to amend, eliminate, or modify it after that discussion, the Council may then adopt a motion to instruct the Marriage-Persons Committee to study the issue.

10. The Council did approve a motion to have the Marriage-Persons Committee, in conjunction with the Louisiana Juvenile and Family Court Judges, the Louisiana State Bar Association and the Department of Children and Family Services, study the modern day circumstances of filiation including statistical information on the number of children born outside of marriage or to a person other than the husband of the mother and related statistics, court cases, and

access to justice issues. In the same motion, the Council also approved having the Marriage-Persons Committee consider the reinstatement of more liberal time frames for disavowal actions and suspension of time periods when circumstances are beyond the husband's control.

The Council adjourned today's meeting at 4:35 PM.

LOUISIANA STATE LAW INSTITUTE

THE MEETING OF THE COUNCIL

September 5-6, 2014

Saturday, September 6, 2014

Persons Present:

Alston, Elizabeth	Kostelka, Robert "Bob" W.
Baker, Katherine	Landry, Ron J.
Bergstedt, Thomas	Lavergne, Luke
Braun, Jessica	Levy, H. Mark
Burris, William J.	Lonegrass, Melissa T.
Carriere, Jeanne Louise	Medlin, Kay C.
Carroll, Andrea	Norman, Rick J.
Carter, James J., Jr.	Odinet, Christopher K.
Crawford, William E.	Pohorelsky, Peter
Crigler, James C., Jr.	Richard, Herschel, Jr.
Cromwell, L. David	Richard, Thomas
Curry, Kevin C.	Richardson, Sally
Curry, Robert L., III	Riviere, Christopher H.
Davidson, James J., III	Scalise, Ronald J., Jr.
Dawkins, Robert G.	Storms, Tyler
Di Giulio, John E.	Stuckey, James A.
Dimos, Jimmy N.	Thibeaux, Robert P.
Doguet, Andre	Trahan, J. Randall
Domingue, Billy J.	Tucker, Zelda
Freel, Angelique	Wilder-Doomes, Erin
Garrett, J. David	Wilson, Evelyn
Haymon, Cordell H.	Woodruff-White, Lisa
Hogan, Lila T.	Yiannopoulos, A. N.
Holdridge, Guy	Ziober, John David
Jewell, John Wayne	
Knighten, Arlene D.	

President James C. Crigler, Jr. opened the Saturday session of the September 2014 Council meeting at 9:02 AM on Saturday, September 6, 2014 at the Monteleone Hotel at New Orleans, LA. During today's session, Professor Andrea B. Carroll represented the Marriage-Persons Committee, Professor A.N. Yiannopoulos represented the Respite Committee, and Professor J. Randall Trahan represented the Birth Certificates Committee. The following documents were presented:

1. Report to the Louisiana Legislature in Response to HCR 140 of the 2012 Regular Session Relative to Dual Paternity and Child Support, (Marriage-Persons Committee).
2. Letter from the Reporter, (Respite Committee).
3. Revision of the Vital Statistics Laws that Pertain to Filiation Avant-Projet # 13, (Birth Certificates Committee).

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

1. The Council unanimously approved the proposed Report as presented to read as follows:

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

August 26, 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

¹ 553 So. 2d 847 (La. 1989).

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 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

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).

⁵ *Id.*, at 1013.

⁶ 860 So. 2d 168 (La. 2003).

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.

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

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).

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

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-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

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.

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

2. During her presentation of this report, the Reporter, Professor Andrea B. Carroll, explained the background of HCR 140 of the 2012 Regular Session, explained that most judges and lawyers are satisfied with the current law, and explained that the expansion of the concept of dual paternity might create unanticipated consequences.

3. During the presentation, a family-court judge said she believed that 90% of Louisiana judges who hear family-law matters were making awards in dual-paternity cases in the manner described by the Reporter.

Respite Committee **Letter from the Reporter**

1. The Council unanimously approved the recommended repeal of Title XVIII of Book III of the Civil Code (Of Respite), Civil Code Articles 3084 through 3098.

2. During his presentation, the Reporter, Professor A.N. Yiannopoulos, explained that the Title "Of Respite" was a dead Title which was no longer being applied in Louisiana, had been essentially replaced by the law of bankruptcy, and had not been provided for in the revisions of modern Civil Codes.

Birth Certificates Committee

Revision of the Vital Statistics Laws that Pertain to Filiation Avant-Projet # 13

Policy Question: Should the Birth Certificates Committee Continue?

1. The Reporter for the Birth Certificates Committee, Professor J. Randall Trahan, reminded the Council that the Council had decided during the session on Friday, September 5, 2014 that the Marriage-Persons Committee should review numerous Civil Code Articles relative to filiation. The Reporter also said that the Reporter for the Marriage-Persons Committee had estimated that it would take the Marriage-Persons Committee two years to complete its review of filiation. Therefore, Professor Trahan asked the Council if the Birth Certificates Committee should continue its work to revise the present law relative to birth certificates based upon the current law of filiation or wait until the Marriage-Persons Committee had finished its review of filiation. The Reporter also emphasized that he wanted the Birth Certificates Committee to continue its revision and to present a bill to the legislature in 2015.

2. The Council then unanimously decided that the Birth Certificates Committee should continue its revision of the present law relative to birth certificates based upon the current law of filiation.

3. Professor Trahan also said that since he was a member of the Marriage-Persons Committee, he would monitor the changes to the law of the filiation made by the Marriage-Persons Committee and would be prepared to recommend changes to the law relative to birth certificates when necessary.

Proposed R.S. 40:46.2(C)(3) (pp. 18-19)

1. After the Council had decided to continue, Professor Trahan presented (C)(3) of proposed R.S. 40:46.2 that had been skipped by the Council during the Friday session.

2. During the review of this provision, several policy issues were raised. One Council member asked why should the default rule provide for an amendment to change the surname of the child to the surname of the husband of the mother. Should the surname of the child be the maiden name of the mother? Should the surname of the child be the surname of the mother at the time of the birth of the child? The following motion was then presented to the Council: Should the surname of the child be struck through only if the mother of the child and the husband agree? The Council approved this policy by a vote of 22 to 11.

3. Although the Council attempted to draft a text for proposed R.S. 40:46.2(C)(3), the Council was unable to do so today.

Proposed R.S. 40:46.2(C)(5)(a) (pp. 19-20)

1. Professor Trahan withdrew proposed R.S. 40:46.2(C)(5)(a) for reconsideration by the committee. He indicated that there was a circumstance that had not been provided for by the draft.

2. During this discussion, a member of the Council asked the Reporter to also consider circumstances when a person had a right to participate in the decision to provide a surname for a child, but had died before he could exercise this right.

Proposed R.S. 40:46.2(C)(5)(b) (p. 20)

1. During the review of proposed R.S. 40:46.2(C)(5)(b)(i) and (ii), the Council approved lines 13-20 on page 20 with amendments to read as follows:

