No. 21-

IN THE

Supreme Court of the United States

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS AND DAVID WATTS,

Petitioners,

v.

GEMINI INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do children given in adoption have a constitutional right to sue for the wrongful death of their biological parent and siblings under the 14th Amendment to the United States Constitution?

2. Has this Court in *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), see also, *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U.S. 73,88 S.Ct. 1515,20 L.Ed.2d 441 (1968), *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972) and *Gomez* v. *Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973), "as a constitutional proposition … substituted a biological classification for the [State's] legal classification"? *Warren v. Richard,* 296 So.2d 813, 816 (La. 1974).

3. Intermediate scrutiny is the federal test in equal protection analysis for gender discrimination, *Sessions v. Morales-Santana,* ___ U.S. ___, 137 S.Ct. 1678, 1689-1690 (2017) and those born out of wedlock. *Clark v. Jeter*, 486 U.S. 456, 486, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988). Should not intermediate scrutiny also apply when children are born of marriage and are adopted?

4. Is "birth" rather than the legal "effects of adoption" under La. C.C. art. 119, as construed by the Louisiana Court, the controlling factor in equal protection analysis? If the Louisiana Supreme Court's decision is allowed to stand, then children, whether born of marriage or not, are divested of their legal right to sue for the death of their biological parent and siblings

upon adoption. This holding discourages adoptions, is contrary to stated legislative policy and contradicts *Levy,* supra and its progeny.

5. The Louisiana Supreme Court recognized the right of adopted children to sue for the loss of their biological parent and siblings, *Rismiller v. Gemini Insurance Company,*___ So. 3d ___, 2020 WL 731056 (2020), Appendix B, p. 16a-59a, the Chief Justice specially concurring that to rule otherwise would be a denial of Equal Protection of the law, citing this Court's opinions in *Levy*, *Glona*, *Weber* and *Gomez*.. Appendix B, p. 31a-34a. Rehearing was granted after the Chief Justice retired and two new Justices were seated. *Rismiller v. Gemini Insurance Company,* ___ So. 3d ___, 2021 WL 248291 (2021). Appendix J, p. 180a. The author of the dissenting opinion was elevated to Chief Justice and a diametrically contrary result was reached. *Rismiller v. Gemini Insurance Company,* ___ So. 3d ___, 2021 WL 248291 (2021). Appendix A, p. 1a-15a. What one Chief Justice found contrary to the United States Constitution another found passed constitutional muster under a "rational basis" test. *Rismiller v. Gemini Insurance Company,* ___ So. 3d ___, 2021 WL 2679552 (2021).p *4, and ___ So.3d ___, 2020 WL 731056, p. ** 13-15. Appendix A, p. 9a-11a, Appendix B, p. 50a-55a. Which test applies shifts the burden of proof. Does the rational basis (any conceivable justification) or intermediate scrutiny test apply?

PARTIES TO THE PROCEEDING AND RELATED CASES

Pursuant to United States Supreme Court Rule 14(1)(b)(i) the following are parties to the proceeding in the Louisiana State Supreme Court whose judgment is sought to be reviewed:

1. Khristy Goins Rismiller, Tutrix for Daniel Edward Goins, Petitioner,

2. David Watts, Petitioner

4. Kenneth Chad Boone d/b/a Boone Trucking, Respondent

5. Keith Boone Trucking, LLC, Respondent

6. Gemini Insurance Company, Respondent.

7. Mark Isiah Gordon, Respondent

Pursuant to United States Supreme Court Rule 14(1)(b)(ii) the following is a list of all proceedings in this case which is sought to be reviewed:

1. *Kristy Goins Rismiller, Tutrix for Daniel Edwardd Goins v. Gemini Insurance Company,* State of Louisiana, Parish of Concordia, 7th Judicial District Court, Case No. 49,186, consolidated with Case No. 49,751, *David Watts v. Mark Gordon, et al*, consolidated with Cases Nos. 49,741 and 49,832. Judgment entered, June 29, 2017.

2. *Stewart v. Gordon,* Case No. 17-812, Louisiana Court of Appeals for the Third Circuit. Judgment entered October 3, 2018.

3. *Rismiller v. Gemini Insurance Company*, Case No. 17,809, Louisiana Court of Appeals for the Third Circuit. Judgment entered October 3, 2018.

4. *Watts v. Gordon*, Case No. 17-811, Louisiana Court of Appeals for the Third Circuit. Judgment entered October 3, 2018.

5. *Rismiller v. Gemini Insurance Company*, No. 2018-CC-2089, Louisiana Supreme Court. Judgment entered February 18, 2019.

6. *Rismiller v. Gemini Insurance Company,* State of Louisiana, Seventh Judicial District Court, Parish of Concordia, Case No. 49,686 c/w 49,751, 49,741 and 49,832. Judgment entered October 14, 2019.

7. *Rismiller v. Gemini Insurance Company*, Case No. 2020-CA-0313, Louisiana Supreme Court. Judgment entered December 11, 2020.

8. *Rismiller v. Gemini Insurance Company, et al*, Case No. 2020-CA-0013. Louisiana Supreme Court. Judgment entered June 30, 2021.

9. *Rismiller v. Gemini Insurance Company, et al*, Case No. 2020-CA-00313, Louisiana Supreme Court. Judgment entered September 30, 2021

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On supervisory review, the Louisiana Court of Appeal for the Third Circuit, in a 4-3 decision, reversed the district court's rulings and granted the exceptions of no right of action. *Stewart v. Gordon,* 2017-812 (La. App. 3 Cir. 10/3/18), 316 So.3d 1052, 2018 WL 4858748, Appendix E, p. 98a-153a, *Rismiller v. Gemini Insurance Company*, 2017-809 (La. App. 3 Cir. 10/3/18), 316 So.3d 1178, Appendix F, p. 154a-165a and *Watts v. Gordon*, 2017-811, (La. App. 3 Cir. 10/3/18), Appendix G, p.166-171a.

The case was then appealed to the Louisiana Supreme Court which pretermitted a decision on the merits and remanded the cases to the district court to allow amendment of the Petitions to assert the unconstitutionality of La. CC arts. 2315.1 and 2315.2 and join the Louisiana Attorney General. *Rismiller Tutrix for Goins v. Gemini Insurance Company*, 2018-2089 (La. 2/18/19), 263 So. 3d 1145, Appendix D, p.96a-97a.

On remand the district court ruled that La. C.C. arts. 2315.1, 2315.2 and 199 are "unconstitutional as applied

to children given in adoption" and overruled defendants' exceptions of no right of action. *Kristy Goins Rismiller, Tutrix for Daniel Edward Goins v. Gemini Insurance Company,* State of Louisiana, Parish of Concordia, 7th Judicial District Court, Case No. 49,186, consolidated with Case No. 49,751, *David Watts v. Mark Gordon, et al*, consolidated with Cases Nos. 49,741 and 49,832, Appendix C, p.60a-95a. The cases were appealed directly to the Louisiana Supreme Court by Gemini Insurance Company.

On December 11, 2020, the Louisiana Supreme Court held that children who had been given in adoption as minors had a right of action for the death of their biological parent and siblings and upheld the overruling of the exceptions by the district court. The opinion had three dissents. *Rismiller v. Gemini Insurance Company*, et al, 2020-0313 (La. 12/11/20), ___ So.3d ___, 2020 WL 7310506, Appendix B, p.16a-59a.

A rehearing was granted. *Rismiller v. Gemini Insurance Company*, et al, 2020-0313 (La. 1/26/21), ___ So.3d ___, 2021 WL 248291, Appendix J, p. 180a.

On June 30, 2021 the Louisiana Supreme Court held that then adult children who had been given in adoption as minors had no right of action for the death of their biological parent and siblings for wrongful death, La. C.C. art. 2315.1 and survival claims. La. C.C. art. 2315.2. *Rismiller v. Gemini Insurance Company, et al*, , No. 2020-0313 (La. 06/30/2021), ___ So. 3d ___, 2021 WL 248291, Appendix A, p. 1a-15a. There were (again) three dissents.

A Petition for Rehearing was denied on September 30, 2021. *Rismiller v. Gemini Insurance Company, et*

al, 2020-0013 (La. 09/30/2021), ___ So. 3d ___, 2021 WL 2679552, Appendix K, p. 181a-182a.

STATEMENT OF JURISDICTION

Jurisdiction lies under the United States Constitution, Art. III, Sec. 2, and 28 U.S.C. Sec. 1257 (a), "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." This application for a writ of Certiorari is timely filed pursuant to Supreme Court Rule 13(1) as it has been filed within 90 days of September 30, 2021 when the Louisiana Supreme Court denied rehearing. Appendix K, p. 181a-182a. The Louisiana Attorney General has been served and has participated in these proceedings. Appendix C, p. 62a-63a.

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment 14, Sec. 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case stems from a tragic accident on October 1, 2015 in which an eighteen-wheeler collided head-on with a

vehicle being driven by Richard Stewart, Jr. Mr. Stewart was killed, as well as his two minor children. At the time of his death Mr. Stewart was married. However, the minors killed in the accident were born to another woman with whom Mr. Stewart reportedly had a relationship during his marriage.

Following the accident multiple separate survival and wrongful death actions arising out of the deaths of Mr. Stewart and his minor children were filed. Two of the lawsuits present claims filed by or on behalf of Daniel Goins and David Watts, now adults who, as minors were given up for adoption by the Stewarts. Mr. Goins was adopted by Mr. Stewart's aunt and uncle. Mr. Watts was adopted by his maternal grandparents.

The driver of the truck, the truck's owner and its insurer were named as defendants. The district court consolidated all of the wrongful death and survival claims, and the defendants filed peremptory exceptions of no right of action against all claimants. The district court overruled the exceptions. As to the claims of Goins and Watts, the district court ruled that "the biological relationship" of Mr. Goins and Mr. Watts was the origin of the right of action and, further, "the fact that Watts and Goins were adopted does not prevent them from bringing survival and wrongful death claims for the death of Mr. Stewart, their biological father." The district court also ruled that Goins and Watts had a right of action arising from the deaths of their half-siblings. *Kristy Goins Rismiller, Tutrix for Daniel Edmond Goins v. Gemini Insurance Company,* State of Louisiana, Parish of Concordia, 7th Judicial District Court, Case No. 49,186, consolidated with Case No. 49,751, *David Watts v. Mark Gordon,*

et al, consolidated with Cases Nos. 49,741 and 49,832., Appendices H, p. 172a-175a and I, p. 176a-179a.

On supervisory review, the Louisiana Court of Appeal for the Third Circuit, in a 4-3 decision, reversed the district court's rulings on the defendants' exceptions of no right of action. The majority opined: "It has long been held that children given up in adoption are divested of their legal rights except as to those relating to inheritance." *Stewart v. Gordon,* 2017-812 (La. App. 3 Cir. 10/3/18), 316 So.3d 1052, 1058. There were three dissents. *Stewart v. Gordon,* 2017-812 (La. App. 3 Cir. 10/3/18), 316 So.3d 1052, 1059-1077, 2018 WL 4858748, Appendix E, p. 98a-153a, *Rismiller v. Gemini Insurance Company*, 2017-809 (La. App. 3 Cir. 10/3/18), 316 So.3d 1178, Appendix F, p. 154a-165a and *Watts v. Gordon*, 2017-811, (La. App. 3 Cir. 10/3/18), 316 So.3d 1049, Appendix G, p.166-171a.

The dissents from the majority's conclusion that Mr. Goins and Mr. Watts do not have a right to assert the survival and wrongful death actions because they were given up for adoption as minors pointed out that La. C.C. arts. 2315.1, 2315.2 and 199 contain no language that children given in adoption as minors are "divested of their legal rights," that La. C. C. art. 199 replaced La. C.C. art. 214 that did divest minor children given in adoption of their "legal rights," that the cases relied upon by the majority arose under the now repealed La. C.C. art. 214, that under La. C.C. art. 199 children given in adoption were specifically entitled to inherit from biological parents and were reserved all legal rights "... as otherwise provided by law," and that to hold otherwise would be unconstitutional under the 14th Amendment of the United States Constitution citing this Court's opinions in

Levy, *Glona, Weber* and *Gomez*. See, *Stewart, v. Gordon* 2017-812 (La. App 3 Cir. 10/3/18), 316 So.3d at 1059-1077,); Appendix E, p. 98a-153a, *Rismiller v. Gemini Insurance Company,* 2017-809 (La. App. 3 Cir. 10/3/18), 316 So.3d at 1180-1183, Appendix F p. 158a-165a, *Watts v. Gordon,* 2017-811 (La. App. 3 Cir. 10/3/18), 316 So.3d at 1051-1052, Appendix G, p. 170a (Cooks, Savoie and Conery J).

The plaintiffs then sought review by Louisiana Supreme Court. They asserted that La. C.C. arts. 2315.1, and 2315.2, relating to wrongful death and survival actions are unconstitutional inasmuch as the Court of Appeal found those articles provide no right of action for adopted children to assert wrongful death and survival actions following the death of their biological parent and siblings. The Louisiana Supreme Court pretermitted a decision on the merits and remanded the matter to the district court to allow the plaintiffs to amend their petition to assert the constitutional issue and join the Louisiana Attorney General. *Rismiller v. Gemini Insurance Company*, No. 2018-2089 (La. 2/18/19), 263 So.3d 1145, Appendix D, p.96a-97a.

On remand, the plaintiffs amended their petitions to assert the unconstitutionality of La. C.C. arts. 2315.1, 2315.2 and La. C.C. art. 199, cited and served the Louisiana Attorney General and filed a motion to declare those articles unconstitutional. The district court held that La. C.C. arts. 2315.1, 2315.2 and 199 are "unconstitutional as applied to children given in adoption" and overruled defendants' exceptions of no right of action. Appendix C, p.60a-95a. Defendants directly appealed to the Louisiana Supreme Court.

On December 11, 2020, the Louisiana Supreme Court held that children who had been given in adoption as minors had a right of action for the death of their biological parent and siblings. The opinion had three dissents. *Rismiller v. Gemini Insurance Company, et al*, 2020-0313 (La. 12/11/2020), ___ So.3d ___, 2020 WL 7310506, Appendix B, p.16a-59a.

After the court was reconstituted following the retirement of the Chief Justice, the seating of two elected Justices and the author of the dissent being elevated to Chief Justice, a rehearing was granted. *Rismiller v. Gemini Insurance Company,* 2020-00313 (La. 1/26/21) ___ So. 3d ___, 2021 WL 248291 (2021), Appendix J, p. 180a.

On June 30, 2021 the Louisiana Supreme Court held that then adult children who had been given in adoption as minors had no right of action for the death of their biological parent and siblings for wrongful death pursuant to La. C.C. art. 2315.1 and survival claims pursuant to La. C.C. art. 2315.2. *Rismiller v. Gemini Insurance Company,* 2020-00313 (La. 6/30/21), ___ So. 3d ___, 2021 WL 248291 (2021), Appendix A, p. 1a-15a. There were (again) three dissents.

A Petition for Rehearing was denied on September 30, 2021. *Rismiller v. Gemini Insurance Company, et al*,2020-00313 (La. 06/30/2021), ___ So. 3d ___, 2021 WL 2679552, Appendix K, p. 181a-182a. Plaintiffs now seek the grant of a Writ of Certiorari from this Court.

For the following reasons petitioners urge that La. CC arts 2315.1, 2315.2 and 199 as applied to Goins and Watts by the decision of the Louisiana Supreme Court is

unconstitutional under the Equal Protection Clause of the 14th Amendment of the United States Constitution as stated by this Court in *Levy, Glona, Weber* and *Gomez*.

ARGUMENT

The Louisiana Supreme Court has (erroneously in petitioner's view) concluded that La. C.C. arts. 2315.1 and 2315.2 and 199 do not afford children given in adoption a right of action for the wrongful death of their biological parent and siblings. The unfortunate result is that such a decision denies a right of action to all children, whether born of marriage or not, upon adoption and runs afoul of *Levy, Glona, Weber* and *Gomez*.

Do children given in adoption have a constitutional right to sue for the wrongful death of their biological parent and siblings under the 14th Amendment to the United States Constitution? Has this Court in *Levy, Glona, Weber* and *Gomez* "as a constitutional proposition … substituted a biological classification for the [State's] legal classification"? *Warren v. Richard*, 296 So.2d 813, 816 (La. 1974).

In *Levy* this Court held that children born out of marriage would be denied Equal Protection under the 14th Amendment if denied the right to sue for the wrongful death of their biological parent and concluded that "it is invidious to discriminate against . . . [children] when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done the [parent]". id at U.S. 72. This Court noted that children are "not 'nonpersons'. They are human, live and have their being. They are clearly 'persons' within the meaning of the Equal Protection

Clause of the Fourteenth Amendment." Id at U.S. 70, S.Ct. 1510-1511.

This Court then stated:

> "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. Even so, would a corporation, which is a 'person' for certain purposes, within the meaning of the Equal Protection Clause be required to forgo recovery for wrongs done its interests because its incorporators were all bastards? However that might be, we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is in issue, why, in terms if 'equal protection,' should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?
>
> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly

> inflicted on the mother." (citations omitted), *Levy* at U.S. 71-72. (emphasis added).

The same question might be asked of children given in adoption being denied claims for the wrongful deaths of their biological parent and siblings. Why, in the name of equal protection, should the tortfeasor go free because the children and brothers of the victims had been given in adoption?

In *Glona* a parent's denial of a wrongful death remedy for the death of their biological child was similarly found to be an unconstitutional denial of Equal Protection. This Court said:

> "Yet we see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death. A law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors. But it hardly has a causal connection with the "sin," which is, we are told the historic reason for the creation of the disability. To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses." U.S. at 75, S.Ct. at 1516-1517. (citations omitted).

The same questions can be asked as to adoption. What possible rational basis exists to deny a wrongful death or survival claim to a biological child when children have no voice in the parent's decision to give up their rights as parents and give a child in adoption? There are many reasons to give a child up for adoption, but the child surely has no voice or consent whatsoever in those decisions.

In *Weber*, *Levy* was found to be controlling. This Court said,

> "The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in *Levy*, there is impermissible discrimination. An unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged. So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate whom Louisiana law has allowed to recover.
>
> * * * * * * * * * * * * * *
>
> Having determined that *Levy* is the applicable precedent we briefly reaffirm here the reasoning which produced that result. The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but

> this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. The essential inquiry in all the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

* * * * * * * * * * * * * *

The status of illegitimacy has expressed through the ages as society's condemnation of irresponsible liaisons beyond the bond of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where as in this case the classification is justified by no legitimate state interest, compelling or otherwise". U.S. at 169, 170, 172-173, 5.Ct. 1403-1404, 1405,. (citations omitted),. (emphasis added).

Again, a child is not responsible for his birth. It would be illogical and unjust to penalize a child who has no say in their being given up for adoption.

In *Gomez*, this Court struck down as unconstitutional the granting to legitimate children a judicially enforceable right to support from their natural fathers while at the same time denying that right to illegitimate children. This Court said:

> We have held that under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. Similarly, we have held that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is 'illogical and unjust.' We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be

> made into an impenetrable barrier that works to shield otherwise invidious discrimination." (citations omitted). U.S. at 537-538, S.Ct. at 874-875 (emphasis added).

In 1974 the State of Louisiana heeded this Court's admonitions that denying rights to a child who has no voice is illogical and unjust and prohibited any discrimination based upon birth. La. Const. Art. I, Sec. 3.

Intermediate scrutiny is the federal test in equal protection analysis for gender discrimination, *Sessions v. Morales-Santana*, ___ U.S. ___, 137 S.Ct. 1678, 1689-1690 (2017) and those born out of wedlock. *Clark v. Jeter*, 486 U.S. 456, 486, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988). Should not intermediate scrutiny also apply when children are born of marriage and are adopted?

Louisiana in 1974 further acknowledged the import of *Levy, Glona, Weber* and *Gomez* and applied "stricter scrutiny," *Webe*r, U.S. 172, S.Ct. 1405, in *Warren v. Richard*, 293 So.2d 813, 816 (1974). Citing *Levy* the Louisiana Supreme Court acknowledged that this Court "... has, as a constitutional proposition, apparently substituted a biological classification for the legal classification" observed by Louisiana statutes.

In 1988 this Court again recognized this "stricter scrutiny" in *Clark v. Jeter*, 481 U.S. 456, 461, 108 S.Ct. 1910, 1914, 100 L.Ed.2d 465 (1988) and said:

> "Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been

> applied to discriminatory classifications based on sex or illegitimacy. (citations omitted).
>
> To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective. Consequently we have invalidated classifications that burden illegitimate children for the sake of punishing the illicit relations of their parent, because visiting this condemnation on the head of an infant is illogical and unjust. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 02 S.Ct. 1400, 1406, 31 L.Ed.2 768 (1972)." Id.

Louisiana continued to affirm the principles of *Levy, Glona, Weber* and *Gomez*. *Chatelain v. State Dept. of Transp. and Development*, 586, So.2d 1373, 1376 (La. 1991) ("The critical requirement for classification of a person as a child under Article 2315 is the biological relationship between the tort victim and the child" citing *Warren v. Richard*), *Jenkins v. Mangano Corp.*, 774 So.2d 101, 103 (La. 2000) ("It is of no consequence that the child is legitimate or illegitimate for purposes of deciding whether the child may bring an action under Article 2315, all children have the right to bring an action for wrongful death and survival action," citing *Levy*).

In 2008 the Louisiana Supreme Court set forth the constitutional analysis for equal protection cases under both the federal and state constitutions. *State v. Granger*, 982 So.2d 779, 787-789 (La. 2008). For claims of denial of equal protection based upon birth there must be shown an important governmental interest. Such discrimination is presumptively unconstitutional placing the burden of

proof on the law's proponent of showing an important governmental interest.

In 2009 La. C.C. art. 199 was enacted to replace and repeal La. C.C. art. 214 which divested adopted children "of all of their legal rights." La. C.C. art 199 now states:

> Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is terminated, except as otherwise provided by law. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent. (emphasis added).

No one even questioned that adopted children had causes of action for the wrongful death of their biological parents and siblings from 2009 to 2019 when the Louisiana Court of Appeal, Third Circuit ruled 4-3 in this case.

Why should the tortfeasor who wrongfully killed the child's biological relatives go free? What important governmental interest could possibly justify the deprivation of a right to sue for the wrongful death of a biological parent or sibling? Did the Louisiana Supreme Court on rehearing violate the Equal Protection Clause of the Fourteenth Amendment, *Levy* and all of its progeny by denying a child, any child, born of marriage or not, of these rights?

The dissents in the Louisiana Third Circuit Court of Appeal after reviewing *Levy, Glona*, *Weber* and *Gomez* and Louisiana Supreme Court cases construing

those decisions attempted to divert us from the present predicament saying,

> "The same rationale applies here. The dual parentage question is answered in the affirmative for the same reasons. These children-given-in-adoption, … had one father created by nature, another created by law, and according to the United States Supreme Court, and our state supreme court, the blood relationship of these children and their biological father is the "determinative factor" in deciding whether "child" as used in La.Civ. Code art. 2315.1 and 2315.2 includes surviving children- given-in-adoption as beneficiaries entitled to recover for the loss of their parent. Consistent with this rationale is the definition of children as a term of law used in the Civil Code provided in La.Civ.Code art. 3506 which includes children born of marriage. It is not the child-given-in-adoption's fault it was born, and it is not its fault it was given up for adoption any more than it is the illegitimate child's fault it was born out of marriage and not legitimated by its parent. I find it deeply troubling that under the majority's holding, a *legitimate biological child* given up for adoption would not enjoy the same rights as an *illegitimate biological* child who is also a legitimate legal child of another parent, for the loss of the same biological parent. I believe such an outcome is not constitutionally sound in light of the United States Supreme Court's and Louisiana State Supreme Court's application of the Equal Protection Clause of

> the U.S. Constitution and our state constitution in the cases discussed herein. The two high courts tell us that the biological blood tie is important between all biological offspring and their parent." *Stewart v. Gordon*, 2017-812 (La. App. 3 Cir. 10/3/18), 316 So.3d 1052, Appendix E, p.125a-126a.

In her concurrence in the original opinion the Chief Justice of the Louisiana Supreme Court agreed, *Rismiller v. Gemini Insurance Company,*___ So.3d ___, 2020 WL 731056 (2020), Appendix B, p.31a-34a observing:

> "The same policy or rationale is equally applicable in this case involving children given in adoption. As set forth in the jurisprudence addressing the rights of illegitimate children, restricting the rights of a child to bring a wrongful death or survival action arising from the death of that child's biological parent or sibling solely because the child was given in adoption would violate the central meaning of the Equal Protection Clause." 2020 WL 731506, p.8, Id. Appendix B, p.34a.

The Louisiana Supreme Court has presented this constitutional issue by its construction of La. C.C. art. 199 and then decided that constitutional issue using the "rational basis" test instead of "intermediate scrutiny." This was clear error. This ruling is directly contrary to this Court's rulings in *Levy, Glona, Weber, Gomez* and *Clark*. Here the proper standard of scrutiny in Equal Protection analysis is intermediate scrutiny, not any conceivable rational basis. *Clark*, id. See also, Discrimination Against

The Unacknowledged Illegitimate Child and the Wrongful Death Statute, 25 Cap. U.L. Rev. 933, 966-967 (1996).[1]

Is "birth" rather than the legal "effects of adoption" under La. C.C. art. 199, as construed by the Louisiana Court, the controlling factor in equal protection analysis? If the Louisiana Supreme Court's decision is allowed to stand, then children, whether born of marriage or not, are divested of their legal right to sue for the death of their biological parent and siblings upon adoption. This holding discourages adoptions, is contrary to stated legislative policy and runs afoul of *Levy, Glona, Weber and Gomez*

The Louisiana Supreme Court described the "crux" of applicant's argument to be that excluding children given in adoption from a right of action is unconstitutional because adoption precludes recovery. Respectfully, that is not the "crux" of the argument. The discrimination lies in denying minor children given in adoption of their fundamental, intimate, personal constitutional right to recover for the wrongful death of their biological parent and siblings. Assuming *Levy* and its progeny remain the law of this land, distinguishing between two classes based on the birth of the child in or out of wedlock is clearly an unconstitutional denial of Equal Protection under *Levy, Glona, Weber* and *Gomez*. Similarly, differentiating between children and children given in adoption is an

1. La. Const. art. 1. §3 prohibits discrimination "because of birth". "Laws creating classifications in [this] situation are prima facie proof that equal protection has been denied, and the law's proponent bears the burden of proving that its classification substantially furthers an important government interest." (citations omitted). *State v. Granger*, 2007-2285 (La. 5/21/08). 982 So.2d 779, 789.

unconstitutional denial of Equal Protection for the same reason, a child is not responsible for its birth, a divorce or being given in adoption. A child has no voice in these matters.

The case of *Warren v. Richard*, 796 So.2d 813, 816-17 (La. 1974) held that under *Levy* a child not born of marriage, but presumed to be the child of another man, could recover for the death of his biological father and his "legal" father. *Warren* was distinguished on rehearing on the basis of "dependency" by the Louisiana court. This reliance begs the question and relates only to the degree of damages. Obviously, the closer the child's relationship with their biological parent or sibling and the greater the dependency the greater the wrongful death damages. But damages are only determined after a finding of liability and one must have a right of action to proceed. To distinguish *Warren* by construing that case holding that dependency is a talisman to a right of action is erroneous. And what of the survival action?

Only a parent surrenders rights in adoption under La. Ch. C. art. 1122, not the child. The child has no voice in that decision, but does retain the right to inherit under La. C.C. art. 199 as well as all other rights as "… otherwise provided by law." Survival actions pass outside of successions under Louisiana law. La. CC art. 199 could easily have been construed to terminate the rights of a parent who gives their child up for adoption voluntarily surrendering their rights, having no effect on the rights of the child to pursue wrongful death or survival actions for the deaths of blood relatives. That is what everyone assumed the article did for over ten years.

La. C.C. arts. 2315.1(E) and 2315.2(F) provide the same stating that a parent who abandons his child during their minority is deemed not to survive them. The parent has no cause of action for the death of a child. But the child should give up no rights. These articles are designed to foreclose recovery to a parent that does not support his child, not to foreclose the child's rights. Indeed, to view filiation as a one-way street and deny a child the right to seek wrongful death and survival damages is contrary to the expressed policy of the State Legislature. La. Ch. Code art. 1269.1 expressly provides that "Agreements for continuing contact by certain biological relatives... with an adopted child do not violate any public policy of this state." (emphasis added). This is to encourage, not discourage adoptions.[2]

There is no basis to exclude a biological child given in adoption from asserting a wrongful death or survival action due to the death of their biological father or sibling. The Louisiana Attorney General has not urged one. The desire to limit potential beneficiaries to chosen classes, *Estate of Burch v. Hancock Holding Co.*, 90-1839, p.9 (La. App. 1 Cir. 5/7/10), 39 So.3d 742, 749, *Allen v. Burrow*, 505 So.2d 880, 887-88 (La. App. 2 Cir. 1987) begs the point. Neither of these cases involved discrimination within a

2. This important question affects many pending cases. For instance, an amicus curiae brief was filed in the Louisiana Supreme Court by Amanda Zigler. She was adopted as a minor by her stepfather in order to receive his company health insurance. Her biological father was afflicted with muscularly dystrophy and her parents divorced when she was a minor child. Now a major and grandmother, she has been denied a cause of action when her biological father was burned alive when his electric wheelchair burst into flames. Yet she inherits as his sole heir.

class based on birth. Discrimination within a class based solely on the birth of the child has no "rational basis." In fact, it is contradicted by the public policy expressed by the repeal of La. C.C. art. 214 and its replacement with La. C.C. art. 199 and the Children's Code, La. Ch. Code art. 1269.1.

Denial of fundamental, intimate, sensitive and personal rights must give rise to greater "intermediate" scrutiny yielding only to the demonstration of an important governmental interest. Certainly, any conceivable rational reason, especially one conceived of by the Louisiana State Supreme Court which is in fact contrary to expressly stated legislative policy, cannot suffice.

Although applicants vehemently disagree with the Louisiana Supreme Court's conclusion that "the text of Articles 2315.1 and 2315.2 do not provide the plaintiff's a right of action," (after all how many types of "children" are there?) it gets worse. The Court has mistakenly treated the claims of children for the wrongful deaths of their biological parent or sibling as a property right and applied a rational basis standard of review.

La. C.C. art. 199 allows adopted children, whether born in or outside of marriage, to inherit. In *Trimble v. Gordon*, 432 U.S. 762, 99 S.Ct. 1459, 52 L.Ed.2d 31 (1977) citing *Weber* and *Levy*, this Court was clear that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny," *Weber*, U.S. 172, S.Ct. 1405, which while not the "strictest scrutiny," is at the same time "not a toothless one." *Mathews v. Lucas*, 427 U.S. 495, 510, 96 S.Ct. 2755, 2764 (1076). This is "a proposition clearly

demonstrated by our previous decisions in this area." U.S. 767, S.Ct. 1463 and Louisiana as a state had heeded same.

The Louisiana Supreme Court stated the objected to classification as follows:

> "Articles 2315.1, 2315.2 and 199 would unconstitutionally create two classes of children, biologically indistinguishable from each other except that one class of children had been given in adoption and the other had not."

But what about the *Warren* case, based on *Levy,* where it was held that a child born out of marriage can legally have two fathers, one by nature and one by law, and does, constitutionally, have two causes of action for wrongful death and survival damages? The inequity is apparent. That scenario presents an equal protection violation in addition to the one stated by the Louisiana Court. The point is the same, however: The State cannot interfere with a fundamental, personal, intimate right by granting a right of action to some, but not to others, when a child is involved who cannot be held responsible for its birth and likewise has no voice in its adoption.

More importantly, the question must be posited as to what possible important governmental interest could support distinguishing between those adopted and those not? A child born into or out of marriage would lose the right to sue for the wrongful death of his biological parent or siblings upon adoption, even if adopted by relatives. Such discrimination is "invidious" according to *Levy* and its progeny. It has no rational basis. It is invidious discrimination to strip a child of their fundamental,

intimate and personal constitutional rights if they are later given in adoption with no consent or voice of theirs.

The motivation to adopt would be smothered and extinguished by this decision. The Louisiana Supreme Court attempted to distinguish *Levy* by noting that an adopted child had a wrongful death remedy for its adoptive parents. The Legislature's express statement is to the contrary, allowing contact with biological relatives along with, presumably, the sharing of family responsibilities. And this sharing of responsibilities promotes adoptions for whatever reasons. Obviously these relationships with biological parents and relatives are important. Indeed, the loss of these relationships is part of the damage suffered when a biological relative is wrongfully killed.

So what "conceivable" reason did the Louisiana Supreme Court find in its "rational basis" analysis to justify, in effect, the judicial reenactment of La. C.C. art. 214? (The Constitutional Analysis can be found in Appendix B, p. 5-a-55a). In fn. 10 Appendix B, p. 51a, the dissent (later to become the majority opinion) says:

> The concept of biological relationship that is relevant in considering the unfounded discrimination between legitimate and illegitimate children does not equate to the new legal relationships formed in the adoption process.

In short, adoption provides "new" parents and relatives. Really? What of legislative policies to the contrary? And is this notion even true?

Everyone needs to know who they are and where they came from. As personal, private and fundamental as it is, there is an innate itch that must be scratched. Why else do adults flock in droves to DNA testing websites like Ancestry.com and other such sites? But the questions will still nag on for the adopted child if not answered. For instance, what step-parent has not heard (usually at about age 15), "you are not my real father, or mother!" How can the fact that a child had been adopted not be apparent to child adopted into a family of a different race or ethnic background? And what reasons underlie adoption? To better care for the child? To allow the child to be an insured under the step-parent's company insurance? These are all private matters, or at minimum legislative choice. But they are clearly not for the courts to decide. The very case relied upon by the Louisiana Supreme Court says as much.

> "This court may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights not proceed along suspect lines. In the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Lakeside Imports, Inc. v. State*, 94-0191, (La. 7/9/94) p. 6, 639 So.2d 253, 257, (emphasis added).

Perhaps the Louisiana court missed the holding in *Levy* that "it is invidious to discriminate against them when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done ..." *Levy* U.S. at 72,

S.Ct. at 1511. (emphasis added). Heightened scrutiny, with teeth, should have been applied.

The federal cases of *Cabrera v. Attorney Gen. United States*, 921 F.3d 401, 404 (3 Cir. 2019), *Brehm v. Harris*, 619 F.2d 1016, 1020 (3d Cir. 1980), *Dent v. Sessions*, 900 F.3d 1075, 1082 (9th Cir. 2018) and *Smart v. Ashcrof*, 401 F.3d 119, 122 (2nd Cir. 2005) are unhelpful. These cases arose under the immigration laws of the United States and before this Court's decision in *Sessions v. Morales-Santana*, __ U.S. __, 137 S.Ct. 1678 (2017). In *Morales-Santana* the Court observed that "[d]isadvantageous treatment of marital children in comparison to non-marital children is scarcely a purpose one can sensibly attribute to Congress." Id at S.Ct. 1700. One cannot sensibly attribute such a purpose to the Louisiana Legislature either. It has more recently been stated that heightened scrutiny would apply to any differential treatment "turning on legitimacy," i.e. birth. *United States v. Mayea-Pulido*, 946 F3d 1055, 1064 (9th Cir. 2020). The case at bar turns on the child's birth status. It has long been held that distinctions based on legitimacy are subject to intermediate scrutiny. Id. F.2d 1065, citing inter alia *Jeter*, *Trimble v. Gordon* and *Weber*. A child has no choice in his very birth. Similarly, a child has no voice in its adoption.

As it alters the burden of proof, which test applies? Rational basis (any conceivable justification) or intermediate scrutiny?

The burden of proof was placed upon the petitioners under "rational basis" review. Under heightened scrutiny or the Louisiana Constitution, Art. 1, Sec. 3 the burden of proof would lie with the State which has not even attempted to justify this ruling.

A minor's consent to their parent's divorce is not required. They have no voice. Nor does a minor have any voice in their adoptions. La. Ch. C. art 1122. The parent consents to the adoption; not the child. Denying wrongful death remedies to a child is "... contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the child is an ineffectual as well as an unjust way of deterring the parent." *Weber,* id.

Proffered justifications for upholding the law as construed are twofold. First, it is stated that adoption has been a part of the Civil Code for over 150 years. Yet as early as 1968 in *Levy* this Court let it be known that it has "not hesitated to strike down an individual's classification even though it had history and tradition on its side." U.S. p.71, S.Ct. 1511. Second, the states latitude in choosing a classification scheme is sought to be used to justify this invidious discrimination, the court below citing *Estate of Burch v. Hancock Holding, Co.,* 09-1839, p. 9 (La. App 1 Cir. 5/7/10), 39 So. 3d 742, 749. *Burch* simply held that grandparents otherwise preempted by other beneficiaries had no right of action under La. C.C. arts. 2315.1 and 2315.2. That case did not involve invidious discrimination among children in the same class of beneficiaries. *Allen v. Barrow*, 505 So.2d 880, 887-88 (La. App. 2d Ci. 1987) is said to justify some limitation of beneficiaries in survival actions such that children born of the marriage would not be required to share a tort recovery with "potential strangers" given in adoption, but there is no explanation of how a stranger sharing in a tort recovery would be any different than a stranger sharing in an inheritance as required by La. C.C. art. 199.

A child is not responsible for the acts of its parents. It is their decision to divorce. It is their decision to give up a child for adoption. These are not the decisions of the child. As this Court has stated, to hold a child responsible for decisions in which they had no control or voice would be "illogical and unjust." *Weber*, id. U.S. 164, S.Ct. 1406. It is "illogical and unjust" to deprive children given in adoption from wrongful death and survival remedies for the deaths of their biological relatives and a violation of the Equal Protection of the law provided for in the Fourteenth Amendment of the United States Constitution. If the "burden of proof" is properly placed, if some heightened scrutiny is used, this decision cannot possibly stand.

CONCLUSION

It is invidious discrimination to deny children given in adoption wrongful death and survival remedies under La. C.C. arts. 2315.1, 2315.2 and 199. Heightened scrutiny, with teeth, is warranted. No action, conduct or demeanor of a child is possibly relevant to the harm done. Such discrimination is simply not justified by any legitimate state interest, compelling or otherwise. To allow such discriminatory treatment of children would deter adoption and conflict with the stated policy of the legislature.

Applicants respectfully submit that the Louisiana Supreme Court's decision denies Equal Protection of the law under the 14th Amendment to the United States Constitution and the decisions of this Court. Biology is the controlling factor. If a child has no constitutional rights after birth, then a child has no constitutional rights at all. The judgment of the Louisiana Supreme Court should be reversed.

Respectfully submitted:

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF LOUISIANA, DATED JUNE 30, 2021

SUPREME COURT OF LOUISIANA

No. 2020-CA-00313

KHRISTY GOINS RISMILLER, TUTRIX
FOR DANIEL EDWARD GOINS

v.

GEMINI INSURANCE COMPANY, MARK ISIAH
GORDON AND KEITH BOONE TRUCKING, LLC
DAVID WATTS

v.

MARK GORDON, KENNETH BOONE DBA BOONE
TRUCKING, KEITH BOONE TRUCKING AND
GEMINI INSURANCE COMPANY SHEILA SMITH

V.

GEMINI INSURANCE COMPANY, KENNETH
CHAD BOONE D/B/A BOONE TRUCKING, AND
MARK GORDON SUCCESSION OF RICHARD
STEWART, JR., RAYMOND KELLY, DONNA
KELLY, RICHARD STEWART, SR. AND VERA
ANITA STEWART

v.

Appendix A

MARK ISIAH GORDON, KENNETH BOONE, KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE COMPANY

June 30, 2021, Decided

On Appeal from the 7th Judicial District Court, Parish of Concordia On Rehearing.

WEIMER, C.J.

The case is before this court on rehearing on request of defendant Gemini Insurance Company. At issue is the holding in this court's original opinion that, "based on the clear and unambiguous wording of La. C.C. arts. 2315.1 and 2315.2," [Pg 2] two adult children (Daniel Goins and David Watts) who were given in adoption as minors "are 'children of the deceased' and 'brothers of the deceased' who are permitted to bring wrongful death and survival actions arising from the death of their biological father and half-siblings." *Rismiller v. Gemini Insurance Co.*, 20-0313, p. 2 (La. 12/11/20), __So.3d __, 2020 La. LEXIS 2999. Based on this finding, the majority of this court affirmed the district court's overruling of the defendant's peremptory exception raising the objection of no right of action and remanded the matter to the district court for further proceedings. *Id.*, 20-0313 at 11, __So.3d at __, 2020 La. LEXIS 2999. Defendant's application for rehearing was granted to reconsider the correctness of this holding.

CODAL ANALYSIS

As stated in the dissent to the court's original opinion, a determination of whether children given in adoption have a right to bring wrongful death and survival actions in

connection with the deaths of a biological parent and half-sibling "requires an intricate civilian analysis of multiple provisions of the Louisiana Civil Code." *Rismiller*, 20-0313 at 1, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting). "The codal question here is whether the plaintiffs are 'children' for purposes of a right to bring a wrongful death and survival action under La. C.C. arts. 2315.1 and 2315.2."*Id.*, 20-0313 at 3, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting). The resolution of this issue requires "an examination of how adoption affects the construction" of La. C.C. arts. 2315.1 and 2315.2; therefore, consideration must be given to La. C.C. art. 199, which "speaks directly to the effects of adoption."[1] *Id.*, 20-0313 at 12 & 17, __So.3d __at & __, 2020 La. LEXIS 2999 (Weimer, J., dissenting).

[Pg 3] Because an interpretation of the relevant codal provisions was thoroughly discussed in the dissenting opinion, an in-depth discussion of the codal issues will not be duplicated herein. *See Rismiller*, 20-0313 at 3-12, __ So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting). Rather, after further evaluation and analysis,[2] the dissent is adopted as the opinion of the court, which is briefly summarized below.

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1. Because La. C.C. arts. 199, 2315.1, and 2315.2 are interrelated laws, each must be given effect. *See Rismiller*, 20-0313 at 12, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting).

2. The briefing by the litigants and the amicus in this matter has assisted this court's analysis and has been thorough and well presented.

Appendix A

"The fundamental question in all cases of [codal] construction is legislative intent and the reasons that prompted the legislature to enact the law." *Id.*, 20-0313 at 3, __So.3d at __, 2020 La. LEXIS 2999 (quoting *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 00-1695, p. 11 (La. 6/29/01), 808 So.2d 294, 302). "The analysis begins, as it must, with the codal text"—La. C.C. arts. 2315.1, 2315.2, and 199. *Id.* (citing *SWAT 24 Shreveport Bossier, Inc.*, 00-1695 at 12, 808 So.2d at 302).

The law governing survival and wrongful death actions provides for "a distinct right of action, in favor of certain classes of persons." *See Vaughan v. Dalton-Lard Lumber Co.*, 119 La. 61, 64, 43 So. 926, 927 (1907), *overruled on other grounds by King v. Cancienne*, 316 So. 2d 366 (La. 1975); *Levy v. State Through Charity Hospital of Louisiana*, 253 La. 73, 77, 216 So.2d 818, 819 (1968); *see also Watkins v. Exxon Mobil Corp.*, 13-1545 (La. 5/7/14), 145 So.3d 237, 240. "[T]he rights of action for wrongful death and survival actions are conferred only upon the persons the legislature has specifically included in the lists of eligible claimants" contained in the governing code article(s)—formerly La. C.C. art. 2315 (1870) and now La. C.C. arts. 2315.1 and 2315.2 (1986). *Rismiller*, 20-0313 at 9, __So.3d __, 2020 La. LEXIS 2999 (Weimer, J., dissenting). "Those not included [in the lists of eligible claimants] are excluded, and [Pg 4] the article[(s)] cannot be construed to confer the right upon persons not expressly mentioned in it." *Vaughan*, 119 La. at 64, 43 So. at 927.

Adoption was not incorporated into La. C.C. art. 2315 (1870) until 1932, when the list of eligible claimants was

expanded to included "adopted children." *See Rismiller*, 20-0313 at 5, __ So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting) (citing 1932 La. Acts 159, § 1). The legislature's introduction of adopted children into the list of eligible claimants requires that the effects of adoption addressed in La. C.C. art. 199 be considered. *See id.*, 20-0313 at 12, __So.3d at __, 2020 La . LEXIS 2999 (Weimer, J., dissenting). The term "adopted children" refers to children who have been added to a parental relationship—a relationship with the adoptive parents owing manifold duties to those children. *Id.*, 20-0313 at 6, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting) (citing La. C.C. art. 199). Not until 1948 was the list of eligible claimants expanded to include "children given in adoption." *See id.* (citing 1948 La. Acts 333, § 1). The term "children given in adoption" refers to the transfer of children out of one parental relationship into a different and new parental relationship. *See id.*, 20-0313 at 17, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting) (citing La. C.C. art. 199). Accordingly, after the 1948 amendment to La. C.C. art. 2315, the list of eligible claimants "included both 'adopted children and children given in adoption.'" *See id.*, 20-0313 at 6, __So.3d at __, 2020 La . LEXIS 2999 (Weimer, J., dissenting).

In the 1960 rewrite of La. C.C. art. 2315, the legislature defined "the words 'child', 'brother', 'sister', 'father', and 'mother'" to "include a child, brother, sister, father and mother *by adoption*, respectively." *Id.* (citing 1960 La. Acts 30, § 1 (emphasis added)). "[C]hildren 'by adoption,' a term like 'adopted children,' . . . refers to children who have been added to a parental relationship—a relationship

with the adoptive parents owing manifold duties to those children." *Id.* (citing La. C.C. [Pg 5] art. 199). Pursuant to the 1960 amendment, the list of eligible claimants no longer included "children given in adoption." *Id.* (citing La. C.C. art. 199). As stated in the dissent to this court's original opinion:

> The legislature's [1960] removal of "children given in adoption" from the lists of eligible claimants for wrongful death and survival actions is the clearest indicator of the legislature's intent. The legislature's [1948] authorization of "children given in adoption" as claimants existed for significant period of time ([until] 1960), which indicates both a realization of the reach of that language and an understanding of the consequences when the legislature chose to remove "children given in adoption" as eligible claimants. In the years following the removal of "children given in adoption," the legislature has not expanded the lists of eligible claimants by returning "children given in adoption" to the lists presently found in La. C.C. arts. 2315.1 and 2315.2. It is not the role of this court to re-insert language into codal enactments the legislature expressly and specifically removed.

Rismiller, 20-0313 at 17-18, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting). Because children given in adoption are currently not included in the lists of eligible claimants, they are excluded. *See Vaughan*, 119 La. at 64, 43 So. at 927.

In summary, as a result of their adoption, in which "the adopting parent becomes the parent of the child for all purposes" and the previous "filiation between the child and his legal parent is terminated" (La. C.C. art. 199), and the plain text of La. C.C. arts. 2315.1 and 2315.2, the plaintiffs have no right to assert a survival and wrongful death action in connection with the death of their biological father and half-siblings.[3] Any relevant legal relationship between the children given in adoption and the biological relatives whose deaths are the subject of these tort cases has been terminated. In our civil law system, this court simply cannot reinsert codal language related to children given in adoption that has been specifically removed by the legislature.

[Pg 6] Furthermore, the evolution of the Louisiana Civil Code's definition of "children" casts doubt on the majority's finding, on original hearing, that interpreting "the term 'children' in La. C.C. arts. 2315.1 and 2315.2 to include biological children given in adoption is entirely consistent with the definition of children found in La. C.C. art. 3506." *See* La. C.C. art. 3556(8) (1870), La. C.C. art. 3506(8) (2004); *Rismiller*, 20-0313 at 10, __So.3d at __, 2020 La. LEXIS 2999 (footnote omitted). Article 3556(8) (1870) provided:

> Children. Under this name are comprehended, not only the children of the first degree, but the

3. "It has long been held that children given up in adoption are divested of their legal rights except as to those relating to inheritance." *Succession of Stewart v. Gordon*, 17-812, at 6 (La. App. 3 Cir. 10/3/18), __So.3d __, __2018 La. App. LEXIS 1937; *see* La. C.C. art. 199.

> grandchildren, great-grandchildren, and all other descendants in the direct line.
>
> Natural children, even though recognized, make no part of the children properly so called, unless they have been legitimated.

In that definition, no mention is made of children who had been adopted or children given in adoption. On the other hand, the *sui generis* law governing survival and wrongful death actions was amended to afford "adopted children" (in 1932) and "children given in adoption" (in 1948) the right to bring such an action. Had children who had been adopted or children given in adoption possessed the right to bring such an action by virtue of the definition of "children" in La. C.C. art. 3556(8) (1870), there would have been no need for the addition of those individuals to the list of eligible claimants in La. C.C. art. 2315 (1870).

The 1979 amendment to La. C.C. art. 3556(8)'s definition of "children" did not mention adopted children or children given in adoption.[4] The term "those adopted" was added to the definition of children in 1981, but still no mention was made of those "given in adoption."[5] Article

4. *See* 1979 La. Acts 607, § 1.

5. Pursuant to the 1981 amendment, La. C.C. art. 3556(8), in pertinent part, provided:

> Children. Under this name are included those persons born of the marriage, *those adopted*, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line. [Emphasis added.]

3556(8) was renumbered as La. C.C. art. 3506(8) [Pg 7] and then amended in 2004 to define "a child born of marriage," which includes a child "adopted by [his parents]"; however, there is still no reference to those "given in adoption" in La. C.C. art. 3506(8).[6] Based on the evolution of the general definition of "children," it is clear that children as defined by La. C.C. art. 3506(8) does not include "children given in adoption."

CONSTITUTIONAL ANALYSIS

Because this court found in its original opinion that the plaintiffs have a right of action under La. C.C. arts. 2315.1 and 2315.2, the plaintiffs' constitutional challenge was pretermitted and "that part of the district court judgment declaring [these code articles and La. C.C. art. 199 to be] unconstitutional as applied to children given in adoption" was vacated. *See Rismiller*, 20-0313 at 11,

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See 1981 La. Acts 919, § 2.

6. Currently, La. C.C. art. 3506(8) provides:

> Children. Under this name are included those persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line.
>
> A child born of marriage is a child conceived or born during the marriage of his parents or *adopted by them*.
>
> A child born outside of marriage is a child conceived and born outside of the marriage of his parents. [Emphasis added.]

See 2004 La. Acts 26, § 1.

__So.3d at __, 2020 La. LEXIS 2999. Having found on rehearing that the codal analysis of La. C.C. arts. 2315.1, 2315.2 and 199 forecloses a right of action to the plaintiff children, who were given in adoption, for the death of their biological parent and half-siblings, this court is called on to address the propriety of the district court's declaration that La. C.C. arts. [Pg 8] 2315.1, 2315.2, and 199 are "unconstitutional as applied to children given in adoption." *See id.*, 20-0313 at 5, __So.3d at __, 2020 La. LEXIS 2999. In this endeavor, the court once again draws on and adopts the analysis in the dissenting opinion,[7] simply noting in summary that "[t]here is no perceived constitutional impediment to the legislature's decision to not include 'children given in adoption' in the lists of eligible claimants." *Id.*, 20-0313 at 18, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting). A rational basis exists for limiting the categories of eligible claimants in La. C.C. arts. 2315.1 and 2315.2 to those who "are likely to be most affected by the death of the deceased." *See Estate of Burch v. Hancock Holding Co.*, 09-1839, p. 9 (La. App. 1 Cir. 5/7/10), 39 So.3d 742, 749; *Allen v. Burrow*, 505 So.2d 880, 887-88 (La.App. 2 Cir. 1987). Children given in adoption "have moved into a new parental relationship, becoming children 'by adoption,' who are eligible claimants in the unfortunate occurrence of the tortious death of their adoptive parents." *Rismiller*, 20-0313 at 18, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting) (citing La. C.C. arts. 2315.1(D) and 2315.2(D)). "Likewise, the transfer of children into a new parental unit as children

7. *See Rismiller*, 20-0313 at 13-17, __So.3d at __, 2020 La. LEXIS 2999 (Weimer, J., dissenting).

'by adoption' terminates, for purposes of wrongful death and survival actions, any connection between the 'children given in adoption' and any biological siblings who were not 'given in adoption.'" *Id.*

CONCLUSION

For these reasons, the district court legally erred[8] in finding that the fact that Daniel Goins and David Watts were adopted does not prevent them from bringing survival and wrongful death claims for the deaths of their biological father and [Pg 9] biological half-siblings and in overruling the defendant's exception raising the objection of no right of action.[9]

DECREE

For these reasons, this court's original decree is vacated. Because the district court legally erred in declaring La. C.C. arts. 199, 2315.1(D), and 2315.2(D) unconstitutional as applied to children given in adoption, the district court's judgment is reversed. Judgment is hereby entered sustaining the defendant's peremptory exception raising the objection of no right of action, and dismissing the claims that are the subject of this exception.

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8. An exception of no right of action involving only a question of law is reviewed *de novo*. *See Rebel Distributors Corp., Inc. v. LUBA Workers' Comp.*, 13-0749, p. 10 (La. 10/15/13), 144 So.3d 825, 833.

9. *Rismiller*, 20-0313 at 3, __So.3d at __, 2020 La. LEXIS 2999 (citing *Succession of Stewart*, 17-812 at 2, __So.3d __, 2018 La. App. LEXIS 1937).

Appendix A

ORIGINAL DECREE VACATED; JUDGMENT OF THE DISTRICT COURT REVERSED; JUDGMENT RENDERED: PEREMPTORY EXCEPTION SUSTAINED and CLAIMS DISMISSED.

Dissent by: Genovese; GRIFFIN

Appendix A

Genovese, J., dissents for reasons assigned in the original opinion and for reasons assigned by Justice Griffin.

[Pg 1] *GRIFFIN, J., dissents and assigns reasons.*

Because I would uphold this Court's opinion on original rehearing, I respectfully dissent.

In my view, the interpretative analysis starts and ends at the plain language of La. C.C. arts. 2315.1 and 2315.2. *See* La. C.C. arts. 9 and 11. While both Articles expressly expand the term "child or children of the deceased" to include children by adoption, there is no language excluding biological children of the deceased who [Pg 2] were given in adoption.[1] Further, the plain

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1. Notwithstanding the plain language of the Articles, I respectfully disagree with the majority's interpretation of the effect of 1960 Acts, No. 30, § 1. As observed by Judge Savoie:

> [T]he 1960 amendment ... did not eliminate the right of a child given in adoption to assert a claim arising out of his biological parent's death; rather, it simplified the pre-amendment phrase "the right of his action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them" by (1) replacing it with "child or children of the deceased," which necessarily includes a biological child given in adoption, and (2) adding a paragraph that expands the term "child" to include a child that the deceased adopted.

Stewart v. Gordon, 17-0812 (La.App. 3 Cir. 10/3/18), __So.3d __, ---, 2018 La. App. LEXIS 1937, 2018 WL 4858748 at *19 (Savoie,

language of La. C.C. art. 199 forestalls the severance of the legal relationship between a child and their biological parent where "otherwise provided by law" — in this case, as provided by La. C.C. arts. 2315.1 and 2315.2.[2] The potential for a "double recovery" does not produce an absurd result as quantum will vary based on a child's personal relationship and dependency on the deceased parent.[3] *See Stewart*, 17-0812, __So.3d at __, 2018 La. App. LEXIS 1937, 2018 WL 4858748 at *11 (Cooks, J., dissenting in part).

I also echo the concerns over constitutionality expressed by former Chief Justice Johnson in her concurrence on original hearing. Specifically, this Court has established that "the critical requirement for classification of a person as a child under Article 2315.2

J., dissenting in part) (citing Wex S. Malone, *Torts*, 21 La. L. Rev. 78, 81-82 (1960)).

2. Support for this interpretation is found in Revision Comment (b) which begins with the phrase: "Among the exceptions to the severance of the legal relationship between the person adopted and his legal parents and relatives are ...." Thus, the Revision Comment anticipates other exceptions expressed within the positive law.

3. The facts of this case do not present the scenario of an effective stranger realizing a windfall because their biological parent died. The record is clear that both Mr. Goins and Mr. Watts were not given for adoption by the Stewarts immediately after their births. Further, Mr. Goins was adopted by Mr. Stewart's aunt and uncle and Mr. Watts was adopted by his maternal grandparents. The families all maintained relationships post-adoptions.

is the biological relationship between the tort victim and the child." *Jenkins v. Mangano Corp.*, 00-0790, p. 3 (La. 11/28/00), 774 So.2d 101, 103 (citing *Warren v. Richard*, 296 So.2d 813, 814 (La.1974)). Precluding recovery under La. C.C. arts. 2315.1 and 2315.2 could result in inequities where, as here, the record establishes that a familial relationship existed between the children and their [Pg 3] biological parents for a substantial time before the children were given in adoption and continued to endure post-adoption.

APPENDIX B — OPINION OF THE SUPREME COURT OF LOUISIANA, DATED DECEMBER 11, 2020

SUPREME COURT OF LOUISIANA

No. 2020-CA-0313

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS

v.

GEMINI INSURANCE COMPANY, MARK ISIAH GORDON AND KEITH BOONE TRUCKING, LLC

DAVID WATTS

v.

MARK GORDON, KENNETH BOONE dba BOONE TRUCKING, KEITH BOONE TRUCKING, LLC, AND GEMINI INSURANCE COMPANY

SHEILA SMITH

v.

GEMINI INSURANCE COMPANY, KENNETH CHAD BOONE D/B/A BOONE TRUCKING, AND MARK GORDON

Appendix B

SUCCESSION OF RICHARD STEWART, JR., RAYMOND KELLY, DONNA KELLY, RICHARD STEWART, SR. AND VERA ANITA STEWART

v.

MARK ISIAH GORDON, KENNETH BOONE, KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE COMPANY

December 11, 2020, Decided

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT, PARISH OF CONCORDIA.

BODDIE, Justice *ad hoc*[*]

This is a direct appeal by defendant, Gemini Insurance Company, from a judgment of the district court holding La. C.C. arts. 2315.1, 2315.2 and 199 "unconstitutional as applied to children given in adoption" and overruling the defendants' peremptory exceptions of no right of action.[1]

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* Retired Judge James H. Boddie, Jr., heard this case as Justice *pro tempore*, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an *ad hoc* for Justice Jay B. McCallum.

1. Review in this court, in the first instance, is proper. Construing the district court's ruling as striking down La. C.C. arts. 2315.1, 2315.2 , and 199 as unconstitutional, this court has direct review via the appellate jurisdiction conferred in La. Const. art. V, § 5(D) ("a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional . ."). This court has

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At issue is whether the plaintiffs, Daniel Goins and David Watts, two adult children who were given in adoption as minors, have a right to bring wrongful death and survival actions stemming from the deaths of their biological father and his two minor children, who were not given in adoption and are the plaintiffs' biological half-siblings. After a *de novo* review, based on the clear and unambiguous wording of La. C.C. arts. 2315.1 and 2315.2, we conclude that Daniel Goins and David Watts, biological children given in adoption, are "children of the deceased" and "brothers of the deceased" who are permitted to bring wrongful death and survival actions arising from the death of their biological father and half-siblings. In view of our holding that the plaintiffs have a right to assert survival and wrongful death actions, we need not address their argument that La. C.C. arts. 2315.1, 2315.2 and 199 are unconstitutional as applied to children given in adoption.

FACTS AND PROCEDURAL HISTORY

This matter stems from a tragic accident on October 1, 2015, in which an eighteen-wheeler truck driven by Mark Gordon collided head-on with a vehicle driven by Richard Stewart, Jr. Mr. Stewart was killed, as well as his two minor children, George and Vera Cheyanne Stewart. At the time of his death, Mr. Stewart was married to Lisa Watts Stewart. However, George and Vera Cheyanne

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supervisory authority over all other Louisiana courts pursuant to La. Const. art. V, § 5(A) ("The supreme court has general supervisory jurisdiction over all other courts."). Furthermore, as recognized in La. Sup. Ct. Rule X, § 5(b), an application for direct review to this court is allowed.

were born to Brandie Hardie, with whom Mr. Stewart reportedly had a relationship during his marriage to Lisa Watts Stewart.

Following the accident, three separate survival and wrongful death actions arising out of the deaths of Mr. Stewart and his minor children were filed in district court. Two of the lawsuits present claims filed by or on behalf of Daniel Goins and David Watts, now adults who, as minors, were given for adoption by the Stewarts. Mr. Goins was adopted by Joyce and George Goins, Mr. Stewart's aunt and uncle. Mr. Watts was adopted by his maternal grandparents, Mary and Jimmy Watts.

The driver of the truck, the truck's owner (Kenneth Boone d/b/a Boone Trucking), and its insurer (Gemini Insurance Company) have been named as defendants. The district court consolidated all of the wrongful death and survival claims, and the defendants filed peremptory exceptions of no right of action against all claimants. The district court overruled the exceptions. As to the claims of Mr. Goins and Mr. Watts, which are the only claims now before this court, the district court ruled that "the biological relationship and dependency" of Mr. Goins and Mr. Watts was the origin of the right of action and, further, "the fact that Watts [and Goins] w[ere] adopted does not prevent [them] from bringing survival and wrongful death claims for the death of [Mr.] Stewart, [their] biological father." *Succession of Stewart v. Gordon*, 17-812, p. 2 (La. App. 3 Cir. 10/3/18), So. 3d , 2018 La. App. LEXIS 1937.[2]

2. The district court further determined that George and Vera Cheyanne, the minor children killed in the accident, had been abandoned by their mother, Brandie Hardie. According to the

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The district court ruled that the plaintiffs had a right of action arising from the deaths of their half-siblings. *Id.*

On supervisory review, the court of appeal, in a 4-3 decision, reversed the district court's rulings on the defendants' exceptions of no right of action.[3] The majority explained: "It has long been held that children given up in adoption are divested of their legal rights except as to those relating to inheritance." *Succession of Stewart*, 17-812 at 4, — So. 3d at — (citing La. C.C. art. 199).

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district court, pursuant to La. C.C. arts. 2315.1(E) and 2315.2(E), the determination that the mother abandoned her minor children paved the way for others to recover for the death of the children. *Id.*

3. The relevant rulings were set forth in three opinions. In *Rismiller v. Gemini Insurance Company*, 17-809, p. 3 (La. App. 3 Cir. 10/3/18), So. 3d , 2018 La. App. LEXIS 1935, the court ruled: "For the reasons set forth in *Succession of Richard Stewart, Jr. et al. v. Gordon, et al.*, 17-812 (La. App. 3 Cir. 10/3/18), So. 3d , 2018 La. App. LEXIS 1937, 2018 WL 4858748, we find the trial court erred in denying Defendants' exceptions of no right of action as to Goins' survival and wrong death claims due to the death of his biological father and half-siblings." In *Succession of Stewart v. Gordon*, 17-812 at 6, So. 3d , 2018 La. App. LEXIS 1937, the court ruled: "we find that Goins and Watts have no assertable claims for their biological father's death nor their biological half-siblings' deaths; therefore, the trial court erred in denying Defendants' no rights of action as to these claims made by Watts and Goins." In *Watts v. Gordon*, 17-811, p. 3 (La. App. 3 Cir. 10/3/18), So. 3d , 2018 La. App. LEXIS 1936, the court ruled: "For the reasons set forth in *Succession of Richard Stewart, Jr. et al. v. Gordon, et al.*, 17-812 (La. App. 3 Cir. 10/3/18), So. 3d , 2018 La. App. LEXIS 1937, 2018 WL 4858748, we find the trial court erred in denying Defendants' exceptions of no right of action as to Watts' survival and wrongful death claims due to the death of his biological father had half-siblings."

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Judges Cooks, Savoie and Conery dissented from the majority's conclusion that Mr. Goins and Mr. Watts do not have a right to assert the survival and wrongful death actions because they were given up for adoption as minors. See *Succession of Stewart*, 17-812 at 5-15, — So. 3d at —, 2018 La. App. LEXIS 1937 (Cooks, J., dissenting in part); see also *id* at 14-21, So. 3d at , 2018 La. App. LEXIS 1937 (Savoie, J., dissenting in part); *Rismiller*, 17-809 at 3-5, — So. 3d —, 2018 La. App. LEXIS 1935 (Conery, J., dissenting in part).

The plaintiffs then sought review by this court. They asserted that La. C.C. arts. 2315.1 and 2315.2, relating to wrongful death and survival actions, are unconstitutional inasmuch as the court of appeal found those articles provide no right of action for adopted children to assert wrongful death and survival actions following the death of a biological parent. Perceiving the constitutional argument to be newly raised in this court, we pretermitted a decision on the merits and remanded the matter to the district court to allow the plaintiffs "to amend their petition in an attempt to state a cause of action."[4]

On remand, the plaintiffs amended their petitions to assert the unconstitutionality of La. C.C. arts. 2315.1, 2315.2, "and/or" La. C.C. art. 199, and filed a motion to declare those articles unconstitutional. The district court granted the motion, holding La. C.C. arts. 2315.1, 2315.2 and 199 are "unconstitutional as applied to children given in adoption" and overruled defendants' exceptions of no right of action. Gemini Insurance Company directly appealed to this court.

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4. *Rismiller Tutrix for Goins v. Gemini Insurance Company*, 18-2089, p. (La. 2/18/19), 263 So. 3d 1145, 1146.

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LAW AND DISCUSSION

An exception of no right of action involving only a question of law is reviewed de novo. *See Rebel Distributors Corp., Inc. v. LUBA Workers' Comp.*, 13-0749, p. 10 La. 10/15/13), 144 So. 3d 825, 833. Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest, which he asserts. La. C.C.P. art. 681. *See also Reese v. State Department of Public Safety and Correction*, 03-1615 (La.2/20/04), 866 So.2d 244, 246. The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Id.* (citing La. C.C.P. art. 927). The focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit, but it assumes the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation. *Id.* For purposes of the exception, all well-pleaded facts in the petition must be taken as true. *Miller v. Thibeaux*, 14-1107, pp. 6-7 (La.1/28/15), 159 So.3d 426, 430.

Regarding the interpretation of laws, the Louisiana Civil Code provides "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. C.C. art. 9. "The words of a law must be given their *generally prevailing meaning*." La. C.C. art. 11 (emphasis added). "Laws on the same subject matter

must be interpreted in reference to each other." La. C.C. art. 13.

The survival action, found in La. C.C. art. 2315.1, provides:

> A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.
>
> (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.
>
> (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.
>
> (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.
>
> B. In addition, the right to recover all damages for injury to the deceased, his property or

> otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.
>
> C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.
>
> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

The wrongful death action, found in La. C.C. art. 2315.2, provides:

> A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. The right of action granted by this Article prescribes one year from the death of the deceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

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Louisiana C.C. art. 2315.1 provides that rights of action or instituted actions for injuries suffered by a person who eventually dies from those injuries do not abate with death but survive in favor of designated persons. In addition, La. C.C. art. 2315.2 creates an action for damages suffered by certain designated survivors for the wrongfully caused death of another. Although clearly separate and distinct causes of action, both the wrongful death and the survival actions are statutorily created tort remedies, expressly conferred upon an exclusive list of beneficiaries. The list of beneficiaries provided by La. C.C. art. 2315.1 is identical to the list set forth in La. C.C. art. 2315.2, with the addition of the decedent's succession representative as party plaintiff in the absence of any of the listed beneficiaries for the survival action only. The existence of a member of the first class of beneficiaries exclude all members of lesser classes. Thus, any member of a higher class preempts the claims of other classes of beneficiaries. *Warren v. Richard*, 296 So.2d 813 (La.1974). If there is more than one member of the first class of beneficiaries then funds derived from the survival action are divided equally among all members of the class. *Austrum v. City of Baton Rouge*, 282 So.2d 434 (La.1973).

Prior to Act 211 of 1986, the survival and wrongful death actions were covered generally by La. C.C. art. 2315. Louisiana C.C. art. 2315 was amended in 1960 to provide essentially what is now contained in La. C.C. arts. 2315.1 and 2315.2. Before the 1960 amendment to La. C.C. art. 2315, the action survived in favor of children, "including adopted children and children given in adoption." See 1948 Acts, No. 333. The 1960 amendment omitted "children

given in adoption" from the list of statutory beneficiaries. See 1960 Acts, No. 30, § 1. The current statutory scheme reflects this omission.

Defendant Gemini Insurance Company argues that the deletion of the language "children given in adoption" demonstrates the legislature's intent to do away with this class of claimants and, therefore, Mr. Goins and Mr. Watts are without a remedy for the death of their natural father. We disagree.

At issue is the phrase "child or children of the deceased" in Paragraph (A)(1) of both La. C.C. arts. 2315.1 and 2315.2. A common, or generally prevailing meaning, of this phrase clearly would be a deceased's biological child or children. See *Jenkins v. Mangano Corp.*, 00-790, p. 3 (La. 11/28/00), 774 So. 2d 101, 103, wherein this court emphasized "that the critical requirement for classification of a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child." While both La. C.C. arts. 2315.1 and 2315.2 include Paragraph (D) that expands the phrase "child or children of the deceased" to include non-biological children that the deceased adopted, these code articles contain no language that narrows the term to exclude biological children of the deceased who were given in adoption. Both articles provide that where there is a surviving spouse and child or children, they are the first in the hierarchy of persons entitled to recover. *See* La. C.C. arts. 2315.1 and 2315.2. It is undisputed that Lisa Watts Stewart, the lawful wife of Mr. Stewart, and his two biological adult sons Mr. Goins and Mr. Watts, survived Mr. Stewart. Nothing in the plain

language of La. C.C. arts. 2315.1 and 2315.2 suggests that if Mr. Goins and Mr. Watts were adopted by another, they would no longer be "children" or "brother" within the meaning of the two articles.

Defendant further argues that La. C.C. art. 199 precludes the plaintiffs from bringing wrongful death and survival actions arising from the death of their biological father and half-siblings. Article 199 provides,

> Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is terminated, except as otherwise provided by law. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.

"Filiation is the legal relationship between a parent and child." La. C.C. art. 178. Defendant asserts that Mr. Goins' and Mr. Watts' filiation with Mr. Stewart, terminated upon their respective adoptions and, thus, they cannot be considered "children" for purposes of La. C.C. art. 2315.1(A)(1) and La. C.C. art. 2315.2(A)(1). Again, we disagree.

Louisiana C.C. arts. 2315.1 and 2315.2 contain no language that one must be filiated to the deceased to be considered a "child or children of the deceased." Rather those codal articles suggest that a deceased's biological children, as well as those who have been filiated to the deceased by adoption, are considered children of the deceased. As Judge Savoie pointed out in his dissent,

"[i]f filiation were required for one to be considered a deceased's 'child' for purposes of La. Civ. Code arts. 2315.1 and 2315.2, then Paragraph (D) of those articles, which expands 'child' to include the deceased's adopted child, would have no independent meaning." *Succession of Stewart*, 17-812 at 16, So. 3d at , 2018 La. App. LEXIS 1937 (Savoie, J., dissenting).

This court has recognized that the codal articles governing survival and wrongful death actions are sui generis and not dependent on any other statute or codal article. See *Levy v. State Through Charity Hospital of Louisiana*, 253 La. 73, 216 So. 2d 818 (1968). Therefore, the proper resolution of the issue presented in the case *sub judice* involves a logical and straightforward application of the relevant provisions of the Civil Code. Notably, La. C.C. arts. 2315.1 and 2315.2 do not limit the term "children" or "brothers" in any way. Thus, giving the words "children" and "brothers" their generally prevailing meaning, we determine Mr. Goins and Mr. Watts are claimants under the survival and wrongful death articles because they are the biological children of the decedent, Mr. Stewart, and half-brothers of George and Vera Cheyanne Stewart. Our interpretation of the term "children" in La. C.C. arts. 2315.1 and 2315.2 to include biological children given in adoption is entirely consistent with the definition of children found in La. C.C. art. 3506[5] of Title 25, *Of the*

5. Louisiana C.C. art. 3506(8) provides:

> Children. — Under this name are included those persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants

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Signification of Sundry Terms of Law Employed in This Code.

In summary, we hold that based on the clear and unambiguous language of La. C.C. arts. 2315.1 and 2315.2, Mr. Watts and Mr. Goins, the biological children given in adoption, are "children of the deceased" and "brothers of the deceased" who are permitted to bring wrongful death and survival actions arising from the deaths of their biological father and half-siblings. Thus, the district court properly overruled the defendants' peremptory exceptions of no right of action.

DECREE

Accordingly, that part of the district court judgment declaring La. C.C. arts. 2315.1, 2315.2 and 199 unconstitutional as applied to children given in adoption is vacated. Insofar as the district court judgment overruled the defendants' peremptory exceptions of no right of action, it is affirmed. The matter is remanded to the district court for further proceedings.

VACATED IN PART; AFFIRMED IN PART; AND REMANDED.

Johnson, C.J., addiitonally concurs and assigns reasons.

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of them in the direct line. A child born of marriage is a child conceived or born during the marriage of his parents or adopted by them. A child born outside of marriage is a child conceived and born outside the marriage of his parents.

Appendix B

ON APPEAL FROM THE 7TH JUDICIAL DISTRICT COURT, PARISH OF CONCORDIA

JOHNSON, C.J., additionally concurs and assigns reasons.

I fully agree with the majority opinion that, based on the clear and explicit wording of La. C.C. arts. 2315.1 and 2315.2, these biological children who are "children of the deceased" and "brothers of the deceased," are specifically designated as claimants permitted to bring wrongful death and survival actions arising from the deaths of their biological father and siblings. I write separately to express my opinion that any holding to the contrary would also be inconsistent with the general constitutional principles set forth by this court in *Warren v. Richard*, 296 So. 2d 813 (La. 1974).

In *Warren*, the court addressed whether an illegitimate child could recover for the wrongful death of her biological father when, at the same time, she was also the legitimate child of another man under the law. *Id.* at 815. Relying on United States Supreme Court jurisprudence, this court found the child had a right to recover under La. C.C. art. 2315:

> Until the 1968 decision of the United States Supreme Court in *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, it was always understood that children, as used in Article 2315, meant legitimate children.

***

Appendix B

In applying the Equal Protection Clause of the United States Constitution, the United States Supreme Court decided in a case where an illegitimate child was suing for damage for the wrongful death of her mother, that it is invidious to discriminate against them (illegitimate children) when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother. In this holding, striking down Louisiana's statutory scheme which had theretofore barred recovery by illegitimate children for the wrongful death of their parents, the Court has, as a constitutional proposition, apparently substituted a biological classification for the legal classification Louisiana had long observed.

Again in *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968), handed down on the same day as the *Levy* case, the United States Supreme Court decided that it would be a denial of equal protection to deny a mother the right to recover for the wrongful death of her child simply because the child was born out of wedlock. The opinion declared: "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue."

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), followed four years after. There the United States Supreme Court approved a claim for workmen's compensation benefits of a dependent, unacknowledged, illegitimate child which had

> been denied by the Louisiana courts. In an opinion authored by Mr. Justice Powell it was held that, by relegating the unacknowledged illegitimate to a lower priority in the recovery scheme, the Louisiana Workmen's Compensation Act thereby denied him equal protection of the law. ***
>
> Finally in its latest decision on the subject in *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973), the United States Supreme Court said..."[u]nder these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."

Id. at 816-17 (internal citations removed). In holding the illegitimate child could bring a wrongful death claim, the *Warren* court recognized that it may provide more rights to that child than to the legitimate child because the illegitimate child would also be able to recover for the death of her legal father, but the court did not find such a result should alter the holding:

> However, this concept is not unique to our law. It is specifically provided that the adopted child, upon his adoption, is not divested of his right to inherit from his blood parents while at the same time he inherits from the adoptive parent. La. Civil Code art. 214.
>
> We are not unmindful of the problems a logical extension of these holdings may create, such as a child in these circumstances recovering from both fathers for support and maintenance, or,

> conversely, requiring the child to support both fathers in a proper case. La. Civil Code arts. 227 , 229. But we are influenced in this decision by the constitutional principles announced by the United States Supreme Court to which we must adhere.

Id. at 817.

More recently in *Jenkins v. Mangano Corporation*, 00-0790 (La. 11/28/00), 774 So. 2d 101, this court considered who is a "child" under Article 2315.2 for purposes of determining whether the parent of a tort victim, or an informally acknowledged adult illegitimate child who had not judicially asserted filiation timely, had the right to recover in a wrongful death action. In finding the parent had no right to recover, this court emphasized that "the critical requirement for classification of a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child." *Id.* at 103 (citing *Warren*). This court further stated "it is of no consequence that the child is legitimate or illegitimate for purposes of deciding whether the child may bring an action under Article 2315, all children have the *right* to bring an action for wrongful death and survival action." *Id.* (citing *Levy v. Louisiana*, 253 LA. 73, 216 So. 2d 818 (La. 1968)).

The same policy or rationale is equally applicable in this case involving children given in adoption. As set forth in the jurisprudence addressing the rights of illegitimate children, restricting the rights of a child to bring a wrongful death or survival action arising from the death of that child's biological parent or sibling solely because the child was given in adoption would violate the central meaning of the Equal Protection Clause.

Appendix B

WEIMER, J., dissenting.

Resolution of this matter requires an intricate civilian analysis of multiple provisions of the Louisiana Civil Code, coupled with an evaluation of constitutional principles. The attorneys for the parties and the amici have done masterful work in their analysis addressing the codal provisions.

As the majority of this court indicates, the decision in this matter involves whether "children given in adoption" have a survival action or wrongful death action for the deaths of their biological father and their half-siblings. Because the legislature purposely removed language from the wrongful death and survival actions, which granted a right of action to "children given in adoption," it is not the role of a court to reinsert this language into these codal provisions.

This court is called on to decide whether the district court correctly found a constitutional infirmity justified overruling the exceptions of no right of action. However, because of the deference accorded to legislation, which includes a presumption of its validity,[6] jurisprudence dictates that a constitutional question should not be reached if a case can be decided on other grounds. "Courts are generally reluctant to address the constitutionality of legislation unless required to do so by the case and its issues then before the court." A settled rule is "never to anticipate a question of constitutional law in advance of

6. *See State v. Brenner*, 486 So.2d 101, 103 (La. 1986).

the necessity of deciding it." *Matherne v. Gray Ins. Co.*, 95-0975, p. 3 (La. 10/16/95), 661 So.2d 432, 434 (quoting *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 72, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961)). Those principles are adhered to in this instance; therefore, first, it must be resolved whether, as a matter of codal law, the plaintiff children given in adoption have a right to a survival and wrongful death action for the death of their biological parent and half-siblings. Only if the statutory analysis forecloses a right of action to those plaintiffs is it proper to reach the plaintiffs' additional argument that those statutes are unconstitutional.

An exception of no right of action involving only a question of law is reviewed *de novo*. *See Rebel Distributors Corp., Inc. v. LUBA Workers' Comp.*, 13-0749, p. 10 (La. 10/15/13), 144 So.3d 825, 833. In summary, the major principles attending that review are:

> Except as otherwise provided by law, an action can be brought only by a person having a real and actual interest, which he asserts. La. Code Civ. Proc. art. 681. *See also Reese v. State Department of Public Safety and Correction*, 03-1615 (La.2/20/04), 866 So.2d 244, 246. The function of the exception of no right of action is to determine whether the plaintiff belongs to the class of persons to whom the law grants the cause of action asserted in the suit. *Id.* (citing La. Code Civ. Proc. art. 927). The focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the

> suit, but it assumes the petition states a valid cause of action for some person and questions whether the plaintiff in the particular case is a member of the class that has a legal interest in the subject matter of the litigation. *Id.* For purposes of the exception, all well-pleaded facts in the petition must be taken as true. *Miller v. Thibeaux*, 14-1107, pp. 6-7 (La.1/28/15), 159 So.3d 426, 430.

State in Interest of K. C.C., 15-1429, p. 5 (La. 1/27/16), 188 So.3d 144, 146-47.

Codal Analysis

The codal question here is whether the plaintiffs are "children" for purposes of a right to bring a wrongful death and survival action under La. C.C. arts. 2315.1 and 2315.2. "The fundamental question in all cases of [codal] construction is legislative intent and the reasons that prompted the legislature to enact the law." *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 00-1695, p. 11 (La. 6/29/01), 808 So.2d 294, 302. The analysis begins, as it must, with the codal text. *See id.*, 00-1695 at 12, 808 So.2d at 302.

The survival action is governed by La. C.C. art. 2315.1, which provides:

> A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person,

his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

Relative to a wrongful death action, La. C.C. art. 2315.2 provides:

> A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.
>
> (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.
>
> (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

> (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.
>
> B. The right of action granted by this Article prescribes one year from the death of the deceased.
>
> C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.
>
> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

The plaintiffs posit that "[t]he definition[s] of 'children'" and "of 'brothers'" under Articles 2315.1 and 2315.2 are "clear and unambiguous, and must be applied as written." The plaintiffs contend that notwithstanding that they were given in adoption to someone else by their late biological father, Mr. Stewart, that they remain "children"

and "brothers" within the meaning of Articles 2315.1 and 2315.2. The defendants, who bear the burden on the exception of no right of action to demonstrate otherwise, argue that the legislature has excluded children given in adoption from the list of eligible wrongful death and survival action claimants. After a review of the language of the provisions and the legislative actions, I find the no right of action exception should be sustained. The legislature described a legal relationship of parent and child when enumerating the list of eligible claimants in Articles 2315.1 and 2315.2, and no relevant legal relationship exists pursuant to La. C.C. art. 199, which mandates that the previous "filiation between the child and his legal parent is terminated" as a legal consequence of adoption.

The legislature first provided for wrongful death and survival actions in Article 2315 of the Revised Civil Code of 1870. Those eligible to serve as claimants were "the minor children or widow of the deceased, or either of them, and in default of these, ... the surviving father and mother, or either of them." *Id.* The next development germane to this case was the legislature's addition, in 1932, of "adopted children" to the lists of eligible claimants. *See* 1932 La. Acts 159, § 1.

Then, in 1948, in the first of two even more significant changes germane to this case, the legislature included both "adopted children *and childrn given in adoption*" in the lists. *See* 1948 La. Acts 333, § 1 (emphasis added). The second major change was in 1960, when the legislature rewrote Article 2315 and defined "the words 'child',

'brother', 'sister', 'father', and 'mother'" to "include a child, brother, sister, father and mother *by adoption*, respectively." *See* 1960 La. Acts 30, § 1 (emphasis added). "Words of art and technical terms [such as 'adopted children,' 'children given in adoption,' and children 'by adoption'] must be given their technical meaning when the law involves a technical matter." La. C.C. art. 11. As of 1960, the lists of eligible claimants include children "by adoption," a term like "adopted children," which refers to children who have been added to a parental relationship—a relationship with the adoptive parents owing manifold duties to those children. *See* La. C.C. art. 199. In its 1960 rewrite of Article 2315, the legislature no longer included "children given in adoption," a term which refers to the transfer of children out of one parental relationship into a different and new parental relationship, in the lists of eligible claimants. *See* La. C.C. art.199. ("[T] he adopting parent becomes the parent of the child for all purposes" and the previous "filiation between the child and his legal parent is terminated.").

More recently, the survival and wrongful death actions were separately codified from Article 2315 (now Articles 2315.1 and 2315.2, respectively), and in so doing, the legislature retained adopted children within the lists of eligible claimants. *See* 1986 La. Acts 211, § 1; *cf.* 1948 La. Acts 333, § 1. However, just like the previous lists, no provision was made for "children given in adoption" to hold a right of action. *See id.*

This court has long recognized that when the legislature changes the wording of a code article, "the

legislature is presumed to have intended to change the law." *See Brown v. Texas-La Cartage, Inc.*, 98-1063, p. 7 (La. 12/1/98), 721 So.2d 885, 889. During the time-frame (dating back to 1870) that the legislature recognized wrongful death and survival actions, the legislature provided for "children given in adoption" to be eligible claimants during the years 1948 to 1960. The fact that this category of claimants once existed, and for a significant period of time, is a compelling indicator that the change in the law which resulted in the deletion of this category of claimants was a change the legislature actually intended.[7]

Significantly, the Civil Code, as a unitary source of law, elsewhere further elucidates the importance of the legislature having directly designated children "by adoption" as eligible claimants. Specifically, the weighty consequences of adoption are indicated in La. C.C. art. 199 (governing the "[e]ffect of adoption"), as follows:

> Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is terminated, except as otherwise provided by law. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.

7. Neither party references any historical legislative materials beyond the relevant legislative acts. Independent research yielded no legislative materials shedding any additional light on the intent behind the relevant legislative acts.

Appendix B

The first full clause of Article 199 provides two mirror-image concepts that bear on this case, in which the plaintiffs were adopted before Mr. Stewart's death. At the time of adoption, each of the plaintiffs' adoptive fathers became the parent "for all purposes." *Id.* Obviously, "for all purposes" would include the presently-claimed purpose of bringing wrongful death and survival claims and, by negative inference, would exclude the purposes of bringing claims stemming from the deaths of the pre-adoption family.[8] Moreover, and dispelling any doubt as to what "for all purposes" means, the next stated concept in Article 199 is that from the time of adoption, the former "filiation between the child and his legal parent is terminated." *Id.*

The termination of the legal relationship between the children given in adoption and their pre-adoption family distinguishes this case from *Jenkins v. Mangano*

8. Noting that Article 199 replaces former La. C.C. art. 214, it is argued that Article 199 tacitly embraces a right of action for blood relatives given in adoption, pointing out that former Article 214 indicated that "the adopted person and his lawful descendants are... divested of all of their legal rights with regard to the blood parent or parents and other blood relatives[.]" According to the plaintiffs, by not mentioning a blood relationship in present Article 199, the legislature did not intend adoption to terminate any rights stemming from blood relationships. This argument is undone by the legislature's choice of the words "for all purposes" in Article 199 to describe the consequence of adoption relative to the adopting parent(s). Additionally, this argument does not disturb the analysis, *supra*, that the legislature's decision to remove "children given in adoption" from the lists of eligible wrongful death and survival claimants is a clear indicator of the legislature's intent that those persons have no right of action.

Corp., 00-0790 (La. 11/28/00), 774 So.2d 101, on which the plaintiffs rely. In *Jenkins*, the issue was whether the right of a tort victim's mother to recover was negated by the existence of someone with a potentially superior right, specifically, the right of "an informally acknowledged adult illegitimate child" who "has not judicially asserted filiation timely." *Id.*, 00-0790 at 1, 774 So.2d at 102. Notably, "the critical requirement for classification of a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child," thus, a defendant could defeat a mother's claim, "as long as the defendant prove[d], by clear and convincing evidence, that the child was acknowledged by the tort victim before death." *Id.*, 00-0790 at 3, 6, 774 So.2d at 103, 106. Therefore, this court's ruling in *Jenkins* relied on proof of a parent/child relationship that the law gave room to be established, *i.e.*, by parental acknowledgment of filiation. *Jenkins* does not aid the plaintiffs here, where the opposite has occurred, *i.e.*, by the parent's act of giving a child in adoption, the "filiation between the child and his legal parent is terminated." *See* La. C.C. art. 199.

In their discussion of Article 199, the plaintiffs rely on the self-described exception, *i.e.*, "as otherwise provided by law." *Id.* The plaintiffs contend that Articles 2315.1 and 2315.2 are examples of other provisions for children given in adoption to have substantive rights *vis-à-vis* their former legal parents. According to the plaintiffs, if the legislature had intended for them to be excluded, the legislature "would have made this explicit ... by further amending Articles 2315.1 and 2315.2" to directly mention that children given in adoption have no right of action.

This argument is rejected because that view of the law is opposite to its actual structure. It has been long recognized that rights of action for wrongful death and survival actions are conferred only upon the persons the legislature has specifically included in the lists of eligible claimants. *See Kerner v. Trans-Mississippi Terminal R. Co.*, 158 LA. 853, 104 So. 740, 741 (La. 1925); *see also Levy v. State Through Charity Hosp. of La. at New Orleans Bd. of Adm'rs*, 253 LA. 73, 216 So.2d 818, 819 (La. 1968) (ruling that tort remedies of wrongful death and survival actions "must be strictly construed" and "those not named are not afforded a right or a remedy"). Because adopted children are listed in Articles 2315.1 and 2315.2, but "children given in adoption" are not listed therein, the legislature clearly indicated that "children given in adoption" are no longer eligible claimants under the plain text of those laws.

In a further effort to fit the claims within the exception allowing for a right of action "as otherwise provided by law" (La. C.C. art. 199), the plaintiffs note that when Article 199 was enacted in 2009, the legislature "fail[ed] to mention Articles 2315.1 and 2315.2." According to the plaintiffs, the failure to reference Articles 2315.1 and 2315.2 at that time "is evidence that [the legislature] did not intend to affect the rights of children given in adoption to sue for the wrongful death of their legal parents."

In this line of argument, the plaintiffs are partially correct; no relevant change in the law was intended. Indeed, the comments to the 2009 enactment of Article 199 indicate: "This Article does not change the law as to the effect of an adoption." La. C.C. art. 199, cmt. (a). The comments

further suggest that the list of rights that are unchanged is illustrative, not exhaustive. *See* La. C.C. art. 199, cmt. (b) (employing the phrase "[a]mong the exceptions" when describing the existence of certain inheritance rights, retaining "the legal relationship between a child who has been adopted and a legal parent if the legal parent is married to the adoptive parent," and allowing the legal parent an avenue to seek visitation rights.).

However, the plaintiffs are incorrect to suggest that when Article 199 was enacted, the legislature already intended "children given in adoption" to be wrongful death and survival action claimants. As discussed earlier, the legislature had already removed "children given in adoption" from the lists of eligible wrongful death and survival action claimants. *See* 1960 La. Acts 30, § 1; *compare* 1948 La. Acts 333, § 1. *See* also n.4, *infra* (listing appellate court cases decided before the enactment of Article 199, holding that children given in adoption were not eligible as wrongful death or survival action claimants). Therefore, the stability in the law that the plaintiffs identify through the enactment of Article 199 already excluded "children given in adoption," such as the plaintiffs, from the lists of eligible claimants. *See also* La. Ch.C. art. 1256(A) (added by 1991 La. Acts 235, § 12, effective January 1, 1992) ("the adopted child and his lawful descendents are relieved of all legal duties and divested of all legal rights with regard to the parents and other blood relatives.").

As another text-based argument, the plaintiffs urge that this court should draw on the Civil Code's general

definitional provision, Article 3506, in which "children" includes "those persons born of the marriage." La. C.C. art. 3506(8). The plaintiffs argue that this definition should be applied to the lists of wrongful death and survival claimants. The plaintiffs point out that although they were given in adoption, each of them was born of Mr. Stewart's marriage and would, therefore, be an eligible claimant if the lists of claimants in Articles 2315.1 and 2315.2 were expanded through Article 3506. However, this argument would necessarily divide children given in adoption into two classes. The class of children given in adoption who were "born of [a] marriage" would have a right of action. However, because illegitimate children are not covered by the definition contained in Article 3506, the class of illegitimate children would have no right of action. A cardinal rule of interpretation is that courts must avoid construing a code article in a manner that yields an absurd result. *See* La. C.C. art. 9 ("When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."); *see also Sultana Corp. v. Jewelers Mut. Ins. Co.*, 03-0360, p. 4 (La. 12/3/03), 860 So.2d 1112, 1116. The constitutional infirmity of excluding illegitimate children from a class of claimants who would otherwise be eligible for a right of action was recognized long ago. *See generally Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968). Therefore, using Article 3506 as a point of reference when interpreting Articles 2315.1 and 2315.2 plaintiffs' proposal would produce the absurd result of dividing claimants along lines of legitimacy and illegitimacy, a classification already found to be unconstitutional.

Another principle of codal construction also prevents acceptance of the plaintiffs' proposed definition. Pursuant to La. C.C. art. 13, "[l]aws on the same subject matter must be interpreted in reference to each other." Consequently, "[u]nder our long-standing rules of [codal] construction, where it is possible, courts have a duty in the interpretation of a [code article] to adopt a construction which harmonizes and reconciles it with other provisions dealing with the same subject matter." *Louisiana Mun. Ass'n v. State*, 04-0227, p. 36 (La. 1/19/05), 893 So.2d 809, 837 (quoting *Hollingsworth v. City of Minden*, 01-2658, p. 4 (La. 6/21/02), 828 So.2d 514, 517). Plainly, by employing the phrase "'child' ... by adoption," the lists of eligible claimants in Articles 2315.1 and 2315.2 must take into account the effects of adoption. As noted earlier, the Civil Code speaks directly to the effects of adoption in Article 199. If the plaintiffs' argument that children given in adoption who were the product of the decedent's marriage had a right of action under Articles 2315.1 and 2315.2 were accepted, no effect would be given to the provision in Article 199 that "the filiation between the child and his legal parent is terminated" as an effect of adoption. The requirement to give effect to each of these interrelated laws, Articles 199, 2315.1, and 2315.2, compels the conclusion that definitionally, the plaintiffs have no right of action stemming from the deaths of Mr. Stewart or their half-siblings.[9]

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9. Various lower courts have held that, because a claimant was given in adoption to another parent, the claimant had no right of action stemming from the death of a biological parent. *See Hernandez v. State, ex rel. Dept. of Transp. & Dev.*, 02-0162, 02-0163 p. 16 (La. App. 4 Cir. 10/16/02), 841 So.2d 808, 819-20; *Nelson v. Burkeen*

Appendix B

Constitutional Analysis

Having found the text of Articles 2315.1 and 2315.2 do not provide the plaintiffs a right of action, the question of whether these laws are constitutionally valid is addressed. Notably, the plaintiffs have not only challenged the constitutionality of the Civil Code's survival and wrongful death provisions, Articles 2315.1 and 2315.2, but have also challenged the "[e]ffect of adoption" provision, Article 199. The simultaneous attack on those tort provisions and on the adoption provision reveals the crux of the plaintiffs' argument to be this: excluding children given in adoption from a right of action is unconstitutional because adoption excludes recovery. However, both premises of this argument make essentially the same point; therefore, the argument is unpersuasively circular. Even so, for thoroughness, the analysis continues.

According to the plaintiffs, the insurer's exceptions of no right of action rely on these impermissible grounds: "Articles 2315.1, 2315.2 and 199 would unconstitutionally create two classes of children, biologically indistinguishable from each other except that one class of children had

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Constr. Co., 605 So.2d 681, 683 (La.App. 2 Cir. 1992); *Domingue v. Carencro Nursing Home, Inc.*, 520 So.2d 996, 997 (La.App. 3 Cir. 1987); *Simmons v. Brooks*, 342 So.2d 236, 237 (La.App. 4 Cir. 1977). Neither the plaintiffs' text-based argument, nor their constitutional challenge discussed below, provides justification for overruling those cases. Despite this line of cases, the legislature has not acted to overrule them, which is consistent with the above discussed earlier removal of "children given in adoption" from the list of those eligible to bring survival and wrongful death actions.

been given in adoption and the other had not." Such classification, the plaintiffs argue, deprives them of federal and state constitutional rights to equal protection, due process, and open access to courts.

Under federal and state jurisprudence, the review required of the classification the plaintiffs have challenged is clear: "When a [law] does not interfere with fundamental personal rights or draw upon inherently suspect distinctions such as race or religion, the jurisprudence requires only that the classification challenged be rationally related to a legitimate state interest." *Lakeside Imports, Inc. v. State*, 94-0191, p. 4 (La. 7/5/94), 639 So.2d 253, 256 (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 301-05, 96 S. Ct. 2513, 49 L. Ed. 2d 511 (1976), and *Harry's Hardware, Inc. v. Parsons*, 410 So.2d 735, 737 (La. 1982)). Indeed, courts have applied the aforementioned standard, known as rational basis review, to claims that classifications based on adoptive status were unconstitutional.[10] *See Cabrera*

10. The plaintiffs suggest application of some form of heightened scrutiny to classifications based on adoption based on *Levy*, *supra*. In *Levy*, the Court ruled a classification that excluded illegitimate children from wrongful death and survival action recovery was unconstitutional. *Levy*, 391 U.S. at 72. The suggestion that *Levy* applies here because the instant case does not deal with any class of children unaffiliated with a parent is rejected. Rather, adopted children are filiated with their adoptive parents. *See* La. C.C. art. 199. For similar reasons, there is no justification for a heightened standard of review based on *Warren v. Richard*, 296 So.2d 813, 816-17 (La. 1974) (a child presumed to be the legitimate child of another man could not be barred from recovery for biological father's death). On those unique facts, the ruling in *Warren* was premised on "the biological relationship and dependency" of the child. Again,

v. Attorney Gen. United States, 921 F.3d 401, 404 (3d Cir. 2019) (regarding a claim to citizenship derived from adoptive father) (citing *Brehm v. Harris*, 619 F.2d 1016, 1020 (3d Cir. 1980) (examining denial of social security benefits to child adopted after parent's disability benefits began)); *Dent v. Sessions*, 900 F.3d 1075, 1082 (9th Cir. 2018) ("Adoptive parents are not a protected class and, therefore, rational basis review applies to that distinction as well."); *Smart v. Ashcroft*, 401 F.3d 119, 122 (2d Cir. 2005) ("There is no suggestion here that adopted children are a 'protected' class entitled to invoke heightened scrutiny."). Accordingly, the following principles further guide the concurrent federal and state law analysis for constitutionality:

> While equal protection claims may be subject to a different analysis under the federal and state guarantees, a minimal standard of review applies under both provisions where, as here, there is no fundamental right, suspect class, or enumerated characteristic alleged as the basis for discrimination. *Progressive Security Ins. Co. v. Foster*, 97-2985 (La.4/23/98), 711 So.2d 675, 685-87. Absent a "suspect class" of persons or a "fundamental right," classifications are set aside only if they are based solely on reasons

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by operation of Article 199, there is no duty of dependency between the biological father and the children given in adoption to another because filiation is terminated. The concept of biological relationship that is relevant in considering the unfounded discrimination between legitimate and illegitimate children does not equate to the new legal relationships formed in the adoption process.

> totally unrelated to the pursuit of the state's goals and only if no grounds can be conceived to justify them. *Frederick v. Ieyoub*, 762 So.2d at 148 (quoting *Clements v. Fashing*, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)).

American Int'l Gaming Ass'n, Inc. v. Louisiana Riverboat Gaming Comm'n, 00-2864, p. 15 (La.App. 1 Cir. 9/11/02), 838 So.2d 5, 17.

In a case such as this, governed by rational basis review, "the law creating the classification is presumed to be constitutional and the party challenging its constitutionality has the burden of proving it unconstitutional by showing the classification does not suitably further any appropriate state interest." *City of New Orleans v. Louisiana Assessors' Ret. & Relief Fund*, 05-2548, p. 37 (La. 10/1/07), 986 So.2d 1, 27. Thus, the state is not obligated, as the plaintiffs suggest, to come forward with record evidence of a "rational basis ... to treat children given in adoption differently from children not given in adoption, under the wrongful death laws." Demonstrating the lack of a rational basis is the plaintiffs' burden. *Id.* The plaintiffs attempt to meet their burden of proof through their contention that not including children given in adoption is not rational, "particularly where, as here, those children never knowingly or voluntarily relinquished their rights."

The complaint of a lack of consent to the legal effects of their adoption is simply unequal to the enormous task of sweeping aside the legal principles that are obstacles

to the plaintiffs' claims. The adoption of minors, which, as noted earlier, lies at the heart of the plaintiffs' constitutional attack, has been a part of the Civil Code for over 150 years. *See Succession of Teller*, 49 La. Ann. 281, 21 So. 265 (La. 1897) (noting "the legislature first, in 1865, and by subsequent enactments, authorized adoption"). By nature of their minority, the consent of minors is not a required factor for valid adoptions.[11] Furthermore, as it concerns the legislature's justification for limiting the category of claimants in La. C.C. arts. 2315.1 and 2315.2, ample grounds have been recognized in the jurisprudence. As here, in the context of a constitutional challenge, the following observations were made to the stated limitations:

> It has been recognized that, of necessity, the legislature was burdened with a need to place some reasonable limitation on the number of potential beneficiaries and that this limitation has obvious benefit to judicial efficiency and economy. ....
>
> *[T]he chosen classes reasonably embrace those individuals that are likely to be most affected by the death of the deceased and yet reflect a reasonably appropriate limitation on the right of action.*

11. *See, e.g.*, La. Ch.C. art. 1122 (describing contents needed for a parent's act of surrender of parental rights, including the declaration in section (B)(6) "[t]hat the parent consents to an adoption which consent is final and irrevocable."). *Cf.* La. C.C. art. 213 (as to adults, "[t]he adoptive parent and the person to be adopted shall consent to the adoption in an authentic act of adoption.").

Estate of Burch v. Hancock Holding Co., 09-1839, p. 9 (La. App. 1 Cir. 5/7/10), 39 So.3d 742, 749 (emphasis added) (citing *Allen v. Burrow*, 505 So.2d 880, 887-88 (La.App. 2 Cir. 1987)). Relatedly, the court in *Allen* explained: "It has been recognized that, of necessity, the legislature was burdened with a need to place some reasonable limitation on the number of potential beneficiaries" for survival actions. *Id.*, 505 So.2d at 887. Children who depend on a parent for support would be required to share a tort recovery with children born of the marriage who, because they were given in adoption, would be potential strangers to the family of the deceased parent.

Thus, under the *de novo* application of the rational basis test, ample justification is found to uphold La. C.C. arts. 199 , 2315.1, and 2315.2 against the plaintiffs' claim that those laws unconstitutionally deprive them of a right of action. In a related vein, the plaintiffs' claim that these laws deny them due process or access to the courts is unavailing. *See Miles v. Illinois Cent. Gulf R. Co.*, 389 So.2d 96, 98-99 (La.App. 4 Cir. 1980). In *Miles*, the court ruled that a deprivation of a property right sufficient to implicate due process exists "only to an injured party who 'has a cause of action.'" *Id.* at 98 (quoting *Burmaster v. Gravity Drainage Dist. No. 2 of St. Charles Par.*, 366 So.2d 1381, 1387 (La. 1978)). As the *Miles* court explained: "Here, appellant does not have a cause or right of action; she has no claim recognized by our law." *Id.*, 389 So.2d at 98-99. Similarly, "Appellant has had full access to the courts. ... [S]he simply has no claim recognized by our law." *Id.* at 99.

Appendix B

Conclusion

In conclusion, the defendants' exceptions raising the objection of no right of action, and the plaintiffs' corresponding objections, have required an examination of how adoption affects the construction and constitutionality of the Civil Code's provisions for wrongful death and survival actions. As constructed, the wrongful death and survival provisions, Articles 2315.1 and 2315.2, contain lists of eligible claimants. Those lists include children "by adoption," a term which refers to children who have been added to a parental relationship—a relationship with the adoptive parents owing manifold duties to those children. *See* La. C.C. art. 199. No longer included in the lists of claimants established in Articles 2315.1 and 2315.2 are "children given in adoption," a term which refers to the transfer of children out of one parental relationship into a different and new parental relationship. *See* La. C.C. art. 199.

The legislature's removal of "children given in adoption" from the lists of eligible claimants for wrongful death and survival actions is the clearest indicator of the legislature's intent. The legislature's former authorization of "children given in adoption" as claimants existed for significant period of time (during 1948-1960), which indicates both a realization of the reach of that language and an understanding of the consequences when the legislature chose to remove "children given in adoption" as eligible claimants. In the years following the removal of "children given in adoption," the legislature has not expanded the lists of eligible claimants by returning "children given in adoption" to the lists presently found in La. C.C. arts. 2315.1 and 2315.2. It is not the role of

this court to re-insert language into codal enactments the legislature expressly and specifically removed.

There is no perceived constitutional impediment to the legislature's decision to not include "children given in adoption" in the lists of eligible claimants. Such children have moved into a new parental relationship, becoming children "by adoption," who are eligible claimants in the unfortunate occurrence of the tortious death of their adoptive parents. *See* La. C.C. arts. 2315.1(D) and 2315.2(D).

Likewise, the transfer of children into a new parental unit as children "by adoption" terminates, for purposes of wrongful death and survival actions, any connection between the "children given in adoption" and any biological siblings who were not "given in adoption." *See* La. C.C. arts. 199 , 2315.1(D) , and 2315.2(D).

For these reasons, I very respectfully dissent.

Appendix B

Crichton, J., dissents and assigns reasons:

I dissent for the reasons assigned by Justice Weimer. The legislative history and *in pari materia* interpretation of C.C. arts. 199 , 2315.1 and 2315.2 support the conclusion that children given in adoption do not qualify as "children" for purposes of survival and wrongful death actions. Contrary to the majority's assertion otherwise, the termination of filiation, as provided by C.C. art. 199, must be interpreted to alter whether a person is a "child" by law. C.C. art. 178 ("Filiation is the legal relationship between a child and his parent."). The terms "child" and "children" appear over one hundred times in the Civil Code alone. *E.g.*, C.C. art. 221 ("The father and mother who are married to each other have parental authority over their minor child during the marriage."). Interpreting all references in the Civil Code to "children" or "child" to necessarily include children given in adoption ignores C.C. art. 199 entirely and guts its effect.

Of course, an adopted child must have at least equal rights per the Civil Code. However, I write separately to highlight that the majority's interpretation would lead to an absurd result, as it has the potential to double the rights of a child given in adoption by maintaining their rights in conjunction with their biological as well as adoptive parents. With respect to the wrongful death and survival action statutes, for example, a child given in adoption would collect twice the amount as a child not given in adoption if both their biological and adoptive parents were killed by the fault of others. *See* C.C. art. 2315.1 (defining "child" to include children by adoption"); C.C. art. 2315.2 (same). This is contrary to the intent of the law, which is to equalize children given in adoption unless otherwise

provided. *See* C.C. art. 199 (providing that exceptions to the termination of filiation may be provided by law and including therein an express exception for inheritance rights). Because I do not believe the legislature intended to carve out an exception to C.C. art. 199 simply by the use of the terms "child" and "children," and for the reasons more fully provided by Justice Weimer, I dissent.

APPENDIX C — JUDGMENT AND MEMORANDUM OF THE STATE OF LOUISIANA, PARISH OF CONCORDIA, SEVENTH JUDICIAL DISTRICT COURT, FILED OCTOBER 15, 2019

STATE OF LOUISIANA
PARISH OF CONCORDIA
SEVENTH JUDICIAL DISTRICT COURT

NO. 49,686 - B

KHRISTY GOINS RISMILLER,
TUTRIX FOR DANIEL EDWARD GOINS

VS.

GEMINI INSURANCE COMPANY, MARK ISIAH GORDON AND KEITH BOONE TRUCKING, LLC

CONSOLIDATED WITH:

49, 751-B

DAVID WATTS

MARK GORDON, KENNETH BOONE DBA BOONE TRUCKING, KEITH BOONE TRUCKING AND GEMINI INSURANCE COMPANY SHEILA SMITH

VS.

NO. 49,741-A

Appendix C

CONSOLIDATED WITH:

NO. 49,832-B

GEMINI INSURANCE COMPANY, KENNETH CHAD BOONE D/B/A BOONE TRUCKING, AND MARK GORDON

CONSOLIDATED WITH:

SUCCESSION OF RICHARD STEWART, JR., RAYMOND KELLY, DONNA KELLY, RICHARD STEWART, SR. AND VERA ANITA STEWART

VS.

MARK ISIAH GORDON, KENNETH BOONE, KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE COMPANY

JUDGMENT

These consolidated cases came for hearing on September 9, 2019 on the following matters:

1) Motion to Declare Louisiana Civil Code Articles 2315.1, 2315.2 and/or 199 Unconstitutional, filed by plaintiff Khristy Goins Rismiller, Tutrix for Daniel Edward Goins, and plaintiff David Watts;

2) Peremptory Exceptions of No Right of Action filed by Mark Isiah Gordon as to the claims of plaintiff Khristy Goins Rismiller, Tutrix for Daniel Edward Goins, and plaintiff David Watts;

3) Peremptory Exceptions of No Right of Action filed by Kenneth Boone d/b/a Kenneth Boone Trucking, LLC as to the claims of plaintiff Kluisty Goins Rismiller, Tutrix for Daniel Edward Goins, and plaintiff David Watts; and

4) Peremptory Exceptions of No Right of Action filed by Mark Isiah Gordon and Kenneth Boone d/b/a Kenneth Boone Trucking, LLC as to the claims of Richard Stewart, Sr. and Vera Anita Stewart.

Present for plaintiff, Kristy Goins Rismiller, Tutrix for Daniel Edward Goins, was Charles S. Norris, Jr.

Present for plaintiff, David Watts, was Colt J. Fore.

Present for plaintiff, Sheila Smith, was Jeremy Z. Soso.

Present for plaintiffs, Richard Stewart, Sr. and Vera Anita Stewart, was Joey Boothe.

Present for defendant, Kenneth Boone d/b/a Boone Trucking, LLC, was M. Joey Bernard.

Present for defendant, Mark Isiah Gordon was Patrick J. Schepens.

Present for defendant, Gemini Insurance Company was Alex Hains.

No one was present for the Louisiana Attorney General. Proof that the Attorney General was properly served with notice of the hearing and given an opportunity

to be heard, pursuant to La. Code Civ. Proc. Art. 1880 and La. R.S. 49:257 (C), was filed into the record.

Considering the arguments of counsel, the briefs and memorandum filed by counsel, the law and the evidence, the Court having taken these matters under advisement, and for those reasons set forth in the Memorandum of Kristy Goins Rismiller, Tutrix for Daniel Edward Goins, which statement of the facts and the law this Courts adopts herein *in toto,* now rules as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Declare Louisiana Civil Code Articles 2315.1, 2315.2 and/or 199 unconstitutional filed by plaintiff Khristy Goins Rismiller, Tutrix for Daniel Edward Goins, and plaintiff David Watts is **granted** as the court finds that Civil Code Articles 2315.1, 2315.2 and 199 are unconstitutional as applied to children given in adoption, which includes plaintiffKhristy Goins Rismiller, Tutrix for Daniel Edward, and plaintiff David Watts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Peremptory Exceptions of No Right of Action filed by Mark Isiah Gordon, as to the claims of plaintiff Khristy Goins Rismiller, Tutrix for Daniel Edward Goins, and plaintiff David Watts are **denied**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Peremptory Exceptions of No Right of Action filed by Kenneth Boone d/b/a Boone Trucking, LLC as to the claims of plaintiff Khristy Goins Rismiller, Tutrix for Daniel Edward Goins, and plaintiff David Watts are **denied**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Peremptory Exceptions of No Right of Action filed by Mark Isiah Gordon and Kenneth Boone d/b/a Boone Trucking, LLC as to the claims of Richard Stewart, Sr. and Vera Anita Stewart are **denied**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Peremptory Exceptions of No Right of Action filed by Mark Isiah Gordon and Kenneth Boone d/b/a Boone Trucking, LLC as to the claims of Brandie Hardie and her four other children, Victoria Chandler, Caleb Chandler, Dalton Ray Seacrest and Marie Grey are deferred to the merits of this case whereupon the existence of other siblings shall be determined by the trier of fact.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all costs associated with the above Motion filed by plaintiff Khristy Goins Rismiller, Tutrix for Daniel Edward Goins, and plaintiff David Watts; and all costs associated with the exceptions filed by Mark Isiah Gordon, Kenneth Boone d/b/a Boone Trucking, LLC against plaintiffs are cast against defendants Mark Isiah Gordon and Kenneth Boone d/b/a Boone Trucking, LLC.

JUDGMENT RENDERED AND SIGNED on this 14th day of October, 2019, in Vidalia, Louisiana.

/s/_____
JUDGE JOHN C. REEVES - DIVISION "B"

Appendix C

7TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF CONCORDIA STATE OF LOUISIANA

NO. 49686 DIVISION B

KHRISTY GOINS RISMILLER, TUTRIX FOR
DANIEL EDWARD GOINS

VERSUS

GEMINI INSURANCE COMPANY, MARK ISIAH
GORDON, AND KEITH BOONE TRUCKING, LLC

consolidated with

NO. 49741 DIVISION A

SHEILA SMITH

VERSUS

GEMINI INSURANCE COMPANY, KENNETH
CHAD BOONE D/B/A BOONE TRUCKING, AND
MARK GORDON

consolidated with

NO. 49751 DIVISION B

DAVID WATTS

VERSUS

Appendix C

MARK GORDON, KENNETH BOONE D/B/A BOONE TRUCKING, KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE COMPANY

consolidated with

NO. 49832 DIVISION B

SUCCESSION OF RICHARD STEWART, JR., RAYMOND KELLY, DONNA KELLY, RICHARD STEWART, SR., AND VERA ANITA STEWART

VERSUS ·

MARK ISIAH GORDON, KENNETH BOONE, KEITH BOONE TRUCKING, LLC, AND GEMINI INSURANCE COMPANY

DATE FILED: 8/8/18

MEMORANDUM IN SUPPORT OF MOTION TO DECLARE LOUISIANA CIVIL CODE ARTICLES 2315.1, 2315.2 AND/OR 199 UNCONSTITUTIONAL

Plaintiff, Khristy Goins Rismiller ("Rismiller"), tutrix for Daniel Edward Goins ("Goins"), and Plaintiff David Watts ("Watts"), submit this memorandum in support of their Motion to Declare Louisiana Civil Code Articles 2315.1, 2315.2 and/or 199 Unconstitutional ("Plaintiffs' Motion").

Appendix C

Rismiller and Watts submit the following exhibits in support of their Motion and in opposition to Defendants" exceptions of no right of action:

Exhibit 1 Louisiana Supreme Court's February 18, 2019 per curiam.

Exhibit 2 Louisiana Third Circuit Court of Appeal's October 3, 2018 decision and dissenting opinions in *Rismiller,* No. 17-809.

Exhibit 3 Louisiana Third Circuit Court of Appeal's October 3, 2018 decision and dissenting opinions in *Watts,* No. 17-811.

Exhibit 4 Louisiana Third Circuit Court of Appeal's October 3, 2018 decision and dissenting opinions in *Stewart,* No. 17-812.

Exhibit 5 Rismiller's *Petition for Damages.*

Exhibit 6 Rismiller's *First Supplemental and Amended Petition for Damages.*

Exhibit 7 Rismiller's *Second Supplemental and Amended Petition for Damages.*

Exhibit 8 Rismiller's *Third Supplemental and Amended Petition for Damages.*

Exhibit 9 Watts' *Petition for Damages.*

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Exhibit 10 Watts' *Supplemental and Amended Petition for Damages.*

Exhibit 11 Watts' *Second Supplemental and Amended Petition for Damages.*

Pursuant to La. Dist. Ct. Rule 9.8, Rismiller and Watts state that: (1) this case is set for trial beginning on April 22, 2020; and (2) they reserve the right to offer testimony at the hearing on Plaintiffs' Motion, which is currently set for September 9, 2019 at 1:00 o'clock p.m., if the parties cannot stipulate to the following facts.

BACKGROUND

For purposes of this motion, the following facts are, or should be, undisputed:

This action arises out of a motor vehicle accident ("the Accident") on October 1, 2015, which resulted in the deaths of Richard L. Stewart, Jr. ("Richard Jr."), and his minor children, George Edward Stewart ("George") and Vera Cheyenne Stewart ("Vera Cheyenne").

Goins and Watts are the biological children of Richard Jr. and were born during Richard Jr.'s marriage to Lisa Watts Stewart. In January 1991, at the age of 2, Goins was adopted by George and Joyce Goins, who were Richard Jr.'s uncle and aunt. They are both deceased, Joyce in 1999 and George in 2007.

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In December 2003, at the age of 15, Watts was adopted by Jimmy Charles Watts and Mary Jane Maher Watts, the natural father and mother of Lisa Watts Stewart. Both Jimmy and Mary are deceased.

At the time of his death, Richard Jr. was legally married to and survived by Lisa Watts Stewart. Richard Jr. was also survived by Goins and Watts, two children who were born of the marriage with Lisa Watts Stewart, given in adoption before Richard Jr.'s death, who were halfsiblings of the deceased passengers, George and Vera Cheyenne. George and Vera Cheyenne were survived by their biological mother, Brandie Hardie ("Hardie").

Both Goins and Watts allege in their petitions, which are accepted as true for purposes of Defendants' exceptions of no right of action, that Hardie abandoned her biological children, George and Vera Cheyenne, before their deaths. Goins and Watts further allege in their petitions that due to her abandonment of George and Vera Cheyenne, and pursuant to La. Civ. Code art. 2315.1 (E), La. Civ. Code art. 2315.2 (E), and La. Children's Code art. 1015 (5), Hardie is deemed to have not survived George and Vera Cheyenne, and the next class available to bring survival action and wrongful death claims for the deaths of George and Vera Cheyenne, is their surviving siblings, i.e., Watts and Goins.

Defendants filed exceptions of no right of action in response to Watts' and Goins' petitions for survival action and wrongful death damages for the deaths of Richard Jr., George and Vera Cheyenne.

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Following a hearing, this Court denied Defendants' exceptions. Defendants then applied for supervisory writs to the Third Circuit Court of Appeal.

On October 3, 2018, a divided seven judge panel of the Third Circuit issued three separate rulings granting the applications for supervisory writs and granting the exceptions of no right of action in part.[1] In. *Rismiller,* a 4-3 decision, the Third Circuit reversed this Court's denial of defendants' exception of no right of action as to Goins, with Judges Cooks, Savoie and Conery dissenting.[2] In *Watts,* a 4-3 decision, the Third Circuit reversed this Court's denial of defendants" exceptions of no right of action as to Watts, with Judge Cooks, Savoie and Conery dissenting.[3] And in *Stewart,* the Third Circuit reversed this Court's denial of Defendants' exceptions of no right of action as to the claims by the Succession of Richard Stewart, Jr., Raymond Kelly, Donna Kelly, Richard

1. *See Stewart v. Gordon,* 17-812 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858748, *Watts v. Gordon,* 17-811 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858747, and *Rismiller v. Gemini Ins. Co.,* 17-809 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4810356,2018 WL 4801927.

2. *Rismiller v. Gemini Ins. Co.,* 2017-809 (La. App. 3 Cir. 10/3118), _So. 3d_, 2018 WL 4905609, *writ granted, cause remanded sub nom. Rismiller Tutrix for Goins v. Gemini Ins. Co.,* 2018-2089 (La. 2118/19); 263 So. 3d 1145.

3. *Watts v. Gordon,* 2017-811 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858747, *writ granted, cause remanded sub nom. Rismiller Tutrix for Goins v. Gemini Ins. Co.,* 2018-2089 (La. 2118119); 263 So. 3d 1145.

Stewart Sr. and Vera Stewart.[4] Judges Cooks, Conery and Savoie dissented fro1n the ruling which held that Goins and Watts had no right of action because they had been given up for adoption.[5]

As noted by Judge Cooks,

> I cannot imagine any reason nor rationale to exclude legitimate biological children of a decedent from recovering [wrongful death and survival action] damages when the legislature did not, and in my view could not do so under the settled decisions of the United States Supreme Court and the Louisiana State Supreme Court, as well as the applicable provisions of the Louisiana Civil Code.[6]

Judge Cooks added that "[s]uch an arbitrary and inequitable result is not consistent with constitutional notions of equal protection and fundamental fairness."[7]

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4. *Stewart v. Gordon,* 2017-812 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858748.

5. *Stewart v. Gordon,* 2017-812 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858748.

6. *Stewart v. Gordon,* 2017-812, p. 9 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858748 at *5 (Cooks, J., dissenting).

7. *Stewart v. Gordon,* 2017-812, p. 12 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858748 at* 12 (Cooks, J., dissenting).

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On February 18, 2019, the Louisiana Supreme Court granted Goins' and Watts' writ applications.[8] The Supreme Court noted that Goins and Watts asked it to pass on the constitutionality of La. Civ. Code arts. 2315.1 and 2315.2 insofar as the court of appeal found those articles do not provide a right of action for adopted children to assert wrongful death and survival actions following the death of a biological parent.[9] Because Goins and Watts did not raise this claim in the district court, the Supreme Court held that the constitutional claims were not properly before it.[10]

Without expressing any opinion on the merits of Goins' and Watts' constitutional arguments, the Supreme Court found it appropriate to remand the case to this Court to allow Goins and Watts to amend their petition in an attempt to remove the objection presented by Defendants' exceptions of no right of action.[11] Accordingly, the Supreme Court granted Goins' and Watts' writ application for the sole purpose of remanding the case to the district court to allow relators to amend their petition in an attempt to state a right of action.[12]

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8. *Rismiller Tutrix for Goins v. Gemini Ins. Co.,* 2018-2089, p. 1 (La. 2/18/19); 263 So. 3d 1145.

9. *Id.*

10. *Id.,* citing *Vallo v. Gayle Oil Company, Inc.,* 94-1238 (La. 11130/94); 646 So.2d 859, 864 ("[t]he long-standing jurisprudential rule of law is: a statute must first be questioned in the trial cout1, not the appellate courts ....").

11. *Rismiller,* 2018—2089 at p. 1, 263 So. 3d at 1145-46.

12. *Id*., 2018-2089 at p. 1, 263 So. 3d at 1146.

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On March 11, 2019, following remand from the Supreme Court, Rismiller filed a *Third Supplemental and Amended Petition. See* Exhibit 8. Goins alleged that he had a right of action under La. Civ. Code arts. 2315.1 ("Article 2315.1") and 2315.2 ("Article 2315.2") and/or La. Civ. Code art. 199 ("Article 199")[13] for damages resulting from the death of Richard Jr., George and Vera Cheyenne. *Id.* In the alternative, and only if this Court determined that he had no right of action, Goins alleged that Article 2315.1, Article 2315.2 and/or Article 199 are unconstitutional on their face or, alternatively, as applied to him, in violation of La. Const. Art. I, Sections 2 (due process), 3 (equal protection) and 22 (open access to the courts), and the United States Constitution, Art. XIV, Section 1 (due process and equal protection).

STATEMENT OF LAW

I. No right of action.

"When it can reasonably do so, the court should maintain a petition against a peremptory exception so as to afford. the litigant an opportunity to present his

13. *See* La. Civ. Code art. 199 (West 2018) (eff. Aug. 15, 2009) ("Art. 199. Effect of adoption. Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is terminated, except as otherwise provided by law. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.").

evidence."[14] Also, "[w]here doubt exists regarding the appropriateness of an objection of no. right of action, it is to be resolved in favor of the plaintiffs."[15]

II. Constitutional challenges.

The constitutionality of a statute must first be questioned in the trial court and the plea of unconstitutionality must be specifically pled to be considered by the trial court. *Vallo v. Gayle Oil Co., Inc.,* 94-1238, p. 7 (La. 11/30/94); 646 So. 2d 859, 864. The attorney general is not an indispensable party; but, he must be served in declaratory judgment actions which seek a declaration of unconstitutionality of a statute. *Id.* In all other proceedings, the attorney general should be served a copy of the pleading which contests the constitutionality of a statute. *Id.* When the unconstitutionality of a statute is specifically pled, the claim must be raised in a petition (the original petition, an amended and supplemental petition or a petition in an incidental demand), an exception, a motion or an answer. *Id.,* 94-1238 at p. 8, 646 So. 2d at 865. (Here, Plaintiff have specifically pled the unconstitutionality of La. Civ. Code arts. 2315.1, 2315.2 and 199 in Goins' *Third Supplemental and Amended Petition,* as well as this motion.) The unconstitutionality of a statute should be tried at a contradictory hearing, wherein all parties will be afforded the opportunity to brief and argue the issue. *Vallo,* 94-1238 at p. 9, 646 So. 2d at 865.

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14. *Teachers' Ret. Sy's. of La. v. La. State Employees' Ret. Sys.,* 456 So. 2d 594, 596 (La. 1984) (emphasis added).

15. *Id.,* 456 So. 2d at 597 (La. 1984) (emphasis added).

Appendix C

ARGUMENT

I. Goins and Watts have a right of action under La. Civ. Code arts. 2315.1, 2315.2 and 199.

Plaintiffs' petitions demonstrate that they have a right of action for survival action and wrongful death damages resulting from the deaths of their biological father, Richard Jr., and their biological siblings, George and Vera Cheyenne, under the plain wording of La. Civ. Code art. 2315.1 and 2315.2.

Survival actions are governed by La. Civ. Code art. 2315.1.[16] Under the plain wording of La. Civ. Code art.

16. Survival action.

A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and **child or children** of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, **child, or parent** surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child. parent, or sibling surviving.

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2315.1 (A) (1) (Survival action), Goins and Watts are both a surviving "child" of Richard Jr., and therefore have a right of action to recover damages for injury to Richard Jr., his property or otherwise, caused by the Defendants' offenses or quasi offenses. Goins and Watts are also both a surviving "brother" of George and Vera Cheyenne, and therefore have the right to recover damages for injury to George and Vera Cheyenne, their property or otherwise, caused by the Defendants' offenses or quasi offenses.

> B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.
>
> C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.
>
> D. As used in this Article, the words **"child", "brother"**, "sister", "father", "mother", "grandfather", and "grandmother" **include a child, brother**, sister, father, mother, grandfather, and grandmother **by adoption**, respectively.
>
> **E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.**

La. Civ. Code art. 2315.1 (West 2019) (eff. July 15, 1997) (emphasis added).

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Wrongful death actions are governed by La. Civ. Code art. 2315.2.[17] Under the plain wording of La. Civ. Code art.

17. Wrongful death action.

A. If a person dies due to the fault of another, suit may be brought by the follow1ng persons to recover damages which they sustained as a result of the death:

(1) The surviving spouse and **child or children** of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) The surviving **brothers** and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. The right of action granted by this Article prescribes one year from the death of the deceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words **"child", "brother"**, "sister", "father", "mother", "grandfather", and "grandmother" **include a child, brother**, sister, father, mother, grandfather, and grandmother **by adoption**, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

2315.2 (A) (1) (Wrongful death action), Goins and Watts both are a surviving "child" of Richard Jr., and therefore each have a right of action to recover damages which he sustained as a result of Richard Jr.'s death. Goins and Watts are both also a surviving "brother" of George and Vera Cheyenne, and therefore have a right of action to recover damages which he sustained as a result of George and Vera Cheyenne's deaths.

Furthermore, Goins and Watts both qualify as a "child" of Richard Jr. under the plain wording of La. Civ. Code art. 3506 (8),[18] as they were born of the marriage of Richard Jr. and Lisa Watts Stewart. The legislature did not except or remove children born of the marriage given up for adoption from inclusion in the definition of a "child."

As recognized by the Louisiana Supreme Court, the critical requirement for classification of a person as a "child" under La. Civ. Code art. 2315.1 and La. Civ. Code

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La. Civ. Code art. 2315.2 (West 2019) (eff. July 15, 1997) (emphasis added).

18. *See* La. Civ. Code art. 3506 (West 2018) ("Art. 3506. General definitions of terms. Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows: .... 8. **Children. Under this name are included those persons born of the marriage, those adopted**, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line. A child born of marriage is a child conceived or born during the marriage of his parents or adopted by them. A child born outside of marriage is a child conceived and born outside of the marriage of his parents ....") (emphasis added).

art. 2315.2 is "the biological relationship between the tort victim," i.e., Richard Jr., George, and Vera Cheyenne, "and the child," i.e., Goins and/or Watts. *See Jenkins v. Mangano,* 00-790, p. 3 (La. 11128/00); 774 So. 2d 101, 103; *Warren* v. *Richard,* 296 So. 2d 813, 815 (La. 1974).

Plaintiffs specifically adopt, by reference, the attached dissenting opinions and arguments of Judges Cooks, Conery and Savoie, in *Rismiller, Watts* and *Stewart,* as to the right of children given up for adoption to seek damages for the death of their biological parents and siblings under Article 2315.1 and 2315.2.

II. In the alternative, La. Civ. Code arts. 2315.1, 2315.2 and/or 199 unconstitutional.

In the alternative, and only if this Court determines that Goins and Watts do not have a right of action under Article 2315.1 and 2315.2, they request that this Court declare that La. Civ. Code arts. 2315.1, 2315.2 and/or 199 are unconstitutional on their face or, alternatively, as applied to them, in violation of La. Const. Art. I, Sections 2 (due process), 3 (equal protection) and 22 (open access to the courts), and the United States Constitution, Art. XIV, Section 1 (due process and equal protection).

If the Court denies Goins and Watts the right to recover survival action damages, pursuant to La. Civ. Code art. 2315.1, and/or wrongful death damages, pursuant to La. Civ. Code art. 2315.2, for damages resulting from the deaths of Richard Jr., George, and Vera Cheyenne, simply because of his status as a child given up for adoption, this

would be an unconstitutional denial of Goins' and Watts' constitutional rights.

The Louisiana Constitution, Art. I, Section 3 provides that:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations ....

The state and federal constitutional guarantees of equal protection mandate that state laws affect alike all persons, and interests similarly situated. U.S. Const. Amend. XIV; La. Const. art. 1, § 3 (1974). The effect of excluding children given up in adoption is to create two classes of litigants biologically indistinguishable from each other except that one is was given up for adoption, and the other was not. The fact that a child given up for adoption had a strong or weak relationship with the biological parent may affect the amount of the child's damages, but it is a denial of equal protection to hold that he or she may never sue for the death of a biological parent. As a result of this distinction the class composed of biological children who were not given up in adoption has the right to file survival and wrongful death actions while those given up in adoption do not. This statutory scheme creates a classification which substantially burdens the right of

some persons to be compensated for injuries suffered by them while not placing such a burden on other individuals.

Such classifications are permissible only if they are: "reasonable, not arbitrary, and ... rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. . . ." *Detraz v. Fontana,* 416 So. 2d 1291 (La. 1982). The code articles produce two classes of tort victims and place a substantial burden on the right to bring an action of one of them. No reasonable justification for this disparate treatment has been supplied. Accordingly, the code articles violate the equal protection clauses of the state and federal constitutions.

The Louisiana Constitution, Art. I, Section 2, provides that: "No person shall be deprived of life, liberty, or property, except by due process of law."

The Louisiana Constitution, Art. I, Section 22 provides that:

> All courts shall be open, and every person shall have an adequate remedy by due process of law and justice, administered without denial partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights.

The United States Constitution, Amend. XIV, Section 1 provides that:

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> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Articles 2315.1, 2315.2 and 199 are also defective because they deprive children given up in adoption of due process and deny open access to the courts. U.S. Const. Amends. V, XIV; La. Const. art. 1 §§ 2, 22 (1974). Children given up in adoption have lost their property rights to recover damages without a prior hearing in violation of the due process clause of the Fourteenth Amendment.

If they bar recovery to Goins and Watts for the death of his biological father, Richard Jr., and his biological siblings, George and Vera Cheyenne, simply because of their status as children given up for adoption, Article 2315.1, Article 2315.2 and/or Art. 199 are unconstitutional on their face.

More particularly, it is invidious to discriminate against children given up in adoption, such as Goins and Watts, when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done to his father and siblings. It would be a denial of equal protection to deny Goins and Watts the right to recover for the wrongful death of his biological father and biological siblings simply because they were given up in adoption. By excluding children given up in adoption, such as Goins and Watts,

Art. 2315.1, Art. 2315.2, and Art. 199 deny them equal protection of the law, due process, and access to the courts. Under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, a State may not create a right of action in favor of children for the wrongful death of a parent, and exclude children given in adoption from the benefit of such a right. A State may not invidiously discriminate against children given up in adoption by denying them substantial benefits accorded children generally. Under the U.S. Constitution, as interpreted by the United States Supreme Court, it is the biological relationship between a child, such as Goins and/or Watts, and his parent or siblings which is the determinative factor in deciding whether "child" and "brother" as used in Art. 2315.1 and Art. 2315.2 includes surviving children given in adoption. It is not the child-given-in-adoption's fault that he or she was born, and it is not the child's fault he or she was given up for adoption. Furthermore, it is a denial of equal protection to hold that a legitimate biological child given up for adoption, such as Goins and/or Watts, does not enjoy the same legal rights as an illegitimate biological child who is also a legitimate child of another parent, for the loss of the same biological parent.

Judge Cooks' dissent in *Stewart* demonstrates the unconstitutionality of depriving children given up in adoption of the right to damages resulting from the death of their biological parents and siblings.[19]

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19. *Stewart v. Gordon,* 2017-812, pp. 8-18 (La. App. 3 Cir. 10/3/18); _So. 3d_, 2018 WL 4858748 at *5- * 15 (Cooks, J., dissenting).

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Children given up in adoption are entitled under our law to inherit from their biological parent as well as their adopted parent.[20] As noted by Judge Cooks,

> I cannot in1agine any reason nor rationale to exclude legitimate biological children of a decedent from recovering these types of damages when the legislature did not, and in my view could not do so under the settled decisions of the United States Supreme Court and the Louisiana State Supreme Court, as well as the applicable provisions of the Louisiana Civil Code.[21]

The majority's perfunctory statement that "children given up in adoption are divested of their legal rights except as to those relating to inheritance," ignores landmark United States Supreme Court decisions, Louisiana State Supreme Court decisions, and relies on the language in the prior version of the Civil Code Article (La. Civ. Code art. 214) regarding the effect of adoption.[22]

The current Civil Code provision setting forth the effect of adoption is found in La. Civ. Code art. 199, which provides that "Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is

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20. *Id.*

21. *Id.*

22. *Id.*

terminated, **except as otherwise provided by law**. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent." (Emphasis added.) The Comments to La. Civ. Code art. 199 note that "[a]mong the exceptions to the severance of the legal relationship" are the right of inheritance; retention of the legal relationship between the adopted child and his legal parent who is married to the adoptive parent; and the right of grandparents (parent of the legal parent) to have visitation with the child.

The legislature has expressly "provided by law" the beneficiaries permitted recovery in the survival and wrongful death actions. Both La. Civ: Code art. 2315.1 (A) (1) and La. Civ. Code art. 2315.2 (A) (1) specifically provide that the "surviving spouse and child or children of the deceased" are first in preference to recover damages under these provisions. No distinction is made regarding the biological child or children of the decedent as legitimate, illegitimate, legitimated, and/or children-given-in-adoption. Moreover, the legislature specifically includes the only non-biological progeny of the decedent by adding a provision to expressly include adopted children. The article also includes an express prohibition against a father or mother who has abandoned a deceased "child" "during his minority" from asserting either a survival action or wrongful death claiim for such child. Presumably this would include any deceased child of the parent whether they were abandoned by being given up in adoption or by simply not providing any support for the child for the requisite period of time. This provision ensures equal treatment to all children abandoned by their biological parent(s) without reference to other laws.

Additionally, La. Civ. Code art. 2315.1 (B) specifically provides for an action by the decedent's estate, in the absence of a surviving spouse, child, mother, father, or sibling. This is so because the survival action recognizes recovery for damage suffered by the decedent which, though it might not be ascertained until after the person's death, is nonetheless part of his/her patrimony.

Adopted children enjoy the right to inherit from their biological parent. These children also enjoy the right to inherit from their half-siblings. See La. Civ. Code art. 199. It is the prerogative of the legislature to provide for devolution of a person's estate by means other than through succession proceedings. As noted by Judge Cooks,

> It is not within their Authority to legislatively deny the right to accede to the decedent's property accorded all children of a decedent, including, by specific legislation, children-given-in-adoption **for to do so would run afoul of our state and federal constitutional right to equal protection under the law.**

In *Jenkins v. Mangano,* 00-790 p. 3 (La. 11/28/00); 774 So. 2d 101, 103, the Louisiana State Supreme Court, specifically addressed the question of "Who is a Child under 2315.2" (The rationale is even more applicable to article 2315.1.):

> In *Chatelain[v. State, DOTD,* 586 So.2d 1373 (La. 1991)], this court determined that the critical requirement for classification of

> a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child. *Warren v. Richard,* 296 So.2d 813, 814 (La. 1974). Once the biological relationship is established, an inquiry must be made as to whether the child is classified as legitimate or illegitimate. Civil Code Art. 178. It is of no consequence that the child is legitimate or illegitimate for purposes of deciding whether the child may bring an action under Article 2315, **all children have the right to bring an action for wrongful death and survival action**. *See Levy v. Louisiana,* 253 La. 73,216 So.2d 818 (1968).

The supreme Court concluded in *Jenkins* that because the "tort victim [was] survived by a child "the surviving parents of the victim could not proceed to recover in a survival or wrongful death action even though the child "did not timely file a filiation action." *Jenkins,* 774 So.2d at 105 (emphasis added). The child, said the high court, "is not precluded from raising her existence as a defense as long as the defendant proves, by clear and convincing evidence, the child was acknowledged by the tort victim before death." *Id.*

In *Warren v. Richard,* 296 So. 2d 813, p. 815 (La. 1974), the Louisiana Supreme Court faced the question "can an illegitimate child recover for the wrongful death of her biological father when, at the same time, she is also the legitimate child of another man under the law?" The supreme court answered in the affirmative, constrained,

it said, by the controlling decisions of the United States Supreme Court.

As noted by Judge Cooks, "We are no less constrained by these decisions of the highest court in the land and in this state." The supreme court explained that "it is the dual paternal parentage of this child—one father created by nature, another created by law—which poses the problem" to be resolved. *Id.* The present case presents the same problem for resolution-dual paternal parentage of the child—one father created biologically "by nature" and one "created by law"— adoption. The court in *Warren* included a thorough review of the decisions of the United States Supreme Court mandating the constitutional outcome of the court's decision and it is worth quoting at length the cases explained therein:

> In applying the Equal Protection Clause of the United States Constitution, the United States Supreme Court decided in a case where an illegitimate child was suing for damage for the wrongful death of her mother, 'that **it is invidious to discriminate against them (illegitimate children) when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.'** In this holding, striking down Louisiana's statutory scheme which had theretofore barred recovery by illegitimate children for the wrongful death of their parents, the Court has, as a constitutional proposition, apparently substituted a biological classification

> for the legal classification Louisiana had long observed. Levy v. Louisiana, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).

(Emphasis added).

Again in *Glona v. American Guarantee & Liability Insurance Co.,* 391 U.S. 73, 88 S.Ct. 1515,20 L.Ed.2d 441 (1968), the United States Supreme Court decided that it would be a denial of equal protection to deny a mother the right to recover for the wrongful death of her child simply because the child was born out of wedlock. The opinion declared: "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue."

In *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), the United States Supreme Court approved a claim for workmen's compensation benefits of a dependent, unacknowledged, illegitimate child which had been denied by the Louisiana courts. It was held that, by relegating the unacknowledged illegitimate to a lower priority in the recovery scheme, the Louisiana Workmen's Compensation Act thereby denied him equal protection of the law. The Court stated the basis for its decision thusly:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and

> unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.

Finally, in its latest decision on the subject in *Gomez v. Perez,* 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973), the United States Supreme Court said:

> We have held that under the Equal Protection Clause of the Fourteenth Amendment **a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right**. Levy v. Louisiana, 391 U.S. 68 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968). Similarly, we have held that illegitimate children may be not (sic) excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). Under these decisions, **a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally**.

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The Supreme Court rejected the argument that this result will accord more rights to this child than are ordinarily accorded the legitimate child—that he or she will be able to recover for the death of her biological father as well as for the death of the biological father, because the law deems her his legitimate offspring. However, this concept is not unique to our law. It is specifically provided that the adopted child, upon his adoption, is not divested of his right to inherit from his blood parents while at the same time he inherits from the adoptive parent.

Louisiana Civil Code Article 2315 provides the foundation for recovery of damages for "every act whatever of man that causes damage to another." It also provides: Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. La. Civ. Code art. 2315 (B).

As noted by Judge Cooks, the provisions of the Civil Code and the Code of Civil Procedure are internally consistent when it comes to the treatment of surviving beneficiaries and takes into consideration the individuals covered in both the survival and wrongful death actions. The majority's prohibition against recovery by children-given-in-adoption for the damages done to their biological parent, or the loss personally suffered as the result of their biological parent's death (loss of consortium, society, etc.), runs afoul of this scheme and will produce inconsistent results.

For example, in the case in which the child-given-in-adoption's parent pursuing litigation involving a heritable right or damage occasioned other than by an offense or quasi offense provided in article 2315.1 and 2315.2, dies during the course of litigation, such child, as an heir of decedent recognized by law, would be a proper party to be substituted in the litigation under La. Code. Civ. P. art 801. The majority acknowledges that a child-given-in-adoption inherits from its biological parent. But, according to the majority's interpretation of the term "surviving child or children" in Articles 2315.1 and 2315.2, this same child would be precluded from recovering for its parent's loss, or rather from continuing the pursuit of a survival claim for injury resulting in death under Article 2315.1, and from pursuing its own personal loss as the result of the wrongful death of its parent under Article 2315.2. As noted by Judge Cooks, **"[s]uch an arbitrary and inequitable result is not consistent with constitutional notions of equal protection and fundamental fairness."** (Emphasis added.)

The United States Supreme Court, as recognized by our state supreme court in *Warren* in 1974, had made it clear, prior to the legislative change in 1986 that enacted articles 2315.1 and 2315.2 legislatively establishing the survival and wrongful death actions that, as the *Jenkins* court put it **"all children have the right to bring an action for wrongful death and survival action,"** *Jenkins,* 774 So.2d at 103. The courts did not include any modifier or exception to that pronouncement.

It is, as the United States Supreme Court has held, **the biological relationship that is determinative of a child's right to recover for the loss of its blood parent.** *See Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); *Glona v. American Guarantee & Liability Insurance Co.,* 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); and *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). It is "not the classification into which the child is placed by the statutory law of the State." *Warren,* 296 So.2d at 816-817, relying on *Levy, Glona* and *Weber.*

And as noted by the Louisiana Supreme Court, "to say that [a] child [has] no right to recover for her biological father's wrongful death because the law presumed her to be the legitimate child of another man would run counter to the principles established in the decisions of the United States Supreme Court [ ] and would ignore the existence of the child's biological father." *Id.* As noted by Judge Cooks: "How can it be any less so for these surviving legitimate biological children given up for adoption?"

It may well be that a child-given-up-in-adoption may not incur the same degree of damage as another offspring which the decedent was caring for at the time of his death, but the degree of loss is not the controlling factor for entitlement to recovery. That speaks only to quantum which will surely vary according to each child's personal relationship and/or dependency on the deceased parent irrespective of the status of the biological child as illegitimate, legitimate, legitimated, given-in-adoption or of the non-biological adopted child.

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As explained by Judge Cooks, "the legislature took the extra step to insure adopted children, the only non-biological progeny of the decedent, would not be excluded from the meaning of 'child or children.'" Accordingly, there is also no reason to exclude any of the decedent's children, biological or adopted, from the list of beneficiaries entitled to recover for their own loss occasioned by the death of their biological or adoptive parent, and once again, the legislature made clear that the only non-biological progeny of the decedent, his adopted child, is entitled to bring the wrongful death action, too.

Plaintiffs specifically adopt, by reference, the attached dissenting opinions and arguments of Judges Cooks, Conery and Savoie, in *Rismiller, Watts* and *Stewart,* as to the unconstitutionality of depriving children given up in adoption of the right to damages for the death of their biological parents and siblings.

CONCLUSION

Plaintiffs respectfully request that this Court deny Defendants' exceptions of no right of action. In the alternative, Plaintiffs respectfully request that this Court declare that La. Civ. Code arts. 2315.1, 2315.2 and/or 199 are unconstitutional on their face or, alternatively, as applied to them, in violation of La. Const. Art. I, Sections 2 (due process), 3 (equal protection) and 22 (open access to the courts), and the United States Constitution, Art. XIV, Section 1 (due process and equal protection).

Respectfully submitted:

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APPENDIX D — DECISION OF THE SUPREME COURT OF LOUISIANA, DATED FEBRUARY 18, 2019

SUPREME COURT OF LOUISIANA.

NO. 2018-CC-2089

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARDS GOINS,

v.

GEMINI INSURANCE COMPANY, *et al.*

02/18/2019

Applying For Writ of Certiorari and/or Review, Parish of Concordia, 7th Judicial District Court Div. B, No. 49,686 C/W 49,751 C/W 49,832 C/W 49,741; to the Court of Appeal, Third Circuit, No. 17-809 C/W 17-811 C/W 17-81.2

ON WRIT OF CERTIORARI, TO THE COURT OF APPEAL, THIRD CIRCUIT, PARISH OF CONCORDIA

PER CURIAM

Granted. In their application to this court, relators asks us to pass on the constitutionality of La. Civ. Code arts. 2315.1 and 2315.2 insofar as the court of appeal found those articles do not provide a right of action for adopted children to assert wrongful death and survival

actions following the death of a biological parent. Because relators did not raise this claim in the district court, it is not properly before this court. *See Vallo v. Gayle Oil Company, Inc.,* 94-1238 (La. 11/30/94), 646 So.2d 859, 864 ("[t]he long-standing jurisprudential rule of law is: a statute must first be questioned in the trial court, not the appellate courts ...").

However, without expressing any opinion on the merits of relators' constitutional arguments, we find it appropriate to remand this case to the district court to allow relators to amend their petition in an attempt to remove the objection presented by the exception of no right of action. *See* La. Code Civ. P. Art. 934; *Reeder v. North,* 97-0239 (La. 10/21/97), 701 So.2d 1291, 1299.

Accordingly, the writ is granted for the sole purpose of remanding the case to the district court to allow relators to amend their petition in an attempt to state a right of action. In all other respects, the writ is denied.

APPENDIX E — OPINION OF THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT, DATED OCTOBER 3, 2018

316 So.3d 1052

COURT OF APPEAL OF LOUISIANA,
THIRD CIRCUIT

SUCCESSION OF RICHARD STEWART, JR., *et al.*

v.

MARK ISAIAH GORDON, *et al.*

17-812

October 3, 2018, Decided

Opinion

GREMILLION, Judge.

This consolidated matter involves a dispute over who has a right of action to assert survival and wrongful death claims arising out of an auto accident and subsequent death of Richard Stewart Jr. (Stewart) and his minor children.[1] For the following reasons, we find the trial court erred in denying Defendants' exceptions of no right of action pertaining to the survival and wrongful death actions asserted by the Succession of Richard Stewart Jr., Raymond Kelly, and Donna Kelly. We further remand for proceedings consistent with this opinion to allow joinder of an indispensable party.

1. This writ is consolidated with 17-809 and 17-811.

Appendix E

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2015, on U.S. Highway 84 in Concordia Parish, an eighteen-wheeler truck driven by Mark Gordon and owned by Kenneth Boone d/b/a Boone Trucking was involved in a head-on collision with a vehicle being driven by Stewart. Stewart and his two minor children, George Stewart and Vera Cheyenne Stewart, were killed in the accident.

George and Vera Cheyenne were Stewart's biological children from a relationship with Brandi Hardie; however, Stewart and Hardie were never married. At the time of the accident, Raymond and Donna Kelly had custody of Vera Cheyenne, and Jimmy and Tammy Johnese had custody of George.

Stewart had two other biological children who were adults at the time of the accident: Daniel Goins and David Watts. Goins and Watts were born during Stewart's marriage to Lisa Watts Stewart, and they were given up for adoption. Goins was adopted by George and Joyce Goins, who are Stewart's uncle and aunt. Watts was adopted by his maternal grandparents, Mary and Jimmy Watts. At the time of the accident, Stewart and Lisa were physically separated, but they had never legally divorced. It has been alleged that Lisa currently resides in a care facility in another state.

Following the accident, three separate survival and wrongful death actions arising out of Stewart's and the minor children's deaths were filed in the trial court. Two of

these actions involve claims filed by or on behalf Stewart's adult biological children, Goins and Watts, who had been adopted by other family members during their minority.[2] The plaintiffs in the third action are: Stewart's Succession; Stewart's parents, Richard Stewart, Sr. and Vera Stewart; and Raymond and Donna Kelly (collectively, "the Stewart Plaintiffs").[3] All three actions were consolidated in the trial court.

In each of the three actions, Defendants Mark Gordon and Kenneth Boone d/b/a Boone Trucking filed exceptions of no right action, which the trial court denied. In connection with Watts' and Goins' survival and wrongful death actions arising from Stewart's death, the trial court found that:

> the cases of *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436, (1968), and *Turner v. Busby*, 03-3444 (La. 9/9/04), 883 So.2d 412 are persuasive in holding that "it is the biological relationship and dependency which is determinative of the child's rights in these cases, and not the classification into which the child is placed by the statutory law of the State." Thus, the fact that Watts [and Goins]

2. *Khristy Goins Rismiller, Tutrix for Daniel Edward Goins v. Gemini Insurance Company, et al.*, Louisiana 7th Judicial District Court Docket Number 49,686; and *David Watts v. Mark Gordon, et al.*, Louisiana 7th Judicial District Court Docket Number 49,751.

3. *Succession of Richard Stewart, Jr., et al. v. Mark Isaiah Gordon, et al.*, Louisiana 7th Judicial District Court Docket Number 49,832

> w[ere] adopted does not prevent [them] from bringing survival and wrongful death claims for the death of [Mr.] Stewart, [their] biological father.

Further, in connection with Watts' and Goins' survival and wrongful death actions arising from the deaths of their biological half-siblings, George and Vera Cheyenne, the trial court found that the children's mother, Brandi Hardie, had abandoned the children during their minority, and, therefore, in accordance with La.Civ.Code arts. 2315.1 and 2315.2, she was deemed to have predeceased the children. The trial court concluded that Goins and Watts, as biological half-siblings, were allowed to assert survival and wrongful death claims arising out of the children's deaths. No specific reasons for the trial court's denial of Defendants' exceptions of no right of action can be found in the record.

Following the trial court's ruling, Defendants filed three separate writ applications with this court seeking review of the trial court's denial of their exceptions. We granted the writ applications and heard oral argument. This particular writ application involves the trial court's denial of Defendants' exception of no right of action pertaining to the claims of the Stewart Plaintiffs.

ANALYSIS

In *Mississippi Land Co. v. S & A Properties II, Inc.*, 01-1623, pp. 2-3 (La.App. 3 Cir. 5/8/02), 817 So. 2d 1200, 1202-03, we stated:

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> Under La.Code Civ.P. art 927, a defendant may raise the peremptory exception of no right of action. An exception of no right of action has the function of determining whether the plaintiff has any interest in the judicially enforced right asserted. *St. Jude Medical Office Bldg., Ltd. Partnership v. City Glass and Mirror, Inc.*, 619 So.2d 529 (La.1993). The function of this exception is to terminate the suit brought by one who has no judicial right to enforce the right asserted in the lawsuit. *Yolanda F.B. v. Robert D.R.*, 00-958 (La.App. 3 Cir. 12/6/00); 775 So.2d 1107. The determination of whether a plaintiff has a right of action is a question of law. *Horrell v. Horrell*, 99-1093 (La. App. 1 Cir. 10/6/00); 808 So. 2d 363, *writ denied* 01-2546 (La.12/7/01); 803 So. 2d 971. Accordingly, we review exceptions of no right of action *de novo. Id.*

A survival action "is transmitted to beneficiaries upon the victim's death and permits recovery only for the damages suffered by the victim from the time of injury to the moment of death." *Taylor v. Giddens*, 618 So.2d 834, 840 (La.1993). Survival actions are governed by La.Civ. Code art. 2315.1, which states:

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A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.

C. The right of action granted under this Article is heritable, but the inheritance of it neither

> interrupts nor prolongs the prescriptive period defined in this Article.
>
> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

A wrongful death action is a separate action that "does not arise until the victim dies and it compensates the beneficiaries for their own injuries which they suffer from the moment of the victim's death and thereafter." *Taylor*, 618 So.2d at 840. Louisiana Civil Code Article 2315.2 provides as follows with respect to a wrongful death action:

> A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. The right of action granted by this Article prescribes one year from the death of the deceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

Appendix E

Claims Asserted by Raymond and Donna Kelly

At the time of the accident, the Kellys had legal custody of Vera Cheyenne. Neither La.Civ.Code art. 2315.1 nor 2315.2 contemplate the legal custodian of a minor to be within a class of persons with a right to assert a survival or wrongful death action arising from the minor child's death. Therefore, the trial court erred in denying Defendants' exceptions as to Raymond and Donna Kelly's claims.

Claims Asserted by Richard Stewart Sr. and Vera Stewart

A. Survival Action and Wrongful Death Claims of Biological Children Given Up for Adoption

Preliminary to the claims of the Stewarts, we will address the issue of what, if any, rights Goins and Watts have as biological relations of the deceased who were given up for adoption. For the reasons that follow, we find that Goins and Watts have no assertable claims for their biological father's death nor their biological half-siblings' deaths; therefore, the trial court erred in denying Defendants' no rights of action as to these claims made by Watts and Goins.

It has long been held that children given up in adoption are divested of their legal rights except as to those relating to inheritance. *See* La.Civ.Code art. 199. Survival actions and wrongful deaths actions are not part of an inheritance. *See Domingue v. Carencro Nursing Home, Inc.*, 520 So.2d 996 (La.App. 3 Cir. 1987), *writ denied*, 522 So. 2d

565 (La.1988). Survival and wrongful deaths actions are statutorily created remedies in tort exclusively available to certain listed beneficiaries. *Nelson v. Burkeen Const. Co.*, 605 So. 2d 681 (La.App. 2 Cir. 1992). Children given up for adoption lose their legal rights to bring claims under La.Civ.Code. arts. 2315.1 and 2315.2. *Domingue*, 520 So.2d 996. *See also Hernandez v. State, DOTD*, 02-162, 02-163 (La.App. 4 Cir. 10/16/02), 841 So. 2d 808, *writs denied* , 03-261, 03-307 (La. 4/25/03), 842 So. 2d 399, 842 So. 2d 399.

B. Wrongful Death and Survival Action Arising out of Stewart's Death

Stewart's parents, Richard Stewart, Sr. and Vera Stewart ("the Stewarts") have a right to assert a survival action and a wrongful death action arising out of Stewart's death only if he left no surviving spouse or children. La.Civ.Code arts. 2315.1(A)(2) and 2315.2(A)(2). Stewart was survived by Lisa Watts Stewart, to whom he was legally married. Therefore, the Stewarts are precluded from asserting wrongful death and survival actions.[4]

C. Wrongful Death and Survival Action Arising out of the Children's deaths.

The Stewarts, who are the grandparents of the George and Vera Cheyenne, have a right to assert survival and

4. Although immaterial to whether the Stewarts have wrongful death or survival action claims because Stewart was survived by a legal spouse, the issue of whether Goins and Watts, who were given up for adoption during their minority, have survival and/or wrongful deaths claims in addition to those of their biological mother, Lisa Watts Stewart, is addressed.

wrongful death actions arising out of their deaths only if the children left "no spouse, child, parent, or sibling surviving." La.Civ.Code. arts. 2315.1(A)(4) and 2315.2(A)(4). The parties do not suggest that the children's father survived the children. Further, as previously noted, the children given up for adoption, Watts and Goins, have no assertable claims. It is, however, undisputed that the children's biological mother, Brandi Hardie, is living; nevertheless, the trial court found that she had abandoned the children as contemplated by La.Civ.Code. arts. 2315.1(E) and 2315.2(E), and therefore it considered Hardie to have predeceased the children. Although there was significant evidence suggesting that Hardie did abandon her children, she was not made a party to the proceeding. As an indispensable party she must be joined and cited and served with notice and given an opportunity for a hearing on this issue. La.Code Civ.P. arts. 644 and 645. If, after the hearing, the trial court finds that Hardie has abandoned her children, the Stewarts would have a right to pursue the survival and wrongful death claims.

The Succession's Claims

A. Wrongful Death Actions Arising out of Stewart's and the Children's Deaths:

The Succession of Richard Stewart, Jr. asserted wrongful death claims arising out of Stewart's and the minor children's deaths. The Succession is not within the express classes of persons entitled to bring a wrongful death action under La.Civ.Code art. 2315.2. Therefore, Defendants' exceptions of no right of action should have been granted as to these claims.

B. Survival Actions Arising out of Stewart's and the Children's Deaths:

The Succession also asserted a survival action under La.Civ.Code art. 2315.1 arising out of Stewart's and the children's deaths. A succession, through its representative, has a right to assert a survival action only "in the absence of a beneficiary set out in [La.Civ.Code. art. 2315.1(A)]." La.Civ.Code. art. 2315.1(B). Lisa Watts Stewart has the right to assert a survival action for Stewart's death; therefore, the Succession is precluded from asserting a claim. Hardie has a survival action claim if it is found that she has not abandoned the children. If she has abandoned them, the claim belongs to the grandparents, the Stewarts. Thus, the Succession has no claims for survival actions for Stewart, George, or Vera Cheyenne, and Defendants' exceptions as to these claims should have been granted.

CONCLUSION

Lisa Stewart Watts is the only party with viable claims for a survival action and wrongful death claim for the death of Richard Stewart, Jr. We remand to the trial court in order that Brandie Hardie be joined as an indispensable party for a determination of whether she abandoned the children. If she abandoned the children, Richard Stewart, Sr. and Vera Stewart are the proper parties to assert the survival and wrongful death actions for the deaths of George Stewart and Vera Cheyenne Stewart.

Accordingly, we grant Defendants' writ application, make it peremptory, and reverse the trial court's denial

of Defendants' exceptions of no right of action as to the claims asserted by the Succession of Richard Stewart, Jr., Raymond Kelly, Donna Kelly, and Richard Stewart Sr. and Vera Stewart as it pertains to wrongful death and survival action claims for Stewart. Costs of these proceedings are assessed to the Succession of Richard Stewart, Jr., Raymond Kelly, and Donna Kelly.

WRIT GRANTED AND MADE PEREMPTORY; EXCEPTIONS OF NO RIGHT OF ACTION GRANTED IN PART; REMANDED FOR FURTHER PROCEEDINGS.

COOKS, J. Concurs in part and dissents in part.

The majority attempts to remove Daniel Edward Goins (Goins) and David Watts (Watts), decedent's surviving children given up for adoption, from the list of beneficiaries expressly included by the legislature in the survival and wrongful death actions provided in La.Civ.Code articles 2315.1 and 2315.2 respectively. It does this while readily acknowledging that such children are entitled under our law to inherit from their biological parent as well as their adopted parent. As I explain more fully below, I cannot imagine any reason nor rationale to exclude legitimate biological children of a decedent from recovering these types of damages when the legislature did not, and in my view could not do so under the settled decisions of the United States Supreme Court and the Louisiana State Supreme Court, as well as the applicable provisions of the Louisiana Civil Code. The majority also improperly denies these children their right to recover

damages for the loss of their half-siblings in the absence of any surviving spouse, child or parent, contrary to the law and jurisprudence. La.Civ.Code art. 2315.1(A)(3); La.Civ. Code art. 2315.2(A)(2); and *Gibbs v. Delatte*, 05-821 (La. App. 1 Cir. 12/22/05), 927 So. 2d 1131, *writ denied*, 06-198 (La. 4/24/06), 926 So. 2d 548.[1] *See also* La.Civ.Code art. 199. It remains to be seen whether Brandie Hardie abandoned her children thus prompting us to remand the case for the reasons stated by the majority. In the event the trial court finds she abandoned her children and would therefore be precluded from recovering under the survival and wrongful death Articles, then these half-siblings would be entitled to proceed.

Children-given-in-adoption are among the named beneficiaries who enjoy the right to bring an action under La.Civ.Code arts. 2315.1 and 2315.2 for the death of their biological father and half-siblings. Louisiana Civil Code Article 2315.1(emphasis added), entitled "Survival Action" provides in pertinent part:

> A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

---

1. The words "brother" and "sister" as denoted in [La.Civ.Code] arts. 2315.1 and 2315.2 include half-brothers and half-sisters. *See Ledet v. State, Dep't of Health and Human Res.*, 465 So.2d 98, 102 (La.App. 4 Cir.), *writ denied*, 468 So. 2d 1211 (La.1985). *Gibbs*, 927 So. 2d at 1139-40.

> (1) The **surviving spouse and child or children of the deceased**, or either the spouse or the child or children. . .
>
> (3) The **surviving brothers and sisters of the deceased**, or any of them, if he left no spouse, child, or parent surviving. . .
>
> B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A. . .
>
> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

Louisiana Civil Code Article 2315.2(emphasis added), entitled "Wrongful Death Action" provides in pertinent part:

> A. If a person dies due to the fault of another, suit may be brought by the following persons

> to recover damages which they sustained as a result of the death:
>
> (1) The **surviving spouse and child or children of the deceased**, or either the spouse or the child or children . . .
>
> (2) The **surviving brothers and sisters of the deceased**, or any of them, if he left no spouse, child, or parent surviving. . .
>
> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

The meaning of the simple words "child or children" seem clear enough to me, but the legislature does not leave us to our own definition of such "terms of law." In Book III, Title XXV of the Civil Code, under the heading "Of the Signification of Sundry Terms of Law Employed in This Code" Article 3506 (emphasis added) specifically provides:

> Whenever the terms of law, employed in this Code, have not been particularly defined therein, **they *shall* be understood as follows:**

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. . .

> 8. Children. Under this name are included those persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line.
>
> A child born of marriage is a child conceived or born during the marriage of his parents or adopted by them. . .

In both La.Civ.Code Article 2315.1(D) and 2315.2(D) the legislature provides that the word "child" as used in these articles, along with other enumerated terms of consanguinity, "include[s] "a child by adoption." This extra provision makes no change in the definition of child(ren) provided in La.Civ.Code art. 3506(8) but merely repeats the definition including that term in the list of other terms that are not defined in La.Civ.Code Art. 3506, i.e "brother, sister, father, mother, grandfather, and grandmother." Thus, by the express provision of the Civil Code the term of law "child or children" as used in La.Civ.Code arts. 2315.1 and 2315.2 "**shall be understood**" to mean **children born of marriage**. The legislature in La.Civ.Code art. 3506 does not except or remove children born of marriage given up for adoption from inclusion in this "term of law" and this court is without authority to do so. It is worthy of note that, as the comment to La.Civ.Code art. 3506 points out, in 1979 the legislature changed the definition of children to exclude illegitimate children. Subsequently, the legislature repealed that change. The article was last

amended in 2004 and to date there has been no change to the article to exclude children-given-in-adoption. There is no question here that both Goins and Watts are children born of the marriage between Richard Stewart, Jr. and Lisa Watts Stewart. The majority acknowledges this fact. For me, the inquiry should end here, but alas the majority travels a different path.

The majority says: "[i]t has long been held that children given up in adoption are divested of their legal rights except as to those relating to inheritance," citing La.Civ.Code art. 199, and a number of appellate court cases in support of that proposition. This perfunctory summation of the law ignores landmark United States Supreme Court decisions, Louisiana State Supreme Court decisions, and relies on the language in the prior version of the Civil Code Article (La.Civ.Code art. 214) regarding the effect of adoption which stated: "... the adopted person and his lawful descendants are relieved of all of their legal duties and divested of all of their legal rights with regard to the blood parent or parents and other blood relatives, except the right of inheritance from them." *Nelson v. Burkeen Const. Co.*, 605 So. 2d 681, 683 (La.App. 2 Cir. 1992), *writ denied*, 98-2433 (La. 11/20/98), 729 So. 2d 558. The current Civil Code provision setting forth the effect of adoption is found in La.Civ.Code art. 199 (emphasis added), which replaced the previous language with the following:

> Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is

> terminated, *except as otherwise provided by law.* The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.[2]

The Comments to La.Civ.Code art. 199 (emphasis added) note that *"[a]mong the exceptions* to the severance of the *legal relationship*" are the right of inheritance; retention of the legal relationship between the adopted child and his legal parent who is married to the adoptive parent; and the right of grandparents (parent of the legal parent) to have visitation with the child. These are only some of the *exceptions* to the effect of the termination of the "legal relationship" resulting from adoption. The majority's position ignores the qualifier "except as provided by law." The legislature has expressly "provided by law" the beneficiaries permitted recovery in the survival and wrongful death actions. Both La.Civ. Code art. 2315.1(A)(1) and La.Civ.Code art. 2315.2(A)(1) specifically provide that the "surviving spouse and **child or children of the deceased**" are first in preference to recover damages under these provisions. No distinction is made regarding the biological child or children of the decedent as legitimate, illegitimate, legitimated, and/or children-given-in-adoption. Moreover, the legislature *specifically includes the only non-biological progeny of the decedent by adding a provision to expressly include adopted children*. The article also includes an express

2. Louisiana Civil Code Article 178 defines filiation as: "... the legal relationship between a child and his parent."

prohibition against a father or mother who has abandoned a deceased "child" "during his minority" from asserting either a survival action or wrongful death claim for such child. Presumably this would include *any* deceased child of the parent whether they were abandoned by being given up in adoption or by simply not providing any support for the child for the requisite period of time. This provision insures equal treatment to *all children* abandoned by their biological parent(s) without reference to other laws. Additionally, La.Civ.Code art. 2315.1(B) specifically provides for an action by the decedent's estate, in the absence of a surviving spouse, child, mother, father, or sibling. This is so because the survival action recognizes recovery for damage suffered by the decedent which, though it might not be ascertained until after the person's death, is nonetheless part of his/her patrimony. Even the majority acknowledges adopted children enjoy the right to inherit from their biological parent. These children also enjoy the right to inherit from their half-siblings. *See* La.Civ.Code art. 199. It is the prerogative of the legislature to provide for devolution of a person's estate by means other than through succession proceedings.[3] It is not within their authority to legislatively deny the right to accede to the decedent's property accorded all children of a decedent, including, by specific legislation, children-given-in-adoption for to do so would run afoul of our state and federal constitutional right to equal protection under

3. Louisiana law provides for means of other types of property of the decedent to devolve to his family outside of succession proceedings such as life insurance proceeds.

the law.[4] The legislature makes no such attempt in the survival and wrongful death provisions of the Civil Code and the majority errs in making it so.

Louisiana Civil Code Article 2315.1 provides a unique means for the legislatively created claim of the decedent to devolve to his family outside ordinary succession proceedings by designating a hierarchy of beneficiaries which expressly includes any surviving "*child or children*" of the deceased. There is absolutely no indication in the language of Article 2315.1 that indicates the legislature intended to exclude children-given-in-adoption, who are otherwise entitled to inherit the patrimony of their biological parent, from being a beneficiary of this portion

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4. No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

La. Const. art. I, § 3.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

of the decedent's "estate." The article merely provides a mechanism outside the normal succession procedure which legal scholars tell us was devised as a means to encourage the family members left behind to pursue the decedent's claim when he dies either during the pendency of litigation or before the litigation even gets underway. *See* Collin S. Buisson, *Juneau v. State Ex Rel. Department of Health and Hospitals-Killed by the Calendar: A Seemingly Unfair Result but A Correct Action*, 91 Tul. L. Rev. 43 (2017).

In *Jenkins v. Mangano*, 00-790 p. 3 (La. 11/28/00), 774 So. 2d 101, 103(emphasis in original) the Louisiana State Supreme Court, specifically addressed the question of "Who is a *Child* under 2315.2" (The rationale is even more applicable to article 2315.1.):

> In *Chatelain[v. State, DOTD*, 586 So. 2d 1373 (La. 1991)], this court determined that **the critical requirement for classification of a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child**. *Warren v. Richard*, 296 So.2d 813, 814 (La.1974). Once the biological relationship is established, an inquiry must be made as to whether the child is classified as legitimate or illegitimate. Civil Code Art. 178. It is of no consequence that the child is legitimate or illegitimate for

> purposes of deciding whether the child may bring an action under Article 2315, ***all children have the right to bring an action for wrongful death and survival action***. See *Levy v. Louisiana*, 253 La. 73, 216 So.2d 818 (1968).

The supreme court concluded in *Jenkins* that because the "tort victim [was] survived by a *child*" the surviving parents of the victim could not proceed to recover in a survival or wrongful death action even though the child "did not timely file a filiation action." *Jenkins*, 774 So.2d at 105 (emphasis added). The child, said the high court, "is not precluded from raising her existence as a defense as long as the defendant proves, by clear and convincing evidence, the child was acknowledged by the tort victim before death." *Id.* In *Warren v. Richard*, 296 So.2d 813, p. 815 (La. 1974) our state supreme court faced the question "can an illegitimate child recover for the wrongful death of her biological father when, at the same time, she is also the legitimate child of another man under the law?" The supreme court answered in the affirmative, constrained, it said, by the controlling decisions of the United States Supreme Court. We are no less constrained by these decisions of the highest court in the land and in this state. The supreme court explained that "**it is the dual paternal parentage of this child—one father created by nature, another created by law**—which poses the problem" to be resolved. *Id.* The present case presents the same problem for resolution—dual paternal parentage of the child—one father created biologically "by nature" and one

"created by law"—adoption. The court in *Warren* included a thorough review of the decisions of the United States Supreme Court mandating the constitutional outcome of the court's decision and it is worth quoting at length the cases explained therein:

> In applying the Equal Protection Clause of the United States Constitution, the United States Supreme Court decided in a case where an illegitimate child was suing for damage for the wrongful death of her mother, 'that it is invidious to discriminate against them (illegitimate children) *when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.*' In this holding, striking down Louisiana's statutory scheme which had theretofore barred recovery by illegitimate children for the wrongful death of their parents, **the Court has, as a constitutional proposition, apparently substituted a biological classification for the legal classification** Louisiana had long observed. *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).
>
> Again in *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968), handed down on the same day as the *Levy* Case, the United States Supreme Court decided that it would be a denial of equal protection to deny a mother the right to recover for the wrongful death of her

> child simply because the child was born out of wedlock. The opinion declared: **'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue.'**

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), followed four years after. There the United States Supreme Court approved a claim for workmen's compensation benefits of a dependent, unacknowledged, illegitimate child which had been denied by the Louisiana courts. *Stokes v. Aetna Casualty and Surety Co.*, 232 So.2d 328 (La.App.1969), aff'd 257 La. 424, 242 So.2d 567. In an opinion authored by Mr. Justice Powell it was held that, by relegating the unacknowledged illegitimate to a lower priority in the recovery scheme, the Louisiana Workmen's Compensation Act thereby denied him equal protection of the law. The Court stated the basis for its decision thusly:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, *no child is responsible for his birth* and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.

Finally, in its latest decision on the subject in *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973), the United States Supreme Court said:

> We have held that under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968). Similarly, we have held that illegitimate children may be not (sic) excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits *accorded children generally.*

To say that the child Iris had no right to recover for her biological father's wrongful death because the law presumed her to be the legitimate child of another man would run counter to the principles established in the decisions of the United States Supreme Court referred to above and **would ignore the existence of the child's biological father**.

For the purpose of this decision, it is not necessary that we determine to which class of illegitimate filiation

this child belongs. **It suffices that we simply determine that the child is in fact the biological child of the decedent** David Lee. And, since we see no real dispute on this point, the case is in a posture for decision. *Babineaux v. Pernie-Bailey Drilling Co. et al.*, 261 LA. 1080, 262 So. 2d 328 (1972). *The fact that the law considers the child to be the legitimate child of Albert Gray will not alter the result.* La. Civil Code art. 184.

Here the child was registered as the child of the decedent, recognized as such by him, educated in his name and sworn to be his child by the mother. The fact that the child is by Louisiana's statutory scheme made the legitimate child of Albert Gray cannot deprive her of a right which illegitimate children generally may have for the wrongful death of their biological fathers. **As we understand the rationale of the decisions of the United States Supreme Court, it is the biological relationship and dependency which is determinative of the child's rights in these cases, and not the classification into which the child is placed by the statutory law of the State**.

The argument is made that this result will accord more rights to this child than are ordinarily accorded the legitimate child—that she will be able to recover for the death of her biological father as well as for the death of Albert Gray, because the law deems her his legitimate offspring. However, this concept is not unique to our law. It is specifically provided that the adopted child, upon his adoption, is not divested of his right to inherit from his blood parents while at the same time he inherits from the adoptive parent. La. Civil Code art. 214.

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We are not umindful of the problems a logical extension of these holdings may create, such as a child in these circumstances recovering from both fathers for support and maintenance, or, conversely, requiring the child to support both fathers in a proper case. La. Civil Code arts. 227 , 229. ***But we are influenced in this decision by the constitutional principles announced by the United States Supreme Court to which we must adhere***.

Warren, 296 So. 2d 816-17.

The same rationale applies here. The dual parentage question is answered in the affirmative for the same reasons. These children-given-in-adoption, like Iris, had **one father created by nature, another created by law**, and according to the United States Supreme Court, and our state supreme court, the blood relationship of these children and their biological father is the "determinative factor" in deciding whether "child" as used in La.Civ. Code art. 2315.1 and 2315.2 includes surviving children-given-in-adoption as beneficiaries entitled to recover for the loss of their parent. Consistent with this rationale is the definition of children as a term of law used in the Civil Code provided in La.Civ.Code art. 3506 which includes children born of marriage. It is not the child-given-in-adoption's fault it was born, and it is not its fault it was given up for adoption any more than it is the illegitimate child's fault it was born out of marriage and not legitimated by its parent. I find it deeply troubling that under the majority's holding, a *legitimate biological child* given up for adoption would not enjoy the same rights as an

illegitimate biological child who is also a legitimate legal child of another parent, for the loss of the same biological parent. I believe such an outcome is not constitutionally sound in light of the United States Supreme Court's and Louisiana State Supreme Court's application of the Equal Protection Clause of the U.S. Constitution and our state constitution in the cases discussed herein. The two high courts tell us that the biological blood tie is important between all biological offspring and their deceased parent. The language of La.Civ.Code arts. 2315.1 and 2315.2 cannot be read to exclude a child-given-in-adoption when the legislature made no such provision. The inclusive language "**surviving child or children of the deceased**" encompasses *all* of the surviving biological children of the decedent—legitimate, illegitimate, legitimated, and given-in-adoption—and the non-biological adopted child. *See Jenkins*, Supra. and La.Civ.Code art. 3506(8).

Louisiana Civil Code Article 2315 provides the foundation for recovery of damages for "every act whatever of man that causes damage to another." It also provides:

> Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

La.Civ.Code art. 2315(B).

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Louisiana Code of Civil Procedure Article 801 provides for the substitution of a legal successor for a deceased party:

> When a party dies during the pendency of an action which is not extinguished by his death, his legal successor may have himself substituted for the deceased party, on ex parte written motion supported by proof of his quality.
>
> As used in Article 801 through 804, "legal successor" means:
>
> > (1) The survivors designated in Articles 2315.1 of the Civil Code, if the action survives in their favor; and
> >
> > (2) Otherwise, it means the succession representative of the deceased appointed by a court of this state, if the succession is under administration therein; or the heirs and legatees of the deceased, if the deceased's succession is not under administration therein.

Thus, the provisions of the Civil Code and the Code of Civil Procedure are internally consistent when it comes to the treatment of surviving beneficiaries and takes into consideration the individuals covered in both the survival and wrongful death actions. The majority's prohibition against recovery by children-given-in-adoption

for the damages done to their biological parent, or the loss personally suffered as the result of their biological parent's death (loss of consortium, society, etc.), runs afoul of this scheme and will produce inconsistent results. For example, in the case in which the child-given-in-adoption's parent pursuing litigation involving a heritable right or damage occasioned other than by an offense or quasi offense provided in article 2315.1 and 2315.2, dies during the course of litigation, such child, as an heir of decedent recognized by law, would be a proper party to be substituted in the litigation under La.Code.Civ.P. art 801. The majority must be in agreement with this assessment as it acknowledges that a child-given-in-adoption inherits from its biological parent. But, according to the majority's interpretation of the term "surviving child or children" in Articles 2315.1 and 2315.2, this same child would be precluded from recovering for its parent's loss, or rather from continuing the pursuit of a survival claim for injury resulting in death under Article 2315.1, and from pursuing its own personal loss as the result of the wrongful death of its parent under Article 2315.2. Such an arbitrary and inequitable result is not consistent with constitutional notions of equal protection and fundamental fairness. But the law, properly applied, results in no such inequity or disparity. The cases cited by the majority opine that the legislature could have expressly listed children-given-in-adoption in Articles 2315.1 and 2315.2 had it intended to include such children in the list of beneficiaries. In my view, the legislature could not have been clearer when it provided that the "surviving spouse and **child or children of the deceased**" constituted the primary beneficiary(ies) priming all others. Likewise, the legislature could not

be clearer in the express definition of the legal term "children" when used in the Civil Code as provided in La.Civ.Code art. 3506(8). The United States Supreme Court, as recognized by our state supreme court in *Warren* in 1974, had made it clear, prior to the legislative change in 1986 that enacted articles 2315.1 and 2315.2 legislatively establishing the survival and wrongful death actions that, as the *Jenkins* court put it "**all children have the right to bring an action for wrongful death and survival action**," *Jenkins*, 774 So.2d at 103. The courts did not include any modifier or exception to that pronouncement. It is, as the United States Supreme Court has held, the biological relationship that is determinative of a child's right to recover for the loss of its blood parent, *See Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L. Ed. 2d 436 (1968); *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L. Ed. 2d 441 (1968); and *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 92 S.Ct. 1400, 31 L. Ed. 2d 768 (1972), "not the classification into which the child is placed by the statutory law of the State." *Warren*, 296 So.2d at 816-817, relying on *Levy, Glona* and *Weber*. And as the state supreme court said: "to say that [a] child [has] no right to recover for her biological father's wrongful death because the law presumed her to be the legitimate child of another man would run counter to the principles established in the decisions of the United States Supreme Court [] and **would ignore the existence of the child's biological father**." *Id.* How can it be any less so for these surviving legitimate biological children given up for adoption? It may well be that a child-given-up-in-adoption may not incur the same degree of damage as another offspring which the

decedent was caring for at the time of his death, but the degree of loss is not the controlling factor for entitlement to recovery. That speaks only to quantum which will surely vary according to each child's personal relationship and/or dependency on the deceased parent irrespective of the status of the biological child as illegitimate, legitimate, legitimated, given-in-adoption or of the non-biological adopted child.

It may be of further help in understanding the correctness of my position to examine the legislative history and purpose of La.Civ.Code arts. 2315.1 and 2315.2.

> In order to fully understand the purpose of an article 2315.1 survival action, it is helpful to look at two revisions. In the 1960 Code revisions, the legislature, for the first time, made a distinction between property and personal damages. The Code allowed for the right of action and proceeds from property damage suits to travel through ordinary successions law, but the right to maintain the survival action for personal damages was only given to an exclusive list of people laid out in article 2315. This meant that there could be a "split" created in the cause of action. For example, if A were in a car crash and began a suit for both damages to his car and to his person but died soon after, the case would be split. The suit for damages to his property would go to his heirs through normal successions law, but the suit for damages to his person would be given to

the specific beneficiaries listed in article 2315. However, this changed with the 1986 revisions to the Civil Code.

In the 1986 revisions, the legislature revised the Code, so that the separate rights to property damage and personal damage no longer exist. Through the creation of article 2315.1, the legislature made clear that rights of action for damage to both the decedent's person and property were to be completely separate from other successions law and instead should be governed by article 2315.1. Therefore, the legislative history of survival actions would seem to indicate that the legislature did not intend to have the proceeds from the survival action suit go through the succession, but rather go to the descendents listed in article 2315.1 . . .

Louisiana courts have held that survival actions and wrongful death actions are ruled by specific laws, not by general laws of successions and inheritance. In *Estate of Burch v. Hancock Holding Co.*, the Louisiana First Circuit stated that "wrongful death and survival actions ... are not subject to the law[s] of marriage, of parent and child, of inheritance, [and are not] required to conform to civil law concepts." The court went on to state that "[n]either the survival action nor the wrongful death action provide[s] rights that are transmitted from the tort victim to the victim's heirs in an inheritance sense"—

> meaning neither right "pass[es] through the victim's succession." Instead, both rights are passed down to the "specified survivors" of a victim's family via the corresponding Civil Code article (i.e., article 2315.1 or 2315.2). The court held that when considering a survival action, courts should look to the Civil Code, not other areas of law.
>
> This type of carving out is not unique to survival actions and wrongful death actions. There are many other examples where the Legislature has specifically excluded certain property or rights from passing through the succession and being governed by ordinary successions law. For example, life insurance payments that are payable to a named beneficiary are excluded from the succession of the decedent.

Collin S. Buisson, *Juneau v. State Ex Rel. Department of Health and Hospitals-Killed by the Calendar: A Seemingly Unfair Result but A Correct Action*, 91 Tul. L. Rev. 43, 45-47 (2017).

In *Juneau v. State ex rel. Department of Health & Hospitals*, 15-1382 p. 8 (La. App. 1 Cir. 7/7/16), 197 So. 3d 398, 403, *writ denied*, 16-1490 (La. 11/15/16), 209 So. 3d 781, the first circuit agreed with this analysis:

> The proceeds from a survival action should be excluded from the estate of the decedent if there exists a survivor under Article 2315.1.

Indeed, it is clear ... that the deceased may have property rights that do not go through the "succession process." Furthermore, Article 801 of the Louisiana Code of Civil Procedure specifically provides that a "legal successor" includes *survivors* designated in Article 2315.1 of the Civil Code, when the action survives in their favor. Albeit, one should consider the intent of the deceased as clearly expressed in his last will and testament, but the United States Supreme Court, in *Boggs v. Boggs*, [520 U.S. 833, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997)], held that legislative acts (whether federal or state) govern the disposition or transmission of certain assets, regardless of a testator's attempt to divert them.

The provisions of Article 2315.1 point to the conclusion that the legislature intended for the survival action to be "self-contained" and unaffected by the succession distribution laws. The cases involving this situation clearly hold that a right of action does not pass through a victim's succession to be transmitted to his heirs as an inheritance. Instead, the cause of action devolves exclusively upon the specially designated classes of beneficiaries or survivors set forth in Article 2315.1.

Warren L. Mengis, *The Article 2315.1 Survival Action: A Probate or Non-Probate Item*, 61 La. L. Rev. 417, 422 (2001) (emphasis added) (footnotes omitted).

Thus, it should be clear, the legislature did not enact La.Civ.Code arts. 2315.1 and 2315.2 with any intention of changing Louisiana's inheritance laws pertaining to children-given-in-adoption, but merely established a separate mechanism for beneficiaries to directly lay claim for both the damages due their biological parent as part of his patrimony and damages incurred individually by virtue of the loss of one's own flesh and blood regardless of legal definitions of the "relationship" of child and parent at the time of the parent's death.

> There are key differences between "survival actions" and "wrongful death actions," including how and why they are passed on to descendants. Both actions result from a tortious incident, but the damages awarded are meant to compensate for different types of injury. A survival action, codified in article 2315.1, is intended to "compensate[] the victim for the pain and suffering he endures until the time of his death." A survival action "does not die with the victim" and is instead passed down to specific descendants via article 2315.1. However, in order to be able to recover any proceeds from a survival action, the "beneficiary or heir *must survive* the tort victim."
>
> Conversely, a wrongful death action, codified in article 2315.2, is not intended to compensate the now deceased party who experienced the physical harm. It is intended to give monetary compensation to specific family members who

> have suffered their own loss (loss of financial support, loss of consortium, etc.) through the death of the injured party. In a wrongful death action, the family members are attempting to recover for their own personal loss created by the death of the victim, not for the victim's pain and suffering. Thus, whereas a survival action is created at the time of the *injury* to the victim, a wrongful death action is only created upon the *death* of the victim.

Buisson, 91 Tul. L. Rev. at 46-7.

As Buisson explains, "survival actions were created to ensure that when a tort victim died, his claim did not die with him" and that it "... belonged to the injured party and, subsequent to his or her death, is brought by a listed person who is substituted for the decedent in accordance with La. C.C. art. 2315.1." Buisson, 91 Tul. L. Rev. at 50. Further, as he points out "[t]he wrongful death action [] is particular to each designated member of the beneficiary class. The value of the claim will vary, depending upon the relationship of the claimant to the decedent." *Id.* There would be no legal basis to exclude any legal heir from recovery in the survival action and there is no indication the legislature intended to do so. In fact, I reiterate, the legislature took the extra step to insure adopted children, the only non-biological progeny of the decedent, would not be excluded from the meaning of "child or children." There is also no reason to exclude any of the decedent's children, biological or adopted, from the list of beneficiaries entitled to recover for their own

loss occasioned by the death of their biological or adoptive parent, and once again, the legislature made clear that the only non-biological progeny of the decedent, his adopted child, is entitled to bring the wrongful death action, too. The majority's opinion offers no rationale or basis for reading into these code provisions language that is simply not there nor does it offer a reasoned explanation as to why it should ignore the United States Supreme Court and our State Supreme Court's fundamental proposition that it is the biological relationship that controls matters of dual parentage, *Warren*, Supra., and their express holdings that "**all children have the right to bring an action for wrongful death and survival action.**" *Jenkins*, 774 So.2d at 103. For these reasons I dissent from the majority's holding that children-given-in-adoption are excluded from recovery for damages under La.Civ.Code arts. 2315.1 and 2315.2. I also dissent from the majority's holding that children-given-in-adoption are not entitled to pursue survival and wrongful death actions for their half-siblings. They are most certainly entitled to bring such actions in the absence of a surviving "spouse, child, or parent." La.Civ.Code art. 2315.1(A)(3); La.Civ.Code art. 2315.2(A)(2); and *Gibbs*, 927 So.2d at 1139-40. *See also* La.Civ.Code art. 199.

I concur with the majority's finding that Raymond and Donna Kelly, as legal custodians of the minor child Vera Cheyenne, enjoy no right of action arising from the minor child's death. Though their loss may indeed be grievous they are not among the named beneficiaries permitted recovery in La.Civ.Code art. 2315.1 and 2315.2. I also concur with the majority's finding that Richard Stewart,

Sr. and Vera Stewart are precluded from bringing either a survival or wrongful death action arising out of Stewart Jr.'s death, for the reason that he is survived by both a spouse and children. I further concur with the majority's finding that the case must be remanded as to Brandie Hardie because, as the majority finds, she is an indispensable party who must be joined, cited, served with notice and accorded the right to be heard. However, I disagree that a finding that Hardie abandoned her children would entitle the Stewarts to make a claim because I believe the decedent's surviving children-given-in-adoption have a right to recover for the deaths of their half-siblings and they prime any claim by the Stewarts.

I additionally concur with the majority's finding that the Succession of Richard Stewart, Jr. has no right to assert a wrongful death claim under the provisions of La.Civ.Code art. 2315.2. As the majority points out, the Succession is not one of the legislatively recognized beneficiaries permitted recovery. The decedent enjoyed no right to this type of recovery as it speaks only to a loss suffered by others. I also concur with the majority's finding that the Succession of Richard Stewart, Jr. is precluded from asserting a survival action but for the additional reason that the surviving children-given-in-adoption, as well as the surviving spouse, preclude the succession's ability to make a claim.

For the reasons stated, I respectfully concur in part and dissent in part.

SAVOIE, J., concurs in part, dissents in part, and assigns the following reasons:

I agree with the majority's conclusion that the trial court erred in denying the Defendants' exceptions as to (1) the wrongful death and survival actions filed by the Kelly's and (2) to the Succession's wrongful death actions. However, I disagree with the analysis and/or the conclusions with respect to the remainder of the majority's opinon as follows:

Claims Asserted by the Stewarts

A. Wrongful Death and Survival Action Arising out of Mr. Stewart's Death

I disagree with the majority's conclusion that Mr. Goins and Mr. Watts, who are Mr. Stewart's biological children, do not have a right to assert survival and wrongful death actions arising out of their father's death because they were given up for adoption. Rather, for the following reasons, I would find that they are "children of the deceased," as contemplated by the code articles at issue, and, as a result, have a right to assert a wrongful death and survival action arising out of their father's death.

The Louisiana Civil Code is instructive on the interpretation of laws. "When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La.Civ.Code art. 9. "The words of a law must be given their **generally prevailing meaning**." La.Civ.Code art. 11 (emphasis added). "Laws on the same

subject matter must be interpreted in reference to each other." La.Civ.Code. art. 13.

Therefore, the first consideration in interpreting La.Civ.Code arts. 2315.1(A)(1) and 2315.2(A)(1) is the language of the code articles themselves. Specifically at issue is the phrase "child or children of the deceased" used therein. A common, or generally prevailing meaning, of this phrase would clearly be a deceased's biological child or children. *See Hunt v. New Orleans Ry. & Light Co.*, 140 LA. 524, 73 So. 667 (La.1916). *See also, Jenkins v. Mangano*, 00-790, p. 3 (La. 11/28/00), 774 So. 2d 101, 103, where the Louisiana Supreme Court recognized "that the critical requirement for classification of a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child." While both La.Civ.Code arts. 2315.1 and 2315.2 include a paragraph that expressly *expands* the term "child or children of the deceased" to include non-biological children that the deceased adopted, there is no language in the code articles that *narrows* the term to *exclude* a deceased's biological children by reason of adoption or otherwise.

The next consideration is whether there are any laws on the same subject matter that are helpful in interpreting the articles' use of the phrase "children of the deceased" that would to lead to the exclusion of a deceased's biological children given up for adoption from that definition.

Defendants-Applicants refer to La.Civ.Code art. 199, which states that:

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> Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is terminated, except as otherwise provided by law. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.

"Filiation is the legal relationship between a parent and child." La.Civ.Code art. 178. Defendants-Applicants suggest that, because Mr. Goins' and Mr. Watts' filiation to Mr. Stewart was terminated by virtue of their adoption, they should not be considered "children of Mr. Stewart" for purposes of the wrongful death and surivial code articles. I disagree.

There is no indication within the language of La.Civ. Code arts. 2315.1 and 2315.2 that one must be filiated to the deceased to be considered a "child or children of the deceased." Rather, those code articles suggest that a deceased's biological children, *as well as* those who have been filiated to the deceased by adoption, are considered children of the deceased. If filiation were required for one to be considered a deceased's "child" for purposes of La.Civ. Code arts. 2315.1 and 2315.2, then Paragraph (D) of those articles, which expands "child" to include the deceased's adopted child, would have no independent meaning.

In addition, the Louisiana Supreme Court has recognized that the code articles governing survival and wrongful death actions are sui generis and that it is

improper to look beyond the language of the code articles when interpreting their meaning.

Specifically, the supreme court stated in *Levy v. State Through Charity Hosp. of La.*, 253 LA. 73, 216 So.2d 818, 819 (La.1968) (emphasis added):[1]

> That these rights are wholly the creatures of the Legislature is recognized historically and jurisprudentially. The statute to this extent is **sui generis and is not a law** of marriage, **of parent and child**, or of inheritance, **nor does it conform to the civil law concepts**. *Vaughan v. Dalton-Lard Lumber Co.*, 119 La. 61 [La.1907], 43 So. 926. It is special legislation providing for the survival of a right of action in favor of named classes of survivors and also creating a cause of action in favor of those same classes of persons for wrongful death. *Walton v. Booth*, 34 La.Ann. 913 [(La.1882)].

1. At issue in *Levy* was whether the deceased's illegitimate children were children with a right to assert wrongful death and survival claims. In *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L. Ed. 2d 436 (1968), the United States Supreme Court, referring to equal protection concepts, reversed the Louisiana courts' interpretation that a deceased's "child," as that term was utilized by then-applicable La.Civ.Code art. 2315, did not include a deceased's illegitimate children. Thereafter, the Louisiana Supreme Court rendered an opinion in accordance with the United States Supreme Court's decision. *Levy*, 253 LA. 73, 216 So.2d 818.

Levy, therefore, suggests that there is no reason to look beyond the language of the survival and wrongful death code articles in interpreting "children of the deceased." Since the articles do not refer to filiation concepts to *exclude* those who are otherwise named as having rights of action, filiation is irrelevant to the analysis.

Similarly, in *Hunt v. New Orleans Ry. & Light Co.*, 140 LA. 524, 73 So. 667, the Louisiana Supreme Court declined to apply the definition of children set forth in the civil code's general definitions article[2] when interpreting the applicable survival action article's use of the term "children."[3] The *Hunt* court concluded that the ordinary meaning of the term "children," that is, descendants in the first degree, was applicable to the survival action article, stating:

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2. Louisiana Civil Code Article 3556 was the general definitions article at issue in *Hunt*, and it is a predecessor to the current general definitions article, La.Civ.Code art. 3506. Louisiana Civil Code article 3506 currently states:

> Whenever the terms of law, employed in this Code, have not been particularly defined therein, they shall be understood as follows:
>
> . . . .
>
> (8) Children. Under this name are included those persons born of the marriage, those adopted, and those whose filiation to the parent has been established in the manner provided by law, as well as descendants of them in the direct line.

3. At the time of *Hunt*, La.Civ.Code. article 2315 provided the "minor children or widow of the deceased, or either of them," with a right of action arising out of the deceased's death.

> We may add to the foregoing that, as we understand the matter, it is only when the word 'children,' as used in the Civil Code, is not particularly defined, or does not, when construed with reference to the body of the law and to the immediate connection in which it is used, convey another meaning (in which case it requires no definition), that the definition given in article 3556 may be invoked.
>
> . . . .
>
> Our conclusion is that the word 'children,' whether as used in the Civil Code or elsewhere, ordinarily applies to a distinct class of persons . . . , and as used in the Code, that the word is to be so construed, with reference to the body of that law and to the immediate connection in which it is used, to give it the meaning plainly intended, rather than such a meaning as might be deduced by proceeding upon the theory that the only part of the Code to be considered is the definition contained in art. 3556.
>
> *Id.* at 668.[4]

It is also noteworthy that limiting the interpretation of those who have rights to assert wrongful death and survival actions to the express language of the code

4. At issue in *Hunt*, was whether a deceased's grandchildren had a right of action to assert wrongful death and survival claims.

articles themselves would not necessarily result in providing a parent, who gave a biological child up for adoption, with a valid right or cause of action arising out of that child's death. The code articles adequately address those circumstances by providing: "[A] father or mother who has abandoned the deceased during his minority is deemed not to have survived him." La.Civ.Code. arts. 2315.1(E) and 2315.2 (E).

Defendants-Applicants rely on *Simmons v. Brooks*, 342 So.2d 236 (La.App. 4 Cir. 1977), in suggesting that a parent's biological children who were given up for adoption do not have a right to assert wrongful death and/or survival actions arising out of their biological parent's death. In *Simmons, Id.* at 237, the appellate court found no such right of action stating: "[La.Civ.Code art.] 2315 cannot be isolated from other sections of the Revised Civil Code in interpreting its meaning. . . . Therefore, we consider the effect of [La.Civ.Code art.] 214, which deals with the rights of an adopted child, on the provisions of LSA-R.C.C. Article 2315."

At the time of *Simmons*, La.Civ.Code art. 214 stated that "the adopted person and his lawful descendants are relieved of all of their legal duties and [d]ivested of all their legal rights with regard to the blood parent or parents and other blood relatives, [e]xcept the right of inheritance from them." *See Simmons*, 342 So.2d at 237. The *Simmons* court went on to find that survival and wrongful death actions were not inheritance rights, and therefore, upon adoption, the children were divested of any right to assert wrongful death and survival actions.

I disagree with *Simmons* as its analysis is based on its conclusion that the survival and wrongful death code articles cannot be isolated from other provisions of the code. This analysis is inconsistent with the Louisiana Supreme Court's indication in *Levy*, 253 LA. 73, 216 So.2d 818, that the wrongful death and survival code article(s) are sui generis.

The Defendants-Applicants, and the majority herein, also rely on *Domingue v. Carencro Nursing Home, Inc.*, 520 So.2d 996 (La.App. 3 Cir. 1987), *writ denied*, 522 So. 2d 565 (La.1988), wherein this court found that a deceased's child given up by adoption had no right of action to assert a wrongful death or survival claim. The *Domingue* court reasoned:

> We agree with the defendants' argument [that] *Simmons*, 342 So.2d 236, involved facts virtually identical to the case at hand. . . . The court stated that Article 2315 must be read in conjunction with other sections of the Civil Code in order to assist in its interpretation. The court then looked to La.C.C. art. 214[.]

Id. at 997. However, given my conclusion that *Simmons*, 342 So.2d 236, is inconsistent with *Levy*, 253 LA. 73, 216 So.2d 818, I would also decline to follow *Domingue*, 520 So.2d 996, inasmuch as it relied on *Simmons*.

The *Domingue* court also found relevant to its analysis that the article governing wrongful death and

survival actions prior to its amendment in 1960 recognized that the term children included adopted children and children given in the adoption, but that following the 1960 amendment, the language "given in adoption" was removed. However, I disagree with the *Domingue* court's suggestion that the 1960 amendment's omission of "given in adoption" was an indication that those children were meant to be excluded from the definition of "children of the deceased."

Prior to the 1960 amendment, La.Civ.Code art. 2315 stated (emphasis added):

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it; **the right of his action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them**, and in default of these in favor of the surviving father and mother or either of them, and in default of any of the above persons, then in favor of the surviving blood brothers and sisters, or either of them, for the space of one year from the death. However, should the deceased leave a surviving spouse, together with minor children, the right of action shall accrue to both the surviving spouse and the minor children. The right of action shall accrue to the major children only in those cases where there is no surviving spouse or minor child or children.

> If the above right of action exists in favor of an adopted person, it shall survive in case of death in favor of the children or spouse of the deceased, or either of them, and in default of these in favor of the surviving adoptive parents, or either of them, for the space of one year from the death. However, this right of action shall survive in favor of the blood parent or parents to the exclusion of the adoptive parent or parents when at the time of the adoption the adopted was a major, or emancipated minor whose adoption was effected without the consent of the blood parent or parents evidenced in the act of adoption. In default of these, it shall survive in favor of the surviving blood brothers and sisters of the adopted person, or either of them, for the space of one year from the death.
>
> The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife or brothers or sisters or adoptive parent, or parents, or adopted person, as the case may be.

See 1948 Acts, No. 333 .

The 1960 amendment to La.Civ.Code art. 2315 revised the article to state:

> Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

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The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words 'child', 'brother', 'sister', 'father', and 'mother' include a child, brother, sister, father and mother, by adoption, respectively.

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1960 Acts, No. 30, § 1.

A Louisiana Law Review article following the 1960 amendment, which discusses the purpose of the 1960 amendment, suggests that the revisions to the language defining the classes of beneficiaries who have rights to assert wrongful death claims were intended to simplify the description of those classes, rather than substantively change them:

> Article 2315 was amended at the last session of the legislature so as to effect one important change and **also to simplify and make clearer the classes of persons designated as claimants or beneficiaries**. Formerly, the death of a beneficiary of a wrongful death claim prior to final judgment served to extinguish the claim completely. The right of the beneficiary is by the amendment designated a "property right, which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

Wex S. Malone, *Torts*, 21 La.L.Rev. 78, 81-82 (1960) (emphasis added). As suggested by this article, the only substantive change to the law was the extension of a beneficiary's right to assert a wrongful death claim to certain heirs upon the beneficiary's death.

Therefore, it is my opinion that the 1960 amendment to La.Civ.Code art. 2315 did not eliminate the right of a

child given in adoption to assert a claim arising out of his biological parent's death; rather, it simplified the pre-amendment phrase "the right of his action shall survive in case of death in favor of the children, including adopted children and children given in adoption, or spouse of the deceased, or either of them" by (1) replacing it with "child or children of the deceased," which necessarily includes a biological child given in adoption, and (2) adding a paragraph that expands the term "child" to include a child that the deceased adopted.

Similarly, I would decline to follow *Hernandez v. State, DOTD*, 02-162, 02-163 (La.App. 4 Cir. 10/16/02), 841 So. 2d 808, *writs denied*, 03-261, 03-307 (La. 4/25/03), 842 So.2d 399, which is relied upon by the Defendants-Applicants and the majority. In *Hernandez*, the deceased's biological daughter filed a wrongful death and survival action arising out the deceased's death. At the age of eighteen, the daughter, along with her great aunt, executed a Notarial Act, whereby the aunt adopted the daughter. In recognizing that the adopted daughter had no right of action, the *Hernandez* court cited to *Simmons*, 342 So.2d. 236, and *Domingue*, 520 So.2d 996. Because I disagree with *Simmons* and *Domingue* on this issue, I also disagree with *Hernandez* in this regard.[5]

The majority also concludes that the Stewarts have no right of action under La.Civ.Code arts. 2315.1 and 2315.2

5. Primarily at issue in *Hernandez*, 841 So.2d 808, was whether a declaratory judgment, which was obtained by the daughter after the wrongful death action was initiated, and which nullified the adoption, had any effect on the daughter's right of action.

arising out Mr. Stewart's death because Mr. Stewart's wife is still alive. I agree with the majority in that respect.

In sum, as to the Stewarts' survival and wrongful death claims arising out of Mr. Stewart's death, I concur with the majority's conclusion that the trial court erred in denying Defendants' exceptions as to their claims. However, I would find that their claims are precluded by Mr. Stewart's biological children, Mr. Watts and Mr. Goins, as well as Mr. Stewart's wife.

B. The Stewarts' Wrongful Death and Survivial Action Arising out of their Grandchildren's Deaths.

I agree with the majority's conclusion to remand this matter for the children's mother, Brandie Hardie, to be added as an indispensable party for determination of whether she had abandoned the children as contemplated by La.Civ.Code. arts. 2315.1(E). However, in the event she is found to have abandoned the deceased's children, I would find that Mr. Goins and Mr. Watts, as biological half-siblings of the deceased children, would have the right to assert a wrongful death and survival action arising out of the children's deaths, to the exclusion of the Stewarts. *See Ledet v. State, Dep't of Health and Human Res.*, 465 So.2d 98 (La.App. 4 Cir.), *writ denied*, 468 So. 2d 1211 (La.1985); and *Gibbs v. Delatte*, 05-821 (La.App. 1 Cir. 12/22/05), 927 So. 2d 1131, *writ denied*, 06-198 (La. 4/24/06), 926 So. 2d 548. Therefore, I would find that the trial court erred in denying Defendants' exceptions as to the Stewarts' survival and wrongful death claims arising out of their grandchildren's deaths.

Appendix E

The Succession's Survival Action

I concur with the majority's conclusion that the trial court erred in denying Defendants' exceptions as to the Succession's survival actions arising out of Mr. Stewart's and the children's deaths. However, in my opinion, Mr. Watts and Mr. Goins, who are Mr. Stewart's children, have a right to assert a survival action arising out of Mr. Stewart's death, thereby precluding the Succession's claim. Moreover, in the event the trial court concludes on remand that Brandie Hardie abandoned the deceased children, it is my opinion that Mr. Goins and Mr. Watts, as siblings of the deceased children, have a right to assert a survival action arising out of the children's deaths.

Conclusion

In sum, I concur with the majority's conclusion to grant Defendants' exceptions as to the Stewarts' survival and wrongful death actions arising out of Mr. Stewart's death. However, I would find that Mr. Watts and Mr. Goins have a right to assert these claims.

I disagree with the majority's conclusion to deny the exceptions as to the Stewarts' claims arising out the minor children's deaths. In my opinion, these claims are precluded by Mr. Watts and Mr. Goins in the event that the children's mother, Ms. Hardie, is deemed on remand to have abandoned the children. Therefore, I would grant Defendants' exceptions in this regard.

Appendix E

I further concur in the majority's conclusion to grant Defendants' exceptions related to the Succession's survival action. However, I would find that Mr. Watts and Mr. Goins have a right to assert a survival action arising out Mr. Stewart's death. They also have a right to assert a survival action arising out of the children's death in the event Ms. Hardie is deemed on remand to have abandoned the children.

APPENDIX F — OPINION OF THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT, DATED OCTOBER 3, 2018

COURT OF APPEAL OF LOUISIANA
THIRD CIRCUIT

17-809

KHRISTY GOINS RISMILLER, TUTRIX FOR
DANIEL EDWARDS GOINS

VERSUS

GEMINI INSURANCE COMPANY, *et al.*

October 3, 2018, Decided

ON APPLICATION FOR SUPERVISORY WRITS
FROM THE SEVENTH JUDICIAL DISTRICT
COURT, PARISH OF CONCORDIA, NO. 49,686 C/W
49,751 C/W 49,832, HONORABLE JOHN C. REEVES,
DISTRICT JUDGE

Court composed of Sylvia R. Cooks, Billy H. Ezell, Shannon J. Gremillion, Phyllis M. Keaty, John E. Conery, D. Kent Savoie, and Van H. Kyzar, Judges.

Appendix F

OPINION

GREMILLION, Judge.

This consolidated matter arises out of a tragic auto accident that occurred on October 1, 2015, on U.S. Highway 84 in Concordia Parish.[1] An eighteen-wheeler truck driven by Mark Gordon and owned by Kenneth Boone d/b/a Boone Trucking was involved in a head-on collision with a vehicle being driven by Richard Stewart, Jr. Stewart and his two minor children, George Stewart and Vera Cheyenne Stewart, were killed in the accident.

George and Vera Cheyenne were Stewart's biological children from a relationship with Brandi Hardie; however, Stewart and Hardie were never married. At the time of the accident, Raymond and Donna Kelly had custody of Vera Cheyenne, and Jimmy and Tammy Johnese had custody of George.

Stewart had two other biological children who were adults at the time of his death: Daniel Goins and David Watts. Goins and Watts were born during Stewart's marriage to Lisa Watts Stewart, and they were given up for adoption. Goins was adopted by George and Joyce Goins, Stewart's uncle and aunt. Watts was adopted by his maternal grandparents, Mary and Jimmy Watts. At the time of the accident, Stewart and Lisa were physically separated, but they had never legally divorced. It has been alleged that Lisa currently resides in a care facility in another state.

1. This writ is consolidated with 17-811 and 17-812.

Appendix F

Following the accident, three separate survival and wrongful death actions arising out of Stewart's and the minor children's deaths were filed in the trial court. Two of these actions involve claims filed by or on behalf of Goins and Watts.[2] The plaintiffs in the third action are: Stewart's Succession; Stewart's parents, Richard Stewart, Sr. and Vera Stewart; and Raymond and Donna Kelly (collectively, "the Stewart Plaintiffs").[3] All three actions were consolidated in the trial court.

In each of the three actions, Defendants Mark Gordon and Kenneth Boone d/b/a Boone Trucking filed exceptions of no right action, which the trial court denied. In connection with Watts' and Goins' survival and wrongful death actions arising from Stewart's death, the trial court found that:

> the cases of *Levy v. Louisiana*, 391 U.S. 68, [88 S. Ct. 1509, 20 L. Ed. 2d 436], (1968), and *Turner v. Busby*, 03-3444 (La. 9/9/04), 883 So.2d 412 are persuasive in holding that "it is the biological relationship and dependency which is determinative of the child's rights in these cases, and not the classification into which

2. *Khristy Goins Rismiller, Tutrix for Daniel Edward Goins v. Gemini Insurance Company, et al.*, Louisiana 7th Judicial District Court Docket Number 49,686; and *David Watts v. Mark Gordon, et al.*, Louisiana 7th Judicial District Court Docket Number 49,751.

3. *Succession of Richard Stewart, Jr., et al. v. Mark Isaiah Gordon, et al.*, Louisiana 7th Judicial District Court Docket Number 49,832.

> the child is placed by the statutory law of the State." Thus, the fact that Watts [and Goins] w[ere] adopted does not prevent [them] from bringing survival and wrongful death claims for the death of [Mr.] Stewart, [their] biological father.

Further, in connection with Watts' and Goins' survival and wrongful death actions arising from the deaths of their biological half-siblings, George and Vera Cheyenne, the trial court found that the children's mother, Brandi Hardie, had abandoned the children during their minority, and, therefore, in accordance with La.Civ.Code arts. 2315.1 and 2315.2, she was deemed to have predeceased the children. The trial court concluded that Goins and Watts were allowed to assert survival and wrongful death claims arising out of the children's deaths. No specific reasons for the trial court's denial of Defendants' exceptions of no right of action can be found in the record.

Following the trial court's ruling, Defendants filed three separate writ applications with this court seeking review of the trial court's denial of their exceptions. We granted the writ applications and heard oral argument. This particular writ involves the trial court's denial of Defendants' exception of no right of action pertaining to the claims asserted on behalf of Goins, Stewart's biological son, who was given up for adoption as a minor and who is a biological half-sibling of the deceased minor children.[4]

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4. Trial Court Docket Number 49,751.

Appendix F

For the reasons set forth in *Succession of Richard Stewart, Jr. et al. vs. Gordon, et al.*, 17-812 (La.App. 3 Cir. 10/03/18), 316 So.3d 1052, 2018 La. App. LEXIS 1937, we find the trial court erred in denying Defendants' exceptions of no right of action as to Goins' survival and wrongful death claims due to the death of his biological father and half-siblings. Costs of these proceedings are assessed to Khristy Goins Rismiller, Tutrix for Daniel Edward Goins.

WRIT GRANTED AND MADE PEREMPTORY; EXCEPTIONS OF NO RIGHT OF ACTION GRANTED.

Cooks, J. dessents and would deny the writ.

Savoie, J., dissents for the reasons expressed by Judge Cooks, and for the additional reasons assigned.

Conery, J., concurs in part and dissents in part for the reasons expressed by Judges Savoie and Cooks, and for the additional reasons assigned.

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COOKS, J., Dissents and would deny the writ.

For the reasons set forth in my concurrence in part and dissent in part in *Succession of Richard Stewart, Jr. et al. vs. Gordon, et al.*, 17-812 (La.App. 3 Cir. 10/03/18), 316 So.3d 1052, 2018 La. App. LEXIS 1937, I dissent and would deny this writ. There was no error in the trial court's ruling denying Defendants' exceptions of no right of action as to Goins' survival and wrongful death claims due to the death of his biological father and the death of his half-siblings.

SAVOIE J., dissents and assigns the following reasons:

I disagree with the majority's conclusion to grant the exceptions in this matter. For the reasons set forth in my concurring and dissenting opinion in *Succession of Richard Stewart, Jr. et. al. vs. Gordon, et. al.*, 17-812 (La.App. 3 Cir. 10/3/18), 316 So.3d 1052, 2018 La. App. LEXIS 1937 , Mr. Watts, who is Mr. Stewart's biological child, has a right to assert a wrongful death and survival action arising out of Mr. Stewart's death. Therefore, the trial court's ruling in this regard was not in error.

In addition, I would remand Defendants' exceptions as to Mr. Watts' survival and wrongful death action arising out of the minor children's deaths. As recognized by the court's opinion in *Succession of Richard Stewart, Jr. et al.*, *Id.*, the children's biological mother, Ms. Hardie, is an indespensable party and should be made a party to these proceedings. In the event Ms. Hardie is determined on remand to have abandoned the deceased children

as contempated by La.Civ.Code arts. 2315.1(E) and 2315.2(E), then Mr. Goins, as the children's sibling, would have a right to assert a survival and wrongful death action arising out of their deaths.

Conery, J., concurs in part and dissents in part for reasons assigned by Judges Savoie and Cooks and for the following additional reasons.

When James Stewart, Jr. was killed in an automobile accident, along with his two minor children George and Vera Cheyenne Stewart, he was survived by his wife, Lisa Stewart, and his two adult children, Daniel Goins and David Watts.[1]

Louisiana Civil Code Article 2315.1 and 2315.2 have been interpreted as "sui generis" and govern the hierarchy

1. Daniel Goins has a tutrix, Kristi Goins Rismiller, who filed suit on his behalf in docket 17-809. David Watts filed suit on his own behalf in docket 17-811. Daniel Goins and David Watts are the biological children of Richard Stewart, Jr. and are the half-brothers of the minors George Stewart and Vera Cheyenne Stewart, whose mother, Brandi Hardie, is not currently a party. Daniel and David were adopted by others but are each claiming survival and wrongful death damages as a result of the death of their biological father, Richard Stewart, Jr. and their biological minor half-siblings, George and Vera Cheyenne Stewart. Richard Stewart, Sr. and his wife, Vera Stewart, are suing for the wrongful death of their son, Richard, Jr., and their minor grandchildren, George and Vera Cheyenne, and are joined in their suit by the Succession of Richard Stewart, Jr. in docket 17-812. All suits have been consolidated, but the majority has issued separate opinions in each.

of who may recover in a survival and wrongful death action, respectively, against the tortfeasor defendants in this case and their insurance carriers. *See Juneau v. State ex rel. Department of Health and Hospitals*, 15-1382 (La. App. 1 Cir. 7/7/16), 197 So.3d 398, *writ denied*, 16-1490 (La. 11/15/16), 209 So.3d 781. Both articles provide that where there is a surviving spouse and child or children, they are the first in the hierarchy of persons entitled to recover. *See* La.Civ.Code art. 2315.1 and 2315.2. There is no dispute that Lisa Stewart, the lawful wife of James Stewart, Jr., and his two biological adult sons Daniel Goins and David Watts, survived James Stewart, Jr.. There is nothing in the plain wording of the civil code articles in question that would suggest that if Daniel Goins and David Watts were adopted by another, they would no longer be "children" or "brother" within the meaning of the two articles in question.

This case then hinges on the words in La.Civ.Code arts. 2315.1 and 2315.2, "except as otherwise provided by law." The majority cites La.Civ.Code art. 199 as the law that precludes recovery by Daniel Goins and David Watts. That article states:

> Upon adoption, the adopting parent becomes the parent of the child for all purposes and the filiation between the child and his legal parent is terminated, **except as otherwise provided by law**. The adopted child and his descendants retain the right to inherit from his former legal parent and the relatives of that parent.
>
> (Emphasis added).

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The majority reasons that because Richard Stewart Jr.'s "filiation" to Daniel Goins and David Watts was terminated by adoption, they cannot be considered "children" for purposes of La.Civ.Code arts. 2315.1(A) and 2315.2(A). However, La.Civ.Code art. 199 also has the admonition "except as otherwise provided by law". Judges Cooks and Savoie in dissent propose that since La.Civ.Code arts. 2315.1 and 2315.2 do not in any way restrict the term "children" or "brothers," in accordance with U.S. Supreme Court decisions and our Louisiana Supreme Court decisions cited in their opinions, neither should we. I agree.

It is settled law that recovery under La.Civ.Code arts. 2315.1 and 2315.2 is "sui generis" and not dependent on any other statute or codal article. Those articles do not define or limit the term "children" or "brothers." *See Juneau*, 197 So.3d 398. The legislature did not limit the recovery to exclude children who have been adopted and half-brothers, and we should not judicially add an exception. I believe Judges Cooks and Savoie have correctly set forth the law and appropriate result in this case and I respectfully join their concurrences/dissents.

To the extent that this decision conflicts with the interpretation expressed by a panel of our court in *Domingue v. Carencro Nursing Home, Inc.*, 520 So.2d 996 (La.App. 3 Cir.), *writ denied*, 522 So. 2d 565 (La.1988), I would offer that under our civilian system we are not bound by a prior decision of another panel of our court, or any other appellate court decision. *Doerr v. Mobil Oil Corp.*, 00-947 (La. 12/19/00), 774 So. 2d 119, *reh'g granted on other grounds*, 00-947 (La. 3/16/01), 782 So. 2d 573.

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As Judges Cooks and Savoie point out in their dissents, to issue a ruling preventing adopted children from filing a wrongful death claim would appear to be unconstitutional based on the prevailing jurisprudence cited in their opinions. We need not and I do not reach that conclusion here. Based strictly on statutory interpretation, La.Civ.Code arts. 2315.1 and 2315.2 do not limit the term "children" or "brothers" in any way, and in my view include as beneficiaries Daniel Goins and David Watts, the biological children of the decedent, Richard Stewart, Jr., who have been adopted by others.

The case of *Ledet v. State, Dep't of Health and Human Res.*, 465 So.2d 98 (La.App. 4 Cir.), *writ denied*, 468 So. 2d 1211 (La.1985), is instructive on this issue. The court in *Ledet* specifically held that since biological half-brothers were not excluded in the definitions of the term "brothers" in La.Civ.Code arts. 2315.1 and 2315.2, the ordinary meaning of the word "brother" would include half-brothers, pursuant to La.Civ.Code art. 11.[2] The fact that Daniel Goins and David Watts were adopted does not mean that they are no longer the biological children of their father as well as the biological half-brothers of the minors, George Stewart and Vera Cheyenne Stewart.

Louisiana Civil Code Articles 2315.1 and 2315.2 use the generic word "children" and "brothers" without exceptions, and we are not authorized to judicially create

2. La.Civ.Code art. 11 provides, "[t]he words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter."

an exception to exclude biological children or half-siblings who have been adopted by another. *See* La.Civ.Code art. 9.[3] It will be up to the plaintiffs to prove the extent of their relationship with their biological father and half-siblings and the amount of their loss, and they should be given an opportunity to do so.

I also agree with Judges Cooks and Savoie's dissents that if, on remand, Brandi Hardie is found to have abandoned her biological minor children, George Stewart and Vera Cheyenne Stewart, pursuant to La.Ch.Code art. 1015(5)[4] the next in line to sue for their wrongful deaths,

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3. Louisiana Civil Code Article 9 states, "[w]hen a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature."

4. According to La.Ch.Code art. 1015(5), "[t]he grounds for termination of parental rights are:

> (5) Abandonment of the child by placing him in the physical custody of a nonparent, or the department, or by otherwise leaving him under circumstances demonstrating an intention to permanently avoid parental responsibility by any of the following:
>
> (a) For a period of at least four months as of the time of the hearing, despite a diligent search, the whereabouts of the child's parent continue to be unknown.
>
> (b) As of the time the petition is filed, the parent has failed to provide significant contributions to the child's care and support for any period of six consecutive months.

would be their biological half-brothers, Daniel Goins and David Watts.

The majority and the dissents all recognize that if either case disposition becomes final, there are some who may have had closer relations with the deceased than those lawfully allowed to recover. We understand their loss but are duty bound to apply the law as written. The hierarchy of beneficiaries allowed to recover is plainly written and should be applied as written. *Blanchard v. Tinsman*, 83-451 (La.App. 3 Cir. 2/1/1984) 445 So.2d 149, *writ denied*, 448 So. 2d 113 (La.1984).

(c) As of the time the petition is filed, the parent has failed to maintain significant contact with the child by visiting him or communicating with him for any period of six consecutive months."

APPENDIX G — OPINION OF THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT, DATED OCTOBER 3, 2018

COURT OF APPEAL OF LOUISIANA
THIRD CIRCUIT

17-811

DAVID WATTS

v.

MARK GORDON, *et al.*

October 3, 2018, Decided

ON APPLICATION FOR SUPERVISORY WRITS FROM THE SEVENTH JUDICIAL DISTRICT COURT, PARISH OF CONCORDIA, NO. 49,686; C/W 49,751; C/W 49,832. HONORABLE JOHN C. REEVES, DISTRICT JUDGE.

GREMILLION, Judge.

This consolidated matter arises out of a tragic auto accident that occurred on October 1, 2015, on U.S. Highway 84 in Concordia Parish.[1] An eighteen-wheeler truck driven by Mark Gordon and owned by Kenneth Boone d/b/a Boone Trucking was involved in a head-on collision with a vehicle being driven by Richard Stewart,

1. This writ is consolidated with 17-809 and 17-812.

Jr. Stewart and his two minor children, George Stewart and Vera Cheyenne Stewart, were killed in the accident.

George and Vera Cheyenne were Stewart's biological children from a relationship with Brandi Hardie; however, Stewart and Hardie were never married. At the time of the accident, Raymond and Donna Kelly had custody of Vera Cheyenne, and Jimmy and Tammy Johnese had custody of George.

Stewart had two other biological children who were adults at the time of the accident: Daniel Goins and David Watts. Goins and Watts were born during Stewart's marriage to Lisa Watts Stewart, and they were given up for adoption. Goins was adopted by George and Joyce Goins, who are Stewart's uncle and aunt. Watts was adopted by his maternal grandparents, Mary and Jimmy Watts. At the time of the accident, Stewart and Lisa were physically separated, but they had never legally divorced. It has been alleged that Lisa currently resides in a care facility in another state.

Following the accident, three separate survival and wrongful death actions arising out of Stewart's and the minor children's deaths were filed in the trial court. Two of these actions involve claims filed by or on behalf of Goins and Watts.[2] The plaintiffs in the third action are: Stewart's Succession; Stewart's parents, Richard Stewart,

2. *Khristy Goins Rismiller, Tutrix for Daniel Edward Goins v. Gemini Insurance Company, et al.*, Louisiana 7th Judicial District Court Docket Number 49,686; and *David Watts v. Mark Gordon, et al.*, Louisiana 7th Judicial District Court Docket Number 49,751.

Sr. and Vera Stewart; and Raymond and Donna Kelly (collectively, "the Stewart Plaintiffs").[3] All three actions were consolidated in the trial court.

In each of the three actions, Defendants Mark Gordon and Kenneth Boone d/b/a Boone Trucking filed exceptions of no right action, which the trial court denied. In connection with Watts' and Goins' survival and wrongful death actions arising from Stewart's death, the trial court found that:

> the cases of *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436, (1968), and *Turner v. Busby*, 03-3444 (La. 9/9/04), 883 So.2d 412 are persuasive in holding that "it is the biological relationship and dependency which is determinative of the child's rights in these cases, and not the classification into which the child is placed by the statutory law of the State." Thus, the fact that Watts [and Goins] w[ere] adopted does not prevent [them] from bringing survival and wrongful death claims for the death of [Mr.] Stewart, [their] biological father.

Further, in connection with Watts' and Goins' survival and wrongful death actions arising from the deaths of their biological half-siblings, George and Vera Cheyenne, the trial court found that the children's mother, Brandi

3. *Succession of Richard Stewart, Jr., et al. v. Mark Isaiah Gordon, et al.*, Louisiana 7th Judicial District Court Docket Number 49,832.

Hardie, had abandoned the children during their minority, and, therefore, in accordance with La.Civ.Code arts. 2315.1 and 2315.2, she was deemed to have predeceased the children. The trial court concluded that Goins and Watts were allowed to assert survival and wrongful death claims arising out of the children's deaths. No specific reasons for the trial court's denial of Defendants' exceptions of no right of action can be found in the record.

Following the trial court's ruling, Defendants filed three separate writ applications with this court seeking review of the trial court's denial of their exceptions. We granted the writ applications and heard oral argument. This particular writ involves the trial court's denial of Defendants' exception of no right of action pertaining to the claims asserted by Watts, Stewart's biological son, who was adopted as a minor and who is a biological half-sibling of the deceased minor children.[4]

For the reasons set forth in *Succession of Richard Stewart, Jr., et al. v. Gordon, et al.*, 17-812 (La.App. 3 Cir. 10/3/18), — So. 3d —, 2018 La. App. LEXIS 1937, we find the trial court erred in denying Defendants' exceptions of no right of action as to Watts' survival and wrongful death claims due to the death of his biological father and half-siblings. Costs of these proceedings are assessed to David Watts.

4. Trial Court Docket Number 49,751

Appendix G

WRIT GRANTED AND MADE PEREMTORY; EXCEPTIONS OF NO RIGHT OF ACTION GRANTED. COOKS, J., Dissents and would deny the writ.

COOKS, J., Dissents and would deny the writ.

For the reasons set forth in my concurrence in part and dissent in part in *Succession of Richard Stewart, Jr., et al. v. Gordon, et al.*, 17-812 (La.App. 3 Cir. /18), So.3d , 2018 La. App. LEXIS 1937, I dissent and would deny this writ. There was no error in the trial court's ruling denying Defendants' exceptions of no right of action as to Watts' survival and wrongful death claims due to the death of his biological father and the death of his half-siblings.

Appendix G

SAVOIE J., dissents and assigns the following reasons:

I disagree with the majority's conclusion to grant the exceptions in this matter. For the reasons set forth in my concurring and dissenting opinion in *Succession of Richard Stewart, Jr., et al. v. Gordon, et al.*, 17-812 (La. App. 3 Cir. 10/3/18), — So.3d —, 2018 La. App. LEXIS 1937, Mr. Watts, who is Mr. Stewart's biolgoical child, has a right to assert a wrongful death and survival action arising out of Mr. Stewart's death. Therefore, the trial court's ruling in this regard was not in error.

In addition, I would remand Defendants' exceptions as to Mr. Watts' survival and wrongful death action arising out of the minor children's deaths. As recognized by the court's opinion in *Succession of Richard Stewart, Jr. et. al., Id.*, the children's biological mother, Ms. Hardie, is an indespensable party and should be made a party to these proceedings. In the event Ms. Hardie is determined on remand to have abandoned the deceased children as contempated by La.Civ.Code arts. 2315.1(E) and 2315.2(E), then Mr. Watts, as the children's sibling, would have a right to assert a survival and wrongful death action arising out of their deaths.

APPENDIX H — JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF CONCORDIA, STATE OF LOUISIANA, DATED JUNE 29, 2017

DOCKET NO: 49686 DIV: B
7TH JUDICIAL DISTRICT COURT
PARISH OF CONCORDIA
STATE OF LOUISIANA

KHRISTY GOINS RISMILLER, TUTRIX
FOR DANIEL EDWARD GOINS,

v.

GEMINI INSURANCE COMPANY, *et al.*

CONSOLIDATED WITH

DOCKET NO: 49741 DIV: A
7TH JUDICIAL DISTRICT COURT
PARISH OF CONCORDIA
STATE OF LOUISIANA

SHEILA SMITH,

v.

GEMINI INSURANCE COMPANY, *et al.*

CONSOLIDATED WITH

Appendix H

DOCKET NO: 49751 DIV: B
7TH JUDICIAL DISTRICT COURT
PARISH OF CONCORDIA
STATE OF LOUISIANA

DAVID WATTS,

v.

MARK GORDON, *et al.*

CONSOLIDATED WITH

DOCKET NO: 49832 DIV: B
7TH JUDICIAL DISTRICT COURT
PARISH OF CONCORDIA
STATE OF LOUISIANA

SUCCESSION OF RICHARD STEWART, *et al.*,

v.

MARK ISIAH GORDON, *et al.*

JUDGMENT ON EXCEPTIONS
(WATTS CASE)

This matter came on for hearing on June 15, 2017 on Exceptions of No Right of Action filed by Kenneth Boone d/b/a Boone Trucking and Mark Gordon as to the claims asserted herein by David Watts.

Appendix H

Present for Plaintiff, David Watts ("Watts"), was Colt J. Fore.

Present for Defendant Kenneth Boone d/b/a Boone Trucking was M. Joey Bernard.

Present for Defendant Mark Gordon was Patrick J. Schepens.

Present for Defendant Gemini Insurance Company was Micah A. Gautreaux.

Considering the arguments of counsel, reviewing the briefs and memorandum filed by counsel, and considering the law and the evidence, the Court rules as follows:

Kenneth Boone d/b/a Boone Trucking and Mark Gordon's Exceptions of No Right of Action questioning whether Watts has the right to pursue survival and wrongful death actions for the death of Richard Stewart, Jr are *denied*. The Court finds that the cases of *Levy v. Louisiana,* 391 U.S. 68, (1968) and *Turner v. Busby,* 03-3444 (La. 9/9/04), 883 So.2d 412 are persuasive in holding that "it is the biological relationship and dependency which is determinative of the child's rights in these cases, and not the classification into which the child is placed by the statutory law of the State." Thus, the fact that Watts was adopted does not prevent him from bringing survival and wrongful death claims for the death of Stewart, his biological father.

Kenneth Boone d/b/a Boone Trucking and Mark Gordon's Exceptions of No Right of Action questioning

whether Watts has the right to pursue survival and wrongful death actions for the deaths of his half-siblings, George Stewart and Cheyenne Stewart, who were minors, are *denied*. The Court finds that Brandie Hardie, the mother of George Stewart and Cheyenne Stewart, abandoned the minors during their minority. The Court finds that her parental rights were terminated at the time of abandonment. Pursuant to LA. C.C. Art. 2315.1 E and LA. C.C. Art. 2315.2 E the law holds that such abandonment acts as though she predeceased her minor children and the next class of persons who can bring claims for their deaths are siblings, one of which is Watts. Thus, Watts has the right to bring survival and wrongful death actions for their deaths.

ACCORDINGLY IT IS ORDERED that the Exceptions of No Right of Action of both, Kenneth Boone d/b/a Boone Trucking and Mark Gordon as to the claims asserted herein by David Watts are *denied.*

IT IS FURTHER ORDERED that all cost associated with the filing of the Exceptions shall be paid by Kenneth Boone d/b/a Boone Trucking and Mark Gordon.

JUDGMENT RENDERED AND SIGNED on June 29,th 2017 in Vidalia, Concordia Parish, Louisiana.

/s/ John C. Reeves
JUDGE JOHN C. REEVES

APPENDIX I — JUDGMENT OF THE SEVENTH JUDICIAL DISTRICT COURT FOR THE PARISH OF CONCORDIA, STATE OF LOUISIANA, DATED JUNE 29, 2017

STATE OF LOUISIANA * PARISH OF CONCORDIA
SEVENTH JUDICIAL DISTRICT COURT

NO. 49,686-B

KHRISTY GOINS RISMILLER, TUTRIX
FOR DANIEL EDWARD GOINS,

v.

GEMINI INSURANCE COMPANY, MARK ISIAH
GORDON AND KEITH BOONE TRUCKING, LLC

CONSOLIDATED WITH:

NO. 49,751-B

DAVID WATTS,

v.

MARK GORDON, KENNETH BOONE DBA
BOONE TRUCKING, KEITH BOONE TRUCKING
AND GEMINI INSURANCE COMPANY

CONSOLIDATED WITH:

Appendix I

NO. 49,741-A

SHEILA SMITH,

v.

GEMINI INSURANCE COMPANY,
KENNETH CHAD BOONE D/B/A BOONE
TRUCKING, AND MARK GORDON

CONSOLIDATED WITH:

NO. 49,832-B

SUCCESSION OF RICHARD STEWART, JR.,
RAYMOND KELLY, DONNA KELLY, RICHARD
STEWART, SR. AND VERA ANITA STEWART,

v.

MARK ISIAH GORDON, KENNETH BOONE,
KEITH BOONE TRUCKING, LLC AND GEMINI
INSURANCE COMPANY.

JUDGMENT ON EXCEPTIONS
(RISMILLER/GOINS CASE)

This matter came on for hearing on June 15, 2017 on Exceptions of No Right of Action filed by Kenneth Boone d/b/a Boone Trucking and Mark Gordon as to the claims asserted herein by Khristy Goins Rismiller, Tutrix for Daniel Edward Goins.

Appendix I

Present for Plaintiff, Kristy Goins Rismiller, Tutrix for Daniel Edward Goins ("Goins"), was Charles S. Norris, Jr. and Christopher J. Norris.

Present for Defendant Kenneth Boone d/b/a Boone Trucking was M. Joey Bernard.

Present for Defendant Mark Gordon was Patrick J. Schepens.

Present for Defendant Gemini Insurance Company was Micah A. Gautreaux.

Considering the arguments of counsel, reviewing the briefs and memorandum filed by counsel, and considering the law and the evidence, the Court rules as follows:

Exceptions of No Right of Action filed by Kenneth Boone d/b/a Boone Trucking and Mark Gordon questioning whether Goins has the right to pursue survival and wrongful death actions for the death of Richard Stewart, Jr are *denied*. The Court finds that the cases of *Levy v. Louisiana,* 391 U.S. 68, (1968) and *Turner v. Busby,* 03-3444 (La. 9/9/04), 883 So.2d 412 are persuasive in holding that "it is the biological relationship and dependency which is determinative of the child's rights in these cases, and not the classification into which the child is placed by the statutory law of the State." Thus, the fact that Goins was adopted does not prevent him from bringing survival and wrongful death claims for the death of Stewart, his biological father.

Appendix I

Exceptions of No Right of Action filed by Kenneth Boone d/b/a Boone Trucking and Mark Gordon questioning whether Goins has the right to pursue survival and wrongful death actions for the deaths of his half-siblings, George Stewart and Cheyenne Stewart, who were minors, are *denied*. The Court finds that Brandie Hardie, the mother of George Stewart and Cheyenne Stewart, abandoned the minors during their minority. Pursuant to LA. C.C. Art. 2315.1 E and LA. C.C. Art. 2315.2 E the law holds that she predeceased her minor children and the next class of persons who can bring claims for their deaths are siblings, one of which is Goins. Thus, Goins has the right to bring survival and wrongful death actions for their deaths.

ACCORDINGLY, IT IS ORDERED that the Exceptions of No Right of Action of Kenneth Boone d/b/a Boone Trucking and Mark Gordon as to the claims asserted herein by Khristy Goins Rismiller, Tutrix for Daniel Edward Goins are *denied.*

IT IS FURTHER ORDERED that all cost associated with the filing of the Exceptions shall be paid by Kenneth Boone d/b/a Boone Trucking and Mark Gordon.

JUDGMENT RENDERED AND SIGNED on June 29th, 2017 in Vidalia, Concordia Parish, Louisiana.

/s/ John Reeves
JUDGE JOHN REEVES – DIVISION "B"

APPENDIX J — ORDER OF THE SUPREME COURT OF LOUISIANA, DATED JANUARY 26, 2021

SUPREME COURT OF LOUISIANA

No. 2020-CA-00313

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS,

v.

GEMINI INSURANCE COMPANY, MARK ISIAH GORDON AND KEITH BOONE TRUCKING, LLC, *et al.*

January 26, 2021

Application for rehearing granted - See briefing notice.

APPENDIX K — DENIAL OF APPLICATION FOR REHEARING OF THE SUPREME COURT OF LOUISIANA, DATED SEPTEMBER 30, 2021

NEWS RELEASE #038

FOR IMMEDIATE NEWS RELEASE
FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the **30th day of September, 2021** the following action was taken by the Supreme Court of Louisiana in the case(s) listed below:

Application for rehearing denied:

2020-CA-00313 KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS VS. GEMINI INSURANCE COMPANY, MARK ISIAH GORDON AND KEITH BOONE TRUCKING, LLC C/W DAVID WATTS VS. MARK GORDON, KENNETH BOONE dba BOONE TRUCKING, KEITH BOONE TRUCKING AND GEMINI INSURANCE COMPANY C/W SHEILA SMITH VS. GEMINI INSURANCE COMPANY, KENNETH CHAD BOONE D/B/A BOONE TRUCKING, AND MARK GORDON C/W SUCCESSION OF RICHARD STEWART, JR., RAYMOND KELLY, DONNA KELLY, RICHARD STEWART, SR. AND VERA ANITA STEWART VS. MARK ISIAH GORDON, KENNETH BOONE, KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE COMPANY (/opinions/2021/20-0313.CA.action.re.pdf)(Parish of Concordia)

Appendix K

Hughes, J., would grant.

Genovese, J., would grant for the reasons assigned in his original opinion.

Griffin, J., would grant for the reasons set forth in her dissent.