APPENDIX TABLE OF CONTENTS

PROCEEDINGS FOLLOWING REMAND

INITIAL APPEAL

APPENDIX TABLE OF CONTENTS (Cont.)

DISTRICT COURT

STATUTORY TEXT

APPENDIX TABLE OF CONTENTS (Cont.)

OPINION, LOUISIANA SUPREME COURT
(JUNE 27, 2023)

SUPREME COURT OF LOUISIANA

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 2023-CJ-00060

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

Before: HUGHES, J., GRIFFIN, J.

HUGHES, J.

In this divorce case, the putative biological father seeks to rebut, pursuant to La. C.C. art. 198,[1] the presumption set forth in La. C.C. art. 185,[2] despite having filed his avowal petition more than one year

[1] Article 198 states, in pertinent part: "If the child is presumed to be the child of another man, the action shall be instituted *within one year* from the day of the birth of the child. Nevertheless, if the mother *in bad faith deceived* the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs. . . . The time periods in this Article are peremptive." (Emphasis added.)

[2] Article 185 provides: "The husband of the mother is presumed to be the father of a child born during the marriage. . . . "

after the birth of the child and even though no "bad faith" was found on the part of the mother. After some five years of litigation on preliminary issues, the appellate court reviewed an earlier district court ruling, which found that La. C.C. art. 198 was not unconstitutional, and reversed the district court, concluding Article 198 was unconstitutional as applied. On review, we hold, under the factual circumstances presented in this case, that the putative biological father has no fundamental constitutional right to parent a child born to a mother, who was married to and living with another man at the time of the child's conception and birth. Therefore, we reverse the appellate court, reinstate the district court judgment holding that La. C.C. art. 198 is constitutional, and we remand to the district court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

The facts of this matter are detailed in this court's prior opinion, *Kinnett v. Kinnett*, 20-01134 (La. 10/10/21), 332 So.3d 1149. We note only the salient facts pertinent to the issues raised herein.

During the marriage of Mr. Kinnett and Ms. Kinnett, two children were born: B.A.K. on August 29, 2011, and G.J.K. on August 5, 2015. Ms. Kinnett filed the instant suit for divorce on January 14, 2017.[3]

On February 10, 2017, Keith Andrews intervened in this divorce action to file a petition to establish paternity and custody of G.J.K., who was at that time approximately one and one-half years old, alleging that

---

[3] We have no indication in the record of this case that a final divorce has been granted.

G.J.K. was conceived as a result of an extramarital affair he had with Ms. Kinnett, which ended in November of 2014. Mr. Kinnett responded to the intervention with exceptions seeking to defeat the avowal action, including a plea of peremption pursuant to La. C.C. art. 198, which was granted by the district court, after concluding: that the avowal action was filed more than a year after Mr. Andrews knew or should have known he was G.J.K.'s biological father; that Ms. Kinnett had not in bad faith deceived Mr. Andrews of the circumstances of G.J.K.'s birth; and that La. C.C. art. 198's one-year peremptive period was not unconstitutional.

On Mr. Andrews' appeal, the appellate court reversed, finding that Ms. Kinnett had in bad faith deceived Mr. Andrews when she informed him of G.J.K.'s birth because she had indicated that she had the child "with her husband," Mr. Kinnett, thereby triggering the exception set forth in La. C.C. art. 198 ("[I]f the mother in bad faith deceived the father of the child regarding his paternity, the [avowal] action shall be instituted within one year from the day the father knew or should have known of his paternity. . . . "). *See Kinnett v. Kinnett*, 17-0625 (La. App. 5 Cir. 8/6/20), 302 So.3d 157.

Thereafter, this court reversed the appellate court, on finding no bad faith deception by the mother and holding that Mr. Andrews' avowal action, filed on February 10, 2017, eighteen months after the child's birth, was not timely; the matter was remanded to the appellate court for the limited purpose of addressing Mr. Andrews' state and federal constitutional challenges to La. C.C. art. 198. *Kinnett v. Kinnett*, 20-01134 (La. 10/10/21), 332 So.3d 1149.

On remand, the appellate court ruled that the putative biological father, Mr. Andrews, "has a vested right or liberty interest to parent his biological child, established through his biological link in addition to evidence presented to prove that he 'grasped the opportunity' to parent and established a relationship with the minor child when given the opportunity" and that La. C.C. art. 198 "as applied in this case unconstitutionally limits the biological father's vested right to parent his child and deprives the biological father of his due process rights under the Louisiana Constitution." Therefore, the appellate court reversed the district court judgment and remanded the matter for further proceedings. *Kinnett v. Kinnett*, 17-0625 (La. App. 5 Cir. 12/28/22), 355 So.3d 181.

The legal father of G.J.K, Mr. Kinnett, subsequently filed a writ application to this court, challenging the appellate court's ruling in favor of the putative biological father, Mr. Andrews, which we granted. *Kinnett v. Kinnett*, 23-00060 (La. 2/24/23), 355 So.3d 1094. A subsequent writ application submitted by Ms. Kinnett was not considered, as it was not timely filed. *Kinnett v. Kinnett*, 23-00133 (La. 2/24/23), 355 So.3d 1098.

LAW AND ANALYSIS

Review of a judgment determining the constitutionality of a statute presents a question of law and is reviewed *de novo*, without deference to the conclusions of the lower courts. *State in Interest of D.T.*, 19-01445, p. 3 (La. 4/3/20), 340 So.3d 745, 748; *State v. Eberhardt*, 13-2306, pp. 4-5 (La. 7/1/14), 145 So.3d 377, 381; *Louisiana Federation of Teachers v. State*, 13-0120, p. 21 (La. 5/7/13), 118 So.3d 1033, 1048. As a general rule, a statute is presumed to be constitu-

tional, and the party challenging the validity of a statute has the burden of proving its unconstitutionality. *Faulk v. Union Pacific Railroad Co*., 14-1598, p. 7 (La. 6/30/15), 172 So.3d 1034, 1042; *Louisiana Federation of Teachers v. State*, 13-0120 at p. 21, 118 So.3d at 1048; *M.J. Farms, Ltd. v. Exxon Mobil Corporation*, 07-2371, p. 21 (La. 7/1/08), 998 So.2d 16, 31; *City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund*, 05-2548, p. 11 (La. 10/1/07), 986 So.2d 1, 12.

In his writ application to this court, Mr. Kinnett admits that Louisiana law allows for dual paternity, but asserts that a putative biological father has not been given substantial parental rights over that of the legal father, who was married to the child's mother at the time of conception and birth. Rather, Mr. Kinnett argues that "[t]he history, tradition, and conscience of the people of Louisiana supports protecting the sanctity of the family unit." Mr. Kinnett further asserts that, in adopting La. C.C. art. 198, the Louisiana Legislature limited a putative biological father's rights and elected to favor a legal father, pointing out that, when first enacted this law allowed a two-year period within which a putative biological father could bring an avowal action, but that the law was subsequently amended to reduce that two-year period to the current one-year peremptive period. Mr. Kinnett maintains that "[i]t is a matter of legislative policy and not constitutional law, whether a state allows a putative father the opportunity to file an avowal action"; therefore, the appellate court erred in this case in determining that Mr. Andrews possesses a fundamental liberty interest in parenting a child conceived or born during the Kinnett marriage.

In response, Mr. Andrews essentially alleges that La. C.C. art. 198 is unconstitutional since it fails to protect and provide to him as a biological father his fundamental constitutional rights to due process and equal protection of the laws, in violation of the United States Constitution, Amendments V and XIV and Louisiana Constitution, Article I, §§ 2-5, 12, and 22.

Article 198, which was enacted by 2005 La. Acts, No. 192, § 1, effective June 29, 2005, provides:

> A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.
>
> If the child is presumed to be the child of another man, the action *shall be instituted within one year from the day of the birth* of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.
>
> In all cases, the action shall be instituted no later than one year from the day of the death of the child.
>
> The time periods in this Article are peremptive.

(Emphasis added.)

In this case, Mr. Andrews claims that, as the biological father of G.J.K., he has a *fundamental* constitutional right to parent his child, which La. C.C.

art. 198 unconstitutionally curtails. However, our review of the relevant jurisprudence of the U.S. Supreme Court and this court does not support an unqualified fundamental right to Mr. Andrews under the facts of this case. Notably, the U.S. Supreme Court case of *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), holds that it is not unconstitutional for the states to statutorily govern the extent to which a putative biological father may challenge the legitimacy of a child born into "an extant marital family." The following examination of U.S. Supreme Court jurisprudence on this issue reveals that a clear distinction has been made between protecting the rights of parents who are part of a family unit into which the child is born, regardless of marital status, as compared to a putative biological father, not living in a family unit with the child at issue, whose rights the Supreme Court states are subject to applicable state law.

In *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Supreme Court examined the propriety of treating an unwed father differently from traditional parents and, while the Court upheld the father's constitutional rights claim in that case, the factual context was determinative, in that the father was attempting to maintain his existing relationship with his children. At the time, Illinois law provided that, when an unwed mother died, her children became wards of the state. Though Peter Stanley and the mother of his three children had lived together for eighteen years (she was known as Joan Stanley), during which time their three children were born, Joan and Peter were not legally married when Joan died. Despite the fact that Mr. Stanley had lived

with, and supported, his children all of their lives, a dependency proceeding was instituted, and the children were declared wards of the state and placed with court-appointed guardians. If Peter and Joan had been married, Illinois law would not have supported the removal of nondelinquent children from the family home unless they had no surviving "parent" or unless the custodial parent or guardian were not fit to provide them suitable care. Because the Stanley children's only *legal* parent (their mother) died, these provisions became applicable. Mr. Stanley claimed he had been denied Equal Protection.

The Stanley Court concluded that, "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment." *Stanley v. Illinois*, 405 U.S. at 649, 92 S.Ct. at 1211. In so holding, the Stanley Court reasoned that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, *absent a powerful countervailing interest*, protection." *Stanley v. Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212 (emphasis added). The Stanley Court further emphasized the importance of the family, stating that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' . . . 'basic civil rights of man,' . . . and '(r)ights far more precious . . . than property rights,' . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obliga-

tions the state can neither supply nor hinder.' . . . The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, . . . and the Ninth Amendment. . . . " *Stanley v. Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212-13 (citations omitted). The Stanley Court also cited *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), as recognizing that "family relationships unlegitimized by a marriage ceremony" should not bar natural, but illegitimate, children from recovering for the wrongful death of their mother, since the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses. *Stanley v. Illinois*, 405 U.S. at 651-52, 92 S.Ct. at 1213.

In contrast to the instant case, there was no legal father at issue in Stanley, and the language the Court used-that "family relationships" should be recognized "absent a countervailing interest"-implied that a different result might be reached if there had been a legal husband and/or if the biological father had not sufficiently established a relationship with his child, which is the scenario that occurred in *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978).

In the *Quilloin* case, Leon Quilloin and Ardell Williams had a child together in 1964, but they never married or established a home together, and the mother raised the child. Three years later, Ardell Williams married Randall Walcott, and then Randall and Ardell Walcott filed a petition for Mr. Walcott to adopt the child. At that time, Georgia law only required a father's consent for an adoption if the father was a *legal* parent of the child, and Mr. Quilloin had

not attempted to legitimate his alleged offspring by either marrying the mother or formally acknowledging the child during the eleven years between the child's birth and the filing of Mr. Walcott's adoption petition. Therefore, the mother was the only legally recognized parent of the child, and Mr. Quilloin had no legal right under Georgia law to veto adoption of the child by Mr. Walcott. However, Mr. Quilloin responded to the adoption petition by filing an application for a writ of habeas corpus, objecting to the adoption and seeking legitimation and visitation rights; he further claimed Georgia laws were unconstitutional, as applied to his case, insofar as they denied him the rights granted to married parents.

The *Quilloin* trial court found that, although the child had never been abandoned or deprived, Mr. Quilloin had provided support only on an irregular basis; however, the child had previously visited with Mr. Quilloin on "many occasions" and Mr. Quilloin had given toys and gifts to the child "from time to time." Notwithstanding, the child's mother had recently decided that these irregular contacts were having a disruptive effect on the child and on her entire family, and the child had expressed a desire to be adopted by Mr. Walcott and to take on Walcott's name; there was no question about Mr. Walcott's fitness to adopt the child. The trial court and the state appellate courts ruled against Mr. Quilloin and in favor of the adoption. In seeking review, Mr. Quilloin maintained only an equal protection claim based on the disparate statutory treatment of him as compared to a married father. Mr. Quilloin did not challenge the sufficiency of the notice he received with respect to the adoption proceeding or assert that he was deprived of a right to

a hearing prior to entry of the order of adoption, as he was afforded a full hearing.

The *Quilloin* Court recognized that the relationship between parent and child is "constitutionally protected," since it is the primary function, freedom, and obligation of parents to have the custody, care, and rearing of children. *Quilloin v. Walcott*, 434 U.S. at 255, 98 S.Ct. at 554-55. *Quilloin* further recognized that it is firmly established that freedom of personal choice in matters of "family life" is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. *Id.* The Due Process Clause would be offended if a state were to attempt to force the *breakup* of a "natural family" over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest. *Id.* However, the *Quilloin* Court inferred that the biological parents in that case (Mr. Quilloin and Mrs. Walcott) and the child were *not a family*, since the unwed father had not at any time had, or sought, actual or legal custody of his child, nor had he resided with the child. Rather, the Court determined that Mrs. Walcott and the child, along with her husband, Mr. Walcott (the child's stepfather) and the younger child she and Mr. Walcott had together, were a family, such that the proposed adoption would not place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption, in *Quilloin*, was to give full recognition to the family unit then in existence, a result desired by all concerned, except Mr. Quilloin. Whatever might be required in other situations, the *Quilloin* Court could not say that the state was required in that particular situation to find anything

more than that the adoption and the denial of legitimation were in the best interest of the child. *Quilloin v. Walcott*, 434 U.S. at 255, 98 S.Ct. at 555. The Supreme Court further commented that Mr. Quilloin had "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," and that he "does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child." *Quilloin v. Walcott*, 434 U.S. at 256, 98 S.Ct. at 555. In contrast, the *Quilloin* Court noted that "legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage." Based on these factors, the *Quilloin* Court held: "Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child." Accordingly, the Georgia statutes were upheld, on the Court's conclusion that they had not deprived Mr. Quilloin of rights under the Due Process and Equal Protection Clauses. *Quilloin v. Walcott*, 434 U.S. at 256, 98 S.Ct. at 555.

In contrast to *Quilloin*, the biological parents (Abdiel and Maria) in *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 1762, 60 L.Ed.2d 297 (1979), lived together in New York City, though without benefit of marriage, during the time two children (David and Denise) were born; Abdiel signed both children's birth certificates and contributed to their support. After Abdiel and Maria separated, Maria (along with her children) moved in with Kazim Mohammed, whom she

later married. Abdiel maintained continued contact with David and Denise. Then, Maria allowed the children to travel with her mother to Puerto Rico (the grandmother's home country), while Maria and Kazim stayed in the U.S. to save money for their planned move to Puerto Rico. Meanwhile, Abdiel (whose parents also lived in Puerto Rico) travelled to Puerto Rico, obtained his children from their maternal grandmother, and returned with them to New York; whereupon, Maria sought and was granted temporary legal custody of the children, and Abdiel and his new wife were granted visitation.

Thereafter, Maria and Kazim petitioned the court to allow Kazim to adopt the children, and Abdiel responded by requesting that he and his wife be allowed to adopt the children. Judgment was eventually rendered in favor of Maria and Kazim, allowing Kazim to adopt the children; Abdiel's parental rights and responsibilities were thereby terminated. Abdiel sought review of the decision, and the state appellate courts affirmed. Before the Supreme Court, Abdiel asserted that the distinction New York law draws between the adoption rights of an unwed father and those of other parents (requiring consent for adoption only from a legal parent) violates the Equal Protection Clause of the Fourteenth Amendment. *Caban v. Mohammed*, 441 U.S. at 385, 99 S.Ct. at 1764.

Finding that New York law clearly treated unmarried parents differently according to their gender "even when [the father's] parental relationship is substantial-as in this case," the *Caban* Court reasoned that "[g]ender-based distinctions . . . must serve important governmental objectives and must be substantially related to achievement of those objectives . . . in order

to withstand judicial scrutiny under the Equal Protection Clause." *Caban v. Mohammed*, 441 U.S. at 387-88, 99 S.Ct. at 1765-66. The Supreme Court found that the New York adoption law's "distinction . . . between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children." *Id*, 441 U.S. at 391, 99 S.Ct. at 1767-68. However, the Court declared that "[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." *Id*, 441 U.S. at 392, 99 S.Ct. at 1768.

Accordingly, the *Caban* Court found that the New York law was "another example of 'overbroad generalizations' in gender-based classifications," the effect of which was to "discriminate against unwed fathers even when their identity is known and they have manifested a significant paternal interest in the child." The *Caban* Court concluded that "this undifferentiated distinction between unwed mothers and unwed fathers, applicable in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests." *Id*, 441 U.S. at 394, 99 S.Ct. at 1769.

The case of *Santosky v. Kramer*, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 1391-92, 71 L.Ed.2d 599 (1982), is often quoted since it is one of the first to denominate the parental right to parent a child as "fundamental," however, the factual context in which this declaration was made is significant. *Santosky* held that "[b]efore a State may sever completely and irrevocably the

rights of *parents in their natural child*, due process requires that the State support its allegations by at least clear and convincing evidence," not simply by a preponderance of the evidence. *Santosky v. Kramer*, 455 U.S. at 747-48, 102 S.Ct. at 1391-92 (emphasis added).

In *Santosky*, the three children of "natural parents" John and Annie Santosky were removed from their custody by state authorities "after incidents reflecting parental neglect" and placed in foster homes. *Id.*, 455 U.S. at 751, 102 S.Ct. at 1393. At trial, evidence was produced to establish, by the preponderance of the evidence required by the state statute: that the Santoskys had maintained contact with their children, but those visits were at best superficial and devoid of any real emotional content; that the state agency had made diligent efforts to encourage and strengthen the parental relationship; that the Santoskys were incapable, even with public assistance, of planning for the future of their children; and that the best interests of the three children required permanent termination of the Santoskys' custody. *Id.*, 455 U.S. at 751-52, 102 S.Ct. at 1393-94. On appeal of the termination of their parental rights, the Santoskys challenged the constitutionality of the preponderance of the evidence burden of proof set forth in the state statute; and the state appellate courts upheld the constitutionality of the statute. In deciding whether the preponderance of the evidence burden of proof was sufficient, the Supreme Court pointed out its historical recognition that freedom of personal choice in matters of *family life* is a *fundamental liberty interest* protected by the Fourteenth Amendment vis-à-vis actions of the government in

trying to affect and/or change previously established family relationships. *Santosky v. Kramer*, 455 U.S. at 753, 102 S.Ct. at 1394. The Santosky Court spoke only in terms of "termination of the rights of natural parents" and it was implicit that parental rights had already been established. In contrast, in the instant case, Mr. Andrews is seeking, by virtue of the right to do so having been set forth in La. C.C. art. 198, to establish the right of paternity.

In *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983), the unwed father, Mr. Lehr, was aware the mother, Lorraine, had given birth to the child, Jessica. Although Mr. Lehr had lived with Lorraine before Jessica's birth, his name was not on Jessica's birth certificate, he had made no offer to marry Lorraine, and he did not live with Lorraine or Jessica after her birth or provide child support. Lorraine did not keep the biological father, Mr. Lehr, informed of her whereabouts, and eight months after giving birth to Jessica, Lorraine married another man, Richard Robertson. Lorraine and Richard Robertson later filed a petition seeking the adoption of Jessica by the stepfather, Richard Robertson. Mr. Lehr was not given notice of the adoption, which was thereafter granted.

Central to the subsequent attempt by Mr. Lehr to have the adoption dissolved was the maintenance by New York of a "putative father registry," whereby a man could file with that registry to demonstrate his intent to claim paternity of a child born out of wedlock, entitling a biological father to receive notice of any proceeding to adopt that child. Before entering Jessica's adoption order, the County Family Court had the putative father registry examined, but Mr. Lehr had

not entered his name in the registry. *Lehr v. Robertson*, 463 U.S. at 250-51, 103 S.Ct. at 2988. After Mr. Lehr discovered Jessica had been adopted by her stepfather, he filed an avowal action and asserted he had a constitutional right to notice and a hearing, which he did not receive, before Jessica could be adopted. *Lehr v. Robertson*, 463 U.S. at 252, 103 S.Ct. at 2988. Mr. Lehr's claims were denied in the state courts.

The *Lehr* Court noted that generally state law determines the outcome of family matters. Further, as a historical matter, the *Lehr* Court recognized that "[t]he institution of marriage has played a critical role . . . in defining the legal entitlements of family members," and in order to serve "the best interests of children, state laws almost universally express an appropriate preference for the formal family." *Lehr v. Robertson*, 463 U.S. at 256-57, 103 S.Ct. at 2991 (footnote omitted). The Lehr Court further stated that, in some cases, the Supreme Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships, declaring, in essence, that the state should not attempt to take the place of parents in their primary function, freedom, and obligation to have the care and custody of their children. *Id.*, 463 U.S. at 257-58, 103 S.Ct. at 2991. In such cases, the Supreme Court has found that "the relationship of love and duty in a *recognized family unit* is an interest in liberty entitled to constitutional protection." *Id.* (Emphasis added.)

In the case of an unwed father, Lehr further stated: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his

offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." *Lehr v. Robertson*, 463 U.S. at 262, 103 S.Ct. at 2993-94 (footnote omitted). The *Lehr* Court reasoned that they were "not assessing the constitutional adequacy of New York's procedures for *terminating a developed relationship*" since Mr. Lehr had "never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old"; rather, the *Lehr* Court was "concerned only with whether New York has adequately protected his opportunity to form such a relationship." *Lehr v. Robertson*, 463 U.S. at 263-64, 103 S.Ct. at 2994 (emphasis added). The Court emphasized that Mr. Lehr's ability to have received notice was completely within his control, by registering in accord with the putative father registry statute, which he failed to do; and the Court was unable to characterize the will of the state legislature in that statutory remedy as constitutionally insufficient. *Id.*, 463 U.S. at 263-65, 103 S.Ct. at 2994-95. The *Lehr* Court likewise found no merit in the equal protection claim raised, as it was unable to say that the parents were similarly situated but treated differently, as was the case in *Caban v. Mohammed*, *supra*, since Mr. Lehr had never established any custodial, personal, or financial relationship with the child Jessica. *Lehr v. Robertson*, 463 U.S. at 267-68, 103 S.Ct. at 2996-97. "If one parent has an established custodial relationship with the child and the other

parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights." *Id.* Accordingly, the *Lehr* Court affirmed the state court decision to deny Mr. Lehr's claims. In comparison to the Lehr father, the putative biological father in the instant case is in a similar position, in that Louisiana has promulgated a statutory method for biological fathers to establish paternity and therefore a relationship with their child, but Mr. Andrews failed to comply with the statute.

The Supreme Court's case of *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), seems to be the factual scenario most closely resembling that of the instant case, in that the mother's husband was the legal father of the child she had conceived through an adulterous relationship, and she subsequently separated, but did not get a final divorce from, her husband. In *Michael H. v. Gerald D.*, the child was born in May 1981, and thereafter for several years the mother resided with the child alternatively with the putative biological father, her husband, and even with a third man. However, the putative biological father did not file an avowal action until November of 1982. At that time, California law presumed that the husband of the mother was the father of a child born during the marriage and allowed no one but the husband or wife to rebut that presumption; therefore, Michael's avowal action was denied in the state courts, even though blood tests indicated a 98.07% probability of paternity.

The *Michael H. v. Gerald D.* Court, on review of the decision, first sought to determine whether the interest advanced by the putative father, Michael, was fundamental, stating that in order for a "liberty"

interest to be "fundamental," it must "be an interest traditionally protected by our society" since "the Due Process Clause affords only those protections . . . so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Michael H. v. Gerald D.*, 491 U.S. at 122-23, 109 S.Ct. at 2341-42. It was noted that some Supreme Court cases had accorded constitutional protections "to certain parental rights." *Id.* The Supreme Court pointed out that Michael asserted the cases of *Stanley v. Illinois*, *Quilloin v. Walcott*, *Caban v. Mohammed*, and *Lehr v. Robertson*, *supra*, establish that a liberty interest is created by biological fatherhood along with the establishment of a parental relationship with the child, and he alleged those factors existed in his case as well. *Id.* To the contrary, the *Michael H. v. Gerald D.* Court labeled Michael's assertion a distortion of the rationale of the cited cases, further stating: "As we view them, they [the cited cases] rest not upon such isolated factors but upon the historic respect-indeed, sanctity would not be too strong a term-traditionally accorded to the relationships that develop within the unitary family." *Id.* Using *Stanley v. Illinois* as an example, the Court stated, "[W]e forbade the destruction of such a family when, upon the death of the mother, the State had sought to remove children from the custody of a father who had lived with and supported them and their mother for 18 years." *Id.*

The legal issue in *Michael H. v. Gerald D.* was framed as "whether the relationship between persons in the situation of Michael and [his biological child] has been treated as a protected *family unit* under the historic practices of our society, or whether on any other basis it has been accorded special protection."

Id., 491 U.S. at 124, 109 S.Ct. at 2342 (emphasis added). The Court answered the question in the negative: "We think it impossible to find that it has. In fact, quite to the contrary, our traditions have protected the *marital family* (Gerald [the husband], Carole [the wife], and the child they acknowledge to be theirs) against the sort of claim Michael asserts." *Id.* (emphasis added). "We have found nothing in the older sources, nor in the older cases, addressing specifically the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be a fundamental right, the lack of evidence alone might defeat his case." *Id.*, 491 U.S. at 125, 109 S.Ct. at 2343.

The *Michael H.* decision went on to acknowledge the Court's prior observation in *Lehr v. Robertson*, *supra* (involving a natural father's attempt to block his child's adoption by the mother's new husband), that "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring." *Id.*, 491 U.S. at 128-29, 109 S.Ct. at 2345. However, the *Michael H.* decision clarifies that, when the child is born into an *extant marital family*, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage, and "it is not unconstitutional for the State to give categorical preference to the latter." *Id.*, 491 U.S. at 129, 109 S.Ct. at 2345. In support of that conclusion, it was noted that Lehr quoted approvingly from Justice Stewart's dissent in *Caban v.*

Mohammed, *supra*, stating that although "'[i]n some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father,'" "'the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist.'" *Id.* In a similar vein, the *Michael H.* decision states that "a limit is also imposed by the circumstance that the mother is, at the time of the child's conception and birth, married to, and cohabitating with, another man, both of whom wish to raise the child as the offspring of their union. . . . *It is a question of legislative policy and not constitutional law whether* [*the state*] *will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted*." *Id.*, 491 U.S. at 129-30, 109 S.Ct. at 2345 (emphasis added).

The *Michael H.* decision further pointed out that it is an "erroneous view that there is only one side to this controversy-that one disposition can expand a 'liberty' of sorts without contracting an equivalent 'liberty' on the other side." *Id.*, 491 U.S. at 130, 109 S.Ct. at 2345-46. To the contrary, in the *Michael H.* case, the Court observed that "*to provide protection to an adulterous natural father is to deny protection to a marital father*, and vice versa." *Id.*, 491 U.S. at 130, 109 S.Ct. at 2346 (emphasis added). "One of them will pay a price . . . Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit" he has established. *Id.* The *Michael H. v. Gerald D.* decision holds that *the court cannot choose between these two competing interests,*

rather, the court "leaves that to the people of [*the state*]," *through their elected legislators*. *Id.* (Emphasis added.) Accordingly, *Michael H. v. Gerald D.* affirmed the California appellate court, which upheld the California law allowing only a husband or wife to rebut the presumption that the husband is the father of children born during their marriage, and dismissed Michael's avowal claim. The *Michael H. v. Gerald D.* case is on point with the case currently before this court.

However, Mr. Andrews heavily relies, in his arguments to this court, on the 1999 Louisiana case of *T.D. v. M.M.M.*, 98-0167 (La. 3/2/99), 730 So.2d 873, 874-75, abrogated by *Fishbein v. State ex rel. Louisiana State University Health Sciences Center*, 04-2482 (La. 4/12/05), 898 So.2d 1260,[4] wherein a putative biological

---

[4] The *T.D. v. M.M.M.* court's application of the common law of laches was later abrogated by this court in *Fishbein v. State ex rel. Louisiana State University Health Sciences Center*, 04-2482, pp. 15-16 (La. 4/12/05), 898 So.2d 1260, 1270 (which was an employee benefits action), stating:

> While the legislature and the opinions of this court have made it clear that the common law doctrine of laches does not belong in Louisiana's system of civil law, there are nevertheless opinions by this court that leave open the possibility of the application of the doctrine in certain cases. *See e.g. T.D. v. M.M.M.*, 98-0167 (La. 3/2/99), 730 So.2d 873; *Bradford v. City of Shreveport*, 305 So.2d 487 (La. 1974). Because the doctrine of laches is in conflict with this state's civil laws of prescription, *the statements contained in those civil opinions* that suggest the doctrine of laches may be applicable under certain circumstances are *hereby repudiated*. We find no other equitable basis upon which LSU can be afforded relief as to plaintiff's claims

father intervened in the legal parents' custody proceeding to have his parental rights acknowledged. In *T.D. v. M.M.M.*, this court upheld the district court's holding that the intervention was not untimely, though filed one and one-half years after a blood test showed a 99.5% probability that the intervenor was the child's biological father, but six years after the child's birth. The district court ruled only that the intervention was not untimely filed and that the evidence established that the putative father was the biological father of the child, but it did not award visitation at that time, finding insufficient evidence had been submitted to determine the best interest of the child. *T.D. v. M.M.M.*, 98-0167 at pp. 1-2, 730 So.2d at 874-75. (The district court, in *T.D. v. M.M.M.*, had ordered an evidentiary hearing to determine visitation rights, requiring a mental health evaluation of the child to assess possible effects of parentage information, and support issues.) On review by this court, because this state had no statutory limitation on an avowal action at the time the *T.D. v. M.M.M.* case was decided,[5] this

---

> that have not prescribed; therefore, we reject its affirmative defense of estoppel. [Emphasis added.]

[5] At the time the 1999 *T.D. v. M.M.M.* decision was rendered, this state had not yet enacted either La. C.C. art. 198 or its precursor, former La. C.C. art. 191. Former Article 191 was enacted by 2004 La. Acts, No. 530, § 1, eff. June 25, 2004, and provided:

> A man may establish his paternity of a child presumed to be the child of another man even though the presumption has not been rebutted.
>
> This action shall be instituted *within two years* from the date of birth of the child, except as may otherwise be provided by law. Nonetheless, if the mother in bad faith deceives the father of the child regarding his

court examined the doctrine of laches to determine whether the putative biological father had timely filed his avowal intervention. *T.D. v. M.M.M.*, 98-0167 at pp. 3-5, 730 So.2d at 876-77. In concluding that the doctrine of laches could not be applied to deny the putative father his intervention, this court reasoned:

> The legal parents based their appeal on the argument that laches bars a biological father's avowal action where it is not promptly asserted. As a matter of law, the purpose of the doctrine is to prevent an injustice which might result from the enforcement of long

---

> paternity, the action shall be instituted within one year from the date the father knew or should have known of his paternity, but no more than ten years from the date of birth of the child.

(Emphasis added.) 2005 La. Acts, No. 192, § 1, eff. June 29, 2005, renumbered Article 191 to Article 198 and amended the text to read:

> A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.
>
> If the child is presumed to be the child of another man, the action shall be instituted *within one year* from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.
>
> In all cases, the action shall be instituted no later than one year from the day of the death of the child.
>
> The time periods in this Article are peremptive.

(Emphasis added.)

neglected rights and to recognize the difficulty of ascertaining the truth as a result of that delay. . . . However, this court has clearly established that the common law doctrine of laches does not prevail in Louisiana. . . . Nevertheless, we have applied the doctrine in rare and extraordinary circumstances. . . .

We will consider the elements of the doctrine as they apply to the instant case to determine if rare and extraordinary circumstances exist in the instant case which merit application of the doctrine of laches. Regarding the first element of prejudice, we find no proof of prejudice to the child nor to the defendants in intervention, the legal parents. To the contrary, the trial judge expressly limited his ruling to a finding of fact that P.W. is the child's father. The trial court passed on the issue of the best interest of the child because it was without sufficient evidence to make a knowledgeable finding. If evidence of the best interest of the child was lacking, certainly there is insufficient proof institution of this action has caused prejudice to the child. Thus, we find no injustice or prejudice may result from this avowal action. The legal parents failed to prove the first element of laches. . . .

Regarding the second element of delay, we surmise that the delay in this case is not entirely the fault of the biological father. It is apparent that the actions of the mother have caused much of the delay. . . . P.W. regularly visited his child when he was on good terms

> with the mother. This appears to be the reason why he did not file suit until after the affair ended and his attempts to visit his child were thwarted. P.W. filed his suit less than one year after it became apparent that he was not free to visit his child, and approximately six years from the child's birth. We find P.W. did not seek enforcement of long neglected rights because his filing was not unreasonable in light of circumstances which impute much of the delay to the mother. . . .

T.D. v. M.M.M., 98-0167 at pp. 4-5, 730 So.2d at 876-77 (citations omitted).

Given that a major portion of the *T.D. v. M.M.M.* decision has been abrogated (relative to the application of the laches doctrine) and, since La. C.C. art. 198 and its predecessor, La. C.C. art. 191, were enacted after the rendition of that opinion, *T.D. v. M.M.M.* is not authoritative in determining the constitutional validity of the subsequently-enacted La. C.C. art. 198, at issue herein.

In a case decided after the enactment of an avowal time limit, in *W.R.M. v. H.C.V.*, 06-0702 (La. 3/9/07), 951 So.2d 172 (per curiam), this court overturned an appellate decision in *W.R.M. v. H.C.V.*, 05-0425 (La. App. 3 Cir. 3/1/06), 923 So.2d 911, which had declared unconstitutional the precursor to La. C.C. art. 198, former La. C.C. art. 191 (restricting an avowal action, when another man is presumed to be the father of the child, to within two years from the date of birth of the child, unless the mother in bad faith deceived the putative father), because of its

retroactive application.[6] The facts and procedural history of the case were stated by the appellate court as follows:

> In 1992, *W.R.M.* and *H.C.V.* began an extra-marital affair while *H.C.V.* was employed as *W.R.M.*'s secretary. On September 1, 1994, *H.C.V.* gave birth to a child, *A.M.V. H.C.V.* obtained a divorce from her husband, M.J.V., in October 1996. In November 2004, *H.C.V.* ended her relationship with W.R.M. On July 7, 2003, *W.R.M.* filed a Petition to Establish Filiation, alleging that he is the biological father of *A.M.V.*, asking that *A.M.V.* be subjected to blood grouping and DNA testing to determine his biological parentage, and seeking a judgment declaring him to be the father of the child. The Defendants filed exceptions of no cause of action, no right of action, and prescription. They argued that the Plaintiff's action was pre-empted under the provisions of La.Civ. Code art. 191 and that he had failed to assert his rights in a timely manner although he was aware of the existence of the child. In response, the Plaintiff filed an amended petition in which he

---

[6] Article 191 was enacted by 2004 La. Acts, No. 530, § 1, eff. June 25, 2004, and Act 530 provided in Section 3: "The provisions of this Act shall be applied both prospectively and retroactively and shall be applied to all pending and existing claims." In contrast, 2005 La. Acts, No. 192, § 1, eff. June 29, 2005, which renumbered Article 191 to Article 198 and amended the text, provided in Section 3: "The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date."

> pled the unconstitutionality of La.Civ.Code art. 191. The trial court denied the plea of unconstitutionality and gave written reasons for its decision. Subsequently, the trial court granted the Defendants' exceptions but declined to dismiss the Plaintiff's suit pending appeal. The Plaintiff appealed.

W.R.M. v. H.C.V., 05-0425 at p. 1, 923 So.2d at 913.

In *W.R.M. v. H.C.V.*, the mother asserted that the putative biological father should not be allowed to proceed with his paternity claim because he knew of the existence of the child and did not assert his rights or acknowledge the child as his own within a reasonable period of time. However, the appellate court agreed with the putative father that it was unconstitutional to apply the 2004 enactment, in former La. C.C. art. 191, of a two-year period to bring the action, retroactively, to divest him of his previously-existing *jurisprudential* right to file an avowal action within a reasonable time. Thus, the appellate court reversed the district court and remanded for further proceedings. *W.R.M. v. H.C.V.*, 05-0425 at pp. 5-6, 923 So.2d at 916.

In a brief per curiam, this court reversed the *W.R.M. v. H.C.V.* appellate court decision, vacating the appellate court's ruling that the retroactive application of former La. C.C. art. 191 was unconstitutional; we stated:

> On July 7, 2003, W.R.M. filed a "Petition to Establish Filiation" against *H.C.V.* and *M.J.V.*, alleging that he is the biological father of *A.M.V* as a result of an adulterous affair between *H.C.V.* and *W.R.M.* In response, *H.C.V.* and *M.J.V.* filed exceptions of no cause

> of action, no right of action, and prescription. While these exceptions were pending, the Louisiana Legislature passed Act 530 of 2004, which enacted La. Civ. Code art. 191. *H.C.V.* and *M.J.V.* filed supplemental exceptions based on the application of La. Civ. Code art. 191, arguing that *W.R.M.* failed to comply with the two-year peremptive period set forth in the article and thus he had no right or cause of action to continue his avowal action.
>
> The district court granted the exceptions of no right of action, no cause of action, and prescription. W.R.M. appealed the judgment to the court of appeal. The court of appeal reversed the district court, thereby declaring the retroactive application of La. Civ.Code art. 191 to be unconstitutional.
>
> *H.C.V.* and *M.J.V.* appealed that judgment to this court pursuant to La. Const. art. V, § 5(d). We render the following decree.
>
> * * *
>
> The *judgment of the court of appeal is vacated and set aside.* W.R.M.'s petition to establish filiation is dismissed with prejudice.

W.R.M. v. H.C.V., 06-0702 at p. 1, 951 So.2d at 172 (emphasis added).

As cited hereinabove, the *Michael H. v. Gerald D.* case presents the same issue under the same circumstances as that presented in this case: what rights does a putative biological father, who sired a child with a married woman, have when there is a legal

father to whom the mother was married and living with when the child was conceived and born? The answer provided by the U.S. Supreme Court in *Michael H. v. Gerald D.* was that when a choice must be made between two competing interests such as these (the inability of a biological father to parent a child "adulterously begotten" versus the preservation of the integrity of a "traditional family unit") the Court "leaves that to the people of [the state]," through their elected legislators. *Michael H. v. Gerald D.*, 491 U.S. at 130, 109 S.Ct. at 2346.

The people of Louisiana, through the Louisiana Legislature, have spoken through the enactment of La. C.C. art. 198, to give a biological father a limited window in which to file a paternity action when there is a legal father: "[T]he action shall be instituted *within one year* from the day of the birth of the child." (Emphasis added.) "All of the time periods established by this Article are peremptive, rather than prescriptive and thus are not subject to interruption or suspension." La. C.C. art. 198, 2005 Revision Comment (d). "The time period of one year from the child's birth imposed upon the alleged father if the child is presumed to be the child of another man *requires* that *the alleged father act quickly* to avow his biological paternity. Requiring that the biological father institute the avowal action quickly is intended to protect the child from the upheaval of such litigation. . . . " La. C.C. art. 198, 2005 Revision Comment (e) (emphasis added). "These restrictions imposed upon the alleged father's rights to institute the avowal action recognize first, that state attempts to require parents to conform to societal norms should be directed at the parents, not the innocent child of the union. . . . " La. C.C. art. 198,

2005 Revision Comment (d). "The only exception to the time period of one year for the institution of an avowal action by the biological father is if the mother in bad faith deceives the father concerning his paternity." La. C.C. art. 198, 2005 Revision Comment (f).

We conclude that La. C.C. art. 198 constitutionally provides a putative biological father an opportunity to establish paternity, when another man is presumed to be a child's father. *See Michael H. v. Gerald D.*, 491 U.S. at 129-30, 109 S.Ct. at 2345 ("It is a question of legislative policy and not constitutional law whether [the state] will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted.").

DECREE

Based on foregoing, we conclude the appellate court erred in holding La. C.C. art. 198 unconstitutional, as applied to Mr. Andrews. We reverse and reinstate the district court judgment holding that La. C.C. art. 198 is constitutional. The matter is remanded to the district court for further proceedings consistent with this opinion.

REVERSED; DISTRICT COURT JUDGMENT REINSTATED; REMANDED TO THE DISTRICT COURT.

CONCURRING OPINION OF J. HUGHES

HUGHES, J., additionally concurring.

I strongly disagree with this court's earlier decision involving these parties. However, this opinion resolves the issue before us now on the law, not the facts.

DISSENTING OPINION OF J. GRIFFIN

GRIFFIN, J., dissents and assigns reasons.

I respectfully dissent for the astute reasons articulated by the court of appeal. The majority of this Court relies on the fractured plurality opinion of *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). Therein only four Justices of the United States Supreme Court concluded that, where a child is conceived and born into an extant marital relationship between the mother and another man, a biological father has no liberty interest in establishing a parental relationship with the child.[1] *Id.*, 491 U.S.

---

[1] The interpretive dispute in *Michael H.* involved the prior jurisprudence of *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599; and *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614.

The plurality opinion turns the relevant constitutional inquiry on its head by focusing on notions of historical practices of our society and framing the right at issue on the specific level of whether a biological father has a liberty interest when his child is born into an extant marital relationship. *Michael H.*, 491 U.S. at 123-27, 109 S.Ct. at 2343-44. Justices O'Connor and Kennedy, although comprising part of the plurality, refrained from concurring in a footnote of the opinion explaining that it "sketches a mode of historical analysis to be used when identifying liberty interests protected by the Due Process Clause of the Fourteenth Amendment that may be somewhat inconsistent with our past decisions in the area." *Id.*, 491 U.S. at 134, 109 S.Ct. at 2346-47 (O'Connor, J., concurring in part) (further observing "the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available"); *see also id.*, 491 U.S. at 137, 109 S.Ct. at 2349 (Brennan, J., dissenting) ("Apparently oblivious to the fact that this concept can be as malleable and as elusive as 'liberty' itself,

at 129, 109 S.Ct. at 2345. However, a majority of the Justices in *Michael H.* refused to foreclose the possibility that a biological father might have a constitutionally protected interest in his relationship with a child in such a situation. *See id.*, 491 U.S. at 133, 109 S.Ct. at 2347 (Stevens, J., concurring in the judgment); *id.*, 491 U.S. at 136, 109 S.Ct. at 2349 (Brennan, J., dissenting). The above distinction was noted by this Court over thirty years ago in its acknowledgment that "a majority of the [United States Supreme Court] has not abandoned its traditional approach of focusing first upon the precise nature of the interest threatened by the state, *i.e.*, *the interest of the unwed father in his child.*" *In re Adoption of B.G.S.*, 556 So.2d 545, 549 n. 2 (La. 1990) (emphasis added); *Michael H.*, 491 U.S. at 139, 109 S.Ct. at 2350 (Brennan, J., dissenting) ("In deciding cases under the Due Process Clause . . . we have considered whether the concrete limitation under consideration impermissibly impinges upon one of these more generalized [liberty] interests."). This presents a question of constitutional law rather than legislative policy.

"The interest of a parent in having a relationship with his children is manifestly a liberty interest protected by the Fourteenth Amendment's due process guarantee." *Adoption of B.G.S.*, 556 So.2d at 549 (citing *Santosky*, 455 U.S. at 75859, 102 S.Ct. at 1397 ("it [is] plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right") (internal quotations omitted)). "Al-

---

the plurality pretends that tradition places a discernible border around the Constitution.").

though an unwed father's biological link to his child does not guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so."[2] *Id*., 556 So.2d at 550 (quoting *Michael H.*, 491 U.S. at 142, 109 S.Ct. at 2352 (Brennan, J., dissenting)). "[T]he interest of a biological parent in having an opportunity to establish a relationship with his child is one of those liberties which no person may be deprived without due process of law under [the Louisiana] constitution." *Id*., 556 So.2d at 552 (citing La. Const. art. I, § 2); *see also In re L.M.M., Jr.*, 17-1988, pp. 17-18 (La. 6/27/18), 319 So.3d 231, 241-42; *Cook v. Sullivan*, 20-1471, p. 8 (La. 9/30/21), 330 So.3d 152, 158. Here, the record reflects that Mr. Andrews sufficiently grasped the opportunity to establish a parental relationship with G.J.K. *See Lehr*, 463 U.S. at 262, 103 S.Ct. at 2993.

Finding the existence of a liberty interest, the court of appeal correctly proceeded to analyze the remaining due process factors under *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Article 198 provides neither a notice requirement to a biological father nor a duty on a mother to inform a father of his potential paternity – only a

---

[2] This Court in *Adoption of B.G.S.* expressly relied upon, and verbatim quoted, Justice Brennan's *Michael H.* dissent wherein he articulated the "unifying theme" of the United States Supreme Court jurisprudence cited in n. 1, *supra*. As further elaborated by Justice Brennan, "marriage is not decisive in answering the question whether the Constitution protects the parental relationship under consideration," rather it is the commitment of the biological father to accept the responsibilities of parenthood by coming forward to participate in rearing his child. *Michael H.*, 491 U.S. at 143-44, 109 S.Ct. at 2352-53 (Brennan, J., dissenting).

narrow exception if the mother acts in bad faith. The risk of erroneous deprivation of the liberty interest at stake is thus substantial given the statute's complete reliance on the mother to decide whether a putative father shall be notified. *See Adoption of B.G.S.*, 556 So.2d at 553. "[T]he placement of decision in the hands of a potentially adverse decision maker, violates the most basic principles of due process under both our state and federal constitutions." *Id.*, 556 So.2d at 556. Further, the government's interest in protecting a child from the upheaval of litigation where the child is currently living in an extant marital family does not warrant the severance of a biological father's rights in the absence of sufficient procedural safeguards. *See Michael H.*, 491 U.S. at 154-56, 109 S.Ct. at 2358-59 (Brennan, J., dissenting) (observing the distinction between determination of paternity and any subsequent determination as to custody and visitation rights). Procedure by presumption is cheaper and easier than individualized determination but when it disdains present realities in deference to past formalities, it needlessly risks running roughshod over the interests of both parent and child. *Stanley*, 405 U.S. at 656-57, 92 S.Ct. at 1215. Accordingly, I would affirm the ruling of the court of appeal.

Despite the edict of the majority, it is my sincere hope that the adults in this matter will set aside their animosity in favor of the best interests of the child. A child who will one day be old enough to fully understand and appreciate the circumstances which accompanied this extensive litigation.

OPINION, FIFTH CIRCUIT COURT OF APPEALS STATE OF LOUISIANA (DECEMBER 28, 2022)

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 17-CA-625

On Remand from Louisiana Supreme Court
Parish of Jefferson, State of Louisiana
No. 768-195, Division "E" Honorable John J. Molaison, Jr., Judge Presiding

Before: Fredericka ROMBERG WICKER, Jude G. GRAVOIS, and Robert A. CHAISSON, Judges.

REVERSED; REMANDED
FHW, JGG, RAC

WICKER, J.

This matter is before this Court following a remand from the Louisiana Supreme Court. The sole issue presented to this Court is the constitutionality of Louisiana Civil Code Article 198, which controls a biological father's avowal action to his biological child and limits that biological father's action to a one-year

peremptive period when that child is born during a marriage between the biological mother and the presumed legal father. Upon review, we first find that the biological father in this case has a vested right or liberty interest to parent his biological child, established through his biological link in addition to evidence presented to prove that he "grasped the opportunity" to parent and established a relationship with the minor child when given the opportunity. We further find that Article 198 as applied in this case unconstitutionally limits the biological father's vested right to parent his child and deprives the biological father of his due process rights under the Louisiana Constitution. For these reasons, we hold that Article 198 is unconstitutional as applied to the biological father in this case. We therefore reverse the January 10, 2019 judgment appealed from and remand this matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts and procedural history in this matter have been previously set forth by this Court:

> Ms. Kinnett commenced the instant litigation by filing for divorce on January 14, 2017. She sought joint custody with Mr. Kinnett of their daughter, B.A.K., but sole custody of her son, G.J.K. On January 27, 2017, Mr. Kinnett filed his Answer and Reconventional Demand disputing Ms. Kinnett's contention that awarding her sole custody of G.J.K. would be in the child's best interest, urging instead that joint custody be granted.

On February 10, 2017, Mr. Andrews filed a Petition in Intervention to Establish Paternity and to Obtain Custody of G.J.K. In his petition, Mr. Andrews alleged that Ms. Kinnett had concealed his possible paternity until December 9, 2016, and sought an order establishing paternity and an action to obtain custody.

On February 21, 2017, Mr. Kinnett answered Mr. Andrews' intervention with Exceptions of No Cause and/or No Right of Action, Prescription, and Peremption, arguing that Mr. Andrews' avowal action was perempted under Louisiana Civil Code art. 198 because he failed to file an action within one year of G.J.K.'s birth. On February 24, 2017, the court appointed the Loyola Law Clinic to represent the interests of the minor child. Ms. Kinnett first filed a memorandum opposing the exceptions on April 10, 2017, however, on May 31, 2017, she filed a second memorandum supporting the exceptions. On appeal, Ms. Kinnett adopted the arguments in Mr. Kinnett's appellee briefs.

At the initial April 12, 2017 hearing, the Domestic Commissioner denied the exceptions of no right of action and no cause of action as to paternity, and granted the exception of no cause of action as to custody. He also granted the exception of peremption, finding that Mr. Andrews should have known G.J.K. was his child given that he had "intimate contact" with Ms. Kinnett nine months prior to the child's birth. Mr. Andrews objected to the Commissioner's ruling, contending in pertinent part

that the "time limitations in Civil Code article 198 are constitutionally invalid."

The parties tried the exceptions de novo before the district court on June 2, 2017. The district court judge ruled from the bench denying the exceptions of no cause of action and no right of action as to paternity, but granting the exceptions of no cause of action and no right of action as to custody and visitation.[1] The judge further held that Mr. Andrews' avowal action was preempted [sic] under Article 198 based on his finding that (a) Mr. Andrews had not proven "that the mother was actually in bad faith and intended to deceive," and (b) he had filed his avowal action more than a year from the time the judge determined he knew or should have known that he was G.J.K.'s father.[2] The trial

---

[1] We point out, in this opinion, that no party sought supervisory or appellate review of the granting of the exception as to visitation, which is an interlocutory judgment. Visitation matters are "always open to change when the conditions warrant it." *See Becnel v. Becnel,* 98-593 (La. App. 5 Cir. 3/25/99), 732 So.2d 589, 592, *writ denied,* 99-1165 (La. 6/4/99), 744 So.2d 630; *Gaskin v. Henry,* 36,714 (La. App. 2 Cir. 10/23/02), 830 So.2d 471, 476.

[2] We point out, in this opinion, that the language of Article 198 does not call for any factual finding considering whether the biological father "knew or should have known" of his paternity until there is *first* a finding that the mother in "bad faith deceived" the biological father. The language in Article 198 provides that "if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity." A simple statutory construction analysis of the "if . . . , then" language structure set forth in Article 198 demonstrates that consideration of the biological father's know-

> court declined to rule on the constitutionality of the statute and denied Mr. Andrews' motion for additional time to notify the attorney general and further plead the constitutionality issue. Mr. Andrews appealed the June 2, 2017 judgment to this Court.
>
> On March 23, 2018, this Court stayed this appeal and remanded the case to the trial court to allow Mr. Andrews the opportunity to amend his petition and appropriately challenge the constitutionality of Article 198. *Kinnett v. Kinnett,* 17-CA-625, per curiam, p. 4. On April 6, 2018, Mr. Andrews filed his First Supplemental and Amending Petition, formally challenging Article 198's constitutionality, thereafter notifying the Louisiana Attorney General as required by law. The Law Clinic filed a memorandum in support of Mr. Andrews' Supplemental and Amending Petition on June 4, 2018.

Kinnett v. Kinnett, 17-625 (La. App. 5 Cir. 8/6/20), 302 So.3d 157, 165, *writ granted,* 20-01134 (La. 2/9/21), 309 So.3d 735, *reh'g denied,* 20-01134 (La. 1/28/22) So.3d, 2022 WL 262973, and *writ granted,* 20-01143 (La. 2/9/21), 309 So.3d 735, *reh'g denied,* 20-01143 (La. 1/28/22) So.3d —, 2022 WL 262971, and *writ granted,* 20-01156 (La. 2/9/21), 309 So.3d 738, *reh'g denied,* 20-

---

ledge is not relevant for consideration or analysis by the courts *until* there is *first* a finding that the mother in bad faith deceived the biological father. Thus, any factual finding by the trial court concerning possible constructive knowledge of paternity is irrelevant to our analysis in this case when considering the fundamental constitutional right to parent as it applies to the constitutionality of Article 198.

01156 (La. 1/28/22) So.3d, 2022 WL 263066, and *rev 'd in part,* 20-01134 (La. 12/10/21), 332 So.3d 1149.

On remand, in his supplemental petition, Mr. Andrews set forth factual allegations to demonstrate that he had "immediately assumed the role of G.J.K.'s biological father and began taking steps to support . . . and become involved in G.J.K.'s life." Subsequently:

> On May 15, 2018, Mr. Kinnett moved to strike the portions of Mr. Andrews' supplemental petition in which he alleged that he had provided financial support and started spending time with G.J.K., on the grounds that whether the biological father had established a relationship with the child was not relevant to the question of constitutionality.
>
> * * *
>
> On June 13, 2018, the trial court, Hon. John Molaison presiding, conducted a hearing on the motions in limine and motions to strike. At the June 13, 2018 hearing, Judge Molaison correctly pointed out that the constitutionality challenge presented in Mr. Andrews' supplemental petition is in fact an ordinary proceeding. Judge Molaison thus found discovery was proper and stated, "it's an ordinary proceeding and I cannot bar someone from attempting to introduce evidence to support that constitutional challenge to a statute" and "I believe the law allows the introduction of evidence to support a challenge to the constitutionality of the statute." On July 18, 2018, Judge Molaison issued a written judgment denying Mr. Kinnett's motion to

strike the allegations stated in the amended petition as well as the motion to strike any fact witnesses. He also denied the motions to strike discovery and fact witnesses, having found that "fact discovery" was appropriate and stated "I think I have to reset this hearing, allow you folks to conduct your discovery, determine if you need any additional witnesses on your own, and then we set it for trial."

* * *

On October 1, 2018, after a new trial judge had been appointed to preside over the case, Ms. Kinnett filed a "Motion In Limine to Exclude Testimony and Evidence of Any Fact Witness," seeking "an order prohibiting Intervenor from calling any fact witnesses at trial" on the constitutionality issue. This motion was nearly identical in substance to the motion in limine previously filed by Mr. Kinnett and denied by Judge Molaison. In her motion, Ms. Kinnett asserted that "testimony as to what relationship Intervenor may or may not have had with the minor and what action he may or may not have taken with respect to parenting the minor, does not make the constitutionality of Art. 198, more or less likely."

* * *

Prior to the hearing on the second motion in limine, the third judge to preside over this case was appointed pro tempore, the Hon. William Credo, III.

* * *

By judgment dated October 23, 2018, Judge Credo granted the "Motion in Limine to Exclude Testimony and Evidence of Any Fact Witnesses," precluding any factual evidence from being introduced at the trial on the issue of constitutionality. Further, while Judge Credo recognized the possibility that "constitutional scholars, legislators, or those who possess highly specialized knowledge of the legislative history of the law in question" might serve as witnesses, the court found that neither the opinion of Mr. Andrews' expert, Dr. Sonnier, nor the testimony of Mr. Andrews or any other fact witness was related to "whether the statute serves a legitimate government purpose of protecting the status of a child vis-a-vis his mother and father, his family, his classmates, and the world."

On November 5 and December 18, 2018, Judge Credo presiding, the trial court heard and considered only oral arguments as to Mr. Andrews' constitutionality challenge raised in his supplemental petition. On January 10, 2019, the court issued its written judgment, holding "that La. Civ. Code art. 198 is constitutional. Keith Edward Andrews has failed to submit evidence that Article 198 violates either substantive or procedural rights to due process or that it fails to protect a fundamental liberty interest, as alleged in his First Supplemental and Amending Petition."

> Mr. Andrews filed a devolutive appeal. On appeal, Mr. Andrews complained of three trial court rulings: the trial court's June 2, 2017 judgment holding that his avowal action was perempted; the October 23, 2018 interlocutory judgment granting the motion *in limine* to exclude "any fact witness" in connection with the trial of his constitutionality challenge raised in his supplemental petition; and the January 10, 2019 judgment holding that La. C.C. art. 198 is constitutional.
>
> * * *
>
> This Court issued an opinion, reversing the trial court judgment on the issue of peremption. Finding legal error that interdicted the fact-finding process, this Court conducted a *de novo* review and found that Ms. Kinnett in bad faith deceived Mr. Andrews regarding his paternity, observing: "there is no set of circumstances wherein a woman—who has had sexual relations with more than one man during the period of possible conception—may have an 'honest belief that one man, and not the other, is the father." *Kinnett v. Kinnett,* 332 So.3d at 1152, citing *Kinnett v. Kinnett,* 302 So.3d at 177.

Kinnett v. Kinnett, 17-625 (La. App. 5 Cir. 7/7/22), 345 So.3d 1122, 1125, *writ granted, judgment vacated and set aside,* 22-01246 (La. 9/20/22), 345 So.3d 1020, and *writ granted, judgment vacated and set aside,* 22-01199 (La. 9/20/22), 345 So.3d 1021.

The Louisiana Supreme Court subsequently granted writs, and reversed this Court's opinion, finding that "the trial court's findings were not manifestly in error or clearly wrong." *Kinnett,* 332 So.3d 1149, 1157. In reversing this Court's opinion, the Louisiana Supreme Court found that "a mother who knows another man is possibly the father of her child" is not in bad faith in failing to disclose that knowledge of possible paternity to a biological father after the child's birth if a trial judge finds credible the mother's belief that one man, rather than the other—both of whom she had sexual relations within a single (typically one-week) conception period— is the father. Thus, the Louisiana Supreme Court found that a woman does not have a duty at any time after the birth of a child to either investigate and conduct testing to determine the child's paternity or to provide the other man, with whom she had sexual relations during the conception period, an opportunity through her disclosure to discover his possible paternity.

Having reversed this Court on the peremption of Mr. Andrews' avowal claim, the Louisiana Supreme Court remanded the matter to this Court for "consideration of Mr. Andrews' constitutional challenge." *Kinnett,* 332 So.3d at 1157. In its decision, the Louisiana Supreme Court clearly instructed that the minor child "G.J.K. lacks standing to challenge the constitutionality of Article 198" and further instructed that, in considering a constitutional analysis, "a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations." *Kinnett v. Kinnett,* 20-01134 (La. 10/10/21), 332 So.3d 1149, 1157.

After remand—and in reviewing the interlocutory judgment on the motion *in limine* set forth previously as an assignment of error in connection with the appeal but not previously considered by this Court as unnecessary in light of our finding that Mr. Andrews' claim was not perempted—this Court found that the trial court erred in granting the motion *in limine* to exclude any fact witness and to prohibit any fact discovery relating to the constitutional issue. This Court found that any party challenging the constitutionality of a statute "has the burden of introducing evidence of his entitlement to bring a declaratory judgment action, *Le.,* his standing to bring suit." *Kinnett v. Kinnett,* 17-625 (La. App. 5 Cir. 7/7/22), 345 So.3d 1122, 1130, *writ granted, judgment vacated and set aside,* 22-01246 (La. 9/20/22), 345 So.3d 1020, and *writ granted, judgment vacated and set aside,* 22-01199 (La. 9/20/22), 345 So.3d 1021, citing *In re Melancon,* 05-1702 (La. 7/10/06), 935 So.2d 661, 667. We further found that the trial judge's rulings "affected the presentation of evidence, or lack thereof, permitted at trial" and we vacated the judgments appealed and remanded the matter to the trial court to allow the parties to conduct proper discovery relating to Mr. Andrews' supplemental petition raising the issue of Article 198's constitutionality. *Id.*

The Louisiana Supreme Court again granted writs in this matter and vacated this Court's judgment, remanding the matter to this Court for consideration of the constitutionality of La. C.C. art. 198. In *a per curiam* opinion, the Court stated, "[i]t is well settled that the determination of whether a statute is constitutional presents a question of law, which is reviewed on a *de novo* basis. *Westlawn Cemeteries, L.L.C. v.*

Louisiana Cemetery Bd., 2021-01414 (La. 3/25/22), 339 So.3d 548, 559; *City of New Orleans v. Clark,* 2017-1453 (La. 9/7/18), 251 So. 3d 1047, 1051; *State v. Webb,* 2013-1681 (La. 5/7/14), 144 So.3d 971, 975. There is sufficient evidence in the record, including the proffered evidence, for the court of appeal to review the district court's judgment finding La. Civ. Code art. 198 to be constitutional." *Kinnett, supra.*

On remand, we now consider, as instructed, only Mr. Andrew's challenge on appeal to the constitutionality of Article 198. For the reasons set forth below, we find Article 198 to be unconstitutional as applied to Mr. Andrews in this case and we remand this matter to the trial court for further proceedings on Mr. Andrews' Petition of Intervention.

DISCUSSION

On appeal, both Mr. Andrews and the minor child, G.J.K, complain of the trial court's January 10, 2019 judgment upholding the constitutionality of Article 198. G.J.K. argues that the article is unconstitutional under the due process clause because it violates G.J.K.'s constitutional right to prevent the erroneous termination of the natural relationship between G.J.K. and his biological father without adequate notice or other safeguards in place. Further, G.J.K. contends that the article violates the equal protection clause because it discriminates on the basis of birth. Mr. Andrews contends that the article violates the due process clause of the federal and state constitutions because it effectively terminates a biological parent's fundamental and constitutional right to parent without notice or a meaningful opportunity to be heard. He further asserts that it violates the equal protection clause because it results in a disparity in

the standards of knowledge and duty between a biological father and a biological mother.

We begin our analysis by reviewing the language of the article itself. La. C.C. art. 198 provides:

> A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.
>
> If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first
>
> Occurs.
>
> In all cases, the action shall be instituted no later than one year from the day of the death of the child.
>
> The time periods in this Article are peremptive.

For the reasons discussed below, we find that Article 198 is unconstitutional as applied to the facts of this case because it effectively terminates a biological parent's fundamental right to parent without due process as required under the Louisiana state constitution. Accordingly, for the reasons discussed below, we reverse the trial court's January 10, 2019 judgment upholding the constitutionality of Article 198,

and we remand the matter to the trial court for further proceedings.

Preliminary Issue of G.J.K.'s Standing

The Louisiana Supreme Court clearly instructed that G.J.K. does not have standing to challenge the constitutionality of La. C.C. art. 198, and we are constrained by that holding. The Louisiana Supreme Court instructed:

> To have standing, a party must complain of a constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations." *Id.; Greater New Orleans Expressway Comm'n,* 892 So.2d at 573-574. Article 198 focuses on the rights of the biological father to establish paternity. In contrast, the rights of a child to establish filiation are addressed by La. Civ. Code art. 197, which provides in part, "[a] child may institute an action to prove paternity even though he is presumed to be the child of another man." A child's action is not subject to any peremptive period, except with regard to succession rights, where it must be brought within one year of the alleged father's death. *Id.* Thus, G.J.K. may institute an action to establish filiation to Mr. Andrews, even though Mr. Andrews' avowal action is peremptive. Article 198 affects Mr. Andrews' rights. G.J.K's rights are controlled by Article 197. Under these circumstances, we find G.J.K. lacks standing to challenge the constitutionality of Article 198.

Kinnett, 332 So.3d at 1157.

Accordingly, considering the Louisiana Supreme Court's direct instructions to this Court, we are limited in our constitutional analysis to those arguments raised on behalf of Mr. Andrews. The Louisiana Supreme Court, however, did instruct that G.J.K. has standing to institute a filiation action under La. C.C. art. 197.[3] However, that issue is not before this Court at this time.

Mr. Andrews' Constitutionality Challenge

At the trial on Mr. Andrew's supplemental petition challenging the constitutionality of Article 198, Mr. Andrews proffered his own testimony as well as the testimony of a child psychologist, **Dr.** Loretta Sonnier, to support his position that he, as G.J.K.'s biological father, *grasped the opportunity* to establish a relationship with G.J.K. and to prove that he has a fundamental constitutional right to parent G.J.K.[4]

---

[3] G.J.K. asserts in brief to this Court that, as a minor child with no procedural capacity to sue under La C.C.P. art. 683, he cannot in fact institute an action under La. C.C. art. 197. The Louisiana Supreme Court in its opinion stated that G.J.K. has a right to institute a filiation action under La. C.C. art. 197. Although such an action, potentially filed by his court-appointed counsel on his behalf in connection with this litigation involving the issue of paternity, would likely be immediately met with an exception of lack of procedural capacity or similar procedural vehicle, at that point the validity and possible constitutionality of La. C.C. art. 197, and its application constrained by the limitation of La. C.C.P. art. 683, would be squarely before the Court for consideration.

[4] In its opinion instructing this Court to consider the constitutionality issue on remand, the Louisiana Supreme Court instructed that "[t]here is sufficient evidence in the record, *including the proffered evidence,* for the court of appeal to review the district

At trial, Mr. Andrews offered testimony to support his position that, once he had actual knowledge of his paternity, he *grasped the opportunity* to have a meaningful role in the child's life and to exercise his parental rights. Between December 9, 2016—the date Ms. Kinnett contacted him to inform him that she "had sibling DNA tests on her two children and her husband was not G.J.K's biological father[5]"—and April 5, 2017—the date on which Ms. Kinnett cut off any visitation or contact between Mr. Andrews and G.J.K.—he spent time with G.J.K. as he described in his testimony:

Mr. Andrews testified that on December 10, 2016 the day following the telephone call from Ms. Kinnett informing him that she learned with certainty that her husband was not G.J.K.'s biological father and, therefore, Mr. Andrews was G.J.K.'s biological father—he underwent an initial informational paternity test. On that date, he met Ms. Kinnett and G.J.K. at a medical testing facility for DNA testing and interacted with G.J.K. On December 20, 2016, Ms. Kinnett and Mr. Andrews met at a coffee shop for approximately one hour, during which he interacted with G.J.K. He testified that, initially, it was difficult to *see* G.J.K. because Ms. Kinnett had not informed Mr. Kinnett of

---

court's judgment finding La. Civ. Code art. 198 to be constitutional." *Kinnett v. Kinnett,* 20-01134 (La. 10/10/21), 332 So.3d 1149, 1157 (emphasis added). Accordingly, for purposes of considering the constitutionality of La. C.C.P. art. 198 in this case, we consider in our analysis, as instructed, the testimony proffered by Mr. Andrews at trial.

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

G.J.K.'s paternity or that she had an affair with Mr. Andrews during the marriage.

On January 7, 2017, Mr. Andrews met Ms. Kinnett with G.J.K. and her daughter B.A.K. at Audubon Park to interact with G.J.K while the children played at the park. After that interaction, Ms. Kinnett additionally became concerned that her older child, B.A.K., would report to her father, Mr. Kinnett, that Mr. Andrews had met them at the park to interact with G.J.K.[6] On another occasion in January, Mr. Andrews met Ms. Kinnett at a coffee shop with G.J.K. On January 12 or 13, 2017, Mr. Andrews met Ms. Kinnett and G.J.K. at Ms. Kinnett's sister's home, where Ms. Kinnett was housesitting, for approximately two hours to interact with G.J.K. while and after Ms. Kinnett put B.A.K. to bed.

On January 22, 2017, days after Ms. Kinnett had filed for divorce from Mr. Kinnett, Mr. Andrews went to Ms. Kinnett's home with G.J.K. and B.A.K. present for approximately two hours to spend time with G.J.K.[7] On January 28, 2017, Mr. Andrews met Ms. Kinnett and G.J.K. at Ms. Kinnett's new apartment to help her clean and prepare the new apartment she secured after she and Mr. Kinnett separated. On that date, he interacted with G.J.K. for approximately two hours. On January 29, 2017, Mr. Andrews went to Ms. Kinnett's home and, while Ms. Kinnett took B.A.K.

---

[6] Mr. Andrews proffered various text messages between Mr. Andrews and Ms. Kinnett to corroborate his testimony and timeline of events.

[7] Mr. Andrews testified that, by January 22, 2017, after Mr. and Ms. Kinnett had separated, it was more comfortable for him to interact with G.J.K. while B.A.K. was present.

and a friend to the movies, he stayed with G.J.K. alone. Mr. Andrews testified that he interacted with the child for approximately four hours by himself; he played with G.J.K.; he put G.J.K. down for a nap; and he played with G.J.K. after he woke from his nap until Ms. Kinnett returned. On the following day, January 30, 2017, Mr. Andrews picked up G.J.K. from Ms. Kinnett's home and drove G.J.K. himself to a medical facility for the purpose of conducting a direct DNA test.[8]

On February 11, 2017, Mr. Andrews went to Ms. Kinnett's home and interacted with G.J.K.[9] for approximately four hours that evening, and spent the night in the home. He went on a morning walk and had breakfast with G.J.K. and Ms. Kinnett and remained with G.J.K. at the home for a couple of hours that morning. On February 19, 2017, he again visited G.J.K. at Ms. Kinnett's home in the afternoon into the evening while Ms. Kinnett prepared dinner and then put the children to bed. On March 3, 2017, Mr. Andrews went to Ms. Kinnett's home to meet her and G.J.K., who was off of school that day, to spend the

---

[8] Mr. Andrews explained that the December 9, 2016 sibling DNA test had a 95% rate of accuracy to show that B.A.K. and G.J.K. were not full biological siblings. The DNA test taken December 10, 2016, was an "information test" that could not be used in court proceedings. Thus, a direct DNA evidence test was necessary to establish paternity legally and to prepare his avowal action.

[9] Mr. Andrews explained that by this time, Ms. Kinnett and Mr. Kinnett shared custody of the minor children and Ms. Kinnett did not have G.J.K. every weekend, so Mr. Andrews' ability to visit with G.J.K. became less frequent due to the custody arrangement between Mr. Kinnett and Ms. Kinnett.

day visiting the aquarium downtown with them. Mr. Andrews testified that thereafter he and Ms. Kinnett agreed for him to visit G.J.K. at Ms. Kinnett's home each Sunday afternoon, when she had custody that week, to help with the kids while she prepared dinner and did advanced meal-prep for the week. He testified that, on average, he would arrive at 2:30 p.m. and would stay and interact with G.J.K. until approximately his 8:00 p.m. bedtime.[10] He testified this routine lasted approximately through March 17, 2017.

On March 24, 2017, Mr. Andrews reached out to Ms. Kinnett to visit with G.J.K. that Sunday, and Ms. Kinnett stated that counsel had advised that he should not visit with G.J.K. anymore and, further, that Mr. Kinnett did not want Mr. Andrews interacting with the child. However, thereafter, Mr. Andrews and Ms. Kinnett made plans for him to visit for dinner on April 5, 2017, from approximately 5:00 p.m. until G.J.K.'s bedtime. Mr. Andrews testified that was the last interaction he had with the minor G.J.K., and that Ms. Kinnett refused to allow him to interact with G.J.K. thereafter.

Mr. Andrews testified to his belief that Ms. Kinnett cut off communication after she received discovery in the beginning of April from Mr. Andrews' counsel reflecting that he intended to introduce at trial text messages or communications between himself and Ms. Kinnett that demonstrated Ms. Kinnett took the sibling DNA test and had a suspicion that Mr.

---

[10] He also testified that on one occasion he purchased materials to hang an outdoor baby swing at Ms. Kinnett's home for G.J.K. and spent time pushing G.J.K. on the swing in Ms. Kinnett's backyard.

Andrews could be the father before disclosing that information to Mr. Kinnett or his family. Mr. Andrews testified that his intent to use those text messages in litigation caused a "rift" between him and Ms. Kinnett because she was concerned as to how it would make her appear to Mr. Kinnett's family and, further, because it would demonstrate that she was not truthful, even after disclosure, to Mr. Kinnett about the extent or duration of the relationship between Mr. Andrews and Ms. Kinnett. Following an April 15, 2017 hearing wherein Mr. Andrews testified concerning the extent and duration of their relationship, Ms. Kinnett's counsel advised that Ms. Kinnett would no longer allow Mr. Andrews to play a role in G.J.K.'s life.

Concerning financial support, Mr. Andrews testified that he provided financial assistance to Ms. Kinnett in the amount of $3,495.00 toward the security deposit and first month's rent to move into a new apartment after she and Mr. Kinnett separated. The following month, he provided Ms. Kinnett $1,000.00, toward expenses.[11] Concerning actions Mr. Andrews took to prepare for visitation or custody with G.J.K., he testified that he converted the spare bedroom in his apartment into a nursery in preparation to have G.J.K. in his home, including purchasing a crib, bedding, decorations, and dresser set for the nursery. He also testified that he purchased a car seat and

---

[11] Mr. Andrews proffered two checks into evidence to corroborate his testimony, one check made payable to Ms. Kinnett for $1,000.00 and a second check in the amount of $3,495.00 to cover expenses for the apartment's security deposit and first month's rent. Mr. Andrews also proffered text message exchanges between himself and Ms. Kinnett concerning him financially helping her with the initial expenses of finding an apartment.

baby-proofed his apartment with electric outlet covers to make the apartment suitable for G.J.K.[12]

When questioned as to why he waited until February 2017 to file his avowal action after learning of the DNA results in December 2016, Mr. Andrews responded that Mrs. Kinnett and her counsel asked him to "hold off" on filing his avowal action until after the holidays so as to not ruin the children's Christmas. He testified he learned that on or about January 7, 2017, Ms. Kinnett and Mr. Kinnett got into an argument, during which Ms. Kinnett "blurted out" that Mr. Kinnett was not the biological father to G.J.K., and that thereafter, Ms. Kinnett and her counsel asked Mr. Andrews to hold off on filing his avowal action to "give everyone a chance to catch their breath."

Mr. Andrews also proffered the testimony of Dr. Loretta Sonnier, a board certified psychiatrist with added qualifications in forensic psychiatry and child and adolescent psychiatry.[13] Dr. Sonnier did not inter-

---

[12] Mr. Andrews proffered photographs of the nursery in his home.

[13] The qualifications of Dr. Sonnier were set forth at the proffer and demonstrate that Dr. Sonnier is a board certified psychiatrist with added qualifications in forensic psychiatry and child and adolescent psychiatry. She is an assistant professor at Tulane University, teaching law and psychiatry. She completed a triple board residency at Cincinnati Children's Hospital in pediatric, child and adolescent psychiatry, and forensic psychiatry, and served as triple-board Chief Resident. She has testified before the Louisiana House of Representatives in May of 2017, and also before the Louisiana Senate Justice Reinvestment Initiative subcommittee in January 2017, relating to adolescent brain development in connection with a bill being considered by the Senate at that time. As we have been instructed by the Louisiana

view or evaluate any of the parties involved in this litigation. Rather, she testified that she reviewed the evidence in the case and the relevant law, Article 198. As applied to this case, Dr. Sonnier considered the benefits and the harms that could come to G.J.K. if he were to be raised not knowing his biological father and further considered any harm that could come to G.J.K. from the avowal of Mr. Andrews as his biological father. Dr. Sonnier testified that an "unplanned disclosure," or a child finding out about his or her origins at a point in time not planned, is the most traumatic manner in which to learn that you have an undisclosed biological parent. She testified that a child most likely would "experience a sense of betrayal and confusion in their legal parents and a sense of abandonment by their biological parents."

When questioned concerning the language of Article 198 restricting the time frame in which a biological father could initiate an avowal action when the mother is married at the time of the child's birth, she testified that while the purpose of the one-year time limitation would be to preserve the "intact family," she stated "that did not apply in this case because it was not an intact family, so G.J.K.'s already impacted by the conflict of divorce."

Dr. Sonnier discussed her understanding of the term "intact family" to mean that both parents live in the home. She further stated that divorce inherently allows for the possibility of the introduction of other adults into the child's life, such as each parents'

Supreme Court, we consider Dr. Sonnier's proffered testimony in our constitutional analysis.

significant others and/or the introduction of step-parents.[14]

Dr. Sonnier opined that the imposition of a one-year preemptive period as presented in Article 198 is not "developmentally informed," meaning that is it not based on any science in the field of child psychology. She further stated that the intended purpose of La. C.C. art. 198, to protect children, is not furthered by the one-year time limitation and "de facto, does not protect children," is not "rationally related" to that purpose, and is not in a child's best interest. Dr. Sonnier testified that such a determination requires an individualized evaluation of each set of circumstances presented, which the Article does not allow for.

Concerning the psychological impact of the one-year peremptive period set forth in Article 198, Dr. Sonnier opined: "I agree that compelling someone to act quickly, would be in the child's best interest; however, foreclosing on any possibility for the remainder of the child–of a child's lifetime after a time frame has elapsed, I–I don't believe that's in the child's best interest." Stated another way, she testified, "it seems rather arbitrary to me to acknowledge that it's in a child's best interest to act quickly and to have a relationship and then to say time's up, never mind, and to not allow it anymore," for the remainder of the child's life.

---

[14] A second divorce for one or both parents would result in the possibility of a second (or third) set of stepparents or yet another set of adults being introduced into the child's life.

Law and Analysis

We now consider only Mr. Andrew's challenge to Article 198's constitutionality.

As a general rule, statutes are presumed to be constitutional. W. *Feliciana Par. Gov't v. State,* 19-00878 (La. 10/11/19), 286 So.3d 987, 993-94. Because the provisions of the Louisiana Constitution are not grants of power, but instead are limitations on the otherwise plenary power of the people, exercised through the legislature, the legislature may enact any legislation that the constitution does not prohibit. *Id.* Because a state statute is presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality. *Id.; see also State v. Brenner,* 486 So.2d 101 (La. 1986). However, this presumption does not apply when a statute infringes upon a fundamental right. *State v. Spell,* 2100876 (La. 5/13/22), 339 So.3d 1125, 1131.

When constitutional challenges are made under both the federal and state constitutions, we must first consider whether the case may be resolved on state constitutional grounds. *See State v. Perry,* 610 So.2d 746, 751 (La. 1992). The Louisiana Constitution of 1974 provides that no person shall be deprived of life, liberty or property, except by due process of law. La. Const. Art. 1, § 2. Due process of law is guaranteed by both the Fourteenth Amendment to the United States Constitution and Art. 1, § 2 of the 1974 Louisiana Constitution. Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Fairbanks v. Beninate,* 20-206 (La. App. 5 Cir. 12/23/20), 308 So.3d 1222, 1232, quoting *Garcia v. Hernandez,* 21-338 (La. App. 5 Cir. 4/11/22), 339 So.3d 61, 65-66. Persons whose rights may be affected

by state action are entitled to be heard, and, in order that they may enjoy that right, they must first be notified. *Id.*

It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a *meaningful time* and in a *meaningful manner*. *In re A.J.F.,* 00-0948 (La. 6/30/00), 764 So.2d 47, 55 (emphasis added); *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965); *Wilson v. City of New Orleans,* 479 So.2d 891 (La.1985); *State v. Woodard,* 387 So.2d 1066 (La. 1980).

When the due process clauses are invoked in a novel context, the established practice is to begin the inquiry with a determination of the precise nature of the private interest that is threatened. *See Lehr v. Robertson,* 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983); *Cafeteria Workers v. McElroy,* 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961). The protections of due process come into play only if the private interest asserted is constitutionally cognizable. Where fundamental rights are at stake, due process is satisfied only when the government has a compelling interest that justifies infringing upon the right, and the law employs the least restrictive means to achieve the government's objective. *State v.* two children were not full biological siblings, he underwent a paternity test to determine paternity. He then made an effort to interact with G.J.K. on a consistent basis and financially contributed to support Ms. Kinnett and G.J.K. while she navigated establishing a new residence after she and Mr. Kinnett separated. The record before us fully supports a fining that Mr. Andrews has demonstrated that he has *grasped the*

opportunity to parent his biological child, G.J.K., and that he has established a vested liberty interest in the constitutional right to parent his biological child, G.J.K.

We next consider the risk of erroneous deprivation of a biological father's right to parent under the procedures or safeguards provided in Article 198. The language of the article, which sets forth a one-year peremptive period, not subject to interruption or suspension, provides *no notice* requirement to a biological father and *no duty* on behalf of the biological mother to inform the biological father of his possible paternity. The very narrow exception under Article 198 applies when a trial judge makes a factual fining that the biological mother acted in bad faith—which requires either a finding of ill or malicious intent or evidence to demonstrate that the biological mother directly, clearly, and intentionally misled the biological father to believe that her husband was in fact the biological father.

The Louisiana Supreme Court's recent interpretation of the language "bad faith" as set forth in its most recent opinion in this matter instructs that "'a mother who knows another man is possibly the father of her child' is not in bad faith in failing to disclose that knowledge of possible paternity after the child's birth if a trial judge fins credible the mother's belief that one man, rather than the other—whom she had sexual relations within a single conception period—is the father." *Kinnett, supra,* 345 So.3d at 1129-30, quoting *Kinnett, supra,* 332 So.3d at 1156.

In other words, the mere belief that one of the two or three or possibly more partners with whom a woman has sexual relations in a likely one-week

conception period could be the biological father of the child, under the Court's interpretation, does not require the mother to notify or inform any partner even after the birth of a child before a biological father's rights may become perempted. She is under no duty to take legal action or to investigate or undergo DNA testing. The biological father, however, is forced to interject himself into a marriage by filing a public suit, most likely causing upheaval or divorce, even if the child ultimately is determined to not biologically be his child, in order to preserve his parental rights. This seems to be in direct conflict with the purpose of the Article—to maintain intact families and prevent the upheaval of litigation. In some scenarios, a biological father may have no knowledge that a child has been born, yet may be deprived of the opportunity to establish his constitutional right to parent his child.[15]

We further point out that "'an impartial decision maker is essential' to due process." *In re Adoption of B.G.S., supra.* Under the language of Article 198 in conjunction with the Louisiana Supreme Court's narrow interpretation of the term "bad faith" as set forth in its opinion, *Kinnett v. Kinnett, supra,* the biological mother alone in many circumstances will control whether the biological father is notified of her

---

[15] As stated earlier, because there was no finding of bad faith in this case, any factual finding concerning constructive knowledge of possible paternity is irrelevant. Nevertheless, we point out that such a fundamental right as the right to parent a biological child should not rest on a trial judge's determination that an individual likely had a fleeting suspicion of possible paternity in a case where contraceptives were physically in place during intercourse and, after the birth of a child, the biological mother informed the biological father that she had subsequently reunited with her husband and gotten pregnant.

pregnancy or the child's birth. "[T]he placement of decision in the hands of a potentially adverse decision maker, violates the most basic principles of due process under both our state and federal constitutions." *Adoption of B.G.S.* at 556.

Finally, we consider the government interest at stake and whether such interest is a compelling one sufficient to justify infringing upon Mr. Andrews' fundamental right to parent his biological child. The comments to Article 198 state that the Article's "time period of one year from the child's birth imposed upon the alleged father if the child is presumed to be the child of another man" is "intended to protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father."

Without this Court opining on the issue, the Louisiana Supreme Court has consistently pointed out that a divorced household is not, in the legal sense, considered an "intact family" as the language has historically been utilized or contemplated by the Louisiana legislature. *See State, Dep't of Child & Fam. Servs. ex rel. A.L. v. Lowrie,* 14-1025 (La. 5/5/15), 167 So. 3d 573, 585, citing La. R.S. 9:315 ("While the legislature acknowledges that the expenditures of two-household divorced, separated, or non-formed families *are different from intact family households,* it is very important that the children of this state not be forced to live in poverty because of family disruption and that they be afforded the same opportunities available to children in intact families . . . .) (emphasis added);

approvingly cited by *Estapa v. Lorenz,* 11-852 (La. App. 5 Cir. 3/27/12), 91 So.3d 1103, 1106; *see also* La. C.C. art. 194, Rev. Cmt. (defining "child as a member of an intact family [is a child] resulting from the marriage of the mother and alleged father."); *See also State, Dep't of Child & Fam. Servs. ex rel. A.L. v. Lowrie,* 141025 (La. 5/5/15), 167 So.3d 573, 581, citing *Pociask v. Moseley,* 13-0262 (La. 6/28/13), 122 So.3d 533, 538; *Gallo v. Gallo,* 03-0794 (La. 12/3/03), 861 So.2d 168, 174; *T.D. v. MMM,* 98-0167 (La. 3/ 2/99), 730 So.2d 873, 878 (concurring opinion), *abrogated on other grounds by Fishbein v. State ex rel. Louisiana State Univ. Health Scis. Ctr.,* 04-2482 (La. 4/12/05), 898 So.2d 1260 ("Where a marital unit is intact, the State's interest in preserving the integrity of the marital family may also silence a biological father's competing interests. . . . However, once the bonds of matrimony are dissolved *a vinculo matrimonii,* the State's interest in preserving the marital family disappears. . . . Today's realities are that illegitimacy and 'broken homes' have neither the rarity nor the stigma as in the past. When parenthood can be objectively determined by scientific evidence, and where illegitimacy is no longer stigmatized, presumptions regarding paternity are 'out of place.'").

Moreover, the Louisiana marital presumption's evolving path illustrates that history and tradition must sometimes give way to truth gained from experience, science, and technology. When the social and legal consequences associated with illegitimacy were dire, and the only actual proof of paternity was long absence, the State's interest in providing protection for innocent children was compelling, whether or not the method of providing protection was wholly effective.

Today, when the evolution of the law and society has rendered the protection of the child from negative social and legal consequences unnecessary, and scientific advances make proof of paternity a simple scientific reality, the State's interest in protecting children no longer justifies the maintenance of legal fiction in the face of biological fact. The marital presumption and its purposes no longer justify denying the existence of a biological father's constitutional right to parent. *Kinnett,* 302 So.3d at 196 (Wicker, J., concurring) (quotations omitted).

While the State's interest in protecting the child is important, Article 198's peremptory period is not so sufficiently related to achieving that interest that it outweighs the risk of erroneous deprivation of the biological father's constitutionally protected interest in an opportunity to develop a relationship with his child. *Id.*

We find that, under the specific facts of this case where Mr. Andrews intervened into a divorce proceeding before the child attained the age of 18 months old (and, thus, had not become attached over many years to the presumed father) and where Mr. Andrews had consistent interaction with G.J.K. when permitted by Ms. Kinnett to establish a relationship with him, the government interest at stake—maintaining the intact family unit or protecting the child after he or she has become attached to the presumed father over the course of many years—is not compelling under the facts of this case and cannot justify deprivation of Mr. Andrews' vested constitutional right to parent G.J.K.

DECREE

Accordingly, for the reasons explained herein, we find first that Mr. Andrews has established a vested liberty interest in the constitutional right to parent his biological child, G.J.K. We further find that Article 198 as applied to the facts of this case is unconstitutional and violates Mr. Andrew's right to due process under the Louisiana state constitution. We therefore reverse the trial court's January 10, 2019 judgment upholding the Article's constitutionality in this case, and we remand this matter to the trial court for further proceedings consistent with this opinion.

REVERSED; REMANDED

OPINION, FIFTH CIRCUIT COURT OF APPEALS STATE OF LOUISIANA (JULY 7, 2022)

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 17-CA-625

On Appeal from the Twenty-fourth Judicial District Court Parish of Jefferson, State of Louisiana No. 768-195, Division "E" Honorable John J. Molaison, Jr., Judge Presiding

Before: Fredericka ROMBERG WICKER, Jude G. GRAVOIS, and Robert A. CHAISSON, Judges.

JUDGMENT ON MOTION IN LIMINE REVERSED; JUDGMENT ON CONSTITUTIONALITY VACATED; REMANDED FOR NEW TRIAL

FHW, JGG, RAC

WICKER, J.

This matter is before this Court on remand from the Louisiana Supreme Court to consider biological father appellant, Keith Andrews', challenge to the

constitutionality of La. C.C. art. 198, an issue which this Court did not consider on appeal. *Kinnett v. Kinnett*, 20-01134 (La. 10/10/21), 332 So.3d 1149, 1157.

Upon review of the rulings appealed in connection with Mr. Andrews' challenge to the constitutionality of La. C.C. art. 198, we find that the trial court abused its discretion in granting a pre-trial motion *in limine* and in excluding "any fact witness" from the trial on Mr. Andrews' first supplemental petition challenging the constitutionality of La. C.C. art. 198. We find that the trial court's ruling impeded the discovery process and prevented Mr. Andrews from properly challenging the statute's constitutionality at trial. We therefore reverse the trial court's October 23, 2018 judgment granting the motion *in limine*, which affected the presentation of evidence, or lack thereof, permitted at trial, vacate the subsequent January 10, 2019 judgment holding La. C.C. art. 198 constitutional, and remand this matter to the trial court to allow the parties to conduct proper discovery and order the trial court to hold a new trial on Mr. Andrews' supplemental petition, with factual and/or expert testimony and evidence, raising the issue of La. C.C. art. 198's constitutionality.

Procedural History:

The preliminary procedural history is set forth in this Court's opinion in the first appeal in this case:

> Ms. Kinnett commenced the instant litigation by filing for divorce on January 14, 2017. She sought joint custody with Mr. Kinnett of their daughter, B.A.K., but sole custody of her son, G.J.K. On January 27, 2017, Mr. Kinnett filed his Answer and Reconventional

Demand disputing Ms. Kinnett's contention that awarding her sole custody of G.J.K. would be in the child's best interest, urging instead that joint custody be granted.

On February 10, 2017, Mr. Andrews filed a Petition in Intervention to Establish Paternity and to Obtain Custody of G.J.K. In his petition, Mr. Andrews alleged that Ms. Kinnett had concealed his possible paternity until December 9, 2016, and sought an order establishing paternity and an action to obtain custody.

On February 21, 2017, Mr. Kinnett answered Mr. Andrews' intervention with Exceptions of No Cause and/or No Right of Action, Prescription, and Peremption, arguing that Mr. Andrews' avowal action was perempted under Louisiana Civil Code art. 198 because he failed to file an action within one year of G.J.K.'s birth. On February 24, 2017, the court appointed the Loyola Law Clinic to represent the interests of the minor child. Ms. Kinnett first filed a memorandum opposing the exceptions on April 10, 2017, however, on May 31, 2017, she filed a second memorandum supporting the exceptions. On appeal, Ms. Kinnett adopted the arguments in Mr. Kinnett's appellee briefs.

At the initial April 12, 2017 hearing, the Domestic Commissioner denied the exceptions of no right of action and no cause of action as to paternity, and granted the exception of no cause of action as to custody. He also granted the exception of peremption, finding that Mr.

Andrews should have known G.J.K. was his child given that he had "intimate contact" with Ms. Kinnett nine months prior to the child's birth. Mr. Andrews objected to the Commissioner's ruling, contending in pertinent part that the "time limitations in Civil Code article 198 are constitutionally invalid."

The parties tried the exceptions de novo before the district court on June 2, 2017. The district court judge ruled from the bench denying the exceptions of no cause of action and no right of action as to paternity, but granting the exceptions of no cause of action and no right of action as to custody and visitation. The judge further held that Mr. Andrews' avowal action was perempted under Article 198 based on his finding that (a) Mr. Andrews had not proven "that the mother was actually in bad faith and intended to deceive," and (b) he had filed his avowal action more than a year from the time the judge determined he knew or should have known that he was G.J.K.'s father. The trial court declined to rule on the constitutionality of the statute and denied Mr. Andrews' motion for additional time to notify the attorney general and further plead the constitutionality issue. Mr. Andrews appealed the June 2, 2017 judgment to this Court.

On March 23, 2018, this Court stayed this appeal and remanded the case to the trial court to allow Mr. Andrews the opportunity to amend his petition and appropriately

> challenge the constitutionality of Article 198. *Kinnett v. Kinnett*, 17-CA-625, per curiam, p. 4. On April 6, 2018, Mr. Andrews filed his First Supplemental and Amending Petition, formally challenging Article 198's constitutionality, thereafter notifying the Louisiana Attorney General as required by law. The Law Clinic filed a memorandum in support of Mr. Andrews' Supplemental and Amending Petition on June 4, 2018.

Kinnett v. Kinnett, 17-625 (La. App. 5 Cir. 8/6/20), 302 So.3d 157, 165, *writ granted*, 20-01134 (La. 2/9/21), 309 So.3d 735, *reh'g denied*, 20-01134 (La. 1/28/22), and *writ granted*, 20-01143 (La. 2/9/21), 309 So.3d 735, *reh'g denied*, 20-01143 (La. 1/28/22), and *writ granted*, 20-01156 (La. 2/9/21), 309 So.3d 738, *reh'g denied*, 20-01156 (La. 1/28/22), and *rev'd in part*, 20-01134 (La. 10/10/21), 332 So.3d 1149.

On remand, Mr. Andrews filed a first supplemental and amended petition to properly raise a challenge to the constitutionality of La. C.C. art. 198. In the supplemental petition, Mr. Andrews further set forth factual allegations to demonstrate that he had "immediately assumed the role of G.J.K.'s biological father and began taking steps to support . . . and become involved in G.J.K.'s life." Mr. Andrews set forth the following allegations:

> Upon learning that he is, in fact, the father of the minor child, G.J.K., Petitioner [sic] [actually Intervenor–Mr. Andrews] immediately began to establish a relationship with G.J.K. and sought to *see* G.J.K. as much as possible. However, this was made extremely difficult by the circumstances then existing

> between Petitioner [Ms. Kinnett] and Defendant [Mr. Kinnett], as Petitioner waited until mid-January of 2017 to tell Defendant he was not the father of G.J.K. After that, Petitioner and Defendant separated, and began sharing custody of G.J.K. and B.A.K., which limited the times that Intervenor could *see* G.J.K. through Petitioner. It was further complicated by the fact that Petitioner hid her relationship with Intervenor from Defendant and Defendant's family. Because B.A.K. was older, in the first grade, and could potentially tell Defendant of Intervenor's presence, Intervenor's time with G.J.K. was very limited at first. Subsequently, Petitioner retaliated against Intervenor on multiple occasions because Intervenor was forced to disclose details about their relationship in court filings and testimony. This ultimately culminated in Petitioner cutting off all contact between Intervenor and G.J.K. after the April 15, 2017 hearing in front of Commissioner Bailey, because she did not like the way he testified.

In his supplemental petition, Mr. Andrews further set forth allegations of the circumstances under which he was able to spend time with G.J.K. prior to Ms. Kinnett's cutting-off contact:

> Despite these difficulties, Intervenor was still able to see G.J.K. and interact and bond with him sixteen times between December of 2016 and April of 2017:
>
> 1) December 10, 2016, Intervenor saw G.J.K. for the first time the day after he learned of

the results of the sibling paternity test, when he met Petitioner and G.J.K. at Tracepoint, LLC in Mid-City to conduct the first paternity test.

2) December 20, 2016, Intervenor went to PJ's coffee on Maple St to meet Petitioner and G.J.K., and spent approximately one hour with him there.

3) January 7, 2017, Intervenor went to Audubon Park to meet Petitioner, G.J.K. and B.A.K. there and spent approximately two hours playing with G.J.K. and B.A.K.

4) January 10, 2017, Intervenor went to PJ's coffee on Maple St. to meet Petitioner and G.J.K. and spent approximately one hour with him there.

5) January 12, 2017, Intervenor met Petitioner, G.J.K., B.A.K. and Petitioner's father at Petitioner's sister's house and spent approximately three hours playing with G.J.K. there.

6) January 22, 2017, Intervenor babysat for G.J.K. for approximately four hours while Petitioner took B.A.K. to a movie with friends.

7) January 28, 2017, Intervenor met Petitioner, G.J.K., B.A.K. and Petitioner's father at Petitioner's new apartment for approximately one hour to help clean and to play with the kids.

8) January 30, 2017, Intervenor picked up G.J.K. and drove him to Tracepoint, LLC for the second paternity test, and spent about one and half hours with him that day.

9) February 11, 2017, Intervenor had dinner with Petitioner and G.J.K. at Petitioner's new apartment, played with G.J.K, and helped get him bathed and ready for bed, and spent approximately three and one half hours with him that night.

10) February 12, 2017, Intervenor met Petitioner and G.J.K. for breakfast, and played with G.J.K., and spent approximately three hours with him that day.

11) February 19, 2017, Intervenor spent approximately two and one-half hours at Petitioner's new apartment one evening after dinner, played with G.J.K. and B.A.K. and helped get G.J.K. bathed and ready for bed.

12) February 27, 2017, Intervenor stopped by Petitioner's new apartment and played with G.J.K. for approximately one and one-half hours.

13) March 3, 2017, Intervenor took Petitioner and G.J.K. to the Audubon Aquarium and spent approximately four hours with him that day.

14) March 12, 2017, Intervenor spent approximately five hours in the afternoon and evening with Petitioner, G.J.K. and B.A.K. at Petitioner's new apartment. Intervenor played with the kids, had dinner together, and helped get G.J.K. bathed and ready for bed.

15) March 19, 2017, Intervenor spent approximately five hours in the afternoon and evening with Petitioner, G.J.K. and B.A.K. at

Petitioner's new apartment. Intervenor played with the kids, had dinner together, and helped get G.J.K. bathed and ready for bed.

16) April 5, 2017, Intervenor met with Petitioner, G.J.K. and B.A.K. for dinner and played with the kids, and spent approximately three hours with G.J.K. that night.

Moreover, Mr. Andrews made the following allegations regarding his desire to financially and emotionally provide for the minor child as follows:

> Intervenor further asserts that he is able to provide a stable and loving home for his son, both financially and as a caretaker. He has flexible work hours that allow for drop off and pick up from school and he rarely has to work on the weekends. As such, Intervenor will have ample time to spend with G.J.K. after school, on the weekends, and[] on holidays. In addition, he has a two-bedroom apartment, in close proximity to the minor child's current residence, wherein one bedroom is solely dedicated to the minor child.
>
> More importantly, and as asserted herein above, Intervenor has established a connection with the minor child, G.J.K., who is at such a young age that commencement of an emotional bond is not damaging to the child in any way, but rather strengthens the need for the protection of the minor child's and father's fundamental constitutional rights to filiation and avowal.

On May 15, 2018, Mr. Kinnett moved to strike the portions of Mr. Andrews' supplemental petition in which he alleged that he had provided financial support and started spending time with G.J.K., on the grounds that whether the biological father had established a relationship with the child was not relevant to the question of constitutionality. Mr. Kinnett also filed a motion *in limine* asserting that "[a] proper challenge to the constitutionality of any statute does not require more than briefs and argument" and argued that Mr. Andrews should be prohibited from presenting any factual testimony or evidence at the constitutionality trial. Ms. Kinnett also filed a "Motion to Strike Expert Witnesses and Written Discovery . . . " arguing that only briefs and arguments were appropriate and that Mr. Andrews should be prohibited from conducting any fact discovery or presenting any factual or expert evidence at trial on the issue of constitutionality.

On June 13, 2018, the trial court, Hon. John Molaison presiding, conducted a hearing on the motions *in limine* and motions to strike. At the June 13, 2018 hearing, Judge Molaison correctly pointed out that the constitutionality challenge presented in Mr. Andrew's supplemental petition is in fact an ordinary proceeding. Judge Molaison thus found discovery was proper and stated, "it's an ordinary proceeding and I cannot bar someone from attempting to introduce evidence to support that constitutional challenge to a statute" and "I believe the law allows the introduction of evidence to support a challenge to the constitutionality of the statute." On July 18, 2018, Judge Molaison issued a written judgment denying Mr. Kinnett's motion to strike the allegations stated in the amended petition

as well as the motion to strike any fact witnesses. He also denied the motions to strike discovery and fact witnesses, having found that "fact discovery" was appropriate and stated "I think I have to reset this hearing, allow you folks to conduct your discovery, determine if you need any additional witnesses on your own, and then we set it for trial."[1]

Judge Molaison then issued a Scheduling Order setting forth discovery deadlines, authorizing the deposition of Mr. Andrews' expert, Dr. Sonnier, and setting a status conference for August 22, 2018 to determine the status of discovery and to set a trial date. Counsel for Mr. Andrews began the discovery process and noticed the depositions of both Mr. Kinnett and Ms. Kinnett.

On July 19, 2018, counsel for Mr. Kinnett filed a motion to quash the notice of deposition for Brandon Kinnett.[2] On July 31, 2018, Ms. Kinnett filed a motion to quash the notice of video deposition of Karen Cohen Kinnett, again arguing that factual testimony was irrelevant to any constitutional analysis.

Soon thereafter, the then trial judge, Hon. John Molaison, was elected to this Court. On August 22, 2018, the Hon. Michael Kirby, Judge Pro Tempore, conducted a hearing on the motions to quash. Judge Kirby granted the motions to quash, finding that Mr. Kinnett's and Ms. Kinnett's depositions were not "relevant to establishing that Article 198 is unconstitutional."

---

[1] As to the motion to strike expert witnesses, Judge Molaison continued that motion.

[2] Mr. Kinnett also filed a motion for protective order, which the trial court granted.

On October 1, 2018, after a new trial judge had been appointed to preside over the case, Ms. Kinnett filed a "Motion *In Limine* to Exclude Testimony and Evidence of Any Fact Witness," seeking "an order prohibiting Intervenor from calling any fact witnesses at trial" on the constitutionality issue. This motion was nearly identical in substance to the motion *in limine* previously filed by Mr. Kinnett and denied by Judge Molaison. In her motion, Ms. Kinnett asserted that "testimony as to what relationship Intervenor may or may not have had with the minor and what action he may or may not have taken with respect to parenting the minor, does not make the constitutionality of Art. 198, more or less likely."

In opposition to this second motion *in limine*, Mr. Andrews argued that this Court had permitted amendment of his petition to appropriately challenge the constitutionality of article 198. He argued that, to appropriately and effectively challenge the constitutionality of La. C.C. art. 198, he would be required to put forth evidence to prove his standing to challenge the statute, as well as put forth evidence as to why the statute, as applied to him, is unconstitutional.

Prior to the hearing on the second motion *in limine*, the third judge to preside over this case was appointed *pro tempore*, the Hon. William Credo, III. In considering the arguments of Mr. Andrews' counsel that this is an ordinary proceeding and that Mr. Andrews has the burden of proving the factual allegations set forth in his supplemental petition in order to prove standing to assert the constitutionality challenge, Judge Credo expressed that "I don't believe that I'm required to hear testimony of a factual nature to establish the right to challenge the constitution-

ality . . . .” By judgment dated October 23, 2018, Judge Credo granted the “Motion *in Limine* to Exclude Testimony and Evidence of Any Fact Witnesses,” precluding any factual evidence from being introduced at the trial on the issue of constitutionality. Further, while Judge Credo recognized the possibility that “constitutional scholars, legislators, or those who possess highly specialized knowledge of the legislative history of the law in question” might serve as witnesses, the court found that neither the opinion of Mr. Andrews’ expert, Dr. Sonnier, nor the testimony of Mr. Andrews or any other fact witness was related to “whether the statute serves a legitimate government purpose of protecting the status of a child vis-á-vis his mother and father, his family, his classmates, and the world.”

On November 5 and December 18, 2018, Judge Credo presiding, the trial court heard and considered only oral arguments as to Mr. Andrews’ constitutionality challenge raised in his supplemental petition. On January 10, 2019, the court issued its written judgment, holding “that La. Civ. Code art. 198 is constitutional. Keith Edward Andrews has failed to submit evidence that Article 198 violates either substantive or procedural rights to due process or that it fails to protect a fundamental liberty interest, as alleged in his First Supplemental and Amending Petition.”[3]

Mr. Andrews filed a devolutive appeal. On appeal, Mr. Andrews complained of three trial court rulings: the trial court’s June 2, 2017 judgment holding that

---

[3] On October 30, 2018, Mr. Andrews filed a Notice of Intent to Proffer his own testimony and the testimony of his expert, Dr. Sonnier at the November 5, 2021 trial.

his avowal action was preempted; the October 23, 2018 interlocutory judgment granting the motion *in limine* to exclude "any fact witness" in connection with the trial of his constitutionality challenge raised in his supplemental petition[4]; and the January 10, 2019 judgment holding that La. C.C. art. 198 is constitutional.

This Court issued an opinion, reversing the trial court judgment on the issue of peremption. Finding legal error that interdicted the fact-finding process, this Court conducted a *de novo* review and found that Ms. Kinnett in bad faith deceived Mr. Andrews regarding his paternity, observing: "there is no set of circumstances wherein a woman–who has had sexual relations with more than one man during the period of possible conception–may have an 'honest belief' that one man, and not the other, is the father." *Kinnett v. Kinnett*, 332 So.3d at 1152, citing *Kinnett v. Kinnett*, 302 So.3d at 177. This Court further held "as a matter of law that a married woman–whose husband is presumed to be the father of her child–who knows that it is possible that another man is the child's biological father has a duty to inform that man of his possible paternity." *Kinnett,* 302 So.3d at 179. Because we found Mr. Andrews' claim not per-empted, this Court

---

[4] It is well-settled that although an interlocutory judgment may not itself be immediately appealable, it is nevertheless subject to review by an appellate court when a judgment is rendered in the case which is appealable. *Elysian, Inc. v. Neal Auction Co., Inc.*, 20-0674 (La. App. 4 Cir. 7/21/21), 325 So.3d 1075, 108, citing *People of the Living God v. Chantilly Corp.,* 251 La. 943, 947-48, 207 So.2d 752, 753 (1968) and *Phillips v. Gibbs,* 10-0175, p. 4 (La. App. 4 Cir. 5/21/10), 39 So.3d 795, 798; *see also Par. Nat. Bank v. Wilks*, 04-1439 (La. App. 1 Cir. 8/3/05), 923 So.2d 8, 11.

pretermitted "discussion of Mr. Andrews' assignments of error regarding the trial court's ruling that Article 198 is constitutional." *Kinnett*, 302 So.3d at 187.

The Louisiana Supreme Court reversed this Court and found that "a mother who knows another man is possibly the father of her child" is not in bad faith in failing to disclose that knowledge of possible paternity after the child's birth if a trial judge finds credible the mother's belief that one man, rather than the other—whom she had sexual relations within a single conception period—is the father. Having reversed this Court on the peremption of Mr. Andrews' avowal claim, the Louisiana Supreme Court remanded the matter to this Court for "consideration of Mr. Andrews' constitutional challenge." *Kinnett*, 332 So.3d at 1157.

This Court permitted the parties the opportunity to appear for oral argument and to file additional briefs for this Court's consideration.

Discussion

The party challenging the constitutionality of a law has the burden of proving that the law is barred by a particular provision of the constitution. *W.R.M. v. H.C.V.,* 06-0702 (La. 3/9/07) 951 So.2d 172. First, a plaintiff challenging the constitutionality of a law has the burden of introducing evidence of his entitlement to bring a declaratory judgment action, *i.e.,* his standing to bring suit. *In re Melancon*, 05-1702 (La. 7/10/06), 935 So.2d 661, 667. The Louisiana Supreme Court has instructed that "a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a constitutional defect in the application of the statute

to him or herself, not of a defect in its application to third parties in hypothetical situations." *Kinnett*, 332 So.3d at 1157, quoting *Melancon*, 935 So.2d at 667.

The United States Supreme Court has held that "a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2159-60, 68 L.Ed.2d 640 (1981) (citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1972)). However, the law is settled that a parent's constitutional right to parent his child does not arise by the mere circumstance of his child's birth. Rather, his liberty interest to parent his child arises with his demonstration of a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child." *Tracie F. v. Francisco D.*, 15-224 (La. App. 5 Cir. 9/21/15), 174 So.3d 781, 797, *writ granted*, 15-1812 (La. 11/16/15), 184 So.3d 20, and *aff'd but criticized*, 15-1812 (La. 3/15/16), 188 So.3d 231, citing *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S. Ct. 2985, 2993, 77 L. Ed. 2d 614 (1983), quoting *Caban,* 441 U.S., at 392, 99 S.Ct., at 1768. After such a showing is made, "his [the father's] interest in personal contact with his child acquires substantial protection under the due process clause. At that point it may be said that he "act[s] as a father toward his children." *Id.*, quoting *Caban*, 441 U.S. at 389, n. 7, 99 S.Ct., at 1766. Thus, for a biological father to properly assert a constitutionality challenge to a law governing paternity actions, he must present evidence to demonstrate his standing, *i.e.*, that he has grasped

the opportunity to father or rear his child and to take an "interest in personal contact with his child." *Id.*

Upon review of the record and consideration of the errors alleged in connection with Mr. Andrews' appeal of the judgments rendered in connection with his constitutionality challenge to La. C.C. art. 198, we find that the trial judge, Judge Credo, erred in granting the motion *in limine* to exclude any fact witness and to, essentially, prohibit any fact discovery or evidence to be produced at trial in this matter. We further point out that Judge Molaison previously denied Mr. Kinnett's substantively identical motion *in limine* and found that "fact discovery" and "depositions" would be relevant and necessary for Mr. Andrews to establish standing to properly challenge the constitutionality of La. C.C. art. 198.

Because we find that the interests of justice would not be served without full discovery and a full evidentiary trial on Mr. Andrews' supplemental petition, with factual and/or expert testimony and evidence, we reverse the trial court's October 23, 2018 judgment granting the motion *in limine*, which affected the presentation of evidence, or lack thereof, permitted at trial, vacate the subsequent January 10, 2019 judgment holding La. C.C. art. 198 constitutional, and remand this matter to the trial court to allow the parties to conduct proper discovery and for a new trial on Mr. Andrews' supplemental petition raising the issue of La. C.C. art. 198's constitutionality.

JUDGMENT ON MOTION IN LIMINE REVERSED; JUDGMENT ON CONSTITUTIONALITY VACATED; REMANDED FOR NEW TRIAL

OPINION, LOUISIANA SUPREME COURT (DECEMBER 10, 2021)

SUPREME COURT OF LOUISIANA

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 2020-CJ-01134, 2020-CJ-01143, and 2020-CJ-01156

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

Before: CRAIN, J., HUGHES, J., GENOVESE, J., GRIFFIN, J.

CRAIN, J.

Keith Andrews intervened in the divorce proceedings of Karen Cohen Kinnett and Jarred Brandon Kinnett asserting he is the biological father of Ms. Kinnett's youngest child. His avowal action was filed eighteen months after the child's birth. We find the avowal action untimely and perempted under Louisiana Civil Code article 198 and remand for the court of appeal to address Mr. Andrews' remaining constitutional challenge.

FACTS AND PROCEDURAL HISTORY

Karen Cohen Kinnett and Jarred Brandon Kinnett were married on January 24, 2009. Two children were

born during their marriage, B.A.K. on August 29, 2011 and G.J.K. on August 5, 2015. In 2013, Ms. Kinnett began an extramarital affair with Keith Andrews. Their last intimate contact occurred on November 15, 2014.

On September 1, 2015, Ms. Kinnett responded to a text from Mr. Andrews and, according to Mr. Andrews, apologized for not answering earlier texts and explained she had sexual relations with her husband, got pregnant, and had a baby with her husband. She further explained she was staying in her marriage for the children.

Fifteen months later, on December 9, 2016, Ms. Kinnett called Mr. Andrews and told him she had sibling DNA tests on her two children and her husband was not G.J.K's biological father. Ms. Kinnett testified she got the sibling DNA tests to prove to Mr. Kinnett that G.J.K. was his child, after Mr. Kinnett said he did not think the child looked like him.

After additional DNA tests showed Mr. Andrews to be G.J.K.'s biological father, Ms. Kinnett told Mr. Kinnett he was not G.J.K.'s biological father and, on January 14, 2017, filed for divorce. Then, Mr. Andrews, Ms. Kinnett, and G.J.K. all obtained DNA tests confirming Mr. Andrews is G.J.K.'s biological father to a scientific certainty of 99.999999998%.

In the divorce proceeding, Ms. Kinnett sought joint custody of B.A.K., but sole custody of G.J.K. Mr. Kinnett answered and reconvened, disputing Ms. Kinnett's contention that sole custody of G.J.K. is in the child's best interest and sought joint custody as G.J.K.'s presumed father.

Mr. Andrews then intervened to establish paternity and obtain custody of G.J.K. Mr. Andrews alleged Ms. Kinnett concealed his possible paternity until December 9, 2016, when she informed him of the sibling DNA test. Mr. Kinnett responded with exceptions of no cause of action, no right of action, prescription, and peremption, arguing the avowal action is perempted under Louisiana Civil Code article 198. Ms. Kinnett initially opposed the exceptions, but later filed a memorandum supporting them. The Loyola Law Clinic was appointed to represent the minor child.

The district court denied the exceptions of no cause of action and no right of action as to paternity, but granted them as to custody and visitation. The court further found Mr. Andrews' avowal action perempted under Article 198, because Ms. Kinnett did not in bad faith deceive Mr. Andrews and the avowal action was filed more than a year after he knew or should have known he was G.J.K's biological father. The district court also upheld the constitutionality of Article 198. Mr. Andrews appealed.

The court of appeal found the burden of proof was misapplied, which interdicted the fact-finding process and required a *de novo* review. Performing its *de novo* review, the court found Ms. Kinnett in bad faith deceived Mr. Andrews regarding his paternity, observing: "there is no set of circumstances wherein a woman–who has had sexual relations with more than one man during the period of possible conception–may have an 'honest belief' that one man, and not the other, is the father." *Kinnett v. Kinnett*, 17-625 (La. App. 5 Cir. 8/6/20), 302 So.3d 157, 177. The court held "as a matter of law that a married woman–whose husband is presumed to be the father of her child–who knows that it is possible

that another man is the child's biological father has a duty to inform that man of his possible paternity." *Id.* at 179. "Failure to so inform the possible biological father is bad faith deceit as contemplated in Civil Code art. 198." *Id.*

The appellate court further found that because of Ms. Kinnett's deception, Mr. Andrews did not know of his paternity until learning of the sibling DNA test on December 9, 2016. Therefore, the February 10, 2017 intervention filed within one year of that date was timely. The court of appeal expressly pretermitted discussing the constitutionality of Article 198. It reversed the district court's judgment and remanded for further proceedings. *Kinnett*, 302 So.3d at 187. This court granted writ applications filed by Mr. Kinnett, Ms. Kinnett, and counsel for G.J.K. *Kinnett v. Kinnett*, 20-01134, 20-01143, 20-01156 (La. 2/9/21), 309 So.3d 735, 738.

Mr. Kinnett asserts the appellate court's holding–that a woman who does not notify her paramour of the possibility of his paternity is *de facto* in bad faith because a woman who has sex with more than one man near the time of conception could never believe that one man and not the other was the father–is unsupported by the language of Article 198. In addition, Mr. Kinnett argues the appellate court ignored the manifest error standard of review in order to conduct a *de novo* review.

Ms. Kinnett contends the appellate court erred by interpreting Article 198 to impose a duty on married mothers to inform legal or biological fathers of the *possibility* of paternity.

Counsel for G.J.K. contends the appellate court erred in not addressing the constitutionality of Article 198. He argues the article is unconstitutional under the due process clause of the fourteenth amendment because it lacks adequate safeguards and violates the minor child's constitutional right to prevent the erroneous termination of the natural relationship with his biological father. He also argues the article is unconstitutional under Louisiana Constitution article I section 3 and the equal protection clause of the fourteenth amendment because it discriminates on the basis of birth.

LAW AND ANALYSIS

Louisiana Civil Code article 198 provides:

> A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.
>
> If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.
>
> In all cases, the action shall be instituted no later than one year from the day of the death of the child.

> The time periods in this Article are peremptive.

Generally, a man may bring an action to establish his paternity at any time. However, Article 198 limits that time in two instances–if the child is the presumed child of another man[1] or if the child dies. La. Civ. Code art. 198, Revision Comment (d). If the child is the presumed child of another man, the avowal action must be instituted within one year after the child's birth, unless the mother "in bad faith deceived the father of the child regarding his paternity." La. Civ. Code art. 198. In that event, the action must be instituted within one year from the day the father knew or should have known of his paternity. *Id*. These time periods are peremptive. *Id*.

Article 198 addresses the circumstance of competing or dual paternity. The one year filing requirement imposed upon the biological father when the child is the presumed child of the husband of the mother requires the biological father to act quickly to determine his paternity. La. Civ. Code art. 198, Revision Comment (e). By creating a relatively short peremptive period, the legislature chose to favor the intact family and the presumed father over the possible biological father.[2] That is a policy decision beyond the role of the

---

[1] La. Civ. Code art. 185:

> The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage.

[2] The presumption that the husband of the mother is the father of the child has been characterized as the "strongest presumption in the law." La. Civ. Code art. 185, Revision Comment (b).

judiciary to disturb. This short time frame reflects the legislature's intent to minimize upheaval for the child and preserve intact families.

Because G.J.K. was born during the marriage between Mr. and Ms. Kinnett, he is the presumed child of Mr. Kinnett. La. Civ. Code art. 185. Consequently, Mr. Andrews' avowal action filed February 10, 2017, eighteen months after G.J.K. was born, is perempted unless Ms. Kinnett in bad faith deceived Mr. Andrews regarding his paternity and the action was filed within one year from the day Mr. Andrews knew or should have known of his paternity.

Burden of Proof

"Peremption has been likened to prescription; namely, it is prescription that is not subject to interruption or suspension." *Lomont v. Bennett*, 14-2483 (La. 6/30/15), 172 So.3d 620, 626-27; *Rando v. Anco Insulations, Inc.*, 08-1163 (La. 5/22/09), 16 So.3d 1065, 1082. The rules governing the burden of proof as to prescription also apply to peremption. *Id.* Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. *Id.* But, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. *Id.*

Mr. Andrews pled the exception to Article 198's one year peremptive period for an avowal action. Thus, the action is not perempted on the face of the pleadings, and the burden of proof was on Mr. Kinnett, the exceptor, to establish the avowal action was untimely. To meet that burden, he was required to show either 1) Ms. Kinnett did not "in bad faith deceive" Mr. Andrews regarding his paternity, or 2)

Mr. Andrews "knew or should have known" of his paternity more than one year before filing his avowal action. The resolution of the bad faith and knowledge of paternity issues required the determination of the subjective states of mind of both Ms. Kinnett and Mr. Andrews. These were contested factual issues at trial.

The court of appeal found the district court erred in placing the burden of proving Ms. Kinnett's bad faith and the timing of Mr. Andrews' knowledge of his paternity on Mr. Andrews rather than Mr. Kinnett, which error interdicted the fact-finding process. This conclusion was reached by relying on the district court's oral reasons for judgment, which, according to the appellate court, reflect "the trial judge was most concerned with Mr. Andrews' responsibility upon being told that a woman he had been intimate with in the past year had given birth to a child," rather than focusing on Ms. Kinnett's behavior and possible motives. *Kinnett*, 302 So.3d at 172. The court found this was legal error, requiring a *de novo* review on appeal. *Id*. at 174. We disagree. The parties argued the burden of proof at the beginning of the hearing. Counsel for Mr. Kinnett, who bore the burden of proof, then proceeded first to present his case. While the trial court did not expressly rule on the burden of proof before allowing the hearing to proceed, the record does not indicate this affected the trial court's findings of fact.

A court of appeal may not set aside a trial court's findings of fact in the absence of manifest error or unless it is clearly wrong. *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So.2d 731, 735; *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). However, where one or more legal errors interdict the fact-finding process,

the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record. *Evans*, 708 So.2d at 735. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. *Id.* Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id.*

Here, there was no legal error that materially affected the outcome or interdicted the fact-finding process. To the contrary, the district court was informed on the proper burden of proof, then determined the critical facts. While the trial court focused on the fact that Mr. Andrews waited more than one year to file the avowal action after he knew or should have known of his paternity, it also found Ms. Kinnett did not in bad faith deceive Mr. Andrews regarding his paternity. These factual findings do not indicate an improper shifting of the burden of proof to Mr. Andrews. To the contrary, both of these findings are part of Mr. Kinnett's burden of proof. Under either scenario, if supported by the facts, the avowal action was perempted.

Manifest Error Review

Applying the proper standard of review, we must determine whether the record supports the trial court's conclusion that Ms. Kinnett did not in bad faith deceive Mr. Andrews regarding his paternity. If the trial court's factual findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed

the evidence differently. *Richard v. Richard*, 2011-0229 (La. 10/25/11), 74 So.3d 1156, 1158.

The operative terms in Article 198 are "bad faith" and "deceived." "Bad faith" is a "[d]ishonesty of belief, purpose, or motive." Black's Law Dictionary (11th ed. 2019). Although "deceived" is not in Black's Law Dictionary, "deception" is defined as "[t]he act of deliberately causing someone to believe that something is true when the actor knows it to be false." Black's Law Dictionary (11th ed. 2019). Merriam-Webster also defines deception as "the act of deceiving." Thus, deception is a deliberate act that causes someone to believe something the actor knows to be false. To "know" something is to be aware of the truth or factuality of it. Merriam-Webster's Dictionary (11th ed. 2021). The question here is whether Ms. Kinnett made a deliberate representation to Mr. Andrews regarding his paternity that she knew was false.[3] The credibility of Ms. Kinnett's belief as to her child's father is the critical issue.

The court of appeal reversed the trial court, finding Ms. Kinnett, as a matter of law, in bad faith deceived Mr. Andrews by not telling him he was possibly G.J.K.'s father, because she could not have honestly believed her husband was the father. First, we reject the notion that a woman who has sex with more than one man during the period of conception cannot have an honest belief that one man and not the other is the father. Facts relating to the timing of the intimate

---

[3] We also note that deceit can result from silence. If Ms. Kinnett knew her husband was not the father and Mr. Andrews was, her silence could constitute bad faith deception. But those are not the facts before us and we do not opine in that regard.

contacts, the timing of ovulation, and the use of contraception, among other factors, can render the determination of the biological father unknowable without paternity testing. If the biological father is unknowable based on these factors, it may be unreasonable, and thus not credible, for the mother to believe that one man and not the other is the father. However, these same factors can also coalesce to make the biological father known or at least reasonably likely. In that case, the mother's honest belief as to her child's paternity can be credible. In other words, a credible belief may exist without factual certainty.

Mr. Andrews argues that by telling him G.J.K. was Mr. Kinnett's child, Ms. Kinnett deceived him because she knew Mr. Andrews was possibly the father. He contends she could not honestly believe her husband was the father if she thought Mr. Andrews was "possibly" the father. On the record before us, we find these facts are not mutually exclusive. Testimony indicates Ms. Kinnett and her husband were intimate around the time of G.J.K.'s conception. Ms. Kinnett's testimony also supports that she believed her husband was G.J.K.'s father. She testified, "I believed I was having my husband's child." When asked whether she was aware Mr. Andrews could be the father, she again answered, "I was aware that he could be, but I believed my husband was the father." There was testimony that Ms. Kinnett used contraception during her last intimate encounter with Mr. Andrews. Ms. Kinnett also testified the child at birth looked "exactly like my husband," so much so that her obstetrician made the same observation.

To counter these facts, Mr. Andrews relies on statements made in a barrage of texts on September

1, 2015. According to him, Ms. Kinnett texted him "I got together with [my husband] one random night, I ended up pregnant, I had a baby and I'm staying in the marriage for the sake of the kids. That is exactly what she told me." Ms. Kinnett acknowledged she testified in an earlier hearing that she told Mr. Andrews in September 2015 that Mr. Kinnett was the father of her child, but at trial she testified she told him "I had had a child and I was trying to work on my marriage." In either event, the fact that Ms. Kinnett may have told Mr. Andrews that Mr. Kinnett was the father of her child is consistent with her stated belief that he was.

Mr. Andrews also testified he dismissed the thought that he might be the father, because Ms. Kinnett believed the child was her husband's. Thus, on this record, it appears Ms. Kinnett and Mr. Andrews, for different reasons, both believed Mr. Kinnett was the father of the child. The trial court concluded Mr. Andrews should have known of his paternity and acted sooner. The court of appeal, revisiting the facts *de novo*, found Ms. Kinnett in bad faith and deceptive for not telling Mr. Andrews sooner that he was possibly the father.

Our manifest error review rests on the evidence presented to the trial court. From this record, Ms. Kinnett did not tell Mr. Andrews anything regarding his paternity that she knew was false. The fact she believed her husband was the father is antithetical to bad faith, if that belief was credible. The trial court found her credible. Based upon the reasonable conclusions of the trial court, Ms. Kinnett told Mr. Andrews what she believed was true. A mother who knows another man is possibly the father of her child, can

also honestly believe that her husband is the father. The trial court astutely noted, the evidence may establish Ms. Kinnett was mistaken, but not deceptive. Likewise, we cannot say that just because she was mistaken, Ms. Kinnett's belief was not honest, or that she was in bad faith and deceptive. The trial court's findings were not manifestly in error or clearly wrong. Consequently, we vacate the findings of the court of appeal and affirm the trial court's dismissal of the avowal action.

Constitutionality of Article 198

"Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise a constitutional challenge." *Greater New Orleans Expressway Comm'n v. Olivier*, 2004-2147 (La. 1/19/05), 892 So.2d 570, 573. The requirement of standing facilitates deference to the legislature as legislators are presumed to have weighed the relevant constitutional considerations in exacting legislation. *Id*. Legislative acts are presumed constitutional until declared otherwise in proceedings brought contradictorily between interested persons. *Id*.; *State v. Bd. of Supervisors, La. State Univ. & Agric. & Mechanical College*, 228 La. 951, 84 So.2d 597, 600 (1955). A litigant not asserting a substantial existing legal right is without standing in court. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667.

"This court has explained that a party has standing to argue that a statute violates the constitution only where the statute seriously affects the party's own rights. To have standing, a party must complain of a

constitutional defect in the application of the statute to him or herself, not of a defect in its application to third parties in hypothetical situations." *Id.*; *Greater New Orleans Expressway Comm'n*, 892 So.2d at 573-574. Article 198 focuses on the rights of the biological father to establish paternity. In contrast, the rights of a child to establish filiation are addressed by La. Civ. Code art. 197, which provides in part, "[a] child may institute an action to prove paternity even though he is presumed to be the child of another man." A child's action is not subject to any peremptive period, except with regard to succession rights, where it must be brought within one year of the alleged father's death. *Id*. Thus, G.J.K. may institute an action to establish filiation to Mr. Andrews, even though Mr. Andrews' avowal action is perempted. Article 198 affects Mr. Andrews' rights. G.J.K's rights are controlled by Article 197. Under these circumstances, we find G.J.K. lacks standing to challenge the constitutionality of Article 198.

Mr. Andrews raised the constitutionality of Article 198 in the trial court, which ultimately found the article constitutional. The court of appeal expressly pretermitted discussion of the constitutionality of Article 198. We therefore remand to the court of appeal for consideration of Mr. Andrews' constitutional challenge to Article 198.

CONCLUSION

In the absence of bad faith deception, the avowal action under Article 198 must be instituted within one year from the day of the child's birth. Finding no bad faith deception by the mother, we hold Mr. Andrews' avowal action filed on February 10, 2017, eighteen months after the child's birth, was not timely. We

hereby reverse the appellate court's judgment and remand to the court of appeal for the limited purpose of addressing Mr. Andrews' constitutional challenge to Article 198.

REVERSED IN PART; REMANDED.

DISSENTING OPINION OF J. HUGHES

Hughes, J., dissenting.

Respectfully, I empathize with the mother's plight in this matter. But she delayed reporting, and then reported falsely. I believe the father was deceived.

ORDER GRANTING PROFFER, LOUISIANA SUPREME COURT (SEPTEMBER 10, 2021)

SUPREME COURT OF LOUISIANA

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 2022-CJ-01199 c/w No. 2022-CJ-1246

On Writ of Certiorari to the Court of Appeal, Fifth Circuit, Parish of Jefferson

PER CURIAM

Granted. It is well settled that the determination of whether a statute is constitutional presents a question of law, which is reviewed on a de novo basis. *Westlawn Cemeteries, L.L.C. v. Louisiana Cemetery Bd.*, 2021-01414 (La. 3/25/22), 339 So.3d 548, 559; *City of New Orleans v. Clark*, 2017-1453 (La. 9/7/18), 251 So. 3d 1047, 1051; *State v. Webb*, 2013-1681 (La. 5/7/14), 144 So.3d 971, 975. There is sufficient evidence in the record, including the proffered evidence, for the court of appeal to review the district court's judgment finding La. Civ. Code art. 198 to be constitutional.[1]

[1] To the extent Mr. Andrews failed to proffer certain testimony, he is precluded from complaining of the exclusion of this testimony. *McLean v. Hunter*, 495 So.2d 1298, 1305 (La. 1986).

Accordingly, the judgment of the court of appeal remanding this case to the district court for a new trial is vacated and set aside. Pursuant to our decree in *Kinnett v.Kinnett*, 20-1134 (La. 12/10/21), 332 So.3d 1149, the case is remanded to the court of appeal to consider Mr. Andrews' constitutional challenge.

OPINION, FIFTH CIRCUIT COURT OF APPEALS STATE OF LOUISIANA (AUGUST 6, 2020)

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 17-CA-625

On Appeal from the Twenty-fourth Judicial District Court Parish of Jefferson, State of Louisiana No. 768-195, Division "E" Honorable John J. Molaison, Jr., Judge Presiding

Before: Fredericka ROMBERG WICKER, Jude G. GRAVOIS, and Robert A. CHAISSON, Judges.

REVERSED AND REMANDED.
FHW, JGG, RAC

WICKER, J.; CONCURS WITH REASONS
FHW

WICKER, J.

DNA evidence establishes a 99.99% probability that Appellant, Keith Andrews, is the biological father of the minor child G.J.K. Mr. Andrews intervened in divorce proceedings between Appellee, Karen Cohen

Kinnett, the child's mother, and her husband, Appellee Jared Brandon Kinnett, to file an avowal action to establish the paternity of G.J.K. on February 10, 2017. At the time, G.J.K. was eighteen months old. Mr. Andrews appeals the judgment of the trial court sustaining Mr. Kinnett's exception of prescription or peremption, resulting in a dismissal of Mr. Andrews' petition to establish paternity.

On March 23, 2018, this Court stayed this appeal and remanded the matter to the trial court to afford the parties the opportunity to properly address the constitutionality of Louisiana Civil Code art. 198 as raised by both Mr. Andrews and the Stuart H. Smith Law Clinic at Loyola Law School ("Law Clinic"), representing the child's interests. On remand, the trial court found that Mr. Andrews failed to meet his burden of proving the statute unconstitutional. Therefore, Mr. Andrews also appeals the trial court's January 10, 2019 judgment excluding his evidence on constitutionality and finding Louisiana Civil Code art. 198 to be constitutional.

For the reasons elucidated below, we find that the trial judge erred in his June 2, 2017 judgment finding that the avowal action was perempted. Therefore, we reverse the June 2, 2017 judgment of the trial court and remand this matter to the trial court for further proceedings consistent with this opinion. As we have resolved this case based upon our interpretation of Louisiana Civil Code art. 198, we decline to address the statute's constitutionality.

FACTS[1]

Karen and Brandon Kinnett were married on January 24, 2009. On August 29, 2011, their daughter, B.A.K., was born. Thereafter, beginning in the late summer or fall of 2013, Ms. Kinnett engaged in an extramarital affair with Mr. Andrews. Mr. Andrews testified that the relationship consisted mostly of infrequent sexual encounters for several reasons. First, although Ms. Kinnett expressed unhappiness with her marriage, telling Mr. Andrews that she slept in her daughter's bedroom instead of with her husband, she was reluctant to leave the marriage.[2] Second, Mr. Andrews was preoccupied with opening a restaurant while simultaneously maintaining his solo law practice at the time the affair began. Finally, the necessity of keeping the relationship a secret combined with both parties' busy schedules made meeting on a regular basis difficult.

Furthermore, soon after the affair with Ms. Kinnett began, Mr. Andrews started dating another woman and suggested to Ms. Kinnett that they end their affair. According to Mr. Andrews' testimony, Ms. Kinnett did not want to end their relationship, but the already infrequent encounters became even more sporadic, occurring only once every two or three months.

---

[1] These facts are based upon the testimony given at the June 2, 2017 hearing before the district court. Mr. Kinnett called Mr. Andrews, and thereafter, Mr. Andrews called Ms. Kinnett to give testimony.

[2] According to Mr. Andrews' testimony, Ms. Kinnett was waiting for a more stable job situation before taking steps to end her marriage.

The last intimate encounter between Mr. Andrews and Ms. Kinnett occurred on November 15, 2014. Mr. Andrews testified that the NuvaRing® birth control device Ms. Kinnett used throughout their relationship was present during the encounter. Ms. Kinnett testified to having ten years' experience using that birth control method.

With the exception of two text messages between Ms. Kinnett and Mr. Andrews five days later, the parties did not communicate thereafter for over five months, until May 7, 2015. Ms. Kinnett was pregnant in May and testified that she knew then that Mr. Andrews was possibly her child's father. She did not, however, tell Mr. Andrews then that she was pregnant or that he might be the father. G.J.K. was born on August 5, 2015. Mr. Andrews testified that he made several attempts to contact Ms. Kinnett via text message in the months between November 2014 and September 1, 2015, without response.

On September 1, 2015, Mr. Andrews tried texting Ms. Kinnett again, and she responded. He testified that she apologized for not answering his texts and explained that she had had sexual relations with her husband one night, had gotten pregnant, and had had a baby "with" her husband. She further explained that she was staying in her marriage for the sake of the children. Mr. Andrews testified that, during the September 1st conversation, it crossed his mind that he could be the child's father, but he testified further that, at that point, he did not recall the date of his last sexual encounter with Ms. Kinnett. During that communication, Ms. Kinnett did not tell Mr. Andrews when G.J.K. had been born or how old he was then. Ms. Kinnett, while initially testifying, "I told him it

was my husband's child," eventually restated, "I think the message was that I had had a baby and that I was trying to work on my marriage."[3] She also testified that she believed her husband was her child's father, and that her belief was confirmed when the baby was born looking exactly like Mr. Kinnett.

After the September 1, 2015 text exchange, communication between Mr. Andrews and Ms. Kinnett was limited to occasional texts as friends.[4] Fifteen months later, on December 9, 2016, Ms. Kinnett called Mr. Andrews by phone. During that conversation, she informed him that she had performed a sibling DNA test on her two children and learned that Mr. Kinnett was not G.J.K.'s biological father.

After hanging up, Ms. Kinnett immediately texted Mr. Andrews photographs of G.J.K. and wished him "Happy Father's Day." The two texted throughout that evening and into early the next morning. In one text Ms. Kinnett stated, "I'll never be able to ask your forgiveness enough. He's a precious guy. He's lucked out with you."

---

[3] Mr. Andrews' attorney confronted Ms. Kinnett with her prior testimony before the Domestic Commissioner on April 12, 2017, wherein she initially testified that she told Mr. Andrews that her husband was the child's father, but on further questioning declared, "[a]ctually, I don't even recall if I—I think the message was that I had had a child and that I was trying to work on my marriage."

[4] Mr. Andrews testified that the only time he saw Ms. Kinnett in person between the date of their last sexual encounter and December 10, 2016, was about three weeks before she called to tell him he was G.J.K.'s father. He ran into Ms. Kinnett with her mother and two children at the Starbucks near his home and exchanged a brief greeting.

Ms. Kinnett testified that she conducted the sibling paternity test to "prove to Brandon that it was his child" after he remarked that he did not think G.J.K. looked like him.[5] She also alleged that when she informed Mr. Andrews of his paternity, he told her that he had suspected that the child was his since first learning of the birth.

On December 10, 2016, Mr. Andrews met Ms. Kinnett and G.J.K. at a testing facility for a DNA paternity test. She called him thereafter on December 14th, to inform him that the test confirmed his biological paternity of G.J.K. On January 12, 2017, she informed Mr. Kinnett that he was not G.J.K.'s biological father, and on January 14, 2017, she filed for divorce. On January 30, 2017, Mr. Andrews, Ms. Kinnett, and G.J.K. all submitted for an additional DNA test. The February 2, 2017 results confirmed that Mr. Andrews is the child's biological father to a scientific certainty of 99.999999998%. Mr. Andrews attached a copy of the January 30th test results to his avowal petition filed eight days later on February 10, 2017.

PROCEDURAL HISTORY

Ms. Kinnett commenced the instant litigation by filing for divorce on January 14, 2017. She sought joint custody with Mr. Kinnett of their daughter, B.A.K., but sole custody of her son, G.J.K. On January 27, 2017, Mr. Kinnett filed his Answer and Reconventional Demand disputing Ms. Kinnett's contention that awarding her sole custody of G.J.K. would be in the

---

[5] Mr. Kinnett gave no indication to the court that he harbored suspicions about G.J.K.'s paternity prior to January of 2017.

child's best interest, urging instead that joint custody be granted.

On February 10, 2017, Mr. Andrews filed a Petition in Intervention to Establish Paternity and to Obtain Custody of G.J.K. In his petition, Mr. Andrews alleged that Ms. Kinnett had concealed his possible paternity until December 9, 2016, and sought an order establishing paternity and an action to obtain custody.

On February 21, 2017, Mr. Kinnett answered Mr. Andrews' intervention with Exceptions of No Cause and/or No Right of Action, Prescription, and Peremption, arguing that Mr. Andrews' avowal action was perempted under Louisiana Civil Code art. 198 because he failed to file an action within one year of G.J.K.'s birth. On February 24, 2017, the court appointed the Loyola Law Clinic to represent the interests of the minor child. Ms. Kinnett first filed a memorandum opposing the exceptions on April 10, 2017, however, on May 31, 2017, she filed a second memorandum supporting the exceptions. On appeal, Ms. Kinnett adopted the arguments in Mr. Kinnett's appellee briefs.

At the initial April 12, 2017 hearing, the Domestic Commissioner denied the exceptions of no right of action and no cause of action as to paternity, and granted the exception of no cause of action as to custody. He also granted the exception of peremption, finding that Mr. Andrews should have known G.J.K. was his child given that he had "intimate contact" with Ms. Kinnett nine months prior to the child's birth. Mr. Andrews objected to the Commissioner's ruling, contending in pertinent part that the "time

limitations in Civil Code article 198 are constitutionally invalid."

The parties tried the exceptions *de novo* before the district court on June 2, 2017. The district court judge ruled from the bench denying the exceptions of no cause of action and no right of action as to paternity, but granting the exceptions of no cause of action and no right of action as to custody and visitation. The judge further held that Mr. Andrews' avowal action was perempted under Article 198 based on his finding that (a) Mr. Andrews had not proven "that the mother was actually in bad faith and intended to deceive," and (b) he had filed his avowal action more than a year from the time the judge determined he knew or should have known that he was G.J.K.'s father. The trial court declined to rule on the constitutionality of the statute and denied Mr. Andrews' motion for additional time to notify the attorney general and further plead the constitutionality issue. Mr. Andrews appealed the June 2, 2017 judgment to this Court.

On March 23, 2018, this Court stayed this appeal and remanded the case to the trial court to allow Mr. Andrews the opportunity to amend his petition and appropriately challenge the constitutionality of Article 198. *Kinnett v. Kinnett*, 17-CA-625, *per curiam*, p. 4. On April 6, 2018, Mr. Andrews filed his First Supplemental and Amending Petition, formally challenging Article 198's constitutionality, thereafter notifying the Louisiana Attorney General as required by law. The Law Clinic filed a memorandum in support of Mr. Andrews' Supplemental and Amending Petition on June 4, 2018.

The hearing on the constitutional challenge was initially set for June 13, 2018. However, a volley of motions prompted a continuance to address the issues raised by the parties. On May 12, 2018, Mr. Kinnett moved to strike the portions of Mr. Andrews' petition in which he alleged that he had provided financial support and started spending time with G.J.K. after December 9, 2016, on the grounds that whether the biological father had established a relationship with the child was not relevant to the question of constitutionality. Ms. Kinnett filed a motion *in limine* to prevent Mr. Andrews from testifying or presenting evidence of the same at the constitutionality hearing. Mr. Kinnett also filed a motion *in limine* to prevent Mr. Andrews from presenting expert testimony and evidence, arguing that only briefs and arguments were appropriate.[6]

On October 16, 2018, the court granted both motions *in limine*. While the trial court recognized the possibility that "constitutional scholars, legislators, or those who possess highly specialized knowledge of the legislative history of the law in question" might serve as witnesses, the court found that neither the opinion of Dr. Sonnier nor the testimony of Mr. Andrews was related to "whether the statute serves a legitimate government purpose of protecting the status of a child vis-á-vis his mother and father, his family, his classmates, and the world."[7]

---

[6] Mr. Andrews' expert witness, Dr. Loretta Sonnier, is a board-certified forensic child and adolescent psychiatrist. In her expert report, Dr. Sonnier expressed the opinion that "the application of Article 198 in GJK's case is more likely to cause him harm than prevent harm."

[7] Although Mr. Andrews asserted that Dr. Sonnier's expertise in the science of child development would "aid the court in determining

On November 5, and December 18, 2018, the district court heard arguments on the constitutionality of Article 198. The Hon. William C. Credo, III, presided as judge *pro tempore*.[8] On January 10, 2019, the court issued its written judgment, holding "that La. Civ. Code art. 198 is constitutional . . . Keith Edward Andrews failed to submit evidence that Article 198 violates either substantive or procedural rights to due process or that it fails to protect a fundamental liberty interest, as alleged in his First Supplemental and Amending Petition." On June 12, 2019, this Court lifted the stay on the appeal and set deadlines for the parties to file supplemental briefs solely on the issue of Article 198's constitutionality.

On appeal, Mr. Andrews argues (1) that the trial court erred in its interpretation and application of Article 198, and (2) that the statute itself is unconstitutional both on its face and as applied. It is well settled that courts should avoid addressing constitutional questions when a case can be disposed of on non-constitutional grounds. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988); *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371 (La. 7/1/08), 998 So.2d 16, 25, *amended on reh'g* (9/19/08); *Crown Beverage Co. v. Dixie Brewing Co.,*

---

whether the law works to protect children," the court denied the need for such testimony stating, "the issue is not whether the statute works or is drawn with child development science in mind."

[8] In August of 2018, Judge John Molaison was elected to this Court. The Louisiana Supreme Court thereafter appointed Mr. William C. Credo, III to the district court bench until the election of Judge Molaison's successor.

Inc., 96-2103 (La. App. 4 Cir. 5/28/97), 695 So.2d 1090, 1093, *writ denied*, 971711 (La. 10/13/97), 703 So.2d 615; *Bize v. Larvadain*, 18-394 (La. App. 3 Cir. 12/28/18), 263 So.3d 584, 592 (citing *State v. Lanclos*, 07-0082 (La. 4/8/08), 980 So.2d 643, 647-48), *reh'g denied* (2/13/19), *writ denied*, 19-0419 (La. 5/6/19), 270 So.3d 577. Likewise, statutes are presumed constitutional, and when the interpretation of a statute is at issue, this Court "must construe a statute so as to preserve its constitutionality when it is reasonable to do so." *Carver v. Louisiana Dep't of Pub. Safety*, 17-1340 (La. 1/30/18), 239 So.3d 226, 230.

Therefore, we first address Mr. Andrews' claims that the trial court erred in interpreting and applying Article 198. We begin with a discussion of the statutory language and the relevant legislative history.

I. Louisiana's Filiation Law

Louisiana Civil Code art. 198 addresses actions to avow paternity of a child and provides,

> A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.
>
> If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or

> within ten years from the day of the birth of the child, whichever first occurs.
>
> In all cases, the action shall be instituted no later than one year from the day of the death of the child.
>
> The time periods in this Article are peremptive.

The general rule is that a man may bring an action to establish his paternity of a child at any time. However, the Louisiana legislature has established time limitations on the right to avow in two distinct instances—when the child is presumed to be the child of another man, and when the child has died. *See* La. C.C. art. 198, Revision Comment (d). A child born during a marriage or within 300 days of its termination is presumed to be the child of the mother's husband. La. C.C. art. 185. Therefore, because Ms. Kinnett was married at the time G.J.K. was born, Mr. Andrews' paternity action was subject to the one-year peremptive period that began on the day G.J.K. was born.

A. Peremption

Peremption, by definition, designates a period of time for which a right exists and cannot be renounced, interrupted, or suspended. La. C.C. arts. 3458 & 3461; *Succession of Pizzillo*, 65 So.2d 783, 786 (La. 1953). However, as to Article 198, the legislature saw fit to include an exception to the default rule. *See infra* Section I.B. In the event the mother in bad faith deceives the father as to his paternity, the peremptory period does not begin to run until the moment in time at which the father knows or should know of his paternity. La. C.C. art. 198. If the exception applies,

the father has one year from that time to file an avowal action, provided that the action is filed within ten years of the child's birth; otherwise a further peremptory period of ten years precludes bringing the action.[9]

B. Legislative History

Because the ultimate goal when interpreting a statute is to give effect to the intent of the legislature, we review the legislative history of Civil Code arts. 191 and 198. *Fontenot v. Chevron U.S.A., Inc.*, 95-1425 (La. 7/2/96), 676 So.2d 557, 562. In 1991, the Louisiana State Law Institute began meeting with the House

---

[9] The legislature expressly defined the Article 198 time limitations as peremptive. As a matter of law, nothing may interfere with the running of a peremptive period, including *contra non valentem* exceptions, but Article 198 explicitly includes such an exception that suspends the running of the peremptory period. *See In re Medical Review Panel of Gerard Lindquist*, 18-444 (La. App. 5 Cir. 5/23/19), 274 So.3d 750, 755–56, *writ denied*, 19-01034 (La. 10/1/19) (doctrine of *contra non valentem* prevents the running of a prescriptive period when (1) "there is some legal cause which prevented the court or its officers from taking cognizance of and acting on the plaintiff's actions;" (2) "there is some condition coupled with the contract or coupled with the proceedings which prevented the plaintiff from suing or acting;" (3) "*the defendant has done some act effectually to prevent the plaintiff from availing himself of his cause of action*;" or (4) "*the cause of action is not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant*") (emphasis added). However, the Article 198 exception, requiring the mother's bad faith deceit, is consistent with the legislature's practice of including a fraud exception even when the time for filing suit is distinctly peremptive. *See* La. R.S. 9:5604(E) (actions for professional accounting liability), 9:5605(E) (actions for legal malpractice), and 9:5606(E) (actions for professional insurance agent liability).

Marriage/Persons Committee to draft legislation that would eventually result in Act of the Louisiana Legislature No. 192 of 2005. Katherine Shaw Spaht, *Who's Your Momma, Who are Your Daddies? Louisiana's New Law of Filiation*, 67 LA. L. REV. 307, 307-08 (2007). The detailed legislative history of Act 192 reflects the legislature's attempt to balance the biological father's interest in an opportunity to parent against the explicit state policy of preserving the intact marriage and the best interests of the child.

House Bill 368 was filed during the 2004 regular session—on the recommendation of the Louisiana Law Institute—and testified to by Katherine Spaht, chairperson of the Louisiana Marriage/Persons Committee. H.R. 368, 30th Reg. Sess. (La. 2004) (failed House final passage); Louisiana House of Representatives, Civil Law Committee (4/5/2004), H.B. 368 *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/apr/0405_04_CL# (48:13:00). The legislation's purpose was to provide for the filiation of children, and the bill included provisions aimed at updating the law to more closely align biological and legal paternity and address questions raised by evolving societal norms and scientific and technological advances.[10] Spaht, *supra*, at 314. By far the most controversial articles the Law Institute proposed dealt with the issue of "dual paternity,"

---

[10] For example, questions raised by scientific developments permitting pregnancy by surrogacy and assisted conception prompted the Law Institute to include, for the first time, a provision in the law identifying the mother for purposes of filiation. La. C.C. art. 184; *see* Spaht, *supra*, at 309.

which was "considered by the Law Institute Council on six separate occasions." Spaht, *supra*, at 308.

House Bill 368's answer to the question "whether the law should permit a child to have two legally recognized fathers" was proposed Article 197, allowing for an action by the child to establish paternity, and Article 198, recognizing a biological father's action to avow his child. *See* Spaht, *supra*, at 321-22. While the Law Institute concluded, based on the United States Supreme Court's decision in *Michael H. v. Gerald D.*,[11] that "denying the biological father of a child the right to establish his filiation when another man was presumed to be the father was not unconstitutional," the Institute opted to retain the jurisprudentially created concept of "dual paternity" granting the second father, if recognized, "all the legal rights and obligations of a legal father." Spaht, *supra*, at 321-22 & nn. 94-96. Yet, due to concern for the child's best interest, the proposed legislation placed far stricter limitations on the biological father's ability to establish paternity than those imposed on the child. *Id.* at 322-23.

House Bill 842, a stand-alone dual paternity statute with the same language as House Bill 368's proposed Article 198, was introduced in the House during the same session as a precaution in the event that House Bill 368 was held up in committee. H.B. 842, 30th Reg. Sess. (La. 2004) (Original) (enacted as 2004 La. Acts, No. 530 § 1, eff. June 25, 2004) *repealed by* 2005 La. Acts, No. 192 § 1, eff. June 29, 2005; Louisiana House of Representatives, Civil Law Committee (4/5/2004), H.B. 842 (statement of Rep. Johns), *available at* https://house.louisiana.gov/H_Video/

---

[11] 491 U.S. 110, 109 S.Ct. 2333, 105 L. Ed. 2d 91 (1989).

VideoArchivePlayer?v=house/2004/apr/0405_04_CL# (2:47:00-2:47:30).[12]

As originally drafted, both bills allowed the biological father to institute an avowal action *only* if the marriage between the child's mother and her husband (the presumed father) had terminated. However, if that condition was satisfied, House Bill 368 placed no time restriction on filing the action as long as the child was living. Upon the death of the child, the father's action was subject to a one-year peremptory period. *See* H.B. 368, 30th Reg. Sess. (La. 2004) (Original), Art. 198 Revision Comments 2004 (c), (f), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=272841. Almost immediately, however, House Bill 368 was amended to require the biological father to institute his avowal action within a peremptory period of two years from the date of the child's birth. *See* H.B. 368 (Engrossed), *available at* http://www.legis.la.gov/legis/ViewDocument.aspx?d=272843; La. H.R. JOURNAL, 30th Reg. Sess., April 6, 2004, at 9. H.B. 842, 30th Reg. Sess. (La. 2004) (Original).

The house then voted to strike the language that denied the biological father the right to avow his paternity if the child's mother was married, providing instead a two-year period from the date of the child's birth to institute the action, regardless of the mother's marital status. *See* Louisiana House Floor Debate, May 11, 2004, H.B. 368, *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/

---

[12] Both bills went through virtually identical amendments, and eventually House Bill 842 became Act of the Legislature 530 of 2005, which created Louisiana Civil Code Article 191. 2004 La. Acts, No. 530.

2004/may/0511_04_Day26_2004RS (1:37:50-1:40:06); H.R. JOURNAL, 30th Reg. Sess., May 11, 2004, at 30. Concern that the law based a man's right to claim his child on the mother's marital status, especially when DNA evidence renders the father certain of his paternity, prompted the revision. *See* Louisiana House Floor Debate, April 7, 2004, H.B. 368 (statements by Rep. Robbie Carter), *available at* https://house.louisiana.gov/H_Video/ VideoArchive-Player?v=house/2004/apr/0407_04_Day07_2004RS (1:13:58-1:18:45).[13] The amendment's author was vehemently opposed to denying a biological father access to the courts and,

---

[13] The debates in the House emphasized a choice between upholding the presumption that the husband of the mother is the father of the child—by depriving the biological father of the right to avow and have a relationship with his child—and having the law recognize biological fact, which protects the rights of the biological father, but also, arguably, potentially harms the child.

> The Law Institute and the House Committee chose to give the presumption absolute deference when the mother remained married to the father for two years after the child's birth, defending this decision by asserting the best interests of the child were better served by preserving the intact family. The drafters of the statute acknowledged that the statute's purpose was to encourage marriage and children born in wedlock. They also tacitly admitted that losing the right to be filiated to the child was the father's punishment for sleeping with and conceiving a child with a married woman. *See* H.B. 368 (Engrossed), Art 198 cmt (b). The importance of the child's interest in having a stable home environment, *see* La. C.C. art. 198 cmt (e), and a settled parentage, Spaht, *supra*, at 313, 316, 323, outweighed any interests the child and the biological father may have in a relationship with each other and any interest the child has in knowing the truth.

therefore, the right to be recognized as the father of his child based on a condition that was out of his control. *Id.*

As is evident from the comments to Article 198's originally proposed language, the Law Institute and some opponents of the amendment believed that denying the biological father the right to avow his child was necessary when the mother was still married to the presumed father. *See* Louisiana House Floor Debate, May 11, 2004, H.B. 368 (statements by Rep. Bowler), *available at* https://house.louisiana.gov/H_Video/ VideoArchivePlayer?v=house/2004/may/ 0511_04_Day26_2004RS (1:44:15-1:45:14). Although jurisprudence "recognized the right of a father to institute an avowal action as a predicate to, or simultaneous with the exercising of parental rights," the comments stated that denying the biological father the right to establish his paternity when the mother was still married "serve[d] to protect a currently intact family unit to which the child belong[ed]." *See* H.B. 368 (Engrossed), Art. 198 cmts (a)-(c) *available at* http://www.legis.la.gov/legis/ ViewDocument.aspx?d=272843.

Other opponents of the amendment and the law as originally drafted opined that even the two-year peremptory period was too restrictive if the biological father did not become aware of his paternity until after the two years had passed. *See* Louisiana House Floor Debate, May 11, 2004, H.B. 368, *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/may/0511_04_Day26_2004RS (1:40:06-1:42:36). In response to these latter concerns, another amendment was proposed providing that "if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted

within one year from the date the father knew or should have known of his paternity, but no more than ten years from the date of birth of the child." *Id.* at (1:47:31-1:58:35); H.R. JOURNAL, 30th Reg. Sess., May 11, 2004, at 30. The bad faith amendment prompted two major questions.

First, when asked whether the biological father had any recourse if the mother "in good faith believe[d]" that her husband was her child's father, the amendment author replied that the exception would apply only if the mother was in bad faith, but continued with an example of bad faith that had been discussed in committee hearings. *See* Louisiana House Floor Debate, May 11, 2004, H.B. 368, *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/ 2004/may/0511_04_Day26_2004RS (1:48:48-1:50:02). In the case referenced, a child was born during a marriage, and, upon divorce, the wife informed the husband that the child was the biological child of another man she had been having an affair with. *Id.* No details were given about statements the mother made to the husband during the marriage or how long the mother had known that the husband was not the child's biological father, but the amendment author stated that the wife had deceived the husband for a number of years, so, in essence, she was in bad faith.

The author's hypothetical prompted another question: in the case of bad faith deception, why limit the biological father's right to file an avowal action to ten years from the birth of the child? *See id.* at (1:50:02-1:51:07). The amendment's author responded that the exception was an attempt to balance the biological father's interests with the best interests of the child. *Id.* If a child had been living in a stable home for more

than ten years and had built a strong relationship with the man presumed to be his father, even if the mother was in bad faith, the Law Institute did not believe the biological father should have a right to disrupt that child's life. *Id.* at (1:48:15-1:48:37); *see* Louisiana Civil Code art. 198 cmt. (e).

The amendment incorporating the bad faith exception was adopted by a vote of 78 to 17. H.R. JOURNAL, 30th Reg. Sess., May 11, 2004, at 30. Thereafter, House Bill 368 failed to pass in its entirety. *Id.* at 31. However, the stand-alone dual paternity statute (H.B. 842), as amended to mirror the proposed Article 198, passed the House by a vote of 91 to 6. H.R. JOURNAL, 30th Reg. Sess., May 12, 2004, at 40.

Act of the Legislature No. 530 (H.B. 842) was signed into law on June 25, 2004, creating Louisiana Civil Code art. 191, which provided,

> A man may establish his paternity of a child presumed to be the child of another man even though the presumption has not been rebutted. This action shall be instituted within two years from the date of birth of the child, except as may otherwise be provided by law. Nonetheless, if the mother in bad faith deceives the father of the child regarding his paternity, the action shall be instituted within one year from the date the father knew or should have known of his paternity, but no more than ten years from the date of birth of the child.

During the 2005 Regular Session, the Law Institute recommended House Bill 91, again proposing changes to the law of filiation after House Bill 368

failed to pass. H.B. 91, 31st Reg. Sess. (La. 2005); S. GREENSHEET DIGEST, H.B. 91, p.2, 31st Reg. Sess. (La. 2005). The proposed Article 198 replaced Civil Code art. 191 as enacted in 2004 with one substantive change that shortened the peremptory period to one year from the date of the birth of the child unless the mother in bad faith deceived the father as to his paternity. *See* La. C.C. art. 198 cmt. (a); S. GREENSHEET DIGEST, H.B. 91, p.2, 31st Reg. Sess. (La. 2005); 2005 La. Acts No. 192.

II. Whether Trial Court Erred in Finding That Avowal Action Was Perempted

Mr. Andrews raises several assignments of error relating to the trial court's application of Article 198 to the facts of this case, which resulted in a ruling that Mr. Andrews' avowal action was untimely filed and, therefore, perempted. First, Mr. Andrews argues that the trial court incorrectly placed the burden of proof on him to prove that Ms. Kinnett "in bad faith deceive[d]" him as to his paternity instead of requiring Mr. Kinnett, as the exceptor, to prove that Mr. Andrews' claim was perempted. Second, Mr. Andrews argues that the trial court erred in interpreting the phrases "in bad faith deceived" and "knew or should have known." Finally, he argues that the trial court erred in finding that there was no evidence of bad faith deception on Ms. Kinnett's part.

For the reasons clearly delineated below, we find that the trial court erred in placing the burden of proof upon Mr. Andrews to prove Ms. Kinnett's bad faith deceit. However, even if the burden of proof was properly upon Mr. Andrews, the evidence establishes that the trial court's finding on the issue of bad faith

deceit was manifestly erroneous. Further, upon *de novo* review, we find that the evidence establishes that Mr. Andrews' avowal action was timely filed less than one year after he knew or should have known of his paternity.

A. Standard of Review

An exception of peremption is a peremptory exception. La. C.C.P. art. 927(A)(2). As peremption has been characterized as a form of prescription, the rules governing the burden of proof and standard of review for prescription apply. *See, e.g.*, *Rando v. Anco Insulations Inc.*, 08-1163 (La. 5/22/09), 16 So.3d 1065, 1082. Peremptive statutes are strictly construed against peremption and in favor of the claim. *Rando*, 16 So.3d at 1083.

When a hearing is held on a peremptory exception prior to trial, evidence may be introduced to support or controvert the exception. La. C.C.P. art. 931. If no evidence is presented, the court must decide the exception of peremption on the facts alleged in the petition accepting the plaintiff's allegations as true. *Lomont v. Bennett*, 14-2483 (La. 6/30/15), 172 So.3d 620, 627. When evidence is introduced, the court will decide the facts based on the evidence presented, and the trial court's factual conclusions are subject to a manifest error or clearly wrong standard of review. *Id.*; La. C.C.P. art. 931; *see, e.g.*, *Bijeaux v. Broyles*, 11-830 (La. App. 3 Cir. 2/8/12), 88 So.3d 523, 526, *writ denied*, 12-0970 (La. 6/22/12), 91 So.3d 971.

B. June 2, 2017 Hearing

At the onset of the June 2, 2017 hearing, brief argument was made as to which party bore the burden

of proof on the exception of peremption. Mr. Kinnett's counsel admitted to carrying the burden of proof on the exception but argued that he needed to prove only that the avowal action was filed more than one year after the child's birth. Once Mr. Kinnett met that burden, his counsel argued, the burden shifted to Mr. Andrews to prove that Ms. Kinnett deceived him in bad faith as to his paternity and that he did not know and should not have known that fact. Mr. Andrews' counsel countered that the burden should remain with the exceptor, as Mr. Andrews had affirmatively pled an exception to peremption in his avowal petition.

Ultimately, before the judge ruled on the issue, Mr. Kinnett's counsel offered to proceed first and called Mr. Andrews to the stand. Thereafter, despite Mr. Andrews' request to present first if the judge placed the burden of proof upon him, the judge permitted Mr. Kinnett's counsel to proceed.

Still, upon review, it appears the trial court placed the burden of proof for the peremption exception on Mr. Andrews. The trial court's oral reasons for judgment given from the bench reflect that, rather than focusing on Ms. Kinnett's behavior and possible motives, the trial judge was most concerned with Mr. Andrews' responsibility upon being told that a woman he had been intimate with in the past year had given birth to a child. After Mr. Andrews testified that Ms. Kinnett had led him to believe that she knew Mr. Kinnett was the child's father, the trial judge referred to Mr. Andrews' testimony that when Ms. Kinnett first told him she had given birth to a child in the fall of 2015, "it ran through my mind that there was a possibility I could be the father of the child."

Rather than considering whether it was more probable than not that Ms. Kinnett intentionally insinuated or affirmatively stated that Mr. Kinnett and not Mr. Andrews was G.J.K.'s father, and whether such an act qualifies as bad faith deception, the trial court questioned how Mr. Andrews could possibly claim that he was deceived when it crossed his mind that he could be the father and Mr. Andrews failed to satisfy what the judge believed was "a moral and a legal obligation to simply ask, is this my child?"

While an appeal is taken from the judgment, not the trial court's reasons for judgment, a trial court's oral or written reasons may be considered in determining whether the court committed legal error. *See Winfield v. Dih*, 01-1357 (La. App. 4 Cir. 4/24/02), 816 So.2d 942, 948; *Wooley v. Lucksinger*, 09-0571 (La. 4/1/11), 61 So.3d 507, 572. When the trial court commits an error that interdicts the fact-finding process, it is appropriate for the appellate court to review the record *de novo* and render judgment. *See Winfield*, 816 So.2d at 948; *Evans v. Lungrin,* 708 So.2d 731, 735 (La. 1998). Therefore, having determined that the burden of proof was placed on Mr. Andrews, we now determine whether that decision constituted legal error.

C. Burden of Proof

While the party who raises the exception of peremption generally bears the burden of proof, when peremption is evident on the face of the pleadings, the plaintiff will bear the burden of proving that the claim is not perempted. *See, e.g.*, *Bijeaux*, 88 So.3d at 526; *Carriere v. Bodenheimer, Jones, Szwak, & Winchell, L.L.P.*, 47,186 (La. App. 2 Cir. 8/22/12), 120 So.3d 281, 283-84, *overruled by Lomont*, 172 So.3d 620.

Mr. Kinnett argues that, as Mr. Andrews' claim was filed more than one year after G.J.K.'s birth, it was perempted on its face. Therefore, the trial court was correct in requiring Mr. Andrews to prove Ms. Kinnett's bad faith deceit. However, in *Lomont v. Bennett*, the Louisiana Supreme Court found that when a plaintiff's petition makes a *prima facie* showing that the claim was timely filed because a statutory exception rendered the peremptive period inapplicable, the burden of proof remains with the party who filed the exception. 172 So.3d at 62627. *See also Gerard Lindquist*, 274 So.3d 750; *N.G. v. A. C.*, 19-307 (La. App. 3 Cir. 10/2/19), 281 So.3d 727.

Article 198 contains a statutory exception that will prevent the running of the peremptory period and states in pertinent part, "if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity." Reading the plain language of the statute, the question of when Mr. Andrews learned of his paternity arises only in the event that Ms. Kinnett deceived him in bad faith as to his paternity. Therefore, Mr. Andrews was required to plead both that Ms. Kinnett deceived him in bad faith, and also that he did not know and should not have known of his paternity for more than one year before filing his avowal action.

In his paternity petition, Mr. Andrews specifically alleged that, after having sex with Ms. Kinnett in November of 2014, he had no further contact with her until fall 2015, at which time, he alleged, Ms. Kinnett told him that she had become pregnant by her husband and had a son "with him." The petition further alleged that Ms. Kinnett concealed that Mr. Andrews was

possibly G.J.K.'s father until December 9, 2016, when she called to inform him that a sibling DNA test had revealed that her husband was not the child's father. Furthermore, Mr. Andrews' petition specifically alleged that, because of the previously delineated facts, the time period for filing his action was one year from the day he knew or should have known of his paternity, December 9, 2016. In light of the allegations contained in Mr. Andrews' petition, we find that—as Mr. Andrews specifically pled a statutory exception which would render the peremptive period inapplicable—Mr. Kinnett, as the party claiming peremption, bore the burden of proving that the bad faith deception exception provided for in Article 198 was not applicable, and it was error for the trial court to assign the burden of proving bad faith deception to Mr. Andrews.

Placing the burden of proof on the wrong party is legal error that will interdict the fact-finding process by placing a more onerous standard than the law requires on one of the parties. *Barnett v. Barnett*, 15-766 (La. App. 5 Cir. 5/26/16), 193 So.3d 460, 466 (citing *Leger v. Leger*, 03-419 (La. App. 3 Cir. 7/2/03), 854 So.2d 955, 957). Therefore, the trial court's factual findings—that Ms. Kinnett was not in bad faith and also that Mr. Andrews knew or should have known of his paternity on September 1, 2015—are no longer entitled to the manifest error standard of review. *Id.* (citing *Evans v. Lungrin*, 97-541 (La. 2/6/98), 708 So.2d 731, 735). Since the record is otherwise complete, we will conduct a *de novo* review to determine whether Mr. Kinnett satisfied his burden of proving that Article 198's bad faith deception exception to peremption did not apply in Mr. Andrews' case by proving, by a preponderance of the evidence, either that Ms. Kinnett

did not engage in bad faith deception or that Mr. Andrews knew or should have known of his paternity for more than one year prior to filing his avowal action. For the reasons elucidated below, we find that Mr. Kinnett failed to meet his burden of establishing that the bad faith deception exception did not apply.

D. "In Bad Faith Deceives"

The trial court found "no evidence to suggest . . . that Mrs. Kinnett satisfied the technical wording of the statute in being, quote unquote, in bad faith and being deceptive."[14] Rather, the trial court found that if Ms. Kinnett *believed* the child was Mr. Kinnett's, and she told Mr. Andrews that the child was her husband's based on this belief, "then she wouldn't be deceptive. She might have been mistaken[,] but she wasn't deceptive."

Reviewing the trial court's judgment requires us to take up *res nova* the interpretation of Article 198's phrase "in bad faith deceives." A law that is clear and unambiguous shall be applied as written when "its application does not lead to absurd consequences." La. C.C. art. 9. But, "[w]hen the literal construction of a statute produces absurd or unreasonable results, 'the letter must give way to the spirit of the law and the statute construed so as to produce a reasonable result.'" *Fontenot*, 676 So.2d at 562 (quoting *Green v. Louisiana Underwriters Insurance Co.*, 571 So.2d 610, 613 (La. 1990). While the plain meaning of the words is a relevant consideration for statutory interpretation,

---

[14] The trial court relied in large part upon two text messages introduced into evidence to reach his factual findings. *See infra* note 33.

see La. C.C. art. 11,[15] as discussed above, the ultimate goal is to give effect to the intention of the legislature. *See, e.g.*, *Fontenot*, 676 So.2d at 562. In determining the generally prevailing meaning of terms used within a statute, dictionaries may "provide a useful starting point . . . by suggesting what the legislature could have meant by using particular terms." *Hopkins v. Howard*, 05-0732 (La. App. 4 Cir. 4/5/06), 930 So.2d 999, 1005 (quoting 2A Norman Singer, *Statutes and Statutory Construction* § 47:28 (6th ed. 2000)).

Black's Law Dictionary defines "bad faith" as "[d]ishonesty of belief, purpose, or motive" and lists the following types of bad faith that have been recognized in judicial decisions: "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." BLACK'S LAW DICTIONARY (11th ed. 2019). Bad faith has also been defined as

> the opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term 'bad faith' is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different

---

[15] "The words of a law must be given their generally prevailing meaning."

> from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

Bordelon v. Medical Center of Baton Rouge, 03-0202 (La. 10/21/03), 871 So.2d 1075, 1083 n.7.

Black's Law Dictionary recognizes "good faith" to include, among other things, "honesty in belief or purpose" and "the absence of malice and the absence of design to defraud or seek unconscionable advantage." *Id.*; BLACK'S LAW DICTIONARY (11th ed. 2019). Good faith does not include various types of conduct that are characterized as "bad faith" because "they violated community standards of decency, fairness[,] or reasonableness." *Good faith*, BLACK'S LAW DICTIONARY (11th ed. 2019).

The definition of "deceit," according to Black's Law Dictionary includes both "intentionally leading someone to believe something that is not true; an act designed to deceive or trick," and "[a] false statement of fact made by a person knowingly or recklessly (*i.e.*, not caring whether it is true or false) with the intent that someone else will act on it." BLACK'S LAW DICTIONARY (11th ed. 2019).

First, we address Mr. Kinnett's[16] argument that Ms. Kinnett could not deceive Mr. Andrews as to his paternity because she did not know who the father of her child was at the time of her September 1, 2015 conversation with Mr. Andrews. Ms. Kinnett testified

---

[16] By the June 2, 2017 hearing, Ms. Kinnett had aligned herself with Mr. Kinnett, arguing in favor of peremption. Mr. Kinnett's arguments on the issue of whether Ms. Kinnett deceived Mr. Andrews in bad faith as to his paternity have since been fully adopted by Ms. Kinnett in briefs to this Court.

that she contacted Mr. Andrews to inform him of his paternity within twenty minutes of learning the truth herself on December 9, 2016. Mr. Kinnett argues that before receiving the test results, as evidenced by a post filing text message she sent to Mr. Andrews in February of 2017, Ms. Kinnett believed, "I did not deceive you. I had no idea." Therefore, Mr. Kinnett posits, there is "no evidence that [Ms. Kinnett] provided fraudulent statements that created a false belief in [Mr. Andrews'] mind."

This argument has two distinct parts. First, Mr. Kinnett argues that Ms. Kinnett could not have the intent to deceive if she relayed information she believed to be true or that she had no way of knowing was false. As will be further discussed below, being *unsure* of who the father was is not the same as having *no idea* who the father might be. Ms. Kinnett did not allege that she informed Mr. Andrews of the fact that he was possibly the father of the child she bore, although she admitted on the witness stand that she was aware of that possibility during her pregnancy and when the child was born.

Conversely, Mr. Andrews testified that during the September, 2015 conversation, Ms. Kinnett informed him that she had sexual relations with her husband, got pregnant, had a son, and was staying in her marriage for the sake of her children. That brings us to the second part of Mr. Kinnett's argument, that "deceit" requires a *false* statement. Therefore, if Ms. Kinnett's version of the conversation accurately reflects what she said, she relayed only the truth. She admits to saying that she "had a baby, and that [she] was trying to work on [her] marriage."

Article 198's legislative history, discussed in detail above, reveals the legislature's original purpose in adding the bad faith exception was to provide a route to avowal for men who do not become aware of their paternity until after the peremptory period has lapsed. *See* discussion *supra,* Section I.B. In particular, the legislature's discussion regarding the hypothetical woman who "holds an honest belief" that her husband is the father and the author's response to his own hypothetical— that a woman who first informs her husband that another man is her child's father upon divorce is guilty of deceiving her husband for a number of years—along with the exception's wording, disclose the legislature's intended meaning of the terms "bad faith" and "deceit" and a concomitant inability to contemplate a scenario wherein a man could be truly unaware of his paternity without bad faith deceit on the part of the mother. *Id.* This exchange also emphasizes the fact that the words "bad faith" and "deceit," as intended by the legislature, have specific definitions in the law.[17]

Very little case law has interpreted the bad faith deception exception since Article 198's passage. However, the Third Circuit briefly addressed the same exception contained in Article 191, Article 198's predecessor. *See Mouret v. Godeaux*, 04-496 (La. App. 3 Cir. 11/10/04), 886 So.2d 1217, 1221, 1222 n. 2. In *Mouret*, the biological father received DNA proof of his

---

[17] A concept of law bearing upon questions of bad faith, deceit, and fraud provides that a person is liable for remaining silent only when there is a duty to speak. *See e.g.*, *McCarthy v. Evolution Petroleum Corp.*, 14-2607 (La. 10/14/15), 180 So.3d 252, 258. The bad faith amendment's legislative history indicates that body's belief that the mother has a duty to speak.

paternity within three months of the child's birth, but failed to file an avowal action for more than two years thereafter. *Id.* at 1219. However, the *Mouret* court pointed out that there was no evidence in that case that the mother "concealed information about [the child] from Mr. Mouret," or "actively or passively created a misimpression about the child's paternity." *Id.* at 1222 n.2.

The question is, then, does a mother, who has singular knowledge of the men with whom she has been intimate, the dates on which she has had sexual encounters with each, the effectiveness of her birth control method if any, her menstrual cycle, and the approximate date of conception, have a duty to inform both the legal and the potential biological father(s) of the possible paternity of the biological father(s)? To interpret Article 198 to permit a mother to prevaricate, dissimulate, and engage in perfidious silence as to a man's potential paternity and yet be found innocent of deceiving the putative father in bad faith—because she lies by omission rather than by commission of a false statement—flies in the face of the common definition of both "bad faith" and "deceit," belies Article 198's legislative history, and leads to unjust results.

Further, such an interpretation calls into question the statute's constitutionality.[18] Another well-settled

---

[18] The Louisiana Supreme Court has recognized that a biological father's right to the opportunity to develop a relationship with his child is a constitutionally protected interest deserving of Due Process protection. *In re A.J.F.*, 00-0948 (La. 6/30/00), 764 So.2d 47, 57. Imposing a duty on the mother to inform the biological father of the possibility of his paternity would serve the state's explicit policy interest in protecting the child and settling his paternity early. While it would not serve the state's goal of

principle of law requires that when a statute is susceptible of two constructions, one of which would render it unconstitutional or raise grave constitutional questions, this Court must adopt the interpretation of the statute which, without doing violence to its language, will maintain its constitutionality." *M.J. Farms, Ltd.*, 998 So.2d at 31-32 (citing *Hondroulis v. Schuhmacher*, 553 So.2d 398, 416-417 (La. 1988)); *Metro Riverboat Associates, Inc. v. Louisiana Gaming Control Bd.*, 01-0185 (La. 10/16/01), 797 So.2d 656, 662; *Crown Beverage Co.*, 695 So.2d at 1093.

Finally, as we explain below, there is no set of circumstances wherein a woman—who has had sexual relations with more than one man during the period of possible conception—may have an "honest belief" that one man, and not the other, is the father. Thus, based upon the foregoing, we find that a mother's act of withholding pertinent information or creating a misimpression through statements, actions, or inactions satisfies the definition of "deceives" within the context of Article 198.

---

preserving the intact family, because an avowal action would disrupt the marriage, once a spouse engages in an extra-marital affair, it is questionable whether the State's interest in preserving that union is legitimate, much less compelling. Also, short of imposing an affirmative duty on the mother to inform all possible fathers of their potential paternity, extending the biological father's right to avow the child in the face of the mother's silence incentivizes her to come forward early. A mother's choice to conceal that a man is the possible father of her child from all interested parties, thereby preserving her intact family with a falsehood, should not serve to terminate the biological father's right to an opportunity to establish a relationship with his child.

Mr. Kinnett additionally asserts that there is "no evidence that [Ms. Kinnett] made a false statement knowingly or recklessly, with or without the intent that [Mr. Andrews] would act on it" because "[w]hen Karen and [Mr. Andrews] communicated on September 1, 2015, she did not doubt that her husband was the father of G.J.K." Mr. Kinnett argues, as the trial court found, "She might have been mistaken, but she wasn't deceptive." He argues that Mr. Andrews presented insufficient evidence to refute Ms. Kinnett's statement that she "had no idea" who the actual father of her child was prior to the December 9, 2016 sibling DNA test results. However, we find that Ms. Kinnett may not escape being found deceitful and in bad faith based upon her claim that she *believed* Mr. Kinnett fathered her child.

As discussed above, Ms. Kinnett had singular knowledge of the date on which she had intimate relations with both men,[19] her attentiveness to her chosen birth control method on each occasion,[20] and the date

---

[19] In spite of telling Mr. Andrews that she did not sleep with her husband, by necessity, Ms. Kinnett would have had to have been intimate with both men within a relatively short period of time for her to harbor a hope that her husband was the biological father and to conceal from her husband both her infidelity and the possibility that he was not the father of her child.

[20] Testimony from the various hearings suggests that Ms. Kinnett's choice of birth control depended on Ms. Kinnett's application of the device at a certain time for it to be effective. Mr. Andrews testified that, after the fact of his paternity became known, Ms. Kinnett admitted to inserting the device a week late. Mr. Andrews' counsel desisted from questioning Ms. Kinnett about her use of the NuvaRing . . . birth control device around the time G.J.K. was conceived after the trial judge stated that

on which the baby was due as given to her by her treating physician. Moreover, Ms. Kinnett admitted to knowing that Mr. Andrews could be her child's father throughout her pregnancy and after G.J.K.'s birth. When asked "[a]t any time, while you were pregnant . . . were you aware that he [Mr. Andrews] could be the father," Ms. Kinnett responded, "I was aware that he could be, but I believed that my husband was the father." She testified, "He was in a relationship and he ended things with me, so why would I tell him I was pregnant?"

Black's Law Dictionary defines "good-faith mistake" as "[a]n honest error that involves neither cynical sabotage nor subconscious bias against accomplishing something." BLACK'S LAW DICTIONARY (11th ed. 2019). Moreover, "[a] party alleging good faith can not (*sic*) close her ears to information or her eyes to suspicious circumstances. She must not act blindly or without reasonable precautions." *Succession of Chavis,* 211 La. 313, 320, 29 So.2d 860, 863 (La. 1947).

Either Ms. Kinnett had not been intimate with her husband during the period G.J.K. was conceived—and therefore knew that Mr. Andrews was the child's father and failed to disclose his paternity to him—or she had been intimate with both her husband and Mr. Andrews—and therefore did not know for certain who the child's father was—yet failed to tell Mr. Andrews that he could possibly be her child's father. If, however, Ms. Kinnett had been intimate with both her husband and Mr. Andrews during the period of conception, it was impossible for Ms. Kinnett to *truthfully*

---

the information was irrelevant because no birth control method, aside from abstinence, is 100% effective.

assert or insinuate to anyone that she was sure that Mr. Kinnett was the father of her child. It was also impossible for her to have an *honest* belief that Mr. Kinnett was definitely G.J.K.'s father. Minimally, Ms. Kinnett engaged in self-deception, and her dishonesty of belief cast her in bad faith.

As to whether Ms. Kinnett engaged in more than self-deception, intending in September, 2015 to deceive Mr. Andrews in bad faith, there is no evidence to suggest that Ms. Kinnett did not intend for Mr. Andrews to believe that her husband was G.J.K.'s father until she revealed the DNA results on December 9, 2016. Ms. Kinnett's act of keeping her pregnancy a secret, her testimony regarding her beliefs about G.J.K.'s parentage, her recollections of the September 1, 2015 conversation with Mr. Andrews, and the actions of both Mr. Andrews and Ms. Kinnett in the sixteen months between September 1, 2015 and December 9, 2016, fail to demonstrate by a preponderance of the evidence that Ms. Kinnett did not deceive Mr. Andrews in bad faith regarding his paternity.

The substance of the September 1, 2015 exchange between Mr. Andrews and Ms. Kinnett is the subject of multiple versions. Mr. Andrews testified that Ms. Kinnett told him that she "had gotten together with her husband one random night" and that her husband was the father of the child she had given birth to some weeks earlier.[21]

---

[21] Mr. Andrews testified that he was told only that Ms. Kinnett had a "newborn," not the child's age or the date of birth.

Ms. Kinnett's testimony regarding the information she relayed to Mr. Andrews during their September 1, 2015 conversation is inconsistent. In response to requests for admission, she admitted that "in the fall of 2015 . . . when you (Ms. Kinnett) informed Keith Andrews . . . that you had given birth to a child, you informed Keith Andrews that Jarred Brandon Kinnett was the child's father."[22] Later, at the hearing on the exceptions before the Domestic Commissioner, after Ms. Kinnett reversed her litigation position from supporting Mr. Andrews' petition to opposing it, Ms. Kinnett responded "yes" when asked if she informed Mr. Andrews that "Mr. Jared Brandon Kinnett was the child's father." However, when subsequently asked, "[y]ou specifically told Mr. Andrews that," she responded, "I told him that I had a child and that I was trying to work on my marriage." Confused by the exchange, the Commissioner asked her to clarify whether she told Mr. Andrews that the child was her husband's; she initially responded, "yeah, I told him it was my husband's child." However, she then continued, "[a]ctually, I don't even recall if I—I think the message was that I had had a baby and that I was trying to work on my marriage."

Regardless of the exact language she used on September 1, 2015, Ms. Kinnett was clear about her intentions during that conversation. Both during the

---

[22] Ms. Kinnett was cross-examined at the June 12, 2017 hearing on her responses to requests for admission. Thereafter, Mr. Andrews offered the responses into evidence without objection. The clerk of court, however, failed to properly record that the exhibit had been "received." When the transcript and the clerk's record are inconsistent, the transcript prevails. *See, e.g.*, *State v. Galle*, 11-0930 (La. App. 4 Cir. 2/13/13), 107 So.3d 916, 934.

April 12, 2017 hearing before the Domestic Commissioner and the June 2, 2017 hearing before the district court, she explained that she informed Mr. Andrews of her intentions to stay in her marriage and work it out with her husband because she "did not want to talk to [Mr. Andrews]" or "be bothered by him anymore." She further testified that she had no doubts that Mr. Kinnett was the father of her child.

In keeping with our duty to interpret the statute in a manner that preserves its constitutionality, we find as a matter of law that a married woman—whose husband is presumed to be the father of her child—who knows that it is possible that another man is the child's biological father has a duty to inform that man of his possible paternity. Failure to so inform the possible biological father is bad faith deceit as contemplated in Civil Code art. 198. Therefore, for the aforementioned reasons, we find that Mr. Kinnett did not satisfy his burden of proving that Ms. Kinnett did not deceive Mr. Andrews in bad faith regarding his paternity of G.J.K. However, even if the trial judge correctly placed the burden of proof upon Mr. Andrews, we find that there was no factual basis for the trial court's finding that Ms. Kinnett did not engage in bad faith deceit.

In the absence of legal error, we would review the trial court's findings of fact on the issue of bad faith deception for manifest error. *See Wooley*, 61 So.3d at 554. When reviewing factual findings for error, the relevant question is not whether the finding was right or wrong, but whether the conclusion reached by the finder of fact was reasonable. *Id.* at 555 (citing *Stobart v. State through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La.1993)). However, a reviewing

court does not simply search the record for some evidence that supports the trial court's finding; the record when viewed in its entirety must establish a reasonable basis for the trial court's conclusion. *Id.* at 554-55. Under the manifest error standard, the appellate court may reverse a finding of fact when the appellate court reviews the record in its entirety and determines (1) that a reasonable factual basis does not exist for the finding, and (2) that the record establishes that the fact finder was clearly wrong. *Lomont*, 172 So.3d at 633 (citing *Bonin v. Ferrellgas*, 03-3024 (La. 7/2/04), 877 So.2d 89, 94-95).

The trial court accepted Ms. Kinnett's testimony that she *believed* her husband was G.J.K.'s father, both during her pregnancy and after the baby was born, as well as her contention that she was completely unaware of the fact that Mr. Andrews was G.J.K.'s biological father until she received the results of the sibling DNA test on December 9, 2016. Prior to that date, the trial court opined, if Ms. Kinnett told Mr. Andrews that she thought her husband was G.J.K.'s father, she might have been mistaken but not deceptive.

When findings of fact are based on judgments regarding the credibility of witnesses, the trial court's determinations are entitled to great deference. *Id.*; *Wooley*, 61 So.3d at 554. However,

> [w]here documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination.

Id. at 554 (quoting *Rossell v. ESCO*, 549 So.2d 840, 844-45 (La.1989)).

Our review of the entire record, as discussed above, leads us to conclude that there was no factual basis upon which the trial court could reasonably conclude that Ms. Kinnett did not deceive Mr. Andrews in bad faith regarding his paternity of G.J.K., and that finding was manifestly erroneous.

Ms. Kinnett's version of events, as discussed in detail above, was inconsistent, ever evolving, and implausible such that it was clear error for the trial court to credit her story. Her testimony changed regarding whether she told Mr. Andrews her husband was her child's father. As discussed above, the finding that Ms. Kinnett was honest in her testimony that she believed her husband, and not Mr. Andrews, was her child's father is not supported by the evidence. Furthermore, if Ms. Kinnett believed her husband was the child's father, the likelihood that she told Mr. Andrews that the child was her husband's increases, which would mean that she made a speculative statement as fact, having no justification for believing that it was anything more than speculation.

The evidence and testimony presented establish that Ms. Kinnett, knowing that Mr. Andrews was at least fifty percent likely to be the child's father, concealed the pregnancy then informed or implied to Mr. Andrews that her husband was the father. The timing of both the DNA test and admission to Mr. Andrews of his paternity just before she filed for divorce supports Mr. Andrews' testimony that Ms. Kinnett claimed the child was the child of her marriage until December, 2016. Based upon the evidence Mr. Andrews presented, it is more probable than not that

Ms. Kinnett deceived him as to the child's paternity until she was ready for a divorce in December, 2016.

Further, the trial court's finding that Ms. Kinnett was not in bad faith was an error of material fact as this finding limited the peremptory period within which Mr. Andrews was required to file an avowal action to one year from his child's birth.[23] As we find the trial court here committed both a reversible error of law and a manifest error of material fact and the appellate record is sufficient, it is incumbent upon us to re-determine the facts *de novo* from the entire record and render a judgment in this case on the merits. *Wooley*, 61 So.3d at 555 (citing *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La. 2/20/95), 650 So.2d 742, 745). Therefore, we now examine the trial court's finding that Mr. Andrews did not file his avowal action within one year of the date that he knew or should have known of his paternity.

E. "Knew or Should Have Known"

After Ms. Kinnett informed Mr. Andrews of G.J.K's birth and that she intended to attempt to make her marriage work in September of 2015, he did not insert himself into her marriage by filing a paternity action or attempting to see the child.[24] However, he submit-

---

[23] Unless Ms. Kinnett is found to have in bad faith deceived Mr. Andrews as to his paternity, the court does not appropriately consider the issue of when Mr. Andrews knew or should have known of his paternity.

[24] To interpret the statute to require a possible biological father to interject himself into an intact marriage in a manner that would, in all probability, cause intense marital strife based upon a thought that "crossed [his] mind" when the mother said she was trying to make the marriage work would flout the Louisiana

ted to a DNA paternity test the day after her December 9, 2016 phone call. His avowal action was filed within three months of the date Ms. Kinnett alleged she first discovered Mr. Andrews' paternity and informed him of it.

As he expressed in his oral reasons for judgment, the trial court granted the exception of peremption, in part, because it found that Mr. Andrews failed to file his avowal action within one year from the day he knew or should have known of his paternity—September 1, 2015. In other words, the judge applied the peremptory period provided for if Article 198's bad faith exception is triggered. That date being also outside the one-year period from the day of the child's birth— the default peremptory period for filing an avowal action pursuant to Article 198— the trial court granted the exception of peremption without an in-depth analysis of whether the mother in bad faith deceived Mr. Andrews as to his paternity.[25]

We find that the trial court erred in its interpretation of Article 198's "knew or should have known"

Legislature's stated public policy of protecting both the intact marriage and the child "from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father." La. C.C. art. 198 cmt. (e).

[25] After explaining the case law and evidence that led to his conclusion that Mr. Andrews "certainly knew or should have known" of his paternity more than one year prior to February 10, 2017, the trial court found "there's been no evidence to suggest to me that Mrs. Kinnett satisfied the technical wording of the statute in being, quote unquote, in bad faith and being deceptive. But the statute is clear that he shall institute within one year of the day he knew or should have known of his paternity."

language, and therefore, manifestly erred in finding that Mr. Andrews knew or should have known that he was G.J.K.'s father after his September 1, 2015 conversation with Ms. Kinnett, that finding being unsupported by the record.

As discussed above, we begin our interpretation of "knew or should have known" by looking first to the language of the statute itself, giving words their ordinary meaning. La. C.C. art. 11; *In re Succession of Boyter*, 99-0761 (La. 1/7/00), 756 So.2d 1122, 1128-29. We do not question whether the trial court was aware of the generally prevailing meaning of the phrase "knew or should have known" itself, but rather, whether the trial court committed an error of law when it found that Mr. Andrews was required to file his avowal action one year from the date he knew or should have known that a *possibility* existed that he was G.J.K.'s father.

The definition of "knowledge," according to Black's Law Dictionary, is "[a]n awareness or understanding of a fact or circumstance; a state of mind in which a person has no substantial doubt about the existence of a fact." BLACK'S LAW DICTIONARY (11th ed. 2019). Knowledge may be attributed to an individual when there is "[d]irect and clear knowledge" and also when a person has "[k]nowledge of information that would lead a reasonable person to inquire further." *Id.*

"Constructive knowledge," refers to the "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Id.* In the context of determining whether a person had knowledge sufficient to trigger the running of a prescriptive period, "constructive knowledge" denotes "whatever notice is enough to excite

attention and put the injured party on guard and call for inquiry." *See, e.g.*, *Campo v. Correa*, 01-2707 (La. 6/21/02), 828 So.2d 502, 510-11 (medical malpractice); *Thompson v. Thompson*, 14-963 (La. App. 3 Cir. 3/4/15), 159 So.3d 1121, 1125 (citing *In re Succession of Bernat*, 13-277 (La. App. 3 Cir. 10/9/13), 123 So.3d 1277, *writ denied*, 13-2640 (La. 2/7/14), 131 So.3d 865). Such notice is tantamount to knowledge or notice of everything to which a reasonable inquiry may lead. *Campo*, 828 So.2d at 511.

A mere apprehension does not trigger the running of peremption. *Murray v. Ward*, 18-1371 (La. App. 1 Cir. 6/10/19), 280 So.3d 625, 630, *writ denied sub nom. Murray v. Samuel C. Ward, Jr. & Associates*, *LLC*, 19-01149 (La. 10/21/19), 280 So.3d 1166. Rather a plaintiff must receive facts from which a reasonable person would assume the ultimate fact at issue exists. *See, e.g.*, *Id.* at 630 ("A plaintiff's mere apprehension that something may be wrong is insufficient to commence the running of peremption unless the plaintiff knew or should have known through the exercise of reasonable diligence that his problem may have been caused by acts of malpractice."); *see also Powell v. St. Francis Med. Ctr., Inc.*, 52,462 (La. App. 2 Cir. 2/27/19), 265 So.3d 1184, 1186. The ultimate issue in determining whether a person had constructive knowledge sufficient to commence a peremptive period is the "reasonableness of the plaintiff's action or inaction in light of his education, intelligence, and the nature of the defendant's conduct." *See, e.g.*, *Wells v. Zadeck*, 11-1232 (La. 3/30/12), 89 So.3d 1145, 1151.

There is a difference between what the plaintiff *knew or should have known* at the relevant time and what he *could* have known through further research.

Gerard Lindquist, 274 So.3d at 761; *Wells*, 89 So.3d at 1152. The inquiry into the reasonableness of the plaintiff's action or inaction properly focuses on the knowledge he actually possessed. *See Wells*, 89 So.3d at 1152. Furthermore, for the cause of action to be reasonably knowable to the plaintiff, such that the peremptive period begins to run, the plaintiff must have "knowledge of facts strongly suggestive" of the ultimate issue and there must be no effort by the defendant "to mislead or cover up information [that] is available to plaintiff through inquiry." *Powell*, 265 So.3d at 1187.

When the defendant's fraud or bad faith prevents the filing of the action within the statutory peremptive or prescriptive period, this Court has held that, "the mere availability of information, in and of itself, cannot serve as sufficient constructive knowledge of a plaintiff's cause of action to start the running of prescription." *Gerard Lindquist*, 274 So.3d at 761 (citing *Lennie v. Exxon Mobil Corp.*, 17-204 (La. App. 5 Cir. 6/27/18), 251 So.3d 637, 646, *writ denied*, 18-1435 (La. 11/20/18), 256 So.3d 994). When a plaintiff has been "lulled into a course of inaction in the enforcement of his right by reason of some concealment or fraudulent conduct on the part of the defendant, or because of the defendant's failure to perform some legal duty whereby the plaintiff has been kept in ignorance of his rights," the plaintiff is excepted from the effects of prescription. *Gerard Lindquist*, 274 So.3d at 759 (citing *Carter v. Haygood*, 04-0646 (La. 1/19/05), 892 So.2d 1261, 1269). *See Fontenot v. Houston General Ins. Co.*, 467 So.2d 77, 80 (La. App. 3 Cir. 1985) ("employer who lulls an injured employee into a false sense of security is estopped from

interposing a plea of prescription to a worker's untimely suit for compensation benefits"). *See also Lomont*, 172 So.3d at 634-35.

Since Article 198 was enacted, no court has been called upon to address a biological father's delay in filing an avowal action in the face of the mother's statements that she had been intimate with her husband and was trying to make her marriage work. However, prior to the 2005 incorporation of dual paternity into the Civil Code, courts refused to find that a biological father's delay in filing an avowal action was unreasonable in "circumstances which impute[d] much of the delay to the mother." *T.D. v. M.M.M.*, 98-0167 (La. 3/2/99), 730 So.2d 873, 87677, *abrogated by Fishbein v. State ex rel. Louisiana State Univ. Health Scis. Ctr.*, 04-2482 (La. 4/12/05), 898 So.2d 1260. *See Finnerty v. Boyett,* 469 So.2d 287, 292 (La. App. 2 Cir. 1985) (When the mother effectively causes the delay in the biological father's filing of an avowal action, the delay is not unreasonable so as to preclude avowal).

In *T.D. v. M.M.M.*, the mother informed the biological father that she suspected he was the father of the child. 730 So.2d at 874. Since she was not intimate with her husband at the time of conception, she also advised him of the child's paternity. *Id.* The biological father regularly visited the child and the mother during the years-long affair, and DNA testing confirmed his paternity to a 99.5% probability. *Id.* at 875. Once the mother and her husband divorced, the mother terminated her affair with the biological father and refused to allow him to see the child. *Id.* Finding that the father failed to file his avowal action earlier because he had regularly visited the child

while in a relationship with the mother, the court held that the father's avowal action, filed six years after the child's birth, was not unreasonable.

Prior to 2005, while dual paternity was a jurisprudential rule, inconsistent applications sometimes stripped the legal father of his parental status when the biological father's avowal was successful, likely creating havoc for the child in the face of losing a parent. *See* Louisiana House of Representatives, Civil Law Committee (4/5/2004), H.B. 368 *available at* https://house.louisiana.gov/H_Video/ VideoArchivePlayer?v=house/2004/apr /0405_04_CL# (2:46:46-2:56:50) (referencing *Finnerty*, 469 So.2d 287). Yet, Louisiana courts were loath to strip the biological father of his right to parent, and the child of his or her right to know that parent, in the face of the mother's contribution to the filing delay. Today, when the application of Article 198 does not dispossess the legal father of his right to parent, but merely adds a parent, we are equally loath to find a biological father unreasonable in his actions under the facts of this case.

The trial court, relying upon two cases, found that Mr. Andrews' avowal action was filed more than one year after the day that he "certainly knew or should have known" of his paternity. In his oral reasons for judgment, the trial court quoted the following passage from *W.R.M. v. H.C.V.*:

> [t]he record reflects that W.R.M. was aware of the possibility that he was A.M.V.'s father from the moment that H.C.V. told him that she was pregnant, because of their ongoing sexual relationship. While there has been no determinative DNA testing, it is clear from the evidence and testimony that W.R.M.

> suspected from the beginning that A.M.V. was his biological son. . . . Despite these suspicions, W.R.M. did nothing to hold A.M.V. out as his son until [a later date].[26]

951 So.2d at 178 (as quoted by the trial court in its oral reasons for judgment on June 2, 2017). In that case, the biological father had an ongoing continuous relationship with the mother of over ten years but brought no avowal action until the child was almost nine years old. *Id.* The trial court also found *Suarez v. Acosta*, 15-750 (La. App. 5 Cir. 3/16/16), 194 So.3d 626, to be "right on point" in its interpretation of the statute. The biological father in that case received knowledge of his paternity before the child was born but filed no avowal action until after the child's death, more than nine years later. *Id.*

Applying the law, the trial judge found that Mr. Andrews testified to an "ongoing and repetitive sexual relationship" with Ms. Kinnett that was exclusive in the sense that he believed she was sleeping in her daughter's room, not with Mr. Kinnett. The trial court further found that the timing of Ms. Kinnett's September 1, 2015 disclosure to Mr. Andrews was "strikingly close to the gestation period," and that Mr. Andrews, "in the back of his mind knowing that he could possibly be the father," did nothing, admitting that he did not ask Ms. Kinnett if the child was his. As reflected in the oral reasons for judgment, the trial

---

[26] *W.R.M. v. H.C.V.* interpreted Article 191, the predecessor to Article 198. The only substantive difference in the two statutes is a two-year peremptive period from the birth of the child in Article 191, which was reduced to one year by the passage of Article 198. 06-0702 (La. 3/9/07), 951 So.2d 172, 174-75 & nn. 5-6 (Johnson, J., concurring).

court found Mr. Andrews was presented with sufficient facts during that conversation to, at the very least, excite his attention to the need for further investigation.

Although the trial court found that there was no evidence of bad faith deception by Ms. Kinnett, the court also opined that Mr. Andrews could not reasonably rely on Ms. Kinnett's statement that the baby was the result of her getting together with her husband one night. The trial judge stated,

> You've got an ongoing and repetitive sexual relationship with a woman and yet the testimony is a one-time encounter with her husband and you just naturally assume, it's not me, when, in fact, the likely probability is that one who has continued and repeated in intercourse is more than likely going to be the father of the child as opposed to [the one time encounter].

The record, however, does not support this interpretation of the facts.

The sporadic nature of Mr. Andrews' and Ms. Kinnett's relationship was uncontested. Mr. Andrews testified without contradiction that several weeks passed between intimate encounters at the height of the affair and became even more infrequent after Mr. Andrews began dating someone else. All parties agree that Mr. Andrews and Ms. Kinnett had a single sexual encounter during the month of November 2014, when G.J.K. was conceived. It is also uncontested that Mr. Andrews did not see Ms. Kinnett in person for over a year thereafter and had only one communication with her between November, 2014 and September, 2015.

Further, Mr. Andrews' testimony is also uncontradicted that he first discovered that Ms. Kinnett had been pregnant nearly a month after she had given birth, and she did not tell him the birth date.[27]

Upon the mother's bad faith deception, Article 198 requires the father to file his avowal action within one year from the day he knew or should have known *of his paternity*. La. C.C. art. 198. Paternity being the ultimate fact that gives rise to the cause of action for avowal, Mr. Andrews would have to have either "[d]irect and clear knowledge" of the fact that he was G.J.K.'s biological father or "[k]nowledge of information that would lead a reasonable person to inquire further." Undisputedly, no one clearly and directly informed Mr. Andrews of his paternity until Ms. Kinnett's December, 2016 DNA test result revelation.[28] The relevant question, then, is whether

---

[27] The trial court's inference that Mr. Andrews should have assumed he was more likely the father than Mr. Kinnett is clearly erroneous as the most Mr. Andrews could have assumed was a fifty-fifty probability of paternity given Ms. Kinnett's statement that she slept with her husband once to conceive G.J.K. The uncontradicted evidence was that, it would have been Mr. Kinnett's one-time encounter versus Mr. Andrews' one-time encounter, setting aside other factors exclusively known by Ms. Kinnett, as discussed above.

[28] The trial court relied upon two February 23, 2017 text messages from Mr. Andrews to Ms. Kinnett to surmise that he might have had actual knowledge. The first message, read, "we do have to say you deceived me as to my paternity of the child, because if not, I don't have a claim . . . ." Mr. Andrews testified that the message was his explanation of the petition's language to Ms. Kinnett because he was trying to maintain a romantic relationship with her, and she became upset that the petition cast her in a bad light. The trial court apparently rejected Mr. Andrews' explanation of the text stating, "[t]hose words do not

Mr. Andrews possessed information on September 1, 2015 sufficient to give him either reason to assume that he was G.J.K.'s father or to excite his attention, put him on guard, and call for further inquiry.

Whether Mr. Andrews knew or should have known that he was G.J.K.'s father on September 1, 2015 depends on the facts available to him at that time, taking into consideration any effort by Ms. Kinnett to mislead him or conceal information that should be available through inquiry. Mr. Andrews testified that during their September 1, 2015 conversation she (1) told him the child was her husband's, (2) did not tell him the date the child was born or the child's age, and that he (3) did not know before then that Ms. Kinnett had been pregnant because he had

---

suggest to me the idea of telling the truth," particularly because Ms. Kinnett's response was, "I did not deceive you. I had no idea. You will be lying if you say that." As addressed in detail above, Ms. Kinnett's claim that she "had no idea" was either untrue or simply wishful thinking.

> The second text message from Mr. Andrews read, "I'm sorry things didn't work out differently between us back then. I feel responsible for the hell you're going through right now. I wish I would have whisked you away from a bad situation and we had had [G.J.K.] together. I am very sorry that I did not do that." The judge found "[t]hat clearly indicates that in previous time as it's written, you had knowledge, you had the ability to intervene and you didn't." However, Ms. Kinnett testified that she did not inform Mr. Andrews that he was G.J.K.'s father until December 9, 2016, because she believed Mr. Kinnett was the father until then, and because she wanted nothing more to do with Mr. Andrews. Given Ms. Kinnett's own testimony, it is difficult to discern how she would have conveyed to Mr. Andrews the probability of his paternity.

not seen her since their last sexual encounter, (4) did not recall the date of that sexual encounter, and (5) knew that Ms. Kinnett had been using the Nuva-Ring . . . birth control device at the time of intercourse.

Mr. Andrews also testified that he had no reason to believe that Ms. Kinnett would lie to him about the child's paternity because he believed she was unhappy in her marriage and would prefer to be with him. Mr. Andrews would not have been unreasonable to assume that Ms. Kinnett was aware of the number of times she had slept with each man, whether or not she had properly used birth control during all of the relevant encounters, the date of her last menstrual cycle prior to conception, and the most likely date of ovulation and conception based on conversations she would have had with her obstetrician about the due date, *i.e.*, whether Mr. Andrews was possibly her child's father.

In fact, while both parties testified to recognizing, at some point, that Mr. Andrews *could* be the father, the trial court conferred a "duty," "obligation," or "responsibility" upon Mr. Andrews to specifically ask Ms. Kinnett if the child was his, simultaneously rejecting the concept that Ms. Kinnett possessed superior knowledge of the facts—which required her to disclose the possibility of paternity to Mr. Andrews—stating, "he was aware of that himself. That's his own testimony that it could have been his."

Upon review of the record, we find that the information available to Mr. Andrews after the September 1, 2015 conversation rendered his failure to file an avowal action within one year thereafter reasonable. Any apprehension or fleeting suspicion he may have had about his paternity upon learning that Ms. Kinnett had had a child was alleviated by her mis-

representations or insinuations that she knew her husband was the father.

Furthermore, assuming arguendo that Mr. Andrews' suspicions were awakened by Ms. Kinnett's statement that she had given birth, notice sufficient to trigger inquiry is tantamount to knowledge of everything to which a reasonable inquiry may lead. The trial court agreed that a reasonable inquiry would have been to simply ask the mother if she was sure about the paternity. Ms. Kinnett testified repeatedly that, on September 1, 2015, she had no doubt that her husband was her child's father. Therefore, by her own admission, she would merely have conveyed to Mr. Andrews her husband's paternity. As Ms. Kinnett, either directly or by insinuation, answered the question in the back of his mind, the trial court erred in attributing knowledge to Mr. Andrews beyond what asking that question would reveal. Mere apprehension of a fact does not trigger the running of the peremptory period. *Murray*, 280 So.3d at 630; *Powell*, 265 So.3d at 1187.

Moreover, the fact that a paternity test would have revealed the truth does not mean that Mr. Andrews was required to seek one. The fact that the information was available does not serve as constructive knowledge by itself. *See Gerard Lindquist*, 274 So.3d at 761. The paternity test demonstrates what Mr. Andrews *could* have known, not what he *knew or should have known*.[29] *See Id.*; *Campo,* 828 So.2d at 511-512. Unless there was enough information available

---

[29] To require the putative biological father to demand a DNA test based upon a mere apprehension of paternity flouts Louisiana's explicitly stated policy to preserve the intact family.

to Mr. Andrews to strongly suggest to him that he *was in fact* the father of Ms. Kinnett's child, it would not have been reasonable for Mr. Andrews to interject himself into her marriage and seek a paternity test.

CONCLUSION

For the reasons thoroughly discussed herein, we find that the trial court committed an error of law in placing the burden of proof on the exception of peremption upon Mr. Andrews rather than Mr. Kinnett, said error interdicting the fact finding process. Upon *de novo* review, we find that Mr. Kinnett failed to carry his burden of proving that Ms. Kinnett did not deceive Mr. Andrews in bad faith as to his possible paternity of G.J.K. We further find that, even if the trial court properly placed the burden upon Mr. Andrews, the trial court was manifestly erroneous in its finding that Ms. Kinnett did not deceive Mr. Andrews in bad faith as to his paternity of G.J.K., there being no factual basis for that finding. Further, the trial court committed an error of law in its interpretation of Civil Code art. 198's exception to the peremptory period when the trial court failed to recognize the mother's duty to inform the potential biological father of his possible paternity of her child. Finally, we find that the trial court legally erred in finding that a biological father who is aware of a mere possibility, rather than a probability, of paternity has a duty to investigate his possible fatherhood—especially when any such investigation would have been fruitless in the face of Ms. Kinnett's repeated statements that she believed Mr. Kinnett was the father of her child.

Therefore, for all of the reasons stated herein, on *de novo* review, we find that the trial court erred in

finding that Mr. Andrews' avowal action was peremptted. We find that Mr. Andrews' avowal action was timely filed on February 10, 2017, that date being less than one year from the date Mr. Andrews knew or should have known of his paternity on December 9, 2016. We hereby reverse the trial court's June 2, 2017 judgment and remand this matter to the trial court for further proceedings consistent with this opinion. As this action renders it unnecessary for this Court to address the constitutional challenge to the statute, we pretermit discussion of Mr. Andrews' assignments of error regarding the trial court's ruling that Article 198 is constitutional.

REVERSED AND REMANDED

CONCURRING OPINION OF J. WICKER

Wicker, J., Concurs with Reasons

While we have resolved this case without addressing the constitutionality of Article 198, I write separately to point out my deep lingering concerns with the statute's constitutionality.

The question is whether Louisiana Civil Code art. 198 on its face and as applied by the trial court in this case violates Mr. Andrews' and the minor child's right to Due Process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Louisiana Constitution.

As the opinion of this Court explains, when a statute can be interpreted two ways, one of which calls into question the statute's constitutionality, the court shall choose the interpretation that avoids the constitutional question. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988); *M.J. Farms, Ltd. v. Exxon Mobil Corp.*, 07-2371 (La. 7/1/08), 998 So.2d 16, 25, *amended on reh'g* (9/19/08); *Crown Beverage Co. v. Dixie Brewing Co., Inc.*, 96-2103 (La. App. 4 Cir. 5/28/97), 695 So.2d 1090, 1093, *writ denied*, 97-1711 (La. 10/13/97), 703 So.2d 615; *Bize v. Larvadain*, 18-394 (La. App. 3 Cir. 12/28/18), 263 So.3d 584, 592 (citing *State v. Lanclos*, 07-0082 (La. 4/8/08), 980 So.2d 643, 647-8), *reh'g denied* (2/13/19), *writ denied*, 19-0419 (La. 5/6/19),270 So.3d 577. Our interpretation of Article 198 does so by attempting to ensure that a biological father receives notice of his child's existence before being deprived of his opportunity to avow his child. *See* discussion *infra*, Section I.b. Thus, in interpreting the statute, we did

not address the argument—asserted by Mr. Kinnett and cited as partial justification for Article 198's limitation on an unwed father's right to avow[30]—that the biological father of a child whose mother was married to another man at the time of the child's birth has no constitutional rights to consider when assessing the statute's validity. I am of the opinion that Article 198 affects the fundamental rights of both the putative father and the child, and other interpretations of the statute would violate both the biological father's and the child's rights to due process.

Further, in Mr. Andrews' case, the deprivation has already occurred and every moment litigation remains pending increases the likelihood that the damage caused will become irreparable.

I. Due Process

The Fourteenth Amendment to the United States Constitution promises that States will not "deprive any person of life, liberty, or property, without due process of law." Jurisprudence recognizes two components of due process: substantive and procedural. Substantive due process has been described as generally protecting individuals from arbitrary legislation. *Griswold v. Connecticut*, 381 U.S. 479, 502; 85 S.Ct. 1678, 1691; 14 L.Ed.2d 510 (1965) (Justice White,

---

[30] The Law Institute concluded, based on the United States Supreme Court's decision in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S. Ct. 2333, 105 L Ed.2d 91 (1989), that "denying the biological father of a child the right to establish his filiation when another man was presumed to be the father was not unconstitutional." Katherine Shaw Spaht, *Who's Your Momma, Who are Your Daddies? Louisiana's New Law of Filiation*, 67 La. L. Rev. 307, 321-22 & nn. 94-96 (2007).

concurring); *Poe v. Ullman*, 367 U.S. 497, 543, 81 S.Ct. 1752, 1777, 6 L.Ed.2d 989 (1961) (Justice Harlan, dissenting); *Babineaux v. Judiciary Comm'n*, 341 So.2d 396, 400 (La. 1976). While a variety of interests may require due process protection, substantive due process is usually satisfied if the government action is rationally related to a legitimate government interest. *Morales v. Par. of Jefferson*, 13-486 (La. App. 5 Cir. 4/30/14), 140 So.3d 375, 395, *writ denied*, 14-1293 (La. 10/10/14), 151 So.3d 582, and *writ denied*, 14-1296 (La. 10/10/14), 151 So.3d 582, and *writ denied*, 141299 (La. 10/10/14), 151 So.3d 583.

However, certain interests, namely, those which are "deeply rooted in this Nation's history and tradition" and "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" are ranked fundamental. *Washington v. Glucksberg*, 521 U.S. 702, 720-21; 117 S.Ct. 2258, 2268; 138 L.Ed.2d 772 (1997); *see Lawrence v. Texas*, 539 U.S. 558, 593; 123 S.Ct. 2472, 2491-92; 156 L.Ed.2d 508 (2003) (Scalia, Dissenting). Fundamental interests cannot be infringed upon by the government "*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1 (1993) (emphasis in original); *See Griswold*, 381 U.S. at 497 (Goldberg, J., concurring).

Procedural due process focuses on the essential fairness of the procedures a state has used to deprive someone of life, liberty, or property. *See Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 542; 97 S.Ct. 1932, 1957; 52 L.Ed.2d 531 (1977) (White, J., dissenting); *Babineaux*, 341 So.2d at 400. Among the requirements

of procedural due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner. *Babineaux*, 341 So.2d at 400. The United States Supreme Court has recognized that the determination of the procedure required depends on the nature of the right or interest being threatened by the government. *See, e.g.*, *Lehr v. Robertson*, 463 U.S. 248, 256, 103 S.Ct. 2985, 2990, 77 L.Ed.2d 614 (1983). *See also Obergefell v. Hodges*, 135 S.Ct. 2584, 2631-32, 192 L.Ed.2d 609 (2015) (Thomas, J., dissenting).

Therefore, the threshold issue in any due process analysis is classifying the liberty interests at stake.

a. What Liberty Interest is at Stake?

The United States Supreme Court has held that "a parent's desire for and right to 'the companionship, care, custody and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18, 27, 101 S.Ct. 2153, 2159-60, 68 L.Ed.2d 640 (1981) (citing *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed. 551 (1972)). However, while the Court has stressed the "fundamental liberty interest of natural parents" in the parent-child relationship in the context of state-initiated proceedings to terminate parental rights, *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982), when discussing the interests of an *unmarried* biological *father* in the parent-child relationship, the Court has reached different conclusions about whether the interest is protected by the Due Process Clause based on the particular facts of the case. *Compr. Stanley*, 405 U.S. 645; *Quilloin v.*

Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); *Lehr*, 463 U.S. at 258; *and Michael H.*, 491 U.S. at 109.

In *Stanley v. Illinois*, an unmarried father's children became wards of the state upon the death of their mother, even though the father had lived with and raised the children and wished to retain custody. The Court found that Stanley's interest in his relationship with his children deserved protection, despite the fact that the relationship was not legitimated by marriage. *Stanley*, 405 U.S. at 651-52.

Similarly, in *Caban v. Mohammed*, an unmarried father's constitutional rights were violated by a statute that allowed an unmarried mother to block the adoption of her biological child by withholding consent, but did not allow an unmarried father to block the adoption in the same manner, even when his parental relationship was substantial. 441 U.S. at 385-87.

Quilloin v. Walcott dealt with a Georgia law that required the consent of each living parent before the adoption of a child who had been born into a marriage, regardless of the current marital status of the parents, but required only the consent of the mother for the adoption of a child born out of wedlock. 434 U.S. at 248. The Court held that the biological father's rights were not violated when he had never exercised actual or legal custody nor participated substantially in the daily responsibilities of rearing the children, and the trial court had found that the adoption of the child by the mother's husband was in the best interest of the child. *Id.* at 256.

In *Lehr v. Robertson*, the Court emphasized the difference between the developed parent-child relationship established in *Stanley* and *Caban* and the "inchoate" relationship evidenced in *Quilloin*. 463 U.S. at 249-50. The Court found,

> [w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," Caban, 441 U.S., at 392, 99 S. Ct., at 1768, his interest in personal contact with his child acquires substantial protection under the due process clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection.

Lehr, 463 U.S. at 261.

The Kinnetts argue that *Michael H. v. Gerald D.* is directly on point with the facts of this case. 491 U.S. 110 (1989). Gerald D.'s wife had an affair with Michael H., and a daughter was born of that relationship. Blood tests confirmed Michael's paternity within the first several months after the birth, and for the first three years of the child's life, Michael had a relationship with the child. When the mother kept Michael from seeing his daughter, he filed a paternity action. However, California law established a conclusive presumption that the husband of the mother was the father of any children born into the marriage, and Michael was denied standing to rebut the presumption.

The United States Supreme Court granted certiorari to address Michael's due process claims. Justice Scalia, writing for the plurality, emphasized the

requirement that the "asserted liberty interest be rooted in history and tradition," and found no evidence that an "adulterous natural father's" right to assert "parental rights over a child born into a woman's existing marriage with another man" had ever received special protection. *Michael H.*, 491 U.S. at 122-25. Instead, he declared that the "presumption of legitimacy was a fundamental principle of the common law." *Id.* at 125 (citing H. Nicholas, Adulturine Bastardy 1 (1836)). The historical policy behind the conclusive presumption was predominately "an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession, and likely making them wards of the state." *Id.* (internal citations omitted). However, he pointed out that a secondary concern was promoting the "peace and tranquility of states and families." *Id.*

Therefore, although the Court had recognized six years earlier, "[t]he significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring," *Lehr*, 463 U.S. at 257-58, the plurality in *Michael H.* held that when the child is born into a marriage, "the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter." 491 U.S. at 128-29.

The plurality conclusion in *Michael H.* is troubling for a number of reasons. The short opinion opened with a narrow description of the right Michael H. actually asserted and then analyzed whether that right, as defined by the author, found protection in our nation's history and traditions. Justice Scalia's rationale fails

to appreciate fully the historical foundation for the Fourteenth Amendment and this nation's unfortunate tradition of denying rights to certain categories of individuals. The Fourteenth Amendment extended rights and protection of the law to individuals who had previously been categorically denied protection.

Only Chief Justice Rehnquist "endors[ed] Justice Scalia's view of the proper method of analyzing questions arising under the Due Process Clause." *See Michael H.*, 491 U.S. at 136 (Brennan, J., dissenting). Justices O'Connor, Kennedy, and Stevens concurred, agreeing with the outcome in this particular case but not with the analysis, decrying Justice Scalia's method of analyzing history and tradition to determine whether Michael H. had a fundamental liberty interest at stake. *Id.* at 132 (O'Connor, J., concurring in part). Justice Stevens questioned Justice Scalia's seeming rejection of "the possibility that a natural father might ever have a constitutionally protected interest in his relationship with a child whose mother was married to, and cohabiting with, another man at the time of the child's conception and birth."[31] *Michael H.*, 491 U.S. at 133 (Stevens, J., concurring).

Justices Brennan, Marshall, Blackman and White, in dissenting, agreed not only that the natural father has a constitutionally protected liberty interest in a relationship with his child, but also that the California

---

[31] Justice Stevens agreed with the outcome because the trial judge had the authority to grant Michael H. reasonable visitation rights as an "other person having an interest in the welfare of the child." Therefore, although Justice Stevens was willing to assume that Michael H. had a constitutional right, he believed that the California statute satisfied due process. *Id.* at 133-34, 136 (Stevens, J., dissenting).

statute unconstitutionally terminated Michael H.'s protected liberty interest in the parent-child relationship without "the least bit of process." *See id.* at 136, 151 (Brennan, J., dissenting). Justice White, with Justice Brennan agreeing, opined further that Michael H. was provided notice but no real opportunity to be heard as the California statute unconstitutionally refused him the opportunity to rebut the State's presumption that the mother's husband was the father of the child through blood test evidence. *Id.* at 161 (White, J., dissenting).

Rigid focus upon history and tradition is inconsistent with a rich body of United States Supreme Court jurisprudence that predates the *Michael H.* decision and fails to consider that both history and tradition are a side effect of the passage of time and evolving social mores. Many of the substantive due process rights now considered to be "implicit in the concept of ordered liberty" such that to abolish them violates "a principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental" were once explicitly denied protection under the Fourteenth Amendment. *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934)) (The Fifth Amendment double jeopardy clause was not a fundamental principle of liberty and due process such that it was applicable to the states through the Fourteenth Amendment); *But see Benton v. Maryland*, 395 U.S. 784, 795, 89 S.Ct. 2056, 2063, 23 L.Ed.2d 707 (1969) (finding, "[t]he fundamental nature of the guarantee against double jeopardy can hardly be doubted" and extending the prohibition against double jeopardy to

the states through the Fourteenth Amendment thirty-two years after the *Palko* decision).

Supreme Court jurisprudence addressing a plethora of asserted rights affirms that history and tradition are not the sole arbiters of whether liberty interests are entitled to protection under the constitution in the face of evolving science and societal norms. *See e.g. Lawrence v. Texas*, 539 U.S. at 572. In *Lawrence v. Texas*, the Supreme Court relied upon no historical evidence of protection for individuals engaging in homosexual intercourse to strike down a Texas statute criminalizing consensual homosexual sex. *Id.* On the contrary, the Court acknowledged that homosexual conduct had been condemned as immoral for centuries. *Id.* at 571. Instead, the majority looked to the laws and traditions of the "past half century" to find an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." *Id.* at 571-72. Seventeen years earlier, in a five-to-four decision, the Supreme Court refused to construe the Constitution to confer "a right of privacy that extends to homosexual sodomy." *Bowers v. Hardwick*, 478 U.S. 186, 190-92, 106 S.Ct. 2841, 2843, 92 L.Ed.2d 140 (1986), *overruled by*, *Lawrence v. Texas*, 539 U.S. at 558.

In *Obergefell v. Hodges*—rather than viewing the right to same-sex marriage through the lens of history and tradition—the majority looked to the changing nature of the institution of marriage and American society as well as its own evolving *stare decisis* to find that the traditional denial of the right to marry to same-sex couples violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *See*

135 S.Ct. at 2602-05. Forty-three years earlier, in 1972, the United States Supreme Court dismissed an appeal from a decision of the Minnesota Supreme Court holding that statutes prohibiting same-sex marriages did not violate the Constitution. *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37 (Mem), 34 L.Ed.2d 65, (1972). The appeal was dismissed "for want of a substantial federal question." *Id.*

Likewise, Justice Scalia's description of the liberty interest at stake in *Michael H.*, in terms of whether the child's mother was married to the biological father or another man at the time of conception and birth, is not consistent with the practice of determining whether the interest is implicit in the concept of ordered liberty or one that has found protection in the history and traditions of our people. Justice White, dissenting in *Michael H.* and *Lehr*, emphasized that relying on the particular facts of a case to determine whether the father has a protected interest is untenable. *See Michael H.*, 491 U.S. at 157-58 & n.1; *Lehr*, 463 U.S. at 268 ("As Jessica's biological father, Lehr either had an interest protected by the Constitution or he did not.").

Furthermore, the dissenting Justices seemed to recognize that historical justifications for failing to protect the biological father's interest in his child born to a married woman no longer exist. Justice Brennan's dissenting opinion in *Michael H.* pointed out that

> the original reasons for the conclusive presumption of paternity are out of place in a world in which blood tests can prove virtually beyond a shadow of a doubt who sired a particular child and in which the fact of illegitimacy no longer plays the burdensome and stigmatizing role it once did.

Michael H., 491 U.S. at 140.

Without question, the parent-child relationship is a fundamental right that has historically been entitled to protection under the Fourteenth Amendment. *See Meyer v. Nebraska*, 262 U.S. 390, 400; 43 S.Ct. 625, 627; 67 L.Ed. 1042 (1923) (describing the corresponding rights and duties between parents and children); *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535, 536; 62 S.Ct. 1110, 1111; 86 L.Ed. 1655 (1942) (the right to have offspring is "one of the basic civil rights of man."); *Prince v. Massachusetts*, 321 U.S. 158, 166; 64 S.Ct. 438, 442; 88 L.Ed. 645 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

Likewise, children have corresponding constitutional rights to the parent-child relationship. *See, e.g.*, *Santosky*, 455 U.S. at 760-61 ("until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."). Yet, courts and legislatures often use the child's best interest as justification for refusing protection to the relationship between the biological father and the child. *See, e.g.*, *Quilloin*, 434 U.S. at 255 ("we cannot say that the State was required . . . to find anything more than that the adoption, and denial of legitimation, were in the 'best interests of the child.'").

The State of course must consider the child's interest in having basic needs met as well as the child's mental, physical, and emotional well-being to control the outcome of many cases involving children. *See, e.g.*, *Tracie F. v. Francisco D.*, 15-224 (La. App. 5

Cir. 9/21/15), 174 So.3d 781, 794. However, if a child's interest in developing and preserving this all-important and unique relationship— which, according to the State, is usually in the child's best interest[32]—is fundamental, then the foreclosure of that right cannot occur without due process of law.[33] Where fundamental rights are at stake, due process is satisfied only when the government has a compelling interest that justifies infringing upon the right, and the law employs the least restrictive means to achieve the government's objective. *See, e.g.*, *State v. Perry*, 610 So.2d 746, 760 (La. 1992).

As will be discussed below, some of the state's originally stated interests justifying Article 198 are no longer compelling. Also, while the best interest of the child is a major consideration, this standard does not adequately protect the fundamental rights of both the biological father and the child when the issue is whether the father may avow the child. Furthermore, Article 198 eliminates even the minimal process that a hearing on the best interest of the child would provide,

---

[32] *See Troxel v. Granville*, 530 U.S. 57, 68, 120 S.Ct. 2054, 2061, 147 L.Ed.2d 49 (2000) (constitutional law historically recognized that "natural bonds of affection lead parents to act in the best interests of their children.") (quoting *Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 2504, 61 L.Ed.2d 101 (1979)); Spaht, supra, at 315 (describing the preference for children being raised by biological parents united in marriage); *Tracie F.*, 188 So.3d at 242-43 (recognizing a preference for biological parents in custody determinations).

[33] The child also has other interests at stake including an interest in knowing his biological father's ancestors, medical history, and genetic traits and an interest in knowing that his father wants to be involved in his life.

unduly burdening the right to the parent-child relationship.

1. History of the Marital Presumption

Historically, children needed protection not only from the social stigma of illegitimacy but also from the harsh legal consequences of being labeled illegitimate. *See Smith v. Cole*, 553 So.2d 847, 849 (La. 1989). In an effort to promote marriage, fidelity, and "legitimate family relationships,"[34] the Civil Code developed a complex system to regulate family life, which included classifying children based on the circumstances of their birth and assigning varying rights and degrees of protection based on those classifications. *See, e.g.*, *id.*; *Succession of Robins*, 349 So.2d 276, 282 (La. 1977) (Summers, J., dissenting) ("Stability of the family and certainty of property rights are sought to be protected by the Civil Code. So interrelated with this purpose is the treatment of illegitimate children that our courts have declined attacks upon the elaborate plan regulating family life embodied in the Code.").

For example, for purposes of inheritance, legitimate children were afforded greater rights than illegitimate children, and some illegitimate children were prohibited from receiving property from their natural parents by any means. *See id.* at 277. On its face, the law of legitimacy was concerned with biological fact. The term "legitimate" included only those children who were conceived during the marriage of their

---

[34] *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173, 92 S.Ct. 1400, 1405, 31 L.Ed.2d 768 (1972) (Louisiana asserted interest in protecting "legitimate family relationships" as justification for denying illegitimate children workmen's compensation benefits at father's death).

natural parents. *Succession of Robins*, 349 So.2d at 282. The category of illegitimate children included both children born to persons who, at the time of conception, could have legally married, and children born to persons who could not marry at the time of conception because of some legal impediment. *Id.* Both "adulterous bastards"[35] and "incestuous bastards" were expressly defined by the law as members of the latter category of illegitimates. *Id.* Furthermore, the law prevented children who were considered illegitimate because they were born of adultery or incest from becoming legitimate through parental acknowledgment. *See Weber*, 406 U.S. at 167 n.3, 171 & n.9.

The harsh consequences of illegitimacy were designed to promote marriage and discourage extramarital affairs. *See, e.g.*, *Succession of Robins*, 349 So.2d at 278 ("valid state purpose said to be served is to help preserve the sanctity of the marriage by penalizing adulteries"). However, the need to protect innocent children from those consequences, combined with the difficulty of proving paternity, resulted in strict application of the marital presumption.[36] *See, e.g.*, *Tannehill v. Tannehill*, 261 So.2d 619, 623 (La. 1972).

---

[35] Former Civil Code art. 182 defined "adulterous bastards" as "those produced by an unlawful connection between two persons, who, at the time when the child was conceived, were, either of them or both, connected by marriage with some other person." *Id.* at 282-83.

[36] The marital presumption was also intended to recognize and protect biological fact by placing the presumption of paternity on the man most likely to be the biological father of a child and eliminating the need for case-by-case determination of paternity. *See* Spaht, *supra*, at 318 (recognizing the same logic applied to new presumptions of paternity in the 2005 revisions to the law

In its first manifestation in Louisiana law, neither the "wife's adultery nor the allegation of the husband's natural or accidental impotency" could rebut the presumption. *T.D. v. M.M.M.*, 730 So.2d at 880 (Kimball, J., dissenting), *abrogated by Fishbein v. State ex rel. Louisiana State Univ. Health Scis. Ctr.*, 04-2482 (La. 4/12/05), 898 So.2d 1260 (citing Title VII, Chapter II, art. 7, Civil Laws of the Treaty of Orleans (1808). Between 1870 and 1976, the husband of the mother was prohibited from disavowing the child because of his wife's infidelity unless the birth was concealed from him. *Id.* at 881. In other words, in Louisiana, just as in the common law referenced by Justice Scalia in *Michael H.*,[37] the presumption could be rebutted only when it was virtually certain that the husband of the mother was not the biological father. *See T.D. v. M.M.M.*, 730 So.2d at 880; *Tannehill*, 261 So.2d at 622 (presumption of paternity did not arise when the child was born before the 180th day of the marriage, when the child was born more than 300 days after dissolution of the marriage or judgment of separation, or when the husband was so remote from the wife that cohabitation was physically impossible).

In reality, however, the presumption also served to circumvent the law's intended consequences for infidelity by shielding children born of a woman's extramarital affair from the label and stigma of illegitimacy and forcing some husbands to support

---

of filiation, *i.e.* that subsequent marriage to the mother is evidence of a man's belief in biological paternity). The marital presumption relied on a further presumption that a married woman complied with her obligation of fidelity. *Id.*; *see* La. C.C. art. 98 cmt. (b); La. C.C. art. 185.

37 *See Michael H.*, 491 U.S. at 122-25.

and legitimize their wives' illegitimate children.[38] *Smith v. Cole*, 553 So.2d at 850; Rachel L. Kovach, *Sorry Daddy—Your Time is Up: Rebutting the Presumption of Paternity in Louisiana*, 56 LOY. L. REV. 651, 653 (2010). While the law defined all children born of extramarital affairs as "illegitimate," a child born as a result of a married woman's affair was protected by the marital presumption. *Succession of Robins*, 349 So.2d at 279.

As seen in *Smith v. Cole*, instead of penalizing extramarital affairs, the presumption could also insulate biological fathers from the responsibility of having children. 553 So.2d at 847. Mr. and Ms. Smith physically separated before Ms. Smith had a child with Mr. Cole but did not divorce until years later. *Id.* at 848. Ms. Smith brought a filiation and support action against the biological father, Mr. Cole. *Id.* Mr. Cole argued that the child was the legitimate child of Mr. Smith—as Mr. Smith had not formally disavowed her—and that Ms. Smith should not be allowed to "bastardize" the child to obtain money. *Id.* at 849.

As various unintended consequences of the law came to light, what was once a nearly irrebuttable presumption gave way to actions allowing proof of actual paternity. In 1976, revisions to the Civil Code granted the husband the ability to rebut the presumption by proving that the child was not his biologically.

---

[38] The fact that the presumption served to protect children that the law intended to suffer the consequences of their parents' choices is not lamentable. The United States Supreme Court correctly decided that such discrimination against innocent children cannot be justified by the State's desire to force adults to conform to certain social standards. *See, e.g., Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 1464-65, 52 L.Ed.2d 31 (1977).

Id. at 881. Around the same time, United States Supreme Court jurisprudence on the constitutional rights of illegitimate children prompted the Louisiana Supreme Court to recognize dual paternity. *Warren v. Richard*, 296 So.2d 813, 816-17 (La. 1974).

As it became clear that the State's interest in promoting and protecting certain family values could not justify discrimination against illegitimate children, the need to protect children from the stigma and legal consequences of illegitimacy was diminished. *Smith v. Cole*, 553 So.2d at 850 & n.4; *Levy v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); *Weber,* 406 U.S. 164. Today, single-parent homes, stepfamilies, and divorce are commonplace, and neither divorce nor illegitimacy carries the stigma that it once did. *See T.D. v. M.M.M.*, 730 So.2d at 878 (Knoll, J., concurring); Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 Tul. L. Rev. 585, 641 (1991).

The Louisiana marital presumption's evolving path illustrates that history and tradition must sometimes give way to truth gained from experience, science, and technology. When the social and legal consequences associated with illegitimacy were dire, and the only actual proof of paternity was long absence, the State's interest in providing protection for innocent children was compelling, whether or not the method of providing protection was wholly effective. Today, when the evolution of the law and society has rendered the protection of the child from negative social and legal consequences unnecessary, and scientific advances make proof of paternity a simple scientific reality, the State's interest in protecting

children no longer justifies the maintenance of legal fiction in the face of biological fact.

The marital presumption and its purposes no longer justify denying the existence of a biological father's constitutional right to parent.

2. Louisiana Law–Right to Avow

Mr. Kinnett, relying upon the plurality's reasoning in *Michael H.,* argues that a biological father has no parental rights unless his petition to avow his child is successful, and the legal relationship between biological father and child is recognized. *See supra* note 30. However, the Louisiana Supreme Court has distinguished between the right that "flows from the [biological] fact of parenthood," and the "possibility of a subsequent forfeiture of parental rights through abandonment or neglect." *See, e.g.*, *Maxwell v. Leblanc*, 434 So.2d 375 (La. 1983) (unwed biological father had a natural right to visitation with his child); *Deville v. LaGrange*, 388 So.2d 696, 697-98 (La. 1980) (unwed biological father had a "paramount" right to custody of his child). Thus, to protect his interest in the parent-child relationship, the biological father may be required to "demonstrate[] his fitness for parental responsibilities, commitment to those responsibilities, concrete actions taken to grasp his opportunity to be a father, and the potential for him to make a valuable contribution to the child's development." *See Matter of R.E.*, 94-2657 (La. 11/9/94), 645 So.2d 205, 207-08 (citing *In re Adoption of B.G.S.,* 556 So.2d 545 (La. 1990)).[39]

---

[39] *But see infra* note 15 (mothers' constitutional rights are entitled to protection without such demonstrations).

However, the Louisiana Supreme Court rejected the concept that only biological fathers with a "fully developed relationship" with their children possess a constitutionally protected interest in parenthood. *B.G.S.*, 556 So.2d at 550-51. *See also State in the Matter of R.E.*, 642 So.2d 889 (concurrence emphasizing that the father had never had the opportunity to meet his child or develop a substantial relationship where the mother surrendered the child days after the birth); *Lehr*, 463 U.S. at 271 (dissent pointing out that the biological father would have developed a substantial relationship with his child if the mother had not hidden the child's whereabouts from him). Relying upon the line of United States Supreme Court cases discussed *supra*, pp. 47-50, the Court found that a biological father has "cognizable constitutional rights to parenthood," *In re A.J.F.*, 764 So.2d at 57, when he has "dedicated himself to his paternity when there is yet time for him to make a valuable contribution to the child's development." *B.G.S.,* 556 So.2d at 550, 553 (*quoting Lehr*, 463 U.S. at 261-62.)[40] Therefore, a "fully committed unwed father of a newborn child has a constitutionally protected interest in his opportunity to develop a mutually beneficial emotional or psychological bond with his child" which is "defeasible if not preserved by dedicated, opportune fatherly action." *Id.* at 550.

The "interest of a biological parent in having an *opportunity* to establish a relationship with his child is one of those liberties of which no person may be

---

[40] The Court examined whether a State through private adoption statutes may allow a mother of an illegitimate child to terminate the parental rights of the unwed father without notice and opportunity to be heard.

deprived without due process of law under our state constitution."[41] *B.G.S.,* 556 So.2d at 550, 553 (La. 1990) (*quoting Lehr*, 463 U.S. at 261). The constitutionally protected interest does not cease to exist when the biological father's child is presumed to be the child of another man. *Finnerty*, 469 So.2d at 292 (The "biological relationship does entitle a natural father to at least some opportunity to develop a personal relationship with his child, and thus to assume a responsible role in the future of his child."). *See Smith v. Jones*, 566 So.2d 408, 413 (La. Ct. App. 1990), *writ denied sub nom. Kemph v. Nolan*, 569 So.2d 981 (La. 1990) (denying the biological father the right to avow paternity also denied him of his opportunity to establish a relationship with his child, which, according to the relevant precedent, he was obliged to take advantage of in order to have his parental rights protected under the constitution).

The relevant question is whether Article 198's procedure for terminating the right of a biological father to avow his child—the peremptory periods—satisfies the requirements of due process.

b. What Process is Due?

Due process requires that a person whose rights may be affected by state action must be notified because he is entitled to be heard. *B.G.S.*, 556 So.2d at 554. Once the court determines that the nature of the

---

[41] Recognizing that the "reciprocal rights and obligations of natural parents and children" are included among the individual rights discussed in Article 1, section 24 of the Louisiana Constitution, which provides that the "enumeration in this constitution of certain rights shall not deny or disparage other rights retained by the individual citizens of the state." *B.G.S.*, 556 So.2d at 551.

interest threatened is constitutionally cognizable, proper evaluation of the state's process involves weighing the importance of the private and public interests at stake. *Id.* Due process requires "some kind of hearing;" just what kind of hearing must be determined by balancing the factors set out in *Mathews v. Eldridge,* 424 U.S. 319, 321; 96 S.Ct. 893, 901-03; 47 L.Ed.2d 18 (1976). *Wilson v. City of New Orleans*, 479 So.2d 891 (La. 1985).

The factors include (1) the "private interest that will be affected by the official action;" (2) the "risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards;" and (3), the "Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S at 334-35.

The private interest affected by the government action in this case is both constitutionally cognizable and significant.[42] Depriving the biological father of the right to avow his child terminates *all* of his parental rights, including the most basic right of parenthood, custody or visitation. *Smith v. Jones*, 566 So.2d at 412 ("If a natural father has no right of action by which he can have the biological parent-child link legally recognized, then there is no link, in the eyes of the law, that could serve as a basis for granting

---

[42] The state action in this case is the establishment of peremptory periods that presume one year from the date of birth of the child is a reasonable amount of time for a man to seize his opportunity to preserve his parental rights in every situation (except one). La. C.C. art. 198.

visitation.") (quoting *Finnerty*, 469 So.2d at 292); *See Michael H.*, 491 U.S. at 148-49 (Brennan, J., dissenting) (a biological father who has been prevented from asserting his paternity cannot benefit from the legal presumption that a *parent* is entitled to visitation rights unless the visitation would be detrimental to the best interests of the child).

However, the biological father is not simultaneously relieved of the responsibilities and obligations of parenthood. *See id.* at 413-14; *T.D. v. M.M.M.*, 730 So.2d at 876. It is the fact of biological paternity or maternity that obliges parents to support and nourish their children. *Smith v. Cole*, 553 So.2d at 854. Therefore, denial of the biological father's right to parent does not prevent the child's mother or the State from establishing paternity for purposes of child support. *See Id.* at 854-55. Conversely, filiation entitles an otherwise deprived child to wrongful death benefits and inheritance. *See Smith v. Jones*, 566 So.2d at 413.

The biological father's constitutional rights to parenthood are not unfettered. The biological father must nurture those rights or risk losing them. Although a biological father has cognizable constitutional rights to parenthood by virtue of his biological relationship to the child, "a biological father *who knows or has reason to know* of the existence of his biological child and who fails to assert his rights for a significant period of time[] cannot later come forward and assert paternity." *See, e.g.*, *Smith v. Jones*, 566 So.2d at 414. When parental rights are at stake, courts have been reluctant to terminate those rights for reasons short of abandonment or unfitness. *See, e.g.*, *Deville*, 388 So.2d at 698; *Santosky*, 455 U.S. at 753. This implies that a man must first know or have reason to know of

the existence of his child before his right to the opportunity to develop a relationship may be eliminated by the mere passage of time and operation of law.

Article 198 risks an erroneous deprivation of the biological father's interest because the statute does not consider whether the biological father has received notice of, not only the upcoming expiration of his parental rights, but first of the child's very existence before his time to develop a relationship lapses. Also, Article 198's bad faith exception may be too narrow to adequately protect the biological father's rights. When constitutionally protected interests are affected by government action, due process requires "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *B.G.S.*, 556 So.2d at 554 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950)). To protect his rights, Article 198 requires Mr. Andrews to rely upon Ms. Kinnett's good will to timely inform him of his possible paternity, in the face of her conflicting interest.

Mr. Kinnett seeks to distinguish *B.G.S.* and other cases involving the biological father's right to notice and a hearing before termination of parental rights and subsequent adoption of the child, arguing such notice is constitutionally required only when the mother seeks to terminate her parental rights. *See generally id.*; *In re A.J.F.*, 764 So.2d 47; La. Ch.C. art. 1132-36 (requiring notice to alleged or adjudicated

father when the mother of a child born outside of marriage surrenders the child for adoption).[43]

However, the adoption cases and the dual paternity cases both base their holdings on the premise that due process requires that the biological father must have the opportunity to assert his right to parenthood. In cases in which the mother voluntarily relinquishes her rights to the child, diligent effort must be made to discover the identity of the biological father if the mother does not reveal it. *See In re A.J.F.*, 764 So.2d at 56. The mother's failure to identify a potential biological father or misattribution of paternity to someone other than the actual father can result in an annulment of the adoption by fraud. *Id.*; *Thompson v. Cavanaugh*, 688 So.2d 1259 (La. App. 3 Cir. 1997).

Article 198, on the other hand, operates to terminate a biological father's parental rights whether or not he even knows such rights exist. As discussed above, the court considers whether the father knew or should have known that his child existed only when

---

[43] The adoption cases are distinguishable to the extent that the adoption process involves state action whereas the filiation process does not. Article 198 permits the state to assume that Mr. Andrews had no parental rights, merely the opportunity to seek them. By finding that the unwed biological father has fewer rights than the mother—the courts have created a situation in which the *state* did not deprive Mr. Andrews of his *opportunity* to develop a meaningful relationship with his son, Ms. Kinnett did.

> The legislature has statutorily determined the reasonable time for a biological father to seize his constitutionally protected opportunity and presumed that a failure to avow within that time period constitutes a *knowing* waiver of parental rights, creating a legal fiction.

there is proof that the mother in bad faith deceived the biological father as to his paternity. Article 198, like the statute found to have deprived the father of due process in *B.G.S.*, allows the child's mother "to decide whether the natural father shall be notified or consulted prior to the termination of his interest." *B.G.S.*, 556 So.2d at 553.

The *B.G.S.* court found that the statute, which depended on the child's mother to provide notice to the biological father that his parental rights were subject to termination, also deprived the biological father of a neutral decision maker, as required for due process. *Id.* at 555. The court there pointed out that the mother could hardly be considered neutral, as she and the father potentially had adverse interests, as in this case. *Id.* at 555.

Article 198's requirement that the mother engage in bad faith deceit to trigger the extended peremptory period and its silence as to the party bearing the burden of proof on that issue may, in the face of the mother's mere silence for over one year from the child's birth, place the biological father in the impossible position of proving bad faith with no evidence whatsoever of the mother's intent. The Louisiana Supreme Court in *B.G.S.* stated, "the lack of a hearing, combined with the placement of decision in the hands of a potentially adverse decision maker, violates the most basic principles of due process under both our state and federal constitutions." *Id.* at 556.

The third *Mathews* factor analyzes the government's interest, including any additional burdens that would be caused by additional or substitute procedural requirements. As discussed in this Court's opinion, the Law Institute had several objectives when drafting the

legislation that eventually incorporated Article 198, including more closely aligning biological and legal paternity. Spaht, *supra*, at 314 *see* Louisiana House of Representatives, Civil Law Committee (4/5/2004), H.B. 842 *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/apr/0405_04_CL# (58:00:00-1:06:20) (discussion of proposed Articles 186, 196, and 197 emphasizing the intention to align filiation and biological paternity).

Acknowledging that the proposed legislation involved the interests of multiple parties, the drafters attempted to fairly balance and protect the interests of all parties affected by the law. *See, e.g.*, Spaht, *supra*, at 311-13.[44] However, with respect to Article 198, the drafters attributed no constitutionally protected interests to the biological father. *See supra* note 30. The constitutional rights of the mother and the presumed father (both the right to marital privacy and parental rights) were weighed along with the child's interests, which include constitutionally protected interests such as the right to care, custody, and support. *See* discussion *supra* pp. 54-55.

---

[44] With respect to proposed Article 186—wherein a child born within 300 days from the termination of a marriage was presumed to be the first husband's child, but upon disavowal, if the mother had remarried, the second husband became the child's presumed father—protection of the interests involved depended on notice. *Id.* at 311-12. To ensure that the second husband was given notice of the effect the first husband's disavowal action might have on him, the law required that the second husband be made a party to the first husband's disavowal action. *Id.* While Article 186 requires notice to other potential fathers, Article 198 does not.

According to Professor Spaht, "the interest of the child demands resolution of its paternity within a reasonable period of time." Spaht, *supra*, at 313. Furthermore, the requirement that the biological father act quickly to institute an avowal action "is intended to protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father." La. C.C. art. 198 cmt. (e). The stated purpose of the peremptory period includes the State's interest in promoting and protecting its preferred definition of family. *See supra*, note 18.

According to research relied upon by the Law Institute when drafting Article 198, "on average a child who is reared in the home of his or her biological parents united in marriage prospers in ways unattained by children reared in other family structures." Spaht, *supra*, at 315. However, in the absence of the ideal situation, a two-parent household is generally preferable (provided the parents are married and regardless of whether a biological connection exists). *See, e.g.*, *Stanley*, 405 U.S. 645. Finally, the State desired, above all, that a child be filiated to someone. *See* Spaht, *supra*, at 315-16 ("The mother may not contest the paternity of her husband if the biological father is unwilling to marry the mother or if the biological father is unknown" because the result would be to "bastardize" her child.).

Therefore, no peremptory period exists as to the biological father's right to avow when the child has never been filiated to anyone. However, when a child is born into a marriage, the law creates barriers to

acknowledging biological truth. While the state's interest in protecting the child is important, Article 198's peremptory period is not so sufficiently related to achieving that interest that it outweighs the risk of erroneous deprivation of the biological father's constitutionally protected interest in an opportunity to develop a relationship with his child.

The fact that a marriage still exists between a child's mother and presumed father does not necessarily mean that an intact family exists, at least not in a way that will nurture the child's interest in a stable and loving home environment. As in *Smith v. Cole*, the presumed father may simply abandon the relationship with the child without going through the disavowal process. 553 So.2d at 848. Then, while the presumption remains, the child is not part of an intact family and has, in fact, lost the parent-child relationship that may have formed over many years.

Furthermore, the "upheaval" contemplated by the legislature depends on there being either an existing intact family involving both the mother and presumed father or a relationship with the presumed father that developed over many years. La. C.C. art. 198 cmt. (e). The upheaval referred to is not just the avowal litigation itself, but the revelation that the man a child has believed to be his biological father is not, and the resulting introduction of a new paternal figure in the child's life. As a practical matter, the upheaval can occur without an avowal action. Nothing prevents the biological father from asserting his paternity outside of court, and nothing limits the time within which he can do so. A phone call may throw the marriage and the family into disarray, causing further upheaval to the child's home in the form of

divorce proceedings or marital strife. *See Michael H.*, 491 U.S. at 155 n.11 (Brennan, J., dissenting).

Article 198, as it was interpreted and applied by the trial court in this case, permits the mother—whose interest conflicts with the biological father's—to deprive the father of parental rights by silently engaging in wishful thinking that her husband is the father of her child in the face of evidence that her paramour is equally likely to be the child's father. The trial court's interpretation and application of Article 198 in this case is more likely to increase the upheaval caused by litigation and its consequences by requiring men to file avowal actions at the earliest suspicion of paternity, in spite of any evidence which tends to refute the suspicion (including the mother's statements to the contrary). *See supra* pp. 41-42 & n. 29. This interpretation may cause unnecessary upheaval of a child's life. However, the fact that Article 198 allows for dual paternity potentially decreases the risk of upheaval if all parties consider the best interests of the child first. Unlike the California law at issue in *Michael H.*,[45] avowal actions pursuant to Articles 197 and 198 do not affect the presumed father's legal status. La. C.C. art. 192 cmt.

In this case, none of the state's interests were served by denying Mr. Andrews the right to avow his biological child. When Mr. Andrews filed his petition to establish paternity, there was little to no risk of upheaval to the child because there was no intact family[46] and, as G.J.K. was under age two, no rela-

---

[45] *See Michael H.*, 491 U.S. at 130.

[46] The Louisiana Supreme Court has stated, "once the bonds of matrimony are dissolved by divorce, the State's interest in

tionship of *many years* existed between G.J.K. and his presumed father. At the time the avowal action was filed, Mr. Andrews had been introduced to his son and had begun spending time developing a relationship. At age eighteen months, the child was young enough to introduce another parental figure into his life without detrimental upset or confusion. Growing up with two fathers could be less disruptive to the child's life than the divorce of his parents and the subsequent remarriage or cohabitation of one or both of those parents with step-parents. *See Michael H.*, 491 U.S. at 162 (White, J., dissenting) ("It is hardly rare in this world of divorce and remarriage for a child to live with the 'father' to whom her mother is married, and still have a relationship with her biological father.").

The trial court in this case also referred to the state's interest in "protecting the status of a child vis-á-vis his mother and father, his family, his classmates, and the world."[47] However, neither denying nor granting Mr. Andrews' avowal petition alters the child's status. If the court had declared Mr. Andrews to be G.J.K.'s biological father, G.J.K. would legally remain the legitimate child of the Kinnett marriage. Conversely, denying Mr. Andrews' avowal of G.J.K. does not change the fact that G.J.K. is Mr. Andrews' illegitimate child born to a married woman. *See* discussion *supra* pp. 55-57. Nor does the state's steadfast refusal to acknowledge biological fact prevent the

---

preserving the marital family disappears." *See Gallo v. Gallo*, 03-0794 (La. 12/3/03), 861 So.2d 168, 174 (citing *T.D. v. M.M.M.,* 730 So.2d at 878 (concurring opinion)).

[47] The legislative history of Article 198 and its stated purpose of protecting the "intact family" reveal the same underlying concern with legitimacy.

child from learning of his biological paternity in the future, although he may suffer more if deceived for years.

Article 198's peremptory periods reflect a pre-determination that the best interest of the child requires terminating the biological father's parental rights without a hearing on parental fitness. *See Maxwell*, 434 So.2d at 379-80 (conclusive evidence that "parent has forfeited his right" by his conduct or that "exercise of the right would injuriously affect the child's welfare" was required to terminate unwed biological father's right to visitation); *Stanley*, 405 U.S. 657-58 (state's interest in caring for children is *de minimus* if the father is a fit parent).

In *B.G.S.*, the Louisiana Supreme Court found that the opportunity to present evidence at a hearing to determine the best interest of the child did not satisfy the requirements of due process because the interest of the biological father and the deprivation of his rights was not at issue in a best interest hearing. 556 So.2d at 555. Article 198 does not afford the biological father even the minimal process that a hearing on the best interest of the child would provide.

In the present case, Mr. Andrews has a private interest in bringing an avowal action that is affected by Article 198's peremption clause. As the current statute can be interpreted to deprive him of his interest after one year, without requiring that he receive notice of a child's birth, there is a risk of an erroneous deprivation. Due process protection of a man's inchoate right to a relationship with his child requires, at a minimum, that he be aware of his paternity, and that he be afforded some meaningful opportunity to exercise his right to develop that rela-

tionship. Article 198 grants sole discretion to the child's mother to determine whether the father has the opportunity to develop the relationship or even receive notice of his child's existence.

Finally, in my opinion, the State has not shown that it would be substantially more burdensome on the system to allow a father a hearing on the child's best interest, or at least notice of paternity, before foreclosing his right through peremption. Even if the definition of "bad faith deceives" is as we have determined in our majority opinion, the time and resources expended in litigating the mother's knowledge and motives would have been better spent determining whether the father acted reasonably, and in a timely fashion, in coming forward to accept responsibility for his child's care and seek a relationship with his child. Before the legislature implemented the peremptory periods, Louisiana courts afforded a biological father a hearing to determine whether he acted in a timely manner considering all relevant factors including the best interest of the child. *Putnam v. Mayeaux*, 645 So.2d 1223 (La. App. 1 Cir. 1994) (no prescriptive period; one year and three days was reasonable); *Geen v. Geen*, 666 So.2d 1192 (La. App. 3 Cir. 1995) (fifteen to nineteen months was reasonable); *Demery v. Housing Auth. Of New Orleans*, 689 So.2d 659 (La. App. 4 Cir. 1997), *T.D. v. M.M.M.*, 730 So.2d 873 (six years was not too long).

As to the claim that G.J.K.'s due process rights were violated, if the biological father has a constitutional interest in his opportunity to develop an emotional and psychological connection with his child, then the child has a concomitant interest in the opportunity to know and develop a relationship with his

biological father. However, at least facially, the child's rights to both the personal relationship and the legal benefits that accompany filiation to one's father are not affected by Article 198.

Civil Code Article 197 allows the child's action to establish filiation to his biological father, despite being filiated to his presumed father, ensuring that the child would receive all of the legal benefits filiation provides (*i.e.*, support, inheritance, wrongful death benefits). There is no time limitation on the child's ability to file the action unless the biological father has died. La. C.C. art. 197. *But see* Louisiana House of Representatives, Civil Law Committee (4/5/2004), H.B. 368 *available at* https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2004/apr/0405_04_CL# (1:18:39-1:19:35-1:20:00). However, Louisiana Code of Civil Procedure art. 683 requires that the presumed father must agree to file the avowal action on behalf of the child until the child reaches the age of majority. As discussed above, the presumed father's interest may well be contrary to avowal of the biological father and inimical to the child's own interest, causing deprivation to the child of his due process rights. Therefore, as discussed above, Civil Code art. 198 risks violating the due process rights of both the biological father and the child.

As is becoming apparent, the most important right parents possess is the right to due process protection of their fundamental right to parent. Parents are entitled to a hearing on the issue of fitness before their parental rights may be terminated. *See, e.g.*, *Stanley*, 405 U.S. at 658. Article 198 risks a biological father's right to an opportunity to prove his willingness and fitness to parent in circumstances in which he may be

unaware of his paternity or, for a legitimate reason, late in filing his action. The statute presumes that the biological father deserves to have his parental rights terminated one year after the birth of the child unless he can affirmatively prove that the child's mother deceived him in bad faith as to his paternity.

When rights as important as these are at stake, a statutory scheme that deprives a biological father of all parental rights without a hearing as to his commitment to parental responsibilities or his fitness minimally places the biological father's right to due process at extreme risk. As the United States Supreme Court found in *Stanley*,

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

405 U.S. at 656-57.

Again, I remain deeply concerned with Louisiana Civil Code Article 198's constitutionality.

PER CURIAM OPINION, FIFTH CIRCUIT COURT OF APPEALS STATE OF LOUISIANA (MARCH 23, 2018)

FIFTH CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 17-CA-625

On Appeal from the Twenty-fourth Judicial District Court Parish of Jefferson, State of Louisiana No. 768-195, Division "E" Honorable John J. Molaison, Jr., Judge Presiding

Before: Fredericka ROMBERG WICKER, Jude G. GRAVOIS, and Robert A. CHAISSON, Judges.

APPEAL STAYED AND SOLE ISSUE REMANDED: FHW, SMC, JGG

WICKER, J.

Appellant-Intervenor, the biological father of G.J.K,[1] seeks review of the trial court's judgment sus-

[1] Pursuant to Uniform Rules-Courts of Appeal Rule 5-2, we will use the initials of all parties to protect the minor's identity and to ensure the confidentiality of the minor who is a party to and

taining the exception of peremption filed by Appellee-Defendant, G.J.K.'s legal father, resulting in a dismissal of Appellee-Intervenor's petition to establish paternity. For the following reasons, given the unique facts of this case and in the interest of justice and judicial economy, we stay the pending appeal of the trial court's judgment sustaining the exception of peremption and remand this matter to the trial court so as to afford the parties the opportunity to properly challenge the constitutionality of La. C.C. art. 198, which sets forth the period of time within which a biological father must institute an action to establish his paternity.

FACTUAL AND PROCEDURAL BACKGROUND

This is an avowal action by an unmarried man, K.A., to establish paternity of a child, G.J.K. At the time of G.J.K.'s birth, his biological mother was married to J.B.K. On January 20, 2017, the child's mother filed a petition for divorce from J.B.K. In the petition for divorce, the mother sought joint custody of the couple's first child, B.A.K., and sole custody of her second child, G.J.K.[2]

On February 10, 2017, K.A. filed his "Petition In Intervention to Establish Paternity and to Obtain Custody Rights," asserting that he and the child's mother had an intimate relationship in November of

---

whose interests are the subject matter of the proceedings on appeal.

[2] In her petition for divorce, the mother further sought child support from J.B.K. for their first child, B.A.K., but did not seek any financial support for her second child, G.J.K., who is the subject of this litigation.

2014, during the mother's marriage to J.B.K., and that the child's mother concealed from K.A. that he was in fact G.J.K.'s biological father. K.A. attached to his petition a DNA test report confirming that he is G.J.K's biological father to a scientific certainty of 99.999999998%.

On February 21, 2017, J.B.K. filed "Exceptions of No Cause and/or No Right of Action, Prescription, Peremption to the Verified Petition In Intervention to Establish Paternity and to Obtain Custody[]," contending that K.A.'s petition, filed more than one year from the time of G.J.K.'s birth, was prescribed or perempted as a matter of law under La. C.C. art. 198.[3]

On March 23, 2017, the trial court issued a judgment appointing the Stuart H. Smith Law Clinic and Center for Social Justice through Loyola University School of Law to represent G.J.K. On April 12, 2017, approximately three weeks later, J.B.K.'s various exceptions were heard before the Domestic Commissioner. The Commissioner issued a judgment on April 13, 2017, overruling J.B.K.'s exception of no right of

---

[3] La. C.C. art. 198, in pertinent part, provides:

> A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.
>
> If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.

action, overruling in part his exception of no cause of action as to the paternity action and sustaining in part his exception of no cause of action as to the custody claims. The Commissioner further sustained the exception of peremption, finding that K.A.'s right to establish paternity was perempted under the time limitations provided in La. C.C. art. 198.

K.A. filed an Objection to the Commissioner's ruling, contending in part that the "time limitations in Civil Code article 198 are constitutionally invalid."

At the trial on J.B.K.'s exceptions to K.A.'s petition, K.A.'s counsel asked the trial court to rule on the constitutionality of the statute, contending that the time limitations provided in La. C.C. art. 198 unconstitutionally infringe upon a biological father's right to parent. J.B.K.'s counsel objected to the consideration of K.A.'s constitutional argument because K.A. had failed to timely notify the attorney general of a challenge to the constitutionality of La. C.C. 198 as required under La. C.C.P. art. 1880. Thereafter, K.A.'s counsel orally moved for additional time to permit notification to the attorney general and further plead the constitutionality issue. The trial judge refused this oral request.

Following the trial on J.B.K.'s exceptions, at which the trial judge did not consider the constitutional arguments raised due to the aforementioned failure to properly notice an indispensable party, the trial judge issued a written judgment sustaining J.B.K.'s exception of peremption and finding that K.A.'s petition to

establish paternity was perempted under La. C.C. art. 198.[4]

Discussion

Our review of the record and the briefs filed by the parties in this matter reveals that this litigation, which involves Louisiana's unique dual paternity principle, implicates both the constitutional issue of the right of a father to parent as well as the concomitant constitutional rights of a child. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2060, 147 L.Ed.2d 49, 56 (2000).

In *Reeder v. North*,[5] 97-0239 (La. 10/21/97), 701 So.2d 1291, 1299-1300, relying on *Vallo v. Gayle Oil*

---

[4] The trial court's June 27, 2017 judgment further overruled the exception of no right of action and the exception of no cause of action as to the paternity claim but sustained the exception of no cause of action as to the custody claim. After the lodging of the appeal, this Court ordered that the trial judge amend the written judgment to include the required decretal language that K.A.'s claims were dismissed.

[5] In *Reeder*, like here, the plaintiff first raised the unconstitutionality of the statute in an opposition memorandum to defendant's exception of prescription/peremption in the trial court. Like here, after a hearing, the trial court nonetheless held that Reeder's action was perempted. When Reeder appealed the ruling to this Court, he also filed a motion to stay the appeal and remand the matter to the trial court so that he could amend and supplement his petition to specifically plead the unconstitutionality of the statute. On appeal, this Court reversed the trial court's ruling, held that Reeder's action was not perempted, and remanded the matter for trial. In the quoted opinion, the Supreme Court reversed this Court, reinstated the trial court's judgment sustaining the exception of peremption, but remanded to the trial court to allow the plaintiff time to amend and supplement his petition.

Co., Inc., 94-1238 (La. 11/30/94), 646 So.2d 859, 864-865, the Louisiana Supreme Court reiterated the long-standing jurisprudential rule of law:

> [A] statute must first be questioned in the trial court, not the appellate courts, and the unconstitutionality of a statute must be specially pleaded and the grounds for the claim particularized.
>
> * * *
>
> However, the law takes a liberal approach toward allowing amended pleadings in order to promote the interests of justice. *Whitnell v. Menville*, 540 So. 2d 304, 309 (La. 1989). La. C.C.P. art. 934 provides as follows: When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court. If the grounds of the objection cannot be so removed, or if plaintiff fails to comply with the order to amend, the action shall be dismissed.

Given the lifetime impact this litigation will have upon the parties involved, particularly the minor child, G.J.K, we find, in the interest of justice and judicial economy, that K.A. should be allowed the opportunity to amend his petition and appropriately challenge

the constitutionality of La. C.C. art. 198 in the trial court.[6]

Decree

For the foregoing reasons, in accordance with La. C.C.P. art. 934 and the jurisprudence, in the interest of justice and judicial economy, we stay the pending appeal and pretermit review of the trial court's judgment sustaining the exception of peremption and remand this matter to the trial court solely to afford the parties the opportunity to properly challenge the constitutionality of La. C.C. art. 198 and to give notice to the attorney general pursuant to La. C.C.P. art. 1880. Accordingly, the matter is remanded to the trial court solely for proceedings consistent with the reasons articulated in this opinion.

APPEAL STAYED AND SOLE ISSUE REMANDED

[6] It is not our intent to afford the parties the opportunity to relitigate the facts of the case presented at the trial court hearing on the exception.

JUDGMENT ON CONSTITUTIONALITY OF LA. CIV. CODE ART 198 (JANUARY 10, 2019)

24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA DIVISION "E"

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 768-195

Before: Hon. William C. CREDO, III,
Pro Tem., 24th Judicial District Court.

JUDGMENT

This matter came before the Court on November 5, 2018, and December 18, 2018, pursuant to the remand from the Louisiana Fifth Circuit Court of Appeal and Keith Edward Andrews' First Supplemental and Amending Petition, on the sole issue of the constitutionality of La. Civ. Code art. 198.

PRESENT:

Thomas Ainsworth Robichaux, Sharon L. Andrews, Desiree Valenti and Stephanie Fratello, Counsel for Intervenor, Keith Edward Andrews

Leonard L. Levenson and Allison K. Nestor, Counsel for Defendant-in-Intervention, Karen Cohen Kinnett

Jacqueline F. Maloney and Tracy Glorioso Sheppard, Counsel for Defendant-in-Intervention, Jarred Brandon Kinnett

Ramona Fernandez, Rachel Breaux and Carly Distephano, Loyola Law Clinic, Counsel for the Minor Child, G.J.K.

Jeffrey M. Wale, Assistant Attorney General, Louisiana Department of Justice, State of Louisiana

After considering the law, pleadings, memoranda, and arguments of counsel, and for the following reasons:

IT IS ORDERED, ADJUDGED AND DECREED that La. Civ. Code art. 198 is constitutional. Keith Edward Andrews has failed to submit evidence that Article 198 violates either substantive or procedural rights to due process or that it fails to protect a fundamental liberty interest, as alleged in his First Supplemental and Amending Petition.

More specifically, at trial on this matter, counsel for Plaintiff and all Respondents made an opening and a closing statement. Outside of the hearing, counsel for Plaintiff proffered the testimony of two witnesses, the first being the plaintiff himself, the second being a board certified Forensic Child Psychiatrist. Both witnesses were subject to cross examination on the proffer. However, no live testimony was considered by the Court at trial because the Court determined that it should be excluded at a previous hearing. Thus, only

the arguments of counsel, which are not evidence, remain in support of the constitutionality claim.

La. Civ. Code art. 198 began as House Bill 91 of the 2005 Louisiana Legislature. A pre-filed bill sponsored by the Louisiana State Law Institute and filed by its sole author, then Representative Glenn Ansardi, now Chief Judge of the 24th Judicial District Court, the bill churned through the legislative process in the House and Senate. It survived various amendments in both the House and Senate committees, the Legislative Bureau, as well as on the floor of the Senate. It was signed into law on June 29, 2005, and became effective that same day.

The law has been in use for well over ten years and is very clear. Generally, a man may institute an action to establish his paternity of a child at any time. However, La. Civ. Code art. 198 establishes two time limitations to that cause of action: (1) if the child is presumed to be the child of another man; and (2) if the child dies. *Leger v. Leger,* 17-270 (La. App. 3 Cir. 12/06/17). If the child is presumed to be the child of another man, as is the case here, the purported biological father must file his action to establish paternity within one year from the day of the birth of the child.

Peremption statutes, regardless of the outcome in any specific case, are well within the purview of the Louisiana Legislature. Article 198's peremptive period is presumed constitutional. No evidence was presented to the Court that would suggest that La. Civ. Code art. 198 does not pass constitutional muster. Therefore, the Court finds that Keith Edward Andrews has failed to prove that Article 198 is unconstitutional.

RENDERED AND SIGNED at Gretna, Louisiana, this 10th day of January, 2019.

/s/ Hon. William C. Credo, III
Pro Tem
24th Judicial District Court

JUDGMENT ON MOTIONS IN LIMINE, 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON STATE OF LOUISIANA (OCTOBER 23, 2018)

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA DIVISION "E"

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 768-195

Before: Hon. William C. CREDO, III,
Pro Tem., 24th Judicial District Court.

JUDGMENT

This matter came for hearing on October 16, 2018, pursuant to Motions in Limine to Exclude Opinion Testimony of Dr. Loretta Ann Sonnier, filed by Jared Brandon Kinnett and Karen Cohen Kinnett, and a Motion in Limine to Exclude Testimony and Evidence of Any Fact Witnesses, filed by Karen Cohen Kinnett.

Present:

Thomas Ainsworth Robichaux
Sharon L. Andrews
Desiree Valenti

Counsel for Intervenor
Keith Andrews

Jacqueline F. Maloney
Tracy Glorioso Sheppard
Counsel for Defendant-in-Intervention
Jarred Brandon Kinnett

Ramona Fernandez
Loyola Law Clinic
Counsel for the Minor Child
G.J.K

Leonard L. Levenson
Allison K. Nestor
Counsel for Defendant-in-Intervention
Karen Cohen Kinnett

Not present:

Jeffrey M. Wale
Assistant Attorney General
Louisiana Dept. of Justice
State of Louisiana

After considering the law, pleadings, agreements and argument of counsel, for the reasons orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that the Motions in Limine to Exclude Opinion Testimony of Dr. Loretta Ann Sonnier, filed by Jared Brandon Kinnett and Karen Cohen Kinnett, are GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion in Limine to Exclude Testimony and Evidence of Any Fact Witnesses, filed by Karen Cohen Kinnett, is GRANTED.

It is first noted that notification of the Attorney General, which is required, has been accomplished as per La. R.S. 13:4448.

Turning to the merits of the motions, Movers contend that Dr. Loretta Sonnier, a board certified Forensic Child Psychiatrist, did not interview the child in this matter and bases any expert opinion on the review of other recognized work in the field.

Dr. Sonnier, in her deposition, clearly states that her role is to explain the scientific and developmental basis of La. Civ. Code art. 198 and whether it is congruent with the developmental science of child development. Mover contends that any specialized knowledge in this area will not assist the Court, who must decide on issues such as due process and equal protection of the law.

In opposition to the motions, Intervenor, Keith Andrews, maintains that this is an ordinary proceeding and that the trial court must have facts to analyze any constitutionality claim. Intervenor goes on to claim that if the law does not protect children, then it is per se unconstitutional, and the expert testimony of Dr. Sonnier will aid the court in assessing whether the law works to protect children.

"Generally, the state constitutional guarantee of equal protection mandates that state laws affect alike all persons and interests similarly situated." *Beauclaire v. Greenhouse,* 922 So. 2d 501, 505 (La. 2006). However, "[t]he equal protection clause does not require absolute equality or precisely equal advantages." *Beauclaire,* 922 So. 2d at 505 (citing *McCormick v. Hunt,* 328 So. 2d 140, 142 (La. 1976)). "It is possible for parties to be treated differently without violation of

equal protection rights. Equal treatment of all claimants in all circumstances is not required. The law merely requires equal application in similar circumstances." *Id.*

"Where the challenged classification is based on grounds other than discrimination because of birth, race, age, sex, social origin, physical condition, or political or religious ideas, the law creating the classification is presumed to be constitutional. Thus, the party challenging the constitutionality of the law has the burden of proving it unconstitutional by showing the statute fails to serve a legitimate government purpose." *Id.* at 505-506; *Dale v. Louisiana Secretary of State,* 971 So. 2d 1136, 1143 (La. App. 1 Cir. 2007).

The amended petition of Intervenor alleges the unconstitutionality of La. Civ. Code article 198 in that it is a violation of his substantive and procedural rights to due process and in that it fails to protect the fundamental liberty interests of both the father and the child. He asserts that it is subject to strict scrutiny, and thus the State must have a compelling interest.

Accordingly, the Court finds that the issue is not whether the statute works or is drawn with child development science in mind, but rather, whether the statute serves a legitimate government purpose of protecting the status of a child vis-à-vis his mother and father, his family, his classmates, and the world. No testimony from either the Intervenor or Dr. Sonnier approaches the issue of constitutionality as defined by law.

An ordinary proceeding is to be had on November 5, 2018. The Court recognizes the possibility of witnesses who might be constitutional scholars, legislators,

or those who possess highly specialized knowledge of the legislative history of the law in question. However, the opinions of Dr. Sonnier and testimony of Intervenor do not accomplish this purpose, and therefore the instant motions to exclude the testimony of Intervenor and Dr. Sonnier are granted.

RENDERED AND SIGNED at Gretna, Louisiana, this 23rd day of October, 2018.

/s/ Hon. William C. Credo, III
Pro Tem
24th Judicial District Court

JUDGMENT ON VARIOUS MOTIONS AND SCHEDULING ORDER, 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON STATE OF LOUISIANA (JULY 18, 2018)

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA DIVISION "E"

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 768-195

Before: Hon. John J. MOLAISON, JR., District Judge.

JUDGMENT ON VARIOUS MOTIONS AND SCHEDULING ORDER

This matter came on for hearing on June 13, 2018, pursuant to various Motions filed on behalf of the defendants-in-intervention, Jarred Brandon Kinnett and Karen Cohen Kinnett, and for hearing upon intervenor's allegations of the unconstitutionality of La. Civil Code art. 198 as alleged in intervenor's First Supplemental & Amending Petition.

Present:

Thomas Ainsworth Robichaux

Stephanie A. Fratello
Sharon L. Andrews
Desiree Valenti
Counsel for Intervenor
Keith Andrews

Jacqueline F. Maloney
Tracy Glorioso Sheppard
Counsel for Defendant-in-Intervention
Jarred Brandon Kinnett

Ramona Fernandez
Loyola Law Clinic
Counsel for the Minor Child
G.J.K

Leonard L. Levenson
Allison K. Nestor
Counsel for Defendant-in-Intervention
Karen Cohen Kinnett

Not present:

Jeffrey M. Wale
Assistant Attorney General
Louisiana Dept. of Justice
State of Louisiana

After considering the law, pleadings, agreements and argument of counsel, for the reasons orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that the trial upon Intervenor's First Supplemental & Amending Petition challenging the constitutionality of La. Civil Code art. 198 be and the same is hereby continued without date, but to be reset for trial upon the merits as set forth herein below;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Strike Intervenor's Expert Witness and/or Intervenor's Expert Report be and the same is hereby continued without date, but to be reset for hearing if requested;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Strike Witnesses and the Factual Allegations of the First Amended Petition be and the same is hereby denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Strike Discovery be and the same is hereby denied;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the following scheduling order be and is hereby entered in these proceedings:

(1) Counsel for defendant-in-intervention, Karen Cohen Kinnett, shall serve written discovery upon counsel for intervenor, Keith Andrews, on or before Monday, June 18, 2018;

(2) All discovery must be answered within fifteen (15) days of service of the discovery. Outstanding discovery must be answered within fifteen (15) days from the hearing on this matter;

(3) Intervenor shall produce his expert, Loretta Sonnier, MD, for her deposition upon oral examination at 10:00 a.m., August 10, 2018, at the law offices of Sharon Andrews, located at 650 Poydras St., Ste. 2319, New Orleans, LA 70130;

(4) Defendants-in-intervention, Jarred Brandon Kinnett and Karen Cohen Kinnett, shall be

entitled to the cost to expedite the preparation of the transcript of the deposition testimony of Dr. Sonnier, at the expense of intervenor, Keith Andrews;

(5) Counsel for defendants-in-intervention, Jarred Brandon Kinnett and Karen Cohen Kinnett, if they so choose, shall designate their expert(s) no later than fourteen (14) days after receipt of the transcript of the deposition testimony of Dr. Sonnier;

(6) With the exception of expert designations and depositions as set forth herein, all fact discovery shall be completed no later than July 30, 2018.

(7) With the exception of representative of the Attorney General, all counsel shall appear, in person, at a status conference at 1:30 p.m., August 22, 2018. The Attorney General designee may appear by telephone for the status conference;

(8) At the status conference the Court shall set the trial for hearing upon the merits as well as any outstanding or pending motions or preliminary matters.

JUDGMENT and ORDER READ at Gretna, Louisiana this 13th day of June, 2018, and **RENDERED AND SIGNED** at Gretna, Louisiana, this 18 day of July 2018

/s/ John J. Molaison, Jr.
District Judge

AMENDED JUDGMENT GRANTING EXCEPTIONS, 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON STATE OF LOUISIANA (NOVEMBER 28, 2017)

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA DIVISION "E"

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 768-195

Before: Hon. John J. MOLAISON, JR.,
24th Judicial District Court Judge.

AMENDED JUDGMENT

This matter came before this Honorable Court on Friday, June 2, 2017, on an objection to the ruling rendered by Commissioner Ruben Bailey on Jared Brandon Kinnett's Exceptions of No Cause and/or No Right of Action, Prescription, and Peremption to Keith Edward Andrews' Verified Petition in Intervention to Establish Paternity and to Obtain Custody.

Present:

Allison Nestor and Leonard Levinson, attorneys for/and Karen Cohen Kinnett (petitioner);

Jacqueline F. Maloney and Tracy Glorioso Sheppard, attorneys for/and Jarred Brandon Kinnett (defendant);

Stephanie Fratello and Sharon Andrews, attorneys for/and Keith Edward Andrews (intervenor); and

Ramona Fernandez and the Loyola Law Clinic, appointed attorneys for the minor child

THE COURT, considering the pleadings filed herein, the applicable law, the evidence provided, the testimony of the parties, and the arguments of counsel, did make the following a Judgment of the Court:

IT IS ORDERED, ADJUDGED AND DECREED that the Exceptions of No Right of Action and No Cause of Action relative to paternity are DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Exceptions of No Cause of Action and No Right of Action relative to custody and visitation are GRANTED, dismissing Keith Edward Andrews' claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Exception of Prescription or Peremption is GRANTED, dismissing Keith Edward Andrews' claims as perempted.

JUDGMENT RENDERED AND SIGNED this 28th day of November, 2017, in Gretna, Louisiana.

/s/ John J. Molaison, Jr.
24th Judicial District Court Judge

STIPULATIONS AND/OR RECOMMENDATIONS OF HEARING OFFICER, 24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON STATE OF LOUISIANA (APRIL 17, 2017)

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON STATE OF LOUISIANA
DIVISION "E"

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

Docket No. 768-195

STIPULATION AND/OR RECOMMENDATIONS OF HEARING OFFICER

Present:

Plaintiff: Karen Kinnett

Attorney: Allison Nestor

Defendant: Jarred Kinnett

Attorney: Jacqueline F. Maloney, Tracy Glorioso

Loyola Law Clinic: Ramona Fernandez Atty Minor, Grant.

Based on conferences with the parties and counsel, and/or the stipulations of parties, the Hearing Officer makes the following findings and recommendations:

1. MARRIAGE:

The parties were married on Jan 24, 2009 in Orleans Parish

The parties were separated on Jan 13, 2017

The parties were divorced on Pending

2. CHILDREN:

The minor child(ren) at issue are:

Name: Beatrice Age 5 Date of Birth Aug 29, 2011

Name: Grant Age 1 Date of Birth Aug 5, 2014

[. . .]

4. ISSUES IN DISPUTe

☑ Custody (E) ☑ Child Support (E)

☑ Visitation (E)

☑ Injunction

☑ Community Property

☑ Paternity

[. . .]

6. Custody:

R S **Legal Custody:**

The parties should be awarded joint custody of the minor child(ren).

R S **Physical Custody:**

The parties should be awarded shared physical custody of the minor child(ren) as follows:

2-2-3 … Alternate Mon + Tues with dad begin April 17 + 18 … Alternate Wed + Thurs with mom begin April 19 + 20 … Alternate Fri, Sat, + Sun with dad begin April 21 + 22, and 23, 2017.

[S] Mother/Father should be designated domiciliary parent of the minor child(ren).

Beatrice and Grant

[. . .]

8. Vacations/Summer Schedule:

[R] [S] Both parties shall have vacation options with the child(ren) each year. They shall notify each other in writing of their vacation plans on or before Sixty (60) days prior to departure. Each party shall provide the other with a basic itinerary to include travel dates, destinations and telephone numbers fat emergency purposes.

[R] [S] Father shall have two (2) week(s) each year/summer. Non-consecutive

[R] [S] Mother shall have (two 2) week(s) each year/summer. Non-consecutive

9. Holidays:

	Odd, Even, Every	Mother	Father
[R] [S]	New Year Eve included in regular schedule		
[R] [S]	New Year Day included in regular schedule		
[R] [S]	Madi Gras	Even	Odd
[R] [S]	Thanksgiving Day	Odd	Even

R S Christmas Eve

Odd: 10 pm on 24th to 6 P M on 25th

Odd: Noon on 24th to 10 PM on 24th and 6 PM on 25th to return on 26th

Even: 10 pm on 25th to return on 26th

Even: 10 pm on 24th to 6 P M on 25th

R S Christmas Day

10. Special days:

R S On Father's Day and Father's birthday, the child(ren) will be with the father.

R S On Mother's Day and Mother's birthday, the child(ren) will be with the mother.

R S The child(ren)'s birthdays will be Kept with Parents.

11. Telephone contacts:

R S

☑ Reasonable ☑ Father ☑ Mother

R S Days and Times: Minors can contact either parent, arty day at any reasonable time.

12. Co-Parenting-Guidelines

R S The parents shall follow the co-parenting guidelines:

To share information with each other about the children in a timely manner so as to coordinate and facilitate their parenting together. This information may include, but is not limited to medical, educational, social, psychological, and religious aspects of the children's lives.

All material, child sharing, court related and financial communications between the parents shall occur at a time when the child(ren) is/are not present or within hearing range. Communication regarding these issues shall not occur at times of exchanges of the child(ren) or during telephone visits with the child(ren).

Neither parent shall say or do anything in the presence or hearing of the child(ren) that would in any way diminish the child(ren)'s love or affection for the other parent, and shall not allow others to do so.

Should either parent require child care for twenty-four hours or longer when the child is in his/her care, the other parent shall have first option to provide such care.

Each parent shall always keep the other informed of his/her actual address of residence, mailing if different, home and work telephone numbers and any changes within twenty-fours hours of such change occurring.

Each parent shall inform the other as soon as possible of all school, sporting and other special activity notices and cooperate in the child(ren)'s consistent attendance at such events. Neither parent shall schedule activities during the other parent's scheduled parenting time without notice to the other parent.

Neither parent shall move the residence of the child(ren) out of state or within the state at a distance of more than 75 miles from the other parent without giving the other party written notice as required by La R.S. 9:355.1 et seq

All prior orders not in conflict with this parenting plan shall remain in full force and effect.

[. . .]

14. Child Support

[. . .]

16. Family Residence-Rental Reimbursement-Mortgage Payments Community Termination:

R S

The parties shall be. declared separate in property in accordance with the La C.C. Art 2374 effective Jan 14, 2017

[. . .]

19. Injunction

R S

The temporary restraining orders should be made (mutual) preliminary injunctions against the parties their agents and assigns:

R S

From alienating, encumbering, concealing, or disposing of the community property previously existing between the parties.

∗ Pages -0- are omitted because they are BLANK.

/s/ Jane S. Fiasconaro
Hearing Officer

Apr 17 2017
Date

The parties agree to the recommendations marked as a stipulation(s) and acknowledge receipt of a copy of these stipulation and/or recommendations:

/s/ Karen Kinnett Party	/s/ Allison Nestor Counsel
/s/ Jarred Kinnett Party	/s/ Jacqueline F. Maloney Counsel
Minor Child, G.K. Party	/s/ Ramona Fernandez Counsel

JUDGMENT

Let the foregoing stipulations be made the Consent Judgment of the with Civil Code Article 3071.

A separate final Consent Judgment must be prepared, signed and presented by the parties or Counsel of record.

SIGNED at Gretna, Louisiana, this 17 day of April, 2017.

/s/ Ruben J. Bailey
Domestic Commissioner

**JUDGMENT ON EXCEPTIONS,
24TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA
(APRIL 13, 2017)**

24TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF JEFFERSON
STATE OF LOUISIANA DIVISION "E"

KAREN COHEN KINNETT

v.

JARRED BRANDON KINNETT

No. 768-195

Before: Ruben J. BAILEY, Domestic Commissioner.

JUDGMENT

This matter came before the court on April 12, 2017 on Jarred Brandon Kinnett's exception of no cause of action, no right of action, prescription and peremption:

Present:

Allison Nestor, attorney for/and Karen Kinnett

Stephanie A. Fratello, attorney for/and Keith Andrews

Jacqueline Maloney and Tracey Sheppard, attorneys for/and Jarred Kinnett

Ramona Fernadez, supervising attorney Loyola Law Clinic and Patrick Murphree, student practitioner on behalf of the minor child

Considering the law, the pleadings, the evidence and the argument of counsel:

IT IS ORDERED, ADJUDGED AND DECREED that the exception of no right of action is overruled. There doesn't appear to be any dispute that Keith Andrews is the biological father of the minor child G.J.K. born 8/5/2015. That being the case he would certainly have a right to seek to establish his paternity and legal custodial rights, in an initial action to establish custody. The petition for divorce filed on January 14, 2017 by Karen Cohen Kinnett and the reconventional demand filed by Jarred Brandon Kinnett seeks to establish an initial custody decree.

IT IS FURTHER ORDERED, ADJDUGED, AND DECREED that exception of no cause of action is overruled in so far as it relates to the action for paternity but is sustained with regard to the action for custody. Intervenor's allegation relative to establishment of a custody decree states only that he seeks an order establishing custody of G.J.K. and that he and the mother should have joint custody with the mother designated the domiciliary parent. There is no allegation that this is in the best interest of the minor child or any fact allegation that demonstrates it is in the child's best interest.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the exception of preemption is granted. Louisiana Civil Code Article 198 provides:

> "A man may institute an action to establish his paternity of a child at any time except as

> provided in this Article. The action is strictly personal.
>
> If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.
>
> In all cases, the action shall be instituted no later than one year from the day of the death of the child.
>
> The time periods in this Article are peremptive.

At trial of the exception, Mr. Andrews testified that he was told of the birth of G.J.K. in the fall of 2015, in October or November, some two to three months after the child's birth. He testified that Karen Kinnett told him that the child was her husband's and they were working on their marriage. Karen testified she did not recall telling him the child was her husband's, only that the child had been born and that she was working their marriage. That she didn't say who the father was. It is not clear what form this communication took, whether it was a verbal communication via telephone or a text communication. Karen says it was a text and Keith says it was a phone call.

The child is presumed to be the child of Jarred Kinnett, Karen's husband. G.J.K. was born nine months after the last "intimate" (sexual) encounter between

Karen and Keith. Keith suspected the child might be his yet he did nothing to prove his paternity until February 10, 2017 approximately fifteen (15) months from the fall of 2015. Cleary he missed the one year deadline of August 5, 2016. So the question then becomes is second deadline applicable. Thus, if the mother in bad faith deceived Mr. Andrews, he would have had until one year after he knew or should have known of his paternity. He knew the child was born August 5, 2015 in October or November of 2015. He also knew that he had had intimate contact with Mrs. Kinnett nine months earlier.

Mr. Andrews should have known that G.J.K. was his child therefore, he had one year from November 21, 2015 to file his action for avowal of paternity. Thus, his action to avow paternity of G.J.K. no longer existed after November 21, 2016 at the latest. Since his action of avowal was filed on February 10, 2017, it was filed too late.

JUDGMENT RENDERED, READ AND SIGNED on April 13, 2017 at Gretna, Louisiana.

/s/ Ruben J. Bailey
Domestic Commissioner

TRANSCRIPT, COURT RULING AND REASONS (JUNE 2, 2017)

24TH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON
STATE OF LOUISIANA DIVISION "E"

KAREN COHEN KINNETT, ET AL.

v.

JARRED BRANDON KINNETT

No. 768-195

Before: Hon. John J. MOLAISON, JR., 24th Judicial District Court Judge.

PROCEEDINGS
(Ruling and Reasons of the Court)

THE COURT:

All right, let me start off by saying, as I started the conference on this case early this morning, it's a very unfortunate set of facts.

I have before me today Exceptions of No Cause of Action, No Right of Action and Prescription or Peremption. And based upon the pleadings and the testimony and the arguments of counsel, the Exception of No Right of Action is overruled. There is no dispute that the intervenor, Mr. Andrews, is, in fact, the biological father of the minor child.

The Exception of No Cause of Action is equally overruled. I do agree with the observation that it should be overruled as it relates to the Action for Paternity. The exception is well-founded with regard to custody and visitation because it does fail to specify or allege allegations that would demonstrate the best interest of the child.

Which leaves me with the Exception of Peremption. The law is quite clear. Article 198 provides a pertinent part, "a man may institute an action to establish his paternity of a child at any time except as provided in this Article," and "the action is strictly personal. If the child is presumed to be the child of another man"–and as in this case, the minor child is presumed to be the husband of the wife, which would be Mr. Kinnett–"the action shall be"–that's a mandate–"shall be instituted within one year from the date of birth of the child. Nevertheless"–and these are the important words–"if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the date of the birth of the child, whichever first occurs."

There's case law on the issue interpreting the statute. We have the Supreme Court case of *W.R.M. v. H.C.V. and M.J.V*, which is 951.7, So. 2d, 172. And that case occurred in the midst of the statutory change. But what I find compelling are the reasons cited in that opinion by the Louisiana Supreme Court with regard to those facts. And I quote, it's on Page 3, "The record reflects that W.R.M. was aware of the possibility

that he was A.V.M.'s father from the moment H.C.V told him she was pregnant because of their ongoing sexual relationship." They go on to say, "While there has been no determinative DNA testing, it is clear from the evidence and testimony that W.R.M. suspected from the beginning that A.V.M. was his biological son." They go on to state that "despite these suspicions, W.R.M. did nothing to hold A.M.V. out as his son until later date," and in this case it was 2002.

The second case that is right on point with regard to interpretation of the statute is *SUAREZ v. ACOSTA*, and it's 194 So. 2d, 626. Those facts are–the facts interpret the statute but they are substantially different than the facts we have before us because a great number of years transpired between notice, allegedly even before the child was born, and then after the mother terminated life, she passed. And only then did the biological father attempt to establish paternity and it was well into or past nine years of age.

And I think I am compelled to say, as a judge, I've got to follow the law. Even if I don't like it. And I will be the first to tell you, I don't like it in this set of circumstances. I do not. Because at the end of the day, while the statute is very succinct and direct, I don't believe that it takes into full consideration the potential harm or the lack of benefit a child can have with the love and support of multiple individuals, whether it be a legal father or a biological father, or both.

Mr. Andrews testified consistently, both under oath downstairs and today, that when told in 2015, and say fall of 2015, that Mrs. Kinnett was pregnant

and had given birth to a child, he said that it ran through his mind that he had had sex with this woman and that he could be the father of the child. He said that without any hesitancy and has consistently said that, which then brings me to the question, What is your obligation under the law, and particularly under this statute? Because the facts as testified by Mr. Andrews is that he had an ongoing and repetitive affair with Mrs. Kinnett, so much so the testimony was they were, as far Mrs. Kinnett and Mr. Andrews were concerned, exclusive, in the sense that she was not having sex with her husband, that she was sleeping with the minor child. I think his testimony was almost that they were like roommates.

So despite being told, on September 1St of 2015, that she had given birth, which was strikingly close to the gestation period, and in the back of his mind knowing that he could possibly be the father, he did nothing.

There's been no evidence to suggest to me that Mrs. Kinnett satisfied the technical wording of the statute and being, quote unquote, in bad faith in being deceptive. But the statute is clear that he shall institute within one year from the day he knew or should have known of his paternity.

The facts are so clear and sometimes it causes you to really question. You've got an ongoing and repetitive sexual relationship with a woman and yet the testimony is a one–time encounter with her husband and you just naturally assume, it's not me, when, in fact, the likely probability is that one who has continued and repeated in intercourse is more than likely going to be the

father of the child as opposed to–and I'm not saying that in a one–time incident it can't occur–but it kind of begs logic.

And while the intent of the statute is to keep families whole, I admit–and I want the record to be clear–that's not the set of facts I have today. Because I've a husband and a wife who are in the midst of divorce. They're not divorce yet but we're in the midst of divorce. So the legislative intent on keeping a family whole and keeping the family together isn't necessarily here. And I find that troubling. I do not ignore the fact that there is a five–year old little girl who looks at this young child as her brother. And as we've pointed out, and I think everyone is well aware, that will always be the case regardless of how this works out in the end. Those two children will always be brother and sister.

And then, in assessing the testimony–because it's different–Mr. Andrews claims that Mrs. Kinnett says Mr. Kinnett is the father. Yet under cross, while being questioned by Mr. Andrews' attorney, she says, I said I had a baby and I want to try to make my marriage work.

But regardless of those facts, and I think we kind of solidified that in argument, we've never really shown that the mother was actually in bad faith and intended to deceive.

Some of the things that are most troubling to me in this case are the text messages and the evidence that were introduced, which in large part drive a lot of the factual findings. On February 23rd of this year, at 5:34, Mr. Andrews sends to

Mrs. Kinnett a text message, which I find to be extremely troubling based upon the wording of it. And I quote, "We do have to say you deceived me as to my paternity of the child, because if not, I don't have a claim. It sounds bad but that is how the statute is worded so that is what we have to say. I'm still 100 per cent Team Karen, but having–me having custody of Grant is very, very important to both of us since you will get to be with him during my time." Those words do not suggest to me the idea of telling the truth. Those words suggest, based upon their wording, we have to say one thing in order to achieve another result. I find that troubling.

Mrs. Kinnett, in response to a text, in bold letters, "I did not deceive you. I had no idea. You will be lying if you say that." So there's some push back.

And then Mr. Andrews responds a couple of posts later, "This is why we need to be working together on this."

And then on February 23rd of 2017, in a text message at 7:54 p.m., "I'm sorry things didn't work out differently between us back then." This is from Mr. Andrews to Mrs. Kinnett. "I feel responsible for the hell you're going through right now. I wish I would have whisked you away from a bad situation and we had had Grant together." These are the words that cause me most concern, "I am very sorry I did not do that." That clearly indicates that in previous time as it's written, you had knowledge, you had the ability to intervene and you didn't. And you're apologizing for it.

Testimony changed with regard to text messaging and communication from the last incident of sexual intercourse to the first phone call that she had given birth. As a result of delayed discovery being turned over, we did learn that there was extensive text communication from time to time between the two.

What's also troubling is that, as a man, if I were to receive a phone call or a communication that I had fathered a child, I think I would remember if I got it by way of telephone call or by text message. And that's not what I heard today.

And what's most concerning to me is the fact that through the process, based upon the testimony that developed in Mr. Andrews' own statements, Mrs. Kinnett's attorney was hand–picked by him, was a friend of his, someone he had referred work to and someone who had represented him, and she had agreed to represent Mrs. Kinnett. And it was through Mr. Andrews' testimony that I learned that she did all of that for free. So there was absolutely tacit, if not expressed, consent when it comes to any perceived conflict. Because the person who would have had the conflict was the one who was actually selecting the attorney. And then only when the hand–picked attorney took steps that Mr. Andrews didn't agree with, that he then send up the flare of conflict. Those facts are most troubling.

Suffice it to say, as I started off this morning, in light of the fact that the Kinnett family is in the midst of divorce and they are no longer going to be a family unit, in light of the fact that the child is two months shy of two years old, still very

young, and probably unknowing, there was great likelihood that we could take a very negative set of facts and turn it into positive and that was my suggestion.

The chance of success for a young man, having the love and support of multiple folks, which is not unusual anytime you have divorce or you have relationships that split, other relationships are formed later and then you have multiple parents, you have multiple adults to look after a child. That's a good thing, folks.

And as I pointed out in this situation, I'm most concerned about when the child learns that he has a biological father that isn't the gentlemen that he holds to be his father, I'm concerned about feelings of betrayal, trust. In the strongest of terms I can say in his interest, I hope you folks come together and support this young man and give him the highest likelihood of success and coping with a set of circumstances that he did not create, a set of circumstances that others created for him.

For those reasons that are dictated into the record, the Exception of Prescription or Peremption is granted.

I do not find, based upon the testimony, that the petition was filed within the one–year period of time, that Mr. Andrews certainly knew or should have known, based upon the ongoing and repetitive sexual relationship with Mrs. Kinnett, the fact that the pregnancy resulted birth in a very close period of time to the last incident of intercourse, and the fact that he had great suspicion that he

could possibly be the father was the date in which the meter began to run. And the petition being filed in February of 2017 is well outside of the one-year period. So for those reasons, the Exception is granted.

Prepare a judgement, submit it to the Court. Five days substance and form; ten days in chambers.

If you want the written reasons, you can get them from Monique. She can prepare a transcript. Any questions?

MS. MALONEY:

No, sir.

MS. FRATELLO:

And your Honor, the Motion to Amend to Allege the Constitutional issues; is that denied?

THE COURT:

And you know, and I've got to say this. That equally causes me trouble and consternation for this reason:

It seems to be the rule of the day in this case. So when you appear downstairs in front of Commissioner Bailey, all of a sudden we have exhibits and we have documents that haven't been turned over, but we suddenly whip out of thin air in an attempt to move the case along, everyone says okay.

Then when we come up here, days before the hearing, we've got Motions to Continue, we've got newly discovered evidence as being turned over and people are going through it, and then after we try a case all day, an issue that is not before

me, I am asked to now hold the case open and allow you to orally amend to allege a constitutional violation. Why hasn't that occurred before today? That's not something that's new. Anybody that picks up into these cases could easily look at that. In the first Supreme Court case in the midst of passing that amendment, the Supreme Court took great pains to discuss constitutional issues. The issue of laches. The gold behind the statue. Whether it was retroactive or prospective owned. I mean, they had a bunch of discussion. Why wait till today?

MS. MALONEY:

Yes, your Honor, it was error to do that. We should have filed it earlier.

THE COURT:

Because what I have now before me is a procedural mess. I've granted the Exception of Peremption, so the case is dismissed, right? Then I'm going to allow you to amend a case that's been dismissed?

What's your position in regard to their request for an oral amendment?

MS. FRATELLO:

I'd ask you to deny it. It's procedurally deficient. It's filed without notice to opposing counsel. It's filed without notice to the Attorney General's Office. They would have to be a party to it in order for that to be properly presented to this court. There's no representative from the Attorney General's Office here. There was no certified copy of that motion sent to them. I don't believe it's properly before the Court and at this point, since

it's not properly filed, it needs to be dismissed. Without hearing. The case is dismissed.

THE COURT:

Well, now it is.

MS. FRATELLO:

Right.

MR. LEVENSON:

The case is dismissed, Judge. It's untimely. I agree.

THE COURT:

I'm sorry.

I hope you folks come together and can work out some arrangement that is in the best interest of this child. I really do. I can't begin to tell you how distasteful the resolution is simply because of the law. It's a unique set of facts. And when you take it across the street, I can't wait to see what my learned colleagues of the Fifth Circuit, and if it goes to the Supreme Court, what they have to say. It really is, it's a sad day. It's probably one of the saddest days I've had on the bench in a very long time. My heart goes out to you folks. It really does. But the law is the law and I've got to follow it. I don't have the ability to legislate from the bench.

All right, folks, thank you.

MS. MALONEY:

Thank you, your Honor.

MS. FRATELLO:

Thank you.

STATUTORY PROVISIONS INVOLVED

Regular Session, 2005

HOUSE BILL NO. 91

BY REPRESENTATIVE ANSARDI

(On Recommendation of the
Louisiana State Law Institute)

Prefiled pursuant to Article III, Section 2(A)(4)(b)(i)
of the Constitution of Louisiana.

AN ACT

To amend and reenact Chapters 1, 2, and 3 of Title VII of Book I of the Civil Code, presently comprised of Articles 178 through 211, to be comprised of Chapters 1 and 2 of Title VII of Book I of the Civil Code, consisting of Articles 184 through 198, relative to the filiation of parents and children; to provide for the proof of maternity and paternity; to provide for the presumptions of paternity; to provide for disavowal of paternity; to provide for the contestation of paternity; to provide for an acknowledgment of paternity; to provide for the avowal action; to provide for the exceptional action of paternity; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. Chapters 1, 2, and 3 of Title VII of Book I of the Civil Code, presently comprised of Articles 178 through 211, are hereby amended and reenacted to comprise Chapters 1 and 2 of Title VII of Book I of the Civil Code, consisting of Articles 184 through 198, to read as follows:

CIVIL CODE
BOOK 1. PERSONS
TITLE VII. PARENT AND CHILD
CHAPTER 1. PROOF OF MATERNITY

Art. 184. Maternity

Maternity may be established by a preponderance of the evidence that the child was born of a particular woman, except as otherwise provided by law.

Revision Comments–2005

(a)This Article clarifies present law by clearly establishing that the mother of a child is the woman who gives birth to the child, and that maternity may be proved by any evidence at any time. Civil Code Article 196 (1870); Civil Code Articles 193-197, which concerned proof of legitimate filiation.

(b)Evidence of maternity includes all facts and circumstances establishing that a child was born of a particular woman, including testimony of witnesses to the fact of birth, documentary evidence (including formal or informal acknowledgment), and scientific evidence.

(c) For exceptions provided by other laws, *see* R.S. 9:121-133; R.S. 40:32(1) (definition of biological parents to include husband and wife providing sperm and egg for in vitro fertilization by physician and fetus is carried by surrogate birth parent who is blood relative of either the husband or wife); R.S. 40:34(B)(1)(h)(v) and (B)(1)(j) (birth certificate reflect mother and father as married couple who donate gametes when child born to a gestational surrogate by

in vitro fertilization who is a relative of the husband or wife).

CHAPTER 2. PROOF OF PATERNITY

Section 1.

The Presumption of Paternity of Husband; Disavowal of Paternity; Contestation; Establishment of Paternity

Subsection A. The Presumption

Art. 185. Presumption of paternity of husband

The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage.

Revision Comments–2005

(a)This Article does not change the law. Under this Article the presumption of the husband's paternity applies to a child born during the marriage of his mother or within three hundred days of its termination.

(b)The presumption that the husband of the mother is the father of the child has been referred to as the strongest presumption in the law. *See*, *e.g.*, Tannehill v. Tannehill, 261 So.2d 619 (La. 1972); Williams v. Williams, 87 So.2d 707 (La. 1956); Katherine Shaw Spaht and William Marshall Shaw, Jr., *The Strongest Presumption Challenged: Speculations on Warren v. Richard and Succession of Mitchell*, 37 La. L. Rev. 59 (1976). Under Article 187 (rev. 2005), the husband can disavow paternity of the child, but he may do so only by clear and convincing evidence, and his testimony requires corroboration. *See also* former

C. C. Art. 187 (rev. 1976). The mother, under limited circumstances, is also permitted to contest the presumption under this revision. *See* Civil Code Articles 191-194 (rev. 2005). Under this Article the presumption that the husband of the mother is the father of the child continues to be among the strongest in the law.

(c) Four other presumptions of paternity exist under this revision. The first is that a man who marries the mother and with her concurrence, acknowledges the child as his is presumed to be the father under Civil Code Article 195 (rev. 2005). This presumption is as strong as that of the paternity of the husband of the mother who conceives or bears a child during marriage; it can only be rebutted in a disavowal action by the same evidence required under Civil Code Article 187, and the action must be brought within a relatively short period of time. The other three presumptions of paternity are either qualified or narrowly focused: (1) the presumption of paternity of a man who executes an acknowledgment can only be invoked by the child, which constitutes a change in the law for an acknowledgment by signing the birth certificate (*see* C.C. Art. 196 (rev. 2005) and former C.C. Art. 203(B)); (2) the presumption of paternity arising under R.S. 9:397.3(B)(2)(b) when tissue or blood tests results establish a 99:9% probability of paternity requires the institution of an action and a high probability of paternity (*see* R.S. 9:396; 398.2); (3) the presumption of paternity created *for child support purposes only* arises when the mother of a child identifies the father. *See* R.S. 40:34(E); C.C. Art. 196, Revision Comment (g).

Art. 186. Presumption if child is born after divorce or after death of husband; effect of disavowal

If a child is born within three hundred days from the day of the termination of a marriage and his mother has married again before his birth, the first husband is presumed to be the father.

If the first husband, or his successor, obtains a judgment of disavowal of paternity of the child, the second husband is presumed to be the father. The second husband, or his successor, may disavow paternity if he institutes a disavowal action within a peremptive period of one year from the day that the judgment of disavowal obtained by the first husband is final and definitive.

Subsection B. Disavowal

Art. 187. Disavowal action; proof

The husband may disavow paternity of the child by clear and convincing evidence that he is not the father. The testimony of the husband shall be corroborated by other evidence.

Revision Comments–2005

(a)This Article only changes the law by changing the explicit standard of persuasion that must be satisfied by a husband in order to disavow the paternity of a child born to his wife or former wife. Under former Civil Code Article 187 (rev. 1976) the husband could disavow paternity if he proved by a preponderance of the evidence facts that reasonably indicated that he was not the father. For a

representative example of the jurisprudence interpreting that language, see Mock v. Mock, 411 So.2d 1063 (La. 1982). Former Civil Code Article 187 also required proof of facts susceptible of independent verification by physical evidence. This Article omits that requirement, but imposes the higher burden of persuasion, clear and convincing evidence, upon the husband who seeks to disavow. The continuing strong policy of favoring the legitimacy of children supports imposition of the higher burden. See Succession of Lyons, 452 So.2d 1161 (La. 1984).

(b)This Article makes it clear that corroboration by other evidence is required when the testimony of the husband is offered to rebut the presumption of paternity. The husband need not testify, of course; but if he does, his testimony must be supported by other evidence. Other evidence includes: scientific or medical evidence, including the results of blood tests or DNA prints, or medical evidence of sterility; evidence of physical impossibility due to location at the probable time of conception; or tangible evidence and testimony of lay witnesses. For a jurisprudential example, see the *Mock* case, *supra. See also* R.S. 9:396 et seq. (blood and tissue-type test results) and C. Blakesley, Louisiana Family Law, Chapter 6 (Butterworth 1993).

Art. 188. Disavowal precluded in case of assisted conception

The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented.

Revision Comments–2005

(a)This Article only changes the law governing disavowal actions by extending its application to all

forms of assisted conception to which the husband consented, not just artificial insemination. Assisted conception includes in vitro fertilization and embryo transfer.

(b)The provision of former Civil Code Article 188 that denied the husband's right to disavow if he married a pregnant woman knowing that she was pregnant has been suppressed in this revision. The suppression of this provision eliminates the need for an exception to it where the husband was deceived into marrying a pregnant woman believing the child was his.

Art. 189. Time limit for disavowal by the husband

The action for disavowal of paternity is subject to a liberative prescription of one year. This prescription commences to run from the day the husband learns or should have learned of the birth of the child.

Nevertheless, if the husband lived separate and apart from the mother continuously during the three hundred days immediately preceding the birth of the child, this prescription does not commence to run until the husband is notified in writing that a party in interest has asserted that the husband is the father of the child.

Revision Comments–2005

(a)The only change in law made by this Article is that the period of time for instituting a disavowal action under this Article is explicitly prescriptive, overruling Pounds v. Schori, 377 So.2d 1195 (La. 1979) (former Civil Code Article 189, the predecessor

to this Article, contained a peremptive period for the disavowal action). The husband may file the disavowal action at any time within one year after he learned or should have learned of the birth of the child, with one exception contained in the second paragraph of this Article. The special "suspension" of the time period that appeared in former Article 189 if the husband "for reasons beyond his control is not able to file suit timely" is no longer necessary because the time period is prescriptive subject as a general rule to both suspension and interruption. *See* C.C. Arts. 3462-3472.

(b)The second paragraph of this Article provides an exception to the general rule that the husband must file his disavowal action within one year of actual or constructive knowledge of the birth of the child. If the husband lived separate and apart from the mother continuously during the three hundred days immediately preceding the birth of the child, the prescriptive period within which the husband must institute his action only begins to run when the husband is notified in writing that a party in interest has asserted that he is the father of the child. The fact that the prescriptive period only begins to run from this notification does not preclude the husband from instituting an action in disavowal before the period begins.

Art. 190. Time limit for disavowal by heir or legatee

> If the prescription has commenced to run and the husband dies before the prescription has accrued, his successor whose interest is adversely affected may institute an action for disavowal of paternity. The action of the successor is subject to

a liberative prescription of one year. This prescription commences to run from the day of the death of the husband.

If the prescription has not yet commenced to run, the action of the successor is subject to a liberative prescription of one year. This prescription commences to run from the day the successor is notified in writing that a party in interest has asserted that the husband is the father of the child.

Revision Comments–2005

(a)This Article clarifies the law. Similarly to its predecessor, former Civil Code Article 190 (1999), this Article permits a successor whose interest is adversely affected by the failure of the husband to institute an action to disavow the child to do so within a prescriptive period of one year. The commencement of prescription pursuant to this Article begins to run at different times depending upon whether or not the prescription of Article 189 commenced to run against the husband before his death. For the definition of "successor," see Civil Code Article 3506(28).

(b)If prescription has commenced to run against the husband but not yet accrued before his death, the prescriptive period of this Article commences with the death of the husband. By contrast, if at the time of the husband's death prescription has not yet commenced to run either because he did not actually or constructively learn of the birth of the child or because he had not yet been notified in writing that his paternity was being asserted, the prescription of this Article commences to run when the successor is notified in

writing that a party in interest has asserted that the husband is the child's father.

Subsection C. Contestation and Establishment of Paternity

Art. 191. Contestation and establishment of paternity by mother

The mother of a child may institute an action to establish both that her former husband is not the father of the child and that her present husband is the father. This action may be instituted only if the present husband has acknowledged the child by authentic act or by signing the birth certificate.

Revision Comments–2005

(a)This Article is new. Under many statutory schemes regulating disavowal of paternity the mother of a child is permitted to disprove her husband's paternity. *See*, *e.g.*, French Civil Code Articles 318, 318.1; Uniform Parentage Act § 6(a); Quebec Civil Code Article 275; Cal. Civil Code § 7006.

(b)The provisions of this Article permit the mother of a child to contest her former husband's paternity, and thus rebut the presumption of Civil Code Article 185, under certain limited circumstances. The mother is permitted to file the contestation action only if she seeks to establish the child's paternity to her present husband. The restricted right of the mother to file an action to contest her former husband's paternity serves to align more closely biological and legal paternity in instances when the child's status will not be adversely affected by the social stigma of birth outside of marriage if the action is successful. In the sit-

uation contemplated by this Article, the mother's action serves to establish legally the child as a member of an intact family, whose stability is marked by the marriage of the mother and alleged father.

(c) This Article accomplishes a compulsory joinder or cumulation of two different actions that can be instituted by the mother of a child-one to disprove the paternity of her former husband, and the other to establish the paternity of her present husband. *See* C.C.P. arts. 641 et seq.

(d) Civil Code Article 195 (rev. 2005) creates a presumption of paternity when a man marries the mother of a child and formally acknowledges the child, but *only* if the child is not filiated to another man.

(e) Under this Article, the judgment in the action of contestation and establishment rebuts the presumption of Article 185 (rev. 2005) and Article 186(2) (rev. 2005) and establishes the paternity of the present husband.

Art. 192. Contestation action; proof

The mother shall prove by clear and convincing evidence both that her former husband is not the father and that her present husband is the father. The testimony of the mother shall be corroborated by other evidence.

Revision Comment–2005

Under this Article the mother must prove by clear and convincing evidence that her present husband is the father of the child and that her former husband is not. The reason for requiring clear and convincing proof that her present husband is the father (see Civil Code Article 195) is that there is a legal presumption that

the mother's former husband is the father, which the mother is also seeking to rebut. The consequences of the contestation action differ significantly from the actions permitted the child or the biological father under Civil Code Articles 198 and 199 (rev. 2005): in a contestation action, the former husband will no longer be considered by law as the child's father; instead, only the mother's present husband will be considered the legal father. Under Civil Code Articles 198 and 199, the child or the father is seeking to establish paternity without affecting in any way the child's established filiation to another man.

Art. 193. Contestation and establishment of paternity; time period

> The action by the mother shall be instituted within a peremptive period of one hundred eighty days from the marriage to her present husband and also within two years from the day of the birth of the child, except as may otherwise be provided by law.

Revision Comment–2005

(a)The contestation action must be instituted within one hundred eighty days of the marriage of the mother to her present husband and before the child has attained the age of two years. This short time period encourages the mother to act expeditiously in the interest of all of the affected parties, in particular the child. The time period for instituting this action is similar to that of French Civil Code Article 318.1 in that both actions must be brought within six months of the inception of the marriage. This Article departs from the French article, however, in requiring that the action be instituted before the child has attained the

age of two years. Under French Civil Code Article 318.1 the action must be instituted before the child has reached the age of seven years.

Art. 194. Judgment in contestation action

A judgment shall not be rendered decreeing that the former husband is not the father of the child unless the judgment also decrees that the present husband is the father of the child.

Revision Comment–2005

(a)This Article assures that there will be a successful contestation action *only* if the mother is also successful in establishing by clear and convincing evidence that her present husband is the father. The compulsory cumulation of the two actions is reflected in the interdependence of the resulting judgments. A judgment recognizing that the former husband of the mother is not the father can be rendered only if at the same time a judgment is rendered recognizing that the present husband of the mother is the father. There are two purposes served by permitting contestation by the mother of her husband's paternity: to align biological and legal paternity more closely and to establish the child as a member of an intact family resulting from the marriage of the mother and alleged father. This Article insures that both purposes will be fulfilled in any successful action under this Subsection.

Section 2. Presumption of Paternity by Subsequent Marriage and Acknowledgment

Art. 195. Presumption by marriage and acknowledgment; child not filiated to another man; proof; time period

A man who marries the mother of a child not filiated to another man and who, with the concurrence of the mother, acknowledges the child by authentic act or by signing the birth certificate is presumed to be the father of that child.

The husband may disavow paternity of the child as provided in Article 187.

The action for disavowal is subject to a peremptive period of one hundred eighty days. This peremptive period commences to run from the day of the marriage or the acknowledgment, whichever occurs later.

Revision Comments–2005

(a)This Article establishes a new presumption of paternity that corresponds to the circumstances of former Civil Code Article 198 (rev. 1979). Former Article 198 recognized legitimation by subsequent marriage as a method of establishing paternity. By creating a presumption of paternity under circumstances that previously constituted legitimation by subsequent marriage, this Article overrules such cases as Chatelain v. State, DOTD, 586 So.2d 1373 (La. 1991), and O'Brien v. O'Brien, 653 So.2d 1364 (La. App. 4 Cir. 1995) (father who signed birth certificate and married the mother was not presumed to be father of child born before marriage).

(b)This Article creating a presumption does not apply if the child born prior to the marriage is filiated to another man. There are two exceptions, however, found in Civil Code Articles 199 (rev. 2005) and 191-194. Article 199 (rev. 2005) permits the child whose filiation is already established to prove his filiation to another man by any method provided in this Chapter.

By contrast, the father of such a child can establish his paternity only if the marriage between the presumed father and the mother of the child has terminated. Compare Succession of Mitchell, 323 So.2d 451 (La. 1975). Furthermore, in a contestation action brought by the mother under Articles 191-194 (rev. 2005), the presumption does not apply and the mother most prove the paternity of her present husband by clear and convincing evidence.

(c) The presumption created by this Article, like that of Articles 185 and 186 (rev. 2005), may be rebutted only by an action instituted within the short time period specified by this Article, and only by clear and convincing evidence that the man who married the mother after the birth of the child and acknowledged the child as his is not in fact the child's father. The time period within which the husband must institute an action to disavow under this Article is six months rather than one year, as provided in Article 189 (rev. 2005). It is also peremptive rather than prescriptive. See Articles 2458, 3447, 3449, and 3462-72.

(d) The presumption created by this Article arises when, subsequent to the birth of a child, the mother marries a man who formally acknowledges, or has acknowledged, the child as his with the mother's concurrence. Prior law provided that a child was legitimated by the subsequent marriage of his parents if the child was formally or informally acknowledged before or after the marriage. This Article requires a formal acknowledgment, which may be made at any time. An informal acknowledgment consisted of a writing not the equivalent of an authentic act in which the father referred to the child as his, or conversations and other

similar conduct to the same effect. See IMC Exploration Co. v. Henderson, 419 So.2d 490 (La. App. 2 Cir. 1982).

(e) The concurrence of the mother required by this Article is a juridical act. *See* C.C. Art. 2347, Revision Comment (c).

Section 3. Other Methods of Establishing Paternity

Art. 196. Formal acknowledgment; presumption

A man may, by authentic act or by signing the birth certificate, acknowledge a child not filiated to another man. The acknowledgment creates a presumption that the man who acknowledges the child is the father. The presumption can be invoked only on behalf of the child. Except in those cases handled by the Department of Social Services, the acknowledgment does not create a presumption in favor of the man who acknowledges the child. In those support and visitation cases handled by the Department of Social Services, the acknowledgment is deemed to be a legal finding of paternity and is sufficient to establish an obligation to support the child and to establish visitation without the necessity of obtaining a judgment of paternity.

Revision Comments–2005

(a) This Article is new, although it resembles former Civil Code Article 203(B)(2) (rev. 1997). Under this Article a man who acknowledges a child creates a presumption that he is the father which operates in favor of the child only. Such an acknowledgment is created by an authentic act in which the father acknowledges his paternity, or by his signing the child's birth certificate as father. The man who executes the

acknowledgment or signs the birth certificate will not create a presumption in his own favor that he is the father of the child.

(b) Under former Civil Code Article 203(B)(2) (rev. 1997), a presumption of paternity was created only when there was an acknowledgment made by signing of the registry of birth or baptism, and that presumption was explicitly declared rebuttable by a mere preponderance of the evidence. C.C. Art. 203 (B)(2) (rev. 1997). To be sufficient to rebut the presumption, however, evidence of certain facts "susceptible of independent verification or of corroboration by physical data or evidence," had to be provided. That language was identical to the description found in former Civil Code Article 187 (rev. 1989) of the proof required for a husband to disavow a child of his wife born or conceived during the marriage. This Article changes the law in that, under this revision, no presumption is created by signing the baptismal registry.

(c) This Article changes the law as to a child acknowledged by authentic act: it creates a rebuttable presumption of paternity in favor of the child only, whereas former Civil Code Article 203(B)(1) (rev. 1997) created "a legal finding of paternity" but for limited purposes. Under former Civil Code Article 203(B)(1), formal acknowledgment by authentic act was "deemed to be a legal finding of paternity" that was "sufficient to establish an obligation to support . . . without the necessity of obtaining a judgment of paternity." The substance of that paragraph appears in R.S. 9:404 (rev. 2005). The presumption created by this Article applies generally and is not restricted to issues of child support. Prior to the 1997 revision of Article 203 declaring an acknowledgment a legal

finding of paternity, the jurisprudence recognized the relevance of blood tests to establish the biological link between the child and the father who had acknowledged him. *See* Succession of Robinson, 654 So.2d 682 (La. 1995) (administrator's motion to compel blood tests of illegitimate children acknowledged in statutory will upheld); O'Brien v. O'Brien, 653 So. 2d 1364 (La. App. 4 Cir. 1995) (man who had acknowledged child by placing his name on birth certificate permitted to seek declaratory relief that he was not the biological father); McKinley v. McKinley, 631 So.2d 45 (La. App. 2 Cir. 1994). *See also* Comment (e), infra.

(d)The presumption created by this Article must be distinguished from the presumptions under Sections 1 and 2 of this Chapter. There is no similar limitation in this Section as to who may bring the action to rebut the presumption created by this Article. See Civil Code Articles 189 and 195 (rev. 2005). Likewise, there is no time period during which an action to challenge the presumption of this Article must be instituted.

(e) Under former Civil Code Article 206 (1997) an acknowledgment could be revoked without cause within sixty days (or less) of its execution in a judicial hearing; thereafter, the acknowledgment could only be revoked upon clear and convincing evidence of fraud (C.C. Arts. 1953-1958), duress (C.C. Arts. 1959-1964), material mistake of fact (C.C. Arts. 1949-1952), or "that the person is not the biological parent of the child." This revision repeals Civil Code Article 206, but the contents of the Article remain in R.S. 9:405 (2005). *See* R.S. 9:392(A) (before execution of acknowledgment notary required to provide in writing explanation of the consequences of a failure to acknowledge and the legal consequences of an ack-

nowledgment, including the right to revoke). *See also* Faucheux v. Faucheux, 772 So.2d 237 (La. App. 5 Cir. 2000); Jones v. Rodrigue, 771 So.2d 275 (La. App. 1 Cir. 2000).

(f) R.S. 40:46.1 establishes a hospital-based voluntary acknowledgment program, but the statute only requires the signatures of the two parents and the signature of a notary who authenticates their signatures. If the form for such an acknowledgment does not provide for the signatures of two witnesses, it does not constitute an acknowledgment by authentic act, and thus does not have the effect accorded to such an acknowledgment under this Article.

(g) R.S. 40:34(E) adopts a procedure for the identification of the father of an illegitimate child, notice to the alleged father, the creation of a presumption of fatherhood *for support purposes only* if he fails to contest the identification, and the effect of blood tests results at a contested hearing. That statute creates a limited exception to the provisions of this Chapter and is unaffected by this revision. See Comment (c) to Article 185 (rev. 2005).

(h) Under prior law, an acknowledgment of fatherhood by an authentic act or by signing the child's birth or baptismal certificate was referred to as a formal acknowledgment. Prior law distinguished the effects of such formal acknowledgments from those of informal acknowledgments. The formal acknowledgment of a child by his father relieved the child of the necessity of establishing paternity by an action timely instituted under former Civil Code Article 209 (rev. 1984). An informal acknowledgment, which consisted of writings by the father and his conversations referring to the child as his, did not relieve the child of

the necessity of instituting a paternity action. The same result obtains under this revision.

Art. 197. Child's action to establish paternity; proof; time period

A child may institute an action to prove paternity even though he is presumed to be the child of another man. If the action is instituted after the death of the alleged father, a child shall prove paternity by clear and convincing evidence.

For purposes of succession only, this action is subject to a peremptive period of one year. This peremptive period commences to run from the day of the death of the alleged father.

Revision Comments–2005

(a)This Article, for the most part, codifies prior jurisprudence interpreting Civil Code Article 209 (rev. 1981), which recognized that a child may institute an action to establish his paternity even though the child's filiation to a man other than the subject of the action has been established. For example, even though the child is presumed to be the child of his mother's husband who has not disavowed the child under Civil Code Article 189, the child may prove that another man is his father by any means permitted by this Chapter. *See*, *e.g.*, Succession of Mitchell, 232 So.2d 451 (La. 1975) (children presumed to be children of mother's first husband but legitimated by subsequent marriage as to her second husband); Griffin v. Succession of Branch, 479 So.2d 324 (La. 1985) (children presumed to be children of mother's husband permitted to institute a paternity action to establish filiation as to the decedent); Smith v. Cole, 553 So.2d 847 (La. 1989) (child presumed to be child of mother's

husband permitted to institute paternity action against another man for support). If the child establishes paternity under this Article, all of the civil effects of filiation apply to both the child and the father. Civil effects of filiation include the right to support, to inherit intestate, and to sue for wrongful death.

(b) Louisiana is the only state which recognizes that a child may establish his filiation to more than one father. The United States Supreme Court concluded that the United States Constitution did not prohibit a California statute from denying the biological father such a right. See Michael H. v. Gerald D., 109 S.Ct. 322 (1989). *But see* Lawrence v. Texas, 123 S.Ct. 2472 (2003), which does not directly concern the biological father's right but rejects part of the rationale of the decision in the Michael H. case.

(c) Under this Article, all relevant evidence is admissible to prove paternity. Examples of such relevant evidence include blood tests, an informal acknowledgment, and cohabitation of the mother and father at the time of conception. See former Civil Code Article 209, Comment (b) (rev. 1981). Compare Jenkins v. Mangano Corp., 774 So.2d 101 (La. 2000) and State, Dept. Soc. Serv. v. Bradley, 779 So.2d 786 (La. App. 2d Cir. 2000). Furthermore, if the results of the blood or tissue sampling indicate "by a ninety-nine and nine-tenths percentage point threshold probability that the alleged father is the father of the child," the alleged father is presumed to be the father. R.S. 9:397.3 (B)(2)(b).

(d) The burden of persuasion applicable to paternity actions under this Article remains, as under prior law, by "clear and convincing evidence" if the alleged father is dead and by a preponderance of evidence if

the alleged father is alive. The latter burden is not explicitly stated here because it is the general burden of persuasion in civil matters. The distinction in the burden of persuasion based upon whether the alleged father is dead or alive is best explained by the fact that "[a]fter the death of the alleged parent, whose knowledge concerning the fact or probability of his filiation to the child is superior, the [estate's] vulnerability to fraudulent claims is significantly increased." Katherine Shaw Spaht, *Developments in the Law, 19811982-Persons*, 43 La. L. Rev. 535, 537 (1982).

(e) The time period for bringing the paternity action under this Article is limited to succession matters only. This is a change in the law. The time for instituting a paternity action for the purpose of exercising the right to support, to sue for wrongful death, or to claim Social Security benefits or the like, is not limited by this Article. Prior law required that a paternity action under former Civil Code Article 209 (rev. 1984) be instituted within nineteen years of the child's birth or within one year from the alleged parent's death, whichever first occurred. If the action was not timely instituted, the child could not thereafter establish his filiation for any purpose, except to recover damage under Civil Code Article 2315. That was a harsh result not justified by any policy consideration. For the particular purpose of succession, on the other hand, there is a time limit on instituting the action to facilitate the orderly disposition of estates and the stability of land titles.

(f) The time period during which the paternity action must be instituted for succession purposes is longer than that of prior law. Under former Civil Code Article 209 (C) (rev. 1984), the action had to be

instituted within nineteen years of the child's birth. Under this Article the child, regardless of his age, has one year from his father's death to institute the action.

Art. 198. Father's action to establish paternity; time period

A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.

If the child is presumed to be the child of another man, the action shall be instituted within two years one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.

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

The time periods in this Article are peremptive.

Revision Comments–2005

(a)This Article replaces C.C. Art. 191 (2004) and clarifies that the avowal action is strictly personal to the alleged father. *See* C.C. Arts. 1765-66. *See also* Mouret v. Godeaux, 886 So.2d 1217 (La. App. 3d Cir. 2004), which applied C.C. Art. 191. Even before the enactment of Article 191, the jurisprudence recognized the right of the father to institute an avowal action as a predicate to, or simultaneous with, the exercising of parental rights. *See*, *e.g.*, State ex rel. Williams v.

Howard, No. 2003 CW 2865 (La. App. 1st Cir. 12/30/04); Putnam v. Mayeaux, 645 So.2d 1223 (La. App. 1st Cir. 1994).

(b) Proof of paternity under this Article may be made at any time, as a general rule, by any relevant evidence, the same type of evidence used in an action by or on behalf of a child to prove his paternity under Article 197 (rev. 2005). See Comment (b) to that Article. The standard of persuasion is a preponderance of the evidence.

(c) The alleged biological father may obtain a court order for blood tests without first instituting the paternity action permitted by this Article. R.S. 9:398.2 (1995). Even though the statute authorizing the court order provides that in such action the court shall not make a determination of paternity, the test results are admissible in any subsequent action filed by the parties relating to the filiation of the child. R.S. 9:398.2(E).

(d) Although the general rule is that the avowal action may be brought by the alleged father at any time, this Article does establish time periods during which this action must be instituted in two instances: (1) if the child is presumed to be the child of another man or (2) if the child dies. All of the time periods established by this Article are peremptive, rather than prescriptive and thus are not subject to interruption or suspension. Contrast Putnam v. Mayeaux, 645 So.2d 1223 (La. App. 1st Cir. 1994) (no applicable prescriptive period for avowal action; one year and three days was a reasonable time); Geen v. Geen, 666 So.2d 1192 (La. App. 3d Cir. 1995) (fifteen to nineteen months not an unreasonable time); Demery v. Housing Auth. of New Orleans, 689 So.2d 659 (La.

App. 4th Cir. 1997); T.D. v. M.M.M., 730 So.2d 873 (La. App. Cir. 1999) (six years was not too long to wait to bring avowal action).

If the child is presumed to be the child of another man, the alleged father must institute his action within two years of the child's birth, to which there is one exception. See comment (e), *infra.* If the child dies, the action must begin no later than one year from the death of the child. These restrictions imposed upon the alleged father's rights to institute the avowal action recognize first, that state attempts to require parents to conform to societal norms should be directed at the parents, not the innocent child of the union (see Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459 (1977)), and second, that a father who failed during a child's life to assume his parental responsibilities should not be permitted unlimited time to institute an action to benefit from the child's death.

(e) The time period of two years from the child's birth imposed upon the alleged father if the child is presumed to be the child of another man requires that the alleged father act quickly to avow his biological paternity. Requiring that the biological father institute the avowal action quickly is intended to protect the child from the upheaval of such litigation and its consequences in circumstances where the child may actually live in an existing intact family with his mother and presumed father or may have become attached over many years to the man presumed to be his father.

(f) The only exception to the time period of two years for the institution of an avowal action by the biological father is if the mother in bad faith deceives the father concerning his paternity. In such case the

father may institute the action within one year from the day he knew or should have known of the birth of the child or within ten years of the child's birth, whichever first occurs. *See* C.C. Art. 191 (2004) and R.S. 9:305.

(g)The Department of Social Services, which is providing services in accordance with 42 U.S.C. 666, is not bound by the time periods in this article. *See* R.S. 9:395.1.

Section 2. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided by Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

Section 3. The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date.

_____
SPEAKER OF THE HOUSE OF REPRESENTATIVES

_____
PRESIDENT OF THE SENATE

_____
GOVERNOR OF THE STATE OF LOUISIANA

APPROVED: _____