

**B. C., ON BEHALF OF HER
MINOR SON, J. C.**

*

NO. 2003-CA-0576

VERSUS

*

COURT OF APPEAL

**THE ESTATE OF GEORGE
PAGE**

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-5832, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

CHIEF JUDGE JOAN BERNARD ARMSTRONG

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Charles R. Jones and Judge Patricia Rivet Murray)

**JONES, J., CONCURS IN THE RESULT
MURRAY, J., CONCURS IN THE RESULT**

FRANK M. BUCK, JR.
810 UNION STREET
SUITE 350
NEW ORLEANS, LA 70112

COUNSEL FOR PLAINTIFF/APPELLEE

BERNARD J. BAGERT, JR.
SALVADOR BIVALACQUA
THE BAGERT LAW FIRM
650 POYDRAS STREET
SUITE 2708
NEW ORLEANS, LA 70130

COUNSEL FOR DEFENDANT/APPELLANT

RICHARD A. BORDELON
RALPH J. AUCOIN

DENECHAUD & DENECHAUD
210 BARONNE STREET
SUITE 1207
NEW ORLEANS LA 70112

COUNSEL FOR INTERVENOR/APPELLEE, PROFESSIONAL SERVICE
INDUSTRIES, INC.

THOMAS M. YOUNG
MIRANDA, WARWICK, MILAZZO, GIORDANO & HEBBLER, APLC
3636 SOUTH I-10 SERVICE ROAD WEST
SUITE 300
METAIRIE LA 7001

COUNSEL FOR INTERVENOR/APPELLAND, CENTRAL MINE
EQUIPMENT COMPANY

REVERSED

The defendant-appellant, the estate of George Page, appeals a judgment rendered on August 29, 2002, pursuant to a judge trial on the merits in favor of the plaintiff-appellee, B. C., the mother and tutrix of J. C., decreeing that the decedent, George Page, was the father of J. C., and that B. C. could pursue George Page's wrongful death claim on J. C.'s behalf. The estate of George Page as a party to this litigation represents the interests of the decedent's siblings, hereinafter referred to as the Page siblings.

Plaintiff instituted this action in 1998 with a "Petition to Establish Filiation", naming the estate of George Page as the defendant and alleging that the decedent, George Page, was the father of her son, J. C., and that the

decedent died on June 10, 1997, in a work related accident while employed by Professional Service Industry. The petition also alleges that while Ms. C. and the decedent were never married and the decedent never formally acknowledged that he was J. C.'s father, nevertheless:

Prior to his death, George Page acknowledged in the community that J. C. was his son and did so by his conduct and through statements.

In other words, plaintiff seeks to establish filiation by informal acknowledgement under La. C.C. art. 209B.

By supplemental petition, P. J. Page, as the administrator of the estate of George Page, was named as the defendant in lieu of any curator or curatrix appointed by the trial court. Central Mine Equipment Company intervened praying for a judgment determining the issue of paternity because it was a defendant in separate suits filed by both B. C. on behalf of her son, J. C., and the estate of George Page. Later, the decedent's employer, Professional Service Industries, Inc., filed a similar intervention.

J. C. was born on January 2, 1989. As will be discussed more fully later in this opinion, the Page siblings offered DNA test results excluding the decedent, George Page, as the father of J. C. based on DNA samples taken from them and from J. C., no DNA being available from the decedent. The efficacy of these DNA test results depends on the accuracy of the

assumptions made by the testers concerning whether certain of the Page siblings were siblings of the decedent by whole or half blood, i.e., whether any of the siblings other than Lloyd Knight had a different father from the decedent. It is uncontested that they all had common maternity.

In her written reasons for judgment, the trial judge stated that the plaintiff had proven filiation with clear and convincing evidence:

The Court discounts the self-serving testimony of Ms. [C.] herself and the Page siblings as they have an interest in the outcome of the case. The Court didn't find Ms. [C.] particularly credible. She didn't list any father on [J. C.'s] birth certificate. She received welfare benefits on [J. C.'s] behalf, even though [J. C.] lived not with her but with Mr. Page and she allowed another man to claim [J. C.] for income tax purposes.

The Court is not impressed with the so called scientific paternity testing. If George Page had a different father than his siblings (as one sibling admittedly did), there is no way to exclude George Page as [J. C.'s] father.

What did impress the Court is that George Page and his mother raised J. C. from infancy until George Page's untimely death. George Page continued to raise J. C. after George's mother passed away. The Court doesn't accept the Page siblings contention that this was done out of the goodness of George Page's heart. [J. C.] was his child, and George acknowledged this on medical and educational documentation submitted to this Court.

In essence, the trial court: (1) found none of the interested parties credible; (2) rejected the DNA testing based on the possibility that George Page and more than one of the Page siblings had different fathers; and (3)

found that the plaintiff produced clear and convincing evidence of informal acknowledgement.

Amy Redmond-Gibbons, a staff attorney employed by the State of Louisiana Department of Social Services Support and Enforcement Services was called as a witness for the plaintiff. She testified concerning the contents of her agency's file on the decedent and the nature of her own interactions with the decedent. The Page siblings entered a hearsay objection to the entire contents of the file. She handled paternity and child support cases in conjunction with applications for aid to family with dependent children (AFDC) applications. In 1996 suit was filed against the decedent pursuant to an application filed by B. C. According to the testimony of Ms. Redmond-Gibbons, in response to a subpoena, the decedent produced records of J. C.'s enrollment at the Crossman School. One such document, bearing a signature purporting to be that of Dorothy Page (the decedent's mother) listed the decedent as J. C.'s father. The document did not, however, bear anything purporting to be the signature of the decedent.

In another document in the decedent's file Ms. Redmond-Gibbons indicated that the decedent took the position that he should not have to pay AFDC because J. C. was living with him and being supported by him.

Ms. Redmond-Gibbons' records showed that the decedent indicated initially that he wished to challenge paternity with a DNA test. Subsequently, he withdrew that request and indicated that the child had lived with him since he was six months old. There was nothing in her file in which the decedent acknowledged directly to the agency that he was J. C.'s father.

Ursula C., the plaintiff, B. C.'s sister, was called by the plaintiff to testify. She testified that after J. C. was born, the decedent treated him as his son. However, she never heard the decedent refer to J. C. as his son or his boy. She explained that for the first few months of his life, J. C. lived with his mother, B. C., but for the next years of his life he lived with the decedent and the decedent's mother. She testified that several of the decedent's siblings also lived in the same house. She testified that:

Jerome is the main sibling on George's side that I know J. C. was with a lot. And I know he lived with his mother. I never really saw a lot of the family members because there was so many family members. Ursula [C.] did not know Yolanda Page or the decedent's mother, Dorothy Page, although she was informed that [J. C.] lived with Dorothy page.

B. C. testified that she had two children, but had never married. One child was J. C. on whose behalf she was conducting the instant litigation. The other was Ryan C. whose father was Bentrice Walker. She testified that

George Page was J. C.'s father. However, she testified that she listed no father on either son's birth certificate. When asked why she failed to do so, she explained:

Because I just didn't. I didn't it [sic] on my other son's birth certificate.

While the plaintiff testified that the decedent was the only man with whom she had sexual relations during the time that Jason was conceived, she did not testify that she and the decedent had ever lived together.

She testified that the decedent never denied to her that J. C. was his son. However, she did not testify that she had ever heard the decedent refer to J. C. as his son. She testified that during the school year J. C. stayed with the decedent at his mother's house and that during the summer he stayed with her. She admitted that she allowed her boyfriend, Kenneth Denny, to claim J. C. as a dependent on his tax return one year; but she also let the decedent claim him one year. When asked why J. C. did not live with her, she explained:

George just asked me could he take him with him in his home and I told him yes.

She testified that it was not the decedent's mother that offered to take J. C., but the decedent himself. She admitted that all of the decedent's siblings did things for the child, but she insisted that she often had J. C. with

her and that there was no personal reason why she could not care for the child. She testified that no other man ever claimed to be J. C.'s father.

Yolanda Page, the decedent's sister, testified for the estate of the decedent. When asked to name all of her brothers and sisters, replied: "Gerald, Jerome, P. J., Lloyd, and Dwayne, and George is deceased." However, she did not specify which, if any, were full siblings and which were half-siblings. She did not specify who her parents were or who any of the parents of her other siblings were. A close reading of her testimony indicates that she never actually indicates that she and the decedent even had the same mother, although that fact does not appear to be contested by the plaintiffs.

She testified that the decedent had no children to her knowledge and that he never acknowledged J. C. as his child. When asked if the decedent did "things with J. C.," she replied:

He done things with a lot of kids. They had a lot of kids in the house.

Yolanda testified that the other children living in her mother's house were neither hers nor were they the children of the decedent or any of her other brothers and sisters:

The kids that lived with my mother, children was mostly mamas was on crack. They only left them, the same as [B. C.] Brought them, left them, never came back for them.

She and her siblings treated all of these children as though they were family members. She testified that the decedent did “fatherly things” and that all of her siblings “showed the kids love.” She said that the decedent went to graduations and took the children on vacations:

He done a lot of things for them. We never treated them no differently. None of them was ever kin to us but we never treated them, we showed all of them love. We never treated any one of them differently.

She stated that the decedent did not take one kid on an outing or to an event. Instead he would take several each time:

Sometimes he would take the boys somewhere. Then maybe the next day he would take the girls to the show.

She testified that the decedent treated all of the kids in a similar fashion and that he did not treat J. C. any better than he did the other children. The decedent went to school functions for the other kids as did she and her brothers. To her knowledge the decedent never signed school report cards for any other the other children. However, Yolanda testified that her mother signed report cards for all of the children. She could not explain why, out of all of her siblings, her mother chose to list the decedent as J. C.’s father when she enrolled J. C. at the Crossman School. When asked to explain why George signed a Charity Hospital record as J. C.’s “closet

relative or legal guardian, she responded:

He wasn't the legal guardian, no. My mother raised J. C.. I could remember what you're talking about with the hospital. That's because no one could find [B. C.] anywhere. George was only one with a car. We had to rush it. He had to going [sic] into convulsions. He had a fever.

When shown documents with what purported to be the decedent's signature and asked if she recognized her late brother's signature or even if the signatures looked alike to her, she testified that she would not recognize either her late brother's signature or that of her mother.

She testified that the decedent had several girlfriends but no children. Yolanda admitted that after her mother died, J. C. didn't go back to his mother. However, she testified that the decedent lived with her and her daughter at 414 Marigny Street for about five years prior to his death, but J. C. continued to live with the other siblings, Lloyd, Jerome and Dwayne at 529 Pierce Street. When then asked to explain why it was that the decedent signed off on J. C.'s report cards after his mother died if J. C. lived with the other siblings and not with the decedent as Yolanda claimed, she said she had no explanation, but also stated that that might explain why she could not say whether it was the decedent who actually signed the report cards. In this manner she implied that it was not really the decedent's signature on the report card.

When asked by the trial judge how B. C. could have known that Dorothy Page took in other people's children, Yolanda replied that it was because Dorothy was already taking care of a child that belonged to one of B. C.'s cousins.

Gerald Page testified for the estate of George Page. He said that his siblings were Jerome Page, Paul Page (P. J.), Yolanda Page, Lloyd Knight, and Dwayne Page and that his parents were Dorothy Page and Paul James Page. He did not specify whether any of his siblings were full siblings or half siblings and he did not specify who the parents of his siblings were. He testified that his deceased brother, George Page was never married and never had any children to his knowledge. He did not live at his mother's house during the time J. C. resided there. He testified that the decedent took J. C. to enroll him in school because "somebody had to take him to school and he [the decedent] volunteered to get him enrolled in school. They didn't have anybody else to enroll him in school." His mother was sick and couldn't handle the enrollment herself.

On cross-examination, Gerald Page testified that he would see the decedent approximately twice a week at the home of their sister, Yolanda, where the decedent was living. He testified that he had seen his late brother take various children who were staying with his mother to such activities as

the movies or the park, and that he, Gerald, did likewise. He never heard the decedent refer to J. C. as his child and he never saw the decedent show J. C. any preference over the other children. He admitted that J. C. remained with Gerald's brothers after the death of his mother, but that J. C. went back to his mother, B. C., after George's death. Gerald knew nothing about the documents previously entered into evidence indicating that the decedent was J. C.'s father.

When counsel for the Page siblings called Lloyd Knight to testify he immediately offered Lloyd's birth certificate into evidence. Unlike the birth certificate of all of the other Page siblings, instead of showing P. J. Page as his father as is the case with all of the other Page siblings, the space on Lloyd's birth certificate provided for the father's name is left blank. Counsel for the Page siblings was immediately forthcoming about the difference in parentage between Lloyd and the other Page siblings and established that Lloyd was only a half sibling with his very first question put to Lloyd on direct examination:

Q. Mr. Knight, who are your parents?

A. Dorothy page and Lloyd Knight.

By taking the initiative in establishing Lloyd's father was not P. J. Page as shown on the birth certificates of all of the other Page siblings,

counsel for the Page siblings prevents any inference that he might be attempting to conceal any relevant parentage differences. Lloyd then testified that the decedent was never married, had no children and never acknowledged any children. He testified that the decedent took J. C. to the hospital because he was the only one who had a car. The decedent did the same for other children. He testified that he and his siblings had signed report cards for the children. While he didn't know if the decedent had signed report cards for any of the children besides J. C., he did know that the decedent had signed in other children at the hospital.

P. J. Page testified that his parents were Dorothy Page and P. J. Page and that his siblings were Lloyd Knight and Dwayne, Gerald Jerome and Yolanda Page. While he readily admitted that Lloyd did not have the same father, he was not asked to specify whether his other siblings were full siblings or only half siblings. Nor did he specify who the parents of any of his siblings were.

P. J. testified that the decedent was never married and never had any children. His mother took in about seven children. After his mother died the girls stayed with his sister, Yolanda, and the boys stayed with his other brothers. He testified that he would visit his mother's home almost every day because she was in poor health. He denied ever having told any one that

he thought that he and the decedent were the only full-blooded siblings in the family and no evidence was offered by the plaintiff to prove otherwise. He admitted that he had a car and that he provided transportation for the children on occasion and that if a child needed to go to the hospital he was in a position to take that child. He testified that J. C. returned to Bridgette only after the death of the decedent.

Jerome Page testified that his parents were Dorothy Page and P. J. Page. He did not specify whether any of his siblings were full siblings or only half siblings. He did not indicate who any the parents of his siblings were. He was living with his mother at the time of her death. J. C. Coffil and several other children were also living there. His late brother, George, was never married and had no children.

When asked by the trial judge if J. C. had ever referred to the decedent as, "Daddy," he replied, "No, ma'am." The trial judge questioned him further on the matter:

BY THE COURT:

What did he call George?

A. He. Didn't call him nothing.

BY THE COURT:

He didn't call him anything? I mean, if he wanted something from him he didn't call him anything?

No. He just like, we used to do like when you want something, we just do for everybody. You know, we don't have no position, you know.

BY MS. ARNOLD:

What did J. C. call you? Did he call you by name?

A. Jerome. That's it.

Q. Did he call your brother George?

A. No.

Q. How did he refer to your mother?

A. He called her Aunt Dorothy. That's it.

During the course of Jerome's testimony, it was stipulated that if Dwayne Page came to testify, he would testify consistent with the testimony of his other siblings. Therefore, we conclude that Dwayne would have testified that his parents were Dorothy and P. J. Page, that he had the same siblings as testified to by the others, but that he would not specify which were full and which were half siblings or who the parents of his siblings were.

A portion of the deposition of Mr. Milton Godfrey was admitted into evidence by the plaintiffs without objection. In his deposition testimony, Mr. Godfrey identified himself as a close friend of the decedent. He testified that the decedent loved J. C.: "That's all he talked about," and "he's my

boy.” He said he interpreted the decedent’s words to be describing a father-son relationship and by that he meant that the decedent felt himself to be the biological father of the decedent.

The estate of George Page called Sudhir K. Sinha, Ph.D. as its DNA expert. He testified that assuming that all of the decedent’s siblings were his full blood siblings with the exception of Lloyd Knight, then he could exclude the decedent with 100% certainty as a possible father of J. C. He had obtained DNA samples from the siblings, J. C. and his mother. He explained that he could never determine paternity to an absolute certainty, only to a statistical certainty. He could, however, with sufficient data exclude paternity with absolute certainty.

He had DNA samples from B. C., J. C., Dorothy, Jerome, Gerald, Yolanda, and P. J. Page, and Lloyd Knight. He testified that:

[I]n this situation we were able to account for all of the four grandparents genes based on all the siblings tests. And that gene is not present in J. C. And that’s why we said that he is not the child of [the decedent.] And you can see, look at the DNA band profiles, and you will see that, if you go across. You will see that. There is between Dwayne page and Jerome Page, Lloyd Knight, and Yolanda Knight [sic] and Gerald Knight [sic], there is 1.56 and close to, with the 2.01, 2.09, 1.25, 1.93, that’s four different DNA bands between all these siblings are there. And that’s not present, none of these four is present in J. C

However, he went on to testify that his conclusion was based on the assumption that, “they’re all full sibs, yes.” He further testified that:

[I]f we group, Yolanda Page, Gerald Page, and P. J. Page, yes, the child is excluded.

But that statement is based on the assumption that each of those persons is the full sibling of all of the others and the decedent as well. In this case the assumption of full sibling kinship was based on the statements of the siblings rather than upon scientific testing. However, if that assumption is not true then the conclusion that the decedent cannot be J. C.’s father is not necessarily true, as Dr. Sinha explained:

[I] have to assume that person “X” is the true child of the grandparents, but person “Y” – see like the question was previously asked, if there is a question that George Page is not the real child of the grandparents but the other persons are, the bands don’t match because it’s not relations there. So, all of these are based on that information.

We deduce the following salient points from the record:

1. No witness testified in court that he/she ever heard the decedent refer to J. C. as his son or that they ever heard J. C. refer to the decedent as his father, not even the plaintiff and her sister. There is such a reference in the excerpt from the deposition of Milton Godfrey which was admitted without objection. No one has referred to Mr. Godfrey’s deposition testimony in connection with this appeal.

2. None of the decedent's siblings specifically stated that they had the same parents as the decedent. Jerome, Dwayne, Gerald, P. J. and Dwayne Page all testified that their parents were Dorothy and P. J. Page. Yolanda referred to the decedent as her brother in her testimony, but did not state who either her parents were or who the decedent's parents were. She did not specify who her siblings were. However, we must give to words their normal meaning unless there is a reason to do otherwise. When a person refers to someone as her brother or sister it is normally assumed that they mean full brother or sister until it is shown otherwise. The record contains nothing explicit or implicit from which it can be inferred that the Page siblings are not full siblings, with the admitted exception of Lloyd Knight.

3. The decedent's death certificate dated June 12, 1997, shows the date of death to be June 10, 1997, and the date of birth to be February 13, 1969. It lists P. J. Page (obviously the decedent's brother and not his father of the same name) as the "Informant" and designates P. J. Page and Dorothy Page as the parents of the decedent. The authenticity of this certificate is not challenged.

4. The birth certificates of Gerald, P. J., Jr., Dwayne, Jerome and Yolanda Page all show that they had the same parents, Dorothy Knight and P. J. Page. The authenticity of these certificates is not challenged. The birth certificate

of the decedent was not offered into evidence.

5. Lloyd Knight's birth certificate lists Dorothy Knight as his mother, but no father is named. It is undisputed that he is only the half sibling of the deceased through their common mother, Dorothy and that his father was not the same father as the Page siblings, P. J. Page. No attempt was made to conceal this fact. In fact, counsel for the Page siblings introduced Lloyd Knight's birth certificate showing no father listed just before Mr. Knight started testifying and established Lloyd's different parentage with his first question on direct examination as discussed earlier in this opinion.

This case highlights the fine distinction in the law between: (1) the burdens of proof required in filiation cases involving living versus deceased defendants; (2) the fine distinction between the degree of certainty with which DNA testing can establish the possibility of parentage versus excluding the possibility of parentage; (3) and the fine distinction between the weight to be accorded to the contents of official birth and death certificates when offered as proof of paternity in a paternity dispute **against** someone who did not sign the certificate or the estate of such a person, such as would be the case in this litigation had J. C.'s mother listed the decedent as J. C.'s father on J. C.'s birth certificate, versus the weight to be afforded such documents when offered by parties whose parentage is not directly at

issue, such as the Page siblings. The answers to these questions lead to the answer to the ultimate question to be decided in this case: Did the plaintiff's prove their case by "clear and convincing evidence" as required by La.C.C.P. art. 209?

La. R.S. 40:42A provides:

Except for delayed or altered certificates, **every original certificate on file in the vital records registry is prima facie evidence of the facts therein stated.** The names of parents as entered on birth and death records shall not be deemed to be prima facie evidence of the existence of a marriage between said parents.

La. R.S. 2821 states in pertinent part:

The deceased's death, his marriage, and all other facts necessary to establish the relationship of his heirs may be evidenced either by official certificates issued by the proper public officer or by affidavit.

Official Revision Comment (b) under La. R.S. 2821 states in pertinent part:

Certificates of birth, death, and marriage issued by the proper public official afford the most reliable proof of the facts recited.

These statutes and comments support the contention of the Page siblings that the contents of the birth and death certificates which they introduced and whose authenticity is uncontested, should be presumed to be

correct until shown otherwise. In other words, these certificates are prima facie proof of their contents, shifting the burden of proof to the party contesting the facts shown on the face of these certificates to offer proof to the contrary. In the instant case, the plaintiff offered no proof to contradict the contents of the certificates offered by the Page siblings.

In *Taboni ex rel. Taboni v. Estate of Longo*, 00-1043, p. 4 (La.App. 4 Cir. 5/16/01), 803 So.2d 55, 56, *reversed on other grounds*, 01-2107 (La. 2/22/02), 810 So.2d 1142, a case in which the defendants had the plaintiff's first suit dismissed alleging that the plaintiff's father and not the plaintiff was the owner of certain property, this Court afforded *prima facie* weight to such documents:

Plaintiff then filed a second suit setting forth the same basic allegations as her first petition and attached to this petition the following documents: the marriage license of plaintiff's parents; the birth certificates of plaintiff and her brother; and finally, the death certificates of plaintiff's father, mother and brother. The district court again dismissed plaintiff's suit on the basis of defendant's exception of no right of action, but the appellate court reversed, finding:

Plaintiff's petition, *with attached documents* [emphasis original], is prima facie evidence of her right to inherit an interest in the property and the right to bring the instant action.

Id.

Taboni is to be distinguished from *Succession of Cobb*, 96-1249 (La.App. 1 Cir. 10/14/97), 710 So.2d 251, and *Succession of Brown*, 522 So.2d 1382 (La.App. 2 Cir.1988), which state that the naming of someone as an illegitimate child's father by others on a birth certificate would not constitute prima facie evidence of the father's identity in a paternity dispute and would not suffice as a formal acknowledgement or declaration of paternity by the father under La. C.C. art. 203. What this means is that had B. C. listed George Page on J. C.'s birth certificate, it would not have constituted prima facie evidence that Goerge Page was J. C.'s father in this paternity dispute. This is distinguishable from the instant case where there has been no pleading filed or proof offered challenging the identity of George Page's parents or that of his siblings. The only reasonable inference to be drawn from the record is that they are all full siblings, with the exception of Lloyd Knight, as established directly on the face of the birth and death certificates and directly and by reasonable inference from the testimony in the record. As regards the parentage of the deceased and his siblings, the certificates of undisputed authenticity must be accepted as prima facie evidence. *Thomas v. Smith*, 463 So.2d 971, 976 (La.App. 3 Cir. 1985), puts it even more strongly:

A listing of paternity on a birth certificate is prima facie proof of such paternity. La.R.S. 40:42.

The *Thomas* court then went on to explain:

It must be remembered that the listing of paternity on a birth certificate is only rebuttable prima facie evidence.

Id.

Therefore, we agree with the Page siblings that they established a *prima facie* case consistent with what is shown on the birth and death certificates, thereby shifting the burden to the plaintiff to prove otherwise, which burden the plaintiff failed to carry.

The plaintiff cites *State in the interest of Gray v. Hogan*, 613 So.2d 681 (La.App. 5 Cir.1993) in support of the proposition that the trial court in the instant case had the discretion to disregard scientific evidence even where it proves paternity to a statistical certainty of 99.99%:

A petitioner's burden of proof in a paternity action is by a **preponderance of the evidence**. Scientific testing alone is not sufficient to prove paternity, but it is persuasive and objective proof that can help establish paternity. . . . [Emphasis added.]

The Fifth Circuit in *Hogan* felt that because of the conflicting testimony of the mother and the alleged father, the trial court acted within its broad discretion in evaluating the credibility of witnesses when deciding that the State had failed to meet its burden of proof in establishing that the alleged father was the biological father, in spite of uncontested scientific

evidence showing that there was a 99.99% probability that the alleged father was the biological father.

Hogan does not apply to the instant case. The burden of proof in the instant case is not the “preponderance of the evidence” referred to in *Hogan*. Instead, even the plaintiff concedes that the “clear and convincing” standard referred to by the trial judge in the instant case in her reasons for judgment and by La. C.C. art. 209B is the applicable standard because the alleged father in the instant case is deceased, while the alleged father in *Hogan* was alive and a party to the proceedings. Where the alleged father is still alive, La. C.C. art. 209A applies and the burden of proof is the lesser “preponderance of the evidence” standard.

Additionally, the scientific evidence in *Hogan* sought to establish paternity, while the scientific evidence in the instant case excludes paternity. This is an important distinction under La. R.S. 9:397.3D which mandates that:

If the court finds that the conclusions of all the experts as disclosed by the reports, based upon the tests, are that the alleged father is not the father of the child, the question of paternity shall be resolved accordingly. If the experts disagree in their findings or conclusions, the question shall be submitted upon all the evidence. [Emphasis added.]

In the instant case the expert DNA evidence is undisputed. It

conclusively excludes the decedent as J. C.'s father, assuming that the decedent and his siblings, other than Lloyd Knight, were full siblings. To put it another way, assuming that the decedent and his brothers and sisters (other than Lloyd Knight) were full siblings, as argued by the Page siblings, the trial court had no discretion to rule in favor of the plaintiffs as it did. However, La. R.S. 9:397.3D is found under "Part I-A. Blood or Tissue Sampling For Determination of Paternity", La. 9:396 et. seq., the language of which is clearly intended to apply to the testing of living parents and children and, therefore, is not necessarily binding on the courts in situations such as exist in the instant case where the purported father is deceased and the tests were conducted upon his purported siblings. *Sudwischer v. Estate of Hoffpauir*, 589 So.2d 474, 474-475 (La.1991). This somewhat subtle distinction is analogous to the distinction noted earlier in this opinion between La. C.C. art. 209A and 209B. For this reason, the decision in *Touzet v. Mobley*, 612 So.2d 890 (La.App. 5 Cir.1993), which held that an exclusion of paternity pursuant to scientific blood tests is conclusive under La.R.S. 9:397D is distinguishable from the instant case because all parties in *Touzet* were still living.

Regardless of whether a close reading of La. R.S. 9:397.3D would be literally applicable to the instant case, at the very least it represents implicit

legislative recognition of the principle to which Dr. Sinha testified: That while it is possible to determine paternity to only a high degree of probability, it is possible to exclude it absolutely. The accuracy and infallibility of the DNA test is remarkable. *Id.*, 589 So.2d at 475. Such tests have only become more accurate and infallible since *Sudwischer* was rendered over twelve years ago.

Accordingly, we find that where there is uncontested DNA evidence excluding a decedent as a possible father of an illegitimate child who was never formally acknowledged, then the party opposed to that result may not, as a matter of law, prove the contrary by clear and convincing evidence. In other words, such uncontested conclusive DNA evidence excluding paternity has been recognized as being so reliable that it creates a level of doubt of paternity that cannot be “clearly and convincingly” overcome by non-scientific documents and lay testimony. The “clear and convincing” standard requires a party to persuade the trier of fact that the fact sought to be proved is highly probable, i.e., much more probable than its non-existence. *Chatelain v. State through the Department of Transportation and Development*, 586 So.2d 1373, 1378 (La.1991).

This standard is usually employed "where there is thought to be special danger of deception, or where the court considers that the particular type of claim should be disfavored on policy grounds."
McCormick on Evidence, Section 340(b), p. 798

(2nd ed. 1972).

Succession of Lyons, 452 So.2d 1161, 1165 (La.1984).

In other words, by requiring “clear and convincing evidence”, La. C.C. art. 209B implies a certain skepticism concerning claims of filiation brought against a deceased individual, a skepticism borne out by the DNA tests conducted in the instant case.

Informal acknowledgment must be continuous, habitual, unequivocal and leave little doubt that the alleged father considered himself to be the father of the child. *Jordan v. Taylor*, 568 So.2d 1097 (La.App. 4 Cir.1990).

The testimony of the purported siblings along with the unchallenged certified copies of the birth and death certificates is sufficient to shift the burden to plaintiffs to show that the siblings were not the full siblings of the deceased. Although one sibling, Lloyd Knight, admitted that he was only a half sibling, that admission has no bearing on the relationship of the other siblings. Knight admitted to being a half sibling and nothing on his birth certificate or in his testimony is inconsistent with that admission by him. There are no documents or testimony in the record tending to show directly or by implication that the Page siblings were not the full siblings of the decedent. Therefore, the plaintiffs failed to carry their burden of proof on that issue. Accordingly, we must assume that the Page siblings were the full

siblings of the decedent, which in turn means that according to the uncontested DNA evidence, the decedent is 100% excluded as a possible father of the boy, J. C.

Having disposed of the case based on the reasoning expressed above we do not reach the many objections raised by the Page siblings concerning the documentary evidence offered by the plaintiff in support of her case, other than to say that plaintiff's documentary evidence is far from unequivocal, and even were we to ignore all of the Page siblings objections to those documents, they and the testimony of the plaintiff's witnesses combined fall far short of establishing a clear and convincing case for the plaintiff in the face of the DNA evidence.

For the foregoing reasons, the judgment of the trial court is reversed and the plaintiff's claim for filiation is hereby dismissed with prejudice.

REVERSED