Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinion(s) handed down on the **28th day of May, 2020** are as follows:

BY Johnson, C.J.:

2019-KK-00962 IN RE: GRAND JURY SUBPOENA (Parish of West Feliciana)

We granted this writ application to determine whether the spousal witness privilege set forth in Louisiana Code of Evidence Article 505 can be invoked in a grand jury proceeding investigating a violation of La. R.S. 14:81.2(A), molestation of a juvenile. Because the grand jury proceeding involves an allegation and investigation of sexual abuse of a child, we find the spousal witness privilege is abrogated by La. R.S. 14:403(B). Therefore we reverse the ruling of the district court which found the spousal privilege applied.

REVERSED.

Retired Judge James H. Boddie Jr. appointed Justice ad hoc, sitting for Clark J.

Retired Judge Jimmie Peters appointed Justice ad hoc, sitting for Crain, J., recused.

05/28/20

SUPREME COURT OF LOUISIANA

No. 2019-KK-00962

IN RE: GRAND JURY SUBPOENA

ON SUPERVISORY WRIT TO THE 20TH JUDICIAL DISTRICT COURT, PARISH OF WEST FELICIANA

JOHNSON, Chief Justice[*]

We granted this writ application to determine whether the spousal witness privilege set forth in Louisiana Code of Evidence Article 505 can be invoked in a grand jury proceeding investigating a violation of La. R.S. 14:81.2(A), molestation of a juvenile. Because the grand jury proceeding involves an allegation and investigation of sexual abuse of a child, we find the spousal witness privilege is abrogated by La. R.S. 14:403(B). Therefore we reverse the ruling of the district court which found the spousal privilege applied.

FACTS AND PROCEDURAL HISTORY

On January 30, 2018, the target of the grand jury investigation was charged by Bill of Information with one count of molestation of a juvenile, a violation of La. R.S. 14:81.2, arising from an incident in 2003 in which he allegedly molested his children's babysitter. The target was subsequently arrested and pled not guilty. Following the District Attorney's voluntary recusal, the Attorney General stepped in as District Attorney ad hoc and dismissed the charges, choosing to proceed by seeking a grand jury indictment. In conjunction with the grand jury proceeding, the state issued a subpoena to Jane Opperman, the target's wife, to appear before the grand jury. Mrs. Opperman filed an "Affidavit of Spouse" wherein she asserted "her

[*]Retired Judge James H. Boddie Jr. appointed Justice ad hoc, sitting for Clark J., and retired Judge Jimmie Peters appointed Justice ad hoc, sitting for Crain, J., recused.

lawful privilege to refuse to give evidence in any criminal proceeding against her husband, pursuant to Louisiana Code of Evidence article 505."[1] The state subsequently filed a "Motion to Determine Applicability of Spousal Privileges," arguing the privilege does not apply when a spouse is charged with a crime against the person of a child. The state further relied on La. R.S. 14:403(B),[2] asserting that evidence cannot be excluded based on privilege in any proceeding concerning the sexual abuse of a child. Following a hearing, the district court found the spousal privilege applied. The district court reasoned that because the target had not been "charged," the spousal privilege in Article 505 was applicable, and although La. R.S. 14:403(B) referenced "proceeding" with no requirement that the target be "charged," the court found the two statutes unclear and therefore found the privilege applied. The court of appeal denied the state's writ application without reasons. *In re Grand Jury Subpoena*, 19-0297 (La. App. 1 Cir. 5/13/19) (unpublished). The state filed an application in this court, which we granted. *In re Grand Jury Subpoena*, 19-00962 (La. 10/21/19), 280 So. 3d 1159.

DISCUSSION

As a preliminary matter we address Mrs. Opperman's argument that there is no justiciable issue to review. According to Mrs. Opperman, the grand jury proceeding was canceled by the state on the day she was subpoenaed to appear, and she has never

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[1] La. C.E. art. 505 states: "**In a criminal case** or in commitment or interdiction proceedings, a witness spouse has a privilege not to testify against the other spouse. This privilege terminates upon the annulment of the marriage, legal separation, or divorce of the spouses. This privilege does not apply in a criminal case in which one spouse **is charged with** a crime against the person of the other spouse or a crime against the person of a child including but not limited to the violation of a preliminary or permanent injunction or protective order and violations of R.S. 14:79." (Emphasis added).

[2] La. R.S. 14:403(B) states: "**In any proceeding** concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, evidence may not be excluded on any ground of privilege, except in the case of communications between an attorney and his client or between a priest, rabbi, duly ordained minister or Christian Science practitioner and his communicant." (Emphasis added).

been served with a subsequent subpoena to appear before another grand jury meeting. Thus, because she is not currently under a valid subpoena to appear, the issues in the writ application are not ripe for review. We find no merit to this argument.

It is well settled that courts will not decide abstract, hypothetical or moot controversies, or render advisory opinions with respect to such controversies. In order to avoid deciding abstract, hypothetical or moot questions, courts require cases submitted for adjudication to be justiciable, ripe for decision, and not brought prematurely. *Cat's Meow, Inc. v. City of New Orleans Through Dep't of Fin.*, 98-0601 (La. 10/20/98), 720 So. 2d 1186, 1193. In *Abbott v. Parker*, this Court explained:

> A "justiciable controversy" connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of conclusive character. Further, the plaintiff should have a legally protectable and tangible interest at stake, and the dispute presented should be of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

259 La. 279, 308, 249 So. 2d 908, 918 (1971). In response to Mrs. Opperman's written assertion of spousal privilege filed via affidavit, the state filed a motion asking the district court to determine the applicability of that privilege. The district court held a hearing and issued a ruling finding the spousal privilege applicable to the grand jury proceeding. The state is now asking this court to reverse that ruling. Based on these facts, we find the issues in the state's writ application are properly subject to review. Our decision will determine whether Mrs. Opperman can be compelled to testify before the grand jury, affecting the manner in which this or a subsequent grand jury inquiry in this matter is conducted.

We now move on to address the legal issue before this court. Specifically, we

must determine whether Mrs. Opperman is entitled to assert the spousal witness privilege in the grand jury proceeding targeting her husband, when that proceeding involves an investigation related to molestation of a juvenile. Our decision hinges on the proper interpretation and application of La. C.E. art. 505 and La. R.S. 14:403(B). Questions of law are reviewed *de novo*, with the judgment rendered on the record, without deference to the legal conclusions of the tribunals below. *Smith v. Citadel Ins. Co.*, 19-0052 (La. 10/22/19), 285 So. 3d 1062, 1066-67. This court has set forth guidelines for statutory construction and interpretation:

> The function of statutory interpretation and the construction given to legislative acts rests with the judicial branch of the government. The rules of statutory construction are designed to ascertain and enforce the intent of the Legislature. Legislation is the solemn expression of legislative will, and, thus, the interpretation of legislation is primarily the search for the legislative intent. We have often noted the paramount consideration in statutory interpretation is ascertainment of the legislative intent and the reason or reasons which prompted the Legislature to enact the law. The starting point in the interpretation of any statute is the language of the statute itself. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the Legislature. However, when the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law. Moreover, when the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur, and the text of the law as a whole. Further, the Legislature is presumed to act with full knowledge of well-settled principles of statutory construction.

Catahoula Par. Sch. Bd. v. Louisiana Mach. Rentals, LLC, 12-2504 (La. 10/15/13), 124 So. 3d 1065, 1073. With these principles in mind, after examining the relevant statutes, reviewing the law, and considering the arguments of the parties, we hold the clear and unambiguous provisions of La. R.S. 14:403(B) prohibit Mrs. Opperman from asserting the spousal witness privilege in a grand jury proceeding targeting her husband for a violation of La. R.S. 14:81.2(A).

Louisiana allows for two distinct spousal privileges–the spousal confidential

communications privilege set forth in La. C.E. art. 504 and the spousal witness privilege set forth in La. C.E. art. 505. These spousal privileges are created by statute and are not constitutional rights. *See State v. Day*, 400 So. 2d 622, 624-25 (La. 1981); *State v. Bennett*, 357 So. 2d 1136, 1141 (La. 1978). Article 504 provides in relevant part:

> B. Confidential communications privilege. Each spouse has a privilege during and after the marriage to refuse to disclose, and to prevent the other spouse from disclosing, confidential communications with the other spouse while they were husband and wife.
>
> C. Confidential communications; exceptions. This privilege does not apply:
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> (1) In a criminal case in which one spouse is charged with a crime against the person or property of the other spouse or of a child of either.
> (2) In a civil case brought by or on behalf of one spouse against the other spouse.
> (3) In commitment or interdiction proceedings as to either spouse.
> (4) When the communication is offered to protect or vindicate the rights of a minor child of either spouse.
> (5) In cases otherwise provided by legislation.

The spousal witness privilege is set forth in Article 505:

> **In a criminal case** or in commitment or interdiction proceedings, a witness spouse has a privilege not to testify against the other spouse. This privilege terminates upon the annulment of the marriage, legal separation, or divorce of the spouses. This privilege does not apply in a criminal case in which one spouse **is charged with** a crime against the person of the other spouse or a crime against the person of a child including but not limited to the violation of a preliminary or permanent injunction or protective order and violations of R.S. 14:79. (Emphasis added).

This court has explained:

> The first of these is the privilege which attaches to private conversations between husband and wife and which may be asserted by the defendant-spouse. Secondly, the statute establishes a privilege in favor of a spouse called to testify against the other spouse by providing that neither spouse shall be compelled to be a witness against the other in a criminal proceeding. The exercise of this privilege rests with the testifying spouse alone and may not be invoked by the defendant-spouse.

State v. Taylor, 94-0696 (La. 9/6/94), 642 So. 2d 160, 164 (quoting *State v. Bennett*, 357 So. 2d 1136, 1139-40 (La. 1978)).[3] In this case, Mrs. Opperman asserted the spousal witness privilege set forth in Article 505.

The state argues the Article 505 privilege is inapplicable because it only applies in a "criminal case," and a grand jury proceeding is not yet a criminal case. Therefore, the district court erred in finding Article 505 provides a spousal privilege applicable to grand jury proceedings. The state also notes that once there is an indictment, the spousal privilege contained in this article has an explicit exception for criminal cases in which one spouse is charged with a crime against the person of a child. Thus, if this court finds a grand jury proceeding is a criminal case, then the exception would apply.

By contrast, Mrs. Opperman takes the position that the "criminal case" language in Article 505 includes grand jury proceedings, and thus she can invoke the spousal privilege to refuse to testify before the grand jury. Further, because her husband has not been "charged with" a crime, Mrs. Opperman argues the exception under Article 505 does not apply.

The question of whether the spousal witness privilege in Article 505 is applicable in grand jury proceedings is directly addressed in La. C.E. art. 1101, which states in relevant part:

> A. Proceedings generally; rule of privilege
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> (1) Except as otherwise provided by legislation, the provisions of this Code shall be applicable to the determination of questions of fact in all contradictory judicial proceedings and in proceedings to confirm a default judgment. Juvenile adjudication hearings in non-delinquency proceedings shall be governed by the provisions of this Code applicable to civil cases. Juvenile adjudication hearings in delinquency proceedings shall be governed by the provisions of this Code applicable in criminal

[3] Referencing former La. R.S. 15:461, where both privileges were contained before being moved to the Code of Evidence.

cases.

> (2) Furthermore, except as otherwise provided by legislation, **Chapter 5 of this Code with respect to testimonial privileges applies to all stages of all actions, cases, and proceedings where there is power to subpoena witnesses, including** administrative, juvenile, legislative, military courts-martial, **grand jury**, arbitration, medical review panel, and judicial **proceedings**, and the proceedings enumerated in Paragraphs B and C of this Article.

Article 1101(C)(6) further provides that "**[e]xcept as otherwise provided by Article 1101(A)(2)** and other legislation, the provisions of this code shall not apply to: . . . (6) Proceedings before grand juries except as provided by Code of Criminal Procedure Article 442." (Emphasis added). Based on the explicit wording of Article 1101, there can be no question that the "in a criminal case" language in Article 505 does not prohibit application of the spousal witness privilege in grand jury proceedings. Specifically, the legislature indicated its intent that the testimonial privileges in Chapter 5 of the Code of Evidence should be applied broadly to all stages of any case or proceeding where there is the power to subpoena, including grand jury proceedings.

However, although the spousal witness privilege is generally applicable in grand jury proceedings, we also find La. R.S. 14:403(B) abrogates any available privilege under Article 505 in this case.[4] La. R.S. 14:403(B) states:

> **In any proceeding** concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, evidence may not be excluded on any ground of privilege, except in the case of communications between an attorney and his client or between a priest, rabbi, duly ordained minister or Christian Science practitioner and his communicant. (Emphasis added).

Mrs. Opperman argues the provision in La. R.S. 14:403(B) cannot be read in isolation and should not be extended to this context. According to Mrs. Opperman, La. R.S.

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[4] Because we find application of La. R.S. 14:403(B) resolves the issue before this court, we pretermit discussion regarding whether the exception set forth in La. C.E. art. 505 is applicable in this case.

14:403 addresses the obligations of statutory mandatory reporters to report child abuse and provides penalties for failure to do so.[5] She asserts the intent of the statute is to abrogate the privilege in cases where reports of child abuse are mandated. Because she was not a "mandatory reporter" relative to the alleged molestation in this case,[6] Mrs. Opperman argues this exception to the spousal privilege would not apply.

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[5] La. R.S. 14:403 provides in its entirety:

A. (1)(a) Any person who, pursuant to Children's Code Article 609(A), is required to report the abuse or neglect of a child and knowingly and willfully fails to so report shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both.
(b)(I) Any person who, pursuant to Children's Code Article 609(A), is required to report the sexual abuse of a child, or the abuse or neglect of a child that results in the serious bodily injury, neurological impairment, or death of the child, and the person knowingly and willfully fails to so report, shall be fined not more than three thousand dollars, imprisoned, with or without hard labor, for not more than three years, or both.
(ii) Repealed by Acts 2019, No. 2, § 3.

(2) Any person, any employee of a local child protection unit of the Department of Children and Family Services, any employee of any local law enforcement agency, any employee or agent of any state department, or any school employee who knowingly and willfully violates the provisions of Chapter 5 of Title VI of the Children's Code, or who knowingly and willfully obstructs the procedures for receiving and investigating reports of child abuse or neglect or sexual abuse, or who discloses without authorization confidential information about or contained within such reports shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both.

(3) Any person who reports a child as abused or neglected or sexually abused to the department or to any law enforcement agency, knowing that such information is false, shall be fined not more than five hundred dollars or imprisoned for not more than six months, or both.

(4)(a) Notwithstanding the provisions of Paragraph (1) of this Subsection, any person who is eighteen years of age or older who witnesses the sexual abuse of a child and knowingly and willfully fails to report the sexual abuse to law enforcement or to the Department of Children and Family Services as required by Children's Code Article 610, shall be fined not more than ten thousand dollars, imprisoned with or without hard labor for not more than five years, or both.
(b) For purposes of this Paragraph, "sexual abuse" shall include but is not limited to the perpetration or attempted perpetration of R.S. 14:41, 42, 42.1, 43, 43.1, 43.2, 43.3, 43.4, 46.2, 46.3, 80, 81, 81.1, 81.2, 86, 89, or 89.1.

B. In any proceeding concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, evidence may not be excluded on any ground of privilege, except in the case of communications between an attorney and his client or between a priest, rabbi, duly ordained minister or Christian Science practitioner and his communicant.

[6] La. Ch. C. art. 603 generally identifies mandatory reporters as: health practitioners; mental health/social service practitioners; members of the clergy; teaching or child care providers; police officers or law enforcement officials; commercial film and photographic print processors; certain mediators; certain parenting coordinators; court-appointed special advocates (CASA) volunteers; organizational or youth activity providers; and school coaches.

We disagree with Mrs. Opperman's position and decline to read La. R.S. 14:403(B) so narrowly. Nothing in the language of the statute limits its application to cases involving mandatory reporters. The term "in any proceeding" is expansive and certainly encompasses a grand jury proceeding. There is no indication the legislature intended the broad language of La. R.S. 14:403(B) to exclude from its purview this grand jury proceeding directly involving "the abuse or neglect or sexual abuse of a child," and we find no justification for limiting the application of the exception to those instances in which there is a mandatory reporter. Had the legislature intended such a narrow application, it could have easily limited the scope of the statute with a different choice of words. *See Moss v. State*, 05-1963 (La. 4/4/06), 925 So. 2d 1185, 1198. Notably, when La. R.S. 14:403 was originally enacted in 1964, the statutory language was not as broad and did provide a limitation on the abrogation of privilege. The original statute provided for mandatory reports by physicians suspecting child abuse, and further stated: "Neither the physician-patient privilege nor the husband-wife privilege shall be a ground for excluding evidence regarding a child's injuries or the cause thereof **in any judicial proceeding resulting from a report pursuant to this Act**." (Emphasis added). *See* La. Acts 1964, No. 116 §§ 1 to 5. In 1972, the legislature amended the statute wherein this limiting language was removed. The provision was rewritten to read: "Any privilege between husband and wife, or between any professional person and his client, such as physicians, and ministers, with the exception of the attorney and his client shall not be grounds for excluding evidence **at any proceeding regarding the abuse or neglect of the child or the cause thereof**." (Emphasis added). *See* La. Acts 1972, No. 556, §1. If the legislature specifically intended to restrict the abrogation of the privilege as suggested by Mrs. Opperman, it would have left in, or reinserted, the original language limiting

it to a "judicial proceeding resulting from a report pursuant to this Act." Instead, the current language is all inclusive–applicable to *any* proceeding and not limited to judicial proceedings involving mandatory reporters. *See SWAT 24 Shreveport Bossier, Inc. v. Bond*, 00-1695 (La. 6/29/01), 808 So. 2d 294, 305 ("Where a new statute is worded differently from the preceding statute, the legislature is presumed to have intended to change the law.")

We also reject Mrs. Opperman's suggestion that this court's decision in *State v. Bellard*, 533 So. 2d 961 (La. 1988) held that the abrogation of privilege in La. R.S. 14:403(B) is limited to cases where reports are mandated. Mrs. Opperman's argument is based on one sentence in *Bellard* that is taken out of context and interpreted in a manner inconsistent with our holding in that case. *Bellard* did not address the spousal privilege, and instead considered the physician-patient privilege in a case involving the sexual abuse of a child committed by the child's uncle who lived in the same household. In considering application of the waiver of privilege, then set forth in La. R.S. 14:403(F), this court rejected the defendant's argument that the exception did not apply to criminal proceedings, and even if it did, he did not fit within the class of persons whose privilege is suspended. Former La. R.S. 14:403(F) provided: "Any privilege between husband and wife, or between any professional person and his client, such as physicians, and ministers, with the exception of the attorney and his client, shall not be grounds for excluding evidence at any proceeding regarding the abuse or neglect of the child or cause thereof." In finding the waiver of privilege applied to the criminal proceeding, this court read the language broadly and reasoned that the proceeding at issue clearly dealt with the "cause of" the abuse of the child victim. *Bellard*, 533 So. 2d at 965.

We noted in *Bellard* that La. R.S. 14:403(F) revealed "a broad legislative intent

to decrease privileges for perpetrators of child abuse and to increase protection for victims of such abuse." *Id*. at 964. Within the opinion, this court did state, as pointed out by Mrs. Opperman: "By providing for waiver of privilege within the context of the child abuse reporting statute, we believe the legislature intended to abrogate the privilege in cases where reports are mandated." *Id.* at 966. However, that statement was not intended to be a general holding restricting the abrogation of the privilege. Rather, the statement explained this court's expansive application of former La. R.S. 14:403(F). Defendant argued the statute was meant to protect children who may be threatened by the conduct of those "responsible for their care" by providing for mandatory reporting by any person who believes that such case exists, and because he did not have a legal or contractual responsibility for the child, a report of abuse was not required and he could not be "reached by the waiver." *Id*. This court rejected defendant's argument, noting he could reasonably be found to be responsible for the child's care based on the record, and held La. R.S. 14:403(F) "would apply in proceedings where the defense of privilege is raised by a person 'responsible for the child's care.'" *Id*. at 966. We applied the provision in former La. R.S. 14:403(F) broadly: "Keeping in mind the admonition of the legislature that R.S. 14:403 'be administered and interpreted to provide the greatest possible protection' for victims of child abuse, we find the waiver provision in R.S. 14:403(F) applicable to the facts in this case." *Id*. Thus, we do not find that one sentence in *Bellard* has any binding effect on our decision today. As we did in *Bellard*, we apply the provision broadly in this case, recognizing the underlying purpose of the statute is the protection of children. We hold La. R.S. 14:403(B) statutorily waives the spousal witness privilege in *any* proceeding where the evidence sought relates to "abuse or neglect or sexual abuse of a child."

CONCLUSION

Because the spousal witness privilege was created solely by the legislature, it can also be modified or withdrawn. *See Bellard*, 533 So. 2d at 965 (citing *State v. Smith*, 489 So. 2d 255 (La. App. 5th Cir. 1986) and *State v. Fuller*, 454 So. 2d 119 (La. 1984)). The legislature has provided for such abrogation in La. R.S. 14:403(B). Based on the facts of this case, we hold that under La. R.S. 14:403(B), Mrs. Opperman is not entitled to assert the spousal witness privilege at a grand jury proceeding targeting her husband.

DECREE

REVERSED.