Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **11th day of December, 2020** are as follows:

BY Boddie, J.:

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

VACATED IN PART; AFFIRMED IN PART; AND REMANDED. SEE OPINION.

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

Johnson, C.J., additionally concurs and assigns reasons.
Weimer, J., dissents and assigns reasons.
Crichton, J., dissents and assigns reason.
Crain, J., dissents for the reasons assigned by Justice Weimer.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-CA-0313

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS

VS.

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

C/W

DAVID WATTS

VS.

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

C/W

SHEILA SMITH

VS.

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

C/W

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

VS.

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

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

BODDIE, Justice *ad hoc*[*]

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

This is a direct appeal by defendant, Gemini Insurance Company, from a judgment of the district court holding La. C.C. arts. 2315.1, 2315.2 and 199 "unconstitutional as applied to children given in adoption" and overruling the defendants' peremptory exceptions of no right of action.[1] At issue is whether the plaintiffs, Daniel Goins and David Watts, two adult children who were given in adoption as minors, have a right to bring wrongful death and survival actions stemming from the deaths of their biological father and his two minor children, who were not given in adoption and are the plaintiffs' biological half-siblings. After a *de novo* review, based on the clear and unambiguous wording of La. C.C. arts. 2315.1 and 2315.2, we conclude that Daniel Goins and David Watts, biological children given in adoption, are "children of the deceased" and "brothers of the deceased" who are permitted to bring wrongful death and survival actions arising from the death of their biological father and half-siblings. In view of our holding that the plaintiffs have a right to assert survival and wrongful death actions, we need not address their argument that La. C.C. arts. 2315.1, 2315.2 and 199 are unconstitutional as applied to children given in adoption.

FACTS AND PROCEDURAL HISTORY

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

[1] Review in this court, in the first instance, is proper. Construing the district court's ruling as striking down La. C.C. arts. 2315.1, 2315.2, and 199 as unconstitutional, this court has direct review via the appellate jurisdiction conferred in La. Const. art. V, § 5(D) ("a case shall be appealable to the supreme court if (1) a law or ordinance has been declared unconstitutional … ."). This court has supervisory authority over all other Louisiana courts pursuant to La. Const. art. V, § 5(A) ("The supreme court has general supervisory jurisdiction over all other courts."). Furthermore, as recognized in La. Sup. Ct. Rule X, § 5(b)(b), an application for direct review to this court is allowed.

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

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

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

[2] The district court further determined that George and Vera Cheyanne, the minor children killed in the accident, had been abandoned by their mother, Brandie Hardie. According to the district court, pursuant to La. C.C. arts. 2315.1(E) and 2315.2(E), the determination that the mother abandoned her minor children paved the way for others to recover for the death of the children. *Id*.

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

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

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

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

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

LAW AND DISCUSSION

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

Regarding the interpretation of laws, the Louisiana Civil Code provides "[w]hen a law is clear and unambiguous and its application does not lead to absurd

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

consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature." La. C.C. art. 9. "The words of a law must be given their *generally prevailing meaning*." La. C.C. art. 11 (emphasis added). "Laws on the same subject matter must be interpreted in reference to each other." La. C.C. art. 13.

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

> A. If a person who has been injured by an offense or quasi offense dies, the right to recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:
>
> (1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.
>
> (2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.
>
> (3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.
>
> (4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.
>
> B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.
>
> C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.
>
> D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.
>
> E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him.

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

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

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

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

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

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

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

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

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

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

Louisiana C.C. art. 2315.1 provides that rights of action or instituted actions for injuries suffered by a person who eventually dies from those injuries do not abate with death but survive in favor of designated persons. In addition, La. C.C. art. 2315.2 creates an action for damages suffered by certain designated survivors for the wrongfully caused death of another. Although clearly separate and distinct causes of action, both the wrongful death and the survival actions are statutorily created tort remedies, expressly conferred upon an exclusive list of beneficiaries. The list of beneficiaries provided by La. C.C. art. 2315.1 is identical to the list set forth in La. C.C. art. 2315.2, with the addition of the decedent's succession representative as party plaintiff in the absence of any of the listed beneficiaries for the survival action only. The existence of a member of the first class of beneficiaries

exclude all members of lesser classes. Thus, any member of a higher class preempts the claims of other classes of beneficiaries. *Warren v. Richard,* 296 So.2d 813 (La.1974). If there is more than one member of the first class of beneficiaries then funds derived from the survival action are divided equally among all members of the class. *Austrum v. City of Baton Rouge,* 282 So.2d 434 (La.1973).

Prior to Act 211 of 1986, the survival and wrongful death actions were covered generally by La. C.C. art. 2315. Louisiana C.C. art. 2315 was amended in 1960 to provide essentially what is now contained in La. C.C. arts. 2315.1 and 2315.2. Before the 1960 amendment to La. C.C. art. 2315, the action survived in favor of children, "including adopted children and children given in adoption." See 1948 Acts, No. 333. The 1960 amendment omitted "children given in adoption" from the list of statutory beneficiaries. See 1960 Acts, No. 30, § 1. The current statutory scheme reflects this omission.

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

At issue is the phrase "child or children of the deceased" in Paragraph (A)(1) of both La. C.C. arts. 2315.1 and 2315.2. A common, or generally prevailing meaning, of this phrase clearly would be a deceased's biological child or children. See *Jenkins v. Mangano*, 00-790, p. 3 (La. 11/28/00), 774 So. 2d 101, 103, wherein this court emphasized "that the critical requirement for classification of a person as a child under Article 2315.2 is the biological relationship between the tort victim and the child." While both La. C.C. arts. 2315.1 and 2315.2 include Paragraph (D) that expands the phrase "child or children of the deceased" to include non-biological children that the deceased adopted, these code articles contain no language that

narrows the term to exclude biological children of the deceased who were given in adoption. Both articles provide that where there is a surviving spouse and child or children, they are the first in the hierarchy of persons entitled to recover. See La. C.C. arts. 2315.1 and 2315.2. It is undisputed that Lisa Watts Stewart, the lawful wife of Mr. Stewart, and his two biological adult sons Mr. Goins and Mr. Watts, survived Mr. Stewart. Nothing in the plain language of La. C.C. arts. 2315.1 and 2315.2 suggests that if Mr. Goins and Mr. Watts were adopted by another, they would no longer be "children" or "brother" within the meaning of the two articles.

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

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

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

Louisiana C.C. arts. 2315.1 and 2315.2 contain no language that one must be filiated to the deceased to be considered a "child or children of the deceased." Rather those codal articles suggest that a deceased's biological children, as well as those who have been filiated to the deceased by adoption, are considered children of the deceased. As Judge Savoie pointed out in his dissent, "[i]f filiation were required for one to be considered a deceased's 'child' for purposes of La. Civ. Code arts. 2315.1 and 2315.2, then Paragraph (D) of those articles, which expands 'child' to

include the deceased's adopted child, would have no independent meaning." *Succession of Stewart*, 17-812 at 16, ___ So. 3d at ___ (Savoie, J., dissenting).

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

In summary, we hold that based on the clear and unambiguous language of La. C.C. arts. 2315.1 and 2315.2, Mr. Watts and Mr. Goins, the biological children given in adoption, are "children of the deceased" and "brothers of the deceased" who are permitted to bring wrongful death and survival actions arising from the deaths of their biological father and half-siblings. Thus, the district court properly overruled

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

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

the defendants' peremptory exceptions of no right of action.

DECREE

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

VACATED IN PART; AFFIRMED IN PART; AND REMANDED.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-CA-00313

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS

VS.

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

C/W

DAVID WATTS VS.
MARK GORDON, KENNETH BOONE dba BOONE TRUCKING, KEITH BOONE TRUCKING AND GEMINI INSURANCE COMPANY

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C/W

SUCCESSION OF RICHARD STEWART, JR., RAYMOND KELLY, DONNA KELLY, RICHARD STEWART, SR. AND VERA ANITA STEWART VS.
MARK ISIAH GORDON, KENNETH BOONE, KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE COMPANY

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

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

I fully agree with the majority opinion that, based on the clear and explicit wording of La. C.C. arts. 2315.1 and 2315.2, these biological children who are "children of the deceased" and "brothers of the deceased," are specifically designated as claimants permitted to bring wrongful death and survival actions arising from the deaths of their biological father and siblings. I write separately to express my opinion that any holding to the contrary would also be inconsistent with

the general constitutional principles set forth by this court in *Warren v. Richard*, 296 So. 2d 813 (La. 1974).

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

> Until the 1968 decision of the United States Supreme Court in *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, it was always understood that children, as used in Article 2315, meant legitimate children.
>
> ***
>
> In applying the Equal Protection Clause of the United States Constitution, the United States Supreme Court decided in a case where an illegitimate child was suing for damage for the wrongful death of her mother, that it is invidious to discriminate against them (illegitimate children) when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother. In this holding, striking down Louisiana's statutory scheme which had theretofore barred recovery by illegitimate children for the wrongful death of their parents, the Court has, as a constitutional proposition, apparently substituted a biological classification for the legal classification Louisiana had long observed.
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> Again in *Glona v. American Guarantee & Liability Insurance Co*., 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968), handed down on the same day as the *Levy* case, the United States Supreme Court decided that it would be a denial of equal protection to deny a mother the right to recover for the wrongful death of her child simply because the child was born out of wedlock. The opinion declared: "To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue."
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> *Weber v. Aetna Casualty & Surety Co*., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), followed four years after. There the United States Supreme Court approved a claim for workmen's compensation benefits of a dependent, unacknowledged, illegitimate child which had been denied by the Louisiana courts. In an opinion authored by Mr. Justice Powell it was held that, by relegating the unacknowledged illegitimate to a lower priority in the recovery scheme, the Louisiana Workmen's Compensation Act thereby denied him equal protection of the law. ***
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> Finally in its latest decision on the subject in *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973), the United States Supreme Court said…"[u]nder these decisions, a State may not invidiously

> discriminate against illegitimate children by denying them substantial benefits accorded children generally."

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

> However, this concept is not unique to our law. It is specifically provided that the adopted child, upon his adoption, is not divested of his right to inherit from his blood parents while at the same time he inherits from the adoptive parent. La. Civil Code art. 214.
>
> We are not unmindful of the problems a logical extension of these holdings may create, such as a child in these circumstances recovering from both fathers for support and maintenance, or, conversely, requiring the child to support both fathers in a proper case. La. Civil Code arts. 227, 229. But we are influenced in this decision by the constitutional principles announced by the United States Supreme Court to which we must adhere.

Id. at 817.

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

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

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-CA-00313

**KHRISTY GOINS RISMILLER,
TUTRIX FOR DANIEL EDWARD GOINS
VS.
GEMINI INSURANCE COMPANY,
MARK ISIAH GORDON AND KEITH BOONE TRUCKING, LLC**

C/W

**DAVID WATTS
VS.
MARK GORDON, KENNETH BOONE dba BOONE TRUCKING,
KEITH BOONE TRUCKING AND GEMINI INSURANCE COMPANY**

C/W

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

C/W

**SUCCESSION OF RICHARD STEWART, JR., RAYMOND KELLY,
DONNA KELLY, RICHARD STEWART, SR. AND
VERA ANITA STEWART
VS.
MARK ISIAH GORDON, KENNETH BOONE,
KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE
COMPANY**

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

WEIMER, J., dissenting.

Resolution of this matter requires an intricate civilian analysis of multiple provisions of the Louisiana Civil Code, coupled with an evaluation of constitutional

principles. The attorneys for the parties and the amici have done masterful work in their analysis addressing the codal provisions.

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

This court is called on to decide whether the district court correctly found a constitutional infirmity justified overruling the exceptions of no right of action. However, because of the deference accorded to legislation, which includes a presumption of its validity,[1] jurisprudence dictates that a constitutional question should not be reached if a case can be decided on other grounds. "Courts are generally reluctant to address the constitutionality of legislation unless required to do so by the case and its issues then before the court." A settled rule is "never to anticipate a question of constitutional law in advance of the necessity of deciding it." **Matherne v. Gray Ins. Co.**, 95-0975, p. 3 (La. 10/16/95), 661 So.2d 432, 434 (quoting **Communist Party of U.S. v. Subversive Activities Control Bd.**, 367 U.S. 1, 72 (1961)). Those principles are adhered to in this instance; therefore, first, it must be resolved whether, as a matter of codal law, the plaintiff children given in adoption have a right to a survival and wrongful death action for the death of their biological parent and half-siblings. Only if the statutory analysis forecloses a right of action to those plaintiffs is it proper to reach the plaintiffs' additional argument that those statutes are unconstitutional.

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

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

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

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

Codal Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The plaintiffs posit that "[t]he definition[s] of 'children'" and "of 'brothers'" under Articles 2315.1 and 2315.2 are "clear and unambiguous, and must be applied as written." The plaintiffs contend that notwithstanding that they were given in adoption to someone else by their late biological father, Mr. Stewart, that they remain "children" and "brothers" within the meaning of Articles 2315.1 and 2315.2. The defendants, who bear the burden on the exception of no right of action to demonstrate otherwise, argue that the legislature has excluded children given in adoption from the list of eligible wrongful death and survival action claimants. After a review of the language of the provisions and the legislative actions, I find the no right of action exception should be sustained. The legislature described a legal relationship of parent and child when enumerating the list of eligible claimants in Articles 2315.1 and 2315.2, and no relevant legal relationship exists pursuant to La. C.C. art. 199, which mandates that the previous "filiation between the child and his legal parent is terminated" as a legal consequence of adoption.

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

Then, in 1948, in the first of two even more significant changes germane to this case, the legislature included both "adopted children and children given in adoption" in the lists. See 1948 La. Acts 333, § 1 (emphasis added). The second major change was in 1960, when the legislature rewrote Article 2315 and defined "the words 'child', 'brother', 'sister', 'father', and 'mother'" to "include a child, brother, sister, father and mother by adoption, respectively." See 1960 La. Acts 30, § 1 (emphasis added). "Words of art and technical terms [such as 'adopted children,' 'children given in adoption,' and children 'by adoption'] must be given their technical meaning when the law involves a technical matter." La. C.C. art. 11. As of 1960, the lists of eligible claimants include children "by adoption," a term like "adopted children," which refers to children who have been added to a parental relationship–a relationship with the adoptive parents owing manifold duties to those children. See La. C.C. art. 199. In its 1960 rewrite of Article 2315, the legislature no longer included "children given in adoption," a term which refers to the transfer of children out of one parental relationship into a different and new parental relationship, in the lists of eligible claimants. See La. C.C. art.199. ("[T]he adopting parent becomes the parent of the child for all purposes" and the previous "filiation between the child and his legal parent is terminated.").

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

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

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

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

The first full clause of Article 199 provides two mirror-image concepts that bear on this case, in which the plaintiffs were adopted before Mr. Stewart's death. At the time of adoption, each of the plaintiffs' adoptive fathers became the parent "for all purposes." ***Id.*** Obviously, "for all purposes" would include the presently-claimed purpose of bringing wrongful death and survival claims and, by negative inference, would exclude the purposes of bringing claims stemming from the deaths of the

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

pre-adoption family.[3] Moreover, and dispelling any doubt as to what "for all purposes" means, the next stated concept in Article 199 is that from the time of adoption, the former "filiation between the child and his legal parent is terminated." ***Id.***

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

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

a child in adoption, the "filiation between the child and his legal parent is terminated." See La. C.C. art. 199.

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

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

In a further effort to fit the claims within the exception allowing for a right of action "as otherwise provided by law" (La. C.C. art. 199), the plaintiffs note that when Article 199 was enacted in 2009, the legislature "fail[ed] to mention Articles 2315.1 and 2315.2." According to the plaintiffs, the failure to reference Articles

2315.1 and 2315.2 at that time "is evidence that [the legislature] did not intend to affect the rights of children given in adoption to sue for the wrongful death of their legal parents."

In this line of argument, the plaintiffs are partially correct; no relevant change in the law was intended. Indeed, the comments to the 2009 enactment of Article 199 indicate: "This Article does not change the law as to the effect of an adoption." La. C.C. art. 199, cmt. (a). The comments further suggest that the list of rights that are unchanged is illustrative, not exhaustive. See La. C.C. art. 199, cmt. (b) (employing the phrase "[a]mong the exceptions" when describing the existence of certain inheritance rights, retaining "the legal relationship between a child who has been adopted and a legal parent if the legal parent is married to the adoptive parent," and allowing the legal parent an avenue to seek visitation rights.).

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

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

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

Constitutional Analysis

[4] Various lower courts have held that, because a claimant was given in adoption to another parent, the claimant had no right of action stemming from the death of a biological parent. See **Hernandez v. State, ex rel. Dept. of Transp. & Dev.**, 02-0162, 02-0163 p. 16 (La.App. 4 Cir. 10/16/02), 841 So.2d 808, 819-20; **Nelson v. Burkeen Const. Co.**, 605 So.2d 681, 683 (La.App. 2 Cir. 1992); **Domingue v. Carencro Nursing Home, Inc.**, 520 So.2d 996, 997 (La.App. 3 Cir. 1987); **Simmons v. Brooks**, 342 So.2d 236, 237 (La.App. 4 Cir. 1977). Neither the plaintiffs' text-based argument, nor their constitutional challenge discussed below, provides justification for overruling those cases. Despite this line of cases, the legislature has not acted to overrule them, which is consistent with the above discussed earlier removal of "children given in adoption" from the list of those eligible to bring survival and wrongful death actions.

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

According to the plaintiffs, the insurer's exceptions of no right of action rely on these impermissible grounds: "Articles 2315.1, 2315.2 and 199 would unconstitutionally create two classes of children, biologically indistinguishable from each other except that one class of children had been given in adoption and the other had not." Such classification, the plaintiffs argue, deprives them of federal and state constitutional rights to equal protection, due process, and open access to courts.

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

known as rational basis review, to claims that classifications based on adoptive status were unconstitutional.[5] See **Cabrera v. Attorney Gen. United States**, 921 F.3d 401, 404 (3d Cir. 2019) (regarding a claim to citizenship derived from adoptive father) (citing **Brehm v. Harris**, 619 F.2d 1016, 1020 (3d Cir. 1980) (examining denial of social security benefits to child adopted after parent's disability benefits began)); **Dent v. Sessions**, 900 F.3d 1075, 1082 (9th Cir. 2018) ("Adoptive parents are not a protected class and, therefore, rational basis review applies to that distinction as well."); **Smart v. Ashcroft**, 401 F.3d 119, 122 (2d Cir. 2005) ("There is no suggestion here that adopted children are a 'protected' class entitled to invoke heightened scrutiny."). Accordingly, the following principles further guide the concurrent federal and state law analysis for constitutionality:

> While equal protection claims may be subject to a different analysis under the federal and state guarantees, a minimal standard of review applies under both provisions where, as here, there is no fundamental right, suspect class, or enumerated characteristic alleged as the basis for discrimination. **Progressive Security Ins. Co. v. Foster**, 97-2985 (La.4/23/98), 711 So.2d 675, 685-87. Absent a "suspect class" of persons or a "fundamental right," classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the state's goals and only if no grounds can be conceived to justify them. **Frederick v. Ieyoub**, 762 So.2d at 148 (quoting **Clements v. Fashing**, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)).

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

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

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

The complaint of a lack of consent to the legal effects of their adoption is simply unequal to the enormous task of sweeping aside the legal principles that are obstacles to the plaintiffs' claims. The adoption of minors, which, as noted earlier, lies at the heart of the plaintiffs' constitutional attack, has been a part of the Civil Code for over 150 years. See **Succession of Teller**, 21 So. 265 (La. 1897) (noting "the legislature first, in 1865, and by subsequent enactments, authorized adoption"). By nature of their minority, the consent of minors is not a required factor for valid adoptions.[6] Furthermore, as it concerns the legislature's justification for limiting the

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

category of claimants in La. C.C. arts. 2315.1 and 2315.2, ample grounds have been recognized in the jurisprudence. As here, in the context of a constitutional challenge, the following observations were made to the stated limitations:

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

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

Thus, under the *de novo* application of the rational basis test, ample justification is found to uphold La. C.C. arts. 199, 2315.1, and 2315.2 against the plaintiffs' claim that those laws unconstitutionally deprive them of a right of action. In a related vein, the plaintiffs' claim that these laws deny them due process or access to the courts is unavailing. See **Miles v. Illinois Cent. Gulf R. Co.**, 389 So.2d 96, 98-99 (La.App. 4 Cir. 1980). In **Miles**, the court ruled that a deprivation of a property right sufficient to implicate due process exists "only to an injured party who 'has a cause of action.'" ***Id.*** at 98 (quoting **Burmaster v. Gravity Drainage Dist. No. 2 of**

St. Charles Par., 366 So.2d 1381, 1387 (La. 1978)). As the **Miles** court explained: "Here, appellant does not have a cause or right of action; she has no claim recognized by our law." ***Id.***, 389 So.2d at 98-99. Similarly, "Appellant has had full access to the courts. ... [S]he simply has no claim recognized by our law." ***Id.*** at 99.

Conclusion

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

The legislature's removal of "children given in adoption" from the lists of eligible claimants for wrongful death and survival actions is the clearest indicator of the legislature's intent. The legislature's former authorization of "children given in adoption" as claimants existed for significant period of time (during 1948-1960), which indicates both a realization of the reach of that language and an understanding of the consequences when the legislature chose to remove "children given in

adoption" as eligible claimants. In the years following the removal of "children given in adoption," the legislature has not expanded the lists of eligible claimants by returning "children given in adoption" to the lists presently found in La. C.C. arts. 2315.1 and 2315.2. It is not the role of this court to re-insert language into codal enactments the legislature expressly and specifically removed.

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

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

For these reasons, I very respectfully dissent.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-CA-00313

KHRISTY GOINS RISMILLER, TUTRIX FOR DANIEL EDWARD GOINS

VS.

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

C/W

DAVID WATTS VS.
MARK GORDON, KENNETH BOONE dba BOONE TRUCKING, KEITH BOONE TRUCKING AND GEMINI INSURANCE COMPANY

C/W

SHEILA SMITH VS.
GEMINI INSURANCE COMPANY, KENNETH CHAD BOONE D/B/A BOONE TRUCKING, AND MARK GORDON

C/W

SUCCESSION OF RICHARD STEWART, JR., RAYMOND KELLY, DONNA KELLY, RICHARD STEWART, SR. AND VERA ANITA STEWART VS.
MARK ISIAH GORDON, KENNETH BOONE, KEITH BOONE TRUCKING, LLC AND GEMINI INSURANCE COMPANY

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

Crichton, J., dissents and assigns reasons:

I dissent for the reasons assigned by Justice Weimer. The legislative history and *in pari materia* interpretation of C.C. arts. 199, 2315.1 and 2315.2 support the conclusion that children given in adoption do not qualify as "children" for purposes of survival and wrongful death actions. Contrary to the majority's assertion otherwise, the termination of filiation, as provided by C.C. art. 199, must be interpreted to alter whether a person is a "child" by law. C.C. art. 178 ("Filiation is the legal relationship between a child and his parent."). The terms "child" and

"children" appear over one hundred times in the Civil Code alone. *E.g.*, C.C. art. 221 ("The father and mother who are married to each other have parental authority over their minor child during the marriage."). Interpreting all references in the Civil Code to "children" or "child" to necessarily include children given in adoption ignores C.C. art. 199 entirely and guts its effect.

Of course, an adopted child must have at least equal rights per the Civil Code. However, I write separately to highlight that the majority's interpretation would lead to an absurd result, as it has the potential to double the rights of a child given in adoption by maintaining their rights in conjunction with their biological as well as adoptive parents. With respect to the wrongful death and survival action statutes, for example, a child given in adoption would collect twice the amount as a child not given in adoption if both their biological and adoptive parents were killed by the fault of others. *See* C.C. art. 2315.1 (defining "child" to include children by adoption"); C.C. art. 2315.2 (same). This is contrary to the intent of the law, which is to equalize children given in adoption unless otherwise provided. *See* C.C. art. 199 (providing that exceptions to the termination of filiation may be provided by law and including therein an express exception for inheritance rights). Because I do not believe the legislature intended to carve out an exception to C.C. art. 199 simply by the use of the terms "child" and "children," and for the reasons more fully provided by Justice Weimer, I dissent.