

Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 10th day of December, 2021 are as follows:

BY Crain, J.:

2020-CJ-01134 c/w KAREN COHEN KINNETT VS. JARRED BRANDON KINNETT
2020-CJ-01143 c/w (PARISH OF JEFFERSON)
2020-CJ-01156

REVERSED IN PART. REMANDED. SEE OPINION.

Hughes, J., dissents and assigns reasons.
Genovese, J., dissents.
Griffin, J., dissents.

SUPREME COURT OF LOUISIANA

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

KAREN COHEN KINNETT

VS.

JARRED BRANDON KINNETT

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

CRAIN, J.

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

FACTS AND PROCEDURAL HISTORY

Karen Cohen Kinnett and Jarred Brandon Kinnett were married on January 24, 2009. Two children were born during their marriage, B.A.K. on August 29, 2011 and G.J.K. on August 5, 2015. In 2013, Ms. Kinnett began an extramarital affair with Keith Andrews. Their last intimate contact occurred on November 15, 2014.

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

Fifteen months later, on December 9, 2016, Ms. Kinnett called Mr. Andrews and told him she had sibling DNA tests on her two children and her husband was not G.J.K.'s biological father. Ms. Kinnett testified she got the sibling DNA tests to

prove to Mr. Kinnett that G.J.K. was his child, after Mr. Kinnett said he did not think the child looked like him.

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

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

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

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

The court of appeal found the burden of proof was misapplied, which interdicted the fact-finding process and required a *de novo* review. Performing its *de novo* review, the court found Ms. Kinnett in bad faith deceived Mr. Andrews regarding his paternity, observing: “there is no set of circumstances wherein a woman—who has had sexual relations with more than one man during the period of possible conception—may have an ‘honest belief’ that one man, and not the other, is the father.” *Kinnett v. Kinnett*, 17-625 (La. App. 5 Cir. 8/6/20), 302 So.3d 157, 177. The court held “as a matter of law that a married woman—whose husband is presumed to be the father of her child—who knows that it is possible that another man is the child’s biological father has a duty to inform that man of his possible paternity.” *Id.* at 179. “Failure to so inform the possible biological father is bad faith deceit as contemplated in Civil Code art. 198.” *Id.*

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

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

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

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

LAW AND ANALYSIS

Louisiana Civil Code article 198 provides:

A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal.

If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs.

In all cases, the action shall be instituted no later than one year from the day of the death of the child.

The time periods in this Article are preemptive.

Generally, a man may bring an action to establish his paternity at any time. However, Article 198 limits that time in two instances—if the child is the presumed child of another man¹ or if the child dies. La. Civ. Code art. 198, Revision Comment

¹ La. Civ. Code art. 185:

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

(d). If the child is the presumed child of another man, the avowal action must be instituted within one year after the child's birth, unless the mother "in bad faith deceived the father of the child regarding his paternity." La. Civ. Code art. 198. In that event, the action must be instituted within one year from the day the father knew or should have known of his paternity. *Id.* These time periods are preemptive. *Id.*

Article 198 addresses the circumstance of competing or dual paternity. The one year filing requirement imposed upon the biological father when the child is the presumed child of the husband of the mother requires the biological father to act quickly to determine his paternity. La. Civ. Code art. 198, Revision Comment (e). By creating a relatively short preemptive period, the legislature chose to favor the intact family and the presumed father over the possible biological father.² That is a policy decision beyond the role of the judiciary to disturb. This short time frame reflects the legislature's intent to minimize upheaval for the child and preserve intact families.

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

Burden of Proof

"Peremption has been likened to prescription; namely, it is prescription that is not subject to interruption or suspension." *Lomont v. Bennett*, 14-2483 (La. 6/30/15), 172 So.3d 620, 626-27; *Rando v. Anco Insulations, Inc.*, 08-1163 (La. 5/22/09), 16 So.3d 1065, 1082. The rules governing the burden of proof as to

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

prescription also apply to peremption. *Id.* Ordinarily, the exceptor bears the burden of proof at the trial of the peremptory exception. *Id.* But, if prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show the action has not prescribed. *Id.*

Mr. Andrews pled the exception to Article 198's one year preemptive period for an avowal action. Thus, the action is not preempted on the face of the pleadings, and the burden of proof was on Mr. Kinnett, the exceptor, to establish the avowal action was untimely. To meet that burden, he was required to show either 1) Ms. Kinnett did not "in bad faith deceive" Mr. Andrews regarding his paternity, or 2) Mr. Andrews "knew or should have known" of his paternity more than one year before filing his avowal action. The resolution of the bad faith and knowledge of paternity issues required the determination of the subjective states of mind of both Ms. Kinnett and Mr. Andrews. These were contested factual issues at trial.

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

A court of appeal may not set aside a trial court's findings of fact in the absence of manifest error or unless it is clearly wrong. *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So.2d 731, 735; *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). However, where one or more legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record. *Evans*, 708 So.2d at 735. A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. *Id.* Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id.*

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

Manifest Error Review

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

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

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

The court of appeal reversed the trial court, finding Ms. Kinnett, as a matter of law, in bad faith deceived Mr. Andrews by not telling him he was possibly G.J.K.’s father, because she could not have honestly believed her husband was the father. First, we reject the notion that a woman who has sex with more than one man during the period of conception cannot have an honest belief that one man and not the other is the father. Facts relating to the timing of the intimate contacts, the timing of ovulation, and the use of contraception, among other factors, can render the determination of the biological father unknowable without paternity testing. If the biological father is unknowable based on these factors, it may be unreasonable, and thus not credible, for the mother to believe that one man and not the other is the father. However, these same factors can also coalesce to make the biological father

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

known or at least reasonably likely. In that case, the mother's honest belief as to her child's paternity can be credible. In other words, a credible belief may exist without factual certainty.

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

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

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

Our manifest error review rests on the evidence presented to the trial court. From this record, Ms. Kinnett did not tell Mr. Andrews anything regarding his paternity that she knew was false. The fact she believed her husband was the father is antithetical to bad faith, if that belief was credible. The trial court found her credible. Based upon the reasonable conclusions of the trial court, Ms. Kinnett told Mr. Andrews what she believed was true. A mother who knows another man is possibly the father of her child, can also honestly believe that her husband is the father. The trial court astutely noted, the evidence may establish Ms. Kinnett was mistaken, but not deceptive. Likewise, we cannot say that just because she was mistaken, Ms. Kinnett's belief was not honest, or that she was in bad faith and deceptive. The trial court's findings were not manifestly in error or clearly wrong. Consequently, we vacate the findings of the court of appeal and affirm the trial court's dismissal of the avowal action.

Constitutionality of Article 198

“Among the threshold requirements that must be satisfied before reaching a constitutional issue is the requirement that the party seeking a declaration of unconstitutionality have standing to raise a constitutional challenge.” *Greater New Orleans Expressway Comm'n v. Olivier*, 2004-2147 (La. 1/19/05), 892 So.2d 570, 573. The requirement of standing facilitates deference to the legislature as

legislators are presumed to have weighed the relevant constitutional considerations in exacting legislation. *Id.* Legislative acts are presumed constitutional until declared otherwise in proceedings brought contradictorily between interested persons. *Id.*; *State v. Bd. of Supervisors, La. State Univ. & Agric. & Mechanical College*, 228 La. 951, 84 So.2d 597, 600 (1955). A litigant not asserting a substantial existing legal right is without standing in court. *In re Melancon*, 2005-1702 (La. 7/10/06), 935 So.2d 661, 667.

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

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

to the court of appeal for consideration of Mr. Andrews' constitutional challenge to Article 198.

CONCLUSION

In the absence of bad faith deception, the avowal action under Article 198 must be instituted within one year from the day of the child's birth. Finding no bad faith deception by the mother, we hold Mr. Andrews' avowal action filed on February 10, 2017, eighteen months after the child's birth, was not timely. We hereby reverse the appellate court's judgment and remand to the court of appeal for the limited purpose of addressing Mr. Andrews' constitutional challenge to Article 198.

REVERSED IN PART; REMANDED.

SUPREME COURT OF LOUISIANA

No. 2020-CJ-01134

c/w

2020-CJ-1143

c/w

2020-CJ-1156

KAREN COHEN KINNETT

VS.

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

Hughes, J., dissenting.

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