Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **27th day of June, 2023** are as follows:

BY Hughes, J.:

2023-CJ-00060 KAREN COHEN KINNETT VS. JARRED BRANDON KINNETT (Parish of Jefferson)

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

Hughes, J., additionally concurs and assigns reasons.
Griffin, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

NUMBER 2023-CJ-00060

KAREN COHEN KINNETT

VERSUS

JARRED BRANDON KINNETT

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

HUGHES, J.

In this divorce case, the putative biological father seeks to rebut, pursuant to La. C.C. art. 198,[1] the presumption set forth in La. C.C. art. 185,[2] despite having filed his avowal petition more than one year after the birth of the child and even though no "bad faith" was found on the part of the mother. After some five years of litigation on preliminary issues, the appellate court reviewed an earlier district court ruling, which found that La. C.C. art. 198 was not unconstitutional, and reversed the district court, concluding Article 198 was unconstitutional as applied. On review, we hold, under the factual circumstances presented in this case, that the putative biological father has no fundamental constitutional right to parent a child born to a mother, who was married to and living with another man at the time of the child's conception and birth. Therefore, we reverse the appellate court, reinstate the district court judgment holding that La. C.C. art. 198 is constitutional, and we remand to the district court for further proceedings consistent with this opinion.

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

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

FACTS AND PROCEDURAL HISTORY

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

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

On February 10, 2017, Keith Andrews intervened in this divorce action to file a petition to establish paternity and custody of G.J.K., who was at that time approximately one and one-half years old, alleging that G.J.K. was conceived as a result of an extramarital affair he had with Ms. Kinnett, which ended in November of 2014. Mr. Kinnett responded to the intervention with exceptions seeking to defeat the avowal action, including a plea of peremption pursuant to La. C.C. art. 198, which was granted by the district court, after concluding: that the avowal action was filed more than a year after Mr. Andrews knew or should have known he was G.J.K.'s biological father; that Ms. Kinnett had not in bad faith deceived Mr. Andrews of the circumstances of G.J.K.'s birth; and that La. C.C. art. 198's one-year peremptive period was not unconstitutional.

On Mr. Andrews' appeal, the appellate court reversed, finding that Ms. Kinnett had in bad faith deceived Mr. Andrews when she informed him of G.J.K.'s birth because she had indicated that she had the child "with her husband," Mr. Kinnett, thereby triggering the exception set forth in La. C.C. art. 198 ("[I]f the mother in bad faith deceived the father of the child regarding his paternity, the [avowal] action shall be instituted within one year from the day the father knew or

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

should have known of his paternity....”). See **Kinnett v. Kinnett**, 17-0625 (La. App. 5 Cir. 8/6/20), 302 So.3d 157.

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

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

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

LAW AND ANALYSIS

Review of a judgment determining the constitutionality of a statute presents a question of law and is reviewed *de novo*, without deference to the conclusions of the

lower courts. **State in Interest of D.T.**, 19-01445, p. 3 (La. 4/3/20), 340 So.3d 745, 748; **State v. Eberhardt**, 13-2306, pp. 4-5 (La. 7/1/14), 145 So.3d 377, 381; **Louisiana Federation of Teachers v. State**, 13-0120, p. 21 (La. 5/7/13), 118 So.3d 1033, 1048. As a general rule, a statute is presumed to be constitutional, and the party challenging the validity of a statute has the burden of proving its unconstitutionality. **Faulk v. Union Pacific Railroad Co.**, 14-1598, p. 7 (La. 6/30/15), 172 So.3d 1034, 1042; **Louisiana Federation of Teachers v. State**, 13-0120 at p. 21, 118 So.3d at 1048; **M.J. Farms, Ltd. v. Exxon Mobil Corporation**, 07-2371, p. 21 (La. 7/1/08), 998 So.2d 16, 31; **City of New Orleans v. Louisiana Assessors' Retirement and Relief Fund,** 05-2548, p. 11 (La. 10/1/07), 986 So.2d 1, 12.

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

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

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

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

(Emphasis added.)

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

living in a family unit with the child at issue, whose rights the Supreme Court states are subject to applicable state law.

In **Stanley v. Illinois**, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), the Supreme Court examined the propriety of treating an unwed father differently from traditional parents and, while the Court upheld the father's constitutional rights claim in that case, the factual context was determinative, in that the father was attempting to maintain his existing relationship with his children. At the time, Illinois law provided that, when an unwed mother died, her children became wards of the state. Though Peter Stanley and the mother of his three children had lived together for eighteen years (she was known as Joan Stanley), during which time their three children were born, Joan and Peter were not legally married when Joan died. Despite the fact that Mr. Stanley had lived with, and supported, his children all of their lives, a dependency proceeding was instituted, and the children were declared wards of the state and placed with court-appointed guardians. If Peter and Joan had been married, Illinois law would not have supported the removal of nondelinquent children from the family home unless they had no surviving "parent" or unless the custodial parent or guardian were not fit to provide them suitable care. Because the Stanley children's only *legal* parent (their mother) died, these provisions became applicable. Mr. Stanley claimed he had been denied Equal Protection.

The **Stanley** Court concluded that, "as a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken from him and that, by denying him a hearing and extending it to all other parents whose custody of their children is challenged, the State denied Stanley the equal protection of the laws guaranteed by the Fourteenth Amendment." **Stanley v. Illinois**, 405 U.S. at 649, 92 S.Ct. at 1211. In so holding, the **Stanley** Court reasoned that "[t]he private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, ***absent a powerful countervailing interest***,

protection." **Stanley v. Illinois**, 405 U.S. at 651, 92 S.Ct. at 1212 (emphasis added). The **Stanley** Court further emphasized the importance of the family, stating that "[t]he rights to conceive and to raise one's children have been deemed 'essential,' ... 'basic civil rights of man,' ... and '(r)ights far more precious ... than property rights,' ... It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' ... The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, ... the Equal Protection Clause of the Fourteenth Amendment, ... and the Ninth Amendment ...." **Stanley v. Illinois**, 405 U.S. at 651, 92 S.Ct. at 1212-13 (citations omitted). The **Stanley** Court also cited **Levy v. Louisiana**, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968), as recognizing that "family relationships unlegitimized by a marriage ceremony" should not bar natural, but illegitimate, children from recovering for the wrongful death of their mother, since the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses. **Stanley v. Illinois**, 405 U.S. at 651-52, 92 S.Ct. at 1213.

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

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

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

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

The **Quilloin** Court recognized that the relationship between parent and child is "constitutionally protected," since it is the primary function, freedom, and obligation of parents to have the custody, care, and rearing of children. **Quilloin v.**

Walcott, 434 U.S. at 255, 98 S.Ct. at 554-55. **Quilloin** further recognized that it is firmly established that freedom of personal choice in matters of "family life" is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. **Id**. The Due Process Clause would be offended if a state were to attempt to force the *breakup* of a "natural family" over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest. **Id**. However, the **Quilloin** Court inferred that the biological parents in that case (Mr. Quilloin and Mrs. Walcott) and the child were *not a family*, since the unwed father had not at any time had, or sought, actual or legal custody of his child, nor had he resided with the child. Rather, the Court determined that Mrs. Walcott and the child, along with her husband, Mr. Walcott (the child's stepfather) and the younger child she and Mr. Walcott had together, were a family, such that the proposed adoption would not place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption, in **Quilloin**, was to give full recognition to the family unit then in existence, a result desired by all concerned, except Mr. Quilloin. Whatever might be required in other situations, the **Quilloin** Court could not say that the state was required in that particular situation to find anything more than that the adoption and the denial of legitimation were in the best interest of the child. **Quilloin v. Walcott**, 434 U.S. at 255, 98 S.Ct. at 555. The Supreme Court further commented that Mr. Quilloin had "never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child," and that he "does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child." **Quilloin v. Walcott**, 434 U.S. at 256, 98 S.Ct. at 555. In contrast, the **Quilloin** Court noted that "legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage

has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage." Based on these factors, the **Quilloin** Court held: "Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child." Accordingly, the Georgia statutes were upheld, on the Court's conclusion that they had not deprived Mr. Quilloin of rights under the Due Process and Equal Protection Clauses. **Quilloin v. Walcott**, 434 U.S. at 256, 98 S.Ct. at 555.

In contrast to **Quilloin**, the biological parents (Abdiel and Maria) in **Caban v. Mohammed**, 441 U.S. 380, 99 S.Ct. 1760, 1762, 60 L.Ed.2d 297 (1979), lived together in New York City, though without benefit of marriage, during the time two children (David and Denise) were born; Abdiel signed both children's birth certificates and contributed to their support. After Abdiel and Maria separated, Maria (along with her children) moved in with Kazim Mohammed, whom she later married. Abdiel maintained continued contact with David and Denise. Then, Maria allowed the children to travel with her mother to Puerto Rico (the grandmother's home country), while Maria and Kazim stayed in the U.S. to save money for their planned move to Puerto Rico. Meanwhile, Abdiel (whose parents also lived in Puerto Rico) travelled to Puerto Rico, obtained his children from their maternal grandmother, and returned with them to New York; whereupon, Maria sought and was granted temporary legal custody of the children, and Abdiel and his new wife were granted visitation.

Thereafter, Maria and Kazim petitioned the court to allow Kazim to adopt the children, and Abdiel responded by requesting that he and his wife be allowed to adopt the children. Judgment was eventually rendered in favor of Maria and Kazim, allowing Kazim to adopt the children; Abdiel's parental rights and responsibilities were thereby terminated. Abdiel sought review of the decision, and the state appellate courts affirmed. Before the Supreme Court, Abdiel asserted that the

distinction New York law draws between the adoption rights of an unwed father and those of other parents (requiring consent for adoption only from a legal parent) violates the Equal Protection Clause of the Fourteenth Amendment. **Caban v. Mohammed**, 441 U.S. at 385, 99 S.Ct. at 1764.

Finding that New York law clearly treated unmarried parents differently according to their gender "even when [the father's] parental relationship is substantial - as in this case," the **Caban** Court reasoned that "[g]ender-based distinctions ... must serve important governmental objectives and must be substantially related to achievement of those objectives ... in order to withstand judicial scrutiny under the Equal Protection Clause." **Caban v. Mohammed**, 441 U.S. at 387-88, 99 S.Ct. at 1765-66. The Supreme Court found that the New York adoption law's "distinction ... between unmarried mothers and unmarried fathers, as illustrated by this case, does not bear a substantial relation to the State's interest in providing adoptive homes for its illegitimate children." **Id**, 441 U.S. at 391, 99 S.Ct. at 1767-68. However, the Court declared that "[i]n those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." **Id**, 441 U.S. at 392, 99 S.Ct. at 1768.

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

The case of **Santosky v. Kramer**, 455 U.S. 745, 747-48, 102 S.Ct. 1388, 1391-92, 71 L.Ed.2d 599 (1982), is often quoted since it is one of the first to denominate the parental right to parent a child as "fundamental," however, the factual context in which this declaration was made is significant. **Santosky** held that "[b]efore a State may sever completely and irrevocably the rights of ***parents in their natural child***, due process requires that the State support its allegations by at least clear and convincing evidence," not simply by a preponderance of the evidence. **Santosky v. Kramer**, 455 U.S. at 747-48, 102 S.Ct. at 1391-92 (emphasis added).

In **Santosky**, the three children of "natural parents" John and Annie Santosky were removed from their custody by state authorities "after incidents reflecting parental neglect" and placed in foster homes. **Id.**, 455 U.S. at 751, 102 S.Ct. at 1393. At trial, evidence was produced to establish, by the preponderance of the evidence required by the state statute: that the Santoskys had maintained contact with their children, but those visits were at best superficial and devoid of any real emotional content; that the state agency had made diligent efforts to encourage and strengthen the parental relationship; that the Santoskys were incapable, even with public assistance, of planning for the future of their children; and that the best interests of the three children required permanent termination of the Santoskys' custody. **Id.**, 455 U.S. at 751-52, 102 S.Ct. at 1393-94. On appeal of the termination of their parental rights, the Santoskys challenged the constitutionality of the preponderance of the evidence burden of proof set forth in the state statute; and the state appellate courts upheld the constitutionality of the statute. In deciding whether the preponderance of the evidence burden of proof was sufficient, the Supreme Court pointed out its historical recognition that freedom of personal choice in matters of ***family life*** is a ***fundamental liberty interest*** protected by the Fourteenth Amendment vis-à-vis actions of the government in trying to affect and/or change previously established family relationships. **Santosky v. Kramer**, 455 U.S. at 753, 102 S.Ct.

at 1394. The **Santosky** Court spoke only in terms of "termination of the rights of natural parents" and it was implicit that parental rights had already been established. In contrast, in the instant case, Mr. Andrews is seeking, by virtue of the right to do so having been set forth in La. C.C. art. 198, to establish the right of paternity.

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

Central to the subsequent attempt by Mr. Lehr to have the adoption dissolved was the maintenance by New York of a "putative father registry," whereby a man could file with that registry to demonstrate his intent to claim paternity of a child born out of wedlock, entitling a biological father to receive notice of any proceeding to adopt that child. Before entering Jessica's adoption order, the County Family Court had the putative father registry examined, but Mr. Lehr had not entered his name in the registry. **Lehr v. Robertson**, 463 U.S. at 250-51, 103 S.Ct. at 2988. After Mr. Lehr discovered Jessica had been adopted by her stepfather, he filed an avowal action and asserted he had a constitutional right to notice and a hearing, which he did not receive, before Jessica could be adopted. **Lehr v. Robertson**, 463 U.S. at 252, 103 S.Ct. at 2988. Mr. Lehr's claims were denied in the state courts.

The **Lehr** Court noted that generally state law determines the outcome of family matters. Further, as a historical matter, the **Lehr** Court recognized that "[t]he

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

In the case of an unwed father, **Lehr** further stated: "The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." **Lehr v. Robertson**, 463 U.S. at 262, 103 S.Ct. at 2993-94 (footnote omitted). The **Lehr** Court reasoned that they were "not assessing the constitutional adequacy of New York's procedures for ***terminating a developed relationship***" since Mr. Lehr had "never had any significant custodial, personal, or financial relationship with Jessica, and he did not seek to establish a legal tie until after she was two years old"; rather, the **Lehr** Court was "concerned only with whether New York has adequately protected his opportunity to form such a relationship." **Lehr v. Robertson**, 463 U.S. at 263-64, 103 S.Ct. at 2994 (emphasis

added). The Court emphasized that Mr. Lehr's ability to have received notice was completely within his control, by registering in accord with the putative father registry statute, which he failed to do; and the Court was unable to characterize the will of the state legislature in that statutory remedy as constitutionally insufficient. **Id**., 463 U.S. at 263-65, 103 S.Ct. at 2994-95. The **Lehr** Court likewise found no merit in the equal protection claim raised, as it was unable to say that the parents were similarly situated but treated differently, as was the case in **Caban v. Mohammed**, supra, since Mr. Lehr had never established any custodial, personal, or financial relationship with the child Jessica. **Lehr v. Robertson**, 463 U.S. at 267-68, 103 S.Ct. at 2996-97. "If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights." **Id**. Accordingly, the **Lehr** Court affirmed the state court decision to deny Mr. Lehr's claims. In comparison to the **Lehr** father, the putative biological father in the instant case is in a similar position, in that Louisiana has promulgated a statutory method for biological fathers to establish paternity and therefore a relationship with their child, but Mr. Andrews failed to comply with the statute.

The Supreme Court's case of **Michael H. v. Gerald D.**, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), seems to be the factual scenario most closely resembling that of the instant case, in that the mother's husband was the legal father of the child she had conceived through an adulterous relationship, and she subsequently separated, but did not get a final divorce from, her husband. In **Michael H. v. Gerald D.**, the child was born in May 1981, and thereafter for several years the mother resided with the child alternatively with the putative biological father, her husband, and even with a third man. However, the putative biological father did not file an avowal action until November of 1982. At that time, California

law presumed that the husband of the mother was the father of a child born during the marriage and allowed no one but the husband or wife to rebut that presumption; therefore, Michael's avowal action was denied in the state courts, even though blood tests indicated a 98.07% probability of paternity.

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

The legal issue in **Michael H. v. Gerald D.** was framed as "whether the relationship between persons in the situation of Michael and [his biological child]

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

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

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

The **Michael H.** decision further pointed out that it is an "erroneous view that there is only one side to this controversy - that one disposition can expand a 'liberty' of sorts without contracting an equivalent 'liberty' on the other side." **Id.**, 491 U.S. at 130, 109 S.Ct. at 2345-46. To the contrary, in the **Michael H.** case, the Court observed that "***to provide protection to an adulterous natural father is to deny protection to a marital father***, and vice versa." **Id.**, 491 U.S. at 130, 109 S.Ct. at 2346 (emphasis added). "One of them will pay a price ... Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the traditional family unit" he has established. **Id**. The **Michael H. v. Gerald D.** decision holds that ***the court cannot choose between these two competing interests, rather, the court*** "***leaves that to the people of*** [***the state***]," ***through their elected legislators***. **Id**. (Emphasis added.) Accordingly, **Michael H. v. Gerald D.** affirmed the California appellate court, which upheld the California law allowing only a husband or wife to rebut the presumption that the husband is the father of children born during their marriage, and dismissed Michael's avowal claim. The **Michael H. v. Gerald D.** case is on point with the case currently before this court.

However, Mr. Andrews heavily relies, in his arguments to this court, on the 1999 Louisiana case of **T.D. v. M.M.M.**, 98-0167 (La. 3/2/99), 730 So.2d 873, 874-75, abrogated by **Fishbein v. State ex rel. Louisiana State University Health Sciences Center**, 04-2482 (La. 4/12/05), 898 So.2d 1260,[4] wherein a putative biological father intervened in the legal parents' custody proceeding to have his parental rights acknowledged. In **T.D. v. M.M.M.**, this court upheld the district court's holding that the intervention was not untimely, though filed one and one-half years after a blood test showed a 99.5% probability that the intervenor was the child's biological father, but six years after the child's birth. The district court ruled only that the intervention was not untimely filed and that the evidence established that the putative father was the biological father of the child, but it did not award visitation at that time, finding insufficient evidence had been submitted to determine the best interest of the child. **T.D. v. M.M.M.**, 98-0167 at pp. 1-2, 730 So.2d at 874-75. (The district court, in **T.D. v. M.M.M.**, had ordered an evidentiary hearing to determine visitation rights, requiring a mental health evaluation of the child to assess possible effects of parentage information, and support issues.) On review by this court, because this state had no statutory limitation on an avowal action at the time

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

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

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

> The legal parents based their appeal on the argument that laches bars a biological father's avowal action where it is not promptly asserted. As a matter of law, the purpose of the doctrine is to prevent an injustice which might result from the enforcement of long neglected rights and to recognize the difficulty of ascertaining the truth as a result of that delay. ... However, this court has clearly established that the common law doctrine of laches does not prevail in Louisiana. ... Nevertheless, we have applied the doctrine in rare and extraordinary circumstances. ...
>
> We will consider the elements of the doctrine as they apply to the instant case to determine if rare and extraordinary circumstances exist in the instant case which merit application of the doctrine of laches. Regarding the first element of prejudice, we find no proof of prejudice to the child nor to the defendants in intervention, the legal parents. To the contrary, the trial judge expressly limited his ruling to a finding of fact that P.W. is the child's father. The trial court passed on the issue of the best interest of the child because it was without sufficient evidence to make a knowledgeable finding. If evidence of the best

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

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

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

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

(Emphasis added.)

> interest of the child was lacking, certainly there is insufficient proof institution of this action has caused prejudice to the child. Thus, we find no injustice or prejudice may result from this avowal action. The legal parents failed to prove the first element of laches....
>
> Regarding the second element of delay, we surmise that the delay in this case is not entirely the fault of the biological father. It is apparent that the actions of the mother have caused much of the delay. ... P.W. regularly visited his child when he was on good terms with the mother. This appears to be the reason why he did not file suit until after the affair ended and his attempts to visit his child were thwarted. P.W. filed his suit less than one year after it became apparent that he was not free to visit his child, and approximately six years from the child's birth. We find P.W. did not seek enforcement of long neglected rights because his filing was not unreasonable in light of circumstances which impute much of the delay to the mother....

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

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

In a case decided after the enactment of an avowal time limit, in **W.R.M. v. H.C.V.**, 06-0702 (La. 3/9/07), 951 So.2d 172 (per curiam), this court overturned an appellate decision in **W.R.M. v. H.C.V.**, 05-0425 (La. App. 3 Cir. 3/1/06), 923 So.2d 911, which had declared unconstitutional the precursor to La. C.C. art. 198, former La. C.C. art. 191 (restricting an avowal action, when another man is presumed to be the father of the child, to within two years from the date of birth of the child, unless the mother in bad faith deceived the putative father), because of its retroactive application.[6] The facts and procedural history of the case were stated by the appellate court as follows:

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

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

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

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

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

> On July 7, 2003, W.R.M. filed a "Petition to Establish Filiation" against H.C.V. and M.J.V., alleging that he is the biological father of A.M.V as a result of an adulterous affair between H.C.V. and W.R.M. In response, H.C.V. and M.J.V. filed exceptions of no cause of action, no right of action, and prescription. While these exceptions were pending, the Louisiana Legislature passed Act 530 of 2004, which enacted La. Civ. Code art. 191. H.C.V. and M.J.V. filed supplemental

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

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

As cited hereinabove, the **Michael H. v. Gerald D.** case presents the same issue under the same circumstances as that presented in this case: what rights does a putative biological father, who sired a child with a married woman, have when there is a legal father to whom the mother was married and living with when the child was conceived and born? The answer provided by the U.S. Supreme Court in **Michael H. v. Gerald D.** was that when a choice must be made between two competing interests such as these (the inability of a biological father to parent a child "adulterously begotten" versus the preservation of the integrity of a "traditional family unit") the Court "leaves that to the people of [the state]," through their elected legislators. **Michael H. v. Gerald D.**, 491 U.S. at 130, 109 S.Ct. at 2346.

The people of Louisiana, through the Louisiana Legislature, have spoken through the enactment of La. C.C. art. 198, to give a biological father a limited window in which to file a paternity action when there is a legal father: "[T]he action shall be instituted ***within one year*** from the day of the birth of the child." (Emphasis added.) "All of the time periods established by this Article are peremptive, rather than prescriptive and thus are not subject to interruption or suspension." La. C.C. art. 198, 2005 Revision Comment (d). "The time period of one year from the child's birth imposed upon the alleged father if the child is presumed to be the child of

another man ***requires*** that ***the alleged father act quickly*** to avow his biological paternity. Requiring that the biological father institute the avowal action quickly is intended to protect the child from the upheaval of such litigation...." La. C.C. art. 198, 2005 Revision Comment (e) (emphasis added). "These restrictions imposed upon the alleged father's rights to institute the avowal action recognize first, that state attempts to require parents to conform to societal norms should be directed at the parents, not the innocent child of the union...." La. C.C. art. 198, 2005 Revision Comment (d). "The only exception to the time period of one year for the institution of an avowal action by the biological father is if the mother in bad faith deceives the father concerning his paternity." La. C.C. art. 198, 2005 Revision Comment (f).

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

DECREE

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

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

SUPREME COURT OF LOUISIANA

NUMBER 2023-CJ-00060

KAREN COHEN KINNETT

VERSUS

JARRED BRANDON KINNETT

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

HUGHES, J., additionally concurring.

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

SUPREME COURT OF LOUISIANA

No. 2023-CJ-00060

KAREN COHEN KINNETT

VS.

JARRED BRANDON KINNETT

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

GRIFFIN, J., dissents and assigns reasons.

I respectfully dissent for the astute reasons articulated by the court of appeal. The majority of this Court relies on the fractured plurality opinion of *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). Therein only four Justices of the United States Supreme Court concluded that, where a child is conceived and born into an extant marital relationship between the mother and another man, a biological father has no liberty interest in establishing a parental relationship with the child.[1] *Id.*, 491 U.S. at 129, 109 S.Ct. at 2345. However, a majority of the Justices in *Michael H.* refused to foreclose the possibility that a biological father might have a constitutionally protected interest in his relationship

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

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

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

"The interest of a parent in having a relationship with his children is manifestly a liberty interest protected by the Fourteenth Amendment's due process guarantee." *Adoption of B.G.S.*, 556 So.2d at 549 (citing *Santosky*, 455 U.S. at 758-59, 102 S.Ct. at 1397 ("it [is] plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right") (internal quotations omitted)). "Although an unwed father's biological link to his child does not guarantee him a constitutional stake in his relationship with that child, such a link combined with a substantial parent-child relationship will do so."[2] *Id*., 556 So.2d at 550 (quoting *Michael H.*, 491 U.S. at 142, 109 S.Ct. at 2352 (Brennan, J., dissenting)). "[T]he interest of a biological parent in having an opportunity to

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

establish a relationship with his child is one of those liberties which no person may be deprived without due process of law under [the Louisiana] constitution." *Id.*, 556 So.2d at 552 (citing La. Const. art. I, § 2); *see also In re L.M.M., Jr.*, 17-1988, pp. 17-18 (La. 6/27/18), 319 So.3d 231, 241-42; *Cook v. Sullivan*, 20-1471, p. 8 (La. 9/30/21), 330 So.3d 152, 158. Here, the record reflects that Mr. Andrews sufficiently grasped the opportunity to establish a parental relationship with G.J.K. *See Lehr*, 463 U.S. at 262, 103 S.Ct. at 2993.

Finding the existence of a liberty interest, the court of appeal correctly proceeded to analyze the remaining due process factors under *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Article 198 provides neither a notice requirement to a biological father nor a duty on a mother to inform a father of his potential paternity – only a narrow exception if the mother acts in bad faith. The risk of erroneous deprivation of the liberty interest at stake is thus substantial given the statute's complete reliance on the mother to decide whether a putative father shall be notified. *See Adoption of B.G.S.*, 556 So.2d at 553. "[T]he placement of decision in the hands of a potentially adverse decision maker, violates the most basic principles of due process under both our state and federal constitutions." *Id.*, 556 So.2d at 556. Further, the government's interest in protecting a child from the upheaval of litigation where the child is currently living in an extant marital family does not warrant the severance of a biological father's rights in the absence of sufficient procedural safeguards. *See Michael H.*, 491 U.S. at 154-56, 109 S.Ct. at 2358-59 (Brennan, J., dissenting) (observing the distinction between determination of paternity and any subsequent determination as to custody and visitation rights). Procedure by presumption is cheaper and easier than individualized determination but when it disdains present realities in deference to past formalities, it needlessly risks running roughshod over the interests of both parent and child. *Stanley*, 405

U.S. at 656-57, 92 S.Ct. at 1215. Accordingly, I would affirm the ruling of the court of appeal.

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