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Department of Social Services ex rel. K.B.D. v. Drew

Chelsea Gomez

SS EX REL. K.B.D. V. DREW: THE FAILURE TO ALIGN BIOLOGICAL AND LEGAL PATERNITY—WHEN CLEAR AND CONVINCING EVIDENCE ISN'T ENOUGH

Chelsea Gomez*

I. BACKGROUND

The case of *State of Louisiana, Department of Social Services ex rel. K.B.D. v. Drew*[1] required the Louisiana Second Circuit Court of Appeal to determine whether a presumed father, under Louisiana Civil Code article 185, could successfully file a petition to disavow paternity more than five years after the birth of his presumed child by providing clear and convincing evidence that he was *not* the biological father of the child.[2] Particularly, the court was asked to determine whether a presumed father could successfully disavow paternity when he had no reason to question paternity until four years after the child's birth.

After becoming pregnant out of wedlock, the mother of K.B.D. married her boyfriend, Marion Drew, Jr., in December 2003. Six months later, on June 14, 2004, the child was born of the marriage, and the husband signed the certificate of live birth. The husband filed for divorce more than four years later. At this point, he never questioned the biological paternity of the child. After the state filed a rule to establish support on behalf of the minor child in April 2008,[3] the husband acquired knowledge that the mother might

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* Candidate, J.D./D.C.L., 2013, Paul M. Hebert Law Center, Louisiana State University. The author would like to thank Professors John Randall Trahan and Olivier Moréteau for their guidance throughout the writing of this Case Note.

1. 46,337, (La. App. 2 Cir. 6/29/11); 70 So. 3d 1011.
2. *Id.* at 1012.
3. *Id.* at 1011, n.1 (citing 42 U.S.C. §§ 651 and 608) ". . .recipients of AFDC under Title IV D of the Social Security Act assign their child support rights to the state and are required to cooperate (unless good cause for refusing to do so is determined to exist) in whatever legal action the state undertakes. By assigning their child support rights in return for AFDC aid, they give the states

have slept with another man around the time of conception. In June 2008, the presumed father requested DNA testing, which ultimately determined that he was not the biological father. In July 2009, he filed a petition to annul his acknowledgment and in October 2009 amended his petition to disavow paternity. This suit was brought more than four years after the birth and more than a year after questioning filiation.

II. JUDGMENT OF THE COURT

A divided court[4] upheld the legal presumption of paternity and dismissed the father's disavowal action as prescribed, with a concurring opinion advocating for the application of *contra non valentem* when a father, such as the presumptive father in the instant case, was not informed of the possibility that the baby could have been fathered by another man.[5] In its legal analysis, the majority quickly disposed of the petition in which the presumed father attempted to annul his acknowledgement of paternity.[6] He alleged that Louisiana Revised Statute 9:392(A)(7)(b) allowed him to annul his acknowledgment because he was able to prove, by clear and convincing evidence, that he was not the biological father.[7] The court, however, recognized that the acknowledgment referred to is not that which can be accomplished by the signing of the birth certificate at the time of birth, but rather that which can be accomplished by the execution of an authentic act of acknowledgment or by the *subsequent* signing of the birth certificate.[8] As the court correctly noted, the presumed father in this case had not made such an acknowledgment. In addition, the

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the opportunity to recoup the financial drain imposed by the welfare system on the state and federal treasuries."

4. *Id*. at 1016 (Judge Stewart concurring in a separate opinion).
5. *Id*. at 1015, 1016.
6. *Id*. at 1014.
7. *Id.*
8. *Id.*

court noted, even if the father had made such an acknowledgment and even if it were to have been annulled, the outcome of the case would not have been changed: the child was born of the marriage; therefore, the presumption of paternity created by Civil Code article 185 was valid without any acknowledgment required.[9]

The court relied on Louisiana Civil Code articles 185 and 189 in deciding this dispute.[10] Article 185 states, "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."[11]The husband and presumed father may rebut this presumption by bringing a "disavowal action."[12] This action is further governed by the one year liberative prescription period of Louisiana Civil Code Article 189, which provides that prescription commences from the day the husband learns of, or should have learned of the birth of the child.[13] The only exception provided is if the husband and mother continuously lived separate and apart during the three hundred days preceding the birth.[14] In that case, prescription does not begin to run until the husband is notified in writing that someone has asserted he is the child's father.[15]

The court recognized that the presumed father's testimony, the mother's testimony, and the DNA results successfully proved, by clear and convincing evidence, that he was not the biological father, thus, meeting the requirements of Louisiana Civil Code article 187 for a successful disavowal action.[16] Regardless of such proof, the language of article 189 is clear and unambiguous—prescription should start on the date the presumed father learned or

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9. *Id.*
10. *Id.* at 1012-1013.
11. LA. CIV. CODE ANN. art. 185 (2011).
12. LA. CIV. CODE ANN. art. 187 (2011).
13. LA. CIV. CODE ANN. art. 189 (2011).
14. *Id.*
15. *Id.*
16. Drew, 70 So. 3d at 1013; LA. CIV. CODE ANN. art. 187 (2011).

should have learned *of the birth*.[17] Though the prescriptive period may be subject to the doctrine of *contra non valentem*,[18] the court recognized that the presumed father, under these circumstances, clearly knew that the child was born on the date of birth, which disallowed interruption or suspension of the prescriptive period.[19] Therefore, by the time the complaint was filed in the instant matter, the cause of action had prescribed. Under this analysis, the majority of the Second Circuit seems willing to apply the doctrine of *contra non valentem* only if the father has no reason to know about the actual birth, not in cases where he had no reason to question the biological paternity until a later date. Though this reasoning is consistent with the public policy to "protect innocent children, born during the marriage," the doctrine would be unnecessary in such circumstances.[20] If the husband has no reason to know of the birth of the child, article 189 already provides for interruption of prescription until he *should have* learned of the birth.[21] Although the court states that *contra non valentem* could be applied to this prescriptive period, its reasoning rejecting its application seemingly bars the doctrine from use in disavowal suits.

The Second Circuit recognized that the changes made in 2005 to the law of filiation liberalize the strict nature of the presumptions, more closely aligning biological and legal

17. LA. CIV. CODE Ann. art. 189 (2011).

18. *See* Corsey v. State ex rel. Dep't of Corrections, 375 So. 2d 1319, 1321-22 (recognizing that "Louisiana jurisprudence has recognized a limited exception [to the running of prescription] where in fact and for good cause a plaintiff is unable to exercise his cause of action when it accrues" The Court also recognizes that this "principle is often denoted by the maxim *Contra non valentem agere nulla currit praescriptio*" and is "especially applicable in the present instance, where the plaintiff's inability to act is due to the defendant's willful or negligent conduct."); Benjamin West Janke and François-Xavier Licari, *Contra Non Valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth*, 71 LA. L. REV. 503 (explaining the relationship between the Louisiana and French courts' treatment of the extra-codal principle of *contra non valentem* in prescription law).

19. Drew, 70 So. 3d at 1014.

20. *Id.* at 1015.

21. LA. CIV. CODE ANN. art. 189 (2011).

paternity.[22] These changes make the presumption more easily rebuttable, including changing the period to disavow from peremptive to prescriptive and extending an action of contestation to the mother of the child.[23] However, the court states that the unambiguous prescription period must govern, and prescription was deemed to have run. Therefore, the Second Circuit affirmed the grant of the state's exception of prescription.[24] This reasoning is in stark contrast with the concurring opinion. Judge Stewart's separate concurring opinion advocates for the application of *contra non valentem*, a doctrine standing for the "proposition that prescription does not run against those who cannot act."[25] Louisiana courts allow *contra non valentem* to apply and prevent the running of liberative prescription when the "cause of action is not known or reasonably knowable by the plaintiff."[26] Judge Stewart states that this doctrine should be applicable "in matters like this one, where the mother withheld information" and "prevented him from availing himself of the disavowal action."[27] In particular, the mother never informed the presumed father that she was still sexually involved with her ex-boyfriend at the time of conception.[28] Whereas the majority seemingly would never apply *contra non valentem* to a disavowal action, Judge Stewart recommends this doctrine be applied when the mother withholds information necessary for the presumed father to avail himself to his cause of action.

III. COMMENTARY

The Second Circuit majority decision in *SS ex rel. K.B.D. v. Drew* reinforces the notion that the presumption of paternity found

22. Drew, 70 So. 3d at 1013-1015.
23. *Id.* at 1014.
24. *Id.* at 1013-1015.
25. *Id.* at 1017.
26. *Id.* (citing Corsey v. State ex rel. Dep't of Corrections, 375 So. 2d 13139, 1321-22 (La. 1979)).
27. *Id.*
28. *Id.* at 1016.

in Louisiana Civil Code article 185 is one of the strongest presumptions in Louisiana law.[29] Regardless of the ability to determine biological paternity with practical certainty (i.e. using advances in technology and science such as DNA testing), the decision strictly enforces the prescriptive period set forth in article 189. The court explained its holding by recognizing the Louisiana Supreme Court's explanation of the purpose of the presumption stating, "The action to disavow is to protect innocent children, born during marriage, against scandalous attacks upon their paternity by the husband;" because of this important purpose, the presumption should be zealously guarded and enforced.[30] However, under the facts provided in the case, it was clear, through testimony, that the mother knew the identity of the other man she engaged in sexual intercourse with, making it possible to find and impose liability on the biological father for the support of his child.

The policy questions raised by Judge Stewart's concurring opinion are especially noteworthy. Particularly, he recognizes that this decision requires a man to support a non-biological child while the known, although absent biological father "escapes financial responsibility." [31] The majority does say that *contra non valentem* could be applied to disavowal actions, but its discussion of the doctrine would likely lead to confusion in lower courts when applying this doctrine to similar disputes. The court merely recognizes its potential application, recognizes that the Plaintiff clearly knew of the child's birth and believed at this time that it was his biological child, and that there was no question of filiation until almost four years later.[32] There is no further explanation as to exactly why the doctrine should not apply. The court's explanation seemingly hinges on the fact that the presumed father *clearly* knew

29. *See*, e.g., Tannehill v. Tannehill, 261 So. 2d 619 (La. 1972); Williams v. Williams, 87 So. 2d 707 (La. 1956).
30. Drew, 70 So. 3d at 1015 (citing Gallo v. Gallo, 03-0794 (La. 12/3/03); 861 So. 2d 168).
31. *Id*. at 1016.
32. *Id*. at 1014.

of the birth, and that the prescription period is unambiguous. However, Judge Stewart's recommendation to remedy this situation seems reasonable—to apply *contra non valentem* in matters, such as the present case, where the mother withheld information, thereby making it impossible for the father to "reasonably know" of his possible cause of action.[33] Today, this seems especially reasonable with the availability of DNA technology, allowing for biological and legal paternity to be more closely aligned without violating the strong public policy in favor of providing child support. Until there is clarification in the Second Circuit's application of *contra non valentem*, the prescriptive period for disavowal actions will likely be strictly enforced to protect children born of a marriage.

Another potential remedy for this apparent inequity would be to extend the policy embedded in the Louisiana Civil Code provisions on the designation of "dual paternity"[34] to circumstances similar to those in the instant case—when a *legal father* is deceived by the mother and there is a known biological father. Civil Code article 198 would seemingly be the most relevant statement of law, capable of application through analogy to the instant situation.[35] This article allows a biological father to establish paternity even if the child has a presumed father.[36] The action to designate a biological father when a presumed father exists is typically limited by a one-year peremptive period, commencing at the time of birth of the child. However, the

33. *Id.* at 1017.

34. LA. CIV. CODE ANN. art. 197, 198 (2011).

35. LA. CIV. CODE ANN. art. 198 (2011); "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."

36. *Id*.

legislature provides a limited application of *contra non valentem* in circumstances of the mother's deception of the *biological father*.[37] Specifically, the action may be instituted within one year from when the biological father knew or should have known of his paternity, but at the latest, within ten years of the child's birth. Applying a similar *contra non valentem* period for the presumed father would not defy the policy in favor of child support as long as appropriate safeguards are followed—as long as a *known* biological father exists and may be held liable for support. Since dual paternity is already recognized in Louisiana, the legislature could at least allow courts to designate dual paternity in these narrow instances of deception of the presumed father. In these cases, courts could then adopt the process already recognized for setting child support in dual paternity cases designated under Civil Code articles 197 and 198.[38] Doing so would not only ensure support for the child, but would also coincide with the policy argument recognized in the *Reed* case. In particular, the court stated, "the biological father does not escape his support obligations merely because others may share with him the responsibility. Biological fathers are civilly obligated for the support of the offspring."[39] In sum, with the proper legislative safeguards, there is no reason to continue requiring presumed fathers to be solely liable to support a child with a known biological father when the mother intentionally deceived the presumed father about the conception of the child. Especially with modern DNA testing, there should be action taken to better align legal and biological paternity.

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37. *Id.*

38. *See* State of Louisiana, Department of Social Services ex rel. P.B. v. Reed, 10-410 (La. App. 5 Cir. 10/26/10); 52 So. 3d 145 (requiring both the presumed and biological father to provide support to the child because it was found to be within the child's best interest; and also requiring the child support guidelines to be followed, with each party providing to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings).

39. *Id.* at 147.