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## SMITH v. COLE: TRIUMPH IN FAMILY COURT

IN *SMITH v. COLE*,<sup>1</sup> the Supreme Court of Louisiana held that a biological father had a duty to support his child, even though the child's mother was married to another man and the law recognized that he was the child's legal father. While in direct conflict with the recent decision of the Supreme Court of the United States in *Michael H. v. Gerald D.*,<sup>2</sup> *Smith* was nevertheless the better decision for all parties involved.

The facts of the case were unusual. The plaintiff, Ledora McCathen Smith, had been married to Henry Smith for four years and had raised two children. During the fall of 1974, the Smiths separated and Ledora began living with the defendant, Playville Cole, despite remaining legally married to Henry.<sup>3</sup> One year later Donel Patrice was born. Although Playville acknowledged that he was the biological father, the birth certificate named Henry as the father.<sup>4</sup> Henry never attempted to legally disavow his paternity. Accordingly, in 1976, when Playville and Ledora attempted to change Donel's surname to Cole, Henry refused to cooperate.<sup>5</sup>

In 1978, the Smiths divorced. The divorce decree mentioned the previous two children but failed to mention Donel.<sup>6</sup> Ledora and Playville ended their five-year relationship in 1980. Ledora then brought a filiation action against Playville in 1988 to prove paternity and to obtain child support.<sup>7</sup> Playville raised an exception to Ledora's action. First, he argued that he was not the presumed (legal) father because the Smiths were still married when Donel was born and because Henry had never disavowed his paternity, as was required under the state statute at the time.<sup>8</sup> Second, he claimed that since a legitimate father already existed,

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1. 553 So. 2d 847 (La. 1989).

2. 109 S. Ct. 2333, *reh'g denied*, 110 S. Ct. 22 (1989).

3. *Smith*, 553 So. 2d at 848.

4. *Id.*

5. *Id.*

6. *Id.*

7. A filiation action is a judicial proceeding to determine the paternity of an illegitimate child. BLACK'S LAW DICTIONARY 566 (5th ed. 1979).

8. See *Smith*, 553 So. 2d at 849 (citing LA. CIV. CODE ANN. art. 184 (West Supp. 1990)).

Ledora could not be allowed to "bastardize" her child simply to obtain money.<sup>9</sup>

The trial court sustained Playville's exception.<sup>10</sup> The court of appeal reversed this decision, holding that Ledora had a proper cause of action under the principle of dual paternity.<sup>11</sup> Playville then appealed to the Supreme Court of Louisiana. The State Supreme Court affirmed the decision of the appellate court, holding that dual paternity did exist in Louisiana and obligating Playville to pay child support.<sup>12</sup>

This Comment discusses the Supreme Court of Louisiana's decision in light of the Supreme Court of the United States' decision in *Michael H. v. Gerald D.*,<sup>13</sup> which held that under California law, a biological father had no right to maintain a relationship with his daughter when a legal father already existed. A legal father was defined as any man who was married to the mother at the time the child was born, whether or not he was the biological father. Utilizing this interpretation, the Court denied the biological father visitation rights to his daughter. After analyzing the *Smith* decision, this Comment will explain why the Supreme Court of the United States erred by not granting Michael his visitation rights.

## I. HISTORY

The subjects of paternity and illegitimate children are governed by statute. Louisiana originally enacted statutes which treated illegitimate children quite harshly.<sup>14</sup> For example, a former Louisiana statute allowed fathers to provide for illegitimate children in their wills only if the father was not survived by de-

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9. *Id.* at 849.

10. *Id.*

11. Under this principle, a person can establish his parentage (*i.e.*, a biological parent) despite the existence of a legally recognized parent. *Warren v. Richard*, 296 So. 2d 813, 815 (La. 1974); *see infra* note 31.

12. *Smith*, 553 So. 2d 847, 855.

13. 109 S. Ct. 2333, *reh'g denied*, 110 S. Ct. 22 (1989). This case had no majority opinion with Justice Scalia delivering the Court's plurality opinion, Chief Justice Rehnquist joining, and Justices O'Connor and Kennedy joining except for footnote 6. *Id.* at 2336. Justice O'Connor filed a concurring opinion with which Justice Kennedy joined. *Id.* at 2346. Justice Stevens concurred in the judgment only. *Id.* at 2347. Justice Brennan filed a dissenting opinion with Justice Marshall and Justice Blackmun joining. *Id.* at 2349. Justice White also wrote a dissenting opinion with Justice Brennan joining in the opinion. *Id.* at 2360. This Note solely discusses the Court's plurality opinion written by Justice Scalia.

14. *E.g.*, *Smith v. Cole*, 553 So. 2d 847, 849 (La. 1989).

scendants, ascendants, collateral relations or a wife, and they had acknowledged the illegitimate children.<sup>15</sup> Interestingly, children conceived from an adulterous affair between the mother and a man not her husband were recognized by law as the legitimate children of the mother's husband.<sup>16</sup> With this historical background, the Louisiana legislature enacted article 184, which provided that "the law considers the husband of the mother as the father of all children conceived during marriage."<sup>17</sup>

Consistent with these developments was the Supreme Court of the United States' decision in *Michael H. v. Gerald D.*<sup>18</sup> In *Michael H.*, the Court was confronted with the application of a California statute that read: "the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."<sup>19</sup> This presumption could be disproved only if the husband or the wife desired blood tests to be performed. Furthermore, the test had to be performed within two years after the child's birth, and in the case of the wife, only after the supposed biological father had filed an affidavit with the court alleging paternity of the child.<sup>20</sup>

The plaintiff, Michael H., brought an action seeking visitation rights to his biological daughter, Victoria, who lived with her mother and her mother's husband, the defendant Gerald D.<sup>21</sup> Michael challenged the validity of the California statute. First, he claimed that his procedural due process rights were violated by the statute because the statute took away his liberty interest in his

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15. *Id.* (citing former LA. CIV. CODE ANN. art. 919 (West 1952)).

16. *Id.* (citing Succession of Robins, 349 So. 2d 276 (La. 1977)).

17. LA. CIV. CODE ANN. art. 184 (West Supp. 1990).

18. 109 S. Ct. 2333 (1989).

19. *Id.* at 2339 (quoting CAL. EVID. CODE § 621 (West Supp. 1989)).

20. *Id.* (citing CAL. EVID. CODE § 621 (West 1989)).

21. The facts of the case were quite complex. Carole D. and Gerald D. were married at the time Victoria was born and Gerald was named as the father on the birth certificate. *Id.* at 2337. However, Carole had had an affair with Michael H. and a blood test showed a 98.07 percent probability that he was the biological father of Victoria. *Id.* Over the course of three years, Carole and Victoria lived with Gerald, Michael and a third man. Michael established a relationship with Victoria as her father, and once Carole and Victoria returned to live permanently with Gerald, Michael petitioned the court, challenging the validity of California's filiation statute and was granted limited visiting privileges. *Id.* At this point, Gerald intervened in Michael's action and filed an affidavit with the court alleging paternity under section 621 of the California filiation statute, CAL. EVID. CODE § 621 (West Supp. 1990). *Michael H.*, 109 S. Ct. at 2337-38. The trial court granted Gerald's motion for summary judgment, Michael's challenge to the constitutionality of the statute was denied, and his visiting privileges were removed. *Id.* at 2338.

child's life without an opportunity to prove his paternity. Second, Michael argued that as a matter of substantive due process, the state did not have a sufficient interest in ending his relationship with Victoria.<sup>22</sup>

The Supreme Court struck down Michael's arguments, holding that he was not entitled to visitation rights, despite a statutory exception that granted discretion to the court in awarding visitation rights to a "nonparent." First the Court rejected Michael's procedural due process claim. The Court stated that the policy furthered by the statute was

actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.<sup>23</sup>

The Court then noted that while it had struck down certain irrebuttable presumptions as illegitimate in the past, it had not done so because of the inadequacy of the procedures but because of problems with "the adequacy of the 'fit' between the classification and the policy that the classification serves."<sup>24</sup> In other words, Michael's claim was to be addressed as a substantive due process issue and not as a procedural due process issue.

The Court continued that in order to be granted protection by the Constitution, Michael needed to establish that a fundamental liberty interest traditionally protected by society was at stake.<sup>25</sup> Only then could the Court interfere with a state's legislation.<sup>26</sup> The Court then examined whether Michael's relationship with Victoria fit within this framework. Justice Scalia found no traditional protection for this type of relationship in his historical analysis.<sup>27</sup> Specifically, the Court refused to classify Michael's relationship to his daughter as a "family", which was an historically protected interest.<sup>28</sup>

When faced with Michael's argument that biological fathers

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22. *Michael H.*, 109 S. Ct. at 2341.

23. *Id.* at 2340 (quoting *Michael H. v. Gerald D.*, 191 Cal. App. 3d 995, 1005, 236 Cal. Rptr. 810, 816 (1987) (quoting *Vincent B. v. Joan R.*, 126 Cal. App. 3d 619, 623, 179 Cal. Rptr. 9, 10 (1981))).

24. *Id.* at 2340-41.

25. *Id.* at 2341.

26. *Id.*

27. *Id.* at 2341-44.

28. *Id.* at 2342.

had been allowed to rebut the marital presumption in other states, the Court stated that Michael must demonstrate that society had traditionally given biological fathers parental rights, and not merely that they had been allowed to rebut the marital presumption.<sup>29</sup> The Court found that not a single state or decision had awarded such rights to an adulterous biological father.<sup>30</sup> The Court concluded that whether the marital presumption could be rebutted was a legislative decision and not a constitutional issue.

Finally, the Court concluded that:

[T]o *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a 'freedom not to conform'. . . Gerald must equivalently have a 'freedom to conform.' One of them will pay a price for asserting that 'freedom' — 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 and Victoria have established.<sup>31</sup>

Noting that it was not within the Court's duties to make such a decision, the Court ruled against Michael.<sup>32</sup>

## II. SMITH v. COLE

The *Smith* case presented the Louisiana Supreme Court with two issues: the viability of dual paternity in Louisiana, and Playville's claim that because the child had a legitimate father, by virtue of article 184, her mother, Ledora, had no right to bastardize the child for child support.<sup>33</sup> Judge Cole, writing the court's opinion, first took an historical approach to the problem. He pointed out that the original purpose behind Louisiana's treatment

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29. *Id.* at 2343-44.

30. *Id.* at 2344.

31. *Id.* at 2345.

32. Victoria, who was represented by a guardian *ad litem*, also brought a claim arguing a violation of her due process rights since the statute prevented her from maintaining filial relations with both Michael and Gerald. The Court struck down Victoria's claim stating that she had an even weaker substantive claim than Michael. Never before in the history or tradition of society had the concept of multiple fatherhood been recognized. *Id.* at 2346.

Victoria also claimed that her equal protection rights had been violated because she was prevented from rebutting the presumption of legitimacy. The Court applied rational basis review to this claim and held the statute's legitimate goal of protecting the family was served by rational means, and therefore only the husband or the wife could challenge the legitimacy of the child. *Id.*

33. *Smith v. Cole*, 553 So. 2d 847, 849 (La. 1989).

of illegitimate children was the "promotion and protection of the family" and "[w]ith the social and legal stigmas which attached to illegitimacy, it is not surprising that the courts rigorously applied the presumption of LSA-C.C. art. 184."<sup>34</sup>

However, Judge Cole noted that "[w]hile [article 184] promoted the policy against bastardizing children, it often failed to conform with reality."<sup>35</sup> For instance, men who were sterile or had not lived with their wives for years, were still presumed to be the children's fathers.<sup>36</sup> As a result, the legislature enacted Act 430 of 1976, which made article 184's irrebuttable presumption rebuttable. However, this alteration allowed only the husband or his heir to disavow paternity.<sup>37</sup>

Judge Cole then outlined other attacks on article 184's presumption. These were indirect attacks from children, from biological fathers and from the state. In *Warren v. Richard*,<sup>38</sup> the court allowed a child to recover for the wrongful death of her biological father in spite of article 184 and the existence of a legally recognized father.<sup>39</sup> *Warren* and the decisions that followed allowed the state to successfully bring support and paternity actions against biological fathers.<sup>40</sup> Finally, biological fathers who were able to establish an actual relationship with their child received protection of their due process and substantive rights under the United States Constitution.<sup>41</sup> Relying on these cases, Louisiana courts established the rule that the failure of the presumptive father to disavow his paternity did "not conclusively operate to deny a biological father his right to avow paternity."<sup>42</sup> Therefore, despite the article 184 presumption, biological fathers were allowed to bring

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34. *Id.*

35. *Id.* at 850.

36. *Id.* (citing *Tannehill v. Tannehill*, 261 La. 933, 261 So. 2d 619 (1972)).

37. *Id.*

38. 296 So. 2d 813 (La. 1974).

39. *Id.* at 817.

40. *Smith*, 553 So. 2d at 851 (citing *Poche v. Poche*, 368 So. 2d 175 (La. Ct. App.), *writ. den.*, 370 So. 2d 577 (La. 1979)).

41. *Id.* at 851 (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)). In *Stanley*, the Supreme Court held that an Illinois statute that automatically made children of unwed fathers wards of the State upon the death of their mothers was unconstitutional and a violation of the father's equal protection rights. *Stanley* 405 U.S. at 648-49. The Court remanded the case to the Supreme Court of Illinois for a hearing to determine the fitness of the petitioner (an unwed father whose children became wards of the state upon their mother's death) as a parent before the children automatically became wards of the state. *Id.* at 658-59.

42. *Id.* at 851 (citing *Finnerty v. Boyett*, 469 So. 2d 287 (La. Ct. App. 1985)).

avowal actions.<sup>43</sup>

Next, Judge Cole explained the effect these changes had on the attitude of the legislature. Although true parentage and dual paternity were consistent with the 1980 filiation provisions,<sup>44</sup> the legislature amended these provisions in 1981.<sup>45</sup> The 1981 amendments stated: "In order to establish filiation, a child who does not enjoy legitimate filiation or who has not been filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must institute a proceeding under Article 209."<sup>46</sup> "A child not entitled to legitimate filiation [sic] nor filiated by the initiative of the parent by legitimation or by acknowledgment under Article 203 must prove filiation by a preponderance of the evidence in a civil proceeding instituted by the child or on his behalf within the time limit provided in this Article."<sup>47</sup> These amendments created confusion and caused some to believe that the right of a child to establish true parentage, which had been granted by the *Warren* case, had been extinguished by the 1981 amendments.<sup>48</sup>

In order to discern the true meaning of the 1981 amendments Judge Cole carefully examined the purpose behind them. The legislature replaced the 1980 language of "any child may establish filiation, regardless of the circumstances of conception"<sup>49</sup> with new language that "[a] child not entitled to legitimate filiation . . . must prove filiation."<sup>50</sup> One commentator argued that this replacement meant that a child who was presumed to be that of

43. *Id.* at 851.

44. *Id.* at 851-52. The 1980 articles stated: "Illegitimate children, who have not been acknowledged as provided in Article 203, may be allowed to prove their filiation." LA. CIV. CODE ANN. art. 208 (West Supp. 1990) (amended 1981).

An illegitimate child may be entitled to a rebuttable presumption of filiation under the provisions of this article. Or any child may establish filiation, regardless of the circumstances of conception, by a civil proceeding instituted by the child or on his behalf in the parish of his birth, or other [proper] venue as provided by law, within the time limitation prescribed in this Article.

*Id.* art. 209 (amended 1981, 1982 & 1984).

45. LA. CIV. CODE ANN. arts. 208-09 (West Supp. 1990); see *Smith*, 553 So. 2d 847, 852.

46. LA. CIV. CODE ANN. art. 208 (West Supp. 1990).

47. *Id.* art. 209 (amended 1982 & 1984).

48. *Smith*, 553 So. 2d at 852 (citing Spaht, *Person, Developments in the Law 1980-81*, 42 LA. L. REV. 403 (1982)).

49. *Id.* at 853 (quoting La. Civ. Code Ann. art. 209 (West Supp. 1990) (amended 1981, 1982 & 1984)).

50. *Id.* at 853 (citing La. Civ. Code Ann. art. 209 (West Supp. 1990) (amended 1982 & 1984)).



the mother's husband, under article 184, could not institute filiation actions against another man.<sup>51</sup> However, Judge Cole suggested that this is not the intended meaning. Instead the phrase, "a child not entitled to legitimate filiation' means a child who is not entitled to legitimate filiation *to the parent to whom he is attempting to prove filiation.*"<sup>52</sup> Therefore the article distinguished between children attempting to prove filiation against a parent presumed to be a legitimate parent and children attempting to prove filiation against a parent not presumed to be a parent. Judge Cole found that rather than barring suits of children in Donel's situation, the amended article served to determine the method for the child to prove filiation.<sup>53</sup> This was supported by the legislative history of the act, in which the Council of the Louisiana State Law Institute had previously discussed the adoption of article 209's presumption in order to aid the Department of Health and Human Resources in its child support collection efforts.<sup>54</sup> Thus, Judge Cole concluded that the amendment merely served to codify the existing case law which allowed the state to bring actions against biological fathers despite the article 184 presumption.

Having determined that dual paternity was consistent with the statutory language in Louisiana's filiation provisions, Judge Cole then considered effects of dual paternity. First he stated that recognition of a biological father would in no way affect the original classification of legitimacy. "The legal tie of paternity will not be affected by subsequent proof of the child's actual biological tie."<sup>55</sup> Thus, although Playville might be Donel's biological father, Henry Smith was still her legal father.

The original purpose of the article 184 presumption was not to shield biological fathers from their child support obligations.<sup>56</sup> Nor did the fact that the legal father accepted responsibility for the child work as a benefit to the biological father. A biological father was civilly and criminally liable to support his offspring, whether or not someone else shared that responsibility.<sup>57</sup>

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51. *Id.* at 853 (citing Spaht, *supra* note 48, at 405-06).

52. *Id.* at 853 (quoting LA. CIV. CODE ANN. art 209 (West Supp. 1990) (amended 1982 & 1984) and citing Griffin v. Succession of Branch, 479 So. 2d 324, 327 (La. 1985)).

53. *Id.* at 853.

54. *Id.* at 853-54.

55. *Id.* at 854.

56. *Id.*

57. *Id.*

Finally, Judge Cole recognized that this decision was in the best interest of the child.<sup>58</sup> Because the statute allowed Donel or her mother to bring a filiation proceeding, a biological tie was recognized and Playville was liable for child support.

In sum, Louisiana retained the presumption of article 184 that the husband of the mother was the father, while also recognizing the concept of dual paternity. If the presumptive father did not timely disavow his paternity, he became the legal father. Filiation actions proved paternity and did not affect the status of the legal father. As a result, the mother and the biological father shared the support obligations once paternity was proven. Judge Cole noted that the separate question of whether the legal father must also share the support obligation had not been decided.<sup>59</sup>

### III. ANALYSIS

The *Smith* case demonstrated the flexibility of the legal system. Rather than rely on outdated precedent, Judge Cole took a contemporary concept and applied it to the existing situation. By recognizing the views of modern society and considering the best interests of the child, Judge Cole wrote an opinion that was optimal for all parties involved.

Judge Cole acknowledged that at one time there was a social stigma attached to illegitimate children.<sup>60</sup> However, he noted that given the change in the types of relationships of modern society, such stigma no longer prevailed. Furthermore, Judge Cole recognized that the old laws did not make sense in some instances, for example, failing to consider that a sterile husband could not possibly be the father of the child. Thus, by studying the history and purposes of the laws and taking a realistic attitude towards statutory interpretation, Judge Cole determined that dual paternity existed in Louisiana.

The analysis did not end there, however. Judge Cole continued to examine the effect of dual paternity, demonstrating that conflicting laws often existed simultaneously in the legal system. In order to avoid confusion, Judge Cole clarified what each of these conflicting principles meant. The end result was that a child could have two fathers at the same time, both responsible for her

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58. *Id.*

59. *Id.* at 855.

60. *Id.* at 849.

in different ways. This result made sense because it did not unduly infringe upon either party. For example, the legal father still had the opportunity to disavow his paternity and any responsibility that he was legally obligated to take resulted from his failure to act timely. Furthermore, the biological father was directed to do what any other biological father should do in the first place.

Despite having a similar issue to the one in *Smith*, the Supreme Court, in *Michael H.*, failed to take advantage of the legal system's flexibility. Not only did the Court render an unfair result, it also failed to take the opportunity to make the law consistent with modern society.

First of all, the Court could have characterized the relationship between a father and his biological daughter as a "family." The Court focused on the fact that this relationship did not fit within the traditional mold of a family, and as a result Michael's substantive due process claim failed. The Court failed to acknowledge that strict use of the term "family" was not required and had not always been required by the Court.<sup>61</sup> The Court also had the option of departing from precedent in determining what should be considered a liberty interest. Instead of admitting that in modern society this type of relationship was recognized as a family interest, the Court stated that Michael did not fit within the traditional mold and thereby cast aside any alternative for him.

Second, the Court evidently disregarded decisions that have granted fathers in Michael's position parental rights.<sup>62</sup> Furthermore, the Court stated that if it were to rule for Michael it would be taking away the protection already enjoyed by the marital father. This was not the case. As shown in *Smith*, the concept of dual paternity was not a new one, and both father-child relationships could exist simultaneously.

Notwithstanding these problems, the Court's decision was unfair for two reasons. First, by upholding the statute, the Court failed to consider the wishes of the biological father. Although the statute potentially allowed the biological father to claim paternity by filing an affidavit with the court, if for some reason the mother did not want to disavow paternity, the filiation action would not be

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61. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494 (1977) (The Court construed "family" to include a woman who was living with her two grandsons, who were related to each other as first cousins. It then struck down the city's statute which defined family in a manner so as to prevent them from living together.)

62. E.g., *Finnerty v. Boyett*, 469 So. 2d 287 (La. Ct. App. 1985).

pursued. One could envision situations where the biological fathers were totally at the mercy of the child's mother, who most likely would not want to destroy the relationship with her husband by admitting that she had committed adultery.

Second, not only did the Court ignore the wishes of Michael, but the wishes of his daughter as well. The Court had the statutory authority to compel visitation rights for Michael, but it refused to do so. The facts indicated a situation that was ripe for allowing visitation. Not only did Victoria and her mother live with Michael previously, but Michael had held Victoria out as his own. Thus, a bond between the two had already been established. Furthermore, *both* Michael and Victoria petitioned the Court to allow visitation rights. Thus, it was bitter irony that in attempting to protect the sanctity of the family the Court succeeded in denying a child's right to know her biological father.

#### CONCLUSION

The Supreme Court of Louisiana exuded logic and fairness with its decision in *Smith v. Cole*. Not only did the court reflect the view of the legislature in its statutory interpretation, but it reflected the view of modern society. On the other hand, the Supreme Court of the United States exhibited an unrealistic attitude by upholding the archaic California statute. Along with strictly construing the concept of family, the Court's reasoning was unconvincing. Moreover, the Court failed to consider the wishes of Michael and his daughter. In the end, justice was not served.

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