NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CU 1500

VICKIE LEIGH WESLEY

VERSUS

JOHN ALLEN DAVID

Judgment Rendered: FEB 18 2014

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Appealed from the
21st Judicial District Court
In and for the Parish of Livingston, Louisiana
Trial Court Number 133,357

Honorable Elizabeth Wolfe, Judge

* * * * * * *

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Plaintiff – Vickie Leigh Wesley

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Defendant – John Allen David

* * * * * *

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

Vickie Leigh Wesley appeals a trial court judgment awarding her and John Allen David joint custody of the minor child, C.J.D., designating John David as the child's domiciliary parent, and awarding her specific visitation. Finding no error in the judgment of the trial court, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Vickie Wesley and John David were married on November 7, 2009. The minor child, C.J.D., was born on November 30, 2008, before the marriage of the parties, and John David was listed as the child's father on the birth certificate.[1] John David's name was included on the minor child's record of birth because he and Vickie Wesley executed a voluntary acknowledgement of paternity (by authentic act) in accordance with La. R.S. 40:34(B)(1)(h)(ii).[2]

The parties physically separated on May 25, 2010, and a year later, on May 27, 2011, Vickie Wesley filed a petition for divorce requesting, among other things, that the parties be awarded joint custody of C.J.D., that she be designated as the child's domiciliary parent, and that John David be awarded specific physical custodial periods consisting of every other weekend. In response, John David filed an answer and reconventional demand seeking that he be awarded primary physical custody of C.J.D., that he be designated as the child's domiciliary parent, and that Vickie Wesley be awarded specific physical custodial periods consisting of every other weekend. When the divorce proceedings were commenced, the minor child had been in the physical care, custody and control of John David; therefore, pending a trial on the issue of custody, Vickie Wesley was awarded interim

[1] Although the minor child's birth certificate is not contained in the record before us, both parties have declared in their pleadings that John David was listed on the birth certificate as the child's father. These declarations by the parties amount to a judicial confession; therefore, evidence of this fact was not necessary. See La. C.C. art. 1853.

[2] The authentic act of acknowledgement of paternity executed by both John David and Vickie Wesley is contained in the record.

visitation with C.J.D. consisting of every other weekend from Thursday at 5:00 p.m. until Sunday at 5:00 p.m. beginning July 8, 2011.

On June 11, 2012, Vickie Wesley filed a peremptory exception raising the objections of no right of action and no cause of action to seek custody. In this exception, Vickie Wesley asserted that although John David was listed on the birth certificate as the father of C.J.D., he was neither "the legal nor biological father of the minor child." She further asserted that she was pregnant with the minor child at the time she commenced her dating relationship with John David; therefore, it was physically impossible for him to be the biological father. She also asserted that the parties were not married at the time of the birth of the child; therefore, John David could not be the legal father. Based on these assertions, Vickie Wesley contended that John David did not have the right to seek an award of custody of C.J.D. as a parent because he was a non-parent, and further, that he failed to state a cause of action for an award of custody to a non-parent under La. C.C. art. 133 because there are no allegations suggesting that substantial harm would come to the minor child if she were awarded custody.[3] After a hearing, the trial court overruled the objections of no right of action and no cause of action.

Thereafter, on July 9, 2012, Vickie Wesley filed a supplemental and amending petition for divorce, seeking to amend her original petition for divorce so as to assert the same factual allegations set forth in her peremptory exception and requesting orders compelling John David to submit to DNA testing for purposes of determining whether he was the biological father of C.J.D. and to return the physical custody of the child to her. Following DNA testing and the receipt of the results, on August 13, 2012, Vickie Wesley filed another peremptory exception

[3] Louisiana Civil Code article 133 provides:

> If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.

raising the objections of no right of action and no cause of action, essentially making the same allegations as the previously filed peremptory exception. In response to the supplemental and amending petition, John David filed a peremptory exception raising the objections of no cause of action and peremption, essentially claiming that Vickie Wesley was precluded from challenging the paternity of the child based on peremption and that he was the presumed legal father of the minor child. Following a hearing on the pending exceptions, by judgment signed on November 20, 2012, the trial court overruled the peremptory exception filed by Vickie Wesley and sustained the peremptory exception filed by John David.[4]

On March 20, 2013, following a trial on the merits on the issue of custody, the trial court rendered judgment awarding the parties joint custody of the minor child, C.J.D., designating John David as the child's domiciliary parent, and awarding Vickie Wesley physical custodial periods consisting of every other weekend from Friday at 5:00 p.m. until Sunday at 6:00 p.m. during the school year, the first three weeks of June and July, and first week of August. The trial court also ordered the parties to share holidays as equally as possible. A judgment in accordance with the trial court's ruling was signed on May 31, 2013, and it is from this judgment that Vickie Wesley has appealed.

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[4] The November 20, 2012 judgment, insofar as it overruled Vickie Wesley's peremptory exception, was clearly a non-appealable interlocutory judgment. See La. C.C.P. art. 1841 and 2083. However, with regard to John David's peremptory exception, although the judgment reflected that the trial court sustained the exception, the judgment did not contain appropriate decretal language specifying the relief granted, *i.e.*, either an order to amend the petition or the dismissal of Vickie Wesley's claims. See La. C.C.P. art. 934. Therefore, that portion of the judgment was not a final, appealable judgment. See **Johnson v. Mount Pilgrim Baptist Church**, 2005–0337 (La. App. 1st Cir. 3/24/06), 934 So.2d 66, 67 (holding that a final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied, and that a judgment that sustains the objection of no cause of action, yet does not contain decretal language, cannot be considered as a final judgment for purpose of an appeal). Accordingly, we construe the entire November 20, 2012 judgment as an interlocutory judgment.

On appeal, Vickie Wesley essentially claims that the trial court erred in: (1) overruling her peremptory exception raising the objections of no right of action and no cause of action and sustaining the peremptory exception raising the objections of no cause of action and peremption filed by John David; and (2) finding that it was in the best interest of C.J.D. that John David be designated as the child's domiciliary parent.[5]

LAW AND DISCUSSION

Peremptory Exceptions

A cause of action, for purposes of the peremptory exception, is defined as the operative facts that give rise to the plaintiff's right to judicially assert the action against the defendant. **Ramey v. DeCaire**, 2003–1299 (La. 3/19/04), 869 So.2d 114, 118. The function of the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the petition. *Id.*

The burden of demonstrating that no cause of action has been stated is on the party filing the exception. **Adams v. Owens–Corning Fiberglas Corp.**, 2004–1296 (La. App. 1st Cir. 9/23/05), 921 So.2d 972, 975, writ denied, 2005–2501 (La. 4/17/06), 926 So.2d 514. Generally, no evidence may be introduced to support or controvert the exception raising the objection of no cause of action. See La. C.C.P. art. 931; **Ramey**, 869 So.2d at 118. For the purpose of determining the issues raised by the exception, all facts pled in the petition must be accepted as true. *Id.* If the petition alleges sufficient facts to establish a cause of action cognizable in law, the exception raising the objection of no cause of action must fail. **Rebardi v.**

[5] Although the November 20, 2012 trial court judgment relating to both parties' peremptory exceptions were non-appealable, interlocutory judgments, the May 31, 2013 judgment relating to custody is a final appealable judgment. See footnote 4 herein; La. C.C.P. art. 1841 and 2083. When an unrestricted appeal is taken from a final judgment determinative of the merits, the appellant is generally entitled to seek review of all adverse interlocutory judgments prejudicial to him in addition to review of the final judgment. See **Judson v. Davis**, 2004-1699 (La. App. 1st Cir. 6/29/05), 916 So.2d 1106, 1112, writ denied, 2005-1998 (La. 2/10/06), 924 So.2d 167.

Crewboats, Inc., 2004–0641 (La. App. 1st Cir. 2/11/05), 906 So.2d 455, 457. Any reasonable doubt concerning the sufficiency of the petition must be resolved in favor of finding that a cause of action has been stated. **Belle Pass Terminal, Inc. v. Jolin, Inc.**, 92–1544, 92–1545 (La. App. 1st Cir. 3/11/94), 634 So.2d 466, 493, writ denied, 94–0906 (La. 6/17/94), 638 So.2d 1094. Appellate courts review a judgment sustaining a peremptory exception raising the objection of no cause of action *de novo,* because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. **Ramey**, 869 So.2d at 119.

The peremptory exception pleading the objection of no right of action tests whether the plaintiff has any interest in judicially enforcing the right asserted. See La. C.C.P. art. 927(A)(6). Simply stated, the objection of no right of action tests whether this particular plaintiff, as a matter of law, has an interest in the claim sued on. To prevail on a peremptory exception pleading the objection of no right of action, the defendant must show that the plaintiff does not have an interest in the subject matter of the suit or legal capacity to proceed with the suit. Whether a plaintiff has a right of action is ultimately a question of law; therefore, it is reviewed *de novo* on appeal. **OXY USA Inc. v. Quintana Production Company**, 2011–0047 (La. App. 1st Cir. 10/19/11), 79 So.3d 366, 376, writ denied, 2012–0024 (La. 3/2/12), 84 So.3d 536.

Vickie Wesley's peremptory exception raising the objections of no cause of action and no right of action pertain to John David's request for custody, as set forth in his reconventional demand. In her exception, she claims that John David is not C.J.D.'s biological father, that he, therefore, does not have the right to seek custody as a parent, and that he did not make allegations sufficient to state a cause of action for custody by a non-parent.

In John David's peremptory exception raising the objections of no cause of action and peremption, he challenges Vickie Wesley's attempt to contest his

paternity, as set forth in her supplemental and amended petition for divorce. He claims that Vickie Wesley does not have a cause of action to contest his paternity, and that any action she may have been able to bring has been perempted.

Louisiana Civil Code article 195 provides:

> A man who marries the mother of a child not filiated to another man and who, with the concurrence of the mother, acknowledges the child by authentic act or by signing the birth certificate is presumed to be the father of that child.
>
> The husband may disavow paternity of the child as provided in [La. C.C. art.] 187.
>
> The action for disavowal is subject to a peremptive period of one hundred eighty days. This peremptive period commences to run from the day of the marriage or the acknowledgment, whichever occurs later.

The record in this matter establishes that C.J.D. was born on November 30, 2008. At that time, C.J.D. was not filiated to another man. John David, with the concurrence of Vickie Wesley, acknowledged C.J.D. by authentic act on December 1, 2008, and he was listed as the child's father on the birth certificate.[6] The record

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[6] We note that Vickie Wesley argues that John David's authentic act of acknowledgement of paternity is invalid because he is not the child's biological father and that only a biological father can acknowledge paternity. However, we find the fact that La. C.C. art. 195 provides for the disavowal of the child by the husband within a certain peremptive period indicates that there are there are instances where a man marries the mother of a child and executes an acknowledgment of paternity without being the child's biological father. In such cases, the remedy provided by law is that the father may file an action to disavow the child within the applicable peremptive period; it does not render the authentic act of acknowledgment invalid. See La. C.C. art. 195.

Furthermore, we find that the case relied upon by Vickie Wesley for her argument in this regard, **State, in the Interest of A.L.**, 2009-1565 (La. App. 3rd Cir. 4/7/10), 34 So.3d 416, writ denied, 2010-1017 (La. 5/28/10), 36 So.3d 256, is clearly distinguishable and not applicable to this case. First, **State, in the Interest of A.L.** involved the presumption set forth in La. C.C. art. 196, which is a presumption of paternity solely in favor of the child when a man acknowledges the child (but is never married to the child's mother), and is substantively different from the presumption set forth in La. C.C. art. 195, which is the presumption applicable to this case. Additionally, in **State, in the Interest of A.L.**, Michael Lange, who was neither married to nor sexually involved with the mother of the child at issue, acknowledged the child by signing child's birth certificate; he did not execute an authentic act of acknowledgement. *Id.* at 417-419. One month after signing the child's birth certificate, Michael Lange disavowed paternity of the child. *Id.* at 418 n.1. A year and a half later, he sought custody of the child based on the fact that he had signed the birth certificate. *Id.* at 419. Given that Michael Lange had already disavowed paternity of the child, the court properly concluded that the acknowledgment of the child (by signing the birth certificate) was "not valid and [was] without legal effect," and thus could not form the basis of his request for custody of the child. Id. at 419-420. In this case, John David executed an authentic act of acknowledgment, married the child's mother, and has not disavowed paternity. Thus, according to La. C.C. art. 195, he remains the presumed father of the child.

also establishes that thereafter, on November 7, 2009, John David and Vickie Wesley were married. Thus, according to La. C.C. art. 195, John David is presumed to be the father of C.J.D. Notably, John David has not sought to disavow paternity of the child. Therefore, we find John David, has both a right of action and a cause of action to seek custody of C.J.D. as a parent. See La. C.C. art. 105, 131, 132; La. R.S. 9:291.

With regard to Vickie Wesley's action to establish that John David is not the father of C.J.D., from our review of the law on filiation, *i.e.*, La. C.C. arts. 178-199, the mother's action to contest a presumption of paternity is limited to the circumstances set forth in La. C.C. art. 191, which provides:

> The mother of a child may institute an action to establish both that her former husband is not the father of the child and that her present husband is the father. This action may be instituted only if the present husband has acknowledged the child by authentic act or by signing the birth certificate.

Based on our review of the record, we find that Vickie Wesley has failed to state a cause of action to establish that John David is not the father of C.J.D. or otherwise to challenge his presumed paternity of C.J.D. under La. C.C. art. 191. Vickie Wesley is not currently married, and therefore, cannot "establish both that her former husband [*i.e.*, John David] is not the father of the child and that her present husband is the father[,]" or that her "present husband has acknowledged the child by authentic act or by signing the birth certificate." See La. C.C. art. 191. Furthermore, La. C.C. art. 193 provides that the mother's action "shall be instituted within a peremptive period of one hundred eighty days from the marriage to her present husband and also within two years from the day of the birth of the child." As the record establishes that C.J.D. was born on November 30, 2008, and that Vickie Wesley did not institute her action to establish that John David was not the father of C.J.D. until three and a half years after the birth of C.J.D. (*i.e.*, when she

filed her amended petition for divorce on July 9, 2012), any action by her to challenge John David's presumed paternity of the child has been perempted.

Accordingly, we find that the trial court properly overruled Vickie Wesley's peremptory exception raising the objections of no cause of action and no right of action and sustained John Wesley's peremptory exception raising the objection of no cause of action and peremption, and the November 20, 2012 judgment of the trial court is affirmed.

Custody

Each child custody case must be viewed in light of its own particular set of facts and circumstances. **Perry v. Monistere**, 2008–1629, 2008-1630 (La. App. 1st Cir. 12/23/08), 4 So.3d 850, 852. Louisiana Civil Code article 131 provides "[i]n a proceeding for divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child." Thus, the paramount consideration in any determination of child custody is the best interest of the child. **Evans v. Lungrin**, 97–0541, 97–0577 (La. 2/6/98), 708 So.2d 731, 738. In determining the best interest of the child, La. C.C. art. 134 provides:

> The court shall consider all relevant factors in determining the best interest of the child. Such factors may include:
>
> (1) The love, affection, and other emotional ties between each party and the child.
>
> (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
>
> (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
>
> (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
>
> (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(6) The moral fitness of each party, insofar as it affects the welfare of the child.

(7) The mental and physical health of each party.

(8) The home, school, and community history of the child.

(9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

(11) The distance between the respective residences of the parties.

(12) The responsibility for the care and rearing of the child previously exercised by each party.

The list of factors set forth in this article is non-exclusive, and the determination as to the weight to be given each factor is left to the discretion of the trial court. La. C.C. art. 134, comment (b). Additionally, the "best interest of the child" test under La. C.C. arts. 131 and 134 is a fact-intensive inquiry, requiring the weighing and balancing of factors favoring or opposing custody in the competing parties on the basis of the evidence presented in each case. **Martello v. Martello**, 2006–0594 (La. App. 1st Cir. 3/23/07), 960 So.2d 186, 191. Hence, every child custody case is to be viewed on its own particular set of facts and the relationships involved, with the paramount goal of reaching a decision that is in the best interest of the child. *Id.*

The trial court is vested with broad discretion in deciding child custody cases. Because of the trial court's better opportunity to evaluate witnesses, and taking into account the proper allocation of trial and appellate court functions, great deference is accorded to the decision of the trial court. Thus, a trial court's determination regarding child custody will not be disturbed absent a clear abuse of discretion. **Martello**, 960 So.2d at 191–92.

In this case, and as in most child custody cases, the trial court's determination as to what was in the best interest of C.J.D. was based heavily on factual findings. It is well settled that an appellate court cannot set aside a trial court's findings of fact in the absence of manifest error or unless those findings are clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse those findings even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.*

On appeal, Vickie Wesley essentially contends that the trial court misapplied the factors set forth in La. C.C. art. 134; that it erred in finding that factors 2 and 3 weighed in favor of John David and should have given more weight to factor 10, which the trial court found weighed in favor of Vickie Wesley; and that it erred in finding that it was in the best interest of C.J.D. that John David be designated as the domiciliary parent.

In oral reasons for judgment, the trial court made the following factual findings and conclusions:

> [The La. C.C. art.] 134 factors which I reviewed, number one, I don't find in favor of either party. I find both parties have great love, affection, and emotional ties with – for the child.
>
> Number two, I find for the father. The father's been, for the most part, at least in the last couple of years, the one to have him in school, to give him what he needs daily – on a daily basis.
>
> Number three, I find in favor of the father. The material needs of the child, the father is providing for them and has provided them except when he's in her custody.... And so the – the financial is a big part of raising children—rearing children – and she has not contributed very much to that at all from the testimony that I heard. And even in her own testimony she said she should have done it. Yes, she should have.
>
> Number four, I don't find in favor of either party. When the child's been with the mother, he's just been in one or two places, in the home in Watson or the place where she is now with her mother. And also, the father, he's – he's been for most of his life where – with

his parents, and the child's been there in that environment when he's with his father.

Number five, I don't find in favor of either party. I think the child's got – feels like he's got a permanent family at – at both homes.

Number six, I don't find in favor of either party.

Number seven, I don't find in favor of either party.

Number eight, home, school, and community history of the child, I find in favor of the father. He's mainly gone to school in Pointe Coupee. That's where he's registered; that's where he's got the family history – the school history.

All right. Number nine is not applicable.

Number ten, from the testimony, it – it appears the parties have a problem informing each other of what's going on. Sounds like the mother has attempted more to inform the father of things going on with the child, so I find in favor of the mother in number ten.

Number 11 doesn't really apply. In fact, if it weren't for the distance between the two parties, I – I would think that they could have more of a shared custody. But the – the difference in the – in the – in the distance from where they live is – is a problem. The party who doesn't have primary custody could – could have more of a hand in it, but they live in two different parishes, two different school districts. It's –it's a problem. Otherwise, I – I would go more towards a closer shared custody.

Number 12, I find in favor of the father. He and his mother, of course helping, have the responsibility for the care and rearing of the child for the most part.

So I'm going to find for the father. I'm going to award him primary domiciliary custody, make him primary domiciliary parent. But this is joint custody. And let me just say the father has joint custody. So that means the mother has – is to have access to all medical, all school. And the mother, of course, with the judgment – … the mother has access to everything. She's going to be on the pick-up list, or a contact. She can pick the child up from school. She needs to know about all the events at school, mother's day's at school, Christmas parties, Easter parties – whatever. She is certainly entitled to be involved, and it's in the best interest of the child that she be involved.

But I do find it's in the best interest of the child after reviewing the factors that the father should be the primary domiciliary parent, with custody to the mother every other Friday at 5:00 p.m. to Sunday at 6:00 p.m.… I'm going to order phone contact with [C.J.D.] on every week on Wednesday's …. I am going to award extended summer visitation for the mother of three weeks in June, three weeks

> in July, and the first week in August. And I order the holidays to be shared. ...
>
> ***
>
> It's unfortunate, again, the parties don't live closer. I think the mother could have more of a hand and more time than just a few days a month with the child. But I – I do find it's in the best interest of the child for what I've ruled. And as much time as is possible that the mother can be with the child other than what I've set out, I would just encourage that. This is a very young child, who I'm sure needs both parents. And – and the father is doing a very good job in – in rearing of him, an[d] the mother can certainly contribute and certainly has the right and – and the responsibility to be involved in everything, like I said, at school, medical.

Thus, in applying the factors set forth in La. C.C. art. 134, the trial court made a factual determination that four of the factors weighed in favor of John David (factors 2, 3, 8, and 12), one factor weighed in favor of Vickie Wesley (factor 10), and that the other factors were either not applicable or did not favor either party over the other (factors 1, 4, 5, 6, 7, 9, and 11). This court has carefully reviewed the arguments presented in this appeal, carefully examined the entire record, and studied the trial court's oral reasons for judgment, factual findings, and conclusions. The trial court's determination that factors 2, 3, 8, and 12 weighed in favor of John David and that factor 10 weighed in favor of Vickie Wesley are fully supported by the testimonial evidence in the record. In weighing and balancing these factors, along with the other factors that the trial court found did not favor one party over the other, we cannot say that the trial court abused its vast discretion in concluding that it was in the best interest of C.J.D. that John David be designated as the domiciliary parent. Accordingly, we affirm the May 31, 2013 judgment of the trial court.

CONCLUSION

For all of the above and foregoing reasons, the November 20, 2012 judgment relating to the parties' peremptory exceptions is affirmed, and the May

31, 2013 judgment of the trial court relating to child custody is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Vickie Leigh Wesley.

NOVEMBER 20, 2012 JUDGMENT AFFIRMED; MAY 31, 2013 JUDGMENT AFFIRMED.