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| **IN RE: C.A.C.** | * | **NO. 2017-CA-0108** |
| | * | **COURT OF APPEAL** |
| | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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**BROUSSARD, J. PRO TEMPORE, CONCURRS IN PART, DISSENTS IN PART, AND ASSIGNS REASONS.**

I respectfully concur in the majority's finding that the district court did not abuse its discretion in denying the exception of no cause of action and the motion in limine.

However, I respectfully dissent from the majority's conclusion that there was no error in the district court's ruling which awarded Joint Custody of the Appellant's natural child to the Appellant and Appellee. The reasons for the dissent are set forth below.

The fundamental basis of this dissent is that the district court misapplied La.Civ.Code art. 133, and the preference given in Louisiana Jurisprudence to the natural mother in the award of joint custody of her natural child. As will be discussed below, this statutory and constitutional preference given to natural mothers is one of the most venerable of rights afforded under the Fourteenth Amendment of the United States Constitution.

Appellee filed, in the district court, a "PETITION FOR CUSTODY PURSUANT TO LA CIVIL CODE ARTICLE 133" seeking joint custody of Charlie, the natural child. In doing so, Appellee stipulated that article 133 is the law which governs this case as it involves the award of custody of a child to which

she did not give birth. Louisiana Civil Code Article 133 provides (emphasis added):

> 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.

Turning to the legal definition of substantial harm, the court in *Black v. Simms*, 08-1465 (La.App. 3 Cir. 6/10/09), 12 So.3d 1140, 1144, wrote:

> "The words 'substantial harm' carry no magical connotation. 'Detrimental' and 'substantial harm' have been used interchangeably in the jurisprudence." *Robert* [v. *Gaudet,* 96-2506 (La.App. 1 Cir. 3/27/97)] 691 So.2d [780] at 783. In *Mills v. Wilkerson,* 34,694, p. 6 (La.App. 2 Cir. 3/26/01), 785 So.2d 69, 74, the court held that substantial harm "includes parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include 'any other circumstances, such as prolonged separation of the child from its natural parents, that would cause the child to suffer substantial harm.'"

*See also*, *Ferrand v. Ferrand*, 16-7 (La.App. 5 Cir. 8/31/16), 221 So.3d 909, 920, *writ denied,* 16-1903 (La.12/16/16), 211 So.3d 1164.

In *Tracie F. v. Francisco D.,* 15-1812, p. 8 (La.3/15/16), 188 So.3d 231, 238 (citing *Arabie v. CITGO Petroleum Corp.,* 10–2605, pp. 4–5 (La. 3/13/12), 89 So.3d 307, 312), the court explained:

> Our application of statutory law is guided by the following principles:
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> > The fundamental question in all cases involving statutory interpretation is legislative intent. *City of DeQuincy v. Henry,* 2010–0070 (La.3/15/11), 62 So.3d 43, 46. Further, according to the general rules of statutory interpretation, our interpretation of any statutory provision begins with the language of the statute itself. *In re Succession of Faget,* 10–0188, p. 8 (La.11/30/10), 53 So.3d 414, 420. While the Official Revision Comments are not the law, they may be helpful in determining legislative intent. *See, e.g., State v. Jones,* 351 So.2d 1194, 1195 (La.1977)

Sole custody of the natural parent should not be abrogated, unless, there is substantial harm to the child. Comment (b) of article 133 supports this view as it

demonstrates the term "substantial harm" was used in the statute to represent an efficient means of giving effect to a parent's paramount right to custody of his/her child as against any nonparent. The comment notes primacy of the parental right was recognized by the Louisiana Jurisprudence long before it was given effect by the legislature in 1982. *Id*. That same efficiency is demonstrated in La.Ch.Code art. 1015. This article deals with the termination of parental rights in preparation for adoption. Since this is not a same gender marriage and there has not been an adoption, the effect of the court's decision in awarding joint custody is to terminate the exclusive right of the natural parent to manage her responsibility, care, custody, and environment in which her child will thrive.

*State ex rel. C.J.,* 00-2375, 00-2504 (La.11/28/00), 774 So.2d 107 is instructive to the application of article 133 when applied by the district court's termination of exclusive parental rights of a natural mother. The Louisiana Supreme Court determined that the termination of a natural mother's parental rights was not warranted on grounds of abuse or neglect even though the children sustained mental injury due to witnessing violence by the father toward the mother. The factors which were considered by the court included the following: the mother made efforts to obtain help for herself through restraining and protective orders and through law enforcement; the mother sought protection at women's shelter; and the mother took initiative in contacting child protection services to ensure her children's safety. *Id*. at 108-09,115.

In this present custody contest, which involves a parent and a non-parent present, there is a convergence of two basic principles: the child's substantive right to live in a custodial arrangement which will serve her best interest, and a natural

parent's constitutional right to parent her biological child.[1] It is well established that the interest of a parent in having a relationship with her/his children is a liberty interest that is protected by the Fourteenth Amendment's Due Process guarantee. *See Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054 (2000) and *Tracie F.,* 188 So.3d at 242. "The United States Supreme Court has declared it 'plain beyond the need for multiple citations' that a biological parent's right to 'the companionship, care, custody, and management' of her/his children is a liberty interest far more important than any property right." *In re Adoption of B.G.S.,* 556 So.2d 545, 549 (La.1990*)*(*citing Santosky v. Kramer,* 455 U.S. 745, 758-59, 102 S.Ct. 1388 (1982). But, the liberty interest of a parent to the companionship, care custody and management of her children is not absolute. *Lassiter v. Department of Social Services of Durham County, N.C.,* 452 U.S. 18, 27, 101 S.Ct. 2153 (1981)). The child's right to a custodial arrangement which promotes his or her best interest arises at birth. Therefore, natural parents acquire the substantial protection of their interest in a child's custody under the Due Process Clause by demonstrating a full commitment to the responsibilities of parenthood and by a personal dedication to participate in the rearing of the child. *Lehr v. Robertson,* 463 U.S. 248, 261, 103 S.Ct. 2985 (1983) *(quoting Caban v. Mohammed*, 441 U.S. 380, 392, 99 S.Ct. 1760 (1979)). Each child custody case has its own unique factual circumstances. Courts must consider the parents' rights and responsibilities along with the overarching

[1]At the time the natural child was born in 2007, there was no legal avenue through which Appellee could obtain parental rights. Appellant and Appellee are a biologically same-sex couple. Appellant is the natural mother through artificial insemination. Appellee could not have adopted the natural child legally under Louisiana law without Appellant relinquishing parental rights. La.Ch.Code art. 1221 (stating that "a single person, eighteen years or older, or a married couple jointly may petition to privately adopt a child.") and La.Ch.Code. art. 1240 (stating that, upon a final judgment of adoption, the natural parents are "divested of all their legal rights with regard to the adopted child"); *see also Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011), *writ denied*, 565 U.S. 942, 132 S.Ct. 400 (2011). Moreover, during that time period, prior to the United States Supreme Court's decision in *Obergefell v. Hodges*, ___ U.S.___, 135 S.Ct. 2584 (2015), Louisiana did not recognize same-sex marriage. *See* La.Civ.Code.art. 3520(B); *see also Costanza v. Caldwell*, 14-2090 (La.7/7/15), 167 So.3d 619.

and overriding concern for the best interest of the child. *Tracie F.,* 188 So.3d at 235*; See also McCormic v. Rider,* 09-2584 (La.2/12/10), 27 So.3d 277, 279.

In written reasons for judgment, the district court awarded joint custody to the non-parent, in this case, finding, "The evidence shows that, given the pattern she [Appellant] has already displayed. Dr. Colon will continue restricting and limiting CAC's [the natural child] access to Ms. Adjmi. This pattern of diminished access disrupts CAC's [the natural child] emotional connection with Ms. Adjmi and causes emotional damage." When these comments are taken at face value, it appears that the court deprived the natural parent of her constitutionally protected right to protect, guide, and nurture her child without a determination of her suitability as a parent. This is clearly wrong.

It is commendable that the district court provided detailed written reasons for judgment. However, when the evidentiary testimony is reviewed, it is clear the district court abused its discretion in failing to follow Louisiana Law. In eroding the constitutionally protected right of the natural parent, the district court misapplied the concept of substantial harm. The district court's decision appeared to be based on a finding of substantial harm based on speculative emotional damage to the natural child. The following facts were considered by the court to constitute substantial harm. 1) Appellee's family and friends *believed* the child would be emotionally upset *if* Appellant prohibited access and visitation between the natural child of the Appellant and the Appellee; 2) Appellee testified she *thought* the natural child of the Appellant was suffering harm by Appellant placing restrictions on her ability to function as a parent and preventing "continual, constant visitation" between her and the natural child; and 3) Appellee stated the natural child became nervous and uncomfortable showing her attention or affection if Appellant was around. These are subjective statements by the Appellee and not the natural mother of the child. None of these facts render the natural mother

incapable of deciding what is in the best interest of the child that would require the intervention of the State of Louisiana. S*ee Troxel,* 530 U.S. 57.

The district court relied on the testimony of Ms. Chaisson, an expert, appointed by the court to conduct a custody evaluation. Her testimony was speculative, and it did not rise to the standard that would deprive a natural mother of her constitutional right to guide, protect and nurture her child. Ms. Chaisson could only testify that it would be a possibility, not a present or certain fact, that a decision by the natural mother regarding relationships with her co-parent would be detrimental to the natural child of the Appellant. Likewise, Ms. Chaisson was of the opinion an award of sole custody to Appellant, with no legal rights and no visitation by Appellee, *would cause* substantial harm to the natural child. However, she admitted that presently, the child *was not* suffering any substantial harm.[2] This is conclusive evidence that the decisions of the natural parent were not a substantial harm to her own natural child. The district court was, therefore, clearly wrong in its determination.

The district court failed to properly consider La.Code Evid. art. 703 regarding expert testimony. Dr. Shwery was called, by the Appellant, as an expert in clinical psychology and child custody evaluations. However, the district court limited Dr. Shwery's testimony to the concept of substantial harm as a psychologist. He did not give a definition in the context of a custody evaluation because he was unable to interview Appellee; though he tried to interview the Appellee, she refused.[3] In its written reasons for judgment, the district court did not give Dr. Shwery's testimony "significant weight" because his definition of substantial harm was based on a psychological definition. Nevertheless, I find Dr.

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[2]Ms. Chaisson admitted she had not seen the natural child since November 2015.

[3]At trial, Appellant's attorney noted on the record the expert requested to interview Appellee, but Appellee declined. Appellee argued she declined because the request was late, and she feared the interview would post-pone the trial.

Shwery's testimony provides guidance on this issue in light of the district court's finding that the basis for the substantial harm was emotional damage or distress suffered by the natural child.[4] Dr. Shwery concluded the natural child of the Appellant was a "healthy, thriving child". This was consistent with all the teacher's reports, collateral interviews, and the two therapists he interviewed.[5] This testimony was consistent with the other witnesses at the hearing who testified the natural child was flourishing and happy.[6] Even though the court did not give the appropriate weight to testimony of Dr. Shwery, his impression was further corroborated by Ms. Chaisson. She concluded that she was not surprised that the testimony from the other witnesses indicated that the natural child was flourishing since the separation. Ms. Chaisson was also of the opinion that the change in the natural child and her exhibited independence was attributed to the fact that she was no longer living in the toxic environment that existed while Appellant and Appellee lived together. Dr. Shwery, like Ms. Chaisson, was of the opinion that the

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[4]In *Succession of Butterworth,* 195 La. 115, 124, 196 So. 39, 41–42 (1940), the court explained in pertinent part, "[T]he testimony of an expert cannot be arbitrarily rejected. Like the testimony of other witnesses, it should be considered by the Court and accorded the weight to which it is entitled in view of the facts and the common knowledge of mankind (citations omitted)."

[5]To prepare for his evaluation, Dr. Shwery read all the legal documents pertaining to the couple's relationship with each other and the child. He was of the opinion from the beginning, Appellant intended the natural child to have a relationship with Appellee and that intent continued to the present although the relationship of Appellant and Appellee changed. He looked at Appellant's medical information. He testified he observed the child over a period of three or four times for a total of three and one-half to four hours. He observed the child at Appellant's home, reviewed all her school records, and administered a battery of psychological test to the child.

[6]Appellant testified the natural child was going to counseling, and she was flourishing and doing very well in school. Kayla Valls, a friend of Appellee and who also babysit the child for Appellant, testified the child was a shy, quiet girl, but she did well in school and did not seem unhappy. Ms. Azucena Rivera, a friend of Appellee, testified, since Appellant and Appellee separated, she saw a change in the demeanor of the child; she described the child before the couple split as shy and not very talkative, but after the split, the child had "flourished into this joyful, happy, joking and just talks to everybody and just affectionate . . . ." Ms. Adele Adjmi, Appellee's mother, agreed with Ms. Rivera's characterization of the natural child's demeanor.

natural child, *presently*, showed no indication of suffering substantial harm.[7] The district court questioned Dr. Shwery on his definition of substantial harm under these particular facts. Dr. Shwery responded that if there was substantial harm, you would expect some "symptomatology" to show up either in relations, in personality, or at school in which he did not see in this case. The combined testimony, of above referenced witnesses, demonstrates no symptomatology of substantial harm to the natural child that would warrant the State of Louisiana to erode the parental rights of the natural parent.

Because the evidence at trial did not reflect the natural child suffered from emotional distress or damage to warrant infringement of a natural parent's rights, I find that the decision is manifestly erroneous. I also find that the evidence presented and reviewed, by the district court, did not rise to the level that would warrant even minimal intrusion of the state court into the constitutionally protected parental rights. The court record does not reflect abandonment, neglect, abuse, or emotional distress that would merit such a grave erosion of the constitutional right of a natural parent to the companionship, care, custody, and the ability to control the environment in which her child could thrive.

While not applicable in this case, the degree to which the rights of the natural mother are elevated in this state is illustrated in La.Ch.Code art. 1015 which provides the standard for abating parental rights in adoption cases. It is offered here to demonstrate how the natural preference is given in other aspects of the law.

Additionally, the district court's judgment is manifestly erroneous because it ignored La.Civ.Code art. 256, which declares that the mother is of right, the natural tutrix of her child born outside of marriage, who is not acknowledged by the father. Since the birth of the Appellant's natural child was by artificial insemination, there

[7]Appellate record, p. 335.

is no acknowledgment by the natural father who by law would also be a natural tutor. The court erroneously equated Appellee's status as a "co-parent" based upon documentation such as the Domestic Partnership Contract. The court erroneously equated presence at birth, name of the child, cards and drawings of the child to elevate Appellee's status above that of the natural mother and natural tutrix. Neither the courts nor the Louisiana State Legislature has sanctioned such a displacement of the natural mother as natural tutrix of her child except under crucial situations. This decision of joint custody by the district court is an abuse of discretion as contrary to Louisiana Law of Tutorship.

In particular, the court's decision seems to be based on concepts such as, *in loco parentis*, *defacto parent, co-parent, and psychological parent*. These theories currently have not been codified by the Louisiana Legislature or by Louisiana Courts in custody determinations. However, the concept of *in loco parentis* has been used in the termination of parental rights of a minor child. There is no clear jurisprudential or legislative guidance on the application of the co-parent or psychological parent concepts in custody determinations. The question presented in this case is: whether a non-parent, former cohabitant, has a fundamental right, superior to the right of the natural mother, to maintain a relationship with a child born of artificial insemination while the two females cohabitated? There was no adoption of the natural child of the Appellant nor was the child born during a lawful marriage. While the rights of children have been recognized by state and federal jurisprudence, the right of a fit parent to care for, guide, and nurture has been given statutory and jurisprudential preference. The district court, in this case, ignored the rights of the natural mother.

The United States Supreme Court provided clear guidance regarding the constitutionally protected right of a natural parent to protect, guide and nurture her child. The district court should have followed this for clear guidance on this issue.

In *Troxel,* 530 U.S. 57, Justice O'Connor, writing for the majority opinion, addressed a Washington State statute which provided that any person may petition the court for visitation at any time and that the court may order visitation rights for any person when visitation may serve the best interest of child. The majority held that the statute violated the substantive due process rights of the mother, as applied, by permitting the paternal grandparents to obtain increased court-ordered visitation in excess of what the mother had thought appropriate. This is precisely the issue in this case. Here, a non-parent is given superior or equal rights of the natural mother. The Supreme Court opined that the rights of natural parents over their natural children derive from the Fourteenth Amendment of the United States Constitution. That amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." The right extended, to the natural mother, is not only due process but fair process. It has long recognized that the Fourteenth Amendment's Due Process Clause, "like its Fifth Amendment counterpart, 'guarantees more than fair process.'" *Troxel*, 530 U.S. at 65 (citing *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S.Ct. 2258 (1997)). The rights of natural parents in the care, custody and control of their children are perhaps the oldest and fundamental liberty recognized by the courts. The Supreme Court has long held that "'liberty' protected by the Due Process Clause includes the right of natural parents to 'establish a home and bring up children' and 'to control the education of their own.'" *Id*. at 65 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 435 S.Ct. 625 (1923)). In *Troxel*, the court determined that decisional framework employed by the Washington State Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child. *Troxel,* 530 U.S. at 69. I find, in this case, that the district court ignored the well engraved principal of preferential rights for natural parents. As the United States Supreme Court proclaimed in *Troxel*, 530 U.S. at 68-69,

> [T]here is a presumption that fit parents act in the best interests of their children. As this Court explained in *Parham*[*v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493 (1979)]:
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> > "[O]ur constitutional system long ago rejected any notion that a child is the mere creature of the State and, on the contrary, asserted that parents generally have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations . . . .' The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." 442 U.S. at 602, 99 S.Ct. 2493 (alteration in original) (internal quotation marks and citations omitted).
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> Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children. *See, e.g., Flores*, 507 U.S., at 304, 113 S.Ct. 1439."

The Louisiana case of *Black*, 12 So.3d 1140, serves as a prism through which to examine how courts may better protect children of same-sex unions. In *Black*, the Louisiana Court of Appeal held that Kimberley Corinne Black (Ms. Black) could not be considered a functional, or *de facto* parent to Braelyn, the child born to her same-sex partner, Kimberly Renae Simms (Ms. Simms). Ms. Black and Ms. Simms used the same sperm donor and each bore a child. For six years, Ms. Black, Ms. Simms, and half-siblings, Braelyn and Eli, lived together as a cohesive family unit. When the couple's relationship ended, Ms. Simms cut off all contact between Braelyn and Ms. Black, as well as between Braelyn and her half-brother, Eli. Braelyn's relationship with Eli was permanently severed when the Louisiana Court of Appeal denied Ms. Black access to Braelyn and failed to make provisions for the siblings to maintain contact. Applying the United States Supreme Court's pronouncements in *Troxel*, the Third Circuit affirmed the district court's ruling finding that the mere severance of the bond between the natural child and her

mother's lesbian former partner, partner's son, and partner's parents, did not rise to level of substantial harm to the child that warranted the granting of joint custody between the natural mother and the former partner. *Black,* 12 So.3d at 1145.

A review of this case shows the district court misapplied the standard of substantial harm. The substantial harm standard was designed to protect the rights of the natural parent in correlation with the rights of the child. The district court applied the standard in a manner designed to ignore the rights of the mother to care, guide, and nurture her natural child. Accordingly, I find Appellee failed to prove an award of sole custody to Appellant would result in substantial harm to the child.

For these reasons, I respectfully dissent from the majority's decision to affirm the district court's ruling.