IN RE: C.A.C.	*	**NO. 2017-CA-0108**
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		COURT OF APPEAL
	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-11840, DIVISION "D"
Honorable Nakisha Ervin-Knott, JUDGE
* * * * * *
Judge Marion F. Edwards, Pro Tempore
* * * * * *

(Court composed of Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Marion F. Edwards, Pro Tempore, Judge Terrel J. Broussard, Pro Tempore)

LOVE, J., CONCURS
LOBRANO, J., CONCURS AND ASSIGNS REASONS.
BROUSSARD, J., PRO TEMPORE, CONCURS IN PART, DISSENTS IN PART, AND ASSIGNS REASONS

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AFFIRMED

NOVEMBER 2, 2017

This is an appeal from a trial court judgment granting joint custody of a minor child to the biological mother and her former life partner. For reasons that follow, we affirm.

The child was born as a result of artificial insemination during the course of a long term same-sex relationship between Dr. Lisa Colon and Victoria Adjmi. After the parties separated in 2014, Ms. Adjmi filed this Petition for Custody seeking joint custody pursuant to La. C.C. art. 133. Dr. Colon filed exceptions of no cause of action, no right of action and vagueness to the custody petition. The trial court denied the exceptions and appointed Tina Chaisson as the custody evaluator. After this Court and the Louisiana Supreme Court denied Dr. Colon's writ applications for review of the ruling denying the exceptions, the parties participated in the custody evaluation with Ms. Chaisson.

Ms. Chaisson submitted a report to the court on January 4, 2016 in which she applied the "best interest of the child" legal standard. Ms. Adjmi filed a motion requesting the court to instruct Ms. Chaisson to apply the "substantial harm

to the child" legal standard as defined by La. C.C. art. 133 relating to a custody claim by a non-parent. The court granted that motion and Ms. Chaisson filed a supplemental report in compliance with that order. Both reports recommended an award of joint custody.

The matter went to a trial on the merits, after which, the trial court rendered judgment in Ms. Adjmi's favor. The judgment, which awards joint custody and sets forth detailed visitation rights, is supported by comprehensive reasons for judgment.

FACTS

The facts regarding the relationship of the parties and the conditions of the child's birth are undisputed. Dr. Lisa Colon and Victoria Adjmi began a romantic relationship in 1996, and lived together as a committed couple for over 18 years.[1] During that time they built a home together, shared finances and bank accounts. Both women are financially successful. Dr. Colon is a gynecologist/obstetrician and Ms. Adjmi is a business woman who owns several retail stores.

In 2007 the couple decided to start a family. It was decided that Dr. Colon, who is 10 years younger than Ms. Adjmi, would undergo an artificial insemination procedure. Both women were involved in the selection of the donor, the pregnancy and the birth. Both women agreed that the donor should be Jewish, Ms. Adjmi's faith. The procedure was successful and Dr. Colon gave birth to a baby girl on October 27, 2007. Ms. Adjmi was present at the birth and cut the umbilical cord.

[1] The couple separated once during that time, but subsequently reconciled before Charlie was born.

The child was named Charlie Adjmi Colon (Charlie) in a tribute to Ms. Adjmi's father.

Two days after Charlie's birth, Dr. Colon hand wrote and signed a notarized document that states. "In the unlikely event of my demise (death) Vicki Susan Adjmi is to attain total/complete/sole custody of Charlie Adjmi Colon."

On April 4, 2008, the parties entered into a "Domestic Partnership Agreement". The effective date of the agreement was October 27, 2007, the date of Charlie's birth. There are three pertinent sections of this agreement.

1.) Section I **Definitions**

D. "Children"

> The children of the Parties is defined as Charlie Adjmi Conon, and any other children subsequently born of, or adopted by one or either of the Parties, during the term of this Contract.

2.) Section VII **Child Custody**

> Notwithstanding the contrary laws of any state, including Louisiana, it is the intent of the parties and it is agreed to herein that in the event of the termination of this Contract, each Party, whether or not the biological or adoptive parent of Charlie Adjmi Colon or any other children subsequently born to or adopted by any Party during the term of this Contract, will be granted joint custody and reasonable visitation rights of Charlie Adjmi Colon and any other children while they are minors. The Parties agree that if a dispute arises related to this provision, they will mediate their differences with the assistance of a professionally licensed and/or certified family counselor or mediator.

3.) Section XIII **Waiver of Constitutional or Statutory Challenge**

> The Parties agree to waive any constitutional challenge, whether under the Constitution of the United States of America or the constitution of any of the fifty states including Louisiana, to the validity and or enforceability of the Domestic Partnership Contract.
>
> The Parties further agree to waive any right to invoke statutes or laws of the United States, or any of the fifty states including Louisiana, that expressly or implicitly provide that this contract is null or void based on the gender or intent of the Parties.

Additionally, Dr. Colon executed a Power of Attorney in which she granted Ms. Adjmi;

> …."absolute full and unlimited power and authority for and in the name of Appearer and in Appearer's behalf and to Appearer's use to conduct, manage and transact all and singular Appearer's affairs, business, concerns and matters of whatever nature or kind, without any exception or reservation whatsoever, related to the care and upbringing of my child, **Charlie Adjmi Colon**, including , but not limited to the following: (emphasis and underline in original)
>
> To enroll the child in school and extracurricular activities;
>
> To obtain medical, dental and mental health treatment for the child;
>
> To provide for the child's food, lodging, housing, recreation, transportation and travel.

On April 21, 2009, Dr. Colon executed her Last Will and Testament in which she bequeaths her property to her "life partner, Victoria Susan Adjmi" and her daughter Charlie Adjmi Colon. The will provides for a trust to be set up for Charlie with Ms. Adjmi as the sole Trustee. Most significant are the following provisions:

> (6) If Charlie Adjmi Colon survives me and has not yet reached the age of 18 years on the date of my death, I appoint Victoria Susan Adjmi, my life partner and the co-parent of Charlie Adjmi Colon, to be Charlie Adjmi Colon's legal Guardian and Tutor, intending for her to have all responsibilities and benefits bestowed under law to the legal parent of a child.
>
> (8) It is important to me and it is my specific request that both the Colon Family and the Adjmi Family share in the life and upbringing of my daughter, Charlie Adjmi Colon. Therefore, if she has not yet reached the age of 18 years on the date of my death, I instruct the two families to grant to each other liberal and frequent visitation and involvement in her life, no matter who serves as her Trustee, Tutor and/or Under-Tutor.

Dr. Colon, Ms. Adjmi and Charlie lived as a family for the first seven years of Charlie's life. Then, in 2014 Dr. Colon became romantically involved with Ms.

Adjmi's sister-in-law (the wife of Ms. Adjmi's brother), Amanda Adjmi, and the couple separated as a result. Dr. Colon now resides with Amanda Adjmi, Charlie and, during their visitation with their mother, Amanda Adjmi's two children.

It is obvious from the filing of this action for custody and the actions and testimony of the parties that the breakup resulted in an acrimonious relationship between Dr. Colon and Ms. Adjmi. Since the breakup Dr. Colon has taken steps to limit Ms. Adjmi's participation in Charlie's life. Dr. Colon testified that she has limited Ms. Adjmi's ability to communicate with Charlie's school specifically to prevent Ms. Adjmi from attending parent-teacher conferences. Dr. Colon also admitted that she will not allow Ms. Adjmi to take Charlie on trips because on one trip to New York Charlie developed a fever and Ms. Adjmi did not take the child to a doctor. Ms. Adjmi explained that she called Dr. Colon from New York when Charlie became ill to ask advice because Dr. Colon is a medical doctor. Dr. Colon flew up to New York that night and took Charlie to a doctor the next day.

Dr. Colon also expressed concerns about Ms. Adjmi's living conditions. Specifically, Dr. Colon stated that Ms. Adjmi's sister smokes marijuana in front of Charlie. However, both Ms. Adjmi and her sister denied that accusation.

Ms. Adjmi testified that Dr. Colon has completely barred her from any communications with Charlie's school, does not inform her of school activities, extracurricular activities, or doctor's appointments, and does not allow her to take Charlie on vacation. Ms. Adjmi also testified that Dr. Colon is in complete control of Charlie's schedule and does not allow sufficient time or communications with

Ms. Adjmi. Dr. Colon admitted she controls Charlie's schedule but asserts that she is aware of the strong bond between Charlie and Ms. Adjmi and allows visits and communications between the two as she deems appropriate.

Although Dr. Colon testified that it was she who parented Charlie and made all of the decisions, she acknowledged that there is a love bond between Charlie and Ms. Adjmi and that Charlie thinks of Ms. Adjmi as a mother. She also testified that Charlie loves to be with Ms. Adjmi and is comfortable in her home, which is a few blocks away from Dr. Colon's home. Other testimony from relatives and experts shows that Charlie thinks of both Dr. Colon and Ms. Adjmi as her mothers and that Charlie considers Ms. Adjmi's mother to be her grandmother.

Tina Chaisson, the court appointed expert testified that both parties cooperated with the custody evaluation and provided additional information. During her evaluation Ms. Chaisson met with Charlie alone and observed her with each of the parties in their homes. Ms. Chaisson also reviewed school, medical and mental health records as well as the domestic partnership agreement, Dr. Colon's will and power of attorney.

Ms. Chaisson found each home to be appropriate and comfortable for Charlie, who had her own room in each. Charlie talked about both homes and both of the parties. She loves both women and enjoys both homes. Charlie calls Dr. Colon "Mom" and Ms. Adjmi "Bae", but considers both to be her parents.

Ms. Chaisson found both parties to have capable parenting abilities with no negative cues in either. Ultimately, Ms. Chaisson's recommendation to the court

was that the parties should be awarded joint custody with Dr. Colon as the domiciliary parent and time divided 60/40. Ms. Chaisson also made specific recommendations for liberal visitation with Ms. Adjmi and opined that there is no justification for barring travel with Ms. Adjmi.

Ms. Chaisson specifically addressed the issue of substantial harm. She stated that a failure to award joint custody of Charlie would result in substantial emotional harm to the child. Ms. Chaisson explained that Charlie was raised, cared for and mothered by both parties for her entire life and enjoyed a parent-child relationship with each party. Ms. Chaisson's concern was that if Dr. Colon were granted sole custody, she would have the ability and the inclination to completely cut Ms. Adjmi out of Charlie's life.

Dr. Colon offered testimony from Dr. Edward Shwery, a clinical psychologist, who did not conduct a custody evaluation and did not have the opportunity to interview the child with both parties. The trial court allowed Dr. Shwery to testify as an expert, noting that he was retained by Dr. Colon and did not interview Ms. Adjmi.

In his testimony, Dr. Shwery explained that, because he did not have the opportunity to see all three parties, he was unable to make a custody evaluation. He stated his opinion is limited to the single question of whether an award of sole custody to Dr. Colon would cause substantial harm to Charlie. To address this issue, Dr. Shwery reviewed the psychological literature and learned that the concept of substantial harm is defined consistent with the child abuse statutes of

brutality, neglect, severe neglect, physical abuse, and emotional abuse. These are the situations which lead to substantial harm, manifested in symptoms of a syndrome, depression or anxiety. Based on this clinical definition of "substantial harm" and his testing of Charlie, Dr. Shwery did not believe Charlie would suffer substantial harm from an award of sole custody to Dr. Colon.

By all accounts, Charlie is a happy, well-adjusted child with two mothers one she calls "Mom" and one she calls "Bae", and a loving extended family. There is no indication that either party is unfit in any way to parent Charlie. The evidence is sufficient to show that both women clearly love the child and are fit parents who provide for all of her needs.

LAW AND ANALYSIS

On appeal, Dr. Colon assigns six errors in which she asserts the trial court violated her constitutionally protected fundamental rights as a natural parent in the award of joint custody and liberal visitation to a non-parent, and in finding substantial harm to the child sufficient to deny an award of sole custody to a biological parent. Dr. Colon also argues the trial court erred in denying her exception of no cause of action and in admitting the domestic partnership agreement, power of attorney, and last will and testament.

1.) NO CAUSE OF ACTION

Dr. Colon argues that the trial court erred in denying her peremptory exception of no cause of action. The denial of this exception was reviewed by this Court and the Louisiana Supreme Court as an interlocutory ruling. Both courts

denied the application for supervisory writs. On appeal, Dr. Colon maintains the trial court should have sustained that exception because the petition for custody failed to properly allege that substantial harm would result if the minor child remained solely in the biological parent's custody. However, the majority of her argument centers on whether Ms. Adjmi can meet her burden of proof at trial, not whether the petition states a cause of action.

The limited function of an exception of no cause of action is to determine whether the law provides a remedy to a plaintiff against these particular defendants.[2] The pertinent question is whether, when viewed in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the petition states any valid cause of action for relief.[3] An exception of no cause of action should be granted only when it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim that would entitle him to relief. [4]

La. C.C. art. 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.

The custody petition asserts a claim by a non-parent for custody pursuant to La. C.C. art. 133 and alleges that "(t)he removal of the child from her (Ms. Adjmi) care will result in substantial harm to the minor child and is not in the child's best

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[2] *Hershberger v. LKM Chinese*, L.L.C., 2014-1079, p. 3 (La.App. 4 Cir. 5/20/15), 172 So.3d 140, 143.
[3] *Phillips v. Gibbs*, 2010-0175, p. 3 (La.App. 4 Cir. 5/21/10), 39 So.3d 795, 797 (citations omitted).
[4] *Industrial Cos., Inc. v. Durbin*, 2002-0665, p. 7 (La. 1/28/03), 837 So.2d 1207, 1213.

interest." We find this petition states a cause of action and find no abuse of the trial court's discretion in denying the exception.

2.) MOTION IN LIMINE

Dr. Colon filed a motion in limine in the trial court seeking to exclude the domestic partnership agreement, power of attorney, and her last will and testament as irrelevant, inadmissible and immaterial to the merits of this case. That motion was denied and the documents were admitted over Dr. Colon's objections.

La. C.E. art. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Louisiana, this Code of Evidence, or other legislation. Evidence which is not relevant is not admissible."[5] Irrelevant evidence is inadmissible, and even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues."[6] A trial court's rulings on such evidentiary issues will not be disturbed unless a clear abuse of discretion is shown.[7]

The documents in question show Dr. Colon's confidence in Ms. Adjmi as a good parent to Charlie, and that she viewed Ms. Adjmi as Charlie's other parent. They also show that Dr. Colon intended the relationship between Charlie and Ms.

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[5] La. C.E. art. 402.
[6] La. C. E. arts. 402–03.
[7] *Jones v. Peyton Place, Inc.,* 95-0574 (La. App. 4 Cir. 5/22/96), 675 So.2d 754, 763.

Adjmi to be a life-long one, even if the relationship between the two women did not last. The documents show that the bond between Charlie and Ms. Adjmi was strong and in the nature of a child-parent relationship. This evidence is relevant to show the depth of the emotional bonds, and to the trial court's consideration of whether the severance of this relationship would result in substantial harm to the child sufficient to meet the burden of proof required to deprive Dr. Colon of sole custody.

Under the facts and circumstances of this case, we find these documents to be relevant and admissible. Consequently we find no abuse of the trial court's discretion in admitting the documents into evidence.

3.) AWARD OF JOINT CUSTODY

The remainder of Dr. Colon's assignments of error and issues of law relate to the award of joint custody and liberal visitation to Ms. Adjmi, a non-parent. Dr. Colon argues that Ms. Adjmi failed to meet her burden of proof that an award of sole custody to Dr. Colon would result in substantial harm to the child and that the trial court erred in granting joint custody. Because the trial judge is in the best position to ascertain the best interest of the child based on the particular circumstances of each case, a trial court's custody determination is entitled to great weight and will not be disturbed by an appellate court absent a clear abuse of discretion. [8]

[8] *Kaptein v. Kaptein*, 2017 WL 2570725, p. 9 2016-1249 (La.App. 4 Cir. 6/14/17), ____ So.3d_____.

In this matter, we are called upon to interpret custody laws in the context of a same-sex relationship, and consider issues not previously before this Court. Our legislature has not yet addressed what changes to the law are necessary and/or appropriate in custody proceedings involving same-sex relationships since the United States Supreme Court's decision in *Obergefell v. Hodges,*[9]

Our analysis must begin with the existing law. Dr. Colon's point, that she is the biological parent and in the law enjoys a superior position over Ms. Adjmi, who by legal status is a stranger to the child, is well taken. Ms. Adjmi is neither a natural parent nor a legal parent. The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests," including parents' fundamental right to make decisions concerning the care, custody, and control of their children.[10] A parent's interest in her relationship with her child is "manifestly a liberty interest protected by the Fourteenth Amendment's due process guarantee."[11] The United States Supreme Court has declared it "plain beyond the need for multiple citation" that a biological parent's right to "the companionship, care, custody, and management" of his children is a liberty interest far more important than any property right. [12]

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[9], ____U.S.____, 135 S.Ct. 2584, 2589, 192 L.Ed. 609 (2015).
[10] *Troxel v. Granville*, 530 U.S. 57, 57, 120 S. Ct. 2054, 2056, 147 L. Ed. 2d 49 (2000) (citations omitted); *Ferrand v. Ferrand*, 16-7 (La. App. 5 Cir. 8/31/16), ____ So.3d____, *writ denied*, 2016-1903 (La. 12/16/16), 211 So.3d 1164.
[11] *Ferrand v. Ferrand*, supra, citing, *Troxel v. Granville,* supra.
[12] *Tracie F. v. Francisco D.*, 15-1812 (La. 03/15/16), 188 So.3d 231, 234; *In re Adoption of B.G.S.*, 556 So.2d 545 (La. 1990) (citing, *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 1982) and *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981)).

However, a parent's right under the constitution is neither absolute nor perpetual. That right attaches at the birth of a child. But, 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 by " '[coming] forward to participate in the rearing of his child.' " [13] As with all constitutional rights, a parent's right must be balanced with the child's right to a custodial arrangement which promotes his or her best interests.[14]

La. C.C. art. 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.

There is no question that the non-parent bears the heavy burden of proof in a custody contest.[15] The dual prong test to determine whether the non-parent has met that burden is as follows:

> In a conflict between a parent and a non-parent, the parent enjoys the paramount right to custody of a child and may be deprived of such right only for compelling reasons. The test to determine whether to deprive a legal parent of custody is a dual-pronged test: first, the trial court must determine that an award of custody to the parent would cause substantial harm to the child; if so, then the courts look at the "best interest of the child" factors to determine if an award of custody to the non-parent is required to serve the best interest of the child. (citations omitted)[16]

Dr. Colon argues that the mere separation of Charlie from Ms. Adjmi and her family is not sufficient to meet the substantial harm standard. In support of her

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[13] *Lehr v. Robertson*, 463 U.S. 248, 261, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 392, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979)).
[14] See: *Ferrand v. Ferrand,* supra.
[15] *Rupert v. Swinford*, 95-0395 (La.App. 1 Cir. 10/6/95), 671 So.2d 502.
[16] *Ferrand v. Ferrand,,* supra.

position Dr. Colon cites *Black v. Simms*[17]. In *Black* the trial court dismissed the custody petition filed by the mother's former lesbian partner based on a finding that mere separation did not rise to the level of substantial harm for purposes of La. C.C. art. 133. On appeal, the Third Circuit affirmed. However, in that decision, the Court characterized the mother's actions as "harsh and inconsiderate of (the child's and the partner's family's) obvious affection and attachment to each other."

While the factual situation regarding the relationship between the parties and the circumstances of the child's birth are similar, the evidence and testimony are disparate. In *Black*, the relationship between the parties was described as "toxic", and there was no communication between the child and the partner's family in over a year. Additionally, there was conflicting expert testimony regarding what custody determination would best serve the child's needs.

While there is some acrimony in the breakup between Dr. Colon and Ms. Adjmi, there has been no break in the relationship between Charlie and Ms. Adjmi and her family. There was also a physical distance between the parties in *Black* that does not exist in the case before this Court. Additionally, the expert testimony in the instant matter only differs in the degree of harm to Charlie should she suffer a separation from Ms. Adjmi. Ms. Chaisson's opinion is that it would cause substantial harm, while Dr. Shwery did not think the harm would reach the clinical definition of substantial harm.

[17] 2008-1465 (La. App. 3 Cir. 6/10/09), 12 So.3d 1140.

The "substantial harm" envisioned in article 133 is the threat of abuse or neglect of the child by an unfit parent and is inapplicable under the facts and circumstances of this case. Dr. Shwery, Dr. Colon's expert, alluded to that in his discussion of "substantial harm", which defined the concept in terms relating to child abuse statutes. He concluded that there was insufficient data based on his testing of Charlie to meet the high threshold of substantial harm. However, as the trial judge pointed out in the reasons for judgment, Dr. Shwery gave a psychological definition of "substantial harm", not a legal one.

In the law, a showing of substantial harm is more inclusive and "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.' " [18]

Further, we note that the term "substantial harm" is not precise and has been used interchangeably with "detrimental" in our jurisprudence.[19] In *McCormic v. Rider*[20], our Supreme Court used the "detrimental" standard in reversing an appellate court determination that an award of joint custody to a parent and a non-parent was an abuse of discretion. In *McCormic*, the trial court awarded joint custody in a tripartite arrangement among a grandparent, who was the legal parent through the adoption of the child, and the biological parents, who were now third parties under the law. The court of appeal reversed, rendering judgment in favor of the grandmother based on a strict interpretation of La. C.C. art. 133. The appellate

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[18] *Ferrand v. Ferrand*, 2016 WL 9022452, p. 7, 16-7 (La.App. 5 Cir. 8/31/16), ___ So.3d ___; citing; *Ramirez v. Ramirez*, 13-166 (La.App. 5 Cir. 08/27/13), 124 So.3d 8, 17.
[19] *Black v. Simms*, supra.
[20] 2009-2584 (La. 2/12/10), 27 So.3d 277, 279.

court found that the grandmother enjoyed the paramount right of custody and that the biological parents, as non-parents, failed to meet the heavy burden that an award of custody to the grandmother would result in substantial harm to the child. The Supreme Court reversed and reinstated the trial court's award of joint custody, finding no abuse in the trial court's discretion.

The *McCormic* case illustrates the difficulty in applying art. 133 to cases that present a factual anomaly to the traditional family situation. The Supreme Court noted that the unique facts did not cleanly fit into the parameters of art. 133 and stated that;

> Nonetheless, it is well-established that each child custody case must be viewed in light of its own particular set of facts and circumstances, with the paramount goal of reaching a decision that is in the best interest of the child. The trial court has great discretion in this area, and its determination will not be disturbed in the absence of a clear abuse of discretion. The primary consideration and prevailing inquiry is whether the custody arrangement is in the best interest of the child. (citations omitted)[21]

Ultimately, the *McCormic* court concluded that the tripartite custody arrangement "would benefit the child by keeping intact the family unit in which he has lived for virtually his entire life." [22]

The difficulty in applying La. C.C. art. 133 to same-sex custody contests is that article 133 presupposes an issue regarding the fitness of one or both parents exists, thus creating a threat of harm to the child. This assumption can be seen in the first phrase of the article and the threshold requirement of a showing of substantial harm to the child for a custody award to a non-parent. Further, our

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[21] *McCormic v. Rider*, 2009-2584 (La. 2/12/10), 27 So.3d 277, 279.
[22] *McCormic v. Rider*, supra 27 So.3d at 280.

jurisprudence states that a custody action brought by a non-parent may only arise pursuant to La. C.C. Art. 133 when a threat of "substantial harm" to the child looms.[23]

The statutory scheme of La. C.C. arts 131-134 was set up to establish the rights of parents in traditional families, and encompasses a traditional presumption "that natural bonds of affection lead parents to act in the best interest of their children."[24] But, as the United States Supreme Court noted, "(t)he demographic changes of the past century make it difficult to speak of an average American family. [25] The nuclear family concept that has influenced our laws regarding custody and visitation of children is not always reflected in the real life factual circumstance in the cases that come before our courts.

An additional problem with applying article 133 to same sex custody cases is that article 133 assumes the third party seeking custody is less likely than the parent to have a parent-child bond, and have lived with and parented the child from birth. These articles were fashioned to manage circumstances in which a parent, or parents become unable or unwilling to properly parent the child and an extended family member or other concerned adult seeks custody.

In same-sex relationships the third party is much more likely to be a co-parent from the child's point of view than in situations where a grandparent or other extended family member seeks custody. The third party life partner was

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[23] *Tracie F. v. Francisco D.*, 15-224 (La. App. 5 Cir. 9/21/15), 174 So.3d 781, 812, *reh'g denied* (Oct. 6, 2015), *writ granted*, 2015-1812 (La. 11/16/15), 184 So.3d 20, and aff'd but criticized on a separate issue, 2015-1812 (La. 3/15/16), 188 So. 3d 231.
[24] *Parham v. J.R.* 442 U.S. 584. 602, 99 S.Ct. 2493, 61 L.Ed.2d. 101 (1979).
[25] *Troxel v. Granville*, 530 U.S. 57, 63, 120 S.Ct. 2054, 2059, 147 L. Ed. 2d 49 (2000).

there when the child was born and has established a bond that, to the child, is indistinguishable from that shared with the biological parent.

In child custody proceedings between two estranged parents, the concern for the best interests of their children can be lost in the emotional upheaval of divorce or separation in hetero-sexual relationships. Custody contests between same-sex couples are more akin to custody contests between embattled divorced parents than that of an unfit parent and a third party.

In reasons for judgment, the trial court found that Ms. Adjmi met her burden of proof that an award of sole custody to Dr. Colon would result in substantial harm to the child for several well supported and articulated reasons. The trial court found that the parties clearly intended to raise Charlie as co-parents. This finding is substantiated by the documents and testimony. The trial court found that Charlie has a strong emotional connection with Ms. Adjmi. There is no evidence to dispute that finding, and in fact, Dr. Colon has conceded this point. Dr. Colon has also admitted to restricting and limiting Charlie's access to Ms. Adjmi, a pattern which the trial court found to cause emotional damage to Charlie.

The trial court expressed concerns about Dr. Colon's actions reducing Ms. Adjmi's time with Charlie from twelve or thirteen days a month to only six, many of which were scheduled to conflict with Ms. Adjmi's travel schedule. These actions, in addition to the restriction of access to school, extracurricular activities and doctor appointments, and the testimony of Ms. Chaisson that the limitation of access to Ms. Adjmi has already caused emotional damage to Charlie, gives

support to the trial court's finding that Dr. Colon's testimony that she did not wish to sever the relationship between Charlie and Ms. Adjmi was not credible.

Article 133 is constructed to require an initial showing that any custody award to a parent would result in substantial harm to the child before an award of custody to a non-parent can be considered. The facts and circumstance here are that Charlie was born into a non-traditional family. She has two mothers who have lovingly raised her since birth. She shares a deep emotional connection with both. The trial court found that separation from either of them would cause Charlie to suffer substantial harm. The trial court has great discretion in this area, and its determination will not be disturbed in the absence of a clear abuse of discretion.[26] Based on the facts and circumstances of this case, we find no abuse of the trial court's discretion in that finding.

After making the finding that substantial harm would result in a sole custody award to Dr. Colon, the trial judge turned to the paramount consideration of 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:
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> (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.

[26] *Id.*

(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.

It is clear from the reasons for judgment that the trial court conducted a complete analysis of all the relevant factors listed above and made the determination that an award of joint custody with liberal visitation was in Charlie's best interest. The court considered the love and emotional connection to Charlie that both women have, and the willingness of both parties to continue to give the child the education and spiritual guidance she needs. Both parties expressed a desire to see Charlie excel in school and will help with homework assignments. Both have the financial ability to care for her material needs. The trial court also commented that the stable life Charlie was living before the breakup has been disrupted by the inconsistent visitation schedule enforced by Dr. Colon.

Ultimately, the trial court found the factors set forth in article 134 did not weigh heavily in either party's favor, with the exception of the willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party. The court found this factor weighed heavily in Ms. Adjmi's favor.

The court noted that Dr. Colon and Ms. Adjmi chose to bring Charlie into this world and intended to raise her as a couple. Before the breakup of the relationship, both women did just that. The trial court held that forcing Charlie to give up one mother, when both are fit, able and loving parents is not in Charlie's best interest.

We are mindful of the directive from our Supreme Court to consider the individual circumstances of each case and to afford great deference to the trial court in determinations of child custody. It is well-established that each child custody case must be viewed in light of its own particular set of facts and circumstances, with the paramount goal of reaching a decision that is in the best interest of the child.[27] We note that the facts and circumstances of this case do not fit within the intent or purpose of La. C.C. art. 133. Dr. Colon is not an unfit mother and Ms. Adjmi is not the third party envisioned by the legislature in the enactment of article 133.

Ultimately, our Supreme Court has held that the primary consideration and prevailing inquiry in every child custody case is whether the custody arrangement

[27] *Hanks v. Hanks*, 2013-1442 (La. App. 4 Cir. 4/16/14), 140 So.3d 208, 214.

is in the best interest of the child.[28] The trial court has carefully weighed the evidence and found that the best interests of the child will be served by a joint custody agreement that will keep her connected to a woman she considers to be her mother and with extended family that are a significant part of her life. We find no abuse of discretion in that judgment.

For reasons set forth herein, the judgment of the trial court is affirmed. All costs of this appeal are assessed to appellant.

AFFIRMED

[28] See; *McCormic v. Rider*, supra; *Tracie F. v. Francisco D.*, supra.