

# Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the 30th day of September, 2021 are as follows:

**BY McCallum, J.:**

2020-C-01471

BILLIE COOK VS. SHARON SULLIVAN (Parish of Bossier)

AFFIRMED. SEE OPINION.

Griffin, J., additionally concurs and assigns reasons.

**SUPREME COURT OF LOUISIANA**

**No. 2020-C-01471**

**BILLIE COOK**

**VS.**

**SHARON SULLIVAN**

*On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Bossier*

**McCALLUM, J.**

The issue in this child custody matter is whether the trial court applied the correct law in awarding joint custody to Sharon Sullivan, the biological parent, and Billie Cook, a non-parent and Sharon’s former same-sex partner. The court of appeal reversed the trial court, concluding that an analysis of the best interest of the child under La. Civ. Code art. 134 was not warranted, because the evidence did not show that an award of sole custody to Sharon would result in substantial harm to the child under La. Civ. Code art. 133. Finding the trial court committed legal error, we did a *de novo* review of the record, and affirm the court of appeal judgment for the reasons herein.

**FACTS AND PROCEDURAL HISTORY**

Sharon and Billie began a romantic relationship and cohabitating in 2002. After failed attempts at artificial insemination, Sharon gave birth on December 31, 2009, to a child conceived naturally through intercourse with a friend and co-worker, David Ebarb. No father was listed on the birth certificate; however, the child was given the hyphenated last name “Cook-Sullivan.” Sharon, Billie, and the child resided together until shortly after Sharon and Billie separated in February 2013. Sharon and Billie never married or entered into a domestic partnership, and Billie

never formally adopted the child.<sup>1</sup> However, upon separation, the parties shared custody of the child – first with an every-other-week schedule, then with Billie having visitation every other weekend. In July 2016, Sharon unilaterally terminated the visitation arrangement, leading Billie to file a petition to establish parentage, custody and support on January 11, 2017.

After the trial on the merits began, the trial court appointed Dr. Shelley Visconte, Ph.D., to conduct an evaluation.<sup>2</sup> The order appointing Dr. Visconte tasked her with the following:

[T]o evaluate and assist the court in the determination of the issue [of] whether an award of sole custody to the parent Sharon Sullivan has or will result in substantial harm [,considering]: 1) The alleged lack of fitness of the parent to maintain custody of her child; and 2) Whether the non-parent seeking custody is seen by the child as a parent or psychological parent such that substantial harm has or will result to the child if the child is deprived of contact with the non-parent and if the non-parent is not awarded custody.

After submitting her initial report, the trial court asked Dr. Visconte to conduct supplemental evaluations and implement a visitation schedule between Billie and the child. After the trial court received Dr. Visconte's second and final report, the trial resumed. In addition to Dr. Visconte's expert opinion, the trial court had the benefit of testimony and evaluations from Ms. Sandi Davis, a licensed marriage and family therapist retained by Sharon to counsel the child for emotional issues she was

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<sup>1</sup> The parties' romantic relationship predated *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L. Ed. 2d 609 (2015), which held that same-sex couples may exercise the fundamental right to marry.

<sup>2</sup> Louisiana Revised Statute 9:331 gives the trial court authority to order an evaluation of the parties and children by an evaluator appointed by the court or parties. That statute provides:

A. The court may order an evaluation of a party or the child in a custody or visitation proceeding for good cause shown. The evaluation shall be made by a mental health professional selected by the parties or by the court. The court may render judgment for costs of the evaluation, or any part thereof, against any party or parties, as it may consider equitable.

B. The court may order a party or the child to submit to and cooperate in the evaluation, testing, or interview by the mental health professional. The mental health professional shall provide the court and the parties with a written report. The mental health professional shall serve as the witness of the court, subject to cross-examination by a party.

experiencing at the time. Sharon, Billie, Mr. Ebarb, and several other lay witnesses testified as to the facts and circumstances of the parties and their relationship.

Following trial, the trial court issued a written opinion and a Considered Decree<sup>3</sup> in which it: (1) recognized Billie as a legal parent of the child; (2) held that failure to reestablish the parental relationship between Billie and the child would result in substantial harm to the child; and, (3) awarded Sharon and Billie joint custody of the child, with Sharon designated as the domiciliary parent.

In its written opinion, the trial court noted the lack of legal precedent in Louisiana on the issue of custody arising out of the relationship of same-sex couples as well as the legislature's failure to address the evolution of same-sex marriage and conception by same-sex couples. However, the court opined that "disputes between same-sex individuals who are living in the same household and where one of them conceives a child through assisted reproduction methods or adopts a child are clearly distinguishable from a traditional third-party dispute with a biological parent." Thus, instead of treating Billie as a non-parent and applying La. Civ. Code art. 133, the trial court formulated and applied the following test to determine whether Billie should be deemed a "legal parent":

- 1) The parties entered into and engaged in assisted reproduction measures, voluntarily and jointly planned, which resulted in conception by one of the parties;
- 2) The parties resided in the same household before and for a substantial time after the birth of the child sufficient to form a parental bond;
- 3) The non-biological parent engaged in full and permanent responsibilities and caretaking of the child without expectations or compensation;
- 4) The non-biological parent acknowledged publicly and held [herself] out to be a parent of the child;

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<sup>3</sup> A "considered decree" is "an award of permanent custody in which the trial court receives evidence of parental fitness to exercise care, custody, and control of children." *Tracie F. v. Francisco D.*, 15-1812 at p. 9 (La. 3/15/16), 188 So. 3d 231, 239.

- 5) The non-biological parent established a bonded and dependent relationship with the child of a parental nature; and
- 6) The biological parent supported and fostered the bonded and dependent relationship between the child and non-biological parent.

The trial court's test included the factors discussed by Dr. Visconte in her report, with the addition of the first element addressing assisted reproduction. In support of its test, the trial court relied on the doctrine of psychological/*de facto* parent as set forth in *Ferrand v. Ferrand*, 2016-7 (La. App. 5 Cir. 8/31/16), 221 So. 3d 909, *writ denied*, 2016-1903 (La. 12/16/16), 211 So. 3d 1164, as well as cases from other "southern states." As to the burden of proof, the trial court opined:

The non-biological parent must establish parentage by "clear and convincing" evidence of the above-mentioned factors. The requirement to show substantial harm to the child is not an evidentiary requirement for a parent under Louisiana prevailing custody/visitation statutes and case law, only the best interest requirement sent [sic] forth in La. C.C. Art. 134. If the non-biological individual establishes parentage then the same parental rights attach as those of the biological parents and then only the best interest test applies along with the change in legal burden to preponderance of evidence.

The trial court concluded that Billie showed by clear and convincing evidence that she met the listed requirements to be identified as a "legal parent" and, consequently, as a parent, was not obligated to meet Article 133's requirement of showing substantial harm.

The court of appeal reversed, finding the trial court erred in applying its own test rather than La. Civ. Code art. 133 and by holding that Billie had established parentage and therefore had the same rights as a natural parent. The court explained that Louisiana law does not currently provide for the award of custody to a non-parent based on her status as a psychological parent; therefore, custody disputes between former same-sex partners must be decided under La. Civ. Code art. 133. The court of appeal commended the trial court for its detailed reasons for judgment and recognized its effort to formulate a ruling that it believed to be both fair to Billie and in the best interest of the child. However, the court of appeal acknowledged "it

is not the judiciary's role to fill in gaps left by the legislature.” *Cook v. Sullivan*, 53,741 at p. 13 (La. App. 2d 11/18/20), 307 So. 3d 1121, 1128.

After reviewing the evidence in the record, the court of appeal found the trial court clearly abused its discretion in failing to follow Louisiana law. The court of appeal found that Billie is not a biological parent of the child, and she never legally adopted the child; therefore, the trial court erred in treating Billie as a parent and by failing to properly analyze the matter under La. Civ. Code art. 133. *Id.*, 53,741 at p. 13-14, 307 So. 3d at 1128.

The court of appeal reasoned that, although the trial court specifically held that “failure to reestablish the parental relationship between Billie and the child would result in substantial harm to the child,” *id.* 53,741 at p. 16, 307 So. 3d at 1129, the court is not “tasked with determining whether or not the child in the past suffered any emotional distress that could be considered substantial harm when she was initially cut off from Billie.” *Id.*, 53,741 at p. 18, 307 So. 3d at 1129. Rather, the substantial harm standard of Article 133 requires “a finding [by the court] that sole custody to Sharon **would result** – future tense - in substantial harm to the child.” *Id.* (emphasis in original).

The evidence, according to the court appeal, indicated that the child is happy, healthy and thriving, and aside from Sharon's “questionable decision to remove Billie from the child's life,” Sharon is a loving, attentive and nurturing parent. *Id.*, 53,741 at p. 19, 307 So. 3d at 1130. The court opined that “[w]hile Sharon's decision to remove Billie from the child's life may seem callous and controversial, her decision is protected [under the laws of the United States and Louisiana] as a fundamental liberty interest of a parent in the absence of substantial harm or neglect.” *Id.*, 53,741 at pp. 19-20, 307 So. 3d at 1130. The court found no grounds in the record to support a finding that an award of sole custody to Sharon would result in substantial harm to the child that would warrant an analysis of the best

interest of the child under La. Civ. Code art. 134 and the trial court erred in awarding joint custody. *Id.*, 53,741 at p. 20, 307 So. 3d at 1130.

Billie filed a writ application, arguing that the court of appeal erroneously reversed the trial court and prioritized Sharon's right to parent over the best interest of the child. She emphasized that the trial court was in the best position to make a determination as to the best interest of the child, and the role of the appellate court was not to reweigh the evidence or assess the credibility of the witnesses. She also argued that the court of appeal ignored the expert opinion of the court-appointed mental health evaluator who had testified on the concept of psychological parenting and opined that allowing Sharon to bar Billie from visits with the child would result in substantial harm to the child. We granted the writ to review the court of appeal's decision. *Cook v. Sullivan*, 20-1471 (La. 2/17/21), 310 So. 3d 559.

## **LAW AND DISCUSSION**

The best interest of the child is the paramount goal in all custody determinations in Louisiana, including disputes between a biological parent and a non-parent. La. Civ. Code. art. 131; *Tracie F.*, 15-1812 at p. 13, 188 So. 3d at 241; *Evans v. Lungrin*, 97-0541, 97-577, p. 12 (La. 02/6/98), 708 So. 2d 731, 738. Every child custody case is to be viewed on its own peculiar set of facts and the relationships involved. *Neathery v. Neathery*, 5,388, p. 13 (La. App. 2 Cir. 2/17/17), 216 So. 3d 251, 253.

Ordinarily, child custody cases are reviewed under the abuse of discretion standard. *Leard v. Schenker*, 06-1116, p. 3 (La. 6/16/06), 931 So. 2d 355, 357. However, where one or more trial court legal errors interdict the fact-finding process, the manifest error/abuse of discretion standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine the sufficiency of the evidence. *Evans*, 97-0541, 97-577 at pp. 6-7, 708 So. 2d at 735. A legal error occurs when a trial

court applies incorrect principles of law and such errors are prejudicial. *Tracie F.*, 15-1812 at 23, 188 So. 3d at 247 (citations omitted). Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id.* When a prejudicial error of law skews the trial court’s finding of a material issue of fact and causes it to pretermite other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts *de novo*. *Id.*

Louisiana Civ. Code art. 133, which governs custody disputes between a parent and a non-parent, 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 words ‘substantial harm’ carry no magical connotation. ‘Detrimental’ and ‘substantial harm’ have been used interchangeably in the jurisprudence.” *Black v. Simms*, 08-1465, p. 6 (La. App. 3d Cir. 6/120/09), 12 So. 3d 1140, 1144, quoting *Robert v. Gaudet*, 96-2506, p. 6, 691 so. 2d 780, 783. “Substantial harm” includes parental unfitness, neglect, abuse, inability to provide a home, and abandonment of rights. *Bowden v. Brown*, 48,268, p. 8 (La. App. 2d Cir. 5/15/13), 114 So. 3d 1194, 1200.

Before a court deprives a parent of the custody of his or her child, the court must first determine that an award of custody to the parent would cause substantial harm to the child. *Black*, 08-1465 at p. 4, 12 So. 3d at 1143. It is only after a finding of substantial harm under La. Civ. Code art. 133 that the best interest of the child analysis under La. Civ. Code art. 134 comes into play. *Id.* In an initial custody battle, the non-parent bears the burden of first proving by clear and convincing evidence that joint or sole custody to the parent would result in substantial harm to the child. *Id.*, 08-1465 at p. 7, 12 So. 3d at 1244. Comment (b) to La. Civ. Code art.



133 explains the greater burden as “an efficient means of giving effect to a parent’s paramount right to custody of his child as against any nonparent.” Otherwise, non-parents are placed on equal footing as parents when seeking joint custody if courts were simply to apply the “best interests” standard set forth in La. Civ. Code arts. 131 and 134. *Black*, 08-1465 at p. 3, 12 So. 3d at 1142. Any non-parent who has a relationship with a biological parent and develops a relationship with the child has to meet the same standard in establishing a basis for custody of the child. *Id.*, 08-1465 at p. 5, 12 So. 3d at 1143.

In any custody dispute, consideration of the best interest of the child must be balanced with the fundamental rights of the parent. When a parent competes with a non-parent of the child, the parent’s right to custody is superior unless the parent is unable or unfit, having forfeited parental rights. *Jones v. Coleman*, 44,543, p. 8 (La. App. 2d 7/15/09), 18 So. 3d 153, 159. 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.” *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, 1397, 71 L. Ed. 2d 599 (1982), and *Lassiter v. Dept. of Social Services of Durham County, N.C.*, 452 U.S. 18, 27, 101 S. Ct. 2153, 2160, 68 L. Ed. 2d 640 (1981). The Court, in *Troxell v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), recognized the special interest of parents in the care, custody, and control of their children as one of the oldest of the fundamental liberty interests protected by the Due Process Clause of the Fourteenth Amendment. The Supreme Court held that:

... 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.

530 U.S. at 68, 120 S. Ct. 2054.

We turn now to the matter at hand. Notwithstanding the United States Supreme Court's decision in *Obergefell, supra*, n.1, which held that, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same sex may not be denied the fundamental right to marry and start a family, the Louisiana Legislature has remained silent on the issue of children of same sex relationships. Likewise, Louisiana has neither statutorily nor jurisprudentially recognized the *in loco parentis, de facto* parent, or psychological parent status in custody contests between a parent and non-parent.<sup>4</sup> The current law in Louisiana governing all custody disputes between a parent and non-parent is found in La. Civ. Code art. 133, relevant to an “[a]ward of custody to a person other than a parent; order of preference.”

It is undisputed that Sharon and Billie never married, Sharon is the biological mother of the child, no father is listed on the child's birth certificate, and Billie has not adopted the child. Thus, there are no circumstances under which Billie can be viewed as a “legal parent.” The petition to establish parentage, custody, and support asserts a claim by Billie, a non-parent, against Sharon, the parent of the child. Since this is an initial custody dispute between a non-parent and parent, Billie is required to prove by clear and convincing evidence that an award of sole custody to Sharon would result in substantial harm to the child under La. Civ. Code art. 133.

In this case, however, the trial court did not perform a “substantial harm” analysis at the outset. Rather, it applied La. Civ. Code art. 134, relevant to “[f]actors in determining child's best interest,” to award joint custody. The trial court found that Billie had demonstrated by clear and convincing evidence that she met the

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<sup>4</sup> For a comprehensive survey of the other southern states' statutory and jurisprudential analysis of the concepts of *in loco parentis, de facto* parent, and psychological parent see *Ferrand*, 2016-7, pp. 15-37, 221 So. 3d at 923-37.

requirements to be identified as a “legal” parent and held that failure to reestablish the parental relationship between Billie and the child would result in substantial harm to the child. The trial court accorded great weight to Dr. Visconte’s expert report and testimony that: Billie satisfies the criteria of a psychological parent<sup>5</sup>; a reunification with Billie is in the child’s best interest; and the child could possibly suffer substantial harm if she is not reunited with Billie, depending on whether or not the child receives good therapeutic treatment. The trial court also relied on the credibility of the lay witness testimony to establish the factual basis of Billie’s claim to be a parent. Although the trial court found Sharon’s testimony to be unreliable and self-serving, it expressed no opinion on her fitness as a parent or on what effect an award of custody to her would have on the child. Rather, the trial court focused on whether Billie offered sufficient evidence to prove she could be designated as a legal parent, whether reestablishing Billie’s bond with the child would be in the child’s best interest, and whether failure to reestablish that bond would result in substantial harm to the child. In recognizing Billie as a legal parent and awarding joint custody, the trial court failed to address the principal question of whether an award of custody to Sharon would result in substantial harm to the child under La. Civ. Code art. 133. Because the joint custody award effectively terminates Sharon’s exclusive right as a natural parent to manage the care, custody and control of her child, and deprives the child of her right to the full companionship of her biological

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<sup>5</sup> Dr. Visconte explained that the term “psychological parent” refers to a person whom a child considers to be his or her parent, even though that individual may not be biologically related to the child. She identified the following factors to consider when determining if an individual should be considered a psychological parent: 1) whether the biological parent consented to and fostered the formation and establishment of a parent-like relationship with the child and non-parent; 2) whether the non-parent and child lived together in the same household; 3) whether the non-parent assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing toward the child’s support, without expectation of financial compensation; and, 4) whether the non-parent has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship that is parental in nature.

mother, we find the trial court committed legal error by not applying the substantial harm standard of La. Civ. Code art. 133.

Having found the trial court committed legal error that interdicted the fact-finding process, and given the complete trial record, we review the record *de novo* to determine whether an award of sole custody to Sharon would result in substantial harm to the child. The evidence in the record reveals that Sharon maintains stable employment as an EMS paramedic, has a safe and comfortable home, and is equipped to provide spiritual and moral guidance to the child. Dr. Visconte testified that Sharon wants what is in the best interest of her child, is a fit parent, and awarding her sole custody would not cause substantial harm to the child. Ms. Davis, the child's counselor, described Sharon as a doting and loving parent, and testified the child has a healthy relationship with her mother. The evidence shows the child has been living with her mother and without Billie since July 2016, and by all accounts the child remains bright, happy, creative, energetic, articulate, caring, intelligent and well-rounded. We conclude that the evidence clearly supports a finding that an award of sole custody to Sharon would not result in substantial harm to the child, and Billie has not satisfied her burden of proof. Thus, we agree with the court of appeal that the trial court's analysis of the best interest of the child under La. Civ. Code art. 134 was not warranted.

Accordingly, we affirm the judgment of the court of appeal that reversed the trial court's judgment recognizing Billie Cook as a legal parent of Sharon Sullivan's child and awarding the parties joint custody.

**AFFIRMED.**

09/30/21

**SUPREME COURT OF LOUISIANA**

**No. 2020-C-01471**

**BILLIE COOK**

**VS.**

**SHARON SULLIVAN**

*On Writ of Certiorari to the Court of Appeal, Second Circuit,  
Parish of Bossier*

**GRIFFIN, J., additionally concurs and assigns reasons.**

I agree with the majority that the record does not support a finding of substantial harm as required by La. C.C. art. 133. However, I write separately to emphasize the shortcomings of the existing statutory scheme in the wake of *Obergefell v. Hodges*, 576 U.S. 644, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015).

“The difficulty in applying La. C.C. art. 133 to same-sex custody contests is that [it] presupposes an issue regarding the fitness of one or both parents exists.” *In re C.A.C.*, 17-0108, p. 16 (La.App. 4 Cir. 11/2/17), 231 So.3d 58, 69. Further problematic in the application of La. C.C. art. 133 is that the article assumes the non-biological parent seeking custody is less likely to have a parent-child bond despite the facts and circumstances of the individual case. *Id.*, 17-0198, p. 17, 231 So.3d at 69 (“[t]he nuclear family concept that has influenced our laws regarding custody and visitation of children is not always reflected in the real life factual circumstance[s] in the cases that come before our courts”). Ms. Sullivan is not an unfit mother, and Ms. Cook is not the third party envisioned by the legislature in its enactment of La. C.C. art. 133. It is incumbent on the legislature to address these important policy issues of child custody and visitation rights involving same-sex relationships.