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Tracie F. v. Francisco D.

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**BEST INTEREST OF THE CHILD STANDARD: *TRACIE F. V.*
*FRANCISCO D.***

Kourtney Benton*

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Keywords: best interest of the child, biological parents, child development, custody, non-parents, stipulated judgement

I. INTRODUCTION

Most people would think that a child’s best interest would be to live with the biological mother and biological father under one roof as one big happy family. Although this might be ideal, this is not always possible. Many families with children separate all around the world and go through challenging custody battles. In most situations, each party will claim that he or she should be granted sole custody or designated as the domiciliary parent¹ because it would be

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1. LA. REV. STAT. ANN. § 9:335(B) (2018) defines domiciliary parent with the following implication:

(2) The domiciliary parent is the parent with whom the child shall primarily reside, but the other parent shall have physical custody during time periods that assure that the child has frequent and continuing contact with both parents.

(3) The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child

in the child's best interest. On the other hand, there are some biological parents who see themselves as unfit to take care of their child at the moment and grant permission for the child to stay with a nonparent because it would be in the child's best interest. Often times, it is in the child's best interest to stay with a nonparent. However, parents have superior rights in most cases. The case of *Tracie F. v. Francisco D.*² confronts this issue by looking through the lenses of whether a child should be moved from what is generally viewed as the stable and long-lasting environment provided by a nonparent who has been awarded custody as a domiciliary parent. In this case, the Louisiana Supreme Court examines the issue by employing the best-interest-of-the-child doctrine to clarify the different approaches that appellate courts have developed in similar situations and to come to a conclusion that will be in the best interest of the child in the case.

II. BACKGROUND

There is a lot of law on the best-interest-of-the-child standard in state, federal, and international law. In regard to efforts which have been implemented internationally for the rights of children, in 1989, the Convention on the Rights of the Child was approved in New York by the United Nations. The treaty sets out the civil, political, economic, social, health, and cultural rights of children. Article 3 states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”³ This concept has been analyzed and applied in various cases in Louisiana, including the instant case. This matter entails a custody dispute between a biological

shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child.

2. *Tracie F. v. Francisco D.*, 188 So. 3d 231 (La. 2016).

3. UN General Assembly, *Convention on The Rights of The Child* at art. 3, (United States, November 1989), available at <https://perma.cc/GV6E-JVGF>.

father and a maternal grandmother, who had been named as the domiciliary parent in a consent judgment.⁴

On May 29, 2006, D. was born to Tracie F., who was unmarried. Tracie indicated that D.'s father was Francisco D., who was in his early 30s.⁵ Tracie and Francisco have never lived together, nor have they ever been in a committed relationship. After Tracie gave birth to D., Tracie filed a petition for sole custody or, alternatively, for joint custody with Francisco but with Tracie being named as the domiciliary parent. On January 7, 2007, by stipulated judgment,⁶ the court granted joint custody, naming Tracie as the domiciliary parent. Francisco was awarded reasonable visitation and was ordered to pay \$400 per month in child support and to sustain health insurance on the child.

By all accounts, including his own stipulation, Francisco had very little interaction with D. in D.'s upbringing for about the first seven years of D.'s life. During that time, Francisco rarely exercised his visitation rights and had not taken a role in D.'s educational development. However, Tracie also had proved to be less than a model parent. When D. was still an infant, Tracie placed many of the responsibilities on her mother, Kathy B., and stepfather, Michael B. without giving them legal rights. Thus, they acted as *de facto* parents.⁷ Additionally, when D. was about six months old, Tracie and D. moved into Kathy and Michael's house for an extended period of time. As D. grew beyond infancy, so did Kathy and Michael's role

4. Although the underlying reasons were uncertain from the record before the court, the court adhered to the appellate court's attempts to conceal the identity of the litigants and the minor child in the court's opinion.

5. As a child born from unmarried parents, D. had been "formally acknowledged by both parents." *See* LA. CIV. CODE ANN. arts. 184, 186, 196 (2019).

6. A stipulated judgment is a type of custody award which a court renders when the parties consent to a custodial arrangement and there is no evidence of parental fitness from either party. *See* LA. REV. STAT. ANN. § 335 (2019).

7. *See De Facto Parent Information (JV-295)*, Advokids, at <https://perma.cc/DFR3-73E5>. A *de facto* parent is an individual who assumes, on a day-to-day basis, the role of a parent for the child. This person fulfills the child's physical and psychological needs for the care and affection of the child. Also, this person assumes that role for a substantial period.

in the development of D. Kathy and Michael sent D. to a private school, and Kathy paid the tuition. Michael was the coach for D.'s baseball team. Also, Kathy and Michael cultivated D.'s religious upbringing and supported his participation in cub scouts.⁸ The record was uncertain as to whether Francisco fulfilled all of his child support obligations. However, it established that out of the payments which Francisco did make Tracie did not give any portion of them to Kathy or Michael. Thus, Kathy and Michael handled the bulk of the financial responsibilities when they cared for D.⁹

In the beginning of 2013, Kathy became concerned about Tracie's behavior, including her supervision of D. Through counsel, Kathy contacted Francisco to inform him of her concerns about Tracie's behavior. Kathy's counsel informed Francisco that Tracie was involved in a physically abusive relationship and had begun abusing drugs. Kathy suggested that D. be removed from Tracie's custody and Francisco agreed. On May 28, 2013, Francisco joined Kathy in a pleading styled "Petition to Change Custody to Non-Parent and Petition of Intervention for Custody of Minor Child."¹⁰ Concurrently with the joint petition, a proposed order was submitted which granted Kathy with temporary custody with a rule to show cause why Francisco should not be relieved of child support obligations "with the change in custody to Kathy."¹¹ The district court imposed the temporary order. Tracie was designated as a defendant in Kathy and Francisco's petition. Subsequently, on July 18, 2013, all three parties agreed to a decree by which D. was permanently removed from Tracie's custody and joint custody was granted to Kathy and Francisco. By the same stipulated judgement, Kathy was named as the domiciliary parent and Francisco was not required to pay child support.¹²

8. *Tracie F.*, 188 So. 3d at 236.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

On August 7, 2014, Francisco filed an “Amended Rule to Change Custody, Set Visitation and Other Relief and Memorandum of Law to Exception of No Cause of Action.”¹³ Francisco’s pleading was prefaced with the statement that “circumstances have changed to such a material extent and degree affecting the welfare of the child to warrant a modification of custody.”¹⁴ Francisco alleged that Kathy had not provided him with any information about D.’s health, education, and welfare. Francisco contended that D. had expressed a strong interest to stay with him and that he wanted sole custody because he as a biological father had a paramount parental right over Kathy, a nonparent.

Francisco’s rule to change was referred to a hearing officer who found that there had not been any material circumstances that had changed since the stipulated judgment. Based on the officer’s instructions, Francisco’s request to change custody was set for trial because his request was “such a profound step” that to do so would require a trial before a district judge.¹⁵ Both Kathy and Francisco filed separate pretrial memoranda, and each argued that the other party had the burden of proof. However, the district court had not indicated which party had the burden of proof. Francisco and Kathy both presented evidence of their current and extensive involvement in D.’s life and upbringing, with Francisco indicating that he became actively involved in D.’s life only within the past year.¹⁶ At the conclusion of the trial, the district court awarded sole custody to Francisco and indicated that Kathy had the burden of proof, but failed to meet her burden of proving that if the father had custody of the minor, the child would sustain substantial harm.¹⁷ The court expressed that the evidence adduced at trial proved that D. would be in a loving and structured environment under the biological father’s care.¹⁸ The

13. *Id.* at 237.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 237-38 (citing LA. CIV. CODE ANN. art. 133 (2019)).

18. *Id.* at 238 (citing LA. CIV. CODE ANN. art. 131, *et seq.* (2019)).

court further recognized Francisco's paramount right to custody of his child.¹⁹ Subsequently, Kathy appealed.

In a split decision, the Louisiana Court of Appeal for the Fifth Circuit determined that Francisco had the burden of proof to show "rehabilit[ation]" to be currently fit to be designated as a domiciliary parent and to prove that the environment provided by Kathy as the present domiciliary parent had "materially changed."²⁰ Thus, the appellate court's majority reinstated the "stipulated judgment awarding joint custody to Kathy and Francisco, with Kathy designated as the domiciliary parent."²¹ Francisco then sought review by the Louisiana Supreme Court. The court granted a writ to determine the standard for adjudicating a request for increased custodial rights brought by a biological parent who shared joint custody with a grandparent, and the biological parent had earlier stipulated that the grandparent should be designated as having the rights and responsibilities of a domiciliary parent.

III. DECISION OF THE COURT

The Louisiana Supreme Court's decision was guided by Title V, Book I, of the Louisiana Civil Code article 131 and the legislative comments to its revision. Article 131 indicates that "[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."²² The court concluded that the legislative comments to article 131 were immensely instructive for this case and that according to the 1993 Revision Comment (a), "the best interest of the child [is] the overriding test to be applied in all child custody determinations."²³ Further, the court acknowledged Revision Comment (d) in article 131, which states that "[t]his Article should be followed in actions to change

19. *Id.* (citing LA. CIV. CODE ANN. art. 133 (2019)).

20. *Id.*

21. *Id.*

22. LA. CIV. CODE ANN. art. 131 (2019).

23. *Id.* at comment (a).

custody as well as in those to initially set it.”²⁴ Therefore, relying on these comments, the court held that the primary consideration in a determination of child custody is the best interest of the child. Specifically, in this case, since the original custody decree was a *stipulated judgment*, the court further held that:

[A] biological parent with joint custody, who seeks modification of a stipulated custody award to obtain greater custodial rights, must prove: 1) that there has been a material change of circumstances since the original custody decree was entered; and 2) that the proposed modification is in the best interest of the child.²⁵

With this being said, the Louisiana Supreme Court concluded that the appellate court committed legal error in choosing the standard it did, for several reasons. First, the appellate court should have applied the standard from article 131 and not the standard from article 133. Second, the court explained that the heightened standard chosen by the appellate court hinders—rather than advocates—the best-interest-of-the-child standard. Further, the standard articulated by the appellate court curtails, rather than respects, the constitutional rights of biological parents. The standard diminishes the constitutional rights because the standard that was applied by the appellate court does not even get to the analysis of the child’s best interest. Thus, this deprives the biological parent from the right of proving that it would be in the child’s best interest to have the biological parent designated as the domiciliary parent. Therefore, the Louisiana Supreme Court applied the correct standard (best interest of the child) to the facts of this case.

Applying the first part of the standard of whether there had been a material change of circumstances since the original custody decree was entered, the court held that Francisco had proven—by his shift from minimal involvement to being integrally involved in the child’s life—a material change in circumstances.²⁶ Francisco had

24. *Id.* at comment (d).

25. *Tracie F.*, 188 So. 3d at 235.

26. *Id.* at 247-248.

frequent visitation with D. and even provided D. with his own bedroom at Francisco's home. Also, Francisco had afforded opportunities for religious growth which were complementary to the religious traditions of D.'s early childhood upbringing. Further, Francisco had nurtured D.'s interest in hunting and fishing, and regularly communicated by phone with D. Applying the second part of the standard of whether it would be in the best interest of D. to change the custody decree, the court held that although Francisco's recent involvement with D. was commendable and was reflected in some of the best interest of the child factors from article 134 in equipoise between Francisco and Kathy, several of the factors weighed in favor of Kathy as the domiciliary parent as in D.'s best interest.²⁷ Francisco was able to meet the factors of developing a loving and affectionate relationship with D., but Kathy met those factors, and more, because she was there for the majority of D.'s upbringing and provided for the necessities and stabilities which D. needed in his early stages of life. Specifically, Kathy had the ability to provide D. with a growing stable and adequate environment for D. to thrive in. Thus, the court found that it was in the best interest of D. to reinstate the stipulated judgment by which Francisco and Kathy share joint custody and Kathy was designated as the domiciliary parent.

Judge Crichton concurred in the result reached by the Louisiana Supreme Court; however, in his view, Francisco had not demonstrated a material change of circumstances sufficient enough to trigger the second prong of the analysis applied by the court. Specifically, Judge Crichton expressed that Francisco's recent efforts to foster a relationship with D. did stand out compared to Francisco's earlier involvement with D. and would be considered a change in circumstances. Yet, he believed that Francisco had not shifted his behavior enough to be considered integrally involved in D.'s life. Thus, Judge Crichton indicated that Francisco had not even met the threshold of materiality.

27. *Id.* at 248-249.

IV. COMMENTARY

This commentary will first provide a discussion on the court's application of the best-interest-of-the-child standard and how the practice of this standard shapes the future development of the child. Next, this commentary will look at a more thorough analysis of the evidentiary standard required to be met for a nonparent to obtain joint or sole custody indicated in the code and how this standard is incompatible with society's current custom. The Louisiana Supreme Court did not address the ability of a parent to consent to a judgment wherein the parent shares legal custody of a child with a nonparent.

A. Best-Interest-of-the-Child Standard

The best-interest-of-the-child standard applied in a custody case where a biological parent is requesting increased custodial rights with a grandparent, and the biological parent has earlier stipulated that the grandparent should be designated as the domiciliary parent such as in this case, gives both parties the chance to fight for the protection of the child. Child Welfare Information Gateway defines "best interests" as the deliberation that courts undertake when deciding what types of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. Other factors including the parent's or caregiver's circumstances and capacity to parent, including the child's ultimate safety and wellbeing, are also taken into consideration. This standard is applied in all states, the District of Columbia, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands.²⁸ Other countries which are part of the United Nations, including France and the United Kingdom, apply this standard as well.

The best-interest-of-the-child is codified in Title V, Book I of the Civil Code. As article 131 explains, "[i]n a proceeding for

28. See Child Welfare Information Gateway, U.S. Department of Health and Human Services, *Determining the Best Interests of the Child Report* (2016), available at <https://perma.cc/YC9N-Y5PV>.

divorce or thereafter, the court shall award custody of a child in accordance with the best interest of the child.”²⁹ According to the 1993 Revision Comment (a), “the best interest of the child [is] the overriding test to be applied in all child custody determinations.”³⁰ Further, Revision Comment (d) states that “[t]his Article should be followed in actions to change custody as well as in those to initially set it.”³¹

Based on the code, the Louisiana Supreme Court correctly concluded that the best-interest-of-the-child standard was the correct standard that needed to be applied by the Louisiana Court of Appeal for the Fifth Circuit in the instant case. Since Francisco D. wanted to modify the stipulated judgement which he, Tracie F., and Kathy had agreed upon in the original consent decree, it was pertinent that this standard was applied to these facts as required by article 131. Instead, the Fifth Circuit decided to use a heightened standard under article 133, which had imposed a greater burden on Francisco D. than the burden of showing a material change of circumstances and the best-interest-of-the-child standard articulated by the Louisiana Supreme Court. This heightened standard required Francisco to prove “rehabilit[ation]” to be currently fit to be designated as a domiciliary parent and to prove that the environment provided by Kathy as the present domiciliary parent had “materially changed.”³² This is a standard that was unfair to Francisco and created a roadblock for Francisco to be able to prove that it was in D.’s best interest to stay with Francisco D. As the biological parent of D., Francisco needed to be given the utmost opportunity to prove to the court that he deserved to have sole custody of his child, no matter whether he

29. See LA. CIV. CODE ANN. art. 131 (2019). The parties in this case expressed that they held onto their substantive rights, which were maintained under the law in effect when the district court’s decision had been determined. Accordingly, the law was applied in effect before January 1, 2016. Louisiana Civil Code article 6 establishes, in part, that “[i]n the absence of contrary legislative expression, substantive laws apply prospectively only.”

30. LA. CIV. CODE ANN. art. 131, comment (a) (2019).

31. *Id.* at art. 131, comment (d).

32. *Id.* at art. 133.

was going to prevail in the judgment or not. With the standard that the Fifth Circuit had imposed, Francisco's rights were being abated because he had constitutionally protected rights as a biological parent in this matter regarding D. Specifically, the United States Constitution provides a protection to biological parents: embedded in the fourteenth amendment, parents are given the due process right to raise their children.³³ Additionally, the United States Supreme Court explained in *Pierce v. Society of the Sisters* that the liberty protected by the Due Process Clause provides that biological parents have the protected right to control the upbringing and education of their child.³⁴ Thus, the application of the best-interest-of-the-child standard maintains this protected right, and the decision by the Louisiana Supreme Court to apply it was consistent with article 131 in the code.

An innocent child who comes into the world deserves to be placed in the most adequate and stable environment because the environment that a child is placed in during the child's upbringing can have a major impact on the future development of the child. If the child is placed in an unstable and risky environment, then the child's future development could be in jeopardy and the child could end up in a very bad situation. On the other hand, if a child is raised in a positive and enriching environment, the child could have a prosperous and successful life. Therefore, it is important to weigh all of the factors mentioned in article 134, which the court applied in the instant case to determine the best interest of the child. Some of these factors include: (1) the love, affection, and other emotional ties between each party and the child; (2) the capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs; (3) the length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment; and (4) the reasonable

33. In re Adoption of B.G.S., 556 So. 2d 545, 549 (La. 1990).

34. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925).

preferences of the child, if the court deems the child to be of sufficient age to express a preference.³⁵ These factors along with the other listed factors in article 134 truly allow an examination into the relationship between the child and each party to determine who the child is most compatible with and who can provide the child with the most adequate and stable environment. This is why the code has chosen this standard to govern situations like the present one to determine what is truly in the best interest of the child. Thus, although the application of the best-interest-of-the-child standard by the Louisiana Supreme Court allowed Francisco to maintain his constitutionally-protected right, the court correctly concluded that Francisco had not met his burden of proof that it was in the best interest of D. to award sole custody to Francisco.

Tracie F. and D. had moved into Kathy's and Michael's house when D. was only about six months old in 2006. During this time, Tracie F. and Francisco D. had shared joint custody with Tracie F. as the domiciliary parent. Thus, D. spent most of his time with Tracie, Kathy, and Michael. Tracie and D. stayed with Kathy and Michael for an extended period of time, which led Tracie to defer her main responsibilities as a mother to Kathy and Michael. This situation went on for a couple of years during the time when Tracie was involved in an abusive relationship and had been abusing drugs. Thus, it was not in the best interest of D. to stay with her any longer with her designated as the domiciliary parent because this would have exposed D. to a risky situation. Although joint custody was eventually transferred from Tracie F. and Francisco D. to Francisco D. and Kathy in 2013, with Kathy named as the domiciliary parent, D. still spent most of his time with Kathy. Francisco was not required to give Kathy child support, with Kathy being a nonparent; therefore, Kathy continued to handle the financial responsibilities for D. By this time, D. was about eight years old and had spent his childhood with Kathy as the primary caregiver. Francisco only

35. LA. CIV. CODE ANN. art. 134 (2019).

recently started to be consistent and active in D's life the year before he filed for sole custody in 2014.

Although Francisco had started to become involved in D.'s life and put effort in to create a stable and adequate environment for D., it was not enough to establish that he deserved sole custody of D. Being actively involved in one year compared to seven years of life which Francisco D. could have actively spent with D. if he chose to proves even more why Kathy should remain the domiciliary parent. There was not a material change in circumstances by Francisco D.'s actions, as the Supreme Court concluded. Therefore, Judge Crichton who concurred with the opinion, but assigned different reasons, was correct when he explained that Francisco had not changed enough to be considered integrally involved in D.'s life and that Francisco had not even met the threshold of materiality.³⁶ Further, Francisco D. had not proved that it would be in the best interest of D. for D. to stay with Francisco D. as the domiciliary parent. With that being said, although Kathy is a nonparent, she proved that it was in the best interest of D. to have her reinstated as the domiciliary parent for joint custody between her and Francisco D. Kathy further proved that it can be a custom in society that a nonparent be considered the one to provide the most adequate and stable environment for a child based on the totality of the circumstances, and that a primary judgment of joint custody between a parent and nonparent should be reflected in the code.

B. Evidentiary Standard for a Nonparent to Obtain Custody

In Title V, Book I of the Civil Code, for an award of custody to parents, article 132 indicates that:

If the parents agree who is to have custody, the court shall award custody in accordance with their agreement . . . in the absence of an agreement, or if the agreement is not in the

36. *Tracie F.*, 188 So. 3d at 251-252.

best interest of the child, the court shall award custody to the parents jointly.³⁷

Article 132 further requires that “if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.”³⁸ Article 132 does not consider a nonparent. However, the code does address the evidentiary standard for a nonparent who is attempting to obtain joint or sole custody of a child. This standard is codified in Title V, Book I of the Civil Code in article 133. As article 133 purports:

If an award 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 person able to provide an adequate and stable environment.³⁹

Thus, this means that a nonparent cannot be awarded joint or sole custody of a child unless the nonparent can prove that the child would be in substantial harm with the biological parent. Under these circumstances, a nonparent does not even have a right of action under article 132 since the nonparent would not be a member of the class of persons that has a legal interest in the subject matter of the litigation. This can be an issue for situations where, although the child may not be in substantial harm, the best interest of the child would be to stay with a nonparent, such as a grandparent. Although the Louisiana Supreme Court allowed joint custody between Francisco D., a biological parent, and Kathy, a nonparent, from a stipulated judgment, the court failed to address this issue otherwise. This is an issue that needs to be addressed because it has become customary in society for grandparents to raise their grandkids.

The upward trend for grandparents raising their grandkids has been called the “Grandparenting Generation.” Sixty percent of households that were headed by grandparents in 2014 translated to

37. LA. CIV. CODE ANN. art. 132 (2019).

38. *Id.*

39. *Id.* at art. 133.

2.7 million grandparents being the primary caregiver for their grandkids, which is a 7 percent rise from 2009.⁴⁰ This type of situation usually occurs when one or both of the biological parents abuse drugs, abandon the kids, work long hours, or might be involved in another situation that requires a grandparent to care for the kids so that the kids will not be placed in an unstable and inadequate environment. Thus, the situation may not always be that the child was removed from a harmful situation, but it might be in the child's best interest for the grandparent to have custody of the child; "Kids who are being cared for by relatives also report that they are more likely to feel like they're loved, like they are cared about and that they have that kind of security that is so essential for a child to develop."⁴¹

When kids are placed in the care of their grandparents, the grandparents carry majority, if not all, of the responsibilities for their grandkids. In the instant case, Kathy had assumed the majority of the responsibilities for D. because it was in D.'s best interest for Kathy to be the domiciliary parent since D. had been exposed to a risky situation based on Tracie's situation. This is important because although Kathy technically was not D.'s biological parent, Kathy played the role of a biological parent in the sense that she had provided an upbringing for D. which included a stable and adequate environment. This environment was filled with love, affection, and mental, physical, emotional, spiritual and educational growth. Thus, in this situation, Francisco should have been required to pay Kathy child support from the original stipulated judgment since Kathy, although a nonparent, had taken the role of a biological parent and raised Francisco's child as if it were her own.

Moreover, it is vital that the code be amended by the Legislature to reflect this custom and allow parents and nonparents to obtain joint custody between one another in a primary judgment declared

40. Alejandra Cancino, *More Grandparents Raising Their Grandchildren*, PBS (2016), <https://perma.cc/EU5P-8RGS/>.

41. Sarah Jones, *The Grandparenting Generation*, THE NEW REPUBLIC (2018), <https://perma.cc/HR96-3YC9>.

by the court without the evidentiary standard required to be proven by the nonparent in article 133. Although the acquisition of joint custody was not an obstacle for Kathy, based on the code language under articles 132 and 133, it could be an obstacle for many other nonparents who try to obtain custody of a child, including same-sex couples.⁴² Unless the parent and nonparent agree to this lower standard, the lower standard is likely unconstitutional.

In *Troxel v. Granville*, the United States Supreme Court held a Washington statute unconstitutional which permitted *any person* to petition for visitation rights *at any time* and authorized state superior courts to grant such rights whenever visitation may serve a child's best interest.⁴³ Under this statute, the judge accords no deference to the parent when determining the best interest of the child, but rather allows the judge to be the only one to decide the best interest of the child in order to grant visitation rights. Visitation rights entail the ability for a person to have a right to visit the child under certain circumstances. On the other hand, custody entails who the child should stay with under certain circumstances. Cases dealing with visitation rights can be used to explain the rights of a parent in a custody case such as this one because both cases consider the same underlying principles, including the best-interest-of-the-child standard. In the *Troxel* case, the grandparents had filed a petition for visitation rights regarding two of their grandchildren. The mother of the two girls wanted the grandparents to see the children one weekend a month (with no overnight stay) with certain holiday visits. However, the grandparents wanted two weekends a month and two full weeks during the summer. The superior court gave no weight to the mother's having consented to visitation even before the filing of any visitation petition or subsequent court intervention. Instead, the

42. Based on the ruling in *Obergefell v. Hodges* on June 26, 2015, the United States Supreme Court ruled in favor of the freedom to marry, allowing all same-sex couples to marry, which ended marriage discrimination across the country, including in Louisiana; *see* *Obergefell v. Hodges*, 135 S.Ct. 2584, 2607-2608 (2015).

43. *Troxel v. Granville*, 530 U.S. 57, 72 (2000).

court rejected the mother's proposal and settled with a middle ground, which ordered one week in the summer, one weekend per month, and time on both of the petitioning grandparents' birthdays.⁴⁴ The U.S. Supreme Court held this unconstitutional. The court ruled that the statute interfered with the fundamental right of parents to rear their child's upbringing. The court further ruled that parents have the protected right to limit visitation of their children with third persons and should be able to choose who their children are exposed to. Here, the mother had the burden of disproving that visitation would be in the best interest of her daughters. The court held this unconstitutional and ruled that a state cannot interfere with parents' rights just because the court believes that it can make a better decision without showing deference to the parents.⁴⁵

The ruling in *Troxel v. Granville* can be applied in the instant case because, as stated before, it is a common custom that non-parents take kids under their wings when a parent has agreed to it and/or it is in the best interest of the child to do so. A parent should have the authorization to decide to share custody of their child with a nonparent as a fundamental right. However, judges should show deference to parents' ideas first when determining the best interest of a child in a custody case. Besides the judge, it is a parent's right to determine the best interest of a child when the parent is able to make a sound decision based on this protected right that is provided to them. There should never be an obstacle for a parent to make a decision about custody of their child unless it is proven otherwise. If the parent and nonparent have not agreed to an obstacle for a nonparent to obtain custody with a parent, a nonparent should be granted the opportunity to have joint custody with the parent if that is what the parent wants for the child's upbringing. Article 133 represents an obstacle because a nonparent would have to prove harm toward the child in the custody of a parent to be able to obtain custody. Most

44. *Id.*

45. *Id.*

parents would not agree to this obstacle based on the current custom. Thus, the state of Louisiana should recognize this right given to the parent which has been acknowledged by the U.S. Supreme Court and make it easier for parents and nonparents to obtain custody together.

The Louisiana Supreme Court decision in the instant case exemplifies how imperative it is that the Louisiana Legislature considers amending the Civil Code so there is a clear recognition of a parent's right to consent to a judgment wherein the parent shares legal custody of the child with a nonparent. It would have been efficient if the court would have addressed this issue in the decision; however, the court made no indication that such a stipulated judgment between a parent and nonparent would be void. Further, the court in *In Re J.E.T.* also granted judgment for a parent to share legal custody with a nonparent. The court acknowledged that it is foreseeable that because of youth, complications, or other life circumstances, a parent might agree to a nonparent being designated as a domiciliary parent. The court further recognized that there is an applicable burden of proof where the parent has been lucky enough to find such a person with whom to share joint custody, but later petitions to modify the stipulated award of joint custody between the parent and nonparent.⁴⁶ Therefore, it is obvious that courts in Louisiana recognize that nonparents in this society sometimes take care of children as a matter of custom. Also, it is clear that these courts support legal custody between a parent and nonparent in various circumstances, based on the best interest of the child.

Moreover, if the Louisiana Legislature also supported this legal relationship between a parent and nonparent under article 132, nonparents would no longer have to fight the article 133 obstacle in order to provide a stable and adequate environment for children. Without this obstacle, children can be placed in a comfortable environment that enhances their educational, spiritual, mental, physical, and emotional growth.

46. *In re J.E.T.*, 211 So. 3d 575, 584 (La. App. 1 Cir. 2016).