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Mommy Issues: Louisiana's Gap in Parental Rights for Unmarried, Same-Sex Couples

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INTRODUCTION

Imagine a nine-year-old child has had two loving mothers for his or her whole life. The child's mothers, who were never married, split up but agreed to share custody. A few years later, the child's biological mother suddenly forbids the child from seeing the other mother to whom the child is not biologically related. Now, imagine that this is happening without any allegations of wrongdoing and with court approval.

Louisiana courts must decide custody disputes like this one, in which someone not biologically or legally related to the child parents the child, specifically in cases between unmarried, same-sex partners. Although the child and the parent have no legal relationship, they develop a

psychological attachment.[1] The attachment between a parent and a child ties them together through each positive interaction and strengthens their emotional connection.[2] Children with healthy attachments are more likely to receive support that is valuable to their growth and development, take appropriate risks, and learn social skills that help them maintain relationships.[3] When the relationship between the child and the third-party parent[4] is severed because of the legal parent's[5] actions, the third-party parent may be left without redress in the courts, and the child will be left to deal with the trauma cutting the attachment causes. Effects of separation from a parental figure include depression, developmental regression, permanent architectural changes in the brain including lower IQs, and many others.[6]

Louisiana courts, however, do not consider such effects on children in custody disputes between unmarried, same-sex couples, as the recent Louisiana Supreme Court decision in *Cook v. Sullivan* demonstrates.[7] In *Cook*, Billie Cook and Sharon Sullivan decided to have a child, parented the child together for years, and when the couple split up, established a

1. Michelle R. Gros, *Since You Brought It Up: Is Legally Separating a Child From a Nonbiological Third Party Who has Essentially Become the Child's Psychological Parent Really In The Best Interest of the Child?*, 44 S.U. L. REV. 367, 368 (2017) [hereinafter Gros, *Since You Brought It Up*].

2. Steve Dennis, *The Emotional Ties Between Parents and Children*, BYU IDAHO (Oct. 1, 2007), https://www.byui.edu/home-family/emotional-ties-between-parents-and-children [https://perma.cc/Y32L-RUYA].

3. *Emotional Connection*, COLUM. NURTURE SCI. PROGRAM, https://nurturescienceprogram.org/emotional-connection/ [https://perma.cc/2MPT-UFLU] (last visited Jan. 17, 2022).

4. A third-party parent is not filiated to a child with whom a filiated parent intends to coparent. This may include same-sex and different-sex partners, grandparents, or other family members. *See generally* Gros, *Since You Brought It Up*, *supra* note 1.

5. A legal parent is one who is legally recognized as a child's parent and has the right to custody of the child and make decisions about the child's health, education, and well-being. *Legal Recognition of LGBT Families*, NTL. CTR. FOR LESBIAN RTS. 1, 1 (2019), https://www.nclrights.org/wp-content/uploads/2013/07/Legal_Recognition_of_LGBT_Families.pdf [https://perma.cc/F3C9-4UAY].

6. *Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers*, ABA: SECTION OF LITIG. 1, 4 (2020), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf [https://perma.cc/TAU6-YNNT].

7. *See* Cook v. Sullivan, 330 So. 3d 152 (La. 2021).

custody arrangement where Billie had visitation with the child every other weekend.[8] When Sharon severed Billie's visitation with the child, Billie filed a petition for custody, and the 26th Judicial District Court, using a list of factors, found Billie to be a legal parent and entitled to custody of the child.[9] On appeal, the Louisiana Second Circuit Court of Appeal, however, found that because Billie was not naturally or legally filiated[10] to the child, she was a stranger to the child in the eyes of the court.[11] Therefore, Billie was required to prove that substantial harm would result if the court awarded sole custody to Sharon.[12] The Second Circuit Court of Appeal found that the child was intelligent, outgoing, and happy, and, therefore, no substantial harm would result from severing the relationship between Billie and the child.[13] Consequently, the court awarded sole custody to Sharon.[14] The *Cook* case demonstrates that the substantial harm test, as currently written, leaves individuals in unmarried, same-sex relationships who are not biologically related to a child at a disadvantage. Parents in this situation face significant hurdles in obtaining custody of a child they have parented since the very beginning or for a substantial portion of the child's life, especially because the substantial harm test fails to consider the emotional effects on children as a result of severing these attachments.

In *Obergefell v. Hodges*, the United States Supreme Court held that same-sex couples cannot be deprived of the fundamental right to marry and the "constellation of benefits" that come with that right.[15] However, Louisiana legislation concerning unmarried, same-sex couples' parental rights post-*Obergefell* remains unchanged.[16] The structure of family units has evolved in society, and because of this, a revision of the Louisiana Civil Code articles relating to marriage and parentage is greatly needed to effectively provide for the best interests of children.[17]

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8. *Id.* at 154.
9. *Id.* at 154–55.
10. *See* discussion *infra* Part II.A.
11. *Cook*, 330 So. 3d at 156.
12. *Id.*
13. *Id.* at 160.
14. *Id.*
15. Obergefell v. Hodges, 576 U.S. 644, 646, 681 (2015). These rights may include presumptions of parentage, the rights and duties of marriage, tax benefits, and more. *Id.* at 670.
16. *See generally* LA. CIV. CODE arts. 133, 184–85 (2022).
17. Monica Hof Wallace, *A Primer on Child Custody in Louisiana*, 65 LOY. L. REV. 1, 111 (2019).

The Louisiana legislature has yet to adopt any specific custody provisions regarding individuals who are in unmarried, same-sex relationships and have children. Specifically, there is a gap in the law for same-sex couples where one partner is a biological parent of the child and the other partner is not biologically related to the child, yet both share parental responsibilities.[18] Under the current law, the non-biological parent must meet a two-pronged test from Louisiana Civil Code article 133 for a court to award him or her custody.[19] First, the court must determine that awarding custody solely to the legal parent will cause substantial harm to the child.[20] The court will only examine what is in the best interest of the child, the second prong of the test illustrated in article 133, if the substantial harm test is met first.[21]

This analysis is flawed in two ways. First, the non-biological parent who shared parental responsibilities with the biological parent from the child's birth or for a majority of the child's life is deprived of fundamental parental rights because of the legislature's antiquated view of a family unit. Both the United States Supreme Court and the Louisiana Supreme Court recognize the fundamental rights of parents.[22] Therefore, even though a non-biological parent maintains the same emotional and psychological connection to the child, a parent who cannot meet his or her burden of proving substantial harm will automatically be deprived of his or her *fundamental* right as a legal parent because of the lack of a genetic connection to the child.[23] Second, the best interest of the child is not considered in cases between non-biological parents and biological parents until the non-biological parent meets the first prong.[24] This determination may take months, or even years,[25] and courts may not consider the best interest of the child in these cases for years—or ever, if they find that no substantial harm to the child exists.[26] Additionally, article 133 gives Louisiana courts vast discretion in determining what constitutes

18. Gros, *Since You Brought It Up*, *supra* note 1, at 378.

19. *Id.*; *see* LA. CIV. CODE art. 133 (2022).

20. *See generally* Troxel v. Granville, 530 U.S. 57 (2000); LA. CIV. CODE arts. 131, 133 (2022).

21. LA. CIV. CODE arts. 131, 133 (2022).

22. *See Troxel*, 530 U.S. at 64; s*ee also* State *ex rel.* G.J.L. and M.M.L., 791 So. 2d 80, 85 (La. 2001).

23. *See Troxel*, 530 U.S. at 64; s*ee also G.J.L. and M.M.L.*, 791 So. 2d at 85.

24. LA. CIV. CODE ANN. art. 131 cmt. a (1993); *see also* Ferrand v. Ferrand, 287 So. 3d 150, 158 (La. Ct. App. 5th Cir. 2019).

25. *See Ferrand*, 287 So. 3d at 153; *see also* discussion *infra* Part II.D.3.

26. *See Ferrand*, 287 So. 3d at 158–59.

substantial harm,[27] and, thus, custody disputes often become dependent upon the judge's opinion as to whether the circumstances of a given case present substantial harm.[28] This leads to an inconsistent application of the article between circuits and confusion concerning the parental rights of LGBTQ individuals, as demonstrated by comparing the application of substantial harm in the Louisiana Circuit Courts of Appeal.[29]

This Comment argues that the Louisiana legislature should revise Louisiana Civil Code article 133 to include a factor test similar to the one the 26th Judicial District set forth in *Cook v. Sullivan*.[30] By utilizing a factor test to consider whether substantial harm would result from an award of sole custody to a legal parent, Louisiana courts would have an effective means of providing for the best interest of children in custody disputes. Alternatively, if the Louisiana legislature does not adopt a factor test, it can amend article 133 to mandate the standard the Louisiana Supreme Court used in *Tracie F. v. Francisco D.*, which addressed a situation in which a legal parent consents to joint custody with a non-parent.[31] The standard from *Tracie F.* requires that when a legal parent consents to joint custody with a non-legal parent under article 133 but later wishes to alter that agreement, the legal parent must demonstrate: "(1) there has been a material change in circumstances after the original custody award; and (2) the proposed modification is in the best interest of the child."[32] Louisiana courts have already used this standard in disputes between legal parents and non-legal parents who have stipulated

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27. *See* LA. CIV. CODE ANN. art. 131 cmt. a (1993).

28. *See, e.g.*, *Ferrand*, 287 So. 3d 150; Cook v. Sullivan, 307 So. 3d 1121 (La. Ct. App. 2d Cir. 2020).

29. *See, e.g.*, *Ferrand*, 287 So. 3d at 158–59; *Cook*, 307 So. 3d 1121; *In re* C.A.C., 231 So. 3d 58 (La. Ct. App. 4th Cir. 2017).

30. *See Cook*, 307 So. 3d at 1127 (discussing the test the trial court applied to determine whether the non-biological parent should be deemed a legal parent).

31. *See* Tracie F. v. Francisco D., 188 So. 3d 231 (La. 2016). In *Tracie F.*, the Supreme Court of Louisiana articulated the standard for adjudicating a custody dispute over custody between a legal parent and a grandparent in which the legal parent had previously stipulated that the grandparent should be designated as the domiciliary parent. The Court noted the difference between a considered decree and a stipulated judgment. When a legal parent *stipulates* joint custody with a non-legal parent, he or she must show that there has been a material change in circumstances, and the modification is in the best interest of the child. This is important because the Court held that the burden of proof to modify the judgment rests on the party seeking the modification, not necessarily the non-legal parent. *Id.* at 235.

32. *Id.*

judgments,[33] including a dispute between an unmarried, same-sex couple.[34] Since courts also used this standard in cases that do not involve same-sex couples, the legislature could revise the current substantial harm test without creating a provision that is specifically tailored for same-sex parents, which it has been unwilling to do.[35]

Part I of this Comment examines how the United States Supreme Court's decisions in *Obergefell v. Hodges* and *Pavan v. Smith* affect the traditional confines of the family unit. Part I also discusses the paramount right of a legal parent, as enumerated in *Troxel v. Granville*. Part II provides the background and history of Louisiana's laws concerning parentage rights for both different-sex and same-sex couples. Specifically, this part discusses judicial interpretations of custodial disputes between same-sex partners in Louisiana, both pre-*Obergefell* and post-*Obergefell.* Additionally, Part II looks at Louisiana Civil Code article 133's substantial harm test and its inconsistent application to custody disputes between same-sex couples as illustrated by Louisiana courts' decisions in *In re C.A.C.*, *Ferrand v. Ferrand*, and *Cook v. Sullivan*. Part III examines the rights of unmarried, same-sex couples in other states as well as the absence of the *in loco parentis*, *de facto,* and psychological parent status doctrines in Louisiana. Part IV argues that article 133's substantial harm test is an inequitable solution in custody disputes between legal parents and non-legal parents in unmarried, same-sex relationships and does not consider the best interests of children. Additionally, Part IV proposes that the Louisiana legislature redraft article 133 to adopt a factor test similar to one the trial court used in *Cook v. Sullivan*. Courts would apply this test to cases in which there is a non-parent who would be considered a "psychological parent" but for the legislature's and courts' refusals to adopt the doctrines. Alternatively, the legislature can revise article 133 to adopt the standard the court in *Tracie F. v. Francisco D.* used.[36]

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33. A stipulation is an agreement between two parties that is submitted to the judge for approval. *See Visitation Schedule*, US LEGAL, https://www.uslegalforms.com/forms/la-5298/stipulated-judgment-of-custody-visitation#:~:text=A%20stipulation%20is%20an%20agreement,signatures%2C%20and%20the%20judge's%20signature [https://perma.cc/A6PF-NBXC] (last visited Jan. 19, 2022) (select "Description" tab).

34. *See In re* J.E.T., 211 So. 3d 575, 578 (La. Ct. App. 1st Cir. 2016).

35. *See* discussion *infra* Part II.B; *see also infra* note 170 and accompanying text.

36. *See Cook*, 307 So. 3d at 154–55; *Tracie F.*, 188 So. 3d at 235.

I. CONSTITUTIONAL RIGHTS

Throughout the twentieth and into the twenty-first century, the United States Supreme Court acknowledged constitutionally protected, fundamental privacy rights[37] and extended several decisions in favor of same-sex rights.[38] The Supreme Court issued favorable decisions once again for same-sex rights in *Obergefell v. Hodges* and again, just two years later, in *Pavan v. Smith*.[39] Since *Obergefell* and *Pavan*, Louisiana courts must operate in a manner consistent with both these landmark decisions and with Louisiana law concerning marriage and parenthood, which remains unchanged in the face of Supreme Court opinions upholding same-sex marriage.[40]

A. Obergefell *Alters the Rights of Same-Sex Couples to Marry*

On June 26, 2015, the United States Supreme Court issued the landmark decision of *Obergefell v. Hodges*.[41] In this case, two men, whose same-sex partners died before litigation, and 14 other same-sex couples challenged several states' statutes that defined marriage as existing only between a man and a woman.[42] The Supreme Court granted certiorari to determine whether the Fourteenth Amendment requires a state to license

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37. *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973) (which recognized the fundamental right to an abortion); Loving v. Va., 388 U.S. 1, 12 (1967) (invalidating Virginia's ban on interracial marriages); Griswold v. Conn., 381 U.S. 479, 487 (1965) (invalidating state law prohibiting use of drugs or devices of contraception and the counseling, aiding and abetting of the use of contraceptives); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending the holding of *Griswold* to unmarried people).

38. *See* Romer v. Evans, 517 U.S. 620, 635–36 (1996) (holding that a law preventing anti-discriminatory measures against gays, lesbians, and bisexuals was unconstitutional); Lawrence v. Tex., 539 U.S. 558, 560 (2003) (holding that consenting adults have the right to engage in public conduct in the privacy of their homes); U.S. v. Windsor, 570 U.S. 744, 774 (2013) (holding that sections of the Defense of Marriage Act that denied federal recognition of same-sex marriage were unconstitutional as a deprivation of liberty of the person protected by the Fifth Amendment).

39. *See* Obergefell v. Hodges, 576 U.S. 644 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017).

40. Laura Tracy, *Presumption Junction, What's That Function: Louisiana Marriage and Parenthood Laws Post-Obergefell*, 81 LA. L. REV. 1523, 1550 (2021).

41. *Obergefell*, 576 U.S. 644.

42. *Id.* at 653–56.

a marriage between two people of the same sex.[43] The Court also determined whether the Fourteenth Amendment requires a state to recognize a same-sex marriage license for a marriage performed in a state that *does* grant the right.[44]

The Court held that denying same-sex couples the right of marriage denies them "the constellation of benefits that the States have linked to marriage," and further held that the "right to marry is a fundamental right inherent in the liberty of the person . . . under the Due Process and Equal Protection Clauses of the Fourteenth Amendment . . . ."[45] Thus, states cannot deprive same-sex couples of the right to marry.[46] As part of its rationale, the majority opined that states depriving same-sex couples the right to marry causes children of these families to grow up knowing that the country considers their families lesser than conventional families.[47] *Obergefell* sought to protect both romantic bonds and parent-child relationships, and as such, scholars have sought to understand *Obergefell*'s implications for parenting by same-sex couples.[48]

*B. Parental Implications for Same-Sex, Married Couples Post-*Obergefell

While *Obergefell* held that marriage between same-sex individuals was a fundamental right, the Court failed to make clear the implications of legal marriage between these individuals as it relates to parentage.[49] Just two years after the *Obergefell* decision, the Supreme Court took up the same-sex parentage question.[50] In *Pavan v. Smith*, two married, lesbian couples brought an action against the Arkansas Department of Health.[51] Each couple gave birth to a child in Arkansas in 2015, and when the couples applied for birth certificates, each listed their same-sex spouses as

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43. *Id.* at 644.
44. *Id.* at 656.
45. *Id.* at 675.
46. *Id.*
47. *Id.* at 668.
48. *See* Douglas Nejaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2265 (2017). *See, e.g.*, Douglas Nejaime, *Marriage and the New Parenthood*, 129 HARV. L. REV. 1185, 1261–63 (2016); *see also* Nancy D. Polikoff, *Marriage as Blindspot: What Children with LGBT Parents Need Now*, *in* AFTER MARRIAGE EQUALITY: THE FUTURE OF LGBT RIGHTS 127, 150 (Carlos A. Ball ed., 2016) (discussing California's and Maine's revisions of their parentage codes to ensure equality for lesbian and gay parents and their children).
49. Tracy, *supra* note 40, at 1547.
50. *See* Pavan v. Smith, 137 S. Ct. 2075 (2017).
51. *Id.* at 2077.

parents of the children.[52] The Department of Health removed the non-biological spouses' names from the children's birth certificates and listed only the birth mothers' names.[53] The Arkansas statute at issue in the case required the name of the mother's *male* spouse to appear on the birth certificate when a mother conceived a child through artificial reproductive technologies.[54] The statute contemplated a mother's husband being put on the birth certificate.[55] However, here, the two mothers did not have a husband but a wife.[56] Therefore, the Court's task was determining whether the Arkansas statute could apply under the facts.[57]

The Arkansas Supreme Court found the statute constitutional because the statute did not focus on the marital relationship of a husband and wife but instead focused on the child's relationship with the biological mother and biological father.[58] The United States Supreme Court reversed the Arkansas Supreme Court's decision and held that birth certificates are more than a "mere marker of biological relationships" and give married parents a "form of legal recognition that is not available to unmarried parents."[59] Therefore, the Arkansas statute was contrary to the holding in *Obergefell* since it denied same-sex couples the same "constellation of benefits" of marriage as different-sex couples by failing to put the name of a female spouse on the birth certificates.[60] *Pavan* illustrates that *Obergefell* applies not only to the right to marry but also to the rights that the law traditionally associates with marriage including parental rights.[61]

C. Troxel v. Granville *Recognizes a Legal Parent's Fundamental Right*

Although the *Obergefell* and *Pavan* opinions enumerated fundamental privacy rights for married, same-sex families, the fundamental rights of legal parents set forth in *Troxel v. Granville* have made it difficult to award custody to non-legal parents in custody disputes

52. *Id.*
53. *Id.*
54. *Id.*; ARK. CODE ANN. § 20-18-401 (2017).
55. *See Pavan*, 137 S. Ct. at 2077; ARK. CODE ANN. § 20-18-401 (2017).
56. *Pavan*, 137 S. Ct. at 2077.
57. *Id.*; ARK. CODE ANN. § 20-18-401 (2017).
58. *Pavan*, 137 S. Ct. at 2077 (citing Smith v. Pavan, 505 S.W.3d 169, 177 (Ark. 2016)).
59. *Id.* at 2078–79.
60. *Id.* at 2078.
61. *See generally id.* at 2075.

between unmarried, same-sex parents.[62] Parents traditionally enjoy the right to nurture and rear their children, and the basis of this tradition comes from the Due Process Clause of the Fourteenth Amendment.[63] The Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[64] Due Process protects against governmental interference into certain "fundamental rights and liberty interests," and a legal parent's right to custody and make decisions concerning their children is considered such a fundamental right.[65]

In *Troxel v. Granville*, the United States Supreme Court determined whether grandparents should be awarded visitation rights under a Washington statute.[66] The Troxels, the paternal grandparents in the case, requested visitation two weekends per month after their son, the children's father, committed suicide and the children's mother opposed overnight visitation.[67] Justice O'Connor, writing for the plurality, noted that the substantive component of the Due Process Clause protects against government interference with certain fundamental rights and liberty interests.[68] Justice O'Connor went on to write, "[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court."[69] The Washington statute provided that "[a]ny person may petition the court for visitation rights at any time including, but not limited to, custody proceedings."[70] The statute further provided that "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child[71] whether or not there has been any change of circumstances."[72] Justice O'Connor noted that this was "breathtakingly broad" and would potentially allow for a trial court to substitute its

62. *See generally id.*; Obergefell v. Hodges, 576 U.S. 644 (2015); Troxel v. Granville, 530 U.S. 57 (2000).

63. *See* U.S. CONST. amend. XIV, § 1; *Troxel*, 530 U.S. at 57.

64. U.S. CONST. amend. XIV, § 1.

65. *See id.*; *Troxel*, 530 U.S. at 57 (citing Wash. V. Glucksberg, 521 U.S. 702, 720 (1997) (citation omitted)).

66. *Troxel*, 530 U.S. at 57.

67. *Id.* at 61. The children's mother did not completely oppose visitation with the Troxels but asked the court to limit visitation to one day per month with no overnight visits. *Id.*

68. *Id.* at 65.

69. *Id.* at 63.

70. *Id.* at 61 (citing WASH. REV. CODE § 26.10.160(3) (1994)).

71. *See* discussion *infra* Part II.D.1.

72. *Troxel*, 530 U.S. at 61 (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

determination of the child's best interests for the parents.[73] Therefore, in cases involving a legal parent and a non-legal parent or parental figure, the court must balance both the best interest of the child and a legal parent's paramount right.[74]

The *Troxel* plurality decision provides little guidance to legislatures and courts in constructing or interpreting non-parental visitation and custody statutes.[75] This is particularly problematic in cases that involve "third-party" parents.[76] Justice Kennedy, in dissent, expressed concern that the best interest of the child standard should not be minimalized even when a legal parent's liberty interest is at stake.[77] He stated that a fit parent's rights versus a stranger's are much different than a fit parent's rights versus a *de facto*[78] parent's, and where a third-party acts as a *de facto* parent, a court may need to employ the best interest of the child standard.[79] Justice Kennedy also noted that the plurality's decision was based on a faulty presumption about the composition of American families and did not properly anticipate claims that might arise.[80] Also in dissent, Justice Stevens opined that a parent's liberty interest is not an "isolated right" and must be viewed within the greater context of a child's relationships.[81] Like Justice Kennedy, Justice Stevens noted that disputes between parents and third parties require a different approach when the child has an interest in maintaining a relationship with the third party.[82]

D. Louisiana Also Recognizes a Legal Parent's Fundamental Right

The Louisiana Supreme Court also recognizes a parent's rights to the custody, care, and control of his or her child: "[P]arents have a natural, fundamental liberty interest in the continuing companionship, care, custody, and management of their children . . . ."[83] In *State ex rel. Paul v. Peniston*, Justice Tate, in a concurring opinion, noted that the rights of parents to their children "existed before governments or other social

73. *Id.* at 67.
74. Gros, *Since You Brought It Up*, *supra* note 1, at 373.
75. *Visitation* is a term of art that refers to when a parent or non-parent does not have custody. Wallace, *supra* note 17, at 116–17; *see infra* note 98.
76. *See generally id.*
77. *Troxel*, 530 U.S. at 99 (Kennedy, J., dissenting).
78. *See* discussion *infra* Part III.C.
79. *Troxel*, 530 U.S. at 100 (Kennedy, J., dissenting).
80. *Id.*
81. *Id.* at 91 (Stevens, J., dissenting).
82. *Id.*
83. State *ex rel.* G.J.L. and M.M.L., 791 So. 2d 80, 85 (La. 2001).

institutions of mankind."[84] He noted that this right is a God-given right, and the state does not have the power to take away such a right in favor of a stranger.[85]

Louisiana's laws reflect the paramount right of parents in the care custody, and control of their children. The Louisiana Children's Code adopts the idea of a parent's fundamental right in its preamble: "that parents have the paramount right to raise their children . . . ."[86] Courts must honor parental choice of custody unless that choice goes against the best interest of the child.[87] This is evidenced in the Civil Code's custody hierarchy.[88] Before 1993,[89] joint custody to parents was presumed, and this arrangement was naturally assumed to be in the best interest of the child.[90] Courts often considered the quality of the relationship between the parents and their willingness to support a relationship between the child and other parent.[91] After 1993, however, as a result of the focus in custody disputes shifting solely to the best interest of the child, the preference for parental agreement replaced the presumption of joint custody.[92] If parents cannot come to an agreement or the agreement is not in the best interest of the child, a court must award custody to the parents jointly.[93] However, if one of the parents can prove that custody by that parent alone would be in the best interest of the child, the court must award sole custody.[94] If the parents cannot come to an agreement and neither joint nor sole custody in the parents is in the best interest of the child, a court may grant custody to a

84. State *ex rel.* Paul v. Peniston, 105 So. 2d 228, 232 (La. 1958) (Tate, J., concurring).

85. *Id.*

86. LA. CHILD. CODE art. 101 (2022).

87. LA. CIV. CODE art. 132 (2022).

88. *See id.* arts. 131–33. First in the hierarchy is a preference for parental agreement. If the parents cannot reach an agreement, or if the agreement is not in the best interest of the child, then the parents must be awarded joint custody. *Id.* art. 132. Next, if one parent provides clear and convincing evidence that custody in that parent alone would serve the best interest of the child, then that parent must be awarded sole custody. *Id.* Lastly, if a non-parent proves that substantial harm would result to the child, the non-parent will be awarded custody. *Id.* art. 133.

89. *See* discussion *infra* Part II.D.

90. Wallace, *supra* note 17, at 50.

91. *Id.*

92. *Id.* (citing LA. CIV. CODE ANN. art. 132 (2019)); Evans v. Lungrin, 708 So. 2d 731, 735–36 (La. Ct. App. 3d Cir. 1999)).

93. *Id.*

94. *Id.*; *see also* Harrell v. Harrell, 236 So. 3d 704, 709 (La. Ct. App. 1st Cir. 2017).

non-parent.[95] However, this is only when the non-parent can prove that parental custody would pose substantial harm to the child.[96] A court must consider each of these steps against a parent's protected interest in the care, custody, and control of his or her children.[97]

Although Louisiana's custody laws seek to protect a parent's fundamental rights, Louisiana's visitation[98] laws have been subject to constitutional debate.[99] Louisiana Revised Statutes § 9:344 permits grandparents to receive visitation with their grandchild if their child is deceased, interdicted, or incarcerated if it is found first that the visitation serves the best interest of the child.[100] In 2012, the legislature amended Louisiana Civil Code article 136 to permit grandparents to seek reasonable visitation with their grandchild if it was in the child's best interest.[101] In 2018, the legislature again amended article 136 to allow grandparents to seek reasonable visitation with their grandchildren only if doing so was in the child's best interest and if the child's parents were living apart in addition to being either divorced or unmarried.[102] Both Revised Statutes § 9:344 and Civil Code article 136 require *extraordinary circumstances*, and the class of persons listed in each is narrower than the Washington statute

95. LA. CIV. CODE art. 133 (2022).

96. *Id.*; *see also* McCormic v. Rider, 27 So. 3d 277, 279 (La. 2010); *In re* C.A.C., 231 So. 3d 58, 67 (La. 2017).

97. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000); *see also* Wallace, *supra* note 17, at 51.

98. *Visitation* is a term of art that is used to describe circumstances when a parent or non-parent does not have custody. Specifically, visitation is the time spent with a child outside of custody. Although visitation and custody are fundamentally different, comparing Louisiana's visitation statues with article 133 demonstrates the disparity in the Louisiana legislature's willingness to extend rights to grandparents versus third parties who have acted as parents to a child. As visitation time with a non-parent increases, the potential for infringement on a parent's right enumerated in *Troxel* also increases. However, after the 2018 revision of Louisiana Civil Code article 136, some grandparents do not have to show extraordinary circumstances to obtain visitation rights, while under article 133, a third party who has acted as a parent to a child still must meet the substantial harm standard. LA. CIV. CODE arts. 133, 136 (2022); *Troxel*, 530 U.S. at 57.

99. *See e.g.*, Galjour v. Harris, 795 So. 2d 350 (La. Ct. App. 1st Cir. 2001); Garner v. Thomas, 13 So. 3d 784, 792 (La. Ct. App. 4th Cir. 2009).

100. LA. REV. STAT. § 9:344 (2022); *Galjour*, 795 So. 2d at 358.

101. LA. CIV. CODE art. 136 (2012).

102. LA. CIV. CODE art. 136 (2018).

in *Troxel* that provided *any person* could seek custody of a child.[103] Therefore, while these articles are constitutional on their face under *Troxel*, the issue of whether their application violates the protected interests of parents is up for debate.[104]

II. ESTABLISHING PARENTAGE IN LOUISIANA

In the wake of *Obergefell* and *Pavan*, states are struggling with how to apply traditional, biological laws that establish the legal relationship between parents and their children to same-sex families.[105] The Louisiana legislature's unwillingness to extend rights in marriage and parenthood to same-sex couples through state legislation has caused Louisiana courts to face similar struggles in establishing parental rights after *Obergefell* and *Pavan*.[106] Louisiana courts must address not only parental rights for married, same-sex couples but also for unmarried, same-sex couples—an issue that the United States Supreme Court did not expressly decide in *Obergefell*, *Pavan*, or *Troxel*.[107]

A. Filiation Provides a Presumption of Parentage

The Preamble of the Louisiana Children's Code states that family is recognized as the most "fundamental unit of human society" and the relationship between a parent and child is "preeminent in establishing and maintaining the well-being of the child . . . ."[108] In Louisiana, the legal relationship between a parent and a child is called *filiation*.[109] Filiation is the juridical link that unites a child to their mother or father and establishes who has parental rights and obligations.[110] By establishing filiation, a

103. LA. CIV. CODE art. 136 (2022); LA. REV. STAT. § 9:344 (2022); *see also Galjour*, 795 So. 2d at 358; *Troxel*, 530 U.S. at 61 (citing WASH. REV. CODE § 26.10.160(3) (1994)).

104. Wallace, *supra* note 17, at 53.

105. Tracy, *supra* note 40, at 1528.

106. *Id.*

107. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017); *Troxel*, 530 U.S. 57 (2000).

108. LA. CHILD. CODE art. 101 (2022).

109. LA. CIV. CODE art. 178 (2022). Filiation is relevant to custody disputes in that it requires someone who has not established legal filiation to meet the substantial harm standard to gain custody. *Id.* art. 133.

110. J.R. Trahan, *Glossae on the New Law of Filiation*, 67 LA. L. REV. 387, 388 n.1 (2007) (citing Gérard Cornu, DRIOT CIVIL: LA FAMILLE No. 195, at 313 (7th ed. 2001)); *see also* Katherine Shaw Spaht & William Marshall Shaw, Jr.,

parent has the ability and duty to care for, supervise, protect, discipline, and instruct his or her children.[111] Parents owe certain rights and duties to their children that come along with these obligations.[112]

Louisiana Civil Code article 179 enumerates the three ways in which filiation may be established.[113] Filiation may be established by: (1) proof of maternity; (2) proof of paternity; or (3) adoption.[114] Article 184 states that "[m]aternity may be established by a preponderance of the evidence that the child was born of a particular woman . . . ."[115] Maternal filiation is generally easy to prove because it flows from the fact of birth.[116] In contrast, paternal filiation lacks the outward manifestation of birth, which makes it more difficult to prove.[117] The Louisiana Civil Code addresses this difficulty by providing three presumptions of paternity, found in articles 185, 186, and 196.[118]

Louisiana Civil Code article 185 provides a paternal presumption, which recognizes that the husband in a marriage is the father of a child of the marriage.[119] Under article 185, a husband is presumed to be the father

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The Strongest Presumption Challenged: Speculations on Warren v. Richard *and* Succession of Mitchell, 37 LA. L. REV. 59, 65 (1976).

111. LA. CIV. CODE art. 224 (2022).

112. *Id.* Under this article, parents are obligated to support, maintain, and educate their children. *Id.*

113. *Id.* art. 179.

114. *See id.*

115. *Id.* art. 184; *see also* LA. CIV. CODE ANN. art. 184 cmt. a (2019).

116. Tracy, *supra* note 40, at 1531 nn.72–73.

117. *Id.*

118. LA. CIV. CODE arts. 185–86, 196 (2022). Civil Code article 185 provides that "[t]he husband of the mother is presumed to be the father of a child born during the marriage or within [300] days of the termination of the marriage." *Id.* art. 185. Article 186 provides:

> If a child is born within [300] days from the day of the termination of a marriage and his mother has married again before his birth, the first husband is presumed to be the father.
>
> If the first husband, or his successor, obtains a judgment of disavowal of paternity of the child, the second husband is presumed to be the father. The second husband, or his successor, may disavow paternity if he institutes a disavowal action within a peremptive period of one year from the day that the judgment of disavowal obtained by the first husband is final and definitive.

Id. art. 186. Article 196 provides that a man who acknowledges, by authentic act, a child not filiated to another man is presumed to be the father of the child. *Id.* art. 196.

119. *Id.* art. 185.

of a child either born to his wife during the marriage or born within 300 days[120] of the termination of the marriage.[121] After *Obergefell* and *Pavan*, Louisiana courts extended the marital presumption under article 185 to include a mother's same-sex spouse.[122] This presumption may be rebutted through a disavowal action[123] under articles 187 and 188.[124]

Traditionally, the presumption of paternity served several functions including: (1) providing a "legal certainty for purposes such as inheritance and succession;"[125] (2) preserving the marital relationship between the couple by "protect[ing] the sanctity of the marriages by assuming the husband and wife [had] both remained true to their marriage vows";[126] and (3) "promot[ing] the welfare of the child because it provided the child with a father . . . ."[127] Since the husband of a mother is typically used to establish parentage, filiation and marriage are closely related.[128]

1. Establishing Filiation Outside of Marriage

Although the legal relationship between a parent and a child is typically related to marriage, the United States Supreme Court in the 1960s and 1970s began setting forth additional measures of constitutional

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120. The full term of a pregnancy is 40 weeks, which amounts to roughly 300 days. *See id.*

121. *Id.*

122. *See id.*; Boquet v. Boquet, 269 So. 3d 895 (La. Ct. App. 3d Cir. 2019). In *Boquet*, the Louisiana Third Circuit Court of Appeal applied the marital presumption in article 185 retroactively to the wife of a woman who gave birth to a child during the marriage. The Third Circuit held that because the child was born during the marriage, the female spouse of the biological mother was the presumed parent of the child, and she owed the child support since her time to file a disavowal action prescribed. *See id.*

123. Disavowal actions allow for the husband in a different-sex marriage to challenge paternity of the child by showing that it is impossible for him to be the biological father of the child in question. LA. CIV. CODE ANN. art. 187 cmt. b (2005). Disavowal actions sever the bond of filiation. LA. CIV. CODE art. 187 (2022).

124. LA. CIV. CODE arts. 187–88 (2022).

125. Tracy, *supra* note 40, at 1532 (quoting Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Martial Presumption*, 65 MD. L. REV. 246, 248–49 (2006)).

126. *Id.* (quoting Singer, *supra* note 125, at 249 n.14).

127. *Id.*

128. *Id.*

protection for non-marital families.[129] In *Weber v. Aetna Casualty & Surety Co.*, the Supreme Court struck down a Louisiana statute that regulated "illegitimate children"[130] to a lesser status of "other dependents" who were not entitled to recover benefits until other more worthy dependents recovered.[131] The Court held that it is constitutionally impermissible to deny rights and protections to children born outside of marriage.[132]

While custody often turns on filiation established through marriage, custody can be awarded based on other actions including paternity actions, voluntary relinquishments of custody, or petitions in custody disputes when the parties are unmarried.[133] In Louisiana, a party proves maternal filiation by evidence "that the child was born of particular woman" and with a birth certificate, birth to a particular woman is not difficult to prove.[134] However, it is more difficult for a party to prove paternal filiation.[135] There are two methods that unmarried, different-sex couples with a child can take to establish paternity in Louisiana: (1) the fathers can sign an Acknowledgment of Paternity Affidavit; or (2) a court can adjudicate on the question of the child's paternity.[136] A man can, by authentic act, formally acknowledge a child, and under Civil Code article 196, the Code presumes the paternity of the man and provides him with the rights of custody and visitation.[137] When a man formally acknowledges a child by authentic act, although he will be able to present the

129. Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CAL. L. REV. 1207, 1209 (2016).

130. This term is no longer used and has been replaced with *non-marital* children.

131. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 168 (1972) ("Unacknowledged illegitimate children, however, are relegated to the lesser status of 'other dependents' under § 1232(8) of the workmen's compensation statute and may recover *only* if there are not enough surviving dependents in the preceding classifications to exhaust the maximum allowable benefits." (emphasis added) (footnote omitted)).

132. *Id.* at 176; *see* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 BOS. U. L. REV. 425, 447 (2017).

133. *See* S.B. 291, 2018 Leg., Reg. Sess. (La. 2018) (enacted as Act. No. 412); Wallace, *supra* note 17, at 18.

134. LA. CIV. CODE art. 184 (2022).

135. Wallace, *supra* note 17, at 19.

136. *See* LA. CIV. CODE arts. 196, 198 (2022).

137. *Id.* art. 196. This article also imposes the obligation of child support on a man who formally acknowledges a child. *Id.*

acknowledgement to obtain custody, visitation, or child support, he will not have full, filial rights.[138]

Some proof of paternity is required to obtain legal custody rights without marriage.[139] When a man does not sign a formal acknowledgement of paternity and is not married to the mother of the child, he may file an avowal action[140] to receive a judgment of paternity.[141] An avowal action may be instituted at any time except when the child is presumed to be the child of another man.[142] When this is the case, an avowal action must be instituted within one year of the child's birth.[143] If a man files an avowal action to establish paternity of the child, he may also seek custody in his petition and will have full, filial rights.[144]

A child may also institute an action to prove paternity even if he or she is presumed to be the child of another man.[145] A parent or legal guardian may bring a child's filiation action on behalf of a child at any time provided that the alleged father is still alive.[146] When the alleged father has died, the action may only be brought within one year from the date of the alleged father's death.[147]

Through both a child's filiation action and a man's avowal action, a biological father may become filiated to a child even if another man is presumed to be the father of the child.[148] Thus, when the marital presumption of paternity under article 185 and the avowal action under article 198 operate in tandem, there may be two legal fathers of a child.[149] Louisiana is the only state in which a child can have two legally-recognized fathers.[150] This doctrine is called dual paternity and was

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138. *Id.* Although the presumption in favor of the man is limited, the presumption in favor of the child is unlimited. *Id.*

139. Wallace, *supra* note 17, at 19.

140. When a child is born outside of marriage, an avowal action allows a man to bring a judicial action to filiate himself to the child. LA. CIV. CODE art. 198 (2022).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* art. 197.

146. *Id.*

147. *Id.*

148. *Id.* arts. 185, 197–98.

149. *Id.* arts. 185, 198.

150. Henry S. Rauschenberger, *To Kill a Cuckoo Bird: Louisiana's Dual Paternity Problem*, 77 LA. L. REV. 1177, 1186 (2017).

adopted not for purposes of same-sex parenting but rather for purposes of child support and succession.[151]

2. Establishing Filiation in a Changing Society

Today, conception does not always occur through sexual intercourse.[152] Modern technology allows couples or individuals to conceive through assisted reproduction.[153] Different-sex couples may not be able to conceive because of *functional* infertility, which is the inability to have children for medical reasons.[154] For single persons or same-sex couples, however, *structural* infertility typically causes the inability to conceive.[155] Structural infertility requires another party's biological assistance in combination with his or her own to reproduce.[156] If an individual or same-sex couple does not intend to adopt—or is legally precluded from adoption[157]—the couple can use assisted reproductive technologies, like in vitro fertilization[158] or artificial insemination,[159] to have a child. While surrogacy[160] is available to different-sex couples in Louisiana, it is not available to same-sex couples because both members

151. *See id.* at 1183–86.

152. Anne R. Dana, *The State of Surrogacy Laws: Determining Legal Parentage for Gay Fathers*, 18 DUKE J. GENDER L. & POL'Y 353, 354 (2011).

153. *Id.*

154. Tracy, *supra* note 40, at 1534. "[I]nfertility is defined as not being able to get pregnant (conceive) after one year (or longer) of unprotected sex." *Reproductive Health: Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 1, 2022), https://www.cdc.gov/reproductivehealth/infertility/index.htm [https://perma.cc/6PEP-4335] (follow "What is infertility?" tab).

155. Tracy, *supra* note 40, at 1534.

156. *Id.*

157. *See* discussion *infra* Part II.A.2.

158. *In Vitro Fertilization*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/in%20vitro%20fertilization [https://perma.cc/S2JC-4PTT] (last visited Oct. 1, 2021) (In vitro fertilization is defined as "fertilization by mixing sperm with eggs surgically removed from an ovary followed by uterine implantation of one or more of the resulting fertilized eggs.").

159. *Artificial Insemination*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/artificial%20insemination [https://perma.cc/MHL2-VRCQ] (last visited Oct. 1, 2021) (Artificial insemination is defined as "introduction of semen into the uterus or oviduct by other than natural means.").

160. *Surrogate Mother*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/surrogate%20mother (last visited Oct. 1, 2021) [https://perma.cc/M9EE-FSSW] (A surrogate mother is defined as "a woman who becomes pregnant by artificial insemination or by implantation of a fertilized egg . . . for the purpose of carrying the fetus to term for another person . . . .").

of the couple must provide genetic material to enter into an enforceable surrogacy agreement.[161]

In Louisiana Civil Code article 188, the Louisiana legislature provides for the establishment of filiation for married, different-sex couples who use reproductive technologies to conceive.[162] Under article 188, a husband may not disavow a child born to his wife when the child is the result of assisted conception to which he consented.[163] Article 188 is the only Civil Code article dealing with the presumption of paternity that does not "presume[] an act of sexual intercourse between the mother and the man presumed to be the father."[164] Article 188 exemplifies that the foundation of filiation has its roots in biology, which makes the application of filiation to same-sex couples problematic.[165]

Filiation may be *by nature*, which describes a genetic link between a parent and child, or *by law*, which requires an act and judgment of adoption that "arises from the legislative will to create something identical to this [natural] filial line so as to attach the adopted child to an individual or to the spouses that the law institutes as parent(s)."[166] Louisiana Civil Code article 199 provides non-biological parents the opportunity to establish filiation through adoption where "the adopting parent becomes the parent of the child for all purposes . . . ."[167] Currently, Louisiana law provides that a single person or a married couple jointly may adopt a child.[168] Therefore, Louisiana allows married, same-sex couples to petition to jointly adopt but does not allow unmarried couples, either same or different sex, to jointly adopt.[169]

B. Rights of Unmarried, Same-Sex Couples in Louisiana

In 2018, Louisiana state senator J.P. Morell introduced Senate Bill 98, a bill designed to be more inclusive of same-sex couples by including

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161. LA. REV. STAT. § 9:2720 (2022).
162. LA. CIV. CODE art. 188 (2022).
163. *Id.*
164. Original Brief on Behalf of Brittany M. Boquet, Plaintiff-Appellant, Boquet v. Boquet, 269 So. 3d 895 (La. Ct. App. 3d Cir. 2019) (No. 18-798), 2018 WL 1910871, at *8.
165. LA. CIV CODE art. 188 (2022); Tracy, *supra* note 40, at 1530.
166. Tracy, *supra* note 40, at 1529–30 (alteration in original); *see also* Trahan, *supra* note 110, at 388 n.1.
167. LA. CIV. CODE art. 199 (2022).
168. LA. CHILD. CODE art. 1221 (2022).
169. *Id.*

gender neutral language in Civil Code articles.[170] Gene Mills, head of conservative, Christian-lobby group Louisiana Family Forum, was the only person who testified against the bill saying that "[o]ften, Louisiana offers a different opinion than the U.S. Supreme Court, which has been reversed in over 200 occasions."[171] Mills, who opposes same-sex marriage, argued that the Supreme Court could again decide to make same-sex marriage illegal in the future.[172] Additionally, he stated that having two mothers or two fathers is less preferred than having a mother and a father.[173] Senate Bill 98 failed with only one senator voting in favor of the legislation.[174]

Since *Obergefell* and *Pavan*, the Louisiana legislature has not revised the Louisiana Civil Code articles relating to marriage and parentage.[175] Some Civil Code articles can be interpreted as gender neutral, such as article 86, which defines marriage as a "legal relationship between a man and a woman."[176] Therefore, by removing "man and woman" and replacing it with "two persons," the meaning of article 86 can still conform with *Obergefell*.[177] However, other articles, such as the filiation articles,

170. Julia O'Donoghue, *Louisiana Senate Committee Rejects Use of LGBT-Friendly Language in Marriage Laws*, THE TIMES-PICAYUNE (Mar. 26, 2018, 10:16 PM), https://www.nola.com/news/politics/article_360fecca-3945-525a-b918-0ffa8e460080.html [https://perma.cc/95WQ-4K5C].

171. *Id.*

172. *Id.* In the 2021 Regular Session, the Louisiana legislature also proposed a bill to deny gender-affirming medical care to transgender youth. This bill also included penalties for parents who encourage or facilitate minors' access to gender affirming medical care. Kerith J. Conron, *Prohibiting Gender-Affirming Medical Care for Youth*, UCLA SCH. OF L.: WILLIAMS INST. (Mar. 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Youth-Health-Bans-Mar-2022.pdf [https://perma.cc/B5NY-KXKY]. Louisiana courts have also engaged in explicit discriminatory behavior against LGBTQ individuals. Additionally, in 2018, the Louisiana Supreme Court failed to grant writ to Governor Jon Bel Edward's appeal concerning an executive order that would have prohibited discrimination against people who work for state governments based on sexual orientation and gender identity. This means that state employees can be fired for being transgender or being in a same-sex relationship. O'Donoghue, *supra* note 170.

173. O'Donoghue, *supra* note 170.

174. *Id.*

175. *See* LA. CIV. CODE arts. 86, 89, 185–98 (2022).

176. Tracy, *supra* note 40, at 1551 (citing LA. CIV. CODE art. 86 (2020)).

177. *Id.*

which are premised on gender-specific language, are difficult for courts to apply to same-sex couples, especially unmarried, same-sex couples.[178]

C. Louisiana Courts Interpret Parental Code Articles Both Before and After Obergefell *&* Pavan

Before *Obergefell*, Louisiana courts looked to marriage as an important consideration in establishing parental rights and were reluctant to grant parental rights to both biological and non-biological parents in same-sex relationships.[179] In *Black v. Simms*, Kimberlee Black and Kimberley Simms were in an unmarried, same-sex relationship until 2004.[180] The couple conceived a child through artificial insemination, and Simms gave birth to the couple's daughter in January 2000.[181] In 2004, the relationship ended, and Black filed a petition seeking sole custody or, alternatively, joint custody and visitation with the child.[182] The trial court and appellate court both denied Black's request because the courts applied the substantial harm standard—the standard necessary for non-parents to receive custody of children.[183] To gain custody rights of her daughter, Black needed to show that awarding sole custody to Simms would result in substantial harm to the child.[184] Black claimed that she and the child had a parent-child relationship, she and Simms decided together to have a child, and the child would suffer substantial harm if their relationship was severed.[185] Both courts, however, denied Black's request for sole or joint custody because she did not meet her burden of proving substantial harm.[186]

Louisiana courts have also at times refused to issue consent judgments of custody based on agreements by a legal parent to share custody with their non-marital, same-sex partner.[187] In *In re Melancon*, same-sex partners used artificial insemination to have a child, and the biological

178. *Id.*
179. *See generally* LA. CIV. CODE art. 185 (2022); Black v. Simms, 12 So. 3d 1140 (La. Ct. App. 3d Cir. 2009).
180. *Black*, 12 So. 3d at 1141.
181. *Id.*
182. *Id.*
183. *Id.* at 1140; *see also* LA. CIV. CODE art. 133 (2022).
184. *Black*, 12 So. 3d at 1140.
185. *Id.* at 1141.
186. *Id.* at 1140.
187. *See generally In re* Melancon, 62 So. 3d 759, 763 (La. Ct. App. 1st Cir. 2010).

mother consented to joint custody with her partner.[188] The trial court, however, refused to issue a consent judgment of custody and stated that the non-biological parent must plead that the award of sole custody to the biological parent would result in substantial harm to the child.[189] Although the court in *In re Melancon* refused to issue a consent judgment, in *In re J.E.T.*, decided just one year before *In re Melancon*, the Louisiana First Circuit Court of Appeal granted a lesbian couple's joint petition to establish joint custody.[190] The consent judgment issued in *In re J.E.T.* in 2005 was later upheld as valid by the Louisiana First Circuit, overturning *In re Melancon*.[191]

Although the First Circuit in *In re Melancon* refused to issue a consent judgment between a legal parent and a non-marital, same-sex partner, the Louisiana Supreme Court recognized the right of a legal parent to consent to custody with a non-parent in *Tracie F. v. Francisco D.*[192] The court articulated the standard for adjudicating a custody dispute between a legal parent and a grandparent in which the legal parent had previously stipulated that the grandparent should be designated as the domiciliary parent.[193] The court held that "the overarching inquiry in an action to change custody is in 'the best interest of the child.'"[194] Additionally, the court found that when a legal parent with joint custody seeks modification of a stipulated custody award, he or she must prove: (1) that there has been a material change in circumstances after the original custody award; and (2) the proposed modification is in the best interest of the child.[195] The court found that the legal parent failed to prove that modification to the longstanding agreement would be in the child's best interest and affirmed the appellate court's decision maintaining the joint custody arrangement with the grandparent.[196] The court noted the difference between a considered decree and a stipulated judgment as well as the differing burdens of proof.[197] When a legal parent stipulates to joint custody with a

188. *Id.* at 763.
189. *Id.*
190. *In re* J.E.T., 211 So. 3d 575, 578 (La. Ct. App. 1st Cir. 2016).
191. *Id.*; *see also* Wallace, *supra* note 17, at 76.
192. *See* Tracie F. v. Francisco D., 188 So. 3d 231, 241 (La. 2016).
193. *Id.* The domiciliary parent is the parent who has authority to make all decisions affecting the child and with whom the child primarily resides. LA. REV. STAT. § 9:335 (2022).
194. *Tracie F.*, 188 So. 3d at 235.
195. *Id.*
196. *Id.*
197. *Id.* at 239. A considered decree is one in which an award of permanent custody is given after the trial court receives evidence of parental fitness to

non-legal parent, he or she must show that there has been a material change in circumstances and that the modification is in the best interest of the child.[198] This requirement is important because the court held that the burden of proof to modify the judgment rests on the party seeking the modification rather than on the non-legal parent.[199]

The standard articulated in *Tracie F.* was used by the First Circuit Court of Appeal in *In re J.E.T*, a case involving lesbian partners, Jennifer Thomas and Jacqueline Calandro, who were in a 17-year relationship.[200] After failed attempts at in vitro fertilization, Thomas adopted a sixteen-month-old child who had been living with the couple since his birth.[201] Ten days after the adoption, Calandro and Thomas jointly filed a motion to establish joint custody; May 12, 2005, the court granted the two women joint legal care, custody, and control of the child and designated them as co-domiciliary parents.[202] The relationship soured in 2015, and Calandro filed a motion to prevent Thomas from relocating the child to Texas.[203] In an attempt to seek sole custody, Thomas reconvened, asserting that the stipulated consent judgment was void *ab initio* as being against public policy.[204] Thomas argued that a legal parent could not enter into a custody agreement with a non-legal parent unless he or she could show the legal parent's lack of fitness.[205] Relying on *Tracie F.*, the Louisiana First Circuit Court of Appeal overruled its decision in *In re Melancon*.[206] The court found that in *Tracie F.*, the Louisiana Supreme Court acknowledged a legal parent's right to enter into a consent judgment of legal custody with a non-parent and did not indicate such a judgment would be against public policy and absolutely null.[207] Thomas also argued that the burden of proof

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exercise care, custody, and control of children. A stipulated judgment is a judgment a court renders when parties consent to custodial arrangements without considering evidence of parental fitness. *Id.*

198. *Id.* at 241 (citing Dalme v. Dalme, 21 So. 3d 477, 479–80 (La. Ct. App. 3d Cir. 2009)).

199. *Id.* at 235; *see also* 1 ROBERT C. LOWE, AWARD TO PERSON OTHER THAN PARENT (SECTION INCLUDES DISCUSSION OF SAME SEX PARENTS), LA. PRAC. DIVORCE § 7:32 (2021 ed.).

200. *See In re* J.E.T., 211 So. 3d 575, 578 (La. Ct. App. 1st Cir. 2016).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 581. *Ab initio* is defined as "[f]rom the beginning." *Ab initio*, BLACK'S LAW DICTIONARY (11th ed. 2019).

205. *In re J.E.T.*, 211 So. 3d at 581.

206. *Id.* at 582.

207. *Id.*

to change the prior agreement should be on the non-biological parent.[208] The court again relied on *Tracie F.* and held that the burden of proof to modify a judgment rests on the party seeking the modification, and, thus, the burden of proof was on Thomas.[209] Therefore, although a legal parent has a fundamental right to the care, custody, and control of their children, when he or she consents to shared custody with a non-legal parent, the burden is on the legal parent to later modify that agreement.[210]

D. Louisiana's Two-Pronged Test for Custody Disputes Between a Legal Parent and Non-Parent

In custody disputes between a legal parent and non-legal parent in which there has been no stipulated judgment, Louisiana Civil Code article 133 controls.[211] Before 1982, under Louisiana law, a court could deprive a legal parent of parental custody only when the "parent [was] unable or unfit, having forfeited parental rights."[212] At the time, the Louisiana Supreme Court noted that a best interest test alone was insufficient to deprive a parent of his or her paramount right to custody of a child.[213] In 1982, the Louisiana legislature codified a two-part statutory test that required non-parents to show that parental custody was "detrimental" to a child and that divesting the legal parent of custody was necessary to serve the best interest of the child.[214] In 1993, however, the legislature changed the language of article 133 to require that non-parents prove that sole custody to a legal parent would result in substantial harm to the child.[215] Therefore, for a court to award a non-parent custody over a legal parent, the non-parent must prove that (1) custody to the legal parent would cause substantial harm to the child; and (2) custody to the non-parent is in the best interest of the child.[216]

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208. *Id.* at 583.
209. *Id.* at 584.
210. *See id.*
211. LA. CIV. CODE art. 133 (2022).
212. Wood v. Beard, 290 So. 2d 675, 677 (La. 1974); *see also* Wallace, *supra* note 17, at 70.
213. *Wood*, 290 So. 2d at 677.
214. Act No. 307, 1982 La. Acts. 804.
215. Act No. 261, 1993 La. Acts. 610.
216. *See* LA. CIV. CODE arts. 131, 133 (2022).

1. Is the Best Interest of the Child Test Really Required?

The analysis of the best interest of a child is required in custody disputes.[217] Louisiana Civil Code article 131 states, "[T]he court shall award custody of a child in accordance with the best interest of the child."[218] Therefore, a court should not have discretion in applying the analysis, and comment (a) of the article states the test is the "overriding test" in all custody disputes.[219] However, although the best interest of the child test is mandated, in practice, the best interest of the of the child test is only applied sometimes.[220] Louisiana Civil Code article 134 enumerates

217. *Id.* art. 131.
218. *Id.*
219. LA. CIV. CODE ANN. art. 131 cmt. a (2022).
220. Gros, *Since You Brought It Up*, *supra* note 1, at 398; *see, e.g.*, Watson v. Watson, 46 So. 3d 218, 221 (La. Ct. App. 2d Cir. 2010).

14 factors[221] to consider in determining the best interest of the child.[222] But, because courts are not bound by a mechanical evaluation of these factors or their application, Louisiana's policy adherence to the best interest of the child is undermined.[223] Article 134 allows the court to consider relevant factors, and, thus, judges are given vast discretion in choosing which factors to consider, which decreases a child's right to a

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221. Article 134 requires courts to consider all relevant factors in determining the best interest of the child, including:

> (1) The potential for the child to be abused, as defined by Children's Code Article 603, which shall be the primary consideration.
> (2) The love, affection, and other emotional ties between each party and the child.
> (3) 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.
> (4) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
> (5) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
> (6) The permanence, as a family unit, of the existing or proposed custodial home or homes.
> (7) The moral fitness of each party, insofar as it affects the welfare of the child.
> (8) The history of substance abuse, violence, or criminal activity of any party.
> (9) The mental and physical health of each party. Evidence that an abused parent suffers from the effects of past abuse by the other parent shall not be grounds for denying that parent custody.
> (10) The home, school, and community history of the child.
> (11) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.
> (12) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party, except when objectively substantial evidence of specific abusive, reckless, or illegal conduct has caused one party to have reasonable concerns for the child's safety or well-being while in the care of the other party.
> (13) The distance between the respective residences of the parties.
> (14) The responsibility for the care and rearing of the child previously exercised by each party.

LA. CIV. CODE art. 134 (2022).

222. *Id.*

223. *See id.*; *see also* Gros, *Since You Brought It Up*, *supra* note 1, at 398.

full evidentiary hearing.[224] Courts, however, only use the factors when there are two parents involved in a custody dispute or only after a court finds that substantial harm would result to a child by awarding sole custody to a filiated parent in disputes between a parent and non-parent.[225] If a court finds that no substantial harm will result, it will not consider the best interest of the child factors because the court will, by default, give the legal parent custody of the child.[226]

2. A Non-Parent's Burden of Proving Substantial Harm

The new "substantial harm" language in article 133 following the 1993 revision was intended to create an efficient means of giving primacy to a parent's paramount right to custody of his child in disputes against a non-parent.[227] Comment (b) to article 133 makes it clear that a non-parent always bears the burden of proving substantial harm in a custody dispute with a legal parent.[228] Article 133 states:

> 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.[229]

Although the paramount consideration in custody disputes should be the best interest of the child, in cases involving parents and non-parents, the factors set out in article 134 are not considered until the court determines that substantial harm will not result from depriving the legal parent of sole custody.[230] The court must first turn to article 133, and because courts may only use article 133 in cases between non-parents and parents, these custody disputes rest largely on a court's interpretation of substantial harm.[231] Substantial harm may include "parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include 'any

224. Gros, *Since You Brought It Up*, *supra* note 1, at 399. *See, e.g.*, *Watson*, 46 So. 3d at 222; *see also* Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 784 (1985) (arguing that social science provides substantially more effective guidance than raw judicial intuition).

225. Tracy, *supra* note 40, at 1536; LA. CIV. CODE arts. 133–34 (2022).

226. LA. CIV. CODE art. 133 (2022).

227. Wallace, *supra* note 17, at 70.

228. LA. CIV. CODE ANN. art. 133 cmt. b (2019).

229. LA. CIV. CODE art. 133 (2022).

230. Ferrand v. Ferrand, 287 So. 3d 150, 154 (La. Ct. App. 5th Cir. 2019).

231. LOWE, *supra* note 199, at 1.

other circumstances, such as prolonged separation of the child from its natural parents, that would cause the child to suffer substantial harm,'"[232] but Louisiana courts inconsistently apply the term.

3. Louisiana's Courts Flip Flop on Their Applications of Article 133

In *In re C.A.C.*, the Louisiana Fourth Circuit Court of Appeal stated:

> 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*.[233]

In *In re C.A.C.*, a long-term, lesbian couple separated, and the non-biological mother sought custody of a child the two had raised together since the child's birth.[234] The two women lived together in a committed relationship for 18 years, and at the time of their separation, their daughter was seven.[235] The biological mother asserted her constitutionally protected right to limited physical custody of the child with her ex-partner.[236] The trial court awarded joint custody, designating the biological mother as domiciliary parent.[237] The biological mother appealed the judgment, and the court of appeal affirmed.[238]

Both the trial and appellate courts' analyses rested largely on the substantial harm language of article 133, finding substantial harm to the child would result from an emotional separation from the non-biological mother.[239] In considering substantial harm, the court considered the intention of the parties in raising the child, the emotional connection between the child and non-parent, and the effect of separation from either parent.[240] Additionally, there was documentary evidence that the

232. Wallace, *supra* note 17, at 112 (citing Ferrand v. Ferrand, 221 So. 3d 909, 920 (La. Ct. App. 5th Cir. 2016)); *see also* Ramirez v. Ramirez, 124 So. 3d 8, 17 (La. Ct. App. 5th Cir. 2013).

233. *In re* C.A.C., 231 So. 3d 58, 66 (La. Ct. App. 4th Cir. 2017).

234. *Id.* at 62–63.

235. *Id.* at 61.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.* at 70.

biological mother wanted or expected her ex-partner to be involved in the child's life.[241] The Fourth Circuit noted that article 133 was not designed to address the situation where a same-sex couple acted as parents to a child over a long period of time and where the child has a strong attachment to both adults.[242] The court went on to explain that article 133 presumes the third party seeking custody is "less likely than the parent to have a parent-child bond."[243] This presumption, the court stated, presupposes the fitness of one or both parents and creates a threat of harm to the child.[244] The court also explained how articles 131 through 134 are set up to create the rights of parents in *traditional* families.[245]

In *Ferrand v. Ferrand*, a case involving a non-traditional family, Vincent, a transgender[246] man, and his ex-partner, Paula, a cisgender[247] female, had twins through artificial insemination.[248] When the twins were born, the couple had been together for seven years, and the two presented themselves as a married couple, although they were not legally married.[249] The children called Vincent "Daddy," and he was active in their lives.[250] When the twins were four years old, Paula moved out of the couple's home, and Vincent became the primary caregiver to the children for two

241. *Id.* at 62. This documentary evidence included: (1) a Domestic Partnership Agreement that the biological mother signed, which contemplated joint custody in the event that the parties separated; (2) a power of attorney in which the biological mother granted her partner unlimited rights over the child; and (3) a testament that left the biological mother's partner as a trustee of the trust in favor of their daughter and instructed both extended families to be involved in the child's life. *Id.* at 65.

242. *Id.* at 68–69.

243. *Id.*

244. *Id.* at 69.

245. *Id.*

246. *Transgender*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/transgender [https://perma .cc/D3BL-F2TK] (last visited Oct. 10, 2021) (Transgender is defined as "a person whose gender identity differs from the sex the person had, or was identified as having, at birth."). Therefore, Vincent was born a female but identifies as a male.

247. *Cisgender*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cisgender [https://perma.cc/ B855-U2SQ] (last visited Oct. 10, 2021) (Cisgender is defined as "a person whose gender identity corresponds with the sex the person had, or otherwise identified as having, at birth.").

248. Ferrand v. Ferrand, 287 So. 3d 150, 153 (La. Ct. App. 5th Cir. 2019).

249. *Id.*

250. *Id.* at 154.

years.[251] Vincent filed a petition for custody, and Paula removed his name from the children's birth certificates, changed their last names, and asserted Vincent had no right to custody.[252] Although the court addressed the concepts of *in loco parentis*, *de facto* parent, and psychological parent status,[253] the court found that the concepts did not apply to the facts of *Ferrand* but were helpful in defining the issues.[254] The trial court found that Vincent failed to meet his burden of proving that substantial harm would result to the children if sole custody was awarded to Paula.[255]

Vincent then appealed, and the Louisiana Fifth Circuit Court of Appeal noted that because the goal in Louisiana custody cases is to protect the "best interest of the children," a custody evaluation was warranted to determine whether substantial harm would result to the children if the court awarded Paula sole custody.[256] Additionally, the court noted that the constitutionally protected rights of legal parents were "not unconditional," and each case should be viewed in light of its own facts.[257] The court found that, traditionally, substantial harm "includes parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include 'any other circumstances, such as prolonged separation of the child from its natural parents, that would cause the child to suffer substantial harm.'"[258] On remand from the Fifth Circuit, the trial court rejected the expert opinion of Dr. Van Beyer, who testified that awarding sole custody to Paula would substantially harm the children, and again awarded sole custody to Paula.[259]

After the trial court found that substantial harm to the children would not result from awarding Paula sole custody, Vincent appealed.[260] The Fifth Circuit again, on appeal, found that because Vincent was not the children's biological or legal parent, article 133 was controlling.[261] In considering substantial harm, the court found that Vincent had a substantial relationship with the children since they called him "Daddy" and lived with him for six and a half out of the eight years of their lives.[262]

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251. *Id.*
252. *Id.* at 157.
253. *See* discussion *infra* Part III.C.
254. LOWE, *supra* note 199, at 1.
255. *Ferrand*, 287 So. 3d at 153.
256. *Id.*
257. *Id.* at 160
258. *Id.*
259. *Id.* at 154.
260. *Id.*
261. *Id.* at 161.
262. *Id.* at 158.

Additionally, the court considered Paula's intention for the children to know Vincent as their father from birth, her decision to co-parent with him, and her actions following the dissolution of the relationship.[263] The court found that, although Vincent lacked legal recognition as the children's parent, he clearly fulfilled the role of the primary parent during the first six years of their lives, but he was deprived of custodial rights to them for two years because of the court's difficulty in applying the substantial harm test.[264] Additionally, the Fifth Circuit held that awarding Paula sole custody would result in continued substantial harm because she psychologically and emotionally abused the children by alienating them from Vincent.[265]

a. Louisiana Courts Back Track on Rights of Non-Filiated Parents

The absence of specific provisions of law protecting non-biological parents in unmarried, same-sex relationships in Louisiana legislation was again problematic in the case of *Cook v. Sullivan*.[266] Billie Cook, a non-biological parent, and Sharron Sullivan, the biological parent, began a romantic relationship in 2002 and lived together thereafter.[267] In 2009, after failed attempts at artificial insemination, Sharon conceived a child naturally through intercourse with a friend, David Ebard.[268] The couple did not list Ebarb on the birth certificate, and the child was given the hyphenated last name "Cook-Sullivan."[269] Billie and Sharon were not legally allowed to marry in Louisiana, and because of Louisiana's adoption laws, Billie could never formally adopt the child.[270] Billie, Sharon, and the child lived together until the couple separated in 2013 when the child was four years old.[271]

After the two separated, they shared custody of the child, but in July 2016, Sharon unilaterally terminated the visitation agreement.[272] Billie then filed a petition to establish parentage, custody, and child support in

263. *Id.* at 162.
264. *Id.* at 160.
265. *Id.* at 168.
266. *See* Cook v. Sullivan, 330 So. 3d 152 (La. 2021).
267. *Id.* at 154.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*

January 2017.[273] The trial court issued a considered decree[274] in which it: (1) recognized Billie as a legal parent; (2) held that failure to reestablish the parental relationship between Billie and the child could result in substantial harm to the child; and (3) awarded Sharon and Billie joint custody of the child.[275] The trial court found that cases between same-sex couples who are living together and where one partner conceives through artificial reproductive technologies or adopts a child are clearly different than traditional, third-party disputes.[276] Therefore, the court treated Billie as a legal parent instead of a non-parent and applied a factor test.[277] The court found that because Billie met the requirements to be identified as a legal parent, she was not obligated to meet the burden of showing substantial harm under article 133.[278]

The Second Circuit Court of Appeal reversed finding that the trial court erred in applying its own test rather than article 133.[279] The court noted that Louisiana law does not currently provide for custody awards to non-parents based on the doctrines of *in loco parentis*, *de facto* parent, or psychological parent status, and, therefore, custody disputes between former, same-sex partners must be decided under article 133.[280] The Court of Appeal found that, although the trial court's determination was equitable to Billie and in the best interest of the child, "it is not the

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273. *Id.*

274. 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., 188 So. 3d 231, 239 (La. 2016).

275. *Cook*, 330 So. 3d at 155.

276. *Id.*

277. *Id.* The factors the trial court used were:

> (1) [t]he parties entered into and engaged in assisted reproduction measures, voluntarily and jointly planned, which resulted in conception by one of the parties; (2) [t]he 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) [t]he non-biological parent engaged in full and permanent responsibilities and caretaking of the child without expectations or compensation; (4) [t]he non-biological parent acknowledged publicly and held [herself] out to be a parent of the child; (5) [t]he non-biological parent established a bonded and dependent relationship with the child of a parental nature; and (6) [t]he biological parent supported and fostered the bonded and dependent relationship between the child and non-biological parent.

Id. (fifth alteration in original).

278. *Id.* at 156.

279. *Id.*

280. *Id.* at 158.

judiciary's role to fill in the gaps left by the legislature."[281] The court found article 133 controlling in the matter, and, thus, another case turned on the court's opinion of the definition of substantial harm.[282] In examining substantial harm, the court found that the test does not require courts to determine if the child *has* suffered emotional distress that could be considered substantial harm but rather determine if the child *will*—in the future—suffer substantial harm by the award of sole custody to the legal parent.[283] Additionally, because Sharon was a "'fit parent,' who loves and adequately cares for her child . . . [and] the child is thriving and exceptional" no substantial harm would result from the declining to give Billie custody rights to the child.[284] Therefore, the court found that the trial court erred in awarding joint custody and awarded sole custody to Sharon.[285]

On appeal, the Louisiana Supreme Court emphasized once again that the trial court committed legal error.[286] In finding that an award of sole custody to Sharon would not result in substantial harm to the child, the Court affirmed the Court of Appeal's judgment of sole custody to Sharon.[287] In concurrence, Justice Griffin noted that the court's application of article 133 was problematic in that it assumed a non-biological parent is less likely to have a parent-child relationship than a biological parent.[288] He went on to say that Billie was not the "third party envisioned by the legislature" when it enacted article 133 and stressed how it is important that the legislature address the issues of child custody rights for same-sex relationships.[289]

III. ESTABLISHING PARENTAGE FOR NON-MARTIAL FAMILIES IN OTHER STATES

Since the 1960s, the idea of the traditional, nuclear family has evolved to include single parenting, grandparent parenting, step parenting, and

281. *Id.* at 156.
282. *Id.*
283. Cook v. Sullivan, 307 So. 3d 1121, 1129 (La. Ct. App. 2d Cir. 2020).
284. *Id.*
285. *Id.* at 1130.
286. *Cook*, 330 So. 3d at 154.
287. *Id.* at 156–57.
288. *Id.* at 160 (Griffin, J., concurring).
289. *Id.*

same-sex-couple parenting.[290] In 2019, 1,012,000 households in the United States were headed by same-sex couples, and approximately half of those households were unmarried couples.[291] Additionally, in 2019, almost 200,000 children were living with same-sex parents.[292] The majority of these families are raising biological children, but same-sex couples with children are more likely than different-sex couples to adopt children.[293] Therefore, the composition of the average family[294] has largely evolved from one with children raised by married, different-sex, biological parents to include families with same-sex parents, married and unmarried.[295] Today, a biological parent and a non-biological parent often raise a child together, and if the relationship between the biological parent and the non-biological parent ends, the rights of the non-biological parent to custody or visitation with the child are much different.[296]

A. The Uniform Parentage Act

Although Louisiana laws concerning marriage and parenthood remain unchanged after *Obergefell* and *Pavan*, in 2017, the National Conference of Commissioners on Uniform State Laws updated the Uniform Parentage Act (UPA) to address the variability in parentage laws as pertaining to non-biological parents across the United States.[297] Since then, only four

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290. *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1643–44 (1991).

291. Kristina Barrett, *U.S. Census Bureau Releases CPS Estimates of Same-Sex Households*, U.S. CENSUS BUREAU (Nov. 19, 2019), https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html [https://perma.cc/WRG8-NQGN].

292. *Id.*

293. Danielle Taylor, *Same-Sex Couples are More Likely to Adopt or Foster Children*, U.S. CENSUS BUREAU (Sept. 17, 2020), https://www.census.gov/library/stories/2020/09/fifteen-percent-of-same-sex-couples-have-children-in-their-household.html [https://perma.cc/PW2K-WLB9].

294. For large portions of the population, including poor and immigrant families, the nuclear model never reflected their lived experiences. *See generally* Rebecca L. Scharf, *Psychological Parentage,* Troxel*, and The Best Interest of the Child*, 13 GEO. J. GENDER & L. 615 (2012).

295. *Id.* at 629.

296. *Id.*

297. Julie Moreau, *Changes to state parenting laws help fill gaps for same-sex couples*, NBC NEWS (Aug. 1, 2020, 8:30 AM), https://www.nbcnews.com/feature/nbc-out/changes-state-parenting-laws-help-fill-gaps-same-sex-couples-n1235517 [https://perma.cc/3MD3-SZMU].

states have adopted all or large parts of the UPA, but many states have amended portions of their existing laws to extend protections to children of same-sex couples.[298] Although these states have taken steps to protect rights of parents and children in non-marital, same-sex families, some states, including Louisiana, have laws that are written in a way to exclude same-sex parents.[299] In 1973, the National Conference of Commissioners on Uniform State Laws promulgated the UPA to remove the status of illegitimacy and provide states with a legal framework for establishing parent-child relationships.[300] In 2017, the UPA underwent major changes, including two relevant provisions: (1) the UPA now seeks to ensure the equal treatment of children born to same-sex couples; and (2) the UPA includes a provision for the establishment of a de facto parent as a legal parent of a child.[301] Therefore, the most recent revision to the UPA better protects the rights of all children, especially those born to same-sex, unmarried parents and children born through assisted reproductive technologies. The UPA provides a legal framework to states for establishing parent-child relationships and is not mandatory, as it is up to individual states[302] to adopt the Act.[303]

There remain gaps in many states' laws that do not take into account assisted reproductive technology or unmarried, same-sex couples.[304] In recent years, however, a few states, inspired by the UPA, made changes to their laws to address these gaps.[305] For example, unmarried partners Sara Watson and Anna Ford, citizens of Rhode Island, had a child in 2017.[306]

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298. *Id.*

299. *Id.*

300. *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, UNIFORM PARENTAGE ACT (2017), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=e4a82c2a-f7cc-b33e-ed68-47ba88c36d92&forceDialog=0 [https://perma.cc/G92T-KJS7].

301. *Id.*

302. Family law is historically a matter of state law. Linda D. Elrod, *The Federalization of Family Law*, ABA (July 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/summer2009/the_federalization_of_family_law/ [https://perma.cc/778U-7426]. This is because every U.S. state is a sovereign entity and is granted the power to create laws and regulate them according to their own needs. *Id.*

303. Melissa Heinig, *What is the Legal Definition of a Parent Under the Uniform Parentage Act?*, LAWYERS.COM (Feb. 1, 2019), https://www.lawyers.com/legal-info/family-law/paternity/legal-definition-parent-under-uniform-parentage-act.html [https://perma.cc/V289-6AMF].

304. *See* Moreau, *supra* note 297.

305. *Id.*

306. *Id.*

Despite using Sara's egg to conceive their son, Sara could not put her name on his birth certificate because Anna carried and gave birth to the child.[307] At the time Anna gave birth to the couple's child, Rhode Island did not recognize Sara as a parent, and the only way for her to acquire parental rights was to adopt, which requires a mandatory six-month waiting period.[308] Because Sara could not establish legal parentage immediately, she could not add the child to her insurance, pick him up from daycare, or authorize him to go to the doctor.[309] In 2020, however, Rhode Island adopted the Rhode Island Uniform Parentage Act.[310] This act allows unmarried, same-sex couples to establish parentage by signing a voluntary acknowledgement of parentage form.[311] It also updates state law to provide rights for parents of children born using assisted reproductive technologies.[312] New Hampshire has a similar law that allows unmarried couples, whether same-sex or different-sex, to adopt children; extends second-parent adoption to same-sex parents; and mandates a court's parentage judgment to be used to secure parental relationships of children born through assisted reproduction technology.[313]

In Michigan, the Court of Appeals recently held that two unmarried lesbian partners, one who was a genetic parent and the other who gave birth to the child, were equal parents to their children.[314] The court found that under Michigan law, a genetic relationship was not required for a woman who gestated and birthed her same-sex partner's genetic children.[315] She was the child's natural parent and could seek custody as a parent, not a third party.[316] One judge, in a separate concurrence, noted that all parents and their children have a constitutional right to be recognized regardless of birth or genetics.[317] These examples demonstrate

307. *Id.*
308. *Id.*
309. *Id.*
310. RI ST. § 15-8.1-111 (2022).
311. A voluntary acknowledgement of parentage form ("VAP") is a document that establishes a legal relationship between a parent and a child. In most states, only men who believe they are genetic fathers of their children are allowed to sign VAPs, but a small number of states now allow parents of any gender or non-genetic parents to sign them. *Legal Recognition of LGBT Families*, *supra* note 5.
312. Moreau, *supra* note 297.
313. An Act Relative to Adoption and Parentage, N.H. HB 1162, 2020 Reg. Sess. (2020); *see also* Moreau, *supra* note 297.
314. Lefever v. Matthews, 971 N.W.2d 672 (Mich. Ct. App. 2021).
315. *Id.*
316. *Id.* at 679.
317. *Id.*

other states' acceptance of same-sex couples and their willingness to extend the rights of married parents to unmarried parents.

B. Voluntary Acknowledgements of Paternity and Second Parent Adoption

Individuals in unmarried, same-sex relationships may also be able to establish parental rights through voluntary acknowledgement forms.[318] A voluntary acknowledgment form is a document that establishes the legal relationship between a parent and a child.[319] As of June 2020, only seven states have statutes or appellate court decisions allowing parents of any gender and non-genetic parents to sign voluntary acknowledgments of parentage (VAPs).[320] VAPs have the same legal effect as a court order,[321] which means that all 50 states must recognize parents who sign VAPs. Most states only allow men who believe they are genetic fathers of children to sign VAPs.[322] Although Louisiana has a voluntary acknowledgement of parentage form, the language on the form indicates that it is to be used when a biological *father* who is not the husband of the mother is to be recognized as the legal father of the child.[323] Thus, it is unavailable to women and non-biological fathers.[324]

Although VAPs are often unavailable to same-sex couples, there is another avenue to establish parental rights for same-sex couples. Second-parent adoption, or co-parent adoption, allows a same-sex parent, regardless of whether he or she has a legal relationship with the other parent, to adopt his or her partner's child without terminating the first

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318. *See generally Voluntary Acknowledgment of Parentage*, NTL. CTR. FOR LESBIAN RTS. (2020), https://www.nclrights.org/wp-content/uploads/2020/11/VAP-fact-sheet.pdf [https://perma.cc/EX2G-T9FM].

319. *Id.*

320. *Id.* These states are: California, Maryland, Massachusetts, Nevada, New York, Vermont, and Washington. *See also* CAL. FAM. CODE § 7572(a)(2) (2022); MD. CODE. FAM. LAW § 5-1028(c)(1)(vi) (2022); Partanen v. Gallagher, 59 N.E.3d 1133, 1139 (Mass. 2016); NEV. REV. STAT. § 440.285 (2022); N.Y. PUB. HEALTH LAW § 4135-b.1(b)(ii) (McKinney 2022); VT. STAT. tit. 15C, § 301 (2022); WASH. REV. CODE § 26.26A.200 (2022).

321. *Voluntary Acknowledgement of Parentage*, *supra* note 318.

322. *Id.*

323. *Paternity Information*, LA. DEPT. OF HEALTH: STATE REGISTRAR & VITAL REC., https://ldh.la.gov/index.cfm/page/681 [https://perma.cc/L38D-CMY3] (last visited May 30, 2022).

324. *Id.*

parent's legal status as a parent.[325] Fifteen states and the District of Columbia have statutes or appellate court decisions allowing couples to get second-parent adoption even if they are not married.[326] Louisiana does not allow for unmarried, second-parent adoption.[327]

Although Louisiana does not provide for second-parent adoption, married same-sex and different-sex couples may use step-parent adoption as a means of developing a legal relationship with a child.[328] Step-parent adoption occurs when a spouse of a child's legal parent adopts the child.[329] In Louisiana, step-parent adoption is referred to as "intrafamily adoption" and may take place without the legal status of the relationship between the initial legal parent and the child changing.[330] This means that when a step-parent adopts through intra-family adoption, the legal relationship between the child and legal parent is retained rather than severed as with a typical adoption.[331] There is nothing in Louisiana's intra-family-adoption statute that prevents a same-sex spouse from completing step-parent adoption of their spouse's child if the child is not filiated to someone else.[332] However, because the language in Louisiana Child Code article 1243 refers only to "stepparent[s], stepgrandparent[s], great-grandparent[s], grandparent[s], or collaterals within the twelfth degree"

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325. *Adoption by LGBT Parents*, NTL. CTR. FOR LESBIAN RTS. (2020), https://www.nclrights.org/wp-content/uploads/2013/07/2PA_state_list.pdf [https://perma.cc/6G9Z-H7J3].

326. *Id.* These states include: California, Colorado, Connecticut, Idaho, Illinois, Indiana, Maine, Massachusetts, Mississippi, Montana, New Jersey, New York, Oklahoma, Pennsylvania, and Vermont. *Id.*

327. LA. CHILD CODE art. 1243 (2022).

328. *Id.*

329. *Louisiana LBGTQ Family Law: A Resource Guide for LGBTQ-Headed Families Living in Louisiana*, FAM. EQUAL. COUNCIL (Dec. 2017), https://www.familyequality.org/wp-content/uploads/2018/06/Louisiana-LGBTQ-Family-Law-Guide-WEB.pdf [https://perma.cc/3BU8-M9XG].

330. *Id.*

331. LA. CHILD. CODE art. 1256 (2022).

332. *Id.* art. 1243; *Louisiana LBGTQ Family Law: A Resource Guide for LGBTQ-Headed Families Living in Louisiana*, *supra* note 329. When the 15th JDC struck down the Louisiana ban on marriage equality, the court held that an out-of-state marriage license issued to a same-sex couple was valid in Louisiana. Additionally, the 15th JDC held that the spouse stratified the stepparent requirement of LA CHILD. CODE art. 1243. Thus, same-sex, married couples are entitled to the same access to intra-family adoptions as different-sex couples. Costanza v. Caldwell, 167 So. 3d 619, 621 (La. 2015).

individuals in unmarried, same-sex relationships cannot adopt his or her partner's child under this provision.[333]

C. Psychological Parent, In Loco Parentis*, and* De Facto *Parent Status*

A few states have also adopted doctrines to protect the rights of parents in non-traditional families. The doctrines of *in loco parentis*, *de facto* parent, and psychological parent status each share the characteristic of a non-parent assuming a caretaking role or responsibility of a typical, natural parent.[334] The phrase "psychological parent" is used to describe the circumstances under which a third party has stepped into the role of a legal parent who is unable or unwilling to undertake the obligations of parenthood or when a party steps into the role of a parent while the legal parent is still in the picture.[335] A psychological parent may become an essential focus in a child's life and may fulfill the child's physical, emotional, and psychological needs.[336] Removal of a psychological parent from a child's life may result in substantial emotional harm to the child, such as difficulties with intimacy, coping skills, self-confidence, peer relations, and aggression.[337]

The psychological parent doctrine was first legally recognized by the Wisconsin Supreme Court in *In re Custody H.S.H.-K*, and many other states[338] have since adopted the doctrine to prevent the severance of a non-parent's relationship with a child at the expense of the child's well-being.[339] In the Louisiana Supreme Court case *Cook v. Sullivan*, Dr.

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333. LA. CHILD. CODE art. 1243 (2022).

334. *See generally* Scharf, *supra* note 294, at 633.

335. *Custody Involving a Non-Parent: The Psychological Parent*, CALLAGY L., https://callagylaw.com/2016/01/09/custody-involving-a-non-parent-the-psychological-parent/ [https://perma.cc/98KA-Q9EP] (last visited May 30, 2022).

336. Scharf, *supra* note 294, at 633.

337. Shelley A. Riggs, *Response to* Troxel v. Granville*: Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 41 (2003).

338. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 176–77 (Wash. 2005); V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000) (finding that a same-sex partner had standing as the psychological parent to the children born to her former same-sex partner); Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008) (finding that the non-biologically related stepfather had standing to seek custody of the child born to his deceased wife because he had formed a psychological bond with the child).

339. *See In re* Custody of H.S.H.-K., 533 N.W.2d 419 (Wis. 1995); *see also* Michelle R. Gros, *In the Case of Biology v. Psychology: Where Did my "Parent" Go?*, 52 FAM. L. Q. 147, 157 (2018) [hereinafter Gros, *In the Case of Biology v. Psychology*].

Visconte, a psychologist specializing in marriage and family therapy, defined a psychological parent as someone a child considers a parent even though the individual may not be biologically related.[340]

In loco parentis describes circumstances in which a non-parent undertakes "all or some of the caretaking responsibilities of the biological parent."[341] In Texas, this doctrine is temporary,[342] and the biological or legal parent can unilaterally revoke it.[343] The Supreme Court of Mississippi found that a person who stands in place of a legal parent and assumes the role and obligation of a parent has *in loco parentis* status, and the non-legal parent with *in loco parentis* status has the same duties, liabilities, and custodial rights as legal parents against third parties.[344] In Oklahoma, courts have found that *in loco parentis* should be expanded to include same-sex parents; those courts hold any third party who stands in *in loco parentis* to a child has legal standing to petition the court for custody or visitation of the child.[345]

Courts also use the doctrine of *de facto* parent status to describe circumstances were a non-biological or non-legal parental figure lived with a child for a certain period of time and was the child's primary caregiver or financial supporter.[346] *De facto* parenting laws provide

340. Cook v. Sullivan, 330 So. 3d 152, 159 n.5 (La. 2021). Dr. Visconte considered the following factors in 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. *Id.*

341. Gros, *Since You Brought It Up*, *supra* note 1, at 386.

342. *See, e.g.*, Coons-Anderson v. Anderson, 104 S.W.3d 630 (Tex. App. 2003) (the same-sex partner's temporary status as a person *in loco parentis* expired after the biological mother and her child moved out of the partner's home).

343. Gros, *In the Case of Biology v. Psychology*, *supra* note 339, at 155.

344. Griffith v. Pell, 881 So. 2d 184 (Miss. 2004).

345. *See* Newland v. Taylor, 368 P.3d 435 (Okla. 2016) (Six months after the delivery of a child born to one of the partners of a same-sex couple, their relationship ended. The court found the non-biological partner had standing to pursue the best-interest-of-the-child hearing to seek custody or visitation of the child.).

346. Gros, *Since You Brought It Up*, *supra* note 1, at 389.

individuals, who raise or parent a child but are not a legal parent to the child, with limited legal rights, such as possible custody or potentially even full parental rights.[347] Thirty-six states currently recognize the *de facto* parent doctrine, with nine of these states recognizing it in a way that may grant *de facto* parents visitation, custody, or full parenting rights.[348] Only 9% of the LGBTQ population live in these states.[349] Twenty-seven states allow for limited recognition of the doctrine, providing a basis for visitation or custody, with 55% of the LGBTQ population living in these states.[350] In nine states, recognition of the doctrine is uncertain, and 23% of the LBGTQ population live in these states.[351]

In *Ferrand v. Ferrand*, the Louisiana Fifth Circuit Court of Appeal conducted an analysis of how other southern states[352] treated psychological parents in custody disputes between a biological parent and a non-biological parent.[353] Several other southern states have recognized or applied the doctrines of *in loco parentis*, *de facto* parent, or psychological parent status.[354] Kentucky and Oklahoma recognized the difference between a traditional non-parent—a grandparent or step-parent—and a non-legal parent who the natural parent intended to be a second parent to the child.[355] In *Ramey v. Sutton*, the Supreme Court of Oklahoma held that a biological mother's former, same-sex partner had standing to seek custody and visitation under the Uniform Custody

347. *Other Parental Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT (May 27, 2022), https://www.lgbtmap.org/equality-maps/other_parenting_laws [https://perma.cc/VS27-XDPX] (follow "De Facto Parent Recognition" tab).

348. *Id.* These states include New Mexico, Kansas, Oklahoma, Vermont, Maryland, Connecticut, Delaware, Road Island, and Maine.

349. *Id.*

350. *Id.* These states include Washington, Oregon, California, Nevada, Colorado, Montana, Arizona, Nebraska, Minnesota, Wisconsin, Arkansas, Mississippi, Indiana, Ohio, Kentucky, West Virginia, South Carolina, North Carolina, Pennsylvania, New Jersey, Maryland, and Washington D.C.

351. *Id.* These states include Washington, Oregon, California, Nevada, Colorado, Montana, Arizona, Nebraska, Minnesota, Wisconsin, Arkansas, Mississippi, Indiana, Ohio, Kentucky, West Virginia, South Carolina, North Carolina, Pennsylvania, New Jersey, Maryland, and Washington D.C.

352. Alabama, Arkansas, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

353. Ferrand v. Ferrand, 221 So. 3d 909, 923 (La. Ct. App. 5th Cir. 2016).

354. *Id.*

355. Ramey v. Sutton, 362 P.3d 217, 221–22 (Okla. 2015); *see also* Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010).

Jurisdiction and Enforcement Act.[356] There, the non-legal parent had been involved in the child's life from conception, parented the child at the request of the biological mother, and made a conscious decision with the biological mother to have the child and co-parent as a family.[357] In *Mullins v. Picklesimer*, the Supreme Court of Kentucky found that a biological mother waived her paramount right as a natural parent to sole custody of her child through a joint custody arrangement with her former, same-sex partner.[358] The court found that the biological mother had encouraged, fostered, and facilitated the emotional and psychological connection between her former partner and the child, and the couple jointly decided to start a family together.[359] After conducting a review of how each state addressed child custody disputes between biological parents and non-biological parents, the Fifth Circuit in *Ferrand* concluded that while a non-biological third party's burden of proof differs in each state, all states deem the best interest of the child as the predominant factor.[360] Additionally, while many other southern states have adopted *in loco parentis*, psychological parent, or *de facto* parent doctrines, Louisiana has not.[361]

Even if doing so may be in the best interest of the child, neither Louisiana legislation nor jurisprudence currently provides for awarding custody to a non-legal parent based on his or her status as a psychological parent.[362] For children born through assisted reproduction, Louisiana recognizes the non-gestational parent as a legal parent if the couple is married, but the Louisiana legislature has failed to enact clear and direct statutes for couples who are not married.[363]

Although Louisiana has not yet adopted the doctrines of *in loco parentis*, *de facto*, or psychological parent status, the Louisiana Supreme Court has recognized the concept of a psychological parent.[364] In *In re J.M.P.*, the Louisiana Supreme Court defined a psychological parent as an adult who has a psychological relationship with a child from the child's

356. *Ramey*, 362 P.3d at 221–22. The Louisiana legislature passed the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) in 2006, and all 50 states have enacted it. The UCCJEA keeps the best interest of the child as its focus and is intended to provide uniformity and predictability in custody disputes. *See* LA. REV. STAT. § 13:1801 (2022).

357. *Ramey*, 362 P.3d at 221–22.

358. *Mullins*, 317 S.W.3d 569, 571.

359. *Id.* at 580.

360. Ferrand v. Ferrand, 221 So. 3d 909, 923 (La. Ct. App. 5th Cir. 2016).

361. *Id.*

362. *See* Cook v. Sullivan, 330 So. 3d 152 (La. 2021).

363. *Other Parental Recognition Laws*, *supra* note 347.

364. *In re* J.M.P, 528 So. 2d 1002, 1013 (La. 1988).

perspective.[365] The court went on to say that an adult may become a psychological parent through day-to-day interaction with the child, companionship, and shared experiences.[366] Additionally, the role can be fulfilled by either biological parents or by any caring adult.[367] The court also noted that courts should prefer a psychological parent over any claimant who is not a psychological parent, and neither biological ties nor legal adoption are guarantees that an adult may be a psychological parent.[368] Lastly, the court noted the importance of the "psychological parent phenomenon" in determining a child's best interest but recognized that in Louisiana, the relationship between a child and a psychological parent is not given legal recognition.[369]

IV. LOUISIANA'S INEQUITABLE SOLUTION TO THE RIGHTS OF UNMARRIED, SAME-SEX PARENTS

As Justice Griffin noted in his dissent in *Cook v. Sullivan*, Louisiana's protections for individuals in same-sex relationships and the children of these relationships are severely lacking.[370] Same-sex couples, specifically unmarried couples, face unique challenges in custody disputes. The absence of the doctrines of *in loco parentis*, *de facto* parent, and psychological parent status in Louisiana legislation and jurisprudence forces courts to decide custody disputes concerning LGBTQ ex-partners who have co-parented the biological child of one of the partners under Louisiana Civil Code article 133.[371]

The law provides protections for different-sex—both married and unmarried—couples, same-sex, married couples, and even grandparents. However, there still remains a gap in Louisiana legislation concerning the rights of non-parents in unmarried, same-sex relationships.[372] After *Obergefell* and *Pavan*, courts are beginning to recognize the difference between an uninvolved biological parent seeking custody of a child and a person acting as a parent but biologically unrelated to the child.[373]

365. *Id.*
366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.* at 1015.
370. *See* Cook v. Sullivan, 330 So. 3d 152, 160 (La. 2021).
371. *See id.*; *see also* LA. CIV. CODE art. 133 (2022).
372. *See generally* LA. CIV. CODE arts. 184–86 (2022); LA. CHILD. CODE art. 1221 (2022); Obergefell v. Hodges, 576 U.S. 644 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017).
373. *Obergefell*, 576 U.S. 644; *Pavan* 137 S. Ct. at 2077.

However, these cases provide protections only for married, same-sex couples, and, thus, individuals in unmarried, same-sex relationships are left unprotected. While other states are taking steps forward to protect the rights of same-sex individuals and their children, Louisiana's legislation has remained largely unchanged, and courts are forced to deliver inequitable decisions.[374] Most recently, the Louisiana Supreme Court illustrated this inadequacy in *Cook v. Sullivan*.[375]

A. Cook v. Sullivan*'s Inequitable Holding*

Sharon Sullivan and Billie Cook's relationship pre-dated *Obergefell*, and had they married after the case, the presumption of parentage would have applied retroactively, as evidenced in *Boquet*.[376] However, the couple never married and was left without the option of co-parent adoption because Louisiana adoption laws only allow for married couples jointly or individuals themselves to petition to adopt.[377] Although Billie functioned as a parent, without valid adoption, she had no rights to the child.[378] Therefore, Billie was treated as a non-parent and was automatically at a disadvantage because of the burden of proof under article 133.[379]

Both *Obergefell* and *Pavan* largely focused on the fundamental rights of individuals to have families, but these decisions provided rights to *married* couples.[380] The United States Supreme Court, however, has discussed the issue of children born outside of marriages by stating that it is "constitutionally impermissible" to deny children born outside of marriage the "critical rights and protections" children born of marriages receive.[381] The Louisiana Supreme Court's decision in *Cook* seemingly does just this.

374. *See generally* Moreau, *supra* note 297.
375. *See* Cook v. Sullivan, 330 So. 3d 152 (La. 2021).
376. *Id.*; *see* Boquet v. Boquet, 269 So. 3d 895 (La. Ct. App. 3d Cir. 2019).
377. *Cook*, 330 So. 3d at 152; LA. CHILD. CODE art. 1221 (2022).
378. *Cook*, 330 So. 3d at 152.
379. *Id.*; LA. CIV. CODE art. 133 (2022).
380. *See generally* Obergefell v. Hodges 576 U.S. 644 (2015); Pavan v. Smith, 137 S. Ct. 2075 (2017).
381. Joslin, *supra* note 132, at 447, 471; *see also* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

B. Louisiana's Courts' Decisions in Unmarried, Same-Sex Custody Disputes are Inequitable

Due to Louisiana's unique legal system, legislation is a primary source of law while jurisprudence is merely persuasive as a secondary source of law.[382] Therefore, courts are dependent on the laws of the state and are not necessarily bound by court decisions.[383] However, when there is an absence of express or implied law, judges are bound to proceed and decide according to equity.[384] Louisiana has not yet legislatively or jurisprudentially adopted the doctrines of *in loco parentis*, *de facto* parent, or psychological parent status, and the laws of filiation include a presumption that prevents individuals, who act as parents but lack a biological connection with a child, from having custodial or parentage rights.[385] The Louisiana legislature has not yet adopted any specific provisions regarding individuals who have committed to non-marital, same-sex relationships in which one of the partners is the biological parent of the child but both share parental responsibilities.[386] Therefore, because there is an absence of express or implied law on the rights of parents in unmarried, same-sex relationships, courts should proceed and decide custody disputes between a biological and non-biological parent equitably. However, as evidenced in *Cook*, this is not always the case.[387]

The standard in *Tracie F.* governs individuals who seek to modify a stipulated custody judgment, while unmarried, same-sex individuals—who likely have similar private custody agreements but without a court's approval—face a heavier burden of proof. For this type of parent to be awarded any custody, they must meet the same two-pronged test from article 133.[388] Parental rights of biological parents are given primacy over parental rights of non-parents seeking custody of a child, so courts first use the substantial harm test from article 133 rather than the best interest of the child test from article 131.[389] This analysis, however, is flawed in two ways: (1) non-parents who share parental responsibilities with

382. *What is Unique About Louisiana Law?*, BLOOMLEGAL (Jan. 16, 2019), https://www.bloomlegal.com/blog/what-is-unique-about-louisiana-law/ [https://perma.cc/8TYD-CADW].

383. *Id.*

384. Loyacano v. Loyacano, 358 So. 3d 304, 309 (La. 1978); LA. CIV. CODE art. 4 (2022).

385. Wallace, *supra* note 17, at 111.

386. *Id.*

387. *See* Cook v. Sullivan, 330 So. 3d 152 (La. 2021).

388. LA. CIV. CODE art. 133 (2022).

389. *Id.* arts. 131, 133.

biological parents are deprived of the fundamental right of parentage; and (2) the best interest of the child is not considered until after the non-biological parent can meet the first prong.[390]

1. Fundamental Rights of Non-Parent Parents

First, the "non-parent" parent who shared parental responsibilities with the biological parent since the child's birth or for a majority of his or her life is deprived of the fundamental rights of parentage.[391] Just as same-sex individuals have the fundamental right to marry and have a family, these individuals also have the fundamental right to *not* marry.[392] Many couples, both in different-sex and same-sex relationships, choose to remain unmarried, and while unmarried, heterosexual couples or individuals in Louisiana have specific statutory provisions relating to parentage rights, unmarried, same-sex individuals not filiated to a child do not.[393] Therefore, Louisiana's legislation treats unmarried, homosexual individuals differently than unmarried, heterosexual individuals, and this undermines "deeply personal considerations," which the Constitution protects.[394]

In cases where a non-biological parent is a part of the child's life, either from the moment the couple *decided* to conceive the child or for a majority of the child's life, the application of substantial harm is inequitable. Disputes between same-sex couples who raise a child together as parents are more akin to divorcing parents' custody disputes than they are to a parent versus non-parent relationship.[395] Although a natural parent has constitutionally protected rights, those rights must be balanced against the best interest of the child. Louisiana legislation attempts to balance these rights by requiring a non-biological parent to prove substantial harm to the child if the biological parent was given sole custody of the child.[396] This balance weighs heavily against a non-biological parent gaining joint or sole custody of a child.

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390. Joslin, *supra* note 132, at 467.

391. *Id.*

392. *Id.*

393. *Id.* at 468.

394. Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshal, J., dissenting); *see also* Joslin, *supra* note 132, at 425; Obergefell v. Hodges, 576 U.S. 644 (2015).

395. *See generally In re* C.A.C., 231 So. 3d 58 (La. Ct. App. 4th Cir. 2017); *see generally* Ferrand v. Ferrand, 287 So. 3d 150 (La. Ct. App. 5th Cir. 2019).

396. Wallace, *supra* note 17, at 79.

If a court finds that a non-biological parent fails to demonstrate substantial harm, it will, by default, give custody of a child to a biological parent.[397] Therefore, even though this non-biological parent has the same emotional and psychological connection to the child but cannot meet the burden of proving substantial harm, the parent will automatically be deprived of his or her "fundamental" rights of parentage because of his or her lack of genetic connection to the child. Additionally, the showing of substantial harm by a non-biological parent against a biological parent seems to contradict Louisiana law, which recognizes that biology is not dispositive of parentage.[398] Louisiana filiation laws presume that the husband of a mother is the father of the children born or conceived during the marriage, regardless of biology.[399] Additionally, a husband who consents to his wife's use of a sperm donor to conceive a child during their marriage cannot disavow that child even though the biological child will not be related to him.[400]

2. Does the Best Interest of the Child Really Matter?

Second, the best interest of the child, in cases between non-biological parents and legal parents, is not considered until after the non-biological parent satisfies the first prong of the article 133 analysis.[401] This determination may take months, or even years, as exemplified in *Ferrand*, and courts in these cases may not consider the best interest of the child for years, or ever, if the court finds that no substantial harm exists.[402] In cases of same-sex partnerships when one parent is not filiated to the child either biologically or through adoption, the effect on the child when a person who functions as a parent is removed from the child's life must be more deeply considered.

3. What Does Substantial Harm Really Mean?

While non-legal parents have been able to prove substantial harm, the burden is difficult, and a court's decision often turns on a court's interpretation of "substantial harm."[403] Few Louisiana courts have applied

397. Wallace, *supra* note 17, at 116.
398. *Id.*
399. LA. CIV. CODE art. 185 (2022).
400. *Id.* arts. 187, 189.
401. LA. CIV. CODE ANN. art. 131 cmt. a (2019); *see also Ferrand*, 287 So. 3d at 154.
402. *See Ferrand*, 287 So. 3d 150.
403. *See generally* Wallace, *supra* note 17, at 116.

current law in a way that protects parental autonomy but expands the definition of substantial harm when a non-parent parental-figure is seeking custody.[404] Further, *Cook v. Sullivan* is the most recent demonstration of the challenge courts face in applying the substantial harm analysis from article 133.[405]

Louisiana courts' failure in properly applying the substantial harm analysis is evidenced in its different interpretations in *Ferrand*, *In re C.A.C.*, and *Cook*. In *Ferrand*, on appeal, the Fifth Circuit began its analysis by recognizing a legal parent's paramount, constitutionally protected right of "companionship, care, custody, and management" of their child.[406] The court noted, however, that this right is not unconditional; courts should view each custody dispute in light of its own facts in addition to the "overarching and overriding" principle of the best interest of the child.[407] The *Ferrand* court found that, traditionally, substantial harm "includes parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include 'any other circumstances, such as prolonged separation of the child from its natural parents . . . .'"[408] This definition of substantial harm, however, differs from the definitions the Louisiana Fourth Circuit Court of Appeal and the Louisiana Supreme Court used.

In *In re C.A.C.*, the Fourth Circuit found that the substantial harm article 133 intended is the "threat of abuse or neglect of the child by an unfit parent . . . ."[409] The court went on to say that in same-sex relationships, third parties may be more like co-parents than grandparents or other extended family members.[410] Therefore, separation from the non-legal parent who, from the child's perspective, was the child's parent would cause substantial harm.[411]

In *Cook v. Sullivan*, the Louisiana Supreme Court used the language "substantial harm" and "detrimental" interchangeably, which seemingly

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404. *Id.*

405. Cook v. Sullivan, 330 So. 3d 152, 156 (La. 2021); LA. CIV. CODE art. 133 (2022).

406. Ferrand v. Ferrand, 221 So. 3d 909, 919 (La. Ct. App. 5th Cir. 2016) (citing Tracie F. v. Francisco D., 188 So. 3d 231, 234 (La. 2016); *In re* Adoption of B.G.S., 556 So. 2d 545 (La. 1990)).

407. *Id.* (citing Tracie F. v. Francisco D., 174 So. 3d 781, 796 (La. Ct. App. 5th Cir. 2015)).

408. *Id.* (quoting Ramirez v. Ramirez, 124 So. 3d 8, 17 (La. Ct. App. 5th Cir. 2013)).

409. *In re* C.A.C., 231 So. 3d 58, 68 (La. Ct. App. 4th Cir. 2017).

410. *Id.* at 69.

411. *Id.* at 70.

reverts article 133 to its pre-1993 revision language.[412] Additionally, the court found that because the child was "bright, happy, creative, energetic . . . and well-rounded," awarding Sharon sole custody *would not* cause substantial harm.[413] Therefore, the court rested its decision that substantial harm would not result to the child from an award of sole custody to Sharon on its flawed assumption that because the child possesses positive personality traits, she will not suffer any emotional harm by removing a parental figure from her life.

4. Can Courts Consider Substantial Harm Without Considering the Best Interest of the Child?

Although article 133 requires a two-pronged test, courts should determine if one prong can be considered without considering the other.[414] In *Ferrand*, the Fifth Circuit noted the Louisiana Supreme Court's emphasis in *Tracie D. v. Francisco D.* that the best interest of the child is the principal consideration in all custody determinations, including contests between parents and non-parents.[415] The court questioned, however, if a court can decide whether a non-parent has met the burden of proving substantial harm without considering the best interest of the child.[416]

Evidenced in *Ferrand*, when a court does not consider the best interest of the child and focuses only on substantial harm, the court may enable future substantial harm to exist.[417] As Justices Kennedy and Stevens noted in their dissents in *Troxel*, although legal parents have constitutionally protected rights to the custody, care, and control of their children, the best interest standard should not be minimalized.[418] The best interest standard is especially important as the structure of family units evolves to include third parties who are really parents from the child's perspective.[419] Both parents, whether legal or non-legal, who consent to have a child and raise that child in a family unit with two parents sharing responsibilities and obligations, should be able to enjoy custody of the child if it is in the child's best interest.

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412. Cook v. Sullivan, 330 So. 3d 152, 157 (La. 2021); *see* Wallace, *supra* note 17, at 80.
413. Cook, 330 So. 3d at 160.
414. Wallace, *supra* note 17, at 80 n.560.
415. *Id.*; Ferrand v. Ferrand, 221 So. 3d 909 (La. Ct. App. 5th Cir. 2016).
416. Wallace, *supra* note 17, at 80 n.560; *Ferrand*, 221 So. 3d 909.
417. *See generally Ferrand*, 221 So. 3d 909.
418. Troxel v. Granville, 530 U.S. 57, 100 (2000) (Kennedy, J., dissenting).
419. *Id.*

C. It's Time for the Louisiana Legislature to Protect Children of Same-Sex Couples.

The need for the doctrines of *in loco parentis, de facto* parent, and psychological parent status has increased as the nature of traditional family units has changed. Incorporation of any one of these principles would provide more protection for partners in unmarried, same-sex relationships who parent children together. Ideally, the Louisiana legislature should update all of the Civil Code articles relating to parentage and filiation to adopt these principles.[420] The legislature should adopt an article including language similar to the following: "When awarding custody, in disputes between a legal parent and an individual who has acted as a parent to his or her partner's child, the court shall consider the psychological relationship the child has to the third-party and the effect on the child of severing that relationship."

However, it is unlikely that the legislature will expressly adopt these doctrines. This is because of the Louisiana legislature's refusal to acknowledge the evolution of family units from its traditional meaning, as well as its history of failing to redraft Civil Code articles to be in line with United States Supreme Court decisions.[421] Additionally, adoption of these doctrines would likely not change the law much because the legal parent would still have priority over the non-legal parent under *Troxel*.[422] This is because a legal parent has a recognized right to parent his or her own child while a non-legal parent does not.[423] One scholar proposed a revision to the filiation articles to include the gender-neutral language of "spouse" instead of "husband,"[424] but this proposed revision would extend the presumption of parentage only to married couples, and, thus, individuals in unmarried, same-sex relationships would once again be left without protection. Therefore, to better protect the rights of non-legal parents in unmarried, same-sex relationships and their children, the Louisiana legislature should amend article 133 to include a factor test similar to the one set out by the 26th Judicial District Court in *Cook v. Sullivan*.

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420. Tracy, *supra* note 40, at 1561.

421. Louisiana still criminalizes sodomy despite the Supreme Court's almost 20-year-old decision in *Lawrence v. Texas*. *See* LA. REV. STAT. § 14:89 (2022); *see also* Lawrence v. Tex., 539 U.S. 558, 578 (2003). Additionally, the Louisiana legislature did not update the state's abortion statutes despite the Supreme Court's decision in *Roe v. Wade* until 1991, almost 20 years later. Roe v. Wade, 410 U.S. 113 (1973). *See also* LA. REV. STAT. § 14:89 (2022); Tracy, *supra* note 40, at 1536.

422. *Troxel*, 530 U.S. at 100.

423. *See generally id.*

424. *See generally* Tracy, *supra* note 40, at 1529–30.

1. Cook v. Sullivan *Factors*

The 26th Judicial District Court in *Cook* used the following factors to determine if Billie should be deemed a legal parent: (1) whether the parties entered into and engaged in assisted reproduction measures voluntarily and jointly, which resulted in conception by one of the parties; (2) whether 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) whether the non-legal parent engaged in full and permanent responsibilities and caretaking of the child without expectations or compensation; (4) whether the non-legal parent acknowledged the child publicly and held [herself] out to be a parent of the child; (5) whether the non-legal parent established a bonded and dependent relationship with the child that was of a parental nature; and (6) whether the legal parent supported and fostered the bonded and dependent relationship between the child and the non-legal parent.[425]

The Louisiana Fourth and Fifth Circuit Courts of Appeal used similar factors in both *In re C.A.C.* and *Ferrand*.[426] Therefore, these factors are not new and have led to similar holdings in both cases. By adopting similar factors, the legislature would give the Louisiana courts guidance as to what to do in custody disputes between non-legal parents and legal parents, which will better protect the best interests of children and the fundamental rights of both legal and non-legal parents. These factors would give courts a way to better protect children without requiring the legislature to expressly acknowledge the evolution of a family from the traditional husband and wife to same-sex partners, both married and unmarried, as it has been so unwilling to do.

Louisiana courts do not overturn a trial court's custody determination unless the trial court applied the wrong law or abused its discretion.[427] This procedure is intended to promote stability and consistency in the child's life.[428] Implementing these factors at the trial court level in custody disputes between a legal parent and a non-legal parent, who has parented the child since birth or from very early in his or her life, would promote consistency in the courts' analyses. To promote the best interests of children in custody determinations, courts should prevent trial courts from going back and forth on who is awarded custody in disputes between unmarried, same-sex couples. The factors set forth by the *Cook* trial court

425. Cook v. Sullivan, 330 So. 3d 152, 155 (La. 2021).

426. *See In re* C.A.C., 231 So. 3d 58, 68 (La. Ct. App. 4th Cir. 2017); Ferrand v. Ferrand, 221 So. 3d 909 (La. Ct. App. 5th Cir. 2016).

427. *See* Thompson v. Thompson, 532 So. 2d 101 (La. 1988).

428. *See generally id.*

would enable courts to provide continuity and stability to children's lives, which is always in a child's best interest.

Some may argue that this proposed solution would lead to a large shift in courts awarding non-legal parents custody over legal parents, thus violating the legal parents' fundamental rights as parents. However, the 26th Judicial District Court's first and sixth factors consider a legal parent's custody, care, and control of his or her child.[429] The factors do so by considering acts of the legal parent in fostering a relationship between the non-legal parent and child and the legal parent's decision to bring a child into the world with their ex-partner. The trial court's factors also consider the best interest of the child, with factors (2), (3), (6) being substantially similar to Louisiana Civil Code article 134's best interest of the child factors (5), (12), and (14).[430] Additionally, the factors the 26th Judicial District enumerated are similar to the ones Dr. Visconte used in *Cook* in considering whether an individual should be considered a psychological parent.[431] If a non-legal parent would be considered a psychological parent, the effect of removing him or her from a child's life would be substantial, and, therefore, the proposed factors would allow courts to weigh both the best interest of the child and potential substantial harm simultaneously while also considering a parent's fundamental right of parentage.

2. Tracie F. v. Francisco D.*'s Standard is Also an Equitable Solution*

Alternatively, the Louisiana legislature can revise Civil Code article 133 to mandate that a legal parent who has a stipulated judgment or has consented to a custody arrangement with a non-legal parent must meet the standard set forth in *Tracie D. v. Francisco F.* to modify the custody arrangement.[432] In both *Ferrand* and *Cook*, the non-legal parents seeking custody had arrangements with the legal parent, which allowed them at least visitation.[433] It is likely that most of the individuals seeking custody rights to the children they have parented have some sort of custody arrangement with a legal parent before the legal parent unilaterally severs the agreement when the couple breaks up. In *Tracie D. v. Francisco F.*,

429. *Cook*, 330 So. 3d at 159 n.5; *see also* LA. CIV. CODE art. 134 (2022).

430. *Id.*

431. *Cook*, 330 So. 3d at 159 n.5. The trial court in *Cook v. Sullivan* used Dr. Visconte's, an expert witness who testified as to the psychological effects of removing a non-legal parent from a child's life, factors in crafting its factor test.

432. Tracie F. v. Francisco D. 188 So. 3d 231, 235 (La. 2016).

433. *See* Ferrand v. Ferrand, 221 So. 3d 909 (La. Ct. App. 5th Cir. 2016); *Cook*, 330 So. 3d 152.

when a grandparent-non-parent had a stipulated judgement of joint custody with a legal parent, the legal parent had the burden of proving that (1) there was a material change in circumstances after the original custody award; and (2) the proposed modification is in the best interest of the child.[434] This standard has already been applied to consent judgments between unmarried, same-sex individuals, as exemplified in *In re J.E.T.*[435] Billie Cook and Sharron Sullivan had an agreement, although not declared by the court, in which they shared custody of their child.[436] The court's failure in *Cook* to consider the custody agreement between Billie and Sharron was inequitable and more in line with *In re Melancon*, which *In re J.E.T.* overruled.[437]

While a legal parent has constitutionally protected rights, if he or she consents to a custody arrangement with an ex-partner, this evidences the intent to share his or her fundamental right of parentage with the ex-partner. The standard promotes the stability of children's living and familial arrangements without depriving a legal parent of the opportunity to obtain custody. Therefore, the application of the standard set forth in *Tracie F. v. Francisco D.* and echoed in *In re J.E.T.* weighs both a parent's fundamental right and the best interest of the child. This is a more equitable solution than the substantial harm analysis of article 133. Although these individuals should already be considered legal parents, this standard would put non-legal parents in unmarried, same-sex relationships on the same level as traditional-non-parents, such as grandparents—who have means of establishing visitation or a legal relationship with a child through intra-family adoption. This standard would be a step up from their current treatment as strangers to the child. Additionally, because courts have already used this standard in cases not involving same-sex couples,[438] the revised article would also apply to disputes involving third-party parents like grandparents or other family members. This would allow the legislature to adopt an article that not only protects children of unmarried, same-sex couples but also children who are parented by third parties without having to acknowledge the growing nature of children raised by same-sex parents.

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

435. *In re* J.E.T., 211 So. 3d 575, 578 (La. Ct. App. 1st Cir. 2016).

436. *Cook*, 330 So. 3d at 152.

437. *Id.*; *see In re* Melancon, 62 So. 3d 759 (La. Ct. App. 1st Cir. 2010); *In re J.E.T.*, 211 So. 3d 575.

438. *See generally In re J.E.T.*, 211 So. 3d 575; *Tracie F.*, 188 So. 3d 231.

CONCLUSION

The goal of custody disputes should be "frequent and continuing contact with *both* parents."[439] Depriving children of unmarried, same-sex couples of this right because one parent cannot establish filiation through adoption or voluntary acknowledgments treats these children differently than children of married, same-sex or married and unmarried, different-sex couples. This disparity takes away the opportunity for a child to have two parents who are willing and able to parent. Louisiana's parentage laws punish individuals and their children in same-sex couples for remaining unmarried by depriving the non-legal parents of the same rights individuals in married, different-sex relationships and same-sex relationships enjoy.

Revision to Louisiana's Civil Code articles relating to filiation and parentage is greatly needed, and a good starting point would be to revise courts' considerations in determining substantial harm under article 133. If the Louisiana legislature adopts the proposed factors above, this would consider the rights of individuals who are not filiated to children but have acted as a parent for the majority of the child's life. Additionally, this would consider a filiated parent's fundamental rights and also the best interest of the child, which should *always* be the overarching concern in custody disputes. Alternatively, revising article 133 with the standard the Louisiana Supreme Court set forth in *Tracie F. v. Francisco D*. would give courts a more equitable solution in custody disputes between non-legal parents and legal parents. To apply one standard in custody disputes between grandparents and other non-parents who have stipulated judgments with legal parents and to apply another, more heightened standard in disputes between unmarried, same-sex couples who have deliberately chosen *together* to bring a child into the world and co-parent is inequitable. Although the Louisiana legislature does not want to address the growing number of families involving same-sex couples, it should at least recognize the harm children of these families may suffer because of the gap in the law concerning the rights of their unmarried, same-sex parents.

439. LA. REV. STAT. § 9:335(A)(2)(a) (2022) (emphasis added).