IN THE CASE OF BIOLOGY v. PSYCHOLOGY: WHERE DID MY “PARENT” GO?

Michelle Gros
In 2015, 4% of children in the United States were living with relatives or nonrelatives with no biological parent present in the home. Additionally, there were 3.3 million cohabiting couples with children under 18 years old, which is a drastic increase from 1.2 million children in 1996. Disconcertingly, millions of children in the United States are raised by someone not biologically related to them, but who has essentially become their parent. The child and nonparent have no legal relationship, but over time, develop a parent-child relationship and psychological attachment. For various reasons, many children are raised jointly by a parent and nonparent, or solely by a nonparent. Customarily this is due to the biological parent’s lack of financial resources or family support, age, behavioral issues with the child, incarceration, military deployment, physical illness, mental illness, disability, substance abuse, cognitive deficits, unsafe living arrangements, employment hours, unemployment, or abandonment of the child to pursue personal agendas. Also, a parent in a same-sex or heterosexual relationship may decide to cohabitate with his or her partner, but remain unmarried. These circumstances often result in the couple sharing physical custody (but not in a legal sense) and “parenting” responsibilities of the child.¹ Sometimes the biological parent even intends from the child’s birth to coparent with their partner.² Unfortunately, if this couple breaks up, the child risks permanently losing his or her “mommy” or “daddy.”

In the first same-sex couple child custody dispute in Louisiana since the United States Supreme Court’s Obergfell decision,³ the Louisiana Fifth Circuit Court of Appeal, in Ferrand v. Ferrand, timely considers the lack of consistent provisions and regulations available to Louisiana

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² In re Gracie Marie Melancon, 62 So. 3d 759, 763 (La. Ct. App. 2010) (finding that the biological parent intended her same-sex partner to co-parent the child she conceived by artificial insemination).
³ See Obergefell v. Hodges, 135 S.Ct. 2584 (2015) (holding that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty).
courts when multifarious and nontraditional child custody disputes arise. With so many children living in nontraditional homes, the lack of adequate and consistent legal protections for a nonparent, who has essentially become the child’s parent, arguably precludes a determination that is in the best interest of the child. Further, when states fail to provide necessary legal avenues for a child’s welfare, the responsibility of caring for the child falls directly to the citizenry of the state. For these reasons, many states have adopted more malleable legal doctrines to ensure the child’s welfare is paramount, both in policy and procedure.

Adopting a legal doctrine, like the psychological parent doctrine, allows states to address traditional parentage expectations in light of present-day challenges and ever-changing demographics of American families. While states are neither required to make dreams come true, nor guarantee a child’s happily ever after, its children deserve a full and fair evidentiary trial, which ensures the stability and protection of the only family structure the child has known. Irrespective of one’s agreement with a biological parent’s or a nonparent’s lifestyle choices, states must not neglect the bond of a nonparent and child in the absence of a legal relationship. This is the conversation implored by the Fifth Circuit’s decision in \textit{Ferrand}.

This Case Note provides the reader with an in-depth discourse into the \textit{Ferrand} decision and discusses the implications this child custody dispute, which is between same-sex partners, should spark regarding parental rights and the child’s best interest in Louisiana and other states. Further, the Fifth Circuit’s analysis of how other southern states have treated custody disputes between a biological parent and “psychological” nonparent is summarized, comprising of the states that have adopted a psychological parent doctrine or similar provision. Finally, the author proposes that Louisiana and other states should expand their definition of parentage by recognizing the

\footnotesize{\textsuperscript{5} See \textit{e.g.}, Chatterjee v. King, 280 P. 3d 283, 291-2 (N.M. 2012).}
nonparents “earned” parental right as the child’s psychological parent and adopting a “psychological parent exceptional circumstances” provision.

I. Which comes First: Best Interest of the Child or Biology?

Similar to other states, the best interest of the child has long been the overriding test and primary consideration in all child custody determinations in Louisiana. In custody disputes between a biological parent and nonparent, the trial court is challenged with balancing the biological parent’s paramount right and the best interest of the child’s paramount consideration.

The United States Supreme Court, in *Troxel v. Granville*, recognized, as one of the oldest fundamental special liberty interests protected by the Due Process Clause of the Fourteenth Amendment, the parents right to the care, custody, and control of their children. The Court found no reason for the state to inject itself into the private realm of the family; yet, it qualified such omission with, “so long as the parent adequately cares for his or her children.”

Louisiana courts have encountered numerous custody disputes between a biological parent and nonparent where the confluence of these “two powerful and basic [principles]: the child’s substantive right to live in a custodial arrangement which will serve his or her best interest and a parent’s constitutional right to parent his or her biological child,” collide. Notably, the Louisiana Supreme Court recognizes that courts must seek to balance the biological parent’s paramount right to the custody of his or her child with the child’s substantive right to a custodianship that best promotes his or her welfare. The tug-of-war between whose rights are paramount remains.

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6 Tracie F. v. Francisco D., 188 So. 3d 231,238 (La. 2015).
7 See State ex rel. Guinn v. Watson, 26 So. 2d. 740, 742-3 (La. 1946) (rights of a biological mother are not absolute, but must yield to the welfare and best interest of the child).
9 Id. at 68.
11 See State ex rel. G.J.L., 791 So. 2d 80 (La. 2001) (“[C]ourts must carefully balance the two private interests of the child and the parents. While the parents have a natural, fundamental liberty interest in the continuing companionship, care, custody and management of their children … the child has a profound interest, often at odds
Louisiana has neither statutorily nor jurisprudentially recognized a psychological parent-child relationship in which a nonparent has essentially become the psychological parent of the child. No specific provisions exist in Louisiana regarding persons who have committed to a same-sex or heterosexual relationship in which only one of the parties is the biological parent of the child, but both share parental responsibilities.\(^\text{12}\) Louisiana law does not require, or even encourage, the court to analyze the psychological parent-child relationship, bond, or attachment the child may have formed with the nonparent.

The only alternative for a nonparent, unable to obtain sole or joint custody of a child, is to seek visitation rights. Yet, under Louisiana law, unless the nonparent is related by blood or affinity, or is a former step parent or step grandparent, a nonparent has no right of action to pursue visitation.\(^\text{13}\) Even if the nonparent has a substantial psychological bond with the child and extraordinary circumstances warrant the continuance of such a relationship, the nonparent has no right of action absent biology, adoption, or marriage, to even seek visitation rights.

\section*{II. \textit{Ferrand v. Ferrand: Remand for Decision Consistent with the Actual Best Interests of the Child}}

\subsection*{A. Factual and Procedural Background}

In 2000, Vincent Ferrand (“Vincent”), who is female but identifies as a male, began dating Paula Ferrand (“Paula”). Three years later, unable to legally marry in Louisiana, Vincent and Paula participated in a ceremony in Tennessee, to exchange vows and wedding rings. Then in 2005, Paula legally changed her last name to that of Vincent’s. Soon after, Vincent paid for Paula to undergo in vitro fertilization treatment, which resulted in Paula’s birth of twins in Louisiana, on with those of his parents, in terminating parental rights that prevent adoption and inhibit establishing secure, stable, long-term, and continuous relationships found in a home with proper parental care.”).

\(^{12}\) \textit{Black v. Simms, 12 So. 3d 1163 (La. Ct. App. 2009).}

July 5, 2007. Not only was Vincent present for the birth of the children, but he and Paula both signed the birth certificates. Vincent signed as the children’s father. Vincent and Paula lived in a home together with the children and took turns caring for the children while the other worked. When the children started preschool in 2011, Vincent registered as their parent. Most notably, the children referred to Vincent as “Daddy.”

Vincent testified that Paula moved out of the home on January 28, 2012, when the children were four years old. Vincent and Paula’s relationship became estranged when Paula reconnected with an old high school boyfriend. Paula moved into a one-bedroom apartment, while Vincent remained in their home. They rotated physical custody of the children every 48 hours from January 2012 through April 2012. Around this time, Paula indicated to Vincent that she was frustrated with the children, and complained that the children viewed her as a “babysitter.”14

Then, in September 2012, Paula started dating her current husband, Robert. Vincent stated that between September 2012 and February 21, 2014, he was the primary provider and caregiver to the children. During this time, Vincent indicated that one of the children only slept at Paula’s home six times, and the other only four. Additionally, Vincent testified that Paula “essentially walked away” from the children because she only visited with them around three hours per month and provided no financial support for the children’s clothing, food, school supplies, or medical care.

On the morning of February 21, 2014, Vincent, following his usual routine, dropped the twins off at school. However, on this afternoon, Vincent was informed by Paula, via email, that she had changed the children’s last names, removed his name from the children’s birth certificate, and that he was never to contact her, her family, or the children, or she would contact the police.

Vincent promptly responded by filing a petition on February 26, 2014, for sole custody, child support, and evaluations of the children, or, alternatively, joint custody with Vincent designated as the domiciliary parent.

Paula filed an Exception of No Cause and No Right of Action, pursuant to Louisiana Civil Code article 132, alleging that Vincent is neither the biological nor legal parent, and failed to show substantial harm as required by law to grant custody to a nonparent. Before this exception was granted on March 11, 2014, Vincent and Paula entered into a Consent Judgment in which the parties agreed to a visitation schedule. However, on April 30, 2014, the domestic commissioner granted Paula’s Exception of No Cause of Action, but gave Vincent the opportunity to amend the petition to state a cause of action. In Vincent’s timely filed supplemental petition, Vincent alleged that:

[H]e was the children’s primary caregiver and that by May 2012, Paula indicated that she was no longer interested in frequent or regular contact with the minor children and left Petitioner with the exclusive care, custody, and control of the minor children. The supplemental petition further asserted that Paula ‘abandoned’ the children and that the children would suffer substantial harm, as contemplated under La. C.C. art. 133, should she be granted sole custody.\(^\text{15}\)

At the hearing before the domestic commissioner, on January 26, 2015, Vincent was informed that a full custody evaluation, pursuant to Louisiana Revised Statutes section 9:331, would not be ordered by the court. However, Vincent was permitted to retain an expert, at his cost, and Paula was required to comply by making the children available to meet with the expert. Then, on June 26, 2015, the hearing officer decided that, due to its unusual facts as well as the unique relationship between the litigants, this case required a trial before the district judge.

In April 2015, Vincent was able to retain an expert in psychology who met with the children, then nine years of age, as well as Vincent for a consultation and evaluation. Yet, the

\(^{15}\) Ferrand, 2016 La. App. LEXIS 1600, at *5-6.
psychologist did not perform a “full, comprehensive evaluation,” nor did she meet with Paula, her husband Robert, or “any other individual involved in the children’s lives.” The psychologist testified at trial that Paula never made herself available for a consultation.

Significantly, during the evaluations, the psychologist testified that both of the children referenced Vincent as their father. Although the psychologist said that it can be normal for a child to feel scared in either parent’s care, one of the children indicated that sometimes he gets scared at his mother’s house. Further, he told the psychologist that he misses his father, and that his mother tries to get him to call her new husband, Robert, “Daddy.” The psychologist testified to the children’s “secure bond” with Vincent, and that “if Vincent did not have regular contact with the children, they would suffer emotional problems.” Specifically, the psychologist stated that “[t]his healthy relationship with their father is crucial to their psychological and emotional well-being. And his constant daily presence in their lives is also vital to their well-being.”

This testimony was followed by Paula’s Motion for an Involuntary Dismissal of Vincent’s petition for custody of the children. Paula asserted that Vincent failed to prove how the children would be substantially harmed in Paula’s custody as required by article 133 of the Louisiana Civil Code. Agreeing with Paula and dismissing Vincent’s petition for custody, the trial judge, in his reasons for judgment, “found that Vincent is neither the biological nor legal parent of the minor children.” The trial judge held that “Vincent failed to prove that Paula is unable, unfit, neglectful, abusive, unwilling, or that she abandoned her rights to parent her biological children.” Vincent subsequently appealed the Twenty-Fourth Judicial District Court judgment seeking review by the Louisiana Fifth Circuit Court of Appeal of the trial court’s denial of his petition for custody of the children.

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B. Majority Opinion

1. Louisiana Law and the Missing Psychological Consideration

In commencing its analysis, the Fifth Circuit established Vincent’s nonparent status due to the fact that he is neither the biological nor legal parent of the children. Then, the majority discussed the challenges in applying article 133 of the Louisiana Civil Code, requiring that the nonparent prove, before the court will even look at the best interest of the child factors, that the child would be substantially harmed if they remain with the biological parent. The majority questions this provision and examines tensions between custody disputes involving a biological parent and nonparent, when the nonparent has essentially become the psychological parent of the child.\(^1\)

Particularly, the majority questions “[t]he child’s substantive right to live in a custodial arrangement which will serve his or her best interest and a parent’s constitutional right to parent his or her biological child,” yet, concluding such right is not unconditional.\(^1\) This conclusion is supported by the United States Supreme Court, which opined that while the biological parent is afforded “substantial protection of their interest in a child’s custody under the Due Process Clause by demonstrating a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,” this right may be lost if abandoned by the biological parent.\(^2\)

The majority stresses that the unique set of facts in this case have not been considered statutorily in Louisiana or by the Louisiana Supreme Court. Likewise, there has been no discussion regarding a nonparent who “has intentionally parented the child as a second parent in a family unit with the biological parent since the child’s birth and, in light of the [Supreme Court’s] decision in

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\(^2\) Id.; see also Troxel, 530 U.S. at 84.
Obergefell.” For these reasons, the Fifth Circuit set out to analyze how other southern states statutorily and jurisprudentially treat such issues to ensure the best interest of the child is upheld.

2. **Analysis and Application in Other Southern States**

The majority provided a state-by-state analysis—summarized below—of the twelve southern states, and discussed how each state addressed child custody disputes between biological parents and nonparents. While a nonbiological third party’s burden of proof differs in each state, and in some cases, depending on the conduct and intent of the biological parent and the nonparent’s relationship with the child, all states deem the best interest of the child as the predominant factor. Particularly, many southern states have adopted an *in loco parentis*, psychological parent, or *de facto* parent doctrine for custody determinations in recognition of the psychological bond formed between the child and the nonparent.

**a. In Loco Parentis**

*In loco parentis* is commonly applied to cases in which the nonparent undertakes all or some of the caretaking responsibilities typical of the biological parent. However, in Texas, this doctrine is temporary and unilaterally revocable by the biological or legal parent. In Arkansas,

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22 Alabama, Arkansas, Florida, Georgia, Kentucky, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia.
23 *See e.g.*, Boseman v. Jarrell, 704, S.E. 2d 494 (N.C. 2010) (holding that the trial court is to consider both the conduct and intent of the legal parent in conceiving or adopting the child during the nonparent relationship); KY. REV. STAT. ANN. § 403.270 (2) (H) (2016) (the court shall consider the intent of the parent or parents in placing the child with a de facto custodian).
24 *See e.g.*, *In re Clifford K.*, 619 S.E.2d 138 (W. Va. 2005) (a psychological parent may intervene in a custody proceeding when such intervention is likely to serve the best interests of the child); Marquez v. Caudill, 656 S.E. 2d 737, 743 (S.C 2008) (“The best interest of the child is the primary controlling consideration of the Court in all child custody controversies.”).
25 *See e.g.*, Bethany v. Jones, 378 S.W. 3d 731, 741 (Ark. 2011) (holding the trial court did not err in finding that biological mother’s former same-sex partner stood in loco parentis to the child for visitation purposes); Davis v. Vaughn, 126 So. 3d 33 (Miss. 2013) (“A person in loco parentis is one who stands in place of a parent, having assumed the status and obligations of a parent.”).
26 *See e.g.*, Coons-Anderson v. Anderson, 104 S.W. 3d 630 (Tex. App. Ct. 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).
Mississippi, North Carolina, and Oklahoma, a third party has been granted standing when seeking custody or visitation of a child nonbiologically-related to them.27

The Arkansas Supreme Court has applied the *in loco parentis* doctrine to determine whether a same-sex partner could seek custody of children born to her same-sex partner and conceived during their relationship. In *Foust v. Montez-Torres*, the Arkansas Supreme Court found that since the children were not living with the nonparent at the time she filed the petition, the nonparent lost *in loco parentis* standing.28 However, in a prior Arkansas Supreme Court ruling, *Bethany v. Jones*, the court granted visitation rights to the *in loco parentis* nonparent, even though the nonparent was not living with the children at the time; the biological parent had taken the children from the nonparent. The Arkansas Supreme Court found that “[t]he non-parent acted as a stay-at-home parent for the first three years of the child’s life, the child called the non-parent ‘Mommy,’ the child had a relationship with the non-parent’s parent and extended family, and the parties originally planned to co-parent the child before the relationship deteriorated.” The holdings in *Foust* and *Bethany* created an “irreconcilable conflict” in the law concerning application of the *in loco parentis* doctrine in same-sex custody disputes in Arkansas.29

The Mississippi Supreme Court in *Griffith v. Pell*, recognized that a person who stands in place of a biological parent and assumes the role and obligations of a parent has *in loco parentis* status. Ultimately, the nonparent with *in loco parentis* has the same duties, liabilities, and custodial rights as a legal parent as against third persons. Although the nonparent’s *in loco parentis’* rights are still inferior to a biological parent, this status is considered a factor in overcoming the natural-

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27 See e.g., Ramey v. Sutton, 362 P. 3d 217 (Okla. 2015) (holding that when persons assumed the status and obligations of a parent without formal adoption they stood in loco parentis to the child and as such, may be awarded custody even against a biological parent).
parent presumption. Particularly, Mississippi “has recognized that a non-parent, acting in loco parentis when a biological or legal parent was not present in the child’s life was an influential factor in its decision to allow that non-parent some custody or visitation rights.”

The North Carolina Supreme Court in Mason v. Dwinnell, found that a former same-sex partner of a biological parent stood in loco parentis; therefore, custody to both women was granted. Essentially, the nonparent “had formed a psychological parenting relationship with the child conceived by artificial insemination during the domestic relationship,” and this relationship was evident to friends, family, and the school the child attended. Its reasoning reveals the driving force of this doctrine, which recognizes the parent’s rights yield to the best interest of the child, when the parent voluntarily allows the child to be cared for by another, “thereby substituting such others in his own place, so that they stand in loco parentis to the child.” When this “continues for so long a time that the love and affection of the child” and the nonparent become “mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness,” the nonparent should be granted custody rights.

Not only has Oklahoma adopted and applied the in loco parentis doctrine in multiple same-sex custody disputes, it has expressly held that public policy dictates an expansion in the application of the in loco parentis doctrine. Therefore, Oklahoma courts hold that any third party who stands in loco parentis to a child has legal standing to petition the court for custody or

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30 See Griffith v. Pell, 881 So. 2d 184 (Miss. 2004) (holding that the doctrine of in loco parentis clearly applied to the ex-husband, who was found not to be biologically related to the child conceived by his ex-wife prior to their marriage).
31 See Britt v. Allred, 25 So.2d 711 (Miss. 1946) (holding that the parties who had taken in and cared for a child abandoned by his biological parents stood in loco parentis to the infant and could not be deprived of their parental rights without notice and an opportunity to be heard).
33 See Fleming v. Hyde, 368 P.3d 435, 435 (Okla. 2016) (recognizing that the unmarried same-sex couples, who prior to Obergefell v. Hodges “entered into committed relationships, engaged in family planning with the intent to parent jointly and then shared in those responsibilities after the child was born,” may seek custody of the child born during the relationship).
visitation of the child; and the best interest of the child standard should be applied in such a proceeding.  

b. **De Facto Parent Doctrine**

Under the doctrine of *de facto* parental status, states generally require a nonparent to prove “by clear and convincing evidence that he or she resided with the child for a certain period of time and was the child’s primary caregiver and financial supporter.” For example, in Kentucky, a *de facto* custodian, also referred to as the child’s “primary caregiver,” is given the same standing as a legal parent in child custody matters. Here, the length of time the child has resided with the nonparent, the intent of the parent in placing the child with the *de facto* custodian, and the circumstances under which the child was placed in the *de facto* custodian’s care is crucial. The waiver of the parent’s superior right to custody “is not required to be exercised to the exclusion of the legal parent,” when an “intent to co-parent a child with a non-parent is demonstrated by specific factors.” Pointedly, the Kentucky Supreme Court opined that a “grandparent, babysitter, or boyfriend or girlfriend, is distinguishable from a same-sex partner, who with the biological or adoptive parent intended to act as a second parent to the child.”

c. **Psychological Parent Doctrine**

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34 See Newland v. Taylor, 368 P.3d 435 (Okla. 2016) (same-sex couple’s relationship ended six months after delivery of child born to one of the partners during the relationship, and the court found that the nonbiologically-related partner had standing to pursue a best interest of the child hearing to seek custody or visitation of the child).


36 Mullins v. Picklesimer, 317 S.W. 3d 569-78 (Ky. 2010) (holding that merely parenting a child alongside the natural parent does not meet the *de facto* standard, rather the nonparent must literally stand in the place of a natural parent).

The Wisconsin Supreme Court in *In re Custody H.S.H-K*, developed the first legally recognized psychological parent doctrine. The psychological parent doctrine has been adopted by many states to provide courts with a mechanism to prevent the severance of a nonparent’s relationship with a child at the expense of the child’s well-being, while also “limiting a nonparent’s eligibility for psychological parent status.” South Carolina, using the terminology of the *de facto* parent, has statutorily adopted Wisconsin’s four-prong test, in which the nonparent must show:

1. That the biological or adoptive parent[s] consented to, and fostered, the petitioner’s formation and establishment of a parent-like relationship with the child;
2. That the petitioner and the child lived together in the same household;
3. That the petitioner assumed obligations of parenthood by taking significant responsibility for the child’s care, education and development, including contributing towards the child’s support, without expectation of financial compensation; and
4. That the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

Of particular importance, when the nonparent meets the standing requirements of a *de facto* custodian or psychological parent, the court may then consider if custody or visitation with the nonparent is in the child’s best interest.

d. Other Custody Determination Mechanisms

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38 See *In re Custody H.S.H-K*, 533 N.W. 2d 419 (Wisc. 1995) (holding that a circuit court could have determined whether visitation with appellant was in the child’s best interest if the appellant first proved that she had a parent-like relationship with the child).
40 See *Marquez v. Caudill*, 656 S.E. 2d 737 (S.C. 2008) (court found that the nonbiologically-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).
Similar to Louisiana, Florida requires a nonparent to show that sole or joint custody of the biological or legal parent would result in substantial harm to the child.\textsuperscript{42} Interestingly, however, Florida stretched its definition of parentage in \textit{D.M.T. v. T.M.H.}, in which a female same-sex partner donated her eggs to her partner who underwent in vitro fertilization and carried the child to birth.\textsuperscript{43} The Florida Supreme Court found that both women had standing to establish parental rights, concluding that the “[s]tate would be hard pressed to find a reason why a child would not be better off having two loving parents in her life, regardless of whether those parents are of the same sex, than she would by having only one parent.”\textsuperscript{44}

In Georgia, the nonparent must first prove by clear and convincing evidence, that parental custody will harm the child; secondly, the nonparent must show that awarding him or her custody will best promote the child’s health, welfare, and happiness.\textsuperscript{45} Differing from Louisiana, within the substantial harm test, Georgia includes an analysis of how the child will be impacted if removed from the nonparent’s life as well as the quality of the psychological bond.\textsuperscript{46} Nonetheless, Georgia limits the class of nonparents to grandparents, great-grandparents, aunts, uncles, siblings, or adoptive parents.\textsuperscript{47}

Tennessee appellate courts clearly indicate that same-sex partners lack standing because they do not meet the definition of a “legal parent” and only allow custody or visitation rights to grandparents and stepparents.\textsuperscript{48} In Alabama, the parent is presumed to have a \textit{prima facie} right to the custody of his or her child, unless the parent has voluntarily forfeited his or her right to custody

\textsuperscript{42} Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996).
\textsuperscript{43} D.M.T. v. T.M.H., 129 So. 3d 320, 338-9 (Fla. 2013).
\textsuperscript{44} \textit{Ferrand}, 2016 La. App. LEXIS 1600, at *40-2.
\textsuperscript{45} Clark v. Wade, 544 S.E. 2d 99 (Ga. 2014).
\textsuperscript{46} Strickland v. Strickland, 783 S.E. 2d 606 (Ga. 2016).
\textsuperscript{47} GA. CODE ANN. art. 19-7-1 (2016).
\textsuperscript{48} \textit{In re Hayden C. G-J}, 2014 Tenn. LEXIS 328 (Tenn. Ct. App. 2013) (“The legislature, however, has not chosen to address the situation presented in this case, where the parties have never been married and the individual who is not biologically related to the child and has not adopted the child seeks visitation.”).
in favor of a nonparent, or if the court finds by clear and convincing evidence that the parent is unfit. Under Virginia law, a nonparent with a legitimate interest is allowed to seek visitation of a child if he or she can prove by clear and convincing evidence that a denial of visitation would be harmful or detrimental to the welfare of the child.

In addition to an adherence to the *in loco parentis* doctrine, Mississippi law gives biological parents preference, which may only be rebutted by clear and convincing evidence that: (1) the parent has abandoned the child; (2) the parent has deserted the child; (3) the parent’s conduct is so immoral as to be detrimental to the child; or (4) the parent is unfit, mentally or otherwise, to have custody. Yet, in *Wilson v. Davis*, the Mississippi Supreme Court found that the “rigid adherence to proving one of the four precise factors to rebut the natural parent presumption may, in very limited and exceptional circumstances, place a child in a circumstance that is clearly not in his or her best interests.” In order to be deemed an exceptional circumstance, the nonparent must prove serious physical or psychological harm, or substantial likelihood such harm will occur to the child.

In Texas, there is a split in the circuit courts regarding the application of the Texas Family Code article 102.003. This statute offers standing to a third party seeking custody or visitation of a child of whom the third party “has had actual care, control, and possession of” for at least six months, but “ending not more than 90 days preceding the date of the filing of the petition.” Some Texas appellate courts have found that the nonparent and biological parent can share custody of

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49 *In re N.L.R.*, 863 So. 2d 1066, 1068-9 (Ala. 2003); *In re G.C.*, 924 So. 2d 651, 656 (Ala. 2005).
52 Wilson v. Davis, 181 So. 3d 991, 995 (Miss. 2016).
the child when it is in the child’s best interest,\textsuperscript{54} while other appellate courts hold that the parent must first relinquish his or her parental rights in order for the third party to have standing.\textsuperscript{55}

Significantly, with the exception of Virginia and Florida, the majority, in \textit{Ferrand v. Ferrand}, found that southern states who have not adopted a more acquiescent standard for determinations involving a nonparent same-sex partner’s standing in child custody determinations have also not had a factually similar case on this issue since the \textit{Obergefell} decision. The majority contends that Louisiana will soon have to reconcile similar child custody determinations.\textsuperscript{56} In providing such a thorough analysis of the other southern states, presumably, the majority believes it is time for Louisiana to contemplate changes to current law in order to ensure the best interest of the child and the psychological parent-child bond prevails over tradition, biology, and bias.

\textbf{3. Analysis and Application of Louisiana Law}

In concluding its analysis, the majority acknowledges that while an \textit{in loco parentis, de facto}, or psychological parent doctrine, is not recognized statutorily or jurisprudentially in Louisiana, the Louisiana Supreme Court in \textit{In re J.M.P.}, discussed the concept of a psychological parent.\textsuperscript{57} In that case, the Louisiana Supreme Court opined the relevancy of the “psychological parent phenomenon” in determining a child’s best interest, and discussed how neither the biological nor legal relationship guarantees that an adult is a child’s psychological parent. Identifying a psychological parent as one that gives parental affection and care, which in turn

\textsuperscript{54} In re M.K.S-V, 301 S.W. 3d 460 (Tex. Ct. App. 2009) (court found that a biological mother’s same-sex partner met the six month period of actual care, custody, and control required to establish standing to seek shared custody of the child).
\textsuperscript{55} In re of A.C.F.H., 373 S.W. 3d. 148 (Tex. Ct. App. 2012) (finding that a parent-child relationship was not sufficient under Texas law to create standing for those who had developed and maintained a relationship with a child over time).
\textsuperscript{56} Ferrand, 2016 La. App. LEXIS 1600, at *70-2.
\textsuperscript{57} In re J.M.P., 528 So. 2d 1002, 1013 (La. 1988) (court remanded for a new hearing on the best interests of the child because the trial court erred by failing to consider petitioner natural mother’s biological relationship with the baby she placed for adoption or whether the baby had a psychological tie to the respondent adoptive parents).
“provides the basis for the child’s sense of self-worth and security,” the Louisiana Supreme Court held that there “is little disagreement within the profession of child psychologist as to the existence of the phenomenon of the child-psychological parent relationship and its importance to the development of the child.” Significantly, the Louisiana Supreme Court found that an interruption of this relationship can carry significant risks to a child, leaving the court of appeal in Ferrand, to question why Louisiana has not given this relationship legal recognition.58

Turning to current Louisiana law, the majority appears to be of the opinion that when considering joint custody between a biological parent and nonparent, the substantial harm test should include a contemplation of the harm a child will incur if he or she is separated from a nonparent. Moreover, the majority interprets the law to require a best interest analysis in every child custody dispute, and asserts that some Louisiana courts have found joint custody may be granted to a biological parent and nonparent when such an arrangement is in the child’s best interest.59 These elucidations are based upon the Louisiana Supreme Court’s and other Louisiana court of appeal’s application of article 133.

For these reasons, and due to the complex factual background of this case, the majority held that the trial court should have ordered a comprehensive custody evaluation to determine whether the children would be substantially harmed if sole custody was granted to Paula. Also, the majority ordered the trial court to use this evaluation when examining the children’s well-being and best interests, as well as the impact separation from Vincent will have on them. The majority held that these matters must be considered because of the secure bond the children have with

58 Ferrand, 2016 La. App. LEXIS 1600, at *68.
59 McCormic v. Rider, 27 So. 3d 277 (La. 2010) (court held that joint custody to a grandmother and both parents was in a child’s best interest where the grandmother had adopted the child, the parties had lived as a family unit in a duplex for most of the child’s life, and, pursuant to La. Civ. Code Ann. art. 133, substantial harm would have resulted to the child if the grandmother had maintained sole custody); Smith v. Tierney, 906 So. 2d 586 (L.a. Ct. App. 2005) (court focused on the child’s best interest in determining whether an award of custody to a parent would result in substantial harm to the child).
Vincent: the children call Vincent “daddy;” the children lived with Vincent as their sole caregiver for at least a year; Vincent was heavily involved in the children’s lives from their birth; and Paula was disengaged from the children’s lives, as well as from her other children born during a previous relationship. Accordingly, the majority vacated the trial court’s judgment in relation to Vincent’s denial of custody over the children, and ordered the trial court to complete a comprehensive evaluation in accordance with Louisiana Revised Statutes section 9:331.60

Not satisfied with this outcome, Paula applied by Writ of Certiorari to the Louisiana Supreme Court requesting its review of the Fifth Circuit’s decision. Of great significance to future interpretations and applications of article 133 in custody disputes between nonparents and biological parents, the Court denied the writ—leaving the door open for further conversations.61

IV. TIME TO EXPAND THE DEFINITION OF “PARENT” BEYOND BIOLOGICAL FILIATION TO PROVIDE THE MOST OPTIMAL ENVIRONMENT FOR A CHILD

The author contends that the adoption of an “exceptional circumstances psychological parent provision” is the answer to the legal challenges presented in cases like Ferrand v. Ferrand. Determining the best interest of a child is problematic even for child psychologists, who are well-trained in child development and attachment. Psychologists have attributed these challenges to the legal system’s lack of understanding and research into the long-term effects of separating a child from a nonparent with whom the child has formed a child-parent attachment.62 However, empirically-sound models exist to inform the best interest of the child, which can provide predictive measures, but require in-depth assessment into the quality and quantity of the child’s relationships with each of his or her caregivers is a necessary component. Additionally, there is

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extensive data to support that a child is drastically psychologically harmed when removed from an
individual who has acted as his or her parent for a significant length of time.63

Tragically, the outcome and reality in Ferrand v. Ferrand, questionably resulted from
inadequate requirements to thoroughly examine the best interest of the child factors, and to order
psychological evaluations. As a result of the trial court’s judgment, by the time the Fifth Circuit
remanded the case, the children had been legally separated from their “daddy” for two years. After
the domestic commissioner refused to order psychological evaluations, Vincent paid for
psychological evaluations to be conducted on himself and the children. The psychologist
determined that the children would be harmed if their relationship with Vincent was severed, but
the trial court did not consider this conclusion in its decision.64

A. Recognition of the Nonparent’s “Earned” Paramount Parental Right

Now is the time for all States to acknowledge the rights of the nonparent who, in principal,
has “earned” the paramount parental right to the custody of the child. For this very reason, some
states have adopted a provision similar to Wisconsin’s psychological parent doctrine.65 For
instance, in a recent landmark ruling for nontraditional families in New York, the state’s highest
court held a person need not have a biological or adoptive relationship with a child to be considered
a parent.66 This holding came out of two same-sex couple custody disputes in which the partners

65 See, e.g., Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008) (adopted Wisconsin psychological parent doctrine
finding that “the test will limit the persons who may seek to be considered a psychological parent, but it will assist
those who are worthy to be called such.”); In re Parentage of L.B., 122 P.3d 161 (Wash. 2005) (adopted Wisconsin
psychological parent doctrine recognizing it is “limited to those adults who have fully and completely undertaken a
permanent, unequivocal, committed, and responsible parental role in the child’s life.”); Griffith v. Pell, 881 So.2d
184, 186-7 (Miss. 2004) (“A parent has a constitutionally protected liberty interest in the ‘companionship, care,
custody and management of his or her children.’”); Stanley v. Illinois, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d
551 (1972) (“However, parental status that rises to the level of a constitutionally protected liberty interest does not
rest solely on biological factors, but rather, is dependent upon an actual relationship with the child where the parent
assumes responsibility for the child's emotional and financial needs.”).
were not legally married, and the partners that were not biologically-related to the children were granted custody rights. The nonparents were “held-out” as the child’s parent at the permission of the biological parent.67

The hesitation to acknowledge a third parties rights to a nonbiological child is rooted in the long-standing Troxel holding, in which the Supreme Court opined that a “biological parents right to the companionship, care, custody, and management of his children is a liberty interest far more important than any property right.”68 Yet, states holding to a psychological parent doctrine, or one similar, have rectified this right by qualifying specific de facto or psychological parental status standing requirements.69 This includes, but is not limited to, such considerations as the biological parent’s intent for the child and nonparent’s relationship,70 whether the biological parent has acted inconsistent with his or her parental paramount right,71 and the length of the parent-child relationship with the child and nonparent as well as the psychological bond established.72 Even the

67 Id.; see also Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005) (adopted the hold out provision, in which “A person is presumed to be the natural parent of a child if the person receives the child into his or her home and openly holds out the child as his or her natural child, regardless of a biological relation or legal adoptive status.”); Chatterjee v. King, 280 P.3d 283 (N.M. 2012) (New Mexico recognizes a nonparent’s rights who holds out the child as his natural child and provides personal, financial, and custodial relationship with the child).
68 Troxel, 530 U.S. at 66; see also State ex rel. Theriot v. Pulling, 25 So. 2d 620 (La. 1946) (“The state has an interest in children which goes beyond the mere parental right, and the welfare of the children must prevail over the mere parental right to their possession.”).
69 See, e.g., In re Guardianship of Madelyn B., 98 A.3d 494 (N.H. 2014) (“Consistent with the above-noted policy goals is the recognition that “[t]he paternity presumptions are driven, not by biological paternity, but by the state’s interest in the welfare of the child and the integrity of the family.”); In re Salvador M., 4 Cal. Rptr. 3d 705, 708 (Cal. App. Ct. 2003) (“The familial relationship between a nonbiological [parent] and an older child [over two years of age], resulting from years of living together in a purported parent/child relationship, is considerably more palpable than the biological relationship of actual paternity and should not be lightly dissolved.”).
70 Pitts v. Moore, 90 A. 3d 1169 (Me. 2014) (“In addition, the test accounts for the intent of the legal parent and the putative de facto parent to co-parent, as measured before the dissolution of their relationship, or the intent of the legal parent that the non-parent act as parent in place of the legal parent. It also ensures that the relationship was not undertaken for the purposes of financial compensation or with other institutional approval, as with a nanny, foster parent, or daycare provider.”).
71 Bosema v. Jarrell, 704 S.E. 2d 494 (N.C. 2010) (“When a parent brings a nonparent into the family unit, represents that the nonparent is a parent, and voluntarily gives custody of the child to the nonparent without creating an expectation that the relationship would be terminated, the parent has acted inconsistently with her paramount parental status.”).
72 In re Clifford K., 619 S.E. 2d 138 (W. Va. 2005).
Louisiana Supreme Court has held that a biological parent may forfeit custodial rights when his or her conduct implicitly denies or explicitly rejects his or her child, or the caring for his or her child.73

Chiefly, the Supreme Court recognizes how illogical and unjust it is for states to deny a child’s essential right to be supported by more than one parent merely because the child’s parents were never “legally” married to one another or are not biologically related to them.74 In fact, the Court has held that limiting a child’s right to a “legal parent” due to the parties “illegal” conduct or status, such as essentially coparenting without a marriage license, improperly penalizes an innocent child.75 Faced with these public policy challenges, many states have adopted a psychological parent doctrine—to ensure an innocent child is not illegitimatized over legal semantics.76

The psychological parent doctrine is premised upon protecting the biological parent’s rights, the best interest of the child, as well as acknowledging the nonparent who has earned the right to the care, custody, and companionship of the child.77 In essence, the doctrine provides safeguards for courts to utilize in determining when psychology outweighs biology. Ferrand shows that there are unique circumstances warranting standing and parental rights to a nonparent. These circumstances arise even amongst heterosexual couples and other nonparents who have

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73 In re B.G.S., 556 So. 2d 545, 551-2 (La. 1990) (“Parenthood itself confers a right to custody, but that right of parenthood may be forfeited by conduct which denies or rejects one's child.”).
75 Weber v. Aetna, 406 U.S. 164, 175 (1972) (“With this in mind, we see no reason for children to be penalized because of the decisions that their parents make, legal or otherwise.”); see also Plyler v. Doe, 457 U.S. 202, 220, 223-4, 230 (1982) (holding that it is improper to create an underclass of children who are held responsible for the illegal actions of their parents because the children could “affect neither their parents' conduct nor their own status). 
77 See, e.g., In re Scarlett, 28 N.E. 3d 776, 790 (Ill. 2015) (“Giving rights to de facto parents may serve to weaken the commitment society has to legal parents, on which the ideology of responsible parenting is based; yet disregarding their connection to a child at the time of family dissolution ignores child-parent relationships that may be fundamental to the child's sense of stability.”).
willfully agreed to provide for, and essentially parent a child not biologically related to them.\textsuperscript{78} To withhold the standing or custody rights of a person who has undergone this type of role for an extended period of time is an injustice to the nonparent and arguably decreases the likelihood that the best interest of the child will prevail. Consequently, an opportunity is missed to provide children with the benefit of legally-recognized access to a person who has become his or her parent, in the truest sense, or even persons who have essentially become his or her siblings as a result of living in the nonparent’s home.\textsuperscript{79}

For example, such legal recognition is vested in Massachusetts, which gives standing to a nonparent who has been a \textit{de facto} parent and has no biological relation to the child, but has participated in the child’s life as a member of the child’s family and the child as a member of the nonparent’s family. Courts in Massachusetts require the child to live with the nonparent, perform a share of caretaking functions at least as great as a legal parent, have permission of the biological parent, shape the child’s daily routine, address his or her developmental needs, discipline the child, provide for the child’s education and medical care, and serve as a moral guide.\textsuperscript{80} Much of the underlying purpose of this criteria is embodied in Louisiana’s best interest of the child factors, but unfortunately, similar to other states, they are not generally considered until the nonparent proves the child will be substantially harmed in they remain in the sole custody of the biological parent.

\textbf{B. Adoption of a “Psychological Parent Exceptional Circumstances” Provision}

Experts in child psychology, the Supreme Court, as well as other state supreme courts, have acknowledged that the absence of biological filiation should not prevent a child from gaining the

\textsuperscript{78} See, e.g., Pittman v. Jones, 559 So. 2d 990 (La. Ct. App. 1990) (“The mother relinquished care of her child to the McBrides when the child was three months old. Although she married and had two additional children, her visits and communication with her first child were minimal. The child is happy and secure in Ms. Pittman’s home, and in fact it is the only home she has known.”).
legal relationship he or she needs and deserves. As such, the psychological parent doctrine should be available for application by all courts in exceptional circumstances, similar to Ferrand in which the nonbiological third party has essentially become the child’s psychological parent. Through express statutory language, state legislatures could effectively ensure that the best interest of the child is consistently evaluated, rather than leaving it to judicial intuition and statutes not in congruence with the complexities of the issues presented in nontraditional contexts.

If the goal in a custody determination is the best interest of the child, child psychology and attachment theory simply cannot be subtracted from the equation. The severance of the child’s psychological attachment with a person, perceived as his or her parent, has catastrophic long-term social and emotional effects on the child. Custody determinations at the broadest level are advised to include assessment of the quality and quantity of a child’s relationship with each caregiver in the child’s life. Without legal mechanisms, the nonparent who has become the child’s psychological parent may legally vanish from the child’s life with no means for the child’s attachment and bond to be maintained.

Each state that has adopted a de facto or psychological parent doctrine has slightly different nuisances, but central to each of them, and proposed in this Case Note, includes an analysis based

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81 See Michael H. v. Gerald D., 491 U.S. 110 (1989); In re T.J., 89 So. 3d 744, 747 (Al. 2012) (“Moreover, the United States Supreme Court and this Court have held that biological ties are not as important as parent-child relationships that give young children emotional stability.”); E.P. Benedek, Child Custody Laws: Their Psychiatric Implications, 129 AM. J. PSYCH. 326-28 (1972) (behavioral scientists should assist legal system in determining best interests of child); see, e.g., Sherwin S. Radin, The Psychological Parent Concept in Contested Custody Cases, 11 J. PSYCHIATRY & L. 503, 504-5 (1983) (concluding that it is necessary to carefully examine the “parent” to whom the child has a healthy attachment and is best equipped to raise the child in order to effectively place the child in a custodial arrangement in his best interest).

82 Ellsworth & Levy, Legislative Reform of Child Custody Adjudication: An Effort to Rely on Social Science Data in Formulating Legal Policies, 4 LAW & SOC’Y REV. 167, 179 (1969). (social science provides substantially more effective guidance than raw judicial intuition).

83 Symons, supra note 212, at 45.

84 See Radin, supra note 81, at 512 (research has shown that children have the best opportunity to develop healthily when they are allowed a relationship with both a biological parent, if they have an existing relationship, and a nonparent, if they have a psychological parent-child relationship).
on the length of the parent-child relationship, as well as the extent of the relationship and attachment.\textsuperscript{85} This provision would ultimately determine whether a nonparent has earned a right to seek the sole or joint custody of a child, as well as require psychological or mental health custody evaluations. Specifically, the proposed provision requires: (1) the person has intentionally assumed the role and obligations of a parent; (2) the person and the child have formed an emotional bond and created a parent-child type relationship established by court-ordered psychological evaluations; (3) the person contributed emotionally and financially to the child’s well-being; (4) the assumption of the parental role is not the result of a financially compensate surrogate arrangement; (5) the continuation of the relationship between the person and the child would be in the child’s best interests; (6) the loss or cessation of the relationship between the person and the child would cause substantial harm to the child; and (7) the person has had physical custody of the child, whether solely or jointly along with the biological parent, for at least six months. If solely, the parent must have absented him or herself, abandoned the child, or have been found by a court to have abused or neglected the child. If jointly, the person must prove the biological parent intended for the person and the biological parent to share physical custody of the child for an indefinite amount of time.\textsuperscript{86}

As part of the standing requirements under this proposed psychological parent exceptional circumstances provision, courts should be required to order psychological evaluations be conducted on all parties. To leave these evaluations in the discretion of the trial judge is preclusive

\textsuperscript{85} Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App.2006) (psychological parent must have “been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.”); K.B. v. J.R., 887 N.Y.S. 2d 516 (N.Y. Sup. Ct. 2009) (“A court should consider the totality of the circumstances including the length of time the child has lived with the non-parent, the quality of the relationship, and the length of time the biological parent allowed custody with a non-parent to continue without attempting to assume the parental role.”).

\textsuperscript{86} See Utah Code Ann. § 30-5a-103 (2008); In re E.L.M.C., 100 P. 3d 546 (Colo. App. 2004); In re Nelson, 825 A. 2d 501 (N.H. 2003).
of determining whether a psychological attachment between the child and the nonparent exists, and leaves the court bereft of adequate evidence to determine the best interest of the child.87 For example, in Ferrand the concurring opinion indicated that the trial judge declined to order evaluations after Vincent made repeated requests. The majority found the record devoid of reasons for prohibiting the children from contact with “their daddy,” until they reached the age of 18. According to the majority, without these evaluations, many questions were left unanswered, preventing a full, evidentiary hearing.88

V. CONCLUSION

Ultimately, the outcome in Ferrand calls for clarification, along with the adoption of new legislation to facilitate comprehensive examinations in child custody or visitation disputes when a child has potentially formed a psychological bond and attachment with a nonparent who has essentially become the child’s parent. Such a change in legislation is needed to meet the demands of an ever-changing society and the growing knowledge of child psychology. In cases like Ferrand states must prevent a child’s “mommy” or “daddy” from being legally taken by insuring a hearing truly considering the child’s best interest. Therefore, in the case of psychology v. biology, it is time to reconcile these life-altering rights, impacting the future health and welfare of our nation, with the growing reality of nontraditional families post-Obergfell and adopt a more expansive definition of parentage.

87 See, e.g., Thibodeaux v. O’Quain, 33 So. 3d 1008 (La. Ct. App. 2010) (the trial court refused to adopt psychologist's opinion that mother be designated as child's domiciliary parent).