MODIFYING CONSENT DECREES: LOUISIANA SUPREME COURT BALANCES PARENTAL RIGHTS WITH THE CHILD'S NEED FOR STABILITY IN *TRACIE V. FRANCISCO*

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I. INTRODUCTION

In *Tracie v. Francisco*, the Louisiana Supreme Court established the legal burden a parent faces when seeking to modify a consent decree with a nonparent.[1] The case originated in the Twenty Fourth Judicial District Court of Jefferson Parish, and the defendant appealed to the Louisiana Fifth Circuit Court of Appeal.[2] The supreme court affirmed the fifth circuit but

1. *See* Tracie v. Francisco, 2015-1812, p. 29 (La. 3/15/16); 188 So. 3d 231, 250–51 (citations omitted).

2. *See* Tracie v. Francisco, 15-224 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

provided different reasons for its decision.[3] Ultimately, the court settled a split among the Louisiana circuit courts by balancing the best interest of the child with the parents' constitutional right to parent. This decision should provide stability and predictability for parents or nonparents involved in a consent decree. The relationship between the parties in *Tracie*, their custodial history, the case's procedural history, and the supreme court's holding are addressed in Part II of this Note. Part III follows with the applicable law in this case, inconsistent state court decisions, as well as authority on the constitutional right to parent. Part IV more closely examines how the supreme court reached its holding in this case. Finally, Part V analyzes how this standard will apply in future custody determinations involving consent decrees, any gaps or room for interpretation left by the court, potential effects on the modern family, and how this decision could impact the standard for considered decrees.

II. FACTS AND HOLDING

Tracie and Francisco are the parents of David.[4] While they are the named parties in the suit, the case primarily concerns a custody arrangement between Francisco and Tracie's mother, Kathy.[5] Kathy and her husband Michael raised David for the majority of David's life.[6] Francisco, in seeking sole custody of David, petitioned the court to modify a stipulated judgment, or a consent decree.[7] Kathy sought to maintain the consent decree, which specifically awarded joint custody to Kathy and Francisco and designated Kathy as David's domiciliary parent.[8]

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3. Tracie v. Francisco, 2015-1812, p. 7 (La. 3/15/16); 188 So. 3d 231, 238 ("Although our reasoning differs greatly from that of the appellate court's majority, we ultimately affirm its decision.").

4. *See id.* at p. 3; 188 So. 3d at 235.

5. *See id.* at pp. 1, 5–7; 188 So. 3d at 234, 236–38.

6. *Id.* at pp. 3–4; 188 So. 3d at 236.

7. A "stipulated judgment" is a custody decree in which "the parties consent to a custodial arrangement, and no evidence of parental fitness is taken." Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 2d 731, 738 (citing Hensgens v. Hensgens, 94-1200, p. 6 (La. App. 3 Cir. 3/15/95); 653 So. 2d 48, 52). This is also known as a "consent decree." *See Tracie*, 2015-1812, p. 19; 188 So. 3d at 245.

8. *See Tracie*, 2015-1812, p. 7; 188 So. 3d at 238; *see also* LA. STAT. ANN. § 9:335(B)(2)–(3) (2008) ("The domiciliary parent is the parent with whom the child shall primarily reside . . . . The domiciliary parent shall have authority to make all decisions affecting the child unless an implementation order provides otherwise. All major decisions made by the domiciliary parent concerning the child shall be subject to review by the court upon motion of the other parent. It shall be presumed that all major decisions made by the domiciliary parent are in the best interest of the child."); *Evans*, 97-0541, p. 12; 708 So. 2d at 738 ("The burden of proving [that the domiciliary

A. FACTS

Tracie and Francisco were neither married nor in a committed relationship when Tracie learned she was pregnant.[9] However, when David was born on May 29, 2006, Francisco formally acknowledged David as his child.[10] Less than a year later, Tracie and Francisco entered a consent decree in which they agreed to share joint custody of David and designated Tracie as the domiciliary parent.[11] The judgment granted Francisco reasonable custodial time and ordered that he provide $400 per month in child support for David.[12]

Throughout the next seven years, neither Tracie nor Francisco adequately fulfilled their parental responsibilities.[13] Francisco rarely exercised his custodial time with David and had no decision-making role in his life.[14] Tracie moved in with her mother and stepfather, and many of Tracie's responsibilities fell to them.[15] Kathy and Michael paid for David's schooling, coached his sports teams, and kept him involved in extracurricular activities.[16] Kathy and Michael almost exclusively raised David and maintained the financial responsibilities of his upbringing.[17]

Tracie became more troubled as the years progressed.[18] She abused drugs and entered tumultuous relationships.[19] Kathy

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parent's decisions] are in fact not in the best interest of the child is placed with the non-domiciliary parent who opposes the decision."). Louisiana law requires that there only be one domiciliary parent. *See* Hodges v. Hodges, 2015-0585, p. 13 (La. 11/23/2015); 181 So. 3d 700, 708 ("[W]e find La. R.S. 9:335 unequivocally requires . . . that there can be only one domiciliary parent.").

9. Tracie v. Francisco, 2015-1812, p. 3 (La. 3/15/16); 188 So. 3d 231, 236.

10. Francisco was present at the hospital when David was born, and he is listed as the father on David's birth certificate. *See id.* at p. 3; 188 So. 3d at 235 n.2. The Supreme Court found these facts sufficient to show that Francisco had formally acknowledged David as his child pursuant to Louisiana Civil Code article 196. *Id.*

11. *Id.* at p. 3; 188 So. 3d at 236.

12. *Id.*

13. *See Tracie*, 2015-1812, pp. 3–4; 188 So. 3d at 236 ("By all accounts, including his own stipulation, Francisco had little involvement in [David's] upbringing for approximately the first seven years of [his] life. . . . Tracie also proved to be less than a model parent.").

14. *Id.* at p. 4; 188 So. 3d at 236.

15. *Id.*

16. *Id.* ("Kathy and Michael enrolled [David] in a private school . . . . Michael coached [his] baseball team. Kathy and Michael nurtured [his] religious upbringing and promoted his participation in cub scouts.").

17. *Id.*

18. *Tracie*, 2015-1812, p.4; 188 So. 3d at 236.

19. *Id.*

became worried about Tracie's ability to care for David, so she approached Francisco and proposed that David be removed from Tracie's custody.[20] In 2013, Kathy and Francisco petitioned the court for a change in custody.[21] Tracie was originally named as a defendant, but all parties eventually consented to a judgment that awarded Kathy and Francisco joint custody, designated Kathy as the domiciliary parent, and allowed Francisco reasonable custodial time.[22] The judgment also granted Tracie specific and conditional visitation.[23]

In March 2014, when David was seven years old, Francisco filed a petition to annul the consent decree, alleging that Kathy and Michael led him into the agreement under false pretenses.[24] He claimed that Kathy would not allow him sufficient time with David and would not communicate with him about David's life.[25] Francisco asked the court to award him sole custody of David and to award Tracie reasonable visitation.[26] His petition excluded Kathy from the proposed arrangement unless the court determined that Kathy's visitation rights were in David's best interest.[27]

Francisco later amended his petition to retract his claim that Kathy and Michael induced him to agree to the consent decree.[28] Instead, he claimed that a material change in circumstances existed to a "degree affecting the welfare of [David] to warrant a modification of custody"[29] because "he ha[d] become an integral part of [David's] life."[30] He also asserted that David had expressed a desire to live with him and that he had a "paramount parental right over a nonparent."[31] The hearing officer found that no circumstances had changed since the parties entered the consent decree assigning custody and denied Francisco's petition

20. Tracie v. Francisco, 2015-1812, p. 4 (La. 3/15/16); 188 So. 3d 231, 236.

21. *Id.*

22. *Id.*

23. Tracie v. Francisco, 15-224, p. 6 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 786, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

24. *Tracie*, 2015-1812, p. 5; 188 So. 3d at 237.

25. *Id.* at pp. 5–6; 188 So. 3d at 237.

26. *Id.*

27. *Id.* at p. 5; 188 So. 3d at 237.

28. *Id.*

29. *Tracie*, 2015-1812, p. 6; 188 So. 3d at 237.

30. *Tracie*, 15-224, p. 7; 174 So. 3d at 787.

31. *Tracie*, 2015-1812, p. 6; 188 So. 3d at 237.

to annul the consent decree.[32] The hearing officer noted that removing the child from a home he had always known was so significant that the matter required a trial before the district court judge.[33] Francisco subsequently objected to the officer's denial of his petition to change custody.[34]

B. PROCEDURAL HISTORY

The case went to trial in the Twenty Fourth Judicial District Court in Jefferson Parish. After hearing evidence from both parties about their involvement in David's life, the court vacated the July 2013 consent decree and awarded Francisco sole custody on January 27, 2015.[35] Tracie received no visitation rights.[36] In its written reasons for judgment, the trial court stated that Kathy had the burden of proving that Francisco's custody of David would cause the child substantial harm and that she had not met that burden.[37] The court also noted that a parent has a "paramount right to the custody of his child," relying on Louisiana Civil Code article 133, which allows an award of custody to a nonparent when continued custody with the parent would result in substantial harm to the child.[38]

While her appeal of the January judgment was pending, Kathy filed a motion for visitation.[39] In July 2015, the court again denied Kathy visitation of David.[40] The court did, however, award Tracie limited and supervised visitation.[41]

Kathy appealed the district court's decision to the fifth circuit.[42] The appellate court, in a 3–2 decision, reversed the district court's decision, vacated the district court's judgment, and reinstated the consent decree granting joint custody to Kathy and

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32. Tracie v. Francisco, 15-224, p. 8 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 787, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

33. *Id.*

34. *Id.*

35. The trial court provided time for a transition period and ordered that the new arrangement not take effect until after David's school year ended in May 2015. *Id.* at p. 8; 174 So. 3d at 787–88. Kathy would not enjoy any custodial rights after May 2015. *Id.* at p. 8; 174 So. 3d at 788.

36. *Tracie*, 15-224, p. 8; 174 So. 3d at 788.

37. Tracie v. Francisco, 2015-1812, p. 7 (La. 3/15/16); 188 So. 3d 231, 237–38.

38. *Id.* at p. 7; 188 So. 3d at 238.

39. *Tracie*, 15-224, p. 9; 174 So. 3d at 788.

40. *Id.*

41. *Id.*

42. *Tracie*, 2015-1812, p. 7; 188 So. 3d at 238.

Francisco, with Kathy designated as the domiciliary parent.[43] The fifth circuit identified two errors made by the trial court. First, it placed the burden on the non-moving grandmother to show that substantial harm would result if custody was given to the moving parent.[44] Second, it granted visitation to Tracie without an analysis of the "best interest of the child" as required by Louisiana Civil Code article 136.[45]

After reviewing decisions made by Louisiana's courts of appeal and other southern state courts, the fifth circuit adopted the Louisiana Second Circuit Court of Appeal's analysis, which placed the burden of proof on the parent seeking to modify the consent decree.[46] The fifth circuit held that after a parent relinquishes custody to a nonparent, the parent can only regain custody upon proof that he has been rehabilitated of his parental unfitness, or provide reasons for abandonment, and that the child's "adequate and stable environment" with the nonparent has materially changed.[47] Absent rehabilitation and material change, a court will deny the parent's request for modification.[48] However, if the parent successfully proves rehabilitation and a material change in circumstances, he must then prove that returning custody to the parent will serve the child's best interest.[49] The fifth circuit reasoned that Civil Code article 133 governs the modification of a consent decree between a parent

43. Tracie v. Francisco, 2015-1812, p. 7 (La. 3/15/16); 188 So. 3d 231, 238.

44. Tracie v. Francisco, 15-224, p. 3 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 784, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

45. *See id.* at pp. 54, 56–59; 174 So. 3d at 813, 815–16 ("The trial court applied the standard and burden of proof it discerned to be correct, placing the burden . . . on the nonparent custodial grandmother. In our holding today, however, we have announced a different standard of proof, and placed the burden of proof upon a different party. Therefore, we find that the trial court's . . . error . . . materially affected the outcome of the case and implicated the substantial rights of the child and the custodial grandmother. Accordingly, we vacate the trial court's . . . judgment . . . . [W]e [also] find that the trial judge failed to make a 'best interest' finding or analysis in modifying Tracie's visitation. Th[is] omission . . . is a legal error which nullifies the trial court's judgment."); *see also* LA. CIV. CODE ANN. art 136(A) (2017) ("A parent not granted custody or joint custody of a child is entitled to reasonable visitation rights unless the court finds . . . that visitation would not be in the best interest of the child."). The trial court's second error is not addressed in this Casenote.

46. *Tracie*, 15-224, pp. 51–53; 174 So. 3d at 812–13 (adopting the standard set forth in Jones v. Coleman, 44, 543 (La. App. 2 Cir. 7/15/09); 18 So. 3d 153).

47. *Id.* at pp. 52–53; 174 So. 3d at 812–13.

48. *Id.* at p. 53; 174 So. 3d at 812–13.

49. *Id.* at p. 53; 174 So. 3d at 813.

and nonparent.[50] Significantly, the court explained that a consent decree awarding joint custody to a parent and designating a nonparent as the domiciliary requires a finding of unfitness of "the parent and the fitness of the nonparent to provide an adequate and stable environment for the child."[51] Francisco sought and was granted review of the decision by the Louisiana Supreme Court.[52]

The Louisiana Supreme Court affirmed the appellate court's decision but for different reasons.[53] The supreme court held that the overarching standard for all custody judgments and modifications should be based on the best interest of the child, as articulated in Civil Code article 131.[54] Specifically, the court held that a parent seeking to modify a consent decree between a parent and a nonparent domiciliary must show: (1) a material change in circumstances since the original custody decree was entered, and (2) the proposed modification is in the best interest of the child.[55]

III. BACKGROUND

The supreme court granted writs in this case to settle differing opinions and interpretations among the Louisiana circuit courts.[56] The Civil Code provides guidance for custodial determinations, and the circuit courts applied these articles to form the appropriate standards, albeit inconsistently. The supreme court took the opportunity in *Tracie* to determine which Civil Code articles should be applied in certain custodial

50. Tracie v. Francisco, 15-224, p. 52 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 812–13, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231 (citing LA. CIV. CODE ANN. art. 133 (2016)).

51. *Id.* at p. 52; 174 So. 3d at 812 ("Because these two necessary elements [of article 133] existed when the nonparent custodial interest was awarded, and must presume to continue until proven otherwise, any subsequent modification action must likewise direct its attention to these two crucial elements.").

52. *Id.*

53. Tracie v. Francisco, 2015-1812, p. 7 (La. 3/15/16); 188 So. 3d 231, 238.

54. *See* LA. CIV. CODE ANN. art. 131 (2017); *Tracie*, 2015-1812, p. 9; 188 So. 3d at 238–39 (citations omitted).

55. *See Tracie*, 2015-1814, p. 10; 188 So. 3d at 239–40 (quoting Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 2d 731, 738).

56. *See id.* at pp. 1–2; 188 So. 3d at 234–35 ("Grappling with whether a child should be moved from what is oftentimes perceived as the stable and long-standing environment provided by a non-parent who has been awarded custody as a domiciliary parent, the appellate courts have developed different approaches for evaluating the request of a biological parent to be awarded domiciliary parent status.").

situations, while also reinforcing a parent's constitutional right to parent and rear his child.

A. LOUISIANA CIVIL CODE

The Louisiana Civil Code requires courts to "award custody of the child in accordance with the best interest of the child."[57] This standard applies to initial actions to set custody, as well as subsequent actions to change custody.[58] While the best interest of the child guides all custody determinations, a heightened standard, as well as a constitutional standard, applies when a nonparent seeks to gain custody from a child's parents.[59] Specifically, Civil Code article 133 provides:

> If an award for 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.[60]

The "substantial harm" standard underscores a parent's fundamental right to parent over a nonparent.[61] The Civil Code also provides considerations that guide the courts when determining a child's best interest in decisions involving custody decrees.[62]

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57. *See* LA. CIV. CODE ANN. art. 131 (2017).

58. *See* LA. CIV. CODE ANN. art. 131 cmt. (d) (2017); Tracie v. Francisco, 2015-1812, p. 9 (La. 3/15/16); 188 So. 3d 231, 238-39 (citations omitted).

59. *See* Troxel v. Granville, 530 U.S. 57, 69–70 (2000) ("In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.").

60. LA. CIV. CODE ANN. art. 133 (2017) (emphasis added).

61. LA. CIV. CODE ANN. art. 133 cmt. (b) (2017) ("[I]t is clear that the heart of the parental primacy concept, the rule that a nonparent always bears the burden of proof in a custody contest with the parent, was not disturbed by the prior statutory enactment, and likewise has not been affected by this revision.").

62. Some of these factors include the: (1) "love, affection, and other emotional ties" between the parties and the child; (2) "length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment"; (3) "permanence . . . of the existing or proposed custodial home or homes"; and (4) "willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party." LA. CIV. CODE ANN. art. 134 (2017).

B. THE CUSTODY DECREE

Louisiana recognizes two types of custody decrees—considered and nonconsidered decrees.[63] A nonconsidered decree is a custody decree whereby the "parties consent to a custodial arrangement, and no evidence of parental fitness is taken."[64] The courts use "stipulated judgment" and "consent decree" interchangeably for nonconsidered decrees, but for the sake of clarity, "consent decree" will be used throughout this Note.[65]

A considered decree, on the other hand, is "an award of permanent custody in which the trial court receives evidence of parental fitness to exercise care, custody, and control of children."[66] The court will employ resources and hear evidence with the goal of permanently setting custody; therefore, the court imposes a higher burden on the moving party to show that modification of the considered decree is necessary.[67]

A party moving to modify either type of custody decree must prove a material change in circumstances.[68] This initial requirement aims to avoid frequent changes to a child's environment, limit excessive litigation, and prevent the possibility of inconsistent decisions.[69] Courts then evaluate additional considerations and apply different standards depending on the type of custody decree the parties originally entered.[70]

The Louisiana Supreme Court adopted a less burdensome standard for modifying a consent decree in *Evans v. Lungrin*.[71] In *Evans*, a father seeking sole custody petitioned the court to

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63. *See* Tracie v. Francisco, 2015-1812, pp. 9–10 (La. 3/15/16); 188 So. 3d 231, 239.

64. Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 2d 731, 738 (citations omitted).

65. *Tracie*, 2015-1812, p. 10 n.6; 188 So. 3d at 240 n.6.

66. *Evans*, 97-0541, pp. 12–13; 708 So. 2d at 738.

67. *See* Bergeron v. Bergeron, 492 So. 2d 1193, 1199 (La. 1986); Fulco v. Fulco, 254 So. 2d 603, 605 (La. 1971).

68. *Bergeron*, 492 So. 2d at 1194.

69. *See id.* at 1195 (citations omitted) ("[T]o require a party to show a change in circumstances materially affecting the child's welfare before contesting an award of custody, that he previously has had a full and fair opportunity to litigate, protects his adversary and the child from the vexation and expense attending multiple unjustified lawsuits, conserves judicial resources, and fosters reliance on judicial actions by minimizing the possibility of inconsistent decisions.").

70. *See Evans*, 97-0541, pp. 12–13; 708 So. 2d at 738.

71. *Id.* at p. 2; 708 So. 2d at 733.

modify a consent decree.[72] The court held that a party moving to modify an original consent decree "must prove (1) that there has been a material change in circumstances since the original custody decree was entered, and (2) that the proposed modification is in the best interest of the child."[73] This standard is easier to meet than the standard in the modification of a considered decree because the parties originally consented, and the trial court did not collect evidence or determine parental fitness.[74]

The Louisiana Supreme Court solidified the heavy burden for modifications of considered decrees in *Bergeron v. Bergeron*.[75] In that case, the trial court awarded sole custody to the mother and continually denied custody to the father.[76] However, after the father's fourth petition, the court awarded joint custody to both parents.[77] The trial court did not require the father to show a change in circumstances, yet awarded him a majority of physical custody.[78] The supreme court reversed the trial court, requiring the party seeking the change in custody to prove a change in circumstances that materially affected the child's well-being.[79] The court decided that once the moving party has shown a material change in circumstances after the considered decree was entered, that party

> bears a heavy burden of proving that the continuation of the present custody is so deleterious to the child as to justify a modification of the custody decree, *or* of proving by clear and convincing evidence that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child.[80]

The court in *Bergeron* acknowledged that this heavy burden could prevent modification of a considered decree even when

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72. Evans v. Lungrin, 97-0541, p. 2 (La. 2/6/98); 708 So. 2d 731, 733.

73. *Id.* at p. 13; 708 So. 2d at 738.

74. *See id.*

75. Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986).

76. *Id.* at 1194.

77. *Id.*

78. *See id.* ("None of the events proved by the father, viz., his improper retention of the child in violation of the custody order, and the mother's divorce, remarriage and custody of her two children by her second marriage, in and of itself without additional evidence of effects upon the child, constitutes a change in circumstances warranting consideration of a change in the custody decree.").

79. *Id.* at 1194–95.

80. *Bergeron*, 492 So. 2d at 1200 (emphasis added) (citations omitted).

modification is in the child's best interest. However, it protects children involved in custody battles who face the possibility of substantial harm: "A heavy burden of proof in custody modification cases is justified . . . [because] [t]here is evidence that more harm is done to children by custody litigation, custody changes, and interparental conflict, than by such factors as the custodial parent's post divorce amours, remarriage, and residential changes."[81]

C. CONSTITUTIONAL RIGHT TO PARENT

The fundamental right to parent is highly recognized as a constitutional liberty interest protected by the Due Process Clause and the Equal Protection Clause.[82] Parents have the right to make child-rearing decisions without government interference and these rights cannot terminate absent any notice or showing of the parents' unfitness.[83] This right is acknowledged by Louisiana legislation and jurisprudence.[84] Civil Code article 133 upholds this principle by requiring proof of "substantial harm" before a court can remove a child from a parent's custody and place the child with a nonparent.[85] Louisiana jurisprudence has recognized that a parent's right to custody of his child is superior to any nonparent's rights, unless the parent has forfeited custody or is deemed unfit.[86]

The Louisiana Supreme Court articulated this fundamental right to parent in *In re Adoption of B.G.S.* (*B.G.S.*).[87] The supreme court held the private adoption statutes unconstitutional because the father's parental rights were automatically terminated when the mother terminated her own rights and

81. *See* Bergeron v. Bergeron, 492 So. 2d 1193, 1199–1200 (La. 1986).

82. *See* Anthony Miller, *The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited*, 53 LOY. L. REV. 395, 401–02 (2007).

83. *See* Troxel v. Granville, 530 U.S. 57, 72–73 (2000).

84. *See, e.g.*, LA. CIV. CODE ANN. art. 133 cmt. (b) (2017); *In re* Adoption of B.G.S., 556 So. 2d 545, 548 (La. 1990) (citations omitted) ("In the absence of a statute, the natural right of a parent to his child requires that his consent must be obtained before his parental rights and duties may be terminated and reestablished in adoptive parents.").

85. LA. CIV. CODE ANN. art. 133 cmt. (b) (2017).

86. *See* Deville v. LaGrange, 388 So. 2d 696, 697–98 (La. 1980) (quoting Wood v. Beard, 290 So. 2d 675, 676–77 (La. 1974)) ("In [*Beard*], we enunciated as a rule of law the principle that 'the parent has the paramount right to the custody of the child, and may be deprived of that custody only when there are compelling reasons.'").

87. *Adoption of B.G.S.*, 556 So. 2d 545.

withheld the father's name from the birth certificate.[88] The statutory scheme did not require the mother to give notice of termination to the unnamed father before the mother surrendered both of their parental rights.[89] The court pointed out that due process does not allow such a statutory scheme: "Persons whose rights may be affected by a State action are entitled to be heard, and in order that they enjoy that right, they must be notified."[90]

The court in *B.G.S.* modeled the Supreme Court's express finding on parental rights:

> [A] biological parent's right to "the companionship, care, custody and management" of his children is a liberty interest far more important than any property right. . . . Even when the natural father has not lived continuously with his child, he enjoys a similar constitutional protection of his paternal interest when he develops and maintains a substantial relationship with his child by accepting responsibility for the child's future.[91]

A biological connection alone is not enough. In *Lehr v. Robertson*, the United States Supreme Court explained that a simple biological connection does not give the father an absolute constitutional protection over his relationship with his child.[92] The connection only "offers a natural father the opportunity that no other male possesses to develop a relationship with his offspring."[93] The father may not take advantage of that relationship unless he also "accepts some measure of

88. *In re* Adoption of B.G.S., 556 So. 2d 545, 548 (La. 1990).

89. *Id.* at 548–49 (citing LA. STAT. ANN. §§ 9:422.8, .10(C), .14(A) (repealed 1992)) ("[T]he mother of an illegitimate child has the power to deprive the unwed father of his natural parental right to custody and to veto the adoption by withholding his consent. If she does so, the father loses all rights to the child, except in the unlikely event that the court later should find that the adoption is not in the child's best interest. Furthermore, even his standing to oppose the adoption is waived if the father does not file a formal acknowledgment of the child prior to the mother's act of surrender . . . . The private adoption statute does not require that the non-designated unwed father be afforded any notice or a hearing prior to the termination of his parental rights by the mother's act of surrender of the child.").

90. *Id.* at 549 (citations omitted).

91. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 758–59 (1982)).

92. Lehr v. Robinson, 463 U.S. 247, 262 (1983).

93. *Id.* ("If he grasps that opportunity . . . he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.").

responsibility for the child's future."[94] Similarly, when a father comes forward with the intent to develop a relationship and accept responsibility for the child, "his interest in personal contact with his child acquires substantial protection under the due process clause."[95]

The Supreme Court again recognized the constitutional right to parent in *Troxel v. Granville*.[96] The Court acknowledged the presumptions that a fit parent will act in the best interest of his child, and the parent has the right to decide what is in the child's best interest.[97] The Court held that, as long as a parent can care for his children, the State may not "inject itself into the private realm of the family" and make determinations about what is best for a child.[98]

When evaluating custody decrees involving a nonparent, Louisiana courts struggled to balance this fundamental right to parent with the best-interest analysis.[99] The Louisiana Supreme Court addressed the competing interests in *Tracie v. Francisco* and ultimately settled the split among the circuit courts.

D. SPLIT AMONG STATE CIRCUITS

Prior to *Tracie*, the Louisiana courts of appeal applied the abovementioned standards to nonparents in different ways. The Louisiana Second Circuit Court of Appeal, in *Jones v. Coleman*, placed a high burden of proof on a parent seeking to modify a nonparent's custody based on Civil Code article 133.[100] The court in *Jones* rejected the *Evans* and *Bergeron* decisions as appropriate standards for modification of a nonparent's

94. Lehr v. Robinson, 463 U.S. 247, 262 (1983).

95. *Id.* at 261 (citations omitted).

96. Troxel v. Granville, 530 U.S. 57 (2000). Grandparents in the state of Washington petitioned the court for visitation of their granddaughters after their son, the children's father, died, and the children's mother sought to limit the grandparents' visitation with their granddaughters. A Washington statute allowed any person to petition the court for visitation rights. The trial court found that it was in the children's best interest to spend time with their grandparents. The Washington Supreme Court reversed, however, finding that the statute was unconstitutional as it "infringe[d] on the fundamental rights of parents to rear their children." *See id.* at 60–63.

97. *See id. at* 68–69.

98. *Id.*

99. *See infra* Section III.D (discussing the inconsistencies among Louisiana circuit court decisions).

100. Jones v. Coleman, 44,543, pp. 18–19 (La. App. 2 Cir. 7/15/09); 18 So. 3d 153, 164; *see* Tracie v. Francisco, 2015-1812, p. 13 (La. 3/15/16); 188 So. 3d 231, 241.

custody.[101] In *Jones*, the parents gave custody of their child to the grandparents when the child was only a few weeks old.[102] A few years later, the father, in a petition for sole custody, alleged a material change in circumstances.[103] The trial court rejected the father's request and reaffirmed custody for the grandparents.[104] The father appealed arguing that he had a superior parental right over any nonparent—even the custodial grandparents.[105] The second circuit determined that any parent's agreement to give up custody to a nonparent "is a determination of the unfitness of the parent and the fitness of the nonparent to provide an adequate and stable environment."[106] Therefore, in any proceeding to regain custody, the parent must establish that he has been rehabilitated of the harm that existed at the time he transferred custody, and that the adequate and stable environment provided by the nonparent, as a result of the initial adjudication, has materially changed.[107] If the parent cannot make an adequate showing of a material change in circumstances, the court may allow appropriate visitation, but custody will remain with the nonparent.[108]

The Louisiana Third Circuit Court of Appeal not only deviated from the second circuit's reasoning but rendered inconsistent opinions within its own circuit. *Cutts v. Cutts* involved a mother petitioning for custody of her daughter, which she voluntarily transferred to her parents.[109] When the grandparents refused to relinquish custody, the mother filed a rule to change custody, and the trial court returned custody to the mother without requiring her to show a material change in circumstances—or even that the change in custody would be in the best interest of the child.[110] The grandparents appealed.[111]

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101. *See* Jones v. Coleman, 44,543, pp. 13–15 (La. App. 2 Cir. 7/15/09); 18 So. 3d 153, 162.

102. *Id.* at pp. 1–2; 18 So. 3d at 156.

103. *Id.*

104. *Id.* at pp. 6–7; 18 So. 3d at 157–58.

105. *Id.*

106. *Jones*, 44,543, p. 18; 18 So. 3d at 164.

107. *Id.* at pp. 18–19; 18 So. 3d at 164.

108. *Id.* at p. 19; 18 So. 3d at 164.

109. *See* Cutts v. Cutts, 2006-33, p. 1 (La. App. 3 Cir. 5/24/06); 931 So. 2d 467, 468, *overruled by* Tracie v. Francisco, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

110. *See id.* at pp. 1–2; 931 So. 2d at 468.

111. *Id.* (arguing that "[t]he trial court committed manifest error when it determined that the previous consent judgment transferring custody of the minor to her paternal grandparents was a voluntary transfer of custody which could simply be

The third circuit affirmed, finding Civil Code article 133 and its comments regarding parental primacy most persuasive.[112] The court held that the nonparent had the burden of proving that custody with the parent would result in substantial harm because parental primacy is a primary factor in determining the best interest of the child.[113]

A subsequent third circuit case, *Dalme v. Dalme*, applied the *Evans* standard to modifications involving nonparents.[114] The court in *Dalme* found that a parent seeking to regain custody that she previously transferred to a nonparent "must show a change in circumstances and that the change in custody would be in the best interest of the child."[115] While applying the standard used in *Evans*, the court in *Dalme* (similar to *Jones* and *Cutts*) found that Civil Code article 133 governed the modification of consent decrees between parents and nonparents.[116]

Each of these cases applied a different burden on a different party and relied on different Code provisions. While the court in *Cutts* protected parental primacy by placing the burden on the nonparent, the court in *Jones* made it difficult for a parent to regain custody because the parent must rely on the nonparent's failure or loss of stability.[117] The court in *Dalme* essentially applied the *Evans* standard for a parent seeking a change in custody, which was consistent with the supreme court's approach in *Tracie v. Francisco*.[118] However, each of these cases looked to Civil Code article 133 as the controlling provision for consent

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withdrawn by the natural mother without a showing that there has been a material change in circumstances since the custody decree was rendered and whether a change in custody is in the best interests of the minor child").

112. *See* Cutts v. Cutts, 2006-33, pp. 4–6 (La. App. 3 Cir. 5/24/06); 931 So. 2d 467, 470–71, *overruled by* Tracie v. Francisco, 2015-1812 (La. 3/15/16); 188 So. 3d 231 (The "parental primacy concept [is the] rule that a nonparent always bears the burden of proof in a custody contest with a nonparent.").

113. *Id.* at pp. 5–6; 931 So. 2d at 471 (citations omitted).

114. *See* Dalme v. Dalme, 09-524, p. 3 (La. App. 3 Cir. 10/14/09); 21 So. 3d 477, 479–80 ("This court has noted that [consent decrees] may only be modified when there is a showing that there has been a material change in circumstances and that the modification would be in the best interest of the minor child."), *overruled in part by Tracie*, 2015-1812; 188 So. 3d 231.

115. *Id.* at p. 3; 21 So. 3d at 480 (quoting Millet v. Andrasko, 93-0520, pp. 5–6 (La. App. 1 Cir. 3/11/94); 640 So. 2d 368, 371).

116. *Id.* at pp. 5–6; 21 So. 3d at 480–81.

117. *See* Jones v. Coleman, 44, 543, p. 13 (La. App. 2 Cir. 7/15/09); 18 So. 3d 153, 162 (quoting *Cutts*, 2006-33, pp. 5–6; 931 So. 3d at 471).

118. *Tracie*, 2015-1812, p. 20; 188 So. 3d at 245 (quoting *Dalme*, 09-524, p. 3; 21 So. 3d at 480).

decrees involving nonparents, rather than Civil Code article 131, which should govern the adjudication of all custody decrees.[119]

IV. THE COURT'S DECISION

In *Tracie v. Francisco*, the fifth circuit held that a parent seeking modification of the consent decree with a nonparent domiciliary must prove (1) he has been rehabilitated of his parental unfitness, and (2) the adequate and stable environment where the child has lived with the nonparent has materially changed.[120] If the parent can meet each of these burdens, the parent must then show that custody with the parent is in the best interest of the child.[121] Finding that the trial court applied the wrong burden and finding that Francisco failed to meet this burden, the fifth circuit reversed the trial court's decision that granted Francisco sole custody of David.[122]

The supreme court affirmed the fifth circuit's ruling but for different reasons.[123] While the court agreed that David should remain in the custody of his grandparents, it found that the burden adopted by the fifth circuit was far too high. Instead, the court extended the *Evans* standard to consent decrees between parents and nonparents even when it involves the expansion of a parent's custodial rights.[124] Therefore, even when a parent is seeking to modify a consent decree and expand his custodial rights shared with a nonparent, that parent must show that there has been a material change in circumstances and that the proposed change is in the best interest of the child.[125] Further, the court underscored the significance of Civil Code article 131 and noted that the "best interest of the child" is the standard to be applied when setting and modifying custody decrees.[126] When

119. *See* Tracie v. Francisco, 2015-1812, p. 20 (La. 3/15/16); 188 So. 3d 231, 245 ("[W]e reject th[e] [*Dalme*] opinion to the extent it found that La. C.C. art. 133 governs when a biological parent who shares joint custody with non-parents seeks to modify a consent decree that awarded domiciliary parent status to a non-parent. Rather . . . we have found that Article 131 governs.").

120. Tracie v. Francisco, 15-224, pp. 52–53 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 812–13, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

121. *Id.* at p. 53; 174 So. 3d at 813.

122. *Id.* at pp. 61–62; 174 So. 3d at 817–18.

123. *Tracie*, 2015-1812, p. 2; 188 So. 3d at 235.

124. *See id.* at pp. 20–21; 188 So. 3d at 245–46 (citations omitted).

125. Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 2d 731, 738 (citations omitted).

126. *Tracie*, 2015-1812, p. 20; 188 So. 3d at 245 (citations omitted).

applying either the *Evans* or *Bergeron* standard, the courts will look to Civil Code article 131 to determine the best interest of the child, rather than the "substantial harm" requirement in Civil Code article 133 that the fifth circuit applied.

The court settled the circuit split when it adopted the viewpoint of some circuits but disagreed with others. It upheld *Dalme* to the extent it held consent agreements may be modified when there has been a material change in circumstances, and the modification is in the best interest of the child.[127] The court overruled *Cutts*, however, finding that "it would be both illogical and inequitable to allow a person with no custodial rights to have no burden of proof, but to impose the burden of proof on a person with custodial rights."[128] Unlike Francisco, the mother in *Cutts* had no custodial rights over her child when she petitioned for custody.[129] Francisco sought to expand his existing custody and visitation rights.[130]

Finally, the supreme court found that a parent would seldom meet the heightened burden adopted by the fifth circuit.[131] The parent may place a child with a nonparent because the nonparent could provide an adequate and stable environment.[132] Because it is unlikely that the parent would be able to show a change in the child's environment with the nonparent, the parent would be unable to regain custody.[133] This requirement thwarts the best-interest analysis in two ways: (1) if the environment never changes, then the court will never reach the best-interest analysis; and (2) the parent has to, essentially, wish for his child's

127. Tracie v. Francisco, 2015-1812, p. 20 (La. 3/15/16); 188 So. 3d 231, 245 (citations omitted) ("[W]e approve of *Dalme* to the extent it held 'such [consent] agreements may only be modified when there is a showing that there has been a material change in circumstances and that the modification would be in the best interest of the minor child.'").

128. *Id.* at p. 21; 188 So. 3d at 246.

129. *See* Cutts v. Cutts, 2006-33, p. 1 (La. App. 3 Cir. 5/24/06); 931 So. 2d 467, 468, *overruled by Tracie*, 2015-1812; 188 So. 3d 231.

130. *Tracie*, 2015-1812, p. 15; 188 So. 3d at 242 ("Here, the issue is not whether the biological father's rights should be terminated, but whether they should be expanded.").

131. *See id.* at pp. 15–16; 188 So. 3d at 243.

132. *See id.* at p. 16; 188 So. 3d at 243.

133. *Id.* at pp. 15–16; 188 So. 3d at 243. ("Most significantly, because of the very real possibility that the circumstances of the non-parent custodian may not ever materially change, there is a correlative possibility that the biological parent may have no opportunity to prove that the child's best interests would be served by changing the custodial arrangement.").

environment to become less stable in order to modify the custody decree.[134] This approach forces parents to wish against their own child's best interest.[135]

The court refused to uphold a standard that might permanently deny a biological parent the chance to alter the custody agreement and possibly deny his constitutionally protected interest in parenting.[136] The lower court's holding "diminishes, rather than respects, the constitutional rights of biological parents."[137]

Therefore, parents petitioning for a modification of custody from a consent decree against a nonparent domiciliary must meet the *Evans* standard and prove: (1) there has been a material change in circumstances since the original custody decree was entered, and (2) the proposed modification is in the best interest of the child.

After applying the standard, the supreme court found that Francisco had proved a material change in circumstances by "transforming from a largely absentee parent to being integrally involved in the child's life."[138] However, the court found that he did not meet the second prong of the test because custody with Francisco was not in David's best interest.[139]

V. ANALYSIS

The Louisiana Supreme Court took on the important task of articulating an express burden for parents moving for modification of a consent decree with a nonparent who is the designated domiciliary.[140] The court balanced the constitutional right to parent with the best interest of the child—a feat that past decisions failed to achieve.[141] While it placed the burden on

134. Tracie v. Francisco, 2015-1812, p. 16 (La. 3/15/16); 188 So. 3d 231, 243 (agreeing with Tracie v. Francisco, 15-224, p. 5 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 820 (Liljeberg, J., dissenting in part), *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231).

135. *See id.* (agreeing with *Tracie*, 15-224, p. 5; 174 So. 3d at 820 (Liljeberg, J., dissenting in part) ("[T]he [Fifth Circuit] majority's standard would place a rehabilitated, deserving parent in the 'untenable situation of needing his own child to be in an inadequate and unstable situation in order to obtain custody.'").

136. *See id.*; *see also In re* Adoption of B.G.S., 556 So. 2d 545, 558 (La. 1990).

137. *Tracie*, 2015-1812, p. 14; 188 So. 3d at 241.

138. *Id.* at p. 24; 188 So. 3d at 248.

139. *Id.*

140. *See id.* at p. 1; 188 So. 3d at 234.

141. *See id.* pp. 20–22; 188 So. 3d at 245–46; *compare* Cutts v. Cutts, 2006-33, p. 5

the parent, the court lowered the burden by clearly stating that the parent only needs to prove a material change in circumstances and that the child's best interest is in the custody of the parent—rather than proving substantial harm in custody with the nonparent.[142]

To understand the significance of this decision, it is important to analyze the differences between the fifth circuit's and the Louisiana Supreme Court's decisions, as well as the supreme court's varied language in the standards for considered and consent decrees. This Note will also analyze the effect that this standard will have on the modern Louisiana family, as well as what effect, if any, it will have on the standard for considered decrees.

A. DIFFERENCE IN OPINIONS

The most significant difference between the fifth circuit's and supreme court's decisions is the second prong of the standard adopted by the fifth circuit: the parent must prove that the adequate and stable environment provided by the nonparent has materially changed.[143] The fifth circuit, understandably, relied on Civil Code article 133 and found this to be the most appropriate standard for the situation.[144] However, as the supreme court noted, this standard would make it almost impossible for a parent to regain custody of his child and would violate the biological parent's "constitutionally protected interests in parenting."[145]

(La. App. 3 Cir. 5/24/06); 931 So. 2d 467, 471 (citations omitted) ("[W]e hold that a parent does not have to show a material change in circumstances and that a change is in the best interests of a child when disputing custody with a non-parent. Rather, the non-parent must show that an award of custody to the parent will result in substantial harm to the child."), *with* Tracie v. Francisco, 15-224, pp. 52–53 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 812–13, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231 ("The parent must first prove he has been rehabilitated to a fit parent, thereby eliminating the threat of the 'substantial harm' to the child which existed at the time of the original consent judgment. Second, the parent must prove that the adequate and stable environment in which the child was placed with the nonparent as a result of the original consent judgment has materially changed. In the absence of such a change, the parent's claim to modify the nonparent's custody of the child shall not prevail. Finally, if the parent has met this initial two-prong burden, the parent must prove that the best interest of the child lies in custody with the parent.").

142. *See* Tracie v. Francisco, 2015-1812, pp. 20–22 (La. 3/15/16); 188 So. 3d 231, 245–47 (holding that Louisiana Civil Code article 131, rather than article 133, controls the modification of a consent decree with a nonparent).

143. *Id.* at p. 20; 188 So. 3d at 245.

144. *See Tracie*, 15-224, pp. 52–53; 174 So. 3d at 812–13 (citations omitted).

145. *Tracie*, 2015-1812, p. 16; 188 So. 3d at 243 (citations omitted).

One fifth circuit judge dissented in part.[146] The judge agreed with the majority that the parent should bear the burden when moving to modify a consent decree to maintain stability for the child, rather than let the parent regain custody on a whim.[147] He disagreed, however, with the court's finding that the parent must prove a material change in the adequate and stable environment provided by the nonparent.[148] This burden, he argued, leaves parents who deserve custody of their children "between a rock and a hard place" because they must wish that the stable environment where their children reside becomes unstable.[149]

The application of this burden could lead to unintended consequences. First, parents who are struggling, but turn to a responsible third party for help, may never regain custody of their children. Therefore, parents who need rehabilitation might be discouraged from placing their children in a stable environment while they recover. Alternatively, if parents do give up their children and are deemed "unfit," the burden to regain custody is so high that it could significantly lower the incentive to seek rehabilitation.[150] For example, a mother might choose to avoid rehab for fear that she will not regain custody if she voluntarily relinquishes custody while she is away. This could lead to a situation where a child is forcibly removed from a home because the mother is legitimately unfit and cannot care for her child. Essentially, the parent chooses to seek help and is deemed unfit, or the parent refuses to seek help making her an unfit parent. Once again, as the fifth circuit's dissent said, the parent is stuck between a rock and a hard place.

Unfitness under this standard does not determine a parent's character or overall capacity, but rather a parent's *current* ability

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146. Tracie v. Francisco, 15-224, pp. 1–9 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 818–22 (Liljeberg, J. dissenting in part), *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

147. *Id.* at pp. 3–4; 174 So. 3d at 819–20 (Liljeberg, J. dissenting in part) ("I agree the overriding need to protect the best interest of the child requires a shift of the burden to the parent. Placing this burden on the parent is an important measure to protect the stability of the child's environment from a parent's whimsical request to regain custody.").

148. *Id.* at p. 4; 174 So. 3d at 820 (Liljeberg, J. dissenting in part) ("I disagree with the second prong of the dual test which requires the parent to prove a material change in the adequate and stable environment provided by the nonparent. This prong unnecessarily infringes on the parent's right to the care, custody and management of his child.").

149. *Id.* at pp. 4–7; 174 So. 3d at 820–21 (Liljeberg, J. dissenting in part).

150. *Id.* at p. 7; 174 So. 3d at 821 (Liljeberg, J. dissenting in part).

to take care and maintain custody of the child. On the issue of Francisco's unfitness, the supreme court agreed with the fifth circuit's dissent.[151] The majority deemed Francisco unfit when he agreed to share custody of his child with a nonparent.[152] The supreme court did not expressly disagree with this designation, but it instead determined that the concept was unfair.[153] Oftentimes, a parent will decide that her children would be better cared for by their grandparents or another person while the parent gets back on her feet.[154]

Consider a college student who becomes pregnant unexpectedly. In an effort to complete school as quickly as possible so she can create a better life for her daughter, the young woman enters a consent decree with her parents to help her care for her child. Under the fifth circuit's analysis, this young woman would be presumed unfit because she voluntarily relinquished part of her custody with a nonparent. Therefore, to regain custody after she graduates and is fully able to provide for her daughter, she must prove her rehabilitation and that the environment her parents provided for her daughter became unstable or inadequate (assuming the parents did not voluntarily relinquish custody).

The supreme court in the instant case recognized that a parent would be lucky to have someone willing to share in the custody and care of the child.[155] Indeed, the United States Supreme Court has recognized the presumption that a fit parent will act in the best interest of his child and has the right to decide the child's best interest without government intrusion.[156]

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151. *See* Tracie v. Francisco, 2015-1812, p. 16 (La. 3/15/16); 188 So. 3d 231, 243.

152. *See id.* at p. 13; 188 So. 3d at 241 (quoting *Tracie*, 15-224, p. 52; 174 So. 3d at 812).

153. *See id.* at pp. 13–16; 188 So. 3d at 241–43.

154. *See id.* at p. 16; 188 So. 3d at 243 ("Indeed, it is foreseeable that because of youth, impecunity, or other life situations, a parent might consent to a non-parent serving the role of a domiciliary parent. It is equally foreseeable that the parent would at least seek to place custody with a person (likely a relative) whom the parent deems will provide a stable environment for the child.").

155. *Id.* ("If the parent has been fortunate enough to find such a person with whom to share joint custody, then under the appellate court's standard, even if the parent's circumstances radically change for the better, the parent can never regain domiciliary custody if the non-parent maintains the status quo.").

156. *See* Troxel v. Granville, 530 U.S. 57, 68–69 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children. . . . Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing

Therefore, for the court to automatically designate a parent unfit when she agreed to joint custody with a nonparent—when no court considered or heard evidence of the parent's unfitness—is a violation of the parent's due process.[157]

B. MATERIAL CHANGE IN CIRCUMSTANCES

The supreme court's decision, while providing an express standard for families and attorneys, left a gap in its finding that could cause confusion. When the supreme court determined that a parent must prove a "material change in circumstances," it failed to expound on whether the material change must affect the welfare of the child or whether a change in the parent's life would satisfy the burden.[158]

Anyone who moves to modify a custody decree must first prove a change in circumstances. In *Bergeron*, the standard for a considered decree expressly states that the moving party must show "a change in circumstances *materially affecting the welfare of the child* has occurred since the prior order respecting custody."[159] In general, the considered decree requires a higher burden of proof for modification because both evidence of the parents' fitness and a trial was required to enter judgment on the considered decree; this high threshold serves to keep the parties out of court.[160]

On the other hand, the supreme court in *Tracie*, which adopted the *Evans* standard, required that the moving party first show "there was a material change in circumstances since the original custody decree was entered" to modify the stipulated judgment.[161] It did not expressly state that the material change in circumstances must affect the welfare of the child, as the court

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of that parent's children.").

157. *See, e.g.*, Tracie v. Francisco, 2015-1812, pp. 14–16 (La. 3/15/16); 188 So. 3d 231, 241–43.

158. A "material change in circumstances" is a factual inquiry, for which the trial court is given broad discretion on appeal. *See* Toups v. Kaufman, 16-0248, p. 6 (La. App. 4 Cir. 11/23/16); 204 So. 3d 1044, 1049 (citations omitted); Watson v. Watson, 39,458, pp. 4–5 (La. App. 2 Cir. 3/2/05); 894 So. 2d 1263, 1266. What exactly constitutes a "material change" is beyond the scope of this Casenote.

159. Bergeron v. Bergeron, 492 So. 2d 1193, 1195 (La. 1986) (emphasis added) (citations omitted).

160. *See id.* ("The reasons for the rule are that it is desirable that there be an end of litigation and undesirable to change the child's established mode of living except for imperative reasons.").

161. Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 2d 731, 738.

did in *Bergeron*.[162] The court went on to state that the parent must then prove that the change in custody is in the child's best interest.[163] The question remains as to whether the court purposefully omitted the requirement—that the change in circumstances affect the welfare of the child—to provide a lesser burden for consent decrees, as not all material changes in a parent's life will affect a child's welfare.

Consider this example: A happily married man and woman were the loving parents to their young daughter. The mother died suddenly, and the father fell into a deep depression and turned to drugs and alcohol. He acknowledged that he no longer had the wherewithal to adequately care for and raise his daughter, so he entered into a consent decree with his parents. The daughter had a close relationship with her grandparents who lived only blocks away, and they agreed to take care of her while the father sought help. The parties agreed that the grandparents should become domiciliaries, but the father maintained some custodial rights and a strong relationship with his daughter throughout his rehabilitation process. The father fully rehabilitated himself and began to lead a new, stable life. He was cured of his temporary unfitness. All the while, the daughter continued to live a happy and full life with her grandparents. She is relieved that her dad is better, but nothing in her day-to-day life has changed since her father and grandparents entered the consent decree. Her father's recovery has not affected *her* welfare.

If this father seeks to regain his full custodial rights, he must prove a material change in circumstances. Is he required to prove that the material change affected his daughter's welfare, as articulated in *Bergeron*, or must he only show a material change since the custody decree was entered? If the material change must have affected the child's welfare, the father will not pass the first prong in *Tracie*. However, if only a material change since the custody decree is necessary, he will pass the first prong, and the court will likely reinstate his full custodial rights after a best interest analysis—especially since the supreme court articulated the importance of parents' constitutional right to custody.

It is possible, but unlikely, that this heightened requirement

162. Bergeron v. Bergeron, 492 So. 2d 1193, 1195 (La. 1986) (citations omitted).

163. Evans v. Lungrin, 97-0541, p. 13 (La. 2/6/98); 708 So. 2d 731, 738 (citations omitted).

in the *Bergeron* standard is meant to apply exclusively to considered decrees, which already require heightened burdens. Civil Code article 134, providing the courts with factors to consider in the best-interest analysis, states in paragraph (6) that courts should consider "[t]he moral fitness of each party, *insofar as it relates to the welfare of the child*."[164] The comments to the article explain "that the purpose of every custody award is to secure the best interest of the child, not to regulate the behavior of his parents."[165]

Further, the supreme court in *Tracie* considered David's welfare in making its decision. Applying the new standard to the facts de novo to consider whether custody with Francisco was in David's best interest, the supreme court used language from *Bergeron* to explain that a child's preference alone does not show a material change in circumstances that affects his welfare.[166] Explanatory evidence revealed that David's preference to live with Francisco was based on his opportunities for play time, rather than any change in his environment with Kathy; therefore, the supreme court did "not find [David had] articulated a material change in circumstances affecting [David's] welfare."[167] The court analyzed the rest of the facts in the same manner by asking how the alleged material change affected David.[168] It ultimately found that Francisco articulated a material change in circumstances affecting David's welfare because he developed a stronger paternal relationship with David.[169]

Therefore, while the supreme court did not expressly state that the material change must affect the welfare of the child, the court assessed the facts in that manner.[170] The inconsistency in language, though, is potentially problematic and could be challenged in a future case.

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164. LA. CIV. CODE ANN. art. 134(6) (2017) (emphasis added). The factors are to be used as a guide for the court to determine the best interest of the child. They are nonexclusive, and the court has discretion to apply different weight to different factors. *See* LA. CIV. CODE ANN. art. 134 cmts. (a)–(b) (2017).

165. LA. CIV. CODE ANN. art. 134 cmt. (f) (2017) (citations omitted).

166. Tracie v. Francisco, 2015-1812, p. 23 (La. 3/15/16); 188 So. 3d 231, 247 (citations omitted).

167. *Id.* at p. 24; 188 So. 3d at 247 (citations omitted).

168. *Id.* at pp. 24–25; 188 So. 3d at 247–48 (finding that Francisco proved a material change in circumstances because he developed a deeper and more integral relationship with David).

169. *See infra* Part IV.

170. *See Tracie*, 2015-1812, pp. 23–25; 188 So. 3d at 247–48 (citations omitted).

This case makes headway in providing stability to these delicate cases between parents and nonparents who share custody but will not apply in all custody determinations.[171]

C. POTENTIAL EFFECTS ON THE MODERN FAMILY

Tracie v. Francisco is a significant decision that balanced the best interest of the child with a parent's constitutional right to the care and custody of his child. While this decision will apply neatly in many scenarios, it could prove challenging in others.

In *Troxel v. Granville*, the United States Supreme Court recognized how the "average American family" varies and

171. In November 2016, the Louisiana Supreme Court issued an opinion summarily recalling a writ of certiorari it had granted in May of that year. *See* George v. Dugas, 15-939 (La. App. 3 Cir. 3/16/16); 188 So. 3d 376, *cert. granted*, 16-0710 (La. 5/20/16); 191 So. 3d 1060, *cert. dismissed as improvidently granted*, 16-0710, p. 1 (La. 11/07/16); 203 So. 3d 1043, 1043 (per curiam). The underlying case was a Louisiana Third Circuit Court of Appeal decision regarding the custody of three children who were removed from their parents' care through "Child In Need of Care" proceedings. *See id.* at p. 1; 188 So. 3d at 378. After the underlying proceedings, the court entered a judgment placing the children in the guardianship of non-parents, the Dugas couple. *Id.* (Weimer, J., dissenting) ("No suitable relatives were available, so the children were placed in the home of Bryan and Robbie Dugas as foster parents."). At issue in the writ application was whether the custody provisions of the Louisiana Civil Code or guardianship provisions of the Louisiana Children's Code applied. *See id.* at p. 4; 203 So. 3d at 1045 ("Having reviewed the record and applicable law, I find that neither the district court nor the appellate court applied the correct legal standard . . . [, which] is statutorily dictated by the guardianship provisions of the Children's Code as opposed to the custody provisions of the Civil Code."). Further, a disposition on the merits of the writ would have required the supreme court to determine both the applicable burden of proof and upon which party the burden should rest. *See id.* ("[W]e granted a writ to determine whether the correct legal standard had been applied and to review the correctness *vel non* of maintaining the original child placement judgment."). Justice John Weimer, who authored the opinion in *Tracie*, dissented from the recall and expressed his disappointment in the court's decision, contending that the parties and the children deserved a resolution of the issues. *George*, 15-939, pp. 1–3; 203 So. 3d at 1043–44. The dissent pointed out, pursuant to the Louisiana Children's Code, challengers to a guardianship arrangement must prove, by "clear and convincing evidence," a "substantial and material change *in the circumstances of the guardian or child,*" indicating that the focus in a civil-custody dispute is on the guardian's circumstances, rather than the challenging parent's. *Id.* at p. 4; 203 So. 3d at 1045 (emphasis added) (quoting LA. CHILD. CODE ANN. art. 724(D) (2016)); *see id.* at pp. 16–17; 203 So. 3d at 1052 (citing LA. CHILD. CODE ANN. art. 724 cmt. (c) (2016)). Like the situation in *Tracie*, Justice Weimer reasoned that the moving parties shouldered the burden, even though they were the biological parents. *See id.* at pp. 4–5; 203 So. 3d at 1045. However, in *George v. Dugas*, Justice Weimer explained that *Tracie* did not apply because it involved joint custody between a parent and non-parent, while *George* involved non-parents with full custody. *George*, 16-0710, p. 16; 203 So. 3d at 1051–52.

evolves.[172] The most recent evolution has involved same-sex marriage, which was officially recognized by the Supreme Court in *Obergefell v. Hodges*.[173] Custody arrangements are often difficult, but they could potentially present a more difficult situation for a divorced, same-sex couple.

Consider a lesbian couple who is recently married and decides to start a family together. The women agree one of them will have the baby using donated sperm. When the designated spouse becomes pregnant, she becomes the biological mother. When the baby is born to the couple, the spouse who is not the biological mother does not adopt the child. The couple goes on to happily raise the child as co-parents. The biological mother, who is the main provider for the family, works a full-time job outside of the home while the non-biological mother works from home to stay with the child. Both women love and adore the child equally, and they consider each other the child's parents. As time progresses, however, the relationship begins to fall apart, and the couple eventually divorces. They enter a consent decree as to the custody and care of the child, in which they agree to joint custody and designate the non-biological mother as the domiciliary parent.

Over the following years the situation begins to change. The domiciliary non-biological mother begins to date. The biological mother then brings an action against the non-biological mother to amend the consent decree. Under current Louisiana law, the biological mother is considered a parent and the non-biological mother a nonparent. The Louisiana Supreme Court, recognizing the constitutional right to parent, adopted a lower standard than the one applied in the fifth circuit. The parent who is not the domiciliary need only prove that there has been a material change in circumstances since the original custody decree and that it is in the best interest of the child for the biological parent to have sole custody of the child. As a result, the child who has spent every day in the direct care of his non-biological mother can be removed from her custody. Nothing has happened to affect the child's welfare, but the current standard would allow the biological mother to remove the child from the domiciliary parent with whom he spent the majority of his time.

This type of situation is not restricted to same-sex couples.

172. Troxel v. Granville, 530 U.S. 57, 63–64 (2000).

173. *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

There are many scenarios in which the biological mother could prove a material change in circumstances[174] and that a modification of the decree would be in the child's best interest. Consider a man who marries a woman with a toddler. The man assumes the role of the child's father and treats the child as his own. Unfortunately, the man never legally adopted the child. When the couple divorced, the man became a nonparent under the law—a legal stranger to the child. Similar to the scenario above, if the biological mother decides to alter the consent decree, her constitutional right to parent her child would be recognized and highly respected by the Louisiana Supreme Court.

Yet, this scenario could potentially reach a different end. Civil Code article 195 states:

> A man who marries the mother of a child not filiated to another man and who, with the concurrence of the mother, acknowledges the child by authentic act is presumed to be the father of that child.[175]

The article expressly states that a *man* may acknowledge the child, and in doing so, he creates a legal link between himself and the child while simultaneously avoiding adoption proceedings. If the man in the second scenario would have executed an authentic act, article 195 and its comments fail to suggest that this man would not be considered the child's father in a custody action. This is an outcome that Louisiana law has not yet afforded to same-sex couples, leaving the lesbian parents with no other outcome.

D. CONSIDER THE CONSIDERED DECREE

The supreme court makes clear in *Tracie v. Francisco* that its decision only applies to consent decrees or nonconsidered decrees.[176] Therefore, the question remains as to how a parent can modify a considered decree with a nonparent. The fifth circuit's standard that the supreme court rejected for consent

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174. As discussed herein, a material change in circumstances should affect the welfare of the child, although this was not explicitly expressed by the court. This is another scenario where that inconsistent language could cause problems. A judge who wishes to uphold the biological mother's constitutional rights might opt for a strict interpretation of the standard.

175. LA. CIV. CODE ANN. art. 195 (2017).

176. *See* Tracie v. Francisco, 2015-1812, p. 8 (La. 3/15/16); 188 So. 3d 231, 238 (containing the subheading, *The Standard for Modifying a Stipulated Judgment Award of Joint Custody and Domiciliary Parent Status to a Non-Parent*).

decrees—requiring a parent to prove rehabilitation and that the adequate and stable environment where the child resides with the nonparent has materially changed—is better suited for considered decrees.[177]

In a considered decree, after the parent proves there has been a material change in circumstances affecting the welfare of the child, the parent must either show that the current custody arrangement with the other parent is "so deleterious to the child to justify modification" or show "by clear and convincing evidence, that the harm likely to be caused by a change of environment is substantially outweighed by its advantages to the child."[178] As discussed earlier, this burden is much higher than that of a consent decree because the considered decree requires evidence of parental fitness at trial.[179]

In *Tracie*, Francisco moved for modification after he voluntarily renounced some of his custodial rights. Some might argue that a parent should have an easier time regaining the custody that was voluntarily relinquished after the unfitness has been cured. Where a court had to determine that a parent was unfit through trial proceedings, that parent likely never admitted to any unfitness or believed that he was unfit. Therefore, chances are less likely that he has taken efforts to rehabilitate himself of his unfitness. When a court addresses a parent's burden against a nonparent to modify a considered decree, the court should apply a higher standard than the one established in *Tracie v. Francisco.*

After the trial court has determined that a parent is unfit, he should then prove to the court that he has been rehabilitated of that unfitness. He must also prove that the child's environment provided by the nonparents has materially changed. While the supreme court felt that this second prong impermissibly burdened the constitutional rights of the parent in the context of a consent decree, it is more justified for considered decrees because it provides a necessary reason for the previously unfit parent to return to court to modify the considered decree. Of course, finding an equitable balance between the parent's constitutional rights and the child's best interest would be

177. Tracie v. Francisco, 15-224, pp. 52–53 (La. App. 5 Cir. 9/21/15); 174 So. 3d 781, 812–13, *reh'g denied* (10/6/15), *aff'd on other grounds*, 2015-1812 (La. 3/15/16); 188 So. 3d 231.

178. Bergeron v. Bergeron, 492 So. 2d 1193, 1200 (La. 1986) (citations omitted).

179. *See* Hensgens v. Hensgens, 94-1200, pp. 5–6 (La. App. 3 Cir. 3/15/95); 653 So. 2d 48, 52 (citations omitted).

necessary, but this standard provides a good starting point when modifying considered decrees between parents and nonparents.

VI. CONCLUSION

The law is as complex as the family unit. Although the law continues to advance, it sometimes fails to adequately resolve challenges facing modern families. While *Tracie v. Francisco* provides parents, nonparents, and attorneys with much-needed guidance in modifying consent decrees, this decision unfortunately does not provide much predictability for non-legal parents. Further, the many parents and nonparents who have spent time in court and have entered considered decrees are without guidance. It remains to be seen how the supreme court's decision and discussion will affect these groups, but this decision reinforced the supreme court's willingness and desire to balance the parent's constitutional rights with the child's need for stability and normalcy.

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