

PAULA STEPHANIE FERRAND

NO. 18-CA-618

VERSUS

FIFTH CIRCUIT

C. VINCENT FERRAND

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 708-409, DIVISION "N"
HONORABLE STEPHEN D. ENRIGHT, JR., JUDGE PRESIDING

December 06, 2019

ROBERT A. CHAISSON
JUDGE

Panel composed of Judges Jude G. Gravois,
Marc E. Johnson, and Robert A. Chaisson

REVERSED AND REMANDED WITH INSTRUCTIONS

RAC

JGG

MEJ

COUNSEL FOR PLAINTIFF/APPELLEE,
PAULA STEPHANIE FERRAND
Becki Truscott Kondkar
Shama Farooq

DEFENDANT/APPELLANT,
C. VINCENT FERRAND
In Proper Person

CHAISSON, J.

In this child custody dispute, Vincent Ferrand appeals a May 29, 2018 judgment of the trial court that granted his former intimate partner, Paula Ferrand (now named Stephanie Wilson) sole custody of two minor children, denied Mr. Ferrand any custody rights or visitation with the two minor children, and denied his Motion for Reconciliation Therapy.¹ For the reasons that follow, we reverse those parts of the May 29, 2018 judgment of the trial court that denied Mr. Ferrand's motion to set custody, sustained Ms. Wilson's objection to the domestic commissioner's February 22, 2018 Order, granted sole custody of the minor children to Ms. Wilson, and denied reconciliation therapy. Further, we render judgment immediately instituting reconciliation therapy for Mr. Ferrand and the two minor children with Dr. Karen Van Beyer, in accordance with the specific instructions contained in the conclusion of this opinion.

PROCEDURAL HISTORY

This is the second time that this matter has come before this Court on appeal. *See Ferrand v. Ferrand*, 16-7 (La. App. 5 Cir. 8/31/16), 221 So.3d 909, *writ denied*, 16-1903 (La. 12/16/16), 211 So.3d 1164. In the first appeal, Mr. Ferrand sought review of the trial court's denial of his petition for custody of the minor children after it found that Mr. Ferrand had failed to meet his burden to prove that the granting of sole custody to the children's mother would result in substantial harm to the children, as required pursuant to La. C.C. art. 133.

On appeal, this Court found that under the unique set of facts presented in this case, the trial court abused its discretion in denying Mr. Ferrand's request for a court-appointed evaluator to assist in the custody determination as contemplated under La. R.S. 9:331. Accordingly, we vacated the judgment of the trial court as it

¹ Although Ms. Wilson has referred to herself by various names since she began her relationship with Mr. Ferrand, at the time that this litigation was instituted she was known as, and had legally changed her name to, Paula Ferrand. In this opinion, we will refer to her as Ms. Wilson.

related to the denial of Mr. Ferrand's petition for custody and remanded the matter to the trial court for the purpose of appointing a mental health evaluator, pursuant to La. R.S. 9:331, to perform a comprehensive custody evaluation. Additionally, in light of vacating the denial of Mr. Ferrand's petition for custody and finding no basis for the issuance of a protective order against Mr. Ferrand relating to the minor children, we also vacated that portion of the trial court's judgment that issued a protective order relating to the minor children.

On remand, in accordance with this Court's instructions, the trial court appointed Dr. Karen Van Beyer to conduct a custody evaluation regarding the minor children.² Following Dr. Van Beyer's evaluation, the 24th Judicial District Court domestic commissioner held a two-day hearing on Mr. Ferrand's motions to set custody and for reconciliation therapy. On February 22, 2018, the commissioner issued a judgment awarding joint shared custody of the two minor children, designating Ms. Wilson as the domiciliary parent, and ordering immediate commencement of reunification therapy.³

Ms. Wilson filed an objection to the commissioner's ruling, and the trial court held another trial on Mr. Ferrand's petition for custody. After the re-trial, the trial court, rejecting the opinion of Dr. Van Beyer regarding substantial harm to the children and the best interests of the minor children, awarded Ms. Wilson sole custody of the two minor children, denied Mr. Ferrand any custody rights or

² Despite this Court finding no basis for a protective order against Mr. Ferrand in relation to the minor children, the trial court refused Mr. Ferrand's request to restore temporary visitation rights to him pending the outcome of the custody evaluation and retrial of his petition for custody.

³ In his written findings of fact and reasons for judgment, the commissioner specifically stated, "[i]n the instant case, we don't have to speculate or wonder whether sole custody to [Ms. Wilson], the children's biological mother, would result in substantial harm. The children have been in [Ms. Wilson]'s sole custody from February 29, 2014 until now and it has been established by clear and convincing evidence that substantial harm has not only happened to the children, but will continue to happen if [Ms. Wilson] is allowed to remain as the children's sole custodian."

visitation with the children, and denied his Motion for Reconciliation Therapy.⁴ It is from this judgment that Mr. Ferrand now appeals.

FACTS⁵

In August of 2000, Ms. Wilson (then known as Stephanie Harrell) met Vincent Ferrand and began a relationship with him.⁶ At that time, Ms. Wilson was 24 years old and living with her husband, Frannon Dykes, III, in Alexandria, Louisiana. Ms. Wilson and Mr. Dykes were the parents of two boys, who, at that time were a four-year-old and a one-year-old infant. Within five months of meeting Mr. Ferrand in person for the first time, Ms. Wilson left Alexandria and moved with her two children into Mr. Ferrand's home in New Orleans, Louisiana, over 150 miles away.⁷ In the subsequent custody proceedings regarding her two children, Mr. Dykes objected to Ms. Wilson moving over 150 miles away with their children. When the court would not allow Ms. Wilson to permanently move the children to the New Orleans area, Ms. Wilson, rather than return to the Alexandria area with her two children, chose to continue living in the New Orleans area with Mr. Ferrand. The court therefore awarded Mr. Dykes and Ms. Wilson joint custody of the children and named Mr. Dykes the domiciliary parent. In October of 2001, the children moved back to the Alexandria area to live with their father, Mr. Dykes. Ms. Wilson was awarded visitation with her two small children every other weekend and two weeks out of the summer.⁸

⁴ At this time, the trial court also heard and granted Mr. Ferrand's motion to traverse *in forma pauperis* status that had been granted to Ms. Wilson since March 7, 2014. Ms. Wilson did not appeal this portion of the trial court's judgment, therefore we do not address it on appeal.

⁵ A much more detailed recitation of the facts of this case, all of which are pertinent to this appeal but for the sake of brevity will not be repeated *in toto* in this opinion, are contained in this Court's prior opinion on the first appeal of this matter. *See Ferrand*, 221 So.3d at 914-918.

⁶ Although Ms. Wilson met Mr. Ferrand in person for the first time in August of 2000, according to Ms. Wilson they had previously been communicating over the internet.

⁷ Ms. Wilson would later testify that she moved to the New Orleans area not only to be with Mr. Ferrand, but also to be closer to family (grandparents, aunts, uncles and cousins), despite the fact that her father and mother were both living in the Alexandria area.

⁸ There appears to be some question as to whether Ms. Wilson regularly exercised her visitation rights with these children. In her September 10, 2014 deposition, Ms. Wilson acknowledged at that time she was only visiting these two children "two or three times a year."

Although Ms. Wilson and Mr. Ferrand were never legally married, on April 12, 2003, they participated in a wedding ceremony in Tennessee⁹, in which they together exchanged vows and “wedding rings.”^{10, 11} Thereafter, Ms. Wilson and Mr. Ferrand held themselves out to the community as a married couple.¹² In 2005, Ms. Wilson legally changed her last name from Harrell to Ferrand so that she would have the same last name as Mr. Ferrand.¹³ Also in 2005, Ms. Wilson, despite relinquishing domiciliary custody of her two older children in order to live with Mr. Ferrand, decided that she wanted to have more children and start a family with Mr. Ferrand.¹⁴ Although initially reluctant to start a family in his forties, Mr. Ferrand eventually agreed and paid for *in vitro* fertilization treatments for Ms. Wilson to become pregnant.

On July 5, 2007, Ms. Wilson gave birth to twins: a daughter that they named “CF”, and a son that they named “VF II”.¹⁵ At the hospital, Ms. Wilson and Mr. Ferrand held themselves out to the medical personnel, just as they had done to the community at large over the prior four years, as husband and wife.

Accordingly, Ms. Wilson was named on the children’s birth certificates as their

⁹ The record contains conflicting evidence as to whether this ceremony took place in Tennessee or North Carolina.

¹⁰ Mr. Ferrand’s sex assignment at birth was female, though he identifies as male. A transgender person is one whose gender identity and/or expression is different from the one they were assigned at birth. As we noted in our prior decision, during that time period, prior to the United States Supreme Court’s ruling in *Obergefell v. Hodges*, — U.S. —, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), Louisiana did not recognize same-sex marriage and would not have recognized an out-of-state marriage. *Ferrand*, 221 So.3d at 919.

¹¹ Confusingly, although Ms. Wilson adamantly denied in her testimony participating in a marriage ceremony, she acknowledged that she herself typed a “wedding announcement,” introduced into evidence, that states “we are very proud to share the happy news Paula Stephanie Harrell and C. Vincent Ferrand were married in a private ceremony on Saturday, the twelfth of April, two thousand and three in Cherokee, North Carolina.”

¹² When asked in her deposition whether she had ever told a judge that she and Mr. Ferrand were married, she testified that “[w]hen I was going through court with my ex, we did say that we were married.”

¹³ Ms. Wilson’s explanation for choosing the last name Ferrand was because of the amount of time that she spent around the Ferrand family. However, she would later contradict this testimony by claiming that they were rarely around the Ferrand family because Mr. Ferrand’s family referred to Mr. Ferrand as “she.”

¹⁴ Ms. Wilson testified at the custody trial, referring to her two older children, that “I was longing for my children, so I wanted to have more children.”

¹⁵ In this opinion we will use the initials of the two minor children who are the subject of this custody dispute in order to protect their privacy.

mother and Mr. Ferrand was named on their birth certificates as their father, and they both signed the birth certificates.¹⁶ Over the next four years, Ms. Wilson and Mr. Ferrand lived together as a married couple and raised their two children. The two minor children, since birth, always knew Mr. Ferrand as their father and called him “Daddy.”

In November of 2011, Ms. Wilson went to Alexandria to visit her two older sons. When she returned, she and Mr. Ferrand argued about a telephone number of one of Ms. Wilson’s former high school boyfriends that Mr. Ferrand found in Ms. Wilson’s cell phone. This argument resulted in Ms. Wilson filing a petition for protection from abuse against Mr. Ferrand on November 15, 2011, in which she alleged that on November 13, 2011, Mr. Ferrand threatened her life if she attempted to take their children away from him.¹⁷ Ms. Wilson attached to this petition a copy of an email that she sent to her “Aunt Tina” a year earlier, on August 9, 2010. After ten years of being in an intimate relationship with Mr. Ferrand and having two children through *in vitro* fertilization with him, Ms. Wilson stated in that email that she had only just recently learned that Mr. Ferrand was in fact a female living as a man, and that explained why, in ten years, she had “never got to see him naked.”

On December 6, 2011, the domestic commissioner dismissed Ms. Wilson’s petition when she failed to appear for the scheduled hearing. Despite Ms. Wilson’s accusations of threats against her, she continued to reside in the family home with Mr. Ferrand. Two months later, on January 28, 2012, when Ms. Wilson ultimately moved out of the family home, she left the children residing with Mr. Ferrand.

¹⁶ At the time the twins were born, there was no legal avenue through which Mr. Ferrand could obtain parental rights. *See Ferrand*, 221 So.3d at 918, n. 16.

¹⁷ Ms. Wilson did not allege any physical abuse at this time, but did refer to two uncorroborated, alleged incidents of physical abuse, one three years earlier, in 2008, involving choking during an argument over their son, and one ten years earlier, in 2001, before the children were born, involving shoving. Although Ms. Wilson also filed the petition on behalf of their children, she did not allege that Mr. Ferrand threatened the children or physically abused them. This petition was the first instance of either Ms. Wilson or Mr. Ferrand filing any litigation against one another.

Ms. Wilson and Mr. Ferrand agreed to a shared custody arrangement of the children with the children residing with Mr. Ferrand and visiting with Ms. Wilson.¹⁸ This custody arrangement initially worked for a few months, but Ms. Wilson's visitation later became much more sporadic with her rarely taking the children overnight.

During that time, Ms. Wilson met Robert Wilson at her apartment complex in April of 2012, four months after moving out of Mr. Ferrand's home, and started dating him a few months later. In October of 2013, Mr. Wilson moved into Ms. Wilson's apartment. In November of 2013, Ms. Wilson and Mr. Ferrand argued over financial issues regarding the children when Mr. Ferrand asked Ms. Wilson to help provide financial assistance for the children. Also in November of 2013, Mr. Ferrand found out that Mr. Wilson had moved in with Ms. Wilson and objected to the children visiting in their home because of Mr. Wilson's mental health and alcohol issues.¹⁹ Ms. Wilson did not visit with her children from Thanksgiving of 2013 until the end of February of 2014. In February of 2014, Ms. Wilson found out that she was pregnant with Mr. Wilson's child.²⁰

On February 19, 2014, Ms. Wilson filed her second petition for protection from abuse against Mr. Ferrand.²¹ At that point, they had not resided together for over two years and Ms. Wilson had resided with Mr. Wilson for five months and was pregnant with his child. In that petition, Ms. Wilson alleged that the most recent incident of abuse was three months earlier, on November 20, 2013, when Mr. Ferrand threatened that if Ms. Wilson came around his house again, he was

¹⁸ Ms. Wilson later testified that she agreed to this arrangement because she "had no one else to help her with the children," she and Mr. Ferrand were "being civil to one another," and "it was in the best interest of the children ... at that point."

¹⁹ In his September 10, 2014 deposition, Mr. Wilson acknowledged that he suffers from post-traumatic stress disorder, depression, and anxiety; that he takes medication for these conditions and occasionally hydrocodone for pain; and that he consumes alcohol in front of the children.

²⁰ Ms. Wilson married Mr. Wilson on April 5, 2014.

²¹ Ms. Wilson filed this petition using the name Paula Stephanie Ferrand Harrell, although there is no indication in the record that Ms. Wilson legally changed her name back to Harrell.

going to “pop a cap in her head,” and also threatened that he would take the minor children out of state and disappear. Ms. Wilson did not allege that Mr. Ferrand threatened or abused the children in any manner. Also, without stating the dates of any alleged prior abuse, Ms. Wilson again described the previously mentioned 2001 shoving incident, before the children were born, and the previously mentioned 2008 choking incident, when the children were one-year-old.

Additionally in this petition, Ms. Wilson disclosed for the first time that Mr. Ferrand “has since been removed from childrens (sic) birth certificates and their last names have been changed.”²² Although in a later pleading verified by Ms. Wilson, she alleged that the Louisiana Office of Vital Records, “through its own efforts,” amended the birth certificates, she later admitted in sworn testimony that she in fact had Mr. Ferrand’s name removed from the birth certificates and the last names of the children changed on the birth certificates.²³ The domestic commissioner declined to issue a temporary restraining order against Mr. Ferrand on the allegations of this petition, but set the matter for hearing.

On February 21, 2014, two days after the domestic commissioner declined to issue a temporary restraining order against Mr. Ferrand, Ms. Wilson sent Mr. Ferrand an email in which she informed him directly for the first time that she had his name removed from the children’s birth certificates as their father and had their last names changed. She also told him in that email to never contact them and threatened to have him arrested for kidnapping if he picked the twins up. Five

²² The children’s birth certificates were amended on February 13, 2014, six days before Ms. Wilson filed her second petition for protection, to remove Mr. Ferrand as the father and change the last names of the children. The second petition for protection identifies the last names of the minor children as “Harrell,” despite the fact that the amended birth certificates do not identify anyone as the father and Ms. Wilson’s legal last name, both at the time of the children’s births and at the time of amendment of the birth certificates, was “Ferrand.”

²³ There is no explanation in the record as to how Ms. Wilson, with no notice or due process afforded Mr. Ferrand, and without a formal court proceeding, was able to have Mr. Ferrand’s name removed from the birth certificates as the father and have the children’s last names changed to a name that was not Ms. Wilson’s legal last name, either at the time of the children’s births or at the time of amendment of the birth certificates.

days later, on February 26, 2014, Mr. Ferrand filed a petition seeking custody of the minor children and requesting a custody evaluation.

In response, Ms. Wilson, having had Mr. Ferrand removed from the birth certificates as the children's father, filed exceptions arguing that Mr. Ferrand, as a non-parent, had no cause of action and no right of action for custody of the minor children. After several hearings before the domestic commissioner, a number of continuances of hearings, and several agreements reached by Ms. Wilson and Mr. Ferrand, Mr. Ferrand was able to maintain some visitation with the minor children up until July of 2015, at which time Ms. Wilson denied Mr. Ferrand any visitation with the children. At that time, the children were eight years old and had lived with Mr. Ferrand for six and a half of those years, always knowing him as their father.

On August 10, 2015, Ms. Wilson filed her third petition for protection from abuse against Mr. Ferrand, alleging that Mr. Ferrand abused her on that date. In that incident, Mr. Ferrand arrived at the children's school on their first day of school, just as he had done every year that the children were in school, and attempted to approach them to take their pictures. As Ms. Wilson rushed the children into the school and yelled at Mr. Ferrand that they were not his children and to leave them alone, a physical altercation ensued during which Mr. Ferrand grabbed Ms. Wilson's hair and knocked her to the ground. This incident was captured by the school's video surveillance system.

On August 14, 2015, Mr. Ferrand filed a petition for protection from abuse against Ms. Wilson based upon the same August 10, 2015 incident. The domestic commissioner issued temporary restraining orders against both Mr. Ferrand and Ms. Wilson, and after a hearing, protective orders against both Mr. Ferrand and Ms. Wilson. Both Mr. Ferrand and Ms. Wilson filed objections to the domestic

commissioner's orders and the matters were set for hearing on those objections, along with Mr. Ferrand's petition for custody, on September 9, 2015.

After trial of the matters on September 9, 2015, the trial court, analyzing this matter as a non-parent's petition for custody against a parent, found that Mr. Ferrand had failed to meet his burden to prove that the granting of sole custody to the children's mother would result in substantial harm to the children, as required by La. C.C. art. 133, and therefore denied his petition for custody. The trial court also found that Mr. Ferrand had perpetrated domestic abuse against Ms. Wilson and issued a protective order for life against Mr. Ferrand as it related to Ms. Wilson. Further, despite the fact that no allegations of any type of threats or abuse, physical or otherwise, were ever made against Mr. Ferrand regarding the minor children, the trial court issued a protective order against Mr. Ferrand as it related to the minor children until their eighteenth birthdays (in effect, a ten-year protective order despite the fact that there has never been an allegation that the children themselves have ever been abused).

On appeal of that judgment, this Court found that under the unique set of facts presented in this case, the trial court abused its discretion in denying Mr. Ferrand's request for a court-appointed evaluator to assist in the custody determination as contemplated under La. R.S. 9:331. Accordingly, we vacated the judgment of the trial court as it related to the denial of Mr. Ferrand's petition for custody and remanded the matter to the trial court for the purpose of appointing a mental health evaluator pursuant to La. R.S. 9:331 to perform a comprehensive custody evaluation. Additionally, in light of vacating the denial of Mr. Ferrand's petition for custody and finding no basis for the issuance of a protective order against Mr. Ferrand relating to the minor children, we also vacated that portion of

the trial court's judgment that issued a protective order relating to the minor children.²⁴

On remand, despite this Court finding no basis for a protective order against Mr. Ferrand in relation to the minor children, the trial court refused Mr. Ferrand's request to restore temporary visitation rights to him pending the outcome of the custody evaluation and retrial of his petition for custody. In accordance with this Court's instructions, the trial court appointed Dr. Van Beyer to conduct a custody evaluation regarding the minor children.

Following Dr. Van Beyer's evaluation, the domestic commissioner held a two-day hearing on Mr. Ferrand's motions to set custody and for reconciliation therapy. On February 22, 2018, the commissioner issued a judgment awarding joint shared custody of the two minor children, designating Ms. Wilson as the domiciliary parent, and ordering immediate commencement of reunification therapy. In his written findings of fact and reasons for judgment, the commissioner specifically found that the minor children had suffered and would continue to suffer substantial harm in Ms. Wilson's sole custody and that, considering the factors set forth in La. C.C. art. 134, it was in the best interests of the children that joint custody be awarded to Mr. Ferrand and Ms. Wilson.²⁵

²⁴ Mr. Ferrand did not appeal the protective order against him as it related to Ms. Wilson, and therefore this Court did not address that protective order in the first appeal.

²⁵ A non-exclusive list of factors the court may consider in determining the best interests of the child are set forth in La. C.C. art. 134 which provides:

The court shall consider all relevant factors in determining the best interest of the child. Such factors may include:

- (1) The love, affection, and other emotional ties between each party and the child.
- (2) The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.
- (3) The capacity and disposition of each party to provide the child with food, clothing, medical care, and other material needs.
- (4) The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.
- (5) The permanence, as a family unit, of the existing or proposed custodial home or homes.
- (6) The moral fitness of each party, insofar as it affects the welfare of the child.
- (7) The mental and physical health of each party.
- (8) The home, school, and community history of the child.
- (9) The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

Ms. Wilson filed an objection to the commissioner's ruling, and the trial court held another trial on Mr. Ferrand's petition for custody. After the re-trial, the trial court, rejecting the opinion of Dr. Van Beyer regarding substantial harm to the children and the best interests of the minor children, awarded Ms. Wilson sole custody of the two minor children, denied Mr. Ferrand any custody rights or visitation with the two minor children, and denied his Motion for Reconciliation Therapy. It is from this judgment that Mr. Ferrand now appeals.

DISCUSSION

Because Mr. Ferrand is not these children's biological father, and because at the time of their births he could not qualify as their legal father under Louisiana law, we are constrained to analyze this matter as a parent versus non-parent custody dispute.²⁶ La. Civil Code Article 133 governs a custody dispute between a parent and a non-parent, and provides as follows:

If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or otherwise to any other person able to provide an adequate and stable environment.

In our prior opinion, this Court set forth the appropriate analysis required by La. C.C. art. 133 as follows:

The Louisiana Circuit Courts of Appeal have determined that La. C.C. art. 133 requires a dual-prong test. This Circuit has set forth the burden a non-parent in a custody contest must meet under La. C.C. art. 133 as follows:

In a conflict between a parent and a non-parent, the parent enjoys the paramount right to custody of a child and may be deprived of such right only for compelling reasons. The test to determine whether to deprive a legal

(10) The willingness and ability of each party to facilitate and encourage a close and continuing relationship between the child and the other party.

(11) The distance between the respective residences of the parties.

(12) The responsibility for the care and rearing of the child previously exercised by each party.

²⁶ As pointed out in our prior opinion in this case, although many other states have utilized the doctrines of *in loco parentis*, psychological parent, and *de facto* parent to recognize the bond formed between a child and legal non-parent, no Louisiana cases have yet adopted or applied these doctrines in a non-parent custody dispute. *Ferrand*, 221 So.3d at 922-37.

parent of custody is a dual-pronged test: first, the trial court must determine that an award of custody to the parent would cause substantial harm to the child; if so, then the courts look at the “best interest of the child” factors to determine if an award of custody to the non-parent is required to serve the best interest of the child.

Thus, a non-parent seeking custody under La. C.C. art. 133 must show that an award of joint custody or sole custody to the parent would result in substantial harm to the child. A showing of substantial harm “includes parental unfitness, neglect, abuse, abandonment of rights, and is broad enough to include ‘any other circumstances, such as prolonged separation of the child from its natural parents, that would cause the child to suffer substantial harm.’” Under the current jurisprudence applying the “dual-prong” test of La. C.C. art. 133, the best interest of the child and, specifically, the factors set forth in La. C.C. art. 134, are not considered until *after* a finding of substantial harm. (citations omitted)

Ferrand, 221 So.3d at 919-20.

Thus custody contests involving a parent and non-parent present the confluence of 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. *Id.* at 918-919. While the interest of a parent in having a relationship with his children is manifestly a liberty interest protected by the Fourteenth Amendment’s due process guarantee, that right is not unconditional. *Id.*

Each child custody case must be viewed in light of its own particular set of facts and circumstances, and courts must consider the “overarching and overriding concern for the best interest of the child as well as the parent’s concomitant rights and responsibilities.” *Tracie V. v. Francisco D.*, 15-224 (La. App. 5 Cir. 9/21/15), 174 So.3d 781, 796. The Louisiana Supreme Court reiterated that “the overarching inquiry” in any custody contest is “the best interest of the child.” *Tracie F. v. Francisco D.*, 15-1812 (La. 3/15/16), 188 So.3d 231, 235. The Court emphasized that the best interest of the child is the paramount goal in all custody

determinations, including contests between a biological parent and a non-parent.

The Court stated:

According to 1993 Revision Comment (a), “the best interest of the child [is] the overriding test to be applied in all child custody determinations. The primacy of that test has been statutorily mandated in Louisiana since 1979 (C.C. Arts. 134, 181(A)(1992); Acts 1979, No. 718), and the best interest principle itself has been jurisprudentially and legislatively recognized at least since 1921.” Leaving no room for doubt that the best interest of the child is the test for “all child custody determinations,” (La. C.C. art. 131, 1993 Revision Comment (a)), a later comment to Article 131 stresses that “[t]his Article should be followed in actions to change custody as well as in those to initially set it.” La. C.C. art. 131, 1993 Revision Comment (d). Similarly, the comments to La. C.C. art. 134, which lists factors for determining the best interest of the child, indicates: “Article [134] should be followed in actions to change custody, as well as in those to fix it initially.”

Tracie F. v. Francisco D., 188 So.3d at 238-39.

Substantial Harm

Applying the overarching principles stated above, we first examine whether the trial court was manifestly erroneous in its determination that the sole custody of these children to Ms. Wilson, to the exclusion of Mr. Ferrand, does not result in substantial harm to these children.

There is no question that at the time this matter was re-tried in April of 2018, the children, who had not seen Mr. Ferrand in almost three years, were alienated from him and were experiencing anxiety and having some behavioral issues. Mr. Ferrand took the position that these issues were caused by the actions of Ms. Wilson in completely removing him as a presence in the children’s lives. Ms. Wilson, on the other hand, claimed that these issues were caused by an alleged pervasive atmosphere of domestic violence perpetrated by Mr. Ferrand. The trial court, in its written reasons for judgment, found that the record supports a history of violent behavior by Mr. Ferrand toward Ms. Wilson and that any alienation of

Mr. Ferrand from the children was caused by Mr. Ferrand's own conduct.²⁷ For the following reasons, we conclude that the trial court was manifestly erroneous in these determinations.

We first note the fact that despite his lack of legal recognition as a parent, Mr. Ferrand clearly fulfilled the role of the primary parent for these children during the first six years of their lives.²⁸ Of significance, this was not an after-the-fact arrangement reached to provide for children that Ms. Wilson already had at the start of her relationship with Mr. Ferrand. Ms. Wilson consciously *decided* to bring these children into this world as a co-parent with Mr. Ferrand, at Ms. Wilson's instigation, with full knowledge that Mr. Ferrand would fulfill the role of their father. Consequently, from the time of their births, Ms. Wilson *chose* for the children to know Mr. Ferrand as their father and to accordingly, call him "daddy."

Against this background, in January of 2012, Ms. Wilson decided to end her relationship with Mr. Ferrand and move out. At that time she chose, as she had done with her two older children, to leave her two younger children with their other parent.²⁹ The record reveals nothing that prevented Ms. Wilson from pursuing custody of the children during the two-year period after she left Mr. Ferrand,³⁰ or at least taking a more active role in parenting them.³¹

²⁷ In its reasons for judgment, the trial court discussed almost exclusively its findings regarding alleged domestic violence by Mr. Ferrand and did not even mention the conduct of Ms. Wilson toward her children regarding removing Mr. Ferrand from their lives.

²⁸ Although the record supports that both Ms. Wilson and Mr. Ferrand were involved in raising the children during the first few years of their lives, it was clearly Mr. Ferrand who took the initiative regarding the children's education once they started school. Furthermore, Ms. Wilson chose to leave the children with Mr. Ferrand when she moved out in January of 2012, when the children were four and a half years old, and she made no attempt to gain custody of them for the next two years.

²⁹ Ms. Wilson's older children were only four and two when she decided to relinquish domiciliary status to Mr. Dykes in order to live with Mr. Ferrand in New Orleans. Ms. Wilson's younger children were both four and a half when she decided to leave Mr. Ferrand and leave the children with him.

³⁰ Although Ms. Wilson attempts to portray her relationship with Mr. Ferrand as one involving domestic abuse, Ms. Wilson stayed with Mr. Ferrand for three months after filing a petition for protection in November, 2011, did not show up for a hearing on that petition, and never filed another petition for protection until two years after she had ended their relationship and left him, all the while leaving her children with Mr. Ferrand.

³¹ An email exchange dated May 20, 2013, between Mr. Ferrand and Ms. Wilson, indicates that when Mr. Ferrand emailed "[V] is sick and I need you to take [C] so I can take him to the hospital," Ms. Wilson replied, "drop her off I am at the pool." Further, Ms. Wilson's own testimony confirmed that when she did finally take custody of the children after two years, they asked her what had taken her so long to come and get them.

According to Ms. Wilson, when she left Mr. Ferrand, she left the children with him because she “had no one else to help her with the children,” she and Mr. Ferrand were “being civil to one another,” and “it was in the best interest of the children ... at that point.”³²

In February of 2014, after two years of the children living solely with Mr. Ferrand and sporadically visiting with Ms. Wilson, the whole dynamic of the custody arrangement between Ms. Wilson and Mr. Ferrand changed. At that time, Ms. Wilson had been dating Mr. Wilson for approximately eighteen months and they had been living together for five months. She was at that time pregnant by Mr. Wilson, her third intimate partner with whom she would have children.³³

Also at that time, on February 13, 2014, Ms. Wilson admittedly surreptitiously had Mr. Ferrand’s name removed from the children’s birth certificates as their father and changed the last names of the children.^{34, 35} On February 21, 2014, Ms. Wilson sent Mr. Ferrand an email in which she informed him directly for the first time that she had his name removed from the children’s birth certificates as their father and had their last names changed. She also told him in that email to never contact them and threatened to have him arrested for kidnapping if he picked the twins up. The amended birth certificates and Ms. Wilson’s email provide, in writing, the apparent motivation for all of Ms. Wilson’s actions, *i.e.*, to completely remove Mr. Ferrand from the children’s lives.

In furtherance of that goal, on February 19, 2014, after not being in a relationship with Mr. Ferrand or living with him for over two years, Ms. Wilson

³² In her September 10, 2014 deposition, when asked if she moved out with the children, Ms. Wilson responded that she “did move out with mine and the children’s stuff.”

³³ She later married Mr. Wilson on April 5, 2014.

³⁴ Although Ms. Wilson later filed a sworn pleading claiming that the Louisiana Office of Vital Records took this action on its own accord, she later directly contradicted that sworn claim by testifying under oath that she in fact had the children’s birth certificates changed.

³⁵ Although this same result may very well have been obtained if Ms. Wilson had pursued appropriate legal channels to affect the changes, the record is devoid of any explanation of how Ms. Wilson was able to have these changes made without affording Mr. Ferrand the basic due process rights of notice and an opportunity to be heard.

filed her second petition for protection from abuse against Mr. Ferrand, alleging that the most recent incident of abuse was three months earlier, on November 20, 2013, when Mr. Ferrand allegedly threatened her physically (if she tried to take the children away from him) and also allegedly threatened that he would take the minor children out of state and disappear. Ms. Wilson did not allege that Mr. Ferrand threatened or abused the children in any manner, nor did she allege any remotely recent incidents of alleged physical abuse against herself.³⁶ Also, without stating the dates of any alleged prior abuse, Ms. Wilson again described the same two undocumented, unreported, and uncorroborated prior incidents: the 2001 shoving incident, allegedly occurring thirteen years earlier, before the children were born, and the 2008 choking incident, allegedly occurring six years earlier, when the children were one-year-olds. Ms. Wilson did not allege any other physical abuse by Mr. Ferrand.³⁷

After having Mr. Ferrand removed from the children's birth certificates, Ms. Wilson, upon her first legal attempt to gain custody of the children after having left them with Mr. Ferrand for the prior two years, obtained legal custody of the children. From that point forward, over the next eighteen months, it is clear from the record that Ms. Wilson began her campaign to alienate the children from Mr. Ferrand. This agenda included, by her own admission, telling her eight-year-old children that the only person that they had ever known, since birth, as their father, was in fact not their father.

³⁶ In his September 10, 2014 deposition, Mr. Wilson, who had dated Ms. Wilson for the prior two years and had lived with her for the prior year, testified that he never saw Mr. Ferrand physically harm Ms. Wilson.

³⁷ In her deposition given seven months later, on September 10, 2014, Ms. Wilson confirmed that those two alleged incidents of physical abuse, occurring six and thirteen years earlier, respectively, were the only two incidents of physical abuse "as far as I can remember right now." Ms. Wilson did not contact the police, seek medical treatment, or file for a protective order regarding these two incidents, which apparently were not witnessed by any third party and were only alleged for the first time once her relationship with Mr. Ferrand had ended and the custody dispute regarding the children had begun. In September of 2015, Ms. Wilson also claimed to remember, for the first time, another choking incident that occurred fourteen years earlier, also in 2001, before the children were born. Like the other two alleged prior incidents, Ms. Wilson did not contact the police, seek medical treatment, or file for a protective order regarding this incident, which apparently was also not witnessed by any third party.

According to Dr. Marianne Walsh³⁸, a clinical psychologist hired by Mr. Ferrand to evaluate the children before the first custody hearing, this agenda also included Ms. Wilson telling VF II to call Mr. Ferrand “Vincent,” and to call Mr. Wilson “daddy,” and further telling him that he would be stolen or kidnapped by Mr. Ferrand.³⁹ And although Ms. Wilson denies telling her children that Mr. Ferrand is biologically female, Dr. Walsh testified that CF reported that “mommy says that daddy isn’t our daddy and she calls him ‘she’ and says that he’s not a man.” Dr. Walsh confirmed that not allowing the children contact with Mr. Ferrand would cause them stress and emotional problems and that they were confused by their mother telling them that Mr. Ferrand is a female. Specifically, Dr. Walsh testified that “this healthy relationship with their father is crucial to their psychological and emotional well-being ... [a]nd his consistent daily presence in their lives is also vital to their well-being.”

Dr. Karen Van Beyer⁴⁰, who was appointed by the trial court to perform a custody evaluation in accordance with instructions from this Court in our prior opinion, agreed with Dr. Walsh’s opinions and testified that the information being provided to the children by Ms. Wilson was confusing to them and that it was harmful to their emotional and psychological well-being to have Mr. Ferrand removed as a presence in their lives.

Contrary to Dr. Walsh’s and Dr. Van Beyer’s opinions, Ms. Wilson presented the testimony of Wendy Durant, a licensed counselor and play therapist,

³⁸ Dr. Walsh holds a doctorate of psychology and a master’s of psychology, with a specialization in child and family psychology. She has previously been accepted in Louisiana courts as an expert in the field of child psychology.

³⁹ According to Dr. Walsh, at the time she saw the children in April of 2015, they had a secure bond to Mr. Ferrand as their father. According to Mr. Wilson, in March or April of 2014, only a month after the children moved in with he and Ms. Wilson, it was the children themselves who asked if they could call him daddy.

⁴⁰ Dr. Van Beyer has a bachelor’s degree in psychology, a doctorate in sociology with a major area in social psychology, a master’s degree in social work with a primary area in children and family and mental health, and a post-doctoral fellowship in child psychiatry. She has a license in clinical social work and also teaches young psychiatrists how to do custody evaluations at the Tulane Department of Psychiatry. She has been accepted as an expert in these fields by various courts in the New Orleans area.

whom Ms. Wilson began taking the children to in October of 2014, almost three years after she had moved out of Mr. Ferrand's home and eight months after she had obtained custody of the children by surreptitiously removing Mr. Ferrand from their birth certificates.⁴¹ Ms. Durant was of the opinion that the children's behavioral issues were caused by the stress of having to visit with Mr. Ferrand. While it appears that Ms. Durant readily accepted Ms. Wilson's contention that there was a history of domestic violence perpetrated by Mr. Ferrand against Ms. Wilson, it does not appear that she considered the considerable upheaval that had occurred in the children's lives, particularly in the eight months immediately preceding when she began seeing the children.

Specifically, eight months prior to the first session with Ms. Durant, Ms. Wilson had surreptitiously removed Mr. Ferrand's name from the children's birth certificates and changed their last names; taken physical custody of the children from Mr. Ferrand, with whom they had lived their entire lives, warning Mr. Ferrand not to contact them under threat of being arrested for kidnapping; moved the children into her home with her new boyfriend, by whom she was pregnant at the time; changed the children's school; and most significantly, told her seven-year-old children, without the guidance or assistance of a mental health professional, that the person they had known since their births as their father, who had been their primary caretaker for at least the prior two years, was in fact not their father.⁴² Additionally, the children were somehow becoming aware, as per Dr. Walsh, that Mr. Ferrand was not biologically male.

⁴¹ Ms. Durant testified that she is not a psychologist and she refers to other professionals for mental health issues, and that she does not do custody evaluations.

⁴² Ms. Durant testified that the children were experiencing behavioral problems from the first time she saw them in October of 2014, and that they have called Mr. Ferrand "Vincent," not "daddy," from the first time she saw them. She also testified that Ms. Wilson never told her that the children had ever called Mr. Ferrand "daddy," calling into question the explanation that Ms. Wilson provided Ms. Durant regarding the relationship that the children shared with Mr. Ferrand over the first seven years of their lives.

Despite this significant upheaval in the children's young lives, it does not appear that Ms. Durant considered this to be the cause, or even a contributing factor, in the children's behavioral issues. In our opinion, this results in Ms. Durant's opinions being flawed and untenable. Furthermore, despite Ms. Wilson's conduct, statements and expressed goal of permanently removing Mr. Ferrand from the children's lives, Ms. Durant would have the children complete "home-work assignments" that the children would bring to Mr. and Ms. Wilson's home to be completed and then returned to her. Not surprisingly, the children's "home-work assignments" parroted much of Ms. Wilson's complaints about Mr. Ferrand. Ms. Durant's opinions were at least partially based upon these "home-work assignments."

Regardless, even Ms. Durant agreed with Dr. Walsh and Dr. Van Beyer that, generally, removing the father from a seven-year-old can have a significant impact on the child's mental health, "if it's a healthy relationship," the implication being that it was not a healthy relationship between Mr. Ferrand and his children. However, not only is there no proof in the record that Mr. Ferrand's relationship with the children was not healthy, there is not even an allegation to this effect. To the contrary, the record is clear that Mr. Ferrand had a very healthy relationship with the children, even acting as their primary provider and caretaker.⁴³

In support of this conclusion is the fact that when Ms. Wilson decided to end her relationship with Mr. Ferrand and moved out of his home in January of 2012, she chose to leave the children residing with Mr. Ferrand, and did so for the next two years. She later testified that it was in the best interest of the children at that

⁴³ We agree with Commissioner Rueben Bailey, who conducted the initial hearings regarding custody, who concluded that "[Mr. Ferrand] and the children formed a strong bond as child and parent, and [Mr. Ferrand] co-parented the children as their father with [Ms. Wilson] from their birth until January, 2012," and that the "children have lived in a wholesome and stable environment with [Mr. Ferrand]."

time.⁴⁴ Also, in an email dated April 28, 2012, three months after Ms. Wilson had ended their relationship and moved out of Mr. Ferrand's home, she wrote to Mr. Ferrand, "[t]hank you for the wonderful years that we did have and our two beautiful children. I will always love you just remember that." Finally, in none of the protective orders filed by Ms. Wilson against Mr. Ferrand did she ever allege that he abused the children.

The implication of an "unhealthy relationship" between Mr. Ferrand and the children can only refer to the history of domestic abuse as alleged by Ms. Wilson, a view that the trial court subscribed to in its reasons for judgment. However, for the following reasons, we find that the trial court's finding of a history of domestic violence is manifestly erroneous.

Throughout this litigation, Ms. Wilson has alleged and testified regarding a total of four incidents of alleged physical abuse over a fifteen-year period: 1) an incident in 2001, at the beginning of their relationship, regarding a struggle over a purse that resulted in her being pushed into a wall; 2) a second incident, also in 2001, regarding a dispute over laundry⁴⁵; 3) a choking incident in June or July of 2008, when the children were almost a year old, regarding the treatment of VF II; and 4) the school yard incident that occurred four and a half years after she had ended her relationship with Mr. Ferrand.

Regarding the first three incidents, at the times that they allegedly occurred, Ms. Wilson did not contact the police, did not report the incidents to any third party, did not seek medical treatment, and did not file a petition for protection against Mr. Ferrand. Ms. Wilson does not allege that there were any witnesses to any of these alleged incidents. Ms. Wilson made her first allegations regarding

⁴⁴ It is also abundantly clear that it was the most convenient arrangement for Ms. Wilson at that time, as she started a new relationship and a new family.

⁴⁵ Ms. Wilson never mentioned this incident in any of her petitions for protection, did not mention it at the time of her deposition in September of 2014, and only remembered it, fourteen years after it allegedly occurred, when she testified at the custody hearing.

these incidents thirteen years, and three and a half years, respectively, after they had occurred, at the time that she was ending her relationship with Mr. Ferrand. Therefore, these first three alleged incidents were not corroborated by any independent evidence, and were simply Ms. Wilson's word against Mr. Ferrand's word.

Mr. Ferrand acknowledged that there was an incident regarding the purse in 2001 and an incident regarding VF II in 2008, but gave a different version of each incident and denied that he had physically abused Ms. Wilson.⁴⁶ The trial court, after hearing the testimony of Ms. Wilson and Mr. Ferrand, found Ms. Wilson to be credible. Although not dispositive of our resolution of this case, we nonetheless find that, because of serious issues regarding Ms. Wilson's lack of credibility, the trial court was manifestly erroneous in this determination.⁴⁷

Specifically, and astonishingly, is Ms. Wilson's claim, in an August 9, 2010 email to her Aunt Tina, which she first revealed in her November 15, 2011 petition for protection, that "after all these years I found out yes it is true he is a female, but lives as a man ... and it explained why I never got to see him naked." It is simply very difficult for us to believe that during a ten-year intimate relationship, that Ms. Wilson never saw Mr. Ferrand naked and that it took her ten years to determine that in fact Mr. Ferrand was biologically a female.⁴⁸

Although Ms. Wilson's claim, standing alone, is not credible, it is also contradicted by later testimony given by Ms. Wilson in her deposition.

Specifically, when asked if she and Mr. Ferrand had ever discussed marriage, she

⁴⁶ Mr. Ferrand denied that there was a 2001 incident regarding laundry.

⁴⁷ "Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination." *Stobart v. State through Dep't of Transp. & Dev.*, 617 So.2d 880, 882 (La. 1993); *Troxclair v. Liberty Pers. Ins. Co.*, 17-520 (La. App. 5 Cir. 2/21/18), 239 So.3d 1067, 1069-70.

⁴⁸ Regarding this claim, Judge Murphy, in his concurrence in our first opinion in this matter, wrote: "[g]iven this most hard to believe assertion, which certainly raises questions as to [Ms. Wilson's] credibility, it is difficult to understand how the trial judge accepted [Ms. Wilson's] version of the school yard incident." *Ferrand*, 221 So.3d at 945.

denied that they had, stating that it is not legal “for two women to get married.”⁴⁹ Additionally, when asked about their decision to have children through *in vitro* fertilization, Ms. Wilson stated that she wanted to have more children and she “knew she couldn’t get me pregnant.” Furthermore, Ms. Wilson testified at trial that “Vincent lived a life where I wasn’t allowed to let anybody know he was a female,” another clear indication that, contrary to her false assertion to her Aunt Tina, Ms. Wilson was well aware that Mr. Ferrand was biologically female.

Also affecting Ms. Wilson’s credibility is the duplicitous means by which she had Mr. Ferrand’s name removed from the children’s birth certificates. Ms. Wilson filed a verified pleading claiming that the Office of Vital Records had Mr. Ferrand’s name removed on its own accord, but then she directly contradicted this claim when she later testified under oath that she in fact had had Mr. Ferrand’s name removed.

Additionally, although Ms. Wilson adamantly refused to admit that she had participated in a “marriage ceremony” with Mr. Ferrand, she acknowledged that she herself prepared the “wedding announcement” stating “we are very proud to share the happy news Paula Stephanie Harrell and C. Vincent Ferrand were married in a private ceremony on Saturday, the twelfth of April, two thousand and three in Cherokee, North Carolina.” And although Ms. Wilson knew that she was never legally married to Mr. Ferrand, she testified that, in a prior judicial proceeding involving her older children, “[w]hen I was going through court with my ex, we did say that we were married,” a direct admission that she misled the judge in a prior custody proceeding.

Lastly, we note that after the alleged 2001 incidents, Ms. Wilson chose to remain in a relationship with Mr. Ferrand for eleven years and, through the

⁴⁹ Although this statement was not made until her deposition in September of 2014, it is her explanation of the reason that they had never discussed marriage during their eleven-year-relationship.

additional efforts and expense of *in vitro* fertilization, have children with him, and further chose to remain with him for three and a half years after the alleged 2008 incident. And three months after she left Mr. Ferrand's home, she sent him an email stating, "[t]hank you for the wonderful years that we did have and our two beautiful children. I will always love you just remember that." And when she left, she left her children with Mr. Ferrand for two years. These facts cast serious doubt on Ms. Wilson's portrayal of a pervasive volatile atmosphere in their relationship.

In light of the above we find that the trial court was manifestly erroneous in its determination that Ms. Wilson was credible. However, regardless of this conclusion, and more importantly, we find that these first three incidents of alleged domestic violence clearly have no bearing on the children's emotional and psychological well-being. The 2001 incidents occurred six years before the children were born, and the 2008 incident occurred just before they turned one. There is simply no possibility that, even if these incidents occurred, they had any effect on these children.

Consequently, the only act of physical violence that could potentially have had an effect on the children is the 2015 school yard incident, a portion of which they undoubtedly saw. As to this incident, although the parties dispute who instigated the physical portion of this confrontation, we agree that Mr. Ferrand committed an act of physical violence against Ms. Wilson. And while we certainly do not condone any act of physical violence, and recognize that Mr. Ferrand exercised extremely poor judgment in this incident, we must note two important factors.

First, Ms. Wilson has never alleged, much less proven, a single act of physical violence by Mr. Ferrand between the time of the alleged 2008 incident, when the children were only one year olds, up until the 2015 school yard incident

seven years later.⁵⁰ A single act of physical violence, by its very nature as a single act, cannot constitute a *history* of domestic violence.⁵¹

Secondly, and more importantly, when considering the cause of the psychological and behavioral issues suffered by these children, which is the substantial harm to these children, we note that Ms. Durant testified that these issues were present in the children when she first saw them in October of 2014. This was ten months *prior* to the August of 2015 school yard incident. She further testified that the children were already alienated from Mr. Ferrand at that time, referring to him as “Vincent” and calling Mr. Wilson “Daddy.” Clearly, an August of 2015 incident cannot be the cause of problems that the children were experiencing in 2014. By the time of the August of 2015 school yard incident, the children had already suffered substantial harm.

In our opinion, it is abundantly clear that the cause of the psychological and behavioral problems being experienced by these children, as early as October of 2014, was the conduct of Ms. Wilson toward them once she embarked upon her campaign to alienate them from Mr. Ferrand and to excise him from their lives. This conduct by Ms. Wilson has clearly resulted in substantial harm to these children and has clearly demonstrated that an award of sole custody to Ms. Wilson, to the exclusion of Mr. Ferrand, will enable this conduct to continue resulting in continued substantial harm to these children.

⁵⁰ Although during this period Ms. Wilson did allege a November 2011 and a November 2013 verbal threat, both of which were in response to her threat to take the children from Mr. Ferrand, there is no proof in the record that the children witnessed either of these alleged verbal threats.

⁵¹ The trial court also supports its finding of a history of violent behavior by Mr. Ferrand toward Ms. Wilson by noting that Jennifer Snowden, the teacher who witnessed the school yard incident, testified that this was the third “incident” at the school and that Mr. Ferrand has now been banned from the school. The record is devoid of any specific information regarding these two prior “incidents.” We note that no witness, including Ms. Wilson or Ms. Snowden, testified as to any specifics regarding the two prior “incidents,” and the letter from the Superintendent of Schools banning Mr. Ferrand appears to indicate that the other “incidents” involved Mr. Ferrand appearing at the school to see his children, which did not involve Ms. Wilson and has nothing to do with domestic violence. There is absolutely nothing in the record indicating that these two other “incidents” support a finding of a history of violent behavior by Mr. Ferrand.

Furthermore, it is apparent from Ms. Wilson's history that when she changes direction in her life, she makes decisions regarding her children that are convenient to the pursuit of her own interests and then later uproots her children's lives when it is convenient for her to do so. Such indecision and waffling does not provide children the stability that they need in their lives, and likewise results in substantial harm to them. We therefore conclude that the trial court was manifestly erroneous in its determination that the award of sole custody to Ms. Wilson, to the exclusion of any contact between the children and Mr. Ferrand, does not result in substantial harm to these children.

Best Interests of Children

Dr. Walsh testified that "this healthy relationship with [Mr. Ferrand] is crucial to their psychological and emotional well-being ... [a]nd his consistent daily presence in their lives is also vital to their well-being." Dr. Van Beyer agreed with the opinion of Dr. Walsh and further testified that the children's continued alienation from Mr. Ferrand would continue to harm them into the future. She testified that it is in the children's best interest that they be reintegrated with Mr. Ferrand under the supervision of a therapist in accordance with a reconciliation plan.

The trial court rejected the opinion of Dr. Van Beyer primarily for two reasons: 1) because Dr. Van Beyer did not believe that there was a *pattern* of domestic violence by Mr. Ferrand; and 2) because Dr. Van Beyer, after viewing the video tape of the school yard incident and interviewing both Ms. Wilson and Mr. Ferrand regarding the incident, did not believe that the *physical* confrontation was *instigated* by Mr. Ferrand.

Having previously found that the trial court was manifestly erroneous in its determination that there was a history of domestic violence perpetrated by Mr. Ferrand against Ms. Wilson, we also conclude that it was manifest error for the

trial court to reject Dr. Van Beyer's well-reasoned opinion regarding the best interests of the children simply because she likewise did not find that there was a *pattern* of domestic violence.

Regarding the school yard incident, Dr. Van Beyer specifically testified that the behavior of both parties was inappropriate and that she viewed it as a "mutual post-separation instigation of domestic violence between two parties." The incident clearly began, even as acknowledged by Ms. Wilson, when Mr. Ferrand appeared on the children's first day of school and wanted to take their pictures. Rather than simply allow Mr. Ferrand to take the pictures, Ms. Wilson yelled at Mr. Ferrand that they were not his children and to leave them alone. Mr. Ferrand persisted and Ms. Wilson, as she reported to Dr. Van Beyer, "exploded." The video tape clearly shows that Ms. Wilson had already entered the school grounds ahead of her husband and Mr. Ferrand when she turned around and went back to confront Mr. Ferrand. Once Ms. Wilson and Mr. Ferrand were face to face, their versions differ as to how the physical portion of the confrontation developed. What is clear from the video tape is that Mr. Ferrand grabbed Ms. Wilson by the hair and flung her to the ground, which is clearly an act of domestic violence. However, the fact that Dr. Van Beyer, in her view, did not believe that the *physical* confrontation was *instigated* by Mr. Ferrand, also does not warrant the wholesale rejection of her well-reasoned opinion regarding the best interests of these children.⁵²

Rather than evaluate the best interests of these children based upon a single post-separation incident of domestic violence, occurring three and a half years after the parties had separated, their best interests must be evaluated, as was done by Dr. Van Beyer and Commissioner Bailey, based upon the established bonds and

⁵² As previously stated, Judge Murphy, in his prior concurrence, even with the benefit of the video tape, expressed skepticism regarding Ms. Wilson's version of how the school yard incident occurred.

relationships they have enjoyed with both Mr. Ferrand and Ms. Wilson during their entire lifetimes, as well as the other relevant factors articulated in La. C.C. art. 134.

Finally, we stress that this case is not about Ms. Wilson or Mr. Ferrand; this case is about the minor children and what is best for them. Our analysis does not focus upon the parental rights of Ms. Wilson or the rights of Mr. Ferrand, or on what is fair to Ms. Wilson or fair to Mr. Ferrand. Our focus in reaching our determination is the best interests of the children. In our view, we agree with the common sense opinions of Drs. Walsh and Van Beyer, that it is not in the best interests of children, especially at the young age of eight, to be removed from a person that they have always known as their father, or to be told that the person that they have always believed to be their father is in fact not their father, or further to be told that their father is not biologically male (a concept which, at that age, they probably would not understand). In effect, Ms. Wilson has *chosen* to punish her children for decisions that she made in what she perceived at the time to be in her own best interests, but that she now regrets. To be told these things at a young age and to be removed from the only person that they have known since birth as their father, for no other reason than Ms. Wilson has changed her mind, clearly results in substantial harm to these children and is not in their best interests. We conclude that the trial court was manifestly erroneous and clearly wrong to find otherwise.

CONCLUSION

For the foregoing reasons, we reverse those parts of the May 29, 2018 judgment of the trial court that denied Mr. Ferrand's motion to set custody, sustained Ms. Wilson's objection to the domestic commissioner's February 22, 2018 Order, granted sole custody of the minor children to Ms. Wilson, and denied reconciliation therapy. Further, due to the complicated history of this particular matter, we render judgment immediately instituting reconciliation therapy for Mr.

Ferrand and the two minor children with Dr. Karen Van Beyer, with the goal of achieving, within the next three months, joint shared custody of the minor children between Mr. Ferrand and Ms. Wilson consistent with, and within the parameters of, the custody plan set forth in Domestic Commissioner Bailey's February 22, 2018 order. In furtherance of this goal, we order Mr. Ferrand and Ms. Wilson to both contact Dr. Van Beyer within seven days of this opinion to schedule appointments to immediately commence reconciliation therapy, with the cost of said therapy to be born equally by Mr. Ferrand and Ms. Wilson. We further order both Mr. Ferrand and Ms. Wilson to cooperate with, and follow the recommendations of, Dr. Van Beyer, in accordance with the best interests of the minor children, in order to achieve both 1) reconciliation between Mr. Ferrand and the minor children; and 2) the stated goal of joint shared custody within the next three months. Additionally, we remand this matter to the trial court with instructions to set a review hearing, to be held within 120 days of this opinion, for the purpose of 1) receiving a report from Dr. Van Beyer on the progress of the parties toward reconciliation between Mr. Ferrand and the minor children; and 2) the finalization of a joint shared custody order between Mr. Ferrand and Ms. Wilson regarding the minor children.

REVERSED AND REMANDED
WITH INSTRUCTIONS

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
STEPHEN J. WINDHORST
HANS J. LILJEBERG
JOHN J. MOLAISSON, JR.

JUDGES



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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 6, 2019** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in blue ink that reads "Curtis B. Pursell".

CURTIS B. PURSELL
CLERK OF COURT

18-CA-618

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE STEPHEN D. ENRIGHT, JR. (DISTRICT JUDGE)
SHAMA FAROOQ (APPELLEE)

MAILED

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