TEXAS LAWYER

State courts are refining the concept of 'psychological parent'

Elisa M. Reiter and Daniel Pollack | January 5, 2022

What You Need to Know

- Numerous states have set legal precedents regarding child custody disputes where the non-biological parent is determined to be a "psychological parent" and is therefore able to retain custody.
- A number of state courts have recently rendered opinions further refining this delicate area of law: Louisiana, Alaska, Idaho and Texas.
- In an era where it takes a village to raise a child, should Congress and State legislators take further action to assure that psychological parents also have legal rights?

Numerous states have set legal precedents regarding child custody disputes where the non-biological parent is determined to be a "psychological parent" and is therefore able to retain custody. In 1973, Goldstein, Freud, and Solnit, wrote their landmark book, *Beyond the Best Interests of the Child*. They opined:

Whether an adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

In *Troxel v. Granville,* the Supreme Court of the United States held that parents have a protected liberty interest in the care, custody and control of their children that is a fundamental right protected by the Due Process Clause. Notwithstanding this precedent, South Carolina's "Psychological Parent Doctrine " is not atypical of the way other states approach the issue of the concept of being a "psychological parent." Enunciated by a Court of Appeals of South Carolina in 2006, it permits a "psychological parent" — read that as someone who is not a parent — to seek custody of or to be awarded the right to have access to and rights to periodic possession of or visitation with a child. To prove this relationship exists, there is a four-prong test. The petitioner must demonstrate:

- That the natural or adoptive parent[s] consented to and fostered the petitioner's formation and establishment of a parent-like relationship with the child;
- That the petitioner and the child lived together in the same household;
- That the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care without an expectation of financial compensation;

- That the petitioner has acted in a parental role long enough to develop a bonded, parental relationship with the child.

A number of state courts have recently rendered opinions further refining this delicate area of law.

Louisiana*: Cook v. Sullivan,* No. 2020-C-01471 (La. 2021).

With blended families on the rise, more and more situations arise where third parties seek to assert standing, despite the fact that the individual is not a biological parent nor an adoptive parent. Such was the case in the recent case of Cook v. Sullivan. In that case, the issue presented was whether the trial court properly applied the law in awarding joint custody to Sharon Sullivan, the biological parent, and to Billie Cook, Ms. Sullivan's former same-sex partner. The Louisiana court of appeal reversed the trial court, finding that an "analysis of the best interest of the child under La. Civ. Code art 134 was not warranted, because the evidence did not show that an award of sole custody to" the biological parent, Sharon Sullivan, "would result in substantial harm to the child." The Louisiana Supreme Court affirmed the appellate court.

Cook and Sullivan had a romantic relationship, and began to live together in 2002. Sullivan gave birth to a child "naturally conceived through intercourse with a friend and co-worker, David Ebarb" on December 31, 2009. Ebarb's name was excluded from the child's birth certificate; the child was given the name "Cook-Sullivan". The child resided with Cook and Sullivan until shortly after Cook and Sullivan separated in February 2013. The parties never married, nor did they enter into a domestic partnership. Cook never adopted the child formally. Following Cook and Sullivan's separation, they had shared custody. They began with

alternating weeks of possession, then modified to Cook having possession of the child every other weekend. In July, 2016, Sullivan stopped permitting Cook access. Cook then filed suit, seeking to establish parentage, custody and support on Jan. 11, 2017.

After a trial on the merits began, the trial court appointed a psychologist to conduct an evaluation. Once the initial child custody report was completed, the trial court asked the psychologist, Dr. Visconte, to supplement the report, and to implement an access schedule for Cook. After Dr. Visconte submitted a second and final report, the trial resumed. In addition to Dr. Visconte's testimony, testimony was presented from a licensed marriage and family therapist who had counseled with the child for emotional issues. The parties, the child's biological father, and several other witnesses testified in regard to the parties and their relationship with the child. The trial court observed that:

…disputes between same-sex individuals who are living in the same household and where one of them conceives a child through assisted reproduction methods or adopts a child are clearly distinguishable from a traditional third-party dispute with a biological parent.

The trial court determined that Cook was a "legal parent" per La. Civ. Code art 133, by looking at six factors:

1. The parties entered into and engaged in assisted reproduction measures, voluntarily and jointly planned, which resulted in conception by one of the parties;
2. The parties resided in the same household before and for a substantial time after the birth of the child sufficient to form a parental bond;
3. The non-biological parent engaged in full and permanent responsibilities and caretaking of the child without expectations or compensation;

4. The non-biological parent acknowledged publicly and held (herself) out to be a parent of the child;
5. The non-biological parent established a bonded and dependent relationship with the child of a parental nature; and
6. The biological parent supports and fostered the bonded and dependent relationship between the child and the non-biological parent.

What is a psychological *de facto* parent? How is the relationship proven to a (Louisiana) trial court?

The non-biological parent must establish parentage by 'clear and convincing' evidence of the above-mentioned factors. The requirement to show substantial hard to the child is not an evidentiary requirement for a parent under Louisiana prevailing custody/visitation statutes and case law, only the best interest requirement sent (sic) forth in La. C.C. Art 134. If the non-biological parent establishes parentage then the same parental rights attach as those of the biological parents and then only the best interest test applies along with the change in legal burden to preponderance of the evidence.

The appellate court lauded the trial court's reasoning and attempts to serve the best interest of the child, noting, however, that it is not the judiciary's role to fill in legislative gaps. The best interest of the child is the ultimate goal in Louisiana custody matters. Each case is viewed individually, based on its own facts and the relationship of the parties involved. The first step in cases involving a parent versus a non-parent, in Louisiana, is to first determine if an award of custody to the parent would result in significant harm to the child. If there is risk of harm to the child, then the court should look to "best interests." The Louisiana Supreme Court therefore held that:

In an initial custody battle, the non-parent bears the burden of proving by clear and convincing evidence that joint or sole custody to the parent would cause significant harm to the child. Despite the U.S. Supreme Court's holding in *Obergefell*, the Louisiana Legislature has yet to address the issues posed by children of same sex relationships, nor has it recognized in loco parentis, de facto parent, nor psychological parent relationships. The Louisiana Supreme Court therefore held in *Cook v. Sullivan* that a joint custody ruling was legal error, as the ruling essentially ended Sullivan's right as a biological parent to "manage the care, custody and control of her child, and deprives the child of her right to the full companionship of her biological mother." The Louisiana Supreme Court also reviewed the testimony of the child custody evaluator, Dr. Visconte, and other evidence reflecting that the child was "bright, happy, creative, energetic, articulate, caring, intelligent and well rounded. Sole custody to Sullivan was deemed appropriate, as Cook had not satisfied her burden to prove that Cook was an unfit parent. The net result: the intermediate appellate court ruling was affirmed, and Cook lost her status as a legal parent with the right to joint custody of the child.

Alaska: *Rosemarie P. v. Kelly B.,* Supreme Court No. S-17960, October 8, 2021.

In another recent case involving two women living together as domestic partners, one of the women had a child via artificial insemination, while the other helped raise the child despite never legally adopting the child. Following the partners' separation, the biological mother (Rosemarie) refused contact between her former partner (Kelly) and the child. That refusal prompted the former partner to petition for custody. The trial

court awarded shared custody, prompting the biological mother to appeal.

In contrast to the stance of the Louisiana court, the Alaska Supreme Court affirms shared custody. Kelly was intimately involved in every aspect of the child's daily life, including feeding, bathing and playing with the child. The child addressed Rosemarie as "mommy" and Kelly as "mommo". Among Kelly's witnesses was the child's preschool teacher, who testified: "[T]his was most definitely a family unit. . . [I]t has never been a question in my mind that [the child] has two moms." Rosemarie contradicted some of Kelly's witnesses, trying her best to paint Kelly as "more like a stepparent than a mother," characterizing Kelly as "impatient, angry, and occasionally violent toward the child," alleging that there was one incident when Kelly shook the child while he was in his car seat, scaring Rosemarie.

Rosemarie's witnesses depicted Kelly's relationship with the child as "more punishing" including withholding possessions from the child and threatening the child. However, a neighbor who so testified admitted that she had never observed Rosemarie using physical discipline to punish the child.

Another focus of the trial court's hearing had been Kelly's mental health, as Kelly had been "diagnosed with Bipolar Disorder in the mid-1990s after a traumatic breakup". An expert diagnosed Kelly with Major Depressive Disorder of mild severity, and her interpersonal style was depicted as "warm, friendly and sympathetic … . She is equally likely to be caring [as] controlling". Rosemarie also testified that Kelly could be irritable and erratic if not on medication.

At the conclusion of the hearing, the superior court requested written closing arguments, directing the parties to address "equal protection or things like that from other states." Kelly addressed *Obergefell v. Hodges*. In a written order, the superior court found that Kelly was the child's "legal parent under the [legitimation] statute". Some of the factors considered by the superior court included:

1. The parties lived together for 14 years and had a commitment ceremony prior to *Obergefell*;
2. Rosemarie voluntarily listed Kelly as a guardian of the child on official documents;
3. The parties raised the child together, including admonishing the child that he had two moms;
4. The parties discussed all major points of raising the child; and
5. The court ignored Kelly's failure to adopt the child as being the result of poor legal advice.

The Alaska Supreme Court notes that its courts "consider various factors to determine whether a third party is a psychological parent, including the length of the relationship with the child, the age and opinion of the child, and whether there is a 'strong and heartfelt bond' between the adult and the child". The burden of proof, given the nature of the parent child relationship, is clear and convincing evidence. The Alaska Supreme Court looks at the factors disjunctively rather than conjunctively, to wit: "a third party seeking custody — such as a psychological parent — must prove 'by clear and convincing evidence' *either* 'that the parent is unfit *or* that the welfare of the child requires the child to be in the custody of the [third] party". The opinion continues:

The record provides clear support for the findings that Kelly was the child's psychological parent and that separating them would be detrimental to the child … evidence supports the findings that (1) Kelly

has been present in the child's life daily since birth and (2) the child considers Kelly a parent.

The Alaska Supreme Court also finds that the custody award did not violate Rosemarie's constitutional rights, in that Kelly is characterized as the child's psychological parent. The Alaska legitimation statute uses sex-neutral language now, while in the past, the statute used gender specific language; consequently, the Alaska Supreme Court does not "adjudicate whether women — especially those in same-sex relationship — were non-biological parents".

Idaho*: Gatsby v. Gatsby*, Docket No. 47710, September 24, 2021.

The Gatsby case addresses the custody rights of a woman whose same-sex former spouse underwent artificial insemination from semen provided by a donor during the ladies' marriage. Appellant Linsay files her appeal, seeking reexamination of Idaho law regarding insemination, paternity and parental rights in light of *Obergefell*. A magistrate's court held that Linsay had no parental rights as she lacked a biological connection to the child. The district court affirmed the holding, as Linsay did not comply with the Artificial Insemination Act ("AIA"). On appeal, Linsay argues that the lower courts' denying her parental rights due to lack of a biological connection to the child violates the Equal Protection and Due Process clauses of the U.S. Constitution, further contending that she complied with the AIA.

The Idaho Supreme court affirms the lower courts' decisions; the AIA is the controlling statute, and Linsay failed to comply with the AIA. The magistrate's court found that "Kylee is the natural, biological parent of [the child] … .[and] has a fundamental constitutional and statutory right

to the custody, care and control of the child". Linsay is unable to prevail on the basis of the argument that a child born during a marriage is a child of the marriage, as the parties conceded that the child's biological parents are Kylee and the sperm donor. These facts overcome the marital presumption that a child born during the marriage is a child of the marriage. The presumption is overcome by clear and convincing evidence.

The AIA mandates that at the time the child is conceived, that the parties file a specific "Request and Consent for Artificial Insemination" form. Linsay argues that she stands in the place and stead of a the "mother's husband" for the purposes of asserting parental rights, i.e., "she could satisfy Idaho Code section 39-5405(3) which provides that 'mother's husband' will have parental rights 'if the husband conceited to the performance of artificial insemination'. The Idaho Supreme Court notes that an amendment to the AIA does not impact its analysis, as Linsay "never obtained parental rights to the child, with whom she has no legal or biological relationship". Further analysis of the underlying facts includes the magistrate court finding that Linsay warranted no right to custody nor access because of:

1. Severe toxicity in the relationship with Kylee;
2. Linsay not evidencing connection with the child in a period that she had sole custody, in that she left the child with others for 31 days in a 180 day period;
3. Kylee's relationship with the child is healthier than Linsay's relationship with the child;
4. Linsay created conflict for the child in the way she treated the child's longtime daycare provider whom the child viewed as a grandparent figure;
5. The existing joint custody schedule was not created for the child's stability;
6. Linsay lied to the court; and
7. While Kylee may have a history of violence, that history does not place the child in danger.

The Idaho Supreme Court holds that the AIA is the controlling statute, and further, that the AIA is constitutional as it can be read and interpreted in a gender-neutral fashion. Ironically, in a strongly worded dissent, Justice Stegner notes that the "majority's rigid interpretation of the AIA is not only incorrect as a matter of law, but also turns a blind eye to Idaho's public policy favoring legitimacy."

Texas: In Re C.J.C., 19-0694, April 22, 2020.

The Texas Supreme Court rendered a unanimous verdict in In Re C.J.C., holding that '[t]he presumption that the best interest of the child is served by awarding custody to [a] parent is deeply embedded in Texas law.' In the underlying case, the child's mother died after a modification case was initiated. The trial court granted rights to a non-parent (the former fiancé of the deceased mother) over the objection of the child's father. The Texas Supreme Court held that a government may not "infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better decision' could be made." Texas jurisprudence underscores this fundamental right, and we too recognize that it gives rise to a "legal presumption" that it is in a child's best interest to be raised by a parent … the fit-parent presumption is "deeply embedded in Texas law" as part of the determination of a child's best interest.

In 2019, the U.S. Census Bureau, for the first time, included statistics for households with same-sex parents. It wrote that according to "estimates from the 2019 Current Population Survey Annual Social and Economic Supplement (CPS ASEC), there are 543,000 same-sex married couple households and 469,000 households with same-sex unmarried partners

living together. This compares to 61.4 million opposite-sex married and 8 million opposite-sex unmarried partner households."

One out of three marriages in the United States are likely to include blended families, as in In Re C.J.C. Are legislatures being short-sighted or are they being puritanical? The best interests of children remain of primary concern. In an era where it takes a village to raise a child, should Congress and State legislators take further action to assure that psychological parents also have legal rights?

Elisa Reiter *is a Senior Attorney at Underwood Perkins, P.C. She is double Board Certified in Family Law and Child Welfare Law by TBLS.*
Contact: ereiter@uplawtx.com.

Daniel Pollack, *MSW, JD is a Professor at Yeshiva University's School of Social Work in New York. Contact: dpollack@yu.edu.*