

Judgment rendered July 25, 2012.
Application for rehearing may be filed
within the delay allowed by art. 2166,
La. C.C.P.

No. 47,491-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

HEATH CAPLES

Plaintiff-Appellant

Versus

ALESHA CAPLES

Defendant-Appellee

* * * * *

Appealed from the
Fourth Judicial District Court for the
Parish of Ouachita, Louisiana
Trial Court No. 2002-1758

Honorable Benjamin Jones, Judge

* * * * *

JACK WRIGHT, JR.

Counsel for Appellant,
Heath Caples

CHARLES R. JOINER

Counsel for Intervener-Appellee,
Elizabeth Stewart

* * * * *

Before DREW, MOORE and LOLLEY, JJ.

UNPUBLISHED APPENDIX ATTACHED.

DREW, J.:

Heath Caples seeks a reversal of a trial court judgment awarding custody of his minor child, K.C., now age 10, to Elizabeth Stewart (“Stewart”), the maternal grandmother. We affirm.

FACTS

Heath divorced K.C.’s mother, Alesha Caples, in 2002. She was granted sole custody of K.C. by stipulation. The reality is that K.C. has lived with her grandmother at all times in her young life.¹

In 2003, Heath filed a rule to change custody. The parties then entered into a stipulated judgment reaffirming custody in favor of Alesha, visitation to Heath, and including a provision that Heath take anger management classes.

Heath filed another rule for custody in December 2010, alleging a change in circumstances since the initial stipulated judgment, in that Alesha was not participating in the rearing of the child, and was not capable of properly doing so.

Before any action was taken on the rule for custody, Stewart filed a petition for intervention in January 2011, requesting that she be appointed primary custodian. Alesha has aligned with her mother, who asserts that she provides a wholesome and stable environment for K.C.

Stewart alleges that Heath:

- has a long history of substance abuse;
- has a criminal history involving alcohol, drugs, and domestic violence;

¹The longest K.C. has ever been continuously outside of Stewart’s home is one week.

- has threatened suicide;
- has a poor history of providing child support, until very recently;² and
- has been treated with Suboxone for his drug problem for two years.³

Stewart's home is the only home that K.C. has ever known. Several of K.C.'s relatives testified that she would be "crushed" or "destroyed" if she did not continue to live with Stewart.

Established factors relative to Stewart include that:

- she admits having several boyfriends stay overnight on the couch;
- she went on a week-long cruise with a male friend;
- she is currently dating a doctor;
- she cleans houses for a living, earning \$1,700 a month;
- she has no formal education;
- she has undergone some cosmetic surgical procedures; and
- she lied about her income in order to receive food stamps.

Stewart expressed concern about Heath Caples' insensitivity and cruelty to his daughter about her weight problem. Stewart also testified that when Heath and his current wife, Kendra, were separated, he told her he wanted to sign away the child's custody so that he could avoid paying child support.

² In April 2011, Heath paid accrued child support arrearage dating back to November 2010. He paid three months of accrued child support on August 2, 2011, just days prior to the first day of the trial in this matter.

³ He claims that he will be off the drug entirely within nine months. Suboxone was prescribed for him by an addictionologist. It is a narcotic drug prescribed to assist those who need help in stepping down from other narcotic drugs. The normal duration is up to three months and, if used longer, the patient may become dependent upon Suboxone. He has passed drug screens in connection with his work, though he does have one DWI, dating from 2005.

Heath and Stewart have had disagreements regarding the discipline of K.C. Heath does not want her to have a cell phone, a Facebook account, or to wear fake fingernails, which Stewart has provided for her. He considers himself more of a disciplinarian than Stewart. He has no objection to K.C. seeing Stewart, and understands the transfer of custody should be in phases. Heath has not been actively involved in overseeing K.C.'s education, but Stewart admits she did not put him on the list to be notified about K.C.'s school functions. If Heath is granted custody of K.C., she will have to change schools.

In our analysis of this appeal, we benefited greatly from the learned trial court's exhaustive and incisive Ruling on a Rule for Custody, which is attached hereto as an unpublished appendix. We express our appreciation for the trial court's dedication to the profession.

ELIZABETH STEWART'S ARGUMENTS

A. Awarding custody to either parent would result in substantial harm.

Stewart relies on La. C.C. art. 133, which states:

If an award of joint custody or sole custody 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.

In her petition for intervention, Stewart claims to provide a wholesome and stable environment in her home.

Heath relies on *Jones v. Jones*, 415 So. 2d 300 (La. App. 2d Cir. 1982), to support his argument for custody. However, *Jones* was decided prior to two statutory amendments to Article 133. The amendments provide that the appropriate standard is "substantial harm" to the minor child.

Stewart has alleged and proved that parental custody to either parent would result in substantial harm to the minor child. Caples' extensive criminal history and substance abuse presents a substantial harm to K.C. Stewart proved that K.C. has resided with her in her home for the entirety of her life.

B. Heath has a long history of drug abuse, for which he is still being treated.

Heath admits his drug problem. His two-year usage of Suboxone, beyond the normal duration of three months, suggests that he may in fact be addicted to this drug. The trial court correctly found that Heath is still struggling with his drug habit and that until he demonstrates a significant period of sobriety, placing custody with him would result in substantial harm to the child.

C. Heath has never acted as K.C.'s full-time father.

Heath moved out of Stewart's home when K.C. was three months old. In the initial judgment on this matter, Alesha Caples was awarded sole custody of K.C. Heath was granted only supervised visitation pending his completion of an anger management program. The record demonstrates discrepancies between his pleadings and his testimony regarding his knowledge of Stewart's child-rearing. This suggests his involvement in the child's life was minimal. He has consistently displayed parental irresponsibility.

D. Stewart's home is a stable and familiar environment for K.C.

K.C. has never known another home. She has performed well in school and has near-perfect attendance. There is no indication that Stewart's home is not a stable and wholesome environment for K.C. She is

flourishing at her school and her church. She is doing well in extracurricular activities, such as Girl Scouts.

HEATH CAPLES' ARGUMENTS

A. A parent enjoys the paramount right to custody under Article 133.

Heath urges that the trial court erred in not recognizing the law as to the paramount right of a parent versus a nonparent in a custody situation. La. C.C. art. 133. He argues that a parent may be deprived of that custody only when there are compelling reasons, such as the parent has forfeited his right to parenthood, he is unfit, or he is unable to provide a home for the child. The burden of proving compelling reasons rests with the non-parent.

The "best interest" standard is not appropriate in this case, where custody is disputed between one parent and one nonparent. The parent always enjoys the paramount right to custody. Stewart has failed to meet the burden of substantial harm or compelling reasons for custody of the child to be awarded to her rather than to her father. No witness has testified to any specific risk of harm or clear reason that K.C. should not be transferred to the custody of her father. The trial court committed manifest error in its custody award.

B. He is capable of raising K.C. and has turned his life around.

Heath is gainfully employed by DOTD, with health insurance that includes family coverage covering his present wife, his two daughters, and himself. He is happily married, and his wife supports his quest for custody of K.C. He sees himself as more of a disciplinarian than Stewart, and believes he can better provide stability, structure, education, and family life activities for her. Her education will be further emphasized by his wife,

Kendra, who is an RN and sees education as a priority. Caples also attends church on Sundays and Wednesdays.

Heath admits to his prior drug problem, but explains it has been over two years since he used a nonprescription drug. He quit drinking in 2005 as well. He estimates he will be off Suboxone within nine months of the trial court date. The drug does not create a buzz. He is using the Suboxone for a shoulder injury. He claims to have always paid child support, receiving help from his father at times. He denies any suicide attempts, and he also denies ever being cruel or insensitive to K.C. He owns a spacious home on three acres in Downsville, in which K.C. would be very comfortable in her living and sleeping arrangements.

TESTIMONY

Heath and Alesha Caples married on July 14, 2001, at a young age; on December 16, 2001, K.C. was born. K.C. has lived with her maternal grandmother, Elizabeth Stewart, all of her life, including when Heath and Alesha were married and living in Stewart's home. On March 16, 2002, Heath and Alesha separated; K.C. was only three months old at that time. Heath and Alesha were divorced on January 14, 2003. Alesha remained with Stewart temporarily after she and Heath separated. In their judgment of divorce, Heath was ordered to attend anger management classes and was given only supervised visitation with K.C. until he successfully completed this treatment. Heath later married Kendra Caples on March 3, 2007.

When Alesha moved out of Stewart's home, Stewart kept K.C., age 18 months, with her. Alesha visited K.C. at Stewart's home. Heath also exercised his visitation rights at Stewart's home, but there is some dispute in

the record as to how often he visited. The record does not reflect why Heath waited so long to seek primary custody of K.C. Heath initially alleged that he did not know K.C. was living with Stewart, but later clarified that he became aware of it around the time of his separation and divorce proceedings with Kendra Caples.

Stewart has encouraged K.C. to do well in school and to participate in extracurricular activities. She purchased a home within walking distance from Highland Elementary School. She has hired a tutor to help K.C. in school as needed. K.C. has been on the A/B honor roll at her school and had perfect attendance for several years. Stewart admits that she did not include Heath on K.C.'s school contact list so that he would be informed about events relevant to K.C.'s education and extracurricular activities. However, Stewart has alleged that she notified Heath and Kendra about these things through text messages. K.C. has participated in Girl Scouts, sports, and music programs in her community for several years.

In addition to K.C.'s formal education, she and Stewart attend Christ Church in West Monroe on Sundays and Wednesdays and when there are special services. Heath and Kendra have also taken K.C. to church when she is in their custody. K.C. has received counseling from Pastor Ottis Lenoir, the Associate Pastor of Christ Church, concerning the custody arrangement and disputes. Pastor Lenoir testified that K.C. is age appropriate, well adjusted, and receiving moral and spiritual guidance from Stewart.

K.C. has built many friendships in her school, her church, and her community while living with Stewart. K.C. is also able to interact with her

brother and sister⁴ while she is at Stewart's home and likely would not see them as much if she primarily lived with Heath. The parties acknowledge that K.C. would be required to attend a different school if Heath received primary custody, and that this would be a significant change for her.

Though both parties have contributed to the educational and moral development of K.C., neither party is without fault. Heath has a history of substance abuse and has been ordered to attend anger management before he could exercise his visitation rights with K.C. Heath received a DWI in 2004 or 2005 and though he quit drinking afterward, he began taking Lortab without a prescription. His drug of choice was OxyContin; he consumed an 80-mg capsule each day. He then became addicted to pain medication prescribed to him for a shoulder injury, which led to his participation in a drug rehabilitation program in 2009.

In Heath's drug rehabilitation program, he was prescribed Suboxone to wean him off opiates. At the time he testified, Heath had been taking Suboxone for approximately two years.⁵ Heath has also fallen behind on his child support payments and relied on his father to make his payments for him on several occasions. Heath and Kendra have had serious marital problems in the recent past, which led to the filing of divorce proceedings.⁶

Stewart has reared K.C. in her home most of K.C.'s life, and during

⁴Alesha Caples had two other children by another man; they both live with Hazel Lightle, Stewart's sister, who lives in close proximity to Stewart.

⁵Though Heath was prescribed this medication, Dr. Figueroa, Stewart's fiancé, testified that typically patients are prescribed Suboxone for approximately 7-10 days, or in some cases, three months.

⁶The parties reconciled before a rule for custody was heard.

that time, she has divorced her husband of many years to raise K.C. Stewart has permitted male friends to stay overnight in her home and went on a cruise with a male friend for one week. Stewart's home was broken into by a male friend of hers who stole from her, but she claimed that he never stayed over at her house. She provided K.C. with a cellular phone when she asked for one. She allowed her to have a Facebook page though K.C. was not old enough to have one and lied about her age in order to create the page. Stewart has purchased fake fingernails for K.C. even though she was not yet 10 years old and Heath disapproved of it. Stewart also knew that Heath disapproved of the Facebook page and the cellular phone and still allowed K.C. to have these things. Stewart did lie about her income to receive government aid.

ANALYSIS

Appellant's assignment of error alleges that the trial court erred in not awarding custody of the minor child to the father.

Louisiana Civil Code requires that "the best interest of the child [be] the guiding principle in all child custody litigation." *Street v. May*, 35,589 (La. App. 2d Cir. 12/5/01), 803 So. 2d 312; *Mills v. Wilkerson*, 34,694 (La. App. 2d Cir. 3/26/01), 785 So. 2d 69, 73; La. C.C. art. 131. Determining the best interest of a child is a fact-intensive inquiry requiring a court to balance the factors supporting or opposing an award of custody to the litigating parties based on the evidence presented. *Street v. May, supra*; *Warlick v. Warlick*, 27,389 (La. App. 2d Cir. 9/29/95), 661 So. 2d 706. A court must consider all relevant factors in determining the best interest of the child and is provided with guiding factors to assist in its consideration; however, the

list is not exhaustive. La. C.C. art. 134. *Turner v. Turner*, 84-0557 (La. 1984), 455 So. 2d 1374.

The trial court is in the best position to determine the best interest of the child, and findings of fact in custody disputes will not be set aside on appeal unless they are manifestly erroneous or clearly wrong. *Street v. May, supra*. A reviewing court should adopt the trial court's findings as its own in the absence of clear error, even if other conclusions from the same evidence were equally reasonable. *Blackshire v. Washington*, 39,028 (La. App. 2d Cir. 8/18/04), 880 So. 2d 988. A trial court's evaluation of the probative value of evidence is accorded great weight and will not be disturbed absent a clear abuse of discretion. *Mills v. Wilkerson, supra*; *Hargrove v. Hargrove*, 29,590 (La. App. 2d Cir. 5/9/97), 695 So. 2d 645, writ denied, 97-1853 (La. 10/31/97), 703 So. 2d 24.

Where an award of joint or 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 who is able to provide an adequate and stable environment for the child. La. C.C. art. 133.

In custody disputes between a parent and a nonparent, the parent enjoys the paramount right to custody and may be deprived of this right only for compelling reasons. *Street v. May, supra*; *Mills v. Wilkerson, supra*. In a subsequent hearing between a parent and a nonparent to modify a nonconsidered decree, the nonparent bears the burden of proof and must show that an award of custody to the parent would result in substantial harm. *Tennessee v. Campbell*, 28,823 (La. App. 2d Cir. 10/30/96), 682 So.

2d 1274; *Bracy v. Bracy*, 32,841 (La. App. 2d Cir. 10/27/99), 743 So. 2d 930. This record amply demonstrates that substantial harm would occur if the child is removed from her grandmother's home.

Substantial harm under art. 133 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." *Mills v. Wilkinson, supra*; *Hughes v. McKenzie*, 20,322 (La. App. 2d Cir. 2/22/89), 539 So. 2d 965.

Heath's argument that a parent enjoys a paramount right to custody of his child against a nonparent and that he may be deprived of that custody only for compelling reasons is correct, but on its own does not demonstrate the trial court erred in making its custody determination. The trial court found that K.C. has lived most of her life in the home of Stewart and that K.C. would be substantially harmed if her father were given domiciliary custody of her. These conclusions were supported by the testimony of three witnesses who have known K.C. for most of her life. The trial court is in a better position to evaluate testimony and evidence and though other equally reasonable conclusions could be made by the evidence, that alone is not sufficient to reverse the trial court's conclusions. *Blackshire v. Washington, supra*.

The trial court also found that Heath has been inconsistent as a father financially, a finding supported by the trial record and within the meaning of substantial harm under art. 133; this finding clearly supports the trial court's conclusion. *Mills v. Wilkinson, supra*.

Though Heath has made progress in recent years, the trial court was not convinced that he is fit to raise K.C. The trial court found that Heath was still struggling with his drug habit as shown by his continued use of Suboxone to block his craving for illegal drugs. The trial court also found that until Heath is completely off drugs and has a period of sobriety, it would not be in the best interest of K.C. for Heath to have custody of her. The record shows that Heath has a history of drug and anger problems, some of which occurred shortly before the trial. While it might be possible to reach other conclusions about K.C.'s best interest or whether Heath's custody of her would cause her substantial harm, we see no error in the trial court's conclusion. *Blackshire v. Washington, supra.*

Heath has made numerous attacks on Stewart's ability to raise K.C. He alleged that he would be able to provide more stability and structure in her life and reinforce education better than Stewart would. The trial court found that K.C. spent most of her life with Stewart and that she was well adjusted for her age. At trial, both parties acknowledged that a sudden change in K.C.'s custody arrangement would be detrimental because she has been living with Stewart for most of her life. Stewart and K.C. attend church often, participate in church activities, and have relationships within their church. This suggests that K.C. has the stability and structure she needs in her life, factors that clearly militate in favor of the grandmother, in determining the child's best interest. La. C.C. art. 134(2), (3), (6).

The record also indicated that K.C. was receiving the education she needs while in Stewart's custody. K.C. has made the A/B honor roll several years in a row and had perfect attendance at school except for the year this

litigation began. Though Kendra Caples has a college degree and Stewart does not, there is nothing to show K.C.'s educational needs are not being met, or that she would not learn to be financially independent.

Heath also attacked Stewart's ability to rear K.C. because her boyfriends and male visitors that have stayed at her house overnight. Stewart admits that this has happened, but only when K.C. was not at home. Stewart also admitted that she went on a cruise with a male friend, but it was only as friends. Heath's argument suggests that Stewart might be living in open concubinage; however, no evidence was offered to prove this claim. Even in circumstances where a party has been living in open concubinage in the presence of a child, the opposing party must show that the living arrangement has had an adverse effect upon the child. *Stephenson v. Stephenson*, 81-1459 (La. 1981), 404 So. 2d 963. Not only has Heath not proven that Stewart was or is living in open concubinage, he has not proven that it has had an adverse effect on K.C. Heath's references to Stewart's beauty enhancement surgeries also fail to show in any way that she is unable to handle the child's upbringing.

Heath has claimed that he would be able to provide a better life for K.C. because of his household income. He is employed with the Department of Transportation and Development with a good salary and benefits, and Kendra is a nurse with a stable income also. However, income alone does not mean that a person is a fit parent. The record shows that Heath has not always been gainfully employed or always paid his child support on time; both of these factors suggest that Heath has not always taken his job as a provider seriously. Though Kendra and Heath claim that

he has improved, the trial court was not convinced. It noted that Stewart has always provided for the child and created a loving environment for her. Though her income is not as high as Heath and Kendra's, there is nothing in the record to suggest that K.C. has been forced to do without while she has lived with Stewart.

The trial court concluded that if Heath Caples were given primary custody of K.C., it would cause substantial harm to the child. That conclusion is amply supported by the record. Though other conclusions could possibly be reached on the facts found by the trial court, the judgment below is quite clearly not an abuse of discretion.

DECREE

With all costs of this appeal being taxed against the appellant, the ruling of the trial court is **AFFIRMED**.

UNPUBLISHED APPENDIX

STATE OF LOUISIANA*PARISH OF OUACHITA*FOURTH DISTRICT COURT

HEATH CAPLES

FILED: December 8, 2011

VERSUS NO. 02-1758

ALESHA CAPLES

BY: [Signature]
DY. CLERK OF COURT

RULING ON A RULE FOR CUSTODY

A suit for divorce between the Plaintiff, Heath Caples, and Defendant, Alesha Caples, was filed on April 23, 2002 by Heath Caples. The record shows that the parties were married July 14, 2001, and that they separated on March 16, 2002. One child was born to the couple, whose name is Kailey Caples who was born December 16, 2001.

Petitioner alleged in paragraph 4 that he intended to live separate and apart from his wife for 180 days and file a rule to show cause for divorce thereafter. This filing was made at a time when a delay of only 180 days was necessary to proceed with a Code of Civil Procedure Article 102 Divorce. Accordingly, on December 19, 2002, Heath Caples filed a rule to show cause why a divorce should not be granted and the judgment of divorce was signed on January 14, 2003. Heath Caples has since remarried, as will be discussed below.

On July 16, 2002, a judgment was rendered related to the custody issues and outlined the visitation that Heath was to have, the amount of child support he was to pay, and the conditions he must meet in order to exercise visitation. The Court notes specifically that the judgment required that Heath successfully complete an Anger Management Treatment Program; and, until he did, he was to have only supervised visitation with the minor child every other Saturday from 12:00 p.m. until 6:00 p.m. This visitation was to be supervised by his mother, Janice Caples.

With respect to the anger management requirement, the record shows that Heath was referred to the YWCA Counseling and Family Development Center and met some nine times with Dr. Jana P. Sutton, following initial resistance to attending anger management treatment. The report from Dr. Sutton indicates that Heath appears to become open to the need for counseling to the point that she was of the opinion he did not require any further sessions. Her letter, however, does note that Alesha reported to her that he had returned

to his abusive behavior and specifically alleged that he was stalking her. Importantly, Dr. Sutton did not think that Heath posed any danger to the child; she felt that he had the child's best interest at heart.

On April 10, 2003, Heath filed a rule to change custody and for contempt of court in which he made certain allegations about custody being withheld and the like. On June 10, 2003, the parties entered into a comprehensive stipulated judgment which resolved the issues raised in the Rule filed by Heath and ordered implementation of the prior judgment and included the requirement that there be follow-through as to the requirement in that there be compliance with the prior order of the Court, and that Heath report to the Court on June 1, 2003, July 1, 2003, and August 1, 2003 stating the dates he participated in counseling during those months.

The matter that is to be decided in this ruling arises out of another Rule for Custody filed by Heath Caples on December 10, 2010. In this Rule Heath, of course, makes Alesha the Defendant and alleges that there have been changes in circumstances since the 2003 and 2005 stipulated judgments. The Court notes that the 2005 Joint Motion to Amend the Stipulated Judgment related only to how the parties would handle claiming the child for tax purposes. The Order signed by the Court provided that Alesha was to claim the child for both federal and state tax deductions for the year 2004 and Heath was to claim her the year 2005 and thereafter the parties would alternate years claiming the child for tax purposes.

In the Rule for Custody that the Court is now addressing, Heath alleged that there had been changes in circumstances since the stipulated judgments and that Alesha was not participating in the rearing of the child, but abandoned the child to the care of "other relatives". He alleged that since he is the biological father and Alesha was not participating in the care and rearing of the child, that he should be made the primary domiciliary parent. In that connection, he alleged that Alesha had not lived with the minor child for over four years; rather, that the child had been under the care of Alesha's mother, the maternal grandmother. Heath alleges that he can provide a stable home for the child; that he had married Kendra Caples on March 3, 2007, and that they had a

sixteen month old child at that time and that Kailey would benefit from a relationship with her sister.

Heath further alleged that Alesha was living in motels and had gotten into fights with her boyfriend; that she had been arrested for domestic battery, disturbing the peace and public drunkenness; that she was possibly currently homeless as his last information about an address for her was 322 Evergreen Street in Bawcomville, which premises had burned down. He alleged that he has not seen or spoken to Alesha for over a year and had been unable to locate her. Finally, he alleged that he felt that the best interest of the child would be served by naming him as domiciliary parent and allowing supervised visitation to Alesha. See paragraph 6 of Rule.

Before any action was taken on the Rule for Custody filed by Heath, Elizabeth Stewart filed a Petition for Intervention on January 19, 2011. Elizabeth is the mother of Defendant, Alesha Caples, and the maternal grandmother of Kailey Caples. In her intervention, she noted that in the 2003 Judgment Alesha had been awarded sole custody of the minor child with Heath having only supervised visitation. Mrs. Stewart alleged that it would be in the best interest of the minor child for her to be awarded sole custody subject to visitation rights being granted to Heath under such terms and conditions as the Court might determine. She alleged that parental custody to either parent would result in substantial harm to the child. La.C.C. Art. 133.

In paragraph 6 of her intervention, Mrs. Stewart alleged that Kailey had been in her care and physical custody since her birth and that she is flourishing in a wholesome and stable environment including school, church and extracurricular activities.

In paragraph 7, Mrs. Stewart alleged that Heath has a long-standing history of substance abuse and a substantial criminal history involving alcohol and related charges, as well as domestic violence with multiple victims and at least one threat of suicide. In paragraph 8, she also alleged that Alesha had a long-standing substance abuse history as well as a significant criminal history. She further alleged that Alesha would consent to the custody request that she was making and, indeed, Alesha did align with her mother in the proceeding, supporting her mother having primary domiciliary custody, instead of Heath.

The evidence showed that while he was sometimes seriously behind, Heath paid child support to Alesha in accordance with the prior Judgment. Therefore, Mrs. Stewart requested that he be ordered to pay child support in accordance with the guidelines to her if she becomes the primary domiciliary custodian of the child.

Although the Motion for Intervention was objected to by Heath, the Court, on the allegations made, and upon hearing, decided that if the child had, indeed, lived in the home of Elizabeth Stewart since birth, then she might be a person appropriate to consider appointing as the primary domiciliary custodian of the child pursuant to Louisiana Civil Code Article 133. Accordingly, the Court granted the Petition for Intervention filed by Elizabeth Stewart.

At the trial of the case, Alesha Caples did align with her mother in support of her mother's petition to be appointed the primary custodian of the child. The first witness in the case was **Elizabeth Stewart**, who testified in support of her allegations in the Petition for Intervention and her testimony supported a finding that both Heath and Alesha had lived with her when the child was first born and that **the child had never left her home for a period longer than one week**. At the time that the evidence came to a close in this matter on October 10, 2011, Kailey was approximately two months away from her 10th birthday. Kailey is now less than two weeks away from her 10th birthday.

Mrs. Stewart's testimony showed that she and her long time husband had separated surrounding the fact that she had taken in Alesha's two other younger children, and three minor children in the household was something that her husband was not prepared to contend with, so they separated over issue and she initially was taking care of all of Alesha's children. However, at the time of the trial, she was only caring for Kailey. During the course of Mrs. Stewart's testimony, she acknowledged that Heath did not think it was appropriate for Kailey to have a cell phone or a Facebook page.

Mrs. Stewart testified that only she and Kailey reside in her home and that she is employed and earns \$1,700.00 per month. She testified that Kailey is well adjusted in school and does well in school as the exhibits showing her 3rd grade grades demonstrate. See Exhibit D-1. Mrs. Stewart also testified that Kailey has near-perfect attendance at Highland Elementary School. Kailey is in Girl Scouts.

With respect to Heath's exercise of custody rights, Mrs. Stewart testified that he does exercise his right to visitation with Kailey every other weekend at his home and she said that Heath had just brought his child support payments current, which indicates that at the time he filed for the final Rule for Change of Custody or Modification of Custody he was delinquent in his child support payment. The Court examines and considers arrearages in child support and makes an assessment of whether one motive in filing a Rule for Modification or Change of Custody is avoidance of child support. Here, the Court has considered that avoidance of payment of child support is likely one important motive, but in light of Alesha's inability to care for their child, he certainly stated a cause of action in his Rule.

With respect to moral upbringing, Mrs. Stewart testified that she takes Kailey to church with her on weekends when she is not with her dad and that her dad has "of late" began taking Kailey to church. C.f. C.C. Art. 134(2)

With respect to her health, she testified that she does take an antidepressant prescribed for her by a nurse practitioner. She also acknowledged that she had undergone certain elective surgery of a beauty enhancement nature, which the Court will not describe in detail in this Opinion.

Mrs. Stewart testified that it has been her practice to inform Heath of Kailey's school activities, but he has not attended many. She said that Kailey has been going to the same school for the last three years and, of course, would have to change schools and attend the school in Downsville if she were to go to her father as primary domiciliary parent.

Mrs. Stewart's testimony was that she felt that Heath was insensitive and even cruel to Kailey about her weight and another medical problem that the child takes medications for. The medical report in evidence as Ex. D-5 describes the child as being obese. She said that Heath makes Kailey cry. However, she said that Kailey loves her father and that she also loves her mother.

With respect to her present dating relationship, she testified that she is engaged to Dr. Glenn Figueroa, who was a witness in this proceeding.

On cross-examination, Mrs. Stewart testified that she lives on Florence Street in West Ouachita Parish and has resided there for three years. That Kailey has not lived anywhere else except on Stroger Road and on Florence Street. She said that Heath moved out of her home when Kailey was about three months old and that she hated to see him go. Her observation was that when Heath was living with her in the first months of the child's birth he did not pick the baby up and change her. She said that Alesha continued to live with her after Heath left for approximately until Kailey was a year and half old. Alesha then moved out and started living on her own in various places including with the then manager at Sonic.

With respect to her support to Kailey, she testified that, when Heath had only supervised visitation, she is the one who drove the child to Janice's house and picked her up when Heath was exercising his visitation at Janice's house. She acknowledges that Janice had sometimes picked Kailey up as well. Later, per judgment, the exchange of the child was to take place at the West Monroe Police Department, rather than at any one of the homes. She said that Heath was sometimes "messed up" on Oxycontin and that Tommy Caples and Janice, the paternal grandparents, picked Kailey up for visitation. Again, she testified that **the longest time that Kailey had ever been out of her physical care was one week.**

Also, during this cross-examination, she testified that Heath and Kendra were separated from November 2009 to September 2010, a period of approximately ten months. She said that during the period of that separation that Heath regularly came to her house and he and Alesha would sit on the couch and love on each other. During that period of time, Mrs. Stewart testified that **Heath told her that he wanted to sign Kailey over to her so that he would not have to pay child support.**

On cross-examination, Mrs. Stewart revisited the suicide claim saying that Heath had taken Valium and threatened suicide with a knife to his throat. But she said that she did not think that Heath would ever hurt himself.

Also during her cross-examination, Mrs. Stewart testified to Kendra filing for divorce during that period of separation discussed above and that Kendra secured an Order from the Court requiring that Heath would exercise only supervised visitation of

the child of that marriage until he completed an Anger Management and Drug Treatment Course administered by the Court. See Ex. D-8.

The petition filed by Kendra against Heath in the Third Judicial District Court for the Parish of Lincoln is in evidence as Exhibit D-8 and that Exhibit describes Heath's battle with drug addiction in some detail¹. In paragraph 20 of Exhibit D-8, she says that Heath's drug of choice was Oxycontin 80 miligrams. The Court will discuss his drug treatment during discussion of his testimony, but will note here that he was placed on medications to help him wean off of his addiction to drugs.

Mrs. Stewart revisited the child support issue saying that **Heath paid last April the child support that he owed from the previous November, and that on August 2nd of this year he paid the child support he owed back to April of this year.** Note that the first day of trial in this matter was held on August 10, 2011.

During this cross-examination, the issue of Kailey's grades was revisited. It was shown that Kailey was promoted from 3rd grade to 4th grade and that she has had very good attendance; indeed, according to Mrs. Stewart, perfect attendance until this year when she missed school to come to court. She also said that her grades suffered somewhat this year because of these proceedings, which she thinks affected the child's performance. She testified that **Heath has not been involved in the child's education.** However, with respect to the exercise of his visitation with Kailey, Mrs. Stewart testified that there were long periods of time when he did not have regular contact with the child but she thinks that Kendra "made" him exercise visitation with Kailey. Finally, the home of Mrs. Stewart was described in her testimony as a three bedroom, two bath home that belongs to her and **only Kailey lives there.** She said that the other two children of Alesha's live with her sister. She also testified that she receives \$240.00 per month in food stamps, so if she received the child support of \$300.00 per month together with her income (\$1,700.00) it would bring her income to \$1,940.00 per month². (Note, however, that Dr. Figueroa testified that he pays her \$1,500.00 a month to work in his office now.) As regards finances, she also testified that Alesha received \$2,300.00 from the federal

¹ The allegations contained in this certified Petition are considered in light of the testimony at trial of Mrs. Stewart, Heath and Kendra, his wife. The allegations are not all rebutted and are of concern to this Court.

² Note that \$1,500.00 plus \$240.00 equals \$1,740.00, which is close to what Mrs. Stewart said her income is without child support.

government as an Earned Income Allowance in 2011). (If she were to become primary custodial, she likely would qualify to receive the Earned Income Allowance, as well.)

Heath Caples testified next, he testified that he had a high school diploma and lives in Downsville, Louisiana. He is employed by the Department of Transportation and Development and has been for the last three years as an Electrician Specialist. The evidence showed that Heath's income is **\$41,828.80** if he simply worked 40 hours per week at \$20.11 per hour. There was no tax return filed in the record to show what Heath's income was for the year 2010, so his income is quoted based on his testimony and Ex. P-1. Heath testified that he now has Kailey covered under his family medical insurance, along with Olivia his daughter by Kendra, who is two years old. Heath discussed the separation mentioned above and said that he and his wife had reconciled. He did not discuss in detail the allegations contained in her petition for divorce but did address the substance abuse problem that he has had and the treatment that he has been under and remains under at this time. He said that to help him get off of the **addiction to drugs**, he was taking a medication called Suboxon and other drugs that are called Narlozone and burprenorephrine. He said that he does not take any illegal drugs for he has stopped doing that.

With respect to Kendra's relationship to Kailey, he said that she is very motherly and caring and concerned about Kailey. Kendra is a nurse who works at Haven Homes Healthcare. He and Kendra have a daughter, Olivia, born June 15, 2009. In his rule, Heath alleged that Kailey would be able to get to know her sister better if she came to live with him as her domiciliary parent.

Heath stated that he and Kendra did separate in November 2009, as alleged in Ex. D-8, but reconciled in September 2010. Kendra filed for divorce during the separation.

Heath testified that he has never "seriously" threatened to kill himself. He said some of the claims made by Kendra in the divorce petition were "exaggerated", but he did not elaborate. He admitted that he has a **history of using illegal drugs** and has had a Driving While Intoxicated conviction.

Heath is still taking the maintenance drugs noted above for the purpose of blocking his desire for illegal drugs or other subscription drugs, and is followed by Dr. Johnson of Shreveport.

Defendant's Exhibit 8 contains two other allegations that the Court finds relevant: First, in Paragraph 17, Kendra's petition said that Heath "never showed much interest in his daughter from his previous marriage. It was only at Kendra's urging, that he had any meaningful relationship with his oldest child." This child is of course Kailey. Ms. Stewart testified that Kendra "made" Heath exercise his visitation and her observation gives credit to the truth of Kendra's assertion.³

The second allegation made by Kendra, in Paragraph 15 of the petition was that: "It also appears that the family dog is scared of Heath as the dog runs and hides whenever Heath is around." This allegation was not addressed in the testimony at trial. But if that is true, it would likely be the result of mistreatment, and it has been said by a commentation in the Michael Vick matter that "mistreatment of a dog is about the functional equivalent of mistreating a toddler." That may not be entirely true, but if true it would be all the more true if the dog is the family dog. Typically, dogs run to their masters.

Heath testified that he gets Kailey every other weekend. He said on other weekends Kailey is with various relatives.

Heath testified that he does not think Kailey has a weight problem. He does not think she should have a cell phone or a Facebook page. Mrs. Stewart testified that she has both.

He said he attends West Monroe Church of God and has taken Kailey with him.

When asked why he thought it would be in Kailey's best interest for him to become the domiciliary parent, he said it is because of his concern for her safety, because he can provide for her, because he will show her the importance of family, and because he will give her structure.

³ The Court notes that the certified copy of Ex. D-8 does not contain a verification, only the Petition and the judgment, but it is unlikely that Judge McCallum would have signed the judgment unless the Petition was verified in accordance with C.C.P. Art. 3951. Moreover, the attorney who signed the Petition is known by this Court to be an experienced and competent practitioner in the area of family law.

On cross-examination Mr. Joiner asked Heath if Kailey was on his major medical health coverage. Heath responded that Mrs. Stewart had put her on LaChip for health coverage, but he had added her in June 2011 to his medical coverage at his job with DOTD. Heath said that adding Kailey to his medical coverage did not cost him any more money.

Heath testified that about two years before he filed this rule he learned that Kailey was being reared by Mrs. Stewart, not Alesha. He was aware that Alesha was not fit to have custody, he said. But he waited to file another Rule for Custody for financial reasons.

Heath acknowledged that he moved out of Mrs. Stewart's house when Kailey was three months old, and that there was a time when about six months passed when he had no contact with Kailey.

On the question of why he had a curator appointed to serve Alesha, Heath said it is because he asked Mrs. Stewart for a service address for Alesha and she was unable to give him one.

Heath testified that he was initially granted only supervised visitation with Kailey because Alesha lied about him to the Court. He felt his visitation did not need to be supervised.

Heath did not address all the allegations in the Petition for Divorce that Kendra filed against him, Ex. D-8, but said she also lied in her petition. He did expressly deny that he'd ever been verbally abusive to Kendra, Kailey or Alesha. He also denied threatening suicide. And he denied that he ever threatened to put Kendra in a pine box.

Heath acknowledged his drug addiction. He once used oxycontin and used opiates and Loratabs. As to alcohol, he said he stopped drinking after he got a DWI in 2005. According to his testimony, he stopped taking other drugs in 2008 or 2009. He takes Suboxon, as noted above, and said he expects to be off drugs in nine months. He takes this medicine to help him stay off illegal drugs.

In further testimony on cross-examination, Heath stated he is not the father of Alesha's two younger children born after their divorce, and has no knowledge of the State taking these kids.

Heath acknowledged becoming seriously in arrears in payment of child support for Kailey. He said his father helped him pay up his child support arrearage.

Heath said he has exercised his visitation with Kailey, consisting of every other weekend and two weeks during the summer, although he did miss one week of summer visitation. On Sundays when Kailey is with him, Heath said he takes her to church, which he regularly attends. C.f. La. C.C. art. 134 (2).

Finally, Heath described his house as a 3000 sq. ft. 3 bedroom, 2 bath home in a rural setting in Downsville, Louisiana. The house has a game room and what he described as a mother-in-law suite. Kailey would attend Downsville High School which has a K-12 grade structure.

The next witness was the minor child Kailey, who testified in the closed courtroom, on the record with counsel present, but with her parents absent. The Court concluded from her testimony that the child loves her father and wants to spend time with him. She also loves her grandmother and is well-adjusted in her grandmother's home. She is well adapted to her school and church communities. While the Court did not ask the child her preference for which contending party she wanted to live with most of the time, it was evident that her father and Mrs. Stewart had talked to her about the purpose of the hearing. Indeed, her dad testified that on cross-examination by Mrs. Joiner that he asked her two or three weeks before the trial whether she wanted to live with him. What a young child says to the contending parties is not determinative due to the influence that near kin can have on the child. Instead, the Court gives consideration to what the child says about her comfort lived in one home versus the other and in which environment the child appear most happy and adjusted. In this case the home where the child is most comfortable is that of her grandmother, Mrs. Stewart, where she has always lived and is well-cared for and seems to be perhaps the center of attention.

The fourth witness was **Kendra Caples**, Heath's wife and the step-mother of Kailey. Kendra is a Registered Nurse and has been since May 2006.

Kendra stated that Kailey visits with her father every other weekend in their home. Kailey has a good relationship with her father, according to Kendra.

Kendra and Heath have a daughter, Olivia, born June 15, 2009. They married March 3, 2007. She acknowledged that her family does not have a relationship with Heath; they have not accepted him, and he does not spend time around her parents.

Kendra testified that on November 18, 2009, Heath told her he was doing drugs. (Her allegations in Ex. D-8 related to Heath's spending money from the family savings and from his 401K suggests how he may have financed his drug habit.)

About two weeks later, on December 4, 2009, Kendra filed for divorce. She and Heath got back together on September 24, 2010, she said. So they were separated around ten months.

With respect to the allegations in her petition, Kendra said they were true "at the time they were made" but he has improved. He was physically aggressive toward her on only one occasion, and was verbally aggressive toward her at other times, she said. Due to her profession, she had some knowledge of the drugs Heath is taking and discussed them and their purpose and effects. In short, they are taken to help a person get off illegal drugs. That is, to control or block the urge to use drugs. She said Heath has been on Suboxon since February 2009. Since last year Heath has been seeing a Dr. Johnson, whose specialty she does not know. She said Heath is on a "step-down" plan. She did not know how long it will take Heath to get off the program.

Although she said in paragraph 17 of her divorce petition that Heath never showed much interest in Kailey, she said he is now very concerned about her. She said that for about the first two and a half years after she married Heath, he did not have much of a relationship with Kailey. Since they married in March 2007, that would mean that up until about two months before she and Heath separated in November 2009, Heath did not have much of a relationship with Kailey.

As in her divorce petition, Kendra identified Oxycontin and Loratab as drugs Heath used. She said one time while they were separated, Heath was very paranoid. He didn't want to sit next to anyone because he thought they were listening to him. She secured a judgment granting her sole custody of Olivia with Heath being granted supervised visitation until he completed an anger management and drug treatment course.

She said Heath **did** have anger management problems, but he **does not now** have anger problems. She said he enrolled in a drug program and has "turned around". She said Heath got behind in paying his court-ordered child support during their separation. He caught up the payments by giving her a \$3,000.00 Cashier's Check. She says she has a good income from her employment. She said she was aware that Heath paid **on the day of hearing** to bring this child support for Kailey current.

With respect to Heath's work schedule, Kendra testified that he is rarely called to work off schedule. Other evidence on this issue was to the effect that in 2010 Heath worked out of town no more than 10 weeks for DOTD. Kendra's work schedule is from 8:00-4:30 p.m. on week days.

Kailey would attend Downsville school if she resided primarily with her father, according to Kendra. She said she does not have a problem communicating with Mrs. Stewart; their communication is good.

Kendra expressed the view that since she has a college education and Mrs. Stewart only finished high school, she would be better able to help Kailey with homework. She said Kailey is doing well in school has her on the "A" "B" honor roll, but she is still looking down the road concerning Kailey's education. She said having a nursing degree makes her financially independent. She can take care of herself and her child, she said. The Court understands that her point is that she wants Kailey to be similarly educated and financially independent.

The next witness was **Tommy Caples**, the father of Heath, grandfather of Kailey. He said he has seen Heath and Kailey together riding the 4-wheeler and putting out deer corn. He has never seen Heath be unkind to Kailey. He considers Heath to be a good father.

He said he did not notice that Heath had a drug problem but was made aware of that by Heath, but he did not think Heath's drug problem was "that bad".

Tommy said he loaned Heath around \$1,500.00 to get caught up on his child support.

Janice Caples, mother of Heath, was the next witness. She testified that she did not think it would do substantial harm to Kailey for Heath to become her primary

custodial parent. She thinks Heath is a good father. She's seen them ride the 4-wheeler and put out deer corn together.

Janice said she "**kind of knew**" that Heath had a drug problem, but he has made a 360 degree turn around.

She said she was concerned about Alesha going in and out of Mrs. Stewart's house and to jail. And about men in and out of Mrs. Stewart's house. She was aware that Kailey had always lived with Alesha and Mrs. Stewart. She acted as supervisor when Heath had supervised visitation with Kailey.

William Stewart, former husband of Elizabeth, the intervenor, father of Alesha and grandfather of Kailey, was the next witness. He confirmed that Kaileh has been living with Mrs. Stewart since birth. He said Alesha got pregnant at age 16 and she and Heath got married and stayed with him and Elizabeth up until and after the birth of Kailey.

Mr. Stewart said Kailey comes and spends time with him on some weekends. He and Elizabeth divorced about three and a half years ago, he said.

William testified that he thinks it would do substantial harm to Kailey if her father were granted domiciliary custody of Kailey. He said the reason he thinks that is that it **would change everything in her life**. She has developed relationships that she would lose out on if she moved, he said.

Rev. Otis Lenoir, Associate Pastor at Christ's Church in West Monroe testified that he has been at the church for a year and a half. He said Elizabeth Stewart is a member. He knows Kailey who comes to church with Elizabeth every Wednesday and on the Sundays she is with Elizabeth. Kailey participates in the Children's Ministry, he said.

Rev. Lenoir was not willing to testify to what he considered confidential conversations with Kailey, but said he has counseled with her about her well being and making sure she was doing well. He said that he will say that, from his counseling with Kailey, she is age-appropriate, well-adjusted, and that she has received appropriate moral guidance.

Hazel Lightle, sister of Elizabeth and aunt of Kailey, testified that she is rearing Alesha's two other children. She took them in because Alesha "lost" them and it was hard for Elizabeth to take care of three young children. She said that it would "crush" Kailey if she were forced out of her home with Elizabeth. Kailey enjoys being around her and Elizabeth. She felt that Kailey would be less happy living primarily with her father because Kailey felt like her dad was sometimes "mean" to her.

Rachael Stewart Hancock, Elizabeth's daughter, was the next witness. She said she is aware that Elizabeth takes Kailey to mid-week services and to Sunday Church services when Kailey is with her. She said Kailey would be "destroyed" if she were required to go and stay with her father.

The next witness was Randy Thomason, who testified that she has known Mrs. Stewart for about five years, and that Kailey has been in her Girl Scouts Group for five years. She said Kailey appeared to be well-adjusted until last year, when she expressed concern about having to go and visit with her father more. She said Kailey cried the first time she talked to her about her concern. She said Kailey missed a Girl Scout event because she was visiting with her father.

Dr. Glenn Figueroa, an M.D., and who is the fiancé of Elizabeth testified next. See Exhibit D-9. He said he is familiar with Suboxone, which is a blocker used to assist patients to step down from the use of narcotics. But these blockers are not supposed to be taken as long as two years, he said. **If a patient takes those blocker drugs for a long time, they become addicted to the drug.** Suboxone is to be taken for months, not years, according to Dr. Figueroa.

Dr. Figueroa said he is engaged to Elizabeth. He has come to know Kailey and thinks she is well-adjusted. She loves her grandmother, as well as her mother and father, he said. He thinks Kailey is mature beyond her years. He testified that he pays Elizabeth \$1,500.00 per month to work in his office and that she has some flexibility in her work schedule.

Elizabeth was called again to the witness stand, and testified that she told Heath when she moved to Florence Street. She also said that Kailey has always had good grades.

The Court credits the testimony that supports a finding that Kailey has lived all of her years (now almost 10) in the home of Mrs. Stewart. For a time after Kailey's birth both Alesha and Heath also lived with her. Heath moved out of after a few months and did not visit with the child often.

The Court finds that Kailey is a well-adjusted child, who does well in school. She attends church and has received proper moral guidance. She is in the Girl Scouts and has been for five years. Kailey has developed relationships while living with her grandmother that she would miss if she moved away. Kailey has two younger siblings on her mother's side that she gets to see, and a 2-year old sister on her dad's side that she visits every two weeks.

Both the homes of Kailey's grandmother and that of her father are more than adequate shelter and she has her own room. Kailey has a relationship with her maternal grandfather, William, with whom she spends time visiting. He thinks moving Kailey to Downsville would do her substantial harm.

Apart from Elizabeth, two other witnesses who think Kailey would be substantially harmed if this Court were to grant primary domiciliary custody to her father were her aunt, Hazel Lightle, who said Kailey would be "crushed" and her aunt, Rachael Hancock, who said Kailey would be "destroyed". The Court finds that those aunts of Kailey honestly spoke their feelings.

There is no evidence to show that Kailey has not been living in a good, nurturing and supportive environment.

The Court finds that Elizabeth is deeply attached to her granddaughter who came to her house from the hospital, following her birth, and has lived with her ever since, with a week being the longest time Kailey has been away from her home. This Court has observed that this kind of attachment sometimes causes grandmothers to fight to withhold the child from their own fit biological child's custody. Sometimes they win the out-of-court fight.

The Court finds that Heath has not consistently been committed to being a father to Kailey, visiting her and supporting her financially. The Court finds that months passed when he had no contact with Kailey. Although ordered in the divorce proceeding with

Alesha, to pay child support of \$300.00 per month for Kailey, he got behind for many months on two occasions. The evidence shows that he got \$3,000.00 behind in payment of child support to Kendra when they separated in 2009. So the Court concluded that there is evidence that part of Heath's motivation in filing his Rule is avoidance of payment of child support for the care of Kailey.

The Court would not consider expanding Heath's visitation rights with Kailey, not to mention granting primary custody to him, were it not for his wife Kendra, who the Court finds encouraged him to have a relationship with Kailey, and is a very important influence in her household. She is smart and strong – strong enough to have left Heath over his drug problem and irresponsible spending. See Ex. D-8. She needs to be in the household for the Court to have any comfort that the child will be well cared for.

The Court has concerns about the **stability of the marriage** between Heath and Kendra, and about the fact that he **is still struggling with his drug habit**. He is still taking a drug to block his craving for illegal drugs well longer than is appropriate. By the testimony of Dr. Figueroa, which the Court credits, he seems to now be addicted to Suboxone and/or other drugs in the cocktail of drugs Dr. Johnson has prescribed. The Court is of the view that **until Heath is off drugs entirely and has had period of sobriety, it is not in the child's best interest and would do substantial harm to the minor child to place her primarily in his custody**.

However, although the evidence shows that Heath has twice been ordered to undergo anger management counseling and drug treatment, the testimony of Janice and Kendra was that he has demonstrated a turn-a-round in his behavior particularly concerning physical and verbal aggression -- and is making progress in overcoming his drug addiction.

Moreover, the Court finds from the testimony that avoidance of child support payments was not the sole reason Heath is seeking domiciliary custody of Kailey. In his Rule he noted that he thinks Alesha, who had been granted sole custody, is not fit to have physical custody of Kailey. That fact is not contested, Alesha did not seek to retain even joint custody, but joined with her mother's fight for custody of her daughter.

When a non-parent is in a fight for custody with a parent, the applicable law for the Court's guidance is La.C.C.P. Art. 133, which 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.

Notice that the law does not require that the Court find that Kailey would be "crushed" or "destroyed" if primary custody were awarded to Heath, only that it would do substantial harm to her to do so. Here, the evidence convinces this Court that the award of primary or sole custody to Heath at this time would do substantial harm to the child. Elizabeth is, in the words of Art. 133, "another person with whom the child has been living in a wholesome and stable environment" all of her life.

Accordingly, the Court orders that Elizabeth Stewart, shall maintain primary physical custody of Kailey and her home will remain the child's primary domicile. Elizabeth has been the sole constant, stable influence in this child's life. However, the evidence shows that, if Kendra and Heath remain in a stable marriage, and Heath continues drug treatment, Kailey can safely spend more time in her father's and Kendra's home. For that reason, the Court orders that the present decree shall be modified as follows:

1. Heath shall have the right to talk to Kailey by telephone daily at all reasonable times. The Court will allow Kailey to keep the cell phone provided by Elizabeth, but the Facebook page is objected to by Heath and will be shut down. The Court's information is that she is too young to qualify for one, anyway.
2. During the school year, Heath shall continue to have visitation every other weekend, and including Father's Day weekend - even if that means back-to-back weekends and gives him an extra weekend that month.
3. The child shall spend Mother's Day weekend with mother, again even if that weekend falls on a weekend when the child would normally be with Heath. But he shall have visitation the next weekend.
4. Summer vacation shall be as follows: Beginning at 6:00 p.m. the Sunday after school is out, Heath shall have the right to visit with the child in his home for a period of three weeks; Elizabeth shall pick Kailey up and shall have physical custody of her for two weeks ending at 6:00 p.m. on Sunday; then Heath shall pick Kailey up for another three week period of visitation, at the end of which Elizabeth shall pick her up.

Thereafter, the every other weekend visits with Heath will resume.

5. Holiday visitation shall be as follows and is only applicable to the Thanksgiving and the Christmas – New Years holidays.
 - a. Thanksgiving vacation in odd-numbered years shall be split with Elizabeth having the right to visitation from noon the Saturday before Thanksgiving until Wednesday at 8:00 p.m.; Heath shall have custody for the remainder of the holiday including the weekend following Thanksgiving until 6:00 p.m. Sunday. In even numbered years, the reverse shall apply.
 - b. Christmas vacation shall be divided between the parties as follows: In odd numbered years, Elizabeth shall have physical custody for visitation with Kailey from noon the Saturday after school lets out until Christmas Day at 2:00 p.m., then Heath shall pick her up for visitation until 6:00 p.m. New Years Day. In even numbered years, the reverse shall apply.

All exchanges are to take place at the homes and not at any other Place, and are to take place without incident.

Heath is ordered to continue to maintain major medical, dental and orthodontic insurance coverage on Kailey through his employment.

The child support is not modified, as it was not an issue at the trial; however, instead of paying the \$300.00 per month child support to Alesha, it is to be paid to Elizabeth by the third day of each month.

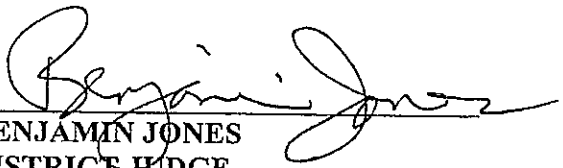
Elizabeth is more likely to qualify for a lump-sum payment from the Federal Government pursuant to the Earned Income Allowance Program, so the Court orders that she shall have the right to claim the child for Federal and State tax purposes beginning for the 2012 tax year. However, she is ordered to deposit all such funds in a college fund for Kailey. This does not include monthly child support.

Elizabeth shall provide to Heath a schedule of Kailey's school schedule, and notify him at least 72 hours in advance of any activity she will participate in. She is to provide him with a copy of her report cards. Additionally, Elizabeth shall notify Heath of any medical problem or any treatment Kailey may need.

The Court will sign a Judgment in accordance with this Ruling.

Each party will pay their own costs owed the Clerk of Court immediately.

Monroe, Louisiana, this 8th day of December, 2011.


BENJAMIN JONES
DISTRICT JUDGE
CIVIL SECTION 3
DIVISION "H"

COPY TO ALL COUNSEL