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Louisiana Family Law

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CHILD SUPPORT

Child Support

It is axiomatic now that the obligation of child support is mutual.[1] Either party may raise the issue during the divorce proceeding or thereafter, without being appointed tutor of the child.[2] Generally, the custodial or soon-to-be custodial parent will seek child support. Also, child support *may* be litigated, when the spouses are living separate and apart, even if not incidental to a divorce action.[3] If a person who is required to provide alimony is or becomes unable to do so by reason of fortuitous events or other circumstances beyond his control, such as the loss of his employment position or illness, relief will be granted. "[I]t would be highly unjust to exact from the obligor a strict compliance with his duty under those conditions."[4] The parent(s)' ability to pay child support, however, has been broadly construed, and the parent must be virtually unemployable before he or she will be excused, although the expense of a second family may be taken into consideration.[5]

Taking on additional obligations, however, provides no excuse. A *voluntary act* by a parent which renders it difficult or impossible for him to perform his primary child support obligation cannot be countenanced as a ground, wholly or partially, for relief from the obligation.[6] Where a paying parent has undertaken additional obligations, including

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* J.Y. Sanders Professor of Law, Paul M. Hebert Law Center, Louisiana State University. See generally Wardle, Blakesley, & Parker, Contemporary Family Law: Principles, Policy & Practice (4 vols. 1988), covering family law in all fifty states. More detailed analysis of the subjects presented herein as well as others may be found in the author's upcoming book, Louisiana Family Law (Butterworths 1992).

1. La. Civ. Code art. 227; Desormeaux v. Montgomery, 576 So. 2d 1158, 1159 (La. App. 3d Cir. 1991) ("Fathers and mothers have a mutual obligation to provide for the support, maintenance, and education of their children.").
2. La. Civ. Code art. 105.
3. La. R.S. 9:291 (1991).
4. Laiche v. Laiche, 237 La. 298, 304, 111 So. 2d 120, 122 (1959).
5. Vidrine v. Vidrine, 567 So. 2d 811, 814 (La. App. 3d Cir. 1990).
6. Toups v. Toups, 573 So. 2d 1164, 1167 (La. App. 5th Cir. 1991).

marrying again and fathering other children, he will not be excused from his primary obligation to support his non-custodial child. This, of course, gives a privileged position to the children of the first marriage, raising the question of whether this preference for one's first family is constitutional? The South Dakota Supreme Court recently rejected an equal protection attack on this preference.[7] Only a fortuitous change in circumstances serves to relieve a parent, support-obligor, of his support obligation.[8]

The Louisiana Supreme Court held in 1959 that Civil Code article 232 requires an *involuntary condition*.[9] Even being in jail as a result of alcohol or drug abuse, or both, may not be used as an excuse to escape the financial consequences of defendant's voluntary actions.[10] Further, an obligor cannot neglect to pay child support and then claim a change in circumstances when a judgment for arrearages is made executory, and his wages are garnished to pay those arrearages.[11] Louisiana Revised Statutes 9:311(B) provides: "A judgment for past support shall not of itself constitute a change in circumstances of the obligor sufficient to reduce an existing award of support." It would be contrary to the letter and spirit of the law to conclude that one required to pay alimony should be relieved therefrom, either in whole or in part, when he has brought about his own unstable financial condition by voluntarily incurring subsequent obligations, secondary to the alimony obligation, which render him unable to meet that obligation.

Child Support Guidelines

Child support awards traditionally have been woefully inadequate, so a change was needed. Prior to the advent of the child support guidelines, to be discussed infra, support entitlement and amount were governed by judicial discretion, through the use of a vague formula balancing the child's needs and the obligor's ability to pay.[12] In an

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7. Feltman v. Feltman, 434 N.W.2d 590 (S.D. 1989); see I. M. Ellman, P. Kurtz, and K. Bartlett, Family Law: Cases, Text, Problems 391 (2d ed. 1991); Note, Second Children Second Best? Equal Protection for Successive Families Under State Child Support Guidelines, 18 Hastings Const. L.Q. 881 (1991).

8. Lustig v. Lustig, 552 So. 2d 516, 518 (La. App. 2d Cir. 1989).

9. Laiche v. Laiche, 237 La. 298, 111 So. 2d 120 (1959).

10. Vidrine v. Vidrine, 567 So. 2d 811, 814 (La. App. 3d Cir. 1990); Salazar v. Salazar, 582 So. 2d 374, 375 (La. App. 4th Cir. 1991).

11. Kirby v. Kirby, 579 So. 2d 508, 518 (La. App. 4th Cir.), writ denied, 582 So. 2d 1308 (1991).

12. Bruch, Developing Standards for Child Support Payments: A Critique of Current Practice, 16 U.C. Davis L. Rev. 49, 50 (1982); Note, The Child Support Standards Act and the New York Judiciary: Fortifying the 17 Percent Solution, 56 Brooklyn L. Rev. 1299, 1304 (1991).

effort to bring adequacy, consistency and efficiency to child support collection, and to improve the dismal record of child support awards and enforcement, the United States Congress mandated that every state adopt child support guidelines by October 1, 1988.[13] The guidelines are designed to eliminate forum shopping, create consistent judgments, foster more settlements and reduce the number of contested cases. They are to be used in any initial or modification child support action.[14] The guidelines have been the catalyst of a virtual revolution in the process of establishing, enforcing and modifying child support.[15] In addition to the guidelines, the Child Support Enforcement Amendments of 1984, and subsequent legislation, provide a series of mandatory remedies to improve enforcement of child support orders. In 1988, Federal regulations added a requirement that the guidelines be numerical.[16] The Family Support Act of 1988 mandated that those charged with setting standards for child support in each state use mathematical guidelines as a rebuttable presumption of the appropriate child support award by October 13, 1989.[17]

Louisiana's guidelines are found in Louisiana Revised Statutes 9:315-9:315.14 (effective October 1989).[18] In 1991, a *new schedule* for child support was adopted for use in determining the basic child support obligation.[19] The guidelines are to be reviewed every four years, and after 1994, awards will be automatically reviewed and adjusted for Aid to Families with Dependent Children (AFDC). Louisiana's guidelines are based on an income share formula.[20] The amount of support is based

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13. Pub. L. No. 100-485, 103; 102 Stat. 2343, 2346 (1988) (codified at 42 U.S.C. § 667(a) (Supp. 1991)).

14. La. R.S. 9:315.1(A) (1991); Carroll v. Carroll, 577 So. 2d 1140, 1145-46 (La. App. 1st Cir. 1991).

15. Elrod, The Federalization of Child Support Guidelines, 6 J. Am. Acad. Matrim. L. 103 (1990); see generally 1 Development of Guidelines for Child Support Orders, U.S. Dep't of Health and Human Services, Office of Child Support Enforcement, Twelfth Annual Report to Congress for Period Ending September 30, 1987 at 7 (1988); Munstermann, Grimm, Henderson & Semiatin, Child Support Guidelines: A Compendium (1990). See also Dodson, A Guide to the Guidelines: New Child Support Rules are Helping Custodial Parents Bridge the Financial Gap, 10 Fam. Advoc. No. 4 (1988); Billings, From Guesswork to Guidelines—the Adoption of Uniform Child Support Guidelines in Utah, 1989 Utah L. Rev. 859 (1989).

16. 45 C.F.R. 302.56(c) (1990); Elrod, supra note 15, at 104.

17. La. R.S. 9:315.1(A) (1991); e.g., Crockett v. Crockett, 575 So. 2d 942 (La. App. 2d Cir. 1991); Family Support Act of 1988, Pub. L. No. 100-485, 103; 102 Stat. 2346 (1990) (codified at 42 U.S.C. § 667(b)(2) (Supp. 1991)); Elrod, supra note 15, at 104.

18. Louisiana Child Support and Paternity Provisions (Guidelines) are found in La. R.S. 9:315-315.14 (1991).

19. La. R.S. 9:315.14 (1991).

20. La. R.S. 9:315.8 (1991). In 1991, new numbers were put into the schedule, found in La. R.S. 9:315.14.

on the needs of the children and the means available to the parents.[21] The total child support obligation shall be determined by adding together the basic child support obligation amount, the net child care costs, the cost of health insurance premiums, extraordinary medical expenses, and other extraordinary expenses. Each of these terms is defined in Louisiana Revised Statutes 9:315. A deduction, if any, for a child's income shall be subtracted from the amount calculated (the remainder is the child support obligation). Each party's share is determined by multiplying his or her percentage share of combined adjusted gross income times the total child support obligation. The party not having custody pays a money judgment, minus any court-ordered direct payments made on behalf of the child or for work related net child care, costs, health insurance premiums, extraordinary medical expenses, or other extraordinary expenses, provided as adjustments to the schedule. If, in working this out, the combined adjusted gross income of the parties exceeds the highest level specified in the schedule, the court shall use its discretion in setting the amount of the basic child support obligation, but in no event shall it be less than the highest amount set forth in the schedule.[22] For *joint custody*, the court may consider the period of time spent with each parent (including the non-domiciliary parent).[23]

Since October 1989, the amount determined by the guideline formula adopted in Louisiana has been *presumed* to be in the best interest of the child. The presumption may be rebutted by good cause showing that the application of the guidelines will not be appropriate and will be unjust; the guidelines will not be applied if the parties agree to an alternative arrangement that is found to be in the best interest of the child(ren).[24] The court may deviate from the guidelines if their application would not be in the best interest of the child or would be inequitable to the parties, but the court is required to give oral or written reasons for any deviation. The reasons are to be made part of the record of the proceedings.[25] The decision to deviate from the guidelines may include consideration of several factors listed in Louisiana Revised Statutes 9:315.1(C)(1-7). The judge, however, cannot deviate from the guidelines because there was a previous judgment for a lower child support amount. Thus, simply stating that an inequity exists or that a prior judgment in

21. Toups v. Toups, 573 So. 2d 1164, 1167 (La. App. 5th Cir. 1991).

22. La. R.S. 9:315.10(B) (1991).

23. La. R.S. 9:315.8(A-E) (1991).

24. La. R.S. 9:315.1(A), (B) and (D) (1991); see Spaht, Developments and Proposed Developments in Custody and Child Support, Separation and Divorce, Lecture for the Louisiana Judicial College, San Destin Summer School, June 6, 1989.

25. La. R.S. 9:315.1(B) and (C) (1991); Montgomery v. Waller, 571 So. 2d 765, 767 (La. App. 2d Cir. 1990).

a lesser amount exists will not suffice to allow a judge to deviate downward from the amount the guidelines would establish.[26]

Factors or Considerations

Child support should be based on the "circumstances" of the paying parent, not just his income. His circumstances are properly determined only by consideration of all of his resources, as well as all the resources of his present spouse.[27] May the court consider an obligor's new spouse's contributions to the non-custodial parent's marriage? Louisiana Revised Statutes 9:315(6)(c) was amended in 1991, to read: "The court may also consider as income the benefits a party derives from expense-sharing or other sources; however, in determining the benefits of expense-sharing, the court *shall not consider* the income of another spouse, regardless of the legal regime under which the remarriage exists, *except* to the extent that such income is used directly to reduce the cost of a party's actual expenses."[28]

Prior to this amendment, the Louisiana Fifth Circuit Court of Appeal had held that a trial judge's refusal to consider evidence concerning the income and contributions to expenses of the noncustodial parent's second marriage made by his second spouse was error.

> It is inconsistent with the concept of separate property regimes to lump the second spouse's income together with the obligor spouse's where they are separate in property. At the same time, it is appropriate to consider evidence that the second spouse contributes to the expenses of the second marriage, where such evidence is presented. *Where that evidence is not available, under the language of C.C. article 2373 we must presume that the second spouse contributes in proportion to his or her income.*[29]

Perhaps the amendment to Louisiana Revised Statutes 9:315(6)(c) was aimed at this language of the fifth circuit decision. Thus, subsequent spouses are prompted strongly to establish separate accounts and to rigorously make it clear that they are living off of their own separate property. Proof of this separateness will require careful and documented budgeting.

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26. *Montgomery*, 571 So. 2d at 767-68.

27. Stockstill v. Stockstill, 546 So. 2d 491, 493 (La. App. 4th Cir.), writ denied, 548 So. 2d 1230 (1989).

28. La. R.S. 9:315(6)(c), Act 854, of the 1991 Regular Session (emphasis added); Crockett v. Crockett, 575 So. 2d 942, 944 (La. App. 2d Cir. 1991) (holding it to be appropriate to consider the new spouse's income where equitable).

29. Fleishmann v. Fleishmann, 538 So. 2d 306, 309 (La. App. 5th Cir. 1989) (italicized language is apparently overruled by the language of new La. R.S. 9:315(6)(c), 1991 La. Acts No. 854).

Modification or Termination of Award

The jurisprudential test for modification is codified in Louisiana Revised Statutes 9:311(A). It provides that an award of child support may be modified if the circumstances of "one of the parties," presumably the child or either parent, change and shall be terminated upon proof that it has become unnecessary.[30] It places the burden on the party seeking a change to prove a change in circumstances of either party since the time of the previous award.[31] The modification of a child support award, however, is within the sole discretion of the trial court and will not be disturbed absent clear abuse of discretion.[32] A child support award may be modified in the following ways: 1) by judgment from a proper suit for modification; 2) by operation of law (e.g., minor reaches majority); or 3) by a conventional agreement between the parties suspending the support award.[33] A child support obligation will end automatically when the child in question reaches majority or is emancipated, or under an in globo award, when the youngest of a set of children reaches majority.[34] Should a parent establish that he or she is unable to meet the child support obligation imposed, a reduction or discharge is possible by establishing in court that he or she has experienced a change in circumstances since the time of the award.[35] Once the moving parent makes a prima facie case of a change in circumstances warranting a reduction or termination of the support award, the burden shifts to the other party to establish that the change was caused by the movant's voluntary action or to prove other facts which require that the support obligation remain the same.[36]

Courts have considered such factors as: 1) another child reaching majority; 2) the lifestyles of both parties; 3) the reduction of defendant's income due to retirement; 4) the impact of defendant's tax liability on disposable income; 5) the assets available to plaintiff not being utilized; and 6) the plaintiff's lack of any attempt to seek employment during

30. Bernhardt v. Bernhardt, 283 So. 2d 226 (La. 1973).

31. La. R.S. 9:311(A) (1991); Mathers v. Mathers, 579 So. 2d 503, 504-05 (La. App. 4th Cir. 1991).

32. *Mathers*, 579 So. 2d at 505.

33. Moga v. Dubroc, 388 So. 2d 377 (La. 1980); Halcomb v. Halcomb, 352 So. 2d 1013 (La. 1977); Tuey v. Tuey, 546 So. 2d 235, 238 (La. App. 2d Cir. 1989); Lavergne v. Lavergne, 556 So. 2d 918, 920 (La. App. 3d Cir. 1990).

34. La. R.S. 9:309(A) and (B) (1991); see Timm v. Timm, 511 So. 2d 838, 840 (La. App. 5th Cir. 1987) ("Clearly, in an in globo award there is not an automatic termination of a portion of the child support when one of the children reaches majority. The father is not entitled to reduce his payments on a pro-rata basis without seeking court modification of the judgment.").

35. La. Civ. Code art. 232; La. R.S. 9:311(A) (1991); Toups v. Toups, 573 So. 2d 1164, 1167 (La. App. 5th Cir. 1991).

36. *Toups*, 573 So. 2d at 1167.

the number of years since separation.[37] Where a parent took the child three days, rather than two days, per week was held not to be sufficient to indicate a reduction in child support.[38] On the other hand, if the amount of support being paid by the paying spouse is less than one-half of the "allowable needs" of the child or children, it may be that the increased income of the recipient parent will not be sufficient to warrant a modification of the paying spouse's obligation.[39]

Termination or Modification and Consent Agreements

Parties may agree to modify child support and such an agreement shall be given effect, if the parties clearly agree[40] and "if it is in the best interest of the child."[41] The fourth circuit "has recognized the right of the parties to modify or terminate child support payments by conventional agreement . . . [although] a contradictory motion is the preferable procedure."[42] The fourth circuit also recognized "that alimony could be established by private agreement and without judicial proceedings."[43] This is consistent with the standard of proof required by *Moga v. Dubroc*,[44] where the Louisiana Supreme Court first departed from the *old rule* that a discharge from the obligation to pay child support may be granted only by a suit or in an answer to a suit to enforce payment. The court held a parent may *suspend* the right to collect child support where the agreement to do so is clearly evidenced by turning the child over to the obligor parent. The agreement, however, may not thwart the enforcement of the child's right to support. A parent owes a duty to his children and the public, which he cannot erase by entering into an agreement. "Neither the parents nor a court decree can permanently set aside the duty of support."[45] To be enforceable, the parties must *clearly agree to that modification*.[46] Mere acquiescence in the obligor's failure to make payments is not a waiver.[47]

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37. Ballanco v. Ballanco, 538 So. 2d 1100, 1102 (La. App. 5th Cir. 1989).
38. Mathers v. Mathers, 579 So. 2d 503, 505 (La. App. 4th Cir. 1991).
39. See id. at 506 (concurring opinion); Owens v. Owens, 489 So. 2d 321 (La. App. 4th Cir. 1986).
40. Lavergne v. Lavergne, 556 So. 2d 918, 921 (La. App. 3d Cir. 1990).
41. Robinson v. Robinson, 561 So. 2d 966, 967 (La. App. 4th Cir.), writ denied, 566 So. 2d 985 (1990).
42. Id.
43. Id. at 967-68.
44. 388 So. 2d 377 (La. 1980).
45. Id. at 380 n.3.
46. Lavergne v. Lavergne, 556 So. 2d 918, 921 (La. App. 3d Cir. 1990).
47. Id. at 921.

Application of Child Support Guidelines and Modification of Child Support

The 1984 Child Support Enforcement Amendments, which were enacted by Congress and called for the child support guidelines, did not indicate whether the adoption of the guidelines alone should be a sufficient change in circumstances to allow a modification of a pre-existing child support award. A question to be addressed is whether the promulgation and/or application of the guidelines provide, in themselves, a change of circumstances sufficient to allow modification of a child support award rendered prior to the promulgation of the guidelines. Does an increased child support amount derived by application of the guidelines constitute a change of circumstances which permits a modification of child support?

States took differing approaches. Some promulgated guidelines which provided expressly that their adoption was a change in circumstances.[48] Other states provided that, if the application of the guidelines indicated an amount of child support a certain percentage different from the extant amount, it would be a sufficient change of circumstances.[49] Still other states continued to insist on initial proof of a change in circumstances independent of the promulgation or application of the guidelines.[50]

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48. See Elrod, supra note 15, at 123, notes California, South Dakota, and Texas as examples (although Texas appears to require that the application of the guidelines must establish a sufficient difference from the extant amount to allow a modification. Tex. Fam. Code Ann. § 14.056(a) (Vernon Supp. 1992). Elrod states:

> The court may consider the guidelines for the support of a child in this chapter to determine whether there has been a material and substantial change in circumstances under Section 14.08(c)(2) . . . . However, an increase in the needs, standard of living, or lifestyle of the obligee since the rendering of the existing order does not warrant an increase in the obligor's child support obligation. If the amount of support of a child contained in the order sought to be modified is not in substantial compliance with the guidelines, this *may* warrant a modification of a prior order in accordance with the guidelines if the modification is in the best interest of the child.

Elrod, supra note 15, at 123 (emphasis added)). See Ramsey, Modification of Child Support: Making the Mother Pay, 52 Tex. B.J. 638, 640 (1989); citing, Sampson & Davis, A Brief, Expurgated History of the Recommendations of the Child Support Advisory Committee, State Bar Section Report, Family Law, 87-1, at 11. The guidelines are found in Tex. Fam. Code Ann. § 14.052-.058 (Vernon Supp. 1992).

49. Elrod, supra note 15, at 123, noting: Alabama, Colorado, Indiana, Ohio, Rhode Island, and Vermont.

50. E.g., Miller v. Miller, 415 N.W.2d 920, 923 (Minn. Ct. App. 1987) (applying Minn. Stat. § 518.64(2)(a) (Supp. 1992), which requires the trial court to determine whether there has been a substantial change in circumstances based on statutory factors to warrant modification, after which, the guidelines will be applied).

Louisiana child support guidelines are applicable to initial awards or modifications of child support filed after October 1, 1989.[51] Louisiana Revised Statutes 9:311(A) provides that: "An award for support shall not be reduced or increased unless the party seeking the reduction or increase shows a change in circumstances of one of the parties between the time of the previous award and the time of the motion for modification of the award."[52] The guidelines apply to determine the amount of support upon modification, when circumstances have changed significantly since the original award.[53] In most instances, the application of the guidelines generally provides more support than was obtained under the prior discretionary method of awarding support.

Once the change of circumstances is established, it is error not to apply the guidelines or not to indicate on the record the reasons for deviation.[54] Although the Louisiana guidelines apply to modification actions brought since their effective date, and although they create a rebuttable presumption that the amount calculated under the guidelines is the proper amount of support,[55] the guidelines were not made retroactive. It does not appear that they were intended to alone create a change of circumstances to awards rendered prior to their effective date.[56] The necessity of proving a change of circumstances apart from the promulgation of the guidelines is reinforced by Louisiana Revised Statutes 9:315.11, which provides that, "[t]he enactment of this Part [the guidelines] shall not for that reason alone be considered a change in the circumstances of either party."[57] The guidelines apply to a modification action filed after their effective date (October 1, 1989), as long as the movant proves a significant change in material circumstances independent of the promulgation of the guidelines.

What sort of change of circumstances is contemplated? Some other states have promulgated statutes explicitly providing that the application

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51. La. R.S. 9:315.1(A) (1991); Crockett v. Crockett, 575 So. 2d 942, 944 (La. App. 2d Cir. 1991).

52. La. R.S. 9:311(A) (1991); see Mitchell v. Mitchell, 543 So. 2d 128, 130 (La. App. 2d Cir. 1989) (it was error to increase a father's child support obligation when there was no evidence to show a change in the mother's or children's expenses since the date of the divorce); Arender v. Houston, 540 So. 2d 439, 440 (La. App. 1st Cir. 1989) (a support award shall not be reduced or increased, unless the party seeking the modification shows a change in circumstances warranting the modification).

53. La. R.S. 9:311(A), 9:315.1(A) (1991); see Watson v. Hampton, 569 So. 2d 635, 637 (La. App. 2d Cir. 1990).

54. La. R.S. 9:315.1(B) (1991); *Crockett*, 575 So. 2d at 944; Montgomery v. Waller, 571 So. 2d 765, 767 (La. App. 2d Cir. 1990).

55. La. R.S. 9:315.1(A) (1991).

56. See La. R.S. 9:311 and 315.1 (1991).

57. La. R.S. 9:315.11 (1991), added by 1989 La. Acts No. 9, § 1, 2d Ex. Sess., eff. Oct. 1, 1989.

of their guidelines alone will constitute a presumption of changed circumstances, when their application establishes a difference of 10% (some provide 20%) in the award. The Louisiana legislature did not include such a provision in the Louisiana guidelines. More detail on this approach and its comparison with Louisiana law will be presented below. First, however, a discussion of the nature and direction of the change in circumstances required in a given case is necessary.

Does Louisiana Revised Statutes 9:311 require that the modification of a child support award be in the direction indicated by the change of circumstances, or just that there be a change? For example, what if recipient's income had risen since an award of child support rendered prior to the effective date of the guidelines? This is a change of circumstances. If the application of the guidelines would provide greater child support than the prior award, would a court be justified in applying the guidelines? If the application of the guidelines to the circumstances of a case of a pre-existing award of child support indicates a significant difference in amount than would have been awarded without the guidelines, certainly, a change of circumstances has occurred. Once a change has occurred, one can argue that the whole issue of child support is reopened. Any reopening of the issue of child support implicates the child support guidelines, which are the substantive rule for application since October 1989.

Louisiana jurisprudence has held that the person moving for a modification of child support must prove that a material change of circumstances, relating to the recipient child's needs or the obligor's ability to pay, has occurred since the support award was made. The Louisiana Third Circuit Court of Appeal in 1987 held that it was an abuse of discretion to allow an increase in child support payments from a former husband, when the former wife had an *increase* in her income and the former husband had a *decrease* in his income.[58] Moreover, any modification that has been allowed has been one triggered by a change in circumstances in the direction of the modification. That is, if the child's needs went up (e.g., the income, etc. of the recipient parent went down), the award of support was modified upward. To allow any change, even one where the recipient's needs *decreased*, to be the basis of allowing the guidelines to apply (to *increase* the amount of child support) seems to fly in the face of Louisiana Revised Statutes 9:315.11 (no change of circumstances intended solely on the basis of the enactment of the guidelines). To hold otherwise, works to apply the guidelines retroactively. Moreover, this would cause equal protection difficulties and ironic inequities: a recipient whose needs remained the same would

58. Carriere v. Alexander, 504 So. 2d 567, 569 (La. App. 3d Cir.), writ denied, 508 So. 2d 90 (1987).

not be able to succeed in having the guidelines apply, while one whose needs decreased would be able to trigger the guidelines. Also, the obligor whose ability to pay decreased would cause the guidelines to apply and his or her support obligation would increase, although the obligor who remained as able as ever to pay would not have to worry about the application of the guidelines.[59] If the legislature had wanted to make the guidelines retroactive, or to allow their enactment or application to constitute a change of circumstances, they could have so indicated. Models of such an approach were available at that time.

The jurisprudence has disapproved of the notion that child support obligations could be modified in that manner.[60] Once an obligor spouse has proved a change of circumstances warranting a reduction, a presumption attaches, which must be rebutted by the other party opposing the reduction.[61] Some problematic language is found in *Watson v. Hampton*,[62] however, where a second circuit panel noted ambiguously in dictum, that:

> given the facts of this case, particularly the hiatus between filing and judgment and the intervening statutory changes, plaintiff might have been better served by seeking an increase in child support, a modification to which the guidelines would apply the presumptions. Plaintiff would have had the chance to more fully develop evidence *viz a viz* the insurance program and its costs, an opportunity foreclosed on appeal.[63]

It is not clear whether the panel meant that it believed that the promulgation of the guidelines itself constituted a sufficient change in circumstances, or simply that the evidence in the case established a change in circumstances since the filing, which, in turn, triggered the application of the guidelines. Only the latter proposition appears appropriate, given Louisiana Revised Statutes 9:315.11.

A Sampling of Experience in Other Jurisdictions Applying Guidelines

Some states have explicitly provided in their guidelines that, if the application to the facts in an action for modification brought after a

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59. Arender v. Houston, 540 So. 2d 439 (La. App. 1st Cir. 1989) (a support award shall not be reduced or increased, unless the party seeking the modification shows a change in circumstances warranting the modification); Kaye v. Kaye, 529 So. 2d 879 (La. App. 4th Cir.), writ denied, 533 So. 2d 377 (1988) (income reduced from $100,000 per year to nothing at one point and then to $40,000 per year established a material change of circumstances which would allow a reduction in child support).

60. *Carriere*, 504 So. 2d at 569.

61. Kaye v. Kaye, 558 So. 2d 1352, 1354 (La. App. 4th Cir. 1990).

62. Watson v. Hampton, 569 So. 2d 635 (La. App. 2d Cir. 1990).

63. Id. at 637.

specifically stated period of time since the original award indicates a difference in amount of child support that is at least 10% (some use 20%), it establishes a presumption of sufficient change in circumstances for modification. Other states do not include such a provision. Unless there is some explicit limitation on the application of the guidelines to modify support orders, a reapplication of the guidelines with nothing more would result in frequent modifications and subvert the policy of stability.

States With No Built-In Change in Circumstances

The New Hampshire Supreme Court recently held that their guidelines do not, of themselves, provide a change of circumstances.[64] The court noted:

> the fact that the legislature has enacted child support guidelines is no reason to alter the permanent stipulation. When the parties are subject to an existing child support order, particularly when the terms of the order were negotiated and agreed upon by the parties, the guidelines are applied only after the trial court has determined that the standard for modification has been met, and the relative financial circumstances of the parties have changed substantially since the order was rendered.[65]

In Florida, where the recipient of child support establishes a significant change in circumstances since the award, the guidelines are applicable to determine the proper amount. The Florida guidelines are expressly applicable to modifications of existing child support orders.[66] The Florida guidelines, however, also provide that "[t]he guidelines shall not: 1. [p]rovide the basis for proving a substantial change in circumstances upon which a modification of an existing order may be granted. . . ."[67]

The Georgia Supreme Court has upheld a modification of a support order awarded prior to the enactment of the guidelines.[68] It may be modified to meet the requisites of the guidelines. The supreme court held that:

> [u]nder the terms of the statute, the finder of fact is free to apply the guidelines, or to fix child support on the basis of

64. Morrill v. Millard, 570 A.2d 387, 390 (N.H. 1990).

65. Id. at 390.

66. Fla. Stat. Ann. § 61.30(1)(a) (West Supp. 1992); Martinez v. Garcia, 575 So. 2d 1365, 1366 (Fla. Dist. Ct. App. 1991) (Florida guidelines are expressly applicable in a proceeding for modification of an existing support order, as long as the modification action was filed on or after the effective date of the Act promulgating the guidelines.).

67. Fla. Stat. Ann. § 61.30(1)(b)(1) (West Supp. 1992).

68. Walker v. Walker, 396 S.E.2d 235 (Ga. 1990).

> appropriate factors other than those reflected in the guidelines. . . . The statute [guidelines] create[s] no new duty on the part of the former husband. Neither does it alter his continuing obligation, which is to provide adequate child support. At the most, the statute offers a computational reference, which the finder of fact may apply if it chooses.[69]

The trial court had considered the guidelines as a substantive change in the law that might not be applied retroactively.[70] The Georgia Supreme Court reversed.[71] The Georgia child support modification statute provides that: "support . . . shall be subject to revision upon petition . . . showing a change in the income and financial status of either former spouse . . . or in the needs of the child or children. . . . No petition [for modification] may be filed . . . within a period of two years from the date of the final order . . . ."[72] The Georgia guidelines do not contain a provision like that in Louisiana where the enactment of the guidelines alone does not constitute a change of circumstances.[73]

Some states have modified their guidelines to include a provision that provides that a modification of a child support order may be made upon a showing that the extant order deviates by a specified percentage (generally either 10% or 20%) from what would be the amount determined by the guidelines.[74] For example, Indiana amended its guidelines in 1990 to provide that after July 1, 1990, modification is to be made upon a showing that the existing order deviates by more than 20% from the guidelines amount and the existing order was entered at least 12 months prior to the action.[75] Ohio law provides similarly, with a 10% difference being sufficient to show a material and significant change of

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69. Id. at 236.

70. Id. at 235.

71. Id. at 236; see also Riggs v. Darsey, 396 S.E.2d 905 (Ga. 1990); Ga. Code Ann. § 19-6-15(a) (1991).

72. Ga. Code Ann. § 19-6-19(a) (1991).

73. Ga. Code Ann. § 19-6-15(b)(5) (1991).

74. E.g., Ind. Code Ann. § 31-6-6.1-13(f) (West Supp. 1991) (modification permitted upon a showing that the original support order differs by more than 20% from the amount indicated by application of the guidelines, when the pre-existing order was issued at least twelve months prior to the action for modification). Nelson v. Scalzitti, 563 N.E.2d 166, 167-68 n.3 (Ind. Ct. App. 1990) (holding that the action for modification was filed and heard prior to the effective date of the amendment to the guidelines, so proof of a change of circumstances independent of the guideline amount applied to the circumstances was necessary). See Colo. Rev. Stat. § 14-10-122(1)(b) (1989) (amended 1986); In re Marriage of Pugliese, 761 P.2d 277, 278 (Colo. Ct. App. 1988), discussed below.

75. Ind. Code Ann. § 31-6-6.1-13(f) (West Supp. 1991). *Nelson*, 563 N.E.2d at 167-68.

circumstances.[76] This approach seems to have been rejected by the Louisiana legislature.[77]

The Colorado guidelines provide that "[i]n any action to . . . modify child support . . . the child support guideline . . . *shall be used as a rebuttable presumption for the establishment or modification of the amount of child support.*"[78] They also provide that "[a]pplication of the child support guideline . . . to the circumstances of the parties at the time of the filing of the motion for modification of the child support order which results in less than a ten percent change in the amount of support due per month shall be deemed not to be a substantial and continuing change of circumstances."[79] A Colorado appellate court read the guidelines to create a rebuttable presumption of a substantial and continuing change of circumstances whenever the application of the guidelines would amount to "more than a 10 percent change in the amount of support due."[80] It reasoned that although the guidelines are to be applied in modification cases[81] and although the change in circumstances must be substantial and continuing for modification,[82] the legislature's mandate, that the "[a]pplication of the child support guideline . . . to the circumstances of the parties at the time of the filing of a motion for modification of the child support order which results in less than a ten percent change in the amount of support due per month shall be deemed not to be a substantial and continuing change in circumstances,"[83] establishes a rebuttable presumption that a modification of child support must be granted whenever application of the child support guidelines would result in more than a 10% change in the amount of support due.[84] Another Colorado appellate court noted, in a case where the father had assumed custody of a child who had previously been in the custody of the mother but who had agreed to "waive" child support, that "the child support guidelines created a rebuttable presumption that a change of circumstances existed here."[85] The court held that the change of custody, in light of the guidelines, created the rebuttable presumption. It noted that the Colorado statute

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76. Rohrbach v. Rohrbach, 40 Ohio App. 3d 92, 531 N.E.2d 773 (1988); Note, Ohio's Child Support Guidelines: A Springboard or a Crutch?, 37 Clev. St. L. Rev. 471, 491-92 (1989).

77. La. R.S. 9:315.11 (1991) ("The enactment of this Part shall not for that reason alone be considered a change in the circumstances of either party.").

78. Colo. Rev. Stat. § 14-10-115(3)(a) (1989).

79. Colo. Rev. Stat. § 14-10-122(1)(b) (1989) (amended 1986).

80. In re Marriage of Pugliese, 761 P.2d 277, 278 (Colo. Ct. App. 1988).

81. Colo. Rev. Stat. § 14-10-115(3)(a) and (b) (1989).

82. Id. at § 14-10-122(1)(a).

83. Id. at § 14-10-122(1)(b).

84. Id. at § 14-10-122(1)(b); *Pugliese*, 761 P.2d at 278.

85. In re Marriage of Miller, 790 P.2d 890, 892 (Colo. Ct. App. 1990).

requiring a showing of a substantial and continuing change of circumstances must be considered in conjunction with the guidelines.[86]

Oregon's legislative guidelines are similar to those in Colorado and Vermont.[87] As in Colorado, the movant must prove a substantial change in circumstances since the original award.[88] A simple reapplication of the guidelines without more would result in frequent modifications and subvert the policy of stability, so Colorado requires a 10% difference[89] and Vermont requires a 10% difference.[90] Oregon's legislation, however, is silent on the percentage difference that will constitute a sufficient change for modification.[91] Again, Louisiana's guidelines apply to both initial awards and modification of child support, and they provide that "[t]here shall be a rebuttable presumption that the amount of child support obtained by use of the guidelines . . . is the proper amount . . . ."[92]

Section 14.08 of the Texas Family Code provides authority to modify a support order if circumstances have changed materially and substantially since the entry of the order.[93] The Texas child support guidelines apparently provide a mechanism to show a material and substantial change of circumstances. The guidelines themselves may be used to determine whether a change of circumstances has occurred.[94] Apparently, if the guidelines, applied to the circumstances of a given case, indicate a substantially different amount, a new order will be appropriate.[95] In

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86. Id.

87. Or. Rev. Stat. 25.270-.285 (Supp. 1990 (Part I)); Note, New Mandatory Child Support Guidelines in Oregon: A New Age of Structured Awards and Parental Accountability, 26 Willamette L. Rev. 1019, 1041 (1990).

88. In re Marriage of Myers and Myers, 764 P.2d 590, 591 (Or. Ct. App. 1988); Note, supra note 87, at 1041.

89. Colo. Rev. Stat. § 14-10-122(1)(b) (1989).

90. Vt. Stat. Ann. tit. 15, § 660(b) (Supp. 1991) (prior to 1989 Vermont required a 15% difference); Note, supra note 87, at 1041.

91. Or. Rev. Stat. § 25.280 (Supp. 1990 (Part I)); Note, supra note 87, at 1042.

92. La. R.S. 9:315.1(A) (1991).

93. Tex. Fam. Code Ann. § 14.08(c)(2) (Vernon Supp. 1992); see Ramsey, Modification of Child Support: Making the Mother Pay, 52 Tex. B.J. 638 (1989). The guidelines are found in Tex. Fam. Code Ann. §§ 14.052-.058 (Vernon Supp. 1992).

94. Tex. Fam. Code Ann. § 14.056(a) (Vernon Supp. 1992); see Ramsey, supra note 93, at 640, citing Sampson & Davis, supra note 48, at 11.

95. Tex. Fam. Code Ann. § 14.056(a) (Vernon Supp. 1992) ("The court may consider the guidelines for the support of a child in this chapter to determine whether there has been a material and substantial change in circumstances under section 14.08(c)(2) . . . . However, an increase in the needs, standard of living, or lifestyle of the obligee since the rendering of the existing order does not warrant an increase in the obligor's child support obligation. If the amount of support of a child contained in the order sought to be modified is not in substantial compliance with the guidelines, this *may* warrant a modification of a prior order in accordance with the guidelines if the modification is in the best interest of the child." (emphasis added)); see Ramsey, supra note 93, at 640, citing Sampson & Davis, supra note 48, at 11.

December, 1990, a Texas court of appeals held that the fact that the trial court may consider the guidelines in the Family Code did not change the former husband's burden of proof or create elements that established a need for modification.[96] In a case where a father wanted to reduce his child support obligation by applying the guidelines, a Texas appellate court held that, while the guidelines create a rebuttable presumption that the amount arising from their application is correct and in the best interest of the child,[97] in modification of previous orders the use of the rebuttable presumption is discretionary, not mandatory, as it utilizes the discretionary *may*.[98] The fact that the court could consider the guidelines does not change the burden of proof or create elements that establish the need for modification.[99]

Alabama's guidelines provide that "[t]he provisions of any judgment respecting child support shall be modified . . . only upon a showing of a material change of circumstances that is substantial and continuing."[100] Prior to the effective date of the mandatory guidelines, some Alabama appellate courts held that proof of a material change must be made prior to applying the guidelines; once a material change in circumstances has occurred, the court is to apply the guidelines to determine the appropriate amount.[101] One appellate court even held that application of the guidelines, which indicated that the child support paid by a husband was substantially higher than the amount recommended under the guidelines, *did not constitute a material change in circumstances*.[102] Alabama's legislation, which is now mandatory, however, *also provides that the child support guidelines are to be applied as a "basis for periodic updates* of child support obligations . . .[103] *[and the] [a]pplication*

96. MacCallum v. MacCallum, 801 S.W.2d 579, 581-82 (Tex. Ct. App. 1990), writ denied, 810 S.W.2d 848 (1991).

97. Tex. Fam. Code Ann. § 14.055(a) (Vernon Supp. 1992) (the 1991 version provides that the amount is reasonable and in the best interest of the child); *MacCallum*, 801 S.W.2d at 583.

98. Tex. Fam. Code Ann. § 14.056(a) (Vernon Supp. 1992); *MacCallum*, 801 S.W.2d at 584.

99. *MacCallum*, 801 S.W.2d at 584.

100. Rule 32(A)(2)(i), Alabama Rules of Judicial Administration (1991) [hereinafter A.R.J.A.].

101. Marchman v. Marchman, 571 So. 2d 1210, 1211 (Ala. Civ. App. 1990) (Once a change had been established, the guidelines were applicable by the trial judge, even though the modification action had been filed prior to the effective date of the guidelines. This was because the guidelines, although not mandatory prior to the effective date, were available as guideposts to aid the trial judge in applying her or his discretion in child support awards.).

102. Davis v. Davis, 535 So. 2d 183, 184 (Ala. Civ. App. 1988) (rendered prior to the effective date of the mandatory guidelines).

103. Rule 32(A)(2), A.R.J.A. (1991) (emphasis added).

of the child support guidelines to the circumstances of the parties at the time of the filing of a petition for modification . . .,[104] *which results in less than a ten percent change in the amount of support due per month, shall be rebuttably presumed not to be a material change in circumstances.*"[105] Later, in 1990, the same Alabama appellate court which decided that a significant difference *did not* amount to a material change in circumstances stated, in a dissenting opinion by Judge Russell, that the guideline language noted above, now that it is mandatory, should be interpreted, by negative implication, to mean that if application of the guidelines establishes a difference of at least 10% in the amount of child support, a material change of circumstances has been made out.[106] The application of the guidelines may function as a basis for modification.[107] This is done by "[applying the guidelines to modify] only as to installments accruing subsequent to the filing . . . ." When the application of the child support guidelines to the circumstances of the parties at the time of the filing of the petition for modification results in less than a ten percent change in the amount of child support due, this is not to be considered a material change in circumstances.[108] Where a trial judge held that the recipient of child support, based on an order rendered prior to the promulgation of the mandatory guidelines, had established a change of circumstances sufficient for a modification, it was error not to apply the guidelines to establish the appropriate amount or, alternatively, to not find on the record why the application of the guidelines would be unjust or inappropriate.[109]

Louisiana law, on the other hand, provides that "[t]he enactment [of the guidelines] shall not for that reason alone be considered a change in the circumstances of either party."[110] It could be argued that it is not the "enactment" of the guidelines that establishes the change in circumstances, but their "application." Louisiana's law, however, does not have a clause indicating that a 10% (or other percentage) difference will amount to a presumption of a change of circumstances, so it seems difficult to accept that the legislature intended to allow their "application" to establish a material change of circumstances.

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104. Rule 32(A)(2)(ii), A.R.J.A. (1991) (emphasis added).

105. Id. (emphasis added).

106. Moore v. Moore, 575 So. 2d 95, 97-98 (Ala. Civ. App. 1990) (dissenting opinion).

107. Rule 32(A)(2), A.R.J.A. (1991).

108. *Moore*, 575 So. 2d at 97, citing In re Marriage of Greenblatt, 789 P.2d 489, 491 (Colo. Ct. App. 1990); In re Marriage of Miller, 790 P.2d 890, 892 (Colo. Ct. App. 1990); and In re Marriage of Pugliese, 761 P.2d 277, 278 (Colo. Ct. App. 1988), as decisions interpreting similar legislation in the manner suggested by the dissent in *Moore*.

109. Thomas v. Thomas, 575 So. 2d 583, 584 (Ala. Civ. App. 1991).

110. La. R.S. 9:315.11 (1991).

Child (and Spousal) Support Enforcement[111]

The Child Support Enforcement Amendments of 1984 made sweeping changes in child and spousal support enforcement. These amendments are part of the *Aid to Families With Dependent Children (AFDC).*[112] These amendments make federal funding for welfare and other social service benefits dependent on the states' adopting the required child support enforcement measures.[113] The amendments make virtually all the pertinent federal agencies available to the states for support enforcement purposes, including: the Social Security Administration, I.R.S., armed forces, etc. In exchange for the funding and access to these agencies and services, the states are required to implement several coordinating and enforcement mechanisms and even to provide certain substantive rules, for example, to allow an illegitimate child to have until her or his 18th birthday to prove paternity.

The states must set up parent locator services and state agencies to assist child support enforcement. The state agencies must be made available to muster information on missing spouses/parents.[114] The states must establish "expedited processes" for support enforcement. Major measures that Louisiana has interstitially and with varying degrees of specificity undertaken, pursuant to its quid pro quo, include expedited processes for establishment and enforcement of support;[115] automatic data processing for purposes of child support enforcement;[116] authorization for Louisiana courts to impose liens to ensure payment of child support;[117] authorization for Louisiana courts to require absent parents to provide security;[118] approval of the interception of income tax refunds;[119] and mandatory income withholding.[120] With regard to income withholding, the employer is liable to the state for any amount he or she fails to withhold. An employer may be fined (the state must have

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111. See the U.S. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984), 42 U.S.C. § 601, 652, et seq. (1984 and Supp. 1991) and related statutes; Family Support Act of 1988, 42 U.S.C. 667 (Supp. 1991). These amendments are implemented in Family and Child Support Programs, La. R.S. 46:236.1 (1982 and Supp. 1991).

112. H. Clark, The Law of Domestic Relations in the United States 735 (2d ed. 1988).

113. Id.

114. Id.

115. La. R.S. 46:236.1; 46:236.5 (Supp. 1992).

116. See, La. R.S. 46:236.1, 46:236.6(F); see also La. R.S. 13:1641 et seq., La. R.S. 13:1671 and 13:1693.

117. See, La. R.S. 46:236.1(F); State v. Stringer, 567 So. 2d 758 (La. App. 2d Cir. 1990); see also La. R.S. 46:236.3 and 23:1693.

118. La. R.S. 46:236.3(E)(1), 46:236.6(D), and 13:1696(C).

119. La. R.S. 46:236.1(I).

120. La. R.S. 46:236.3 (1982 and Supp. 1991), Enforcement of Support by Income Assignment. La. R.S. 46:236.4 (Supp. 1991), Interstate Enforcement of Support by Income Assignment. La. R.S. 46:236.5 (Supp. 1991), Expedited Process for the Establishment and Enforcement of Support. See also, La. R.S. 23:731.

a means to fine the employer). Louisiana has had to provide sanctions against employers who take any disciplinary action against or who discharge any such employee, due to the burdens of the process.[121]

New Cause of Action to Prove Paternity

Unless it is not in the best interest of the child, the Department of Health and Human Resources may take direct civil action, including actions to establish filiation, against an alleged biological parent, and notwithstanding the existence of a legal presumption that another person is the parent of the child, solely for the purpose of fulfilling its responsibility under this section. This may be done in any court of competent jurisdiction and without the necessity of written assignment, subrogation, tutorship proceedings, or divorce proceedings in any case in which an AFDC grant has been made for or on behalf of a child, or in any case in which the department has agreed to provide services for a non-AFDC applicant. This statute creates a distinct and separate cause of action in favor of the department, and suits under this section need not be ancillary to or dependent on any other proceeding.[122]

Child Support Enforcement—Other Means

Criminal Neglect

The Louisiana Criminal Code provides criminal sanctions for parents who do not support their children. This charge encompasses "intentional non-support" by a parent if his or her minor child is in "destitute or necessitous circumstances."[123] The Louisiana Supreme Court has held that the application of the presumption of paternity in Civil Code articles 184-186 to establish filiation for purposes of criminal neglect "clearly violates the federal and state constitutional guarantees of due process."[124] When a legally presumed father utilized blood testing to prove that he could not have been the father, he was held not guilty of criminal neglect and not responsible to pay child support. He, also, was given credit for support paid for this child from the original *in globo* support order that had been made pursuant to the presumption of paternity, even though the father had obtained the blood test results subsequent

121. La. R.S. 46:236.3 (1982 and Supp. 1991).

122. La. R.S. 46:236.1 (1982 and Supp. 1991); see also Smith v. Cole, 553 So. 2d 847 (La. 1989).

123. La. R.S. 14:74(A)(1)(b) (1982); State v. Veal, 579 So. 2d 486, 487 (La. App. 4th Cir. 1991).

124. State v. Prosper, 580 So. 2d 1085, 1088 (La. App. 4th Cir.), writ denied, 580 So. 2d 84 (1991) (relying on State v. Cornell Jones, 481 So. 2d 598, 601 (La. 1986)).

to the running of the Louisiana Civil Code article 189 prescriptive period.[125]

Contempt

The Uniform Reciprocal Enforcement of Support Act (URESA) provides that the duty to support is enforceable by a proceeding for civil contempt.[126] Louisiana Revised Statutes 13:4611 is Louisiana's general contempt statute. Contempt is defined as: "Wilful disobedience of any lawful judgment . . . wilful disobedience means an act or failure to act that is done intentionally, knowingly and purposefully, without justifiable excuse."[127] Louisiana Revised Statutes 13:4611, entitled Punishment for Contempt of Court, provides in pertinent part:

> Except as otherwise provided for by law: (1) The supreme court, the courts of appeal, the district courts, family courts, juvenile courts and the city courts may punish a person adjudged guilty of a contempt of court therein . . . [f]or . . . disobeying an order for the payment of child support or alimony or an order for the right of visitation, by a fine of not more than five hundred dollars, or imprisonment for not more than three months, or both . . . .[128]

Contempt procedure in civil cases is regulated by Louisiana Code of Civil Procedure articles 221-227 and Louisiana Revised Statutes 13:4611. Louisiana Code of Civil Procedure article 227 provides that the punishment which a court may impose on a person adjudged guilty of contempt of court is provided in Louisiana Revised Statutes 13:4611 and Louisiana Code of Civil Procedure article 224(2).[129] A trial court is vested with great discretion to determine whether a party should be held in contempt for willful disobedience of a trial court judgment.[130]

Right to Counsel

There is a variety of judicial opinion as to whether a defendant may have a right to counsel at the time he consents to a court support

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125. Id.

126. La. R.S. 13:1663 (1982) and La. R.S. 13:1680 (1982). The Children's Code, discussed infra, has its own contempt mechanism.

127. Kirby v. Kirby, 579 So. 2d 508, 519 (La. App. 4th Cir.), writ denied, 582 So. 2d 1308 (1991).

128. La. R.S. 13:4611(1)(d) (1991).

129. La. Code Civ. P. art. 224(2); *Kirby*, 579 So. 2d at 519.

130. Id. at 519.

order under Louisiana Revised Statutes 9:75-75.2.[131] The fourth circuit held that it is not necessary to appoint counsel in a Louisiana Revised Statutes 9:75.2 situation where the defendant and the district attorney agree to a stipulation of support.[132] This aspect of "criminal neglect" for the fourth circuit is apparently "quasi-civil" in nature and does not require such constitutional protection, although violation of this order can result in the defendant being found to be in contempt of court and sentenced to not more than six months in prison.[133] Some provisions of Louisiana Revised Statutes 9:74-75.2 are "necessarily criminal in nature,"[134] insofar as a violation of a support order will give rise to possible fine or imprisonment for punishment. Contempt proceedings have been held to be prosecutorial in nature.[135]

Contempt generally is considered "civil" when the court uses it to "encourage" the obligor to pay and "criminal" when designed to sanction the spouse who willfully disobeys a court order. Notwithstanding the ventured distinction between civil and criminal contempt, it would seem that any power to incarcerate for "vindication of the dignity of the court" or to coerce payment is at least quasi-criminal in nature, triggering a due process requirement of notice and an opportunity to be heard.[136] Imprisonment for such contempt is not considered to violate the constitutional prohibition against imprisonment for debt, because support is considered to be an obligation imposed by law pursuant to the marriage, its dissolution, or the parent-child relation.

The second circuit recently held that a "defendant who is brought to trial upon a petition for support filed by the State pursuant to [Louisiana Revised Statutes] 46:236.1 must be advised of his right to counsel . . . because the judgment rendered against the defendant wherein he was uncounseled was used as a basis to punish him for contempt under R.S. 46:236.7."[137] The right to counsel existed, even though the

131. See, e.g., State v. St. Pierre, 515 So. 2d 769 (La. 1987); State v. Broussard, 490 So. 2d 273 (La. 1986).

132. State v. Veal, 579 So. 2d 486, 487 (La. App. 4th Cir.), writ denied, 582 So. 2d 1308 (1991).

133. Id. at 487.

134. Id.

135. State v. St. Pierre, 515 So. 2d 769 (La. 1987); *Veal*, 579 So. 2d at 487.

136. See Caughron v. Caughron, 579 So. 2d 1214, 1216 (La. App. 3d Cir. 1991) (a continuance should have been allowed to give defendant in a civil action time to obtain counsel to represent him in contempt hearing); Martin v. Martin, 457 So. 2d 189, 193 (La. App. 2d Cir. 1984); C. Blakesley, Chapter 32, Alimony and Spousal Support, in Wardle, Blakesley & Parker, Contemporary Family Law, supra note *, at 68-69.

137. State v. St. Pierre, 515 So. 2d 769 (La. 1987); State v. Creamer, 528 So. 2d 667, 669 (La. App. 2d Cir. 1988) (relying on State v. Broussard, 490 So. 2d 273 (La. 1986)); and State v. Scott, 508 So. 2d 101 (La. App. 2d Cir. 1987), aff'd in part, rev'd in part, 519 So. 2d 104 (La. 1988).

state did not proceed pursuant to the criminal neglect statutes. The Department of Health and Human Resources is authorized to enforce child support orders even for people not receiving AFDC benefits.[138] The penalties for contempt under Louisiana Revised Statutes 46:236 are the same as those pursuant to Louisiana Revised Statutes 14:74 and 14:75, possible prison for not more than six months, subject to suspension and probation. Although it is true that no imprisonment is possible under this scheme, nevertheless, when the defendant enters a support stipulation under Louisiana Revised Statutes 14:75.2, the right to counsel ought to attach because the proceedings are prosecutorial in nature and because subsequent violation of the support stipulation serves as a basis to punish the defendant for contempt under Louisiana Revised Statutes 46:236.7. The manner in which the district attorney proceeds and the potential penalty are indistinguishable from those used in criminal neglect. Thus, the right to counsel should obtain.[139]

An argument against the right to counsel in child support contempt cases has been made recently in a dissent from a decision of the Louisiana Third Circuit Court of Appeals. The dissent argued that in a civil, rather than criminal, proceeding a person is "not *constitutionally entitled* to a lawyer"; failure to provide an attorney "is not per se reversible error." In the dissent's view, "public policy dictates that the enforcement of the defendant's obligation bears penal consequences and remains a purely civil proceeding, without triggering the constitutional safeguards provided to a criminal defendant. Appointment of counsel at civil support enforcement proceedings would serve only to frustrate public policy."[140]

Contempt has recently been held not appropriate for failure to pay child support pursuant to a consent agreement arising out of a criminal neglect proceeding that was fifteen years old, for which the transcript had been lost or destroyed, and for which there was no evidence that the defendant had been read his rights, including his right to counsel.[141]

Interstate Enforcement: The Uniform Reciprocal Enforcement of Support Act (URESA)

The mechanism for enforcing child support, when more than one state is involved, is based on the Uniform Reciprocal Enforcement of Support Act (URESA).[142] Louisiana Revised Statutes 13:1641 provides

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138. La. R.S. 46:236.1(B)(2) (Supp. 1991).

139. *Creamer*, 528 So. 2d at 669.

140. *Caughron*, 579 So. 2d at 1216-17 (Knoll, J., dissenting).

141. State v. Thomas, 579 So. 2d 1086, 1088 (La. App. 4th Cir.), writ denied, 586 So. 2d 535 (1991).

142. La. R.S. 13:1641 et seq. (1983 and Supp. 1991).

that, "The purposes of this Part are to improve and extend by reciprocal legislation the enforcement of duties of support."[143] URESA is available to enforce either child or spousal support awards. Louisiana Revised Statutes 13:1642 reads: "*Duty of support* means a duty of support whether imposed or imposable by law or by order, decree, or judgment of any court, whether interlocutory or final or whether incidental to an action for divorce . . . and includes the duty to pay arrearages of support past due and unpaid."[144] *A support order* is defined therein as a judgment in favor of an obligee and an obligee is a "person to whom a duty of support is owed."[145] The law provides that jurisdiction for any proceeding under URESA is vested in the juvenile court.[146] A parent may sue the other parent of a child for child support or a spouse or ex-spouse may sue his or her spouse or ex-spouse for alimony, pendente lite, or permanent, as the case may be.[147]

Also, of course, any person with custody of a minor may sue for his or her support.[148] The Uniform Enforcement of Support Act has been held constitutional in Louisiana, like in other states.[149]

Child Support Arrearages

In *Lavergne v. Lavergne*, the third circuit held the movant in an action to make past-due child support executory has the burden of proving the amount of child support in arrears.[150] The paying spouse is not entitled to credit for overpayments made without proving an agreement with the recipient ex-spouse to allow him to credit those overpayments against any future support obligation. The paying spouse had testified that he paid the extra amount because he was asked to do so by his ex-wife, and he obliged simply because he wanted to help. A specific agreement to allow credit for overpayment is required.[151]

Retroactivity of Child Support Awards

Louisiana Revised Statutes 9:310 provides that child support orders and alimony awards are to be retroactive to the date the action was

143. La. R.S. 13:1641 (1983).

144. La. R.S. 13:1642 (1983) (emphasis added).

145. La. R.S. 13:1642(g) and (o) (1983). See Bonvillian v. Bonvillian, 573 So. 2d 1161, 1163 (La. App. 5th Cir.), writ denied, 577 So. 2d 31 (1991).

146. La. R.S. 13:1664 (1983).

147. See La. R.S. 13:1663, 9:291, and 9:571, all of which allow suits for support.

148. La. R.S. 13:1667 (1983); R. Pascal & K. Spaht, Louisiana Family Law Course 602 (4th ed. 1986).

149. *Bonvillian*, 573 So. 2d at 1163.

150. 556 So. 2d 918, 919 (La. App. 3d Cir. 1990).

151. Id. at 920.

filed, unless the court finds good cause for not making the award retroactive.[152] Louisiana Revised Statutes 9:399 provides similarly for child support related to paternity actions.[153]

CHILDREN'S CODE[154]

Jurisdiction in Family Law Related Matters

Children's Code article 307 provides that a court exercising juvenile jurisdiction shall have exclusive original jurisdiction over adult parties in the following cases involving the care, custody, or control of a child: (1) child in need of care proceedings pursuant to Title VI of the Code; (2) families in need of services proceedings pursuant to Title VII; (3) involuntary termination of parental rights proceedings pursuant to Title X; (4) voluntary termination of parental rights proceedings pursuant to Title XI; (5) adoption proceedings pursuant to Title XII; and (6) special proceedings, such as parental transfer of custody proceedings pursuant to Title XV. The Louisiana Revised Statutes 9:211-214 relating to marriage of minors were repealed and enacted verbatim as Children's Code articles 1543-1550. Many of the issues covered by the Civil Code or the Louisiana Revised Statutes relating to children and their relationship with parents or others are covered in the Children's Code, creating possible difficulties in coordination and coherency.

A major problem that arises from the promulgation and language of the Children's Code is the Children's Code's correlation with and impact on substantive family law. Although it can be argued, and the rapporteur has indicated, that the Children's Code applies only to ju-

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152. La. R.S. 9:310 (1991); e.g., Watson v. Hampton, 569 So. 2d 635, 636 (La. App. 2d Cir. 1990) (affirming a trial judge's decision that good cause supported the decision not to make a child support award retroactive to the date of the filing of the paternity and child support action; trial was delayed for over a year because of scheduling conflicts involving plaintiff's counsel).

153. La. R.S. 9:399 (1991) (where the trial judge finds good cause not to make the award retroactive to the filing of the action, he or she may make it "retroactive to a date subsequent to the filing of the paternity suit, but in no event shall the award be fixed later than the date of the rendition of the paternity judgment."); see, e.g., *Watson*, 569 So. 2d at 636.

154. Act 235 of the Regular Session 1991 enacted the Children's Code. Certain titles of the Children's Code impact on or amend matters relating to family law. For example, La. R.S. 9:211, 212, 213, 214 (relating to marriage of minors); 9:401, 402, 403, 404, 405, 406, 407, 421, 422, 422.1, 422.2, 422.3, 422.4, 422.5, 422.6, 422.7, 422.8, 422.9, 422.10, 422.11, 422.12, 422.13, 422.14, 422.15, 423, 424, 424.1, 424.2, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 440.1, 441 (relating to "voluntary surrender of a child," "abandonment of children," and adoption) were repealed and articles of the Children's Code were promulgated to cover these subjects. This article will cover the changes and refer to the Children's Code in the relevant subject matter sections.

venile court proceedings, the language in the Code does not clearly so provide. Thus, a potential conflict of substantive law arises in matters of custody, marriage of minors, tutorship, as well as other areas.

Children's Code article 103 provides: "*Except as otherwise specified in any Title of this Code*, the provisions of the Children's Code shall be applicable in all juvenile court proceedings."[155] Immediately, in the definitional section, conflict and incoherence with the Civil Code and the relevant titles of the Revised Statutes begins. For example, Children's Code article 116(6) defines "*[g]uardian of the person of the child*" to mean:

> the duty and authority to make important decisions in matters having a permanent effect on the life and development of the child and the responsibility for the child's general welfare until he reaches the age of majority, subject to any residual rights possessed by the child's parents. It shall include but not necessarily be limited to: (a) The authority to consent to marriage, to enlistment in the armed forces of the United States, to represent the minor in legal actions, to make other decisions of substantial legal significance concerning the minor. (b) The authority and duty of reasonable visitation, except to the extent that such right of visitation has been limited by court order. (c) The rights and responsibilities of legal custody.[156]

These are rights and obligations pertaining to custody, tutorship, and visitation, which are governed by extant Civil Code articles. The intention was not to encroach upon the substantive Civil Code provisions, but the language does not clearly so indicate.

A similar problem relates to Article 116(12), which provides: "*Legal custody* means the right to have physical custody of the child and to determine where and with whom the child shall reside; to exercise the rights and duty to protect, train, and discipline the child; the authority to consent to major medical, psychiatric, and surgical treatment; and to provide the child with food, shelter, education and ordinary medical care, all subject to any residual rights possessed by the child's parents."[157] This could be interpreted to have appropriated all matters of child custody or even to have abrogated Civil Code articles 131-134, including joint custody and all the substantive provisions appertaining thereto.

Similarly, Article 116(28) provides: "*Tutor means one other than a parent* who has qualified for the office and has been confirmed or

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155. La. Ch.C. art. 103 (emphasis added).

156. La. Ch.C. art. 116(6) (emphasis added). This particular provision is discussed more in detail, infra.

157. La. Ch.C. art. 116(12) (emphasis added).

appointed by a court."[158] Could this be read to mean that all the law relating to natural tutors has been abrogated? The Children's Code presents a serious problem of correlation, if not more, with Louisiana substantive family law. This is substantive law applying to subjects which have always been prescribed by the Civil Code or its ancillaries. The language of Children's Code article 103 could be read to appropriate significant portions of the Civil Code.[159]

These untoward possibilities apparently were not intended by the drafters, but the language is broad enough to be so interpreted; the Children's Code was not designed or intended to create this potential havoc.[160] Nevertheless, some of the language, without gloss and development might lead an unknowing judge to believe otherwise. This symposium piece is not intended to provide a comprehensive critique of the Children's Code or to provide a complete iteration of these problems of correlation between the Children's Code and the rest of the civil law, but simply to indicate some potential problems and to suggest that those interested in clarifying the law focus on an amelioration of the potential problem of overlapping codes. Jurists need to look carefully at the purpose of the Children's Code and its intended correlation with the rest of Louisiana family law.

UCCJA

Children's Code article 310 provides: Unless declined, a court exercising juvenile court jurisdiction shall have exclusive original jurisdiction over cases subject to the provisions of the Uniform Child Custody Jurisdiction Act (UCCJA), Louisiana Revised Statutes 13:1701-1724, when any of the following circumstances occur: (1) a claim of emergency jurisdiction is made pursuant to Louisiana Revised Statutes 13:1702(3); (2) a petition alleges that a child is in need of care as defined by Title VI, of the Children's Code; and (3) a petition otherwise alleges facts that would bring the proceedings within the exclusive original jurisdiction of the juvenile courts pursuant to the Children's Code. The district court shall have exclusive original jurisdiction over all other claims of jurisdiction under the UCCJA and claims of emergency jurisdiction when declined by the juvenile court.[161] Thus, we have a potentially confusing situation, where the district court will have jurisdiction when the jurisdiction hinges on *home state, significant connection and substantial evidence*, but the juvenile court will have jurisdiction when the above-noted indications obtain.

158. La. Ch.C. art. 116(28) (emphasis added).
159. See La. Ch.C. art. 116(4).
160. Personal discussion with Professor Lucy McGough, rapporteur.
161. La. Ch.C. art. 310.

Support of the Family

Children's Code article 311 provides for exclusive juvenile court jurisdiction over matters relating to the support of the family in the following cases: (1) proceedings involving desertion, nonsupport, or criminal neglect of a child by either parent, or by one spouse of the other spouse; (2) proceedings under URESA; (3) proceedings brought by the Department of Social Services on its own behalf or on behalf of any person for whom support has been ordered to enforce support by interstate income assignment pursuant to Louisiana Revised Statutes 46:236.4; or (4) proceedings brought by the district attorney to establish or enforce support pursuant to the provisions of Louisiana Revised Statutes 46:236.2 or Louisiana Revised Statutes 46:236.1(F). A support order brought under Article 311 shall not modify a prior judgment of a district court or be modified by a district court having appropriate jurisdiction over support.[162]

Special Proceedings

The purpose of the title in the Children's Code on Special Proceedings is to provide the substantive and procedural guidelines governing the juvenile court's exercise of jurisdiction over contempt proceedings, voluntary transfer of custody proceedings, proceedings seeking judicial authorization for minors' marriages, declaratory judgment proceedings involving medical treatment for terminally ill children, and domestic abuse assistance proceedings.[163] Louisiana Revised Statutes 9:211-214, relating to marriage of minors, were repealed and enacted verbatim as Children's Code articles 1543-1550.

Voluntary Transfer of Custody

The code states that its purpose:

> is to protect the health and welfare of children by providing, in addition to any other provisions of law, for juvenile court procedure to govern a voluntary transfer of custody of a child by parents to other responsible adults for the purpose of enabling the child to receive adequate care and treatment. The provisions of this Chapter are intended to promote mutual understanding of the rights and responsibilities of the parents and custodians and of any terms or conditions which may be set forth by agreement of the parties.[164]

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162. La. Ch.C. art. 311.
163. La. Ch.C. art. 1501. Special Proceedings are presented in Title XV.
164. La. Ch.C. art. 1510.

This chapter of the Children's Code establishes a new institution called "*guardianship of the person of the child.*" Apparently there are three institutions: *parental authority, tutorship, and, now, guardianship of the person of the child.* The latter is designed, apparently, for those instances when a child is removed from parents or when parents voluntarily give the child up to the custody of another, but no tutorship is established. There appear to be questions as to how this chapter dovetails with parental authority and tutorship. It seems that the chapter, *Guardianship of the Person of the Child*, was adopted to comply with the Federal Permanency Planning Law,[165] which calls for continuing judicial oversight of children in foster programs. Thus, for example, a child who has been placed in the custody of her mother after a divorce would be under the mother's natural tutorship. If the mother agreed to have the child placed into foster care, the child would be legally placed under the regime of guardianship of the child. On its own motion or on the motion of any party, the court may order a hearing to review the transfer of custody. Judgments transferring custody pursuant to this chapter are exempt from the permanency planning requirements mandated in Title VI of the Children's Code.[166]

Guardianship of the person of the child is defined in Article 1511(1) as "the duty and authority to make important decisions in matters having a permanent effect on the life and development of the minor and to be concerned about his general welfare." The institution seems to have the same authority and responsibility as that of tutorship, but query whether the guardian is liable under Article 2318. Article 1511 continues:

> It shall include but shall not necessarily be limited in either number or kind to: (a) The authority to consent to marriage, to enlistment in the armed forces . . ., or to major medical, psychiatric, and surgical treatment, to represent the minor in legal actions, to make other decisions of substantial legal significance concerning the minor. (b) The authority and duty of reasonable visitation, except to the extent that such right of visitation has been limited by court order. (c) The rights and responsibilities of legal custody, including the right to have physical custody of the child and to exercise the rights and duty to protect, train, and discipline him and to provide him with food, shelter, education, and ordinary medical care, all subject to any residual rights possessed by the child's parents.[167]

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165. Pub. L. No. 96-272; 94 Stat. 500 (1980).
166. La. Ch.C. art. 1521 (Review and Permanency Planning).
167. La. Ch.C. art. 1511(1).

"Legal custody," is defined in Article 1511(2) as "a legal status created by court order which vests in a custodian the right to have physical custody of the child and the right and duty to protect, train, and discipline him and to provide him with food, shelter, education, and ordinary medical care, all subject to the powers, rights, and duties and responsibilities of the guardian of the person of the child and subject to any residual parental rights and responsibilities."[168] "Physical custody" is defined in Article 1511(3) as the "duty and authority to provide care for a child in the home of the custodian."[169]

How Does This Comport With Parental Authority and Tutorship?

Is guardianship of the person of the child the legal institution that arises when a court awards custody and fails to establish tutorship? What about the institution of the "natural tutor," which arises as a matter of right to the custodial parent after a divorce? Is the natural tutor removed and replaced by a "guardian of the person of the child?" Does the latter have to qualify as tutor? It looks like this institution relates only to those instances in which parents or tutors make a voluntary and knowing transfer of custody. A voluntary transfer of custody is "the knowing and voluntary relinquishment of legal custody or guardianship to an agency, institution, or individual, subject to residual parental rights retained by the parent under such terms and conditions that enable the child to receive adequate care and treatment."[170] The juvenile court in the parish in which either the parents requesting transfer of custody reside, or in which the person, agency, or institution to whom the transfer of custody is intended resides has jurisdiction.[171] The petition for voluntary transfer of custody is provided for in Article 1514, which indicates that the action to transfer custody commences with the filing of a written petition. Also, all persons or organizations lawfully exercising legal custody shall join the petition, unless a legal custodian is unable or unwilling to join in, and in that case the petition shall state with particularity the reasons therefore.

The contents and form of the petition are presented in Article 1515. The petition shall contain: (1) the name and address of all parents and legal custodians; (2) an affirmation that the parents are knowingly and voluntarily transferring custody; (3) the full name and date of birth of the child whose custody is sought to be transferred; (4) the factual basis for the transfer of custody; (5) the nature, duration, and extent of the transfer of custody, including any terms and conditions; and (6) the

168. La. Ch.C. art. 1511(2).
169. La. Ch.C. art. 1511(3).
170. La. Ch.C. art. 1511(4).
171. La. Ch.C. art. 1513.

name and address of the agency, institution, or individual to whom the child is sought to be transferred and the relationship, if any, to the child.[172] A form for the petition is also provided. Notice of the transfer of custody proceeding shall be served on any parent or legal custodian who has not joined in the petition. Notice may be served by personal or domiciliary service or by certified mail, proof of which shall be filed in the record. If a parent or legal custodian cannot be served, the court may appoint an attorney as curator for him, and service shall be made upon the curator. If a curator is not appointed, the court shall specifically reserve the absentee's rights in any order transferring custody.[173] There shall be a hearing on the record, unless specifically waived by the court. The court shall render a written judgment granting or denying the transfer of custody.[174]

If the court grants the transfer of custody, it must indicate that: (1) all the necessary parties were involved; (2) the transfer was knowing and voluntary; (3) there is a legitimate purpose and a factual basis to support that purpose; (4) all parties have been advised of and understand the nature and extent of the transfer, including any terms and conditions, and of their respective rights; and (5) the proposed change of custody is in the best interest of the child. The court then shall order the transfer of custody and recite such terms and conditions as requested by the parties.[175] As noted above, the authority of the person(s) awarded custody of the person of the child in this manner is essentially the same as the authority of a parent pursuant to parental authority or tutorship. Does the new "guardian of the person of the child" become tutor or have to meet the requirements and protections pertaining to tutorship? The Children's Code does not seem to answer this question.

Modification

Except when the parties jointly desire to dismiss the proceedings and return custody of the child to the parents, modification or enforcement of a judgment transferring custody shall be upon motion of any party and by order of the court according to the provisions of the chapter. If the parties desire to dismiss the proceedings and return the child to the parents, the court is to be notified and the court shall render an ex parte dismissal of the proceedings.[176] This raises questions relating to whether tutorship will be restored. Will the tutor have to be confirmed or qualified again? Similarly, relating to revocation, if a

172. La. Ch.C. art. 1515.
173. La. Ch.C. art. 1517.
174. La. Ch.C. arts. 1519 and 1520 (Hearing and Judgment).
175. La. Ch.C. art. 1520.
176. La. Ch.C. art. 1522.

parent or tutor revokes his or her consent and the custodian refuses to return the child, the parent may move for dismissal of the proceedings and for the return of the child to his or her custody. There will then be a contradictory hearing with the parents or tutor and the custodian.[177]

Contempt in the New Children's Code

The juvenile courts have the power to enforce their orders by contempt of court.[178] The Code spells out the kinds of contempt, direct and constructive, and provides the measures that may be taken to "punish" those found to be in contempt.[179] Constructive contempt is most relevant. Article 1507 provides that constructive contempt includes, "Willful disobedience of any lawful judgment, order, mandate, writ, or process of the court."[180]

CHILD CUSTODY

The New Children's Code and Custody

Children's Code article 309 provides:

> A. Except as provided in Article 313 [relating to the duration of jurisdiction over proceedings], a court exercising juvenile jurisdiction shall have continuing jurisdiction over the following proceedings and the exclusive authority to modify any custody determination rendered, including the consideration of visitation rights: (1) Child in need of care proceedings pursuant to Title VI. (2) Families in need of services proceedings pursuant to Title VII. (3) Involuntary termination of parental rights proceedings pursuant to Title X. (4) Voluntary termination of parental rights proceedings pursuant to Title XI. (5) Adoption proceedings pursuant to Title XII. (6) Parental transfer of custody proceedings pursuant to Title XV.
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> B. In exercise of its jurisdiction to determine the custody of a child under writs of habeas corpus or when custody is incidental to the determination of pending cases, a district court may enter an order of custody or modify any prior order of custody rendered by a juvenile court concerning the same child in any proceeding *except* those enumerated in [Article 309(A)].[181]

177. La. Ch.C. art. 1523 (Revocation).
178. La. Ch.C. art. 319; La. Ch.C. arts. 1503-1509.
179. La. Ch.C. arts. 1504-1508.
180. La. Ch.C. art. 1507.
181. La. Ch.C. art. 309 (emphasis added).

Custody & Divorce

Louisiana Civil Code article 157 was amended in 1990 to comport with the elimination of separation from bed and board as a step in divorce proceedings, and was redesignated as Article 134.[182] Article 134 directs that "[i]n all cases of *divorce*, and change of custody after an original award, permanent custody of the child or children shall be granted to the parents in accordance with article 131 [old article 146]."[183] Physical custody and legal custody of a child are related, but distinct propositions. Thus, a parent may have equal authority, privileges and responsibilities for a child, pursuant to Civil Code articles 131 and 250, without having equal physical care and control.[184]

The test to be applied in all child custody determinations is the extremely vague *best interest of the child standard*, as jurisprudentially mandated at least since 1921 and legislatively mandated since 1979. Every child custody case must be viewed within its own peculiar set of facts with the paramount goal being the best interest of the child.[185] The trial court's decision as to what is in the best interest of the child in custody cases is to be given great weight and will be reversed only where there is a clear abuse of discretion.[186] Louisiana's "Best Interest Test" is given content by the *order of preference* in child custody: 1) joint custody in parents; 2) sole custody to parent; and 3) custody to a third person, if it is proved that parental custody will result in substantial harm to the child and if it would be in the best interest of the child to be with the non-parent.[187] More content is provided by the factors to be considered: "In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's race or sex."[188] There is also a built in presumption that the child's interests are best served by placing custody in a parent rather than a third party. Civil Code article 131(B) provides: "Before the court makes any order awarding custody to a person or

182. 1990 La. Acts No. 361, § 1, 1990 La. Acts No. 1008, §§ 8 and 10, both effective January 1, 1991.

183. La. Civ. Code art. 134 (emphasis added). La. Civ. Code art. 131 (effective January 1, 1991) is old La. Civ. Code art. 146.

184. Favaloro v. Cooper, 562 So. 2d 943, 945 (La. App. 5th Cir. 1990).

185. La. Civ. Code art. 131; Cooper v. Cooper, 579 So. 2d 1159, 1162 (La. App. 2d Cir. 1991).

186. Thompson v. Thompson, 532 So. 2d 101 (La. 1988); Everett v. Everett, 433 So. 2d 705 (La. 1983); Schloegel v. Schloegel, 584 So. 2d 344, 347 (La. App. 4th Cir. 1991).

187. La. Civ. Code art. 131(A)(1), (2), (3), and (4), respectively; see Spaht, supra note 24.

188. La. Civ. Code art. 131(A)(2).

persons other than a parent without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child."[189]

Joint custody is not always in the best interest of the child, for example, where the parents are seriously antagonistic to each other, creating a harmful, continuing volatile atmosphere.[190] The burden of proof that joint custody would not be in the child's best interest rests with the parent requesting sole custody.[191] It has been held that when one of the parties to a joint custody plan has moved out of town and the children are approaching school age, 50/50 sharing becomes unworkable.[192] Also, a mother's impending marriage and consequent removal from the state, especially in conjunction with the parents' inability to communicate or to put aside their differences for the child, obligate the trial court to determine which parent ought to be sole custodian.[193] The presumption that joint custody is best for the child ends when one parent moves out of state.[194] The presumption provides the court with a first choice, which must be rejected in the face of evidence which tends to disprove the conclusion. In such a case, it becomes necessary for the other party to reestablish the propriety of the presumption's conclusion.[195]

When a Choice Between Parents Must Be Made

If joint custody is not possible, the next option is to choose between the two parents.[196] First, the choice is to go to the parent who will provide the other parent with the most access to the child.[197] Louisiana legislation attempts to elucidate on the notion of the best interest of the child by providing a list of factors to be considered. Stability of the child's environment is a factor.[198] "A change from a stable envi-

189. La. Civ. Code art. 131(B).

190. Turner v. Turner, 455 So. 2d 1374 (La. 1984); Waits v. Waits, 556 So. 2d 215, 219 (La. App. 2d Cir. 1990).

191. La. Civ. Code art. 131(A)(2).

192. Carroll v. Carroll, 577 So. 2d 1140, 1145 (La. App. 1st Cir. 1991); *Waits*, 556 So. 2d at 219.

193. Edwards v. Edwards, 556 So. 2d 207, 209 (La. App. 2d Cir. 1990).

194. Id. at 213, citing old La. Civ. Code art. 146(K), now La. Civ. Code art. 131(K); Myers v. Myers, 561 So. 2d 875, 878 (La. App. 2d Cir. 1990).

195. Linder v. Linder, 569 So. 2d 173, 175-76 (La. App. 1st Cir. 1990).

196. Waits v. Waits, 556 So. 2d 215, 219 (La. App. 2d Cir. 1990); Edwards v. Edwards, 556 So. 2d 207, 209 (La. App. 2d Cir. 1990).

197. La. Civ. Code art. 131(A)(2).

198. E.g., Rogers v. Rogers, 577 So. 2d 761, 763 (La. App. 1st Cir. 1991); Cooper v. Cooper, 579 So. 2d 1159, 1162 (La. App. 2d Cir. 1991); Bailey v. Bailey, 527 So. 2d 1030, 1032 (La. App. 2d Cir.), writ denied, 528 So. 2d 565 (1988).

ronment should not be made absent a compelling reason."[199] The length of time the child has been with the domiciliary parent is an important factor in this regard,[200] as there must be a compelling reason to uproot a child from a stable environment.[201] This recognizes the value of the *primary caretaker* approach, an example of the "psychological parent" vision of the "best interest of the child,"[202] which was adopted as an actual presumption by the West Virginia and Minnesota Supreme Courts.[203] It is aimed at promoting certainty, stability, and predictable results[204] and has been promoted as a "bright line" standard for child custody cases and as a means to reduce litigation.[205] The primary caretaker preference, however, runs head on into the equally compelling need to allow trial court discretion to consider freely the "variations in each family situation."[206] Thus, only these two states have adopted the full-blown presumption. Most states, like Louisiana, have instead adopted the rule that the "primary caretaker" notion functions only as *one* of many factors to consider in determining child custody.[207] The proponents of the presumption argue that it is a precise standard necessary to replace the broad, vague, best interest standard.[208] On the other hand, it is not clear that the notion of "primary caretaker" is much more precise than that of the "best interest" test.[209]

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199. *Rogers*, 577 So. 2d at 763.

200. Id. at 763; *Bailey*, 527 So. 2d at 1033.

201. *Rogers*, 577 So. 2d at 764.

202. J. Goldstein, A. Freud, A. Solnit & S. Goldstein, In the Best Interest of the Child 66-67 (1986) (heralding the primary caretaker preference); cited and discussed in Crippen, Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference, 75 Minn. L. Rev. 427, 440-42 (1990); see also Charlow, Awarding Custody: The Best Interests of the Child and Other Fictions, 5 Yale L. & Pol'y Rev. 267, 274-75 (1987); O'Kelly, Blessing the Tie That Binds: Preference for the Primary Caretaker as Custodian, 63 N.D.L. Rev. 481, 484-85, 511-17 (1987) (the notion of "bonding" is primary to the rule).

203. Garska v. McKoy, 278 S.E.2d 357, 363 (W. Va. 1981); Pikula v. Pikula, 374 N.W.2d 705, 713-14 (Minn. 1985).

204. Crippen, supra note 202; O'Kelly, supra note 202, at 486-89 (detailing the reasons for the rule).

205. Crippen, supra note 202, at 429.

206. Id. at 429.

207. The Minnesota Legislature abrogated the preference in Act of May 3, 1990, ch. 574, § 13, 1990 Minn. Laws 2131 (codified at Minn. Stat. Ann. § 518.17 (West 1990 and Supp. 1992) (noting that "[t]he primary caretaker factor may not be used as a presumption in determining the best interests of the child."), cited and discussed in Crippen, supra note 202, at 428-29, 438-39. See also Marriage of Derby, 571 P.2d 562, 564 (Or. Ct. App.) (primary caretaker recognized, but without a presumption or preference), modified on other grounds, 572 P.2d 1080 (1977).

208. See authority cited and discussed in Crippen, supra note 202, at 442-50.

209. Id. at 460-61.

Considering the primary caretaker as a factor probably does enhance the ability of the court to determine what will be in the best interest of the child. The comments to the 1989 legislative proposal by the Louisiana Law Institute provided a list of factors that would have assisted the court in determining which parent has been the primary caretaker. The list of "primary caretaker factors" may still be helpful to practitioners arguing the custody issue. The factors considered in identifying the primary caretaker include, the parent who primarily: (1) prepared and planned the child's meals; (2) bathed, groomed and dressed the child; (3) purchased, cleaned and cared for the child's clothes; (4) obtained and provided medical care, including nursing and trips to physicians; (5) arranged for social interaction among the child's peers after school; (6) arranged alternative care; (7) put the child to bed at night and awakened the child in the morning; (8) disciplined the child, including teaching manners and toilet training; (9) obtained and provided education (religious, social, cultural); and (10) taught elementary skills.[210] On the other hand, the factors delineating how to determine who the primary caretaker is may not really be suitable in determining what is best for the child.[211] Does "bonding" really equate with the volume of time spent with the child?[212] What is bonding, anyway? When and how do parents and children bond? Does a child bond with more than one person? The primary caretaker approach has the tendency, as the paternal and maternal preference rules, to become a shibboleth, allowing the court to avoid analysis. These questions apparently caused an increase in child custody litigation in Minnesota, where the approach was eventually abrogated by the legislature.[213]

Recently, the West Virginia Supreme Court reaffirmed the primary caretaker presumption, stating: "This court has repeatedly held that custody of children of tender years should be awarded to the primary caretaker of those children."[214] "[T]he primary caretaker is that natural or adoptive parent who, until the initiation of the divorce proceedings, has been primarily responsible, for the care and nurturing of the child."[215]

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210. Efaw v. Efaw, 400 S.E.2d 599 (W. Va. 1990); Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981); O'Hanlon & Workman, Beyond the Best Interest of the Child: The Primary Caretaker Doctrine in West Virginia, 92 W. Va. L. Rev. 355 (1990); Neely, The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed, 3 Yale L. & Pol'y Rev. 168 (1984).

211. Crippen, supra note 202, at 460-61.

212. Id. at 460-61 nn.120-21 and accompanying text; citing Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 U. Chi. L. Rev. 1, 38 (1987); and Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 L. & Contemp. Probs. 226, 284 (Summer 1975).

213. Crippen, supra note 202, at 461.

214. *Efaw*, 400 S.E.2d at 602.

215. Id., citing Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).

"Once a determination of primary caretaker has been established, a presumption in favor of the primary caretaker attaches, and that party is entitled to custody absent a showing that he or she is unfit. . . ."[216] If the court is unable to determine that one of the two parents was clearly the primary caretaker, neither one will have the advantage of the presumption.[217]

Rejection of the Primary Caretaker Presumption

The Minnesota legislature has abrogated the Minnesota Supreme Court's adoption of the primary caretaker presumption.[218] All other states have rejected the primary caretaker presumption making West Virginia the only state that calls for a firm primary caretaker presumption.[219] For example, the North Dakota Supreme Court rejected the primary caretaker presumption even for child custody *modification* proceedings, noting that it had already recognized the importance of the parent who provides daily care, but found that a further presumption would "overbalance the scales too far" in favor of the custodial parent in modification proceedings.[220] Most states, like Louisiana, apply the notion of "primary caretaker" as a factor among others to assist the judge in making his or her determination in child custody.[221] Louisiana's primary caretaker type factors include: "The love, affection, and other emotional ties existing between the parties . . . and the child," the "length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity."[222] Article 131 also explicitly provides that when the child is to go to neither parent, the child should continue in the home that has provided a wholesome and stable environment.[223]

Miscellaneous Factors

Drugs or the Health of the Parties

Where a non-custodial party has made a significant effort to extricate himself from drugs and the drug culture, and the other party has

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216. *Efaw*, 400 S.E.2d at 602.

217. Id.

218. Act of May 3, 1990, ch. 574, § 13, 1990 Minn. Laws 2131 (codified at Minn. Stat. Ann. § 518.17 (West 1990 and Supp. 1992).

219. Crippen, supra note 202, at 439.

220. Von Bank v. Von Bank, 443 N.W.2d 618, 621 (N.D. 1989).

221. E.g., In re Marriage of Tuttle, 660 P.2d 196, 199 (Or. Ct. App. 1983) (primary caretaker role is relevant and important); In re Marriage of Van Dyke, 618 P.2d 465, 467 (Or. Ct. App. 1980) (primary caretaker role a "dominant consideration"), cited and discussed in Crippen, supra note 202, at 438 n.38.

222. La. Civ. Code art. 131(C)(2)(a), (d).

223. La. Civ. Code art. 131(A)(3).

continued or become more involved in drug use, this is a significant factor allowing the former to have custody.[224] Louisiana jurisprudence has provided that the legislature created an exception to the health provider privilege, by virtue of its enactment of Civil Code article 146(C)(2)(g), now Civil Code article 131(C)(2)(g), which makes the mental and physical health of the parties disputing custody relevant.[225]

As a result, the legislature has provided a qualified privilege for communication between a patient and his or her health care provider in civil proceedings.[226] This statute provides that a patient has a privilege to refuse to disclose any communication made to a health care provider which enables the provider to diagnose, treat, prescribe or act for the patient except in certain instances. Statutory exceptions include custody suits, among others.[227] The disputing party's physical and mental health are essential elements to a custody action. Evidence must be adduced which addresses the fitness of the parties seeking custody, including the moral, mental, and physical fitness of the parties. Medical testimony and records form part of the best evidence of these factors.[228] Confidentiality may be preserved, as the court may seal the records or take testimony in chambers. In a custody dispute, a party may obtain the deposition of the other party's physician with regard to the contestant's mental and physical health if it comes within the exceptions to the health care provider privilege.[229]

Mentally Retarded Parents

In Louisiana, a disability such as mental retardation, spina bifida, or another health problem will be a factor to consider in awarding custody or in determining who should be the domiciliary parent, but it is not the sole consideration.[230] If the health of either parent deteriorates to the extent that the child will not properly be cared for, a modification may be requested, but until such time as that occurs, the health difficulty should not be determinative.

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224. Cooper v. Cooper, 579 So. 2d 1159, 1163 (La. App. 2d Cir. 1991) (modification case, where wife blatantly used drugs in children's presence, kept very poor house and made no effort to change her ways). See also Schloegel v. Schloegel, 584 So. 2d 344 (La. App. 4th Cir. 1991).

225. Kirkley v. Kirkley, 575 So. 2d 509, 510 (La. App. 5th Cir.), writ denied, 577 So. 2d 19 (1991).

226. La. R.S. 13:3734 (1991).

227. Id.; *Kirkley*, 575 So. 2d at 510-11.

228. La. Civ. Code art. 131(C)(2)(f) and (g); *Kirkley*, 575 So. 2d at 510-11.

229. *Kirkley*, 575 So. 2d at 510.

230. Harper v. Harper, 559 So. 2d 9, 10 (La. App. 1st Cir. 1990).

Religion & Custody

Louisiana courts have held that religion may be considered under Civil Code article 131(C)(2)(b) under certain circumstances, such as when a child expresses a desire to attend a particular church.[231] In *LeDoux v. LeDoux*, the Nebraska Supreme Court held that a trial court did not abuse its discretion in ordering the non-custodial father, a Jehovah's Witness, to refrain from exposing or permitting any other person to expose his minor children to any religious practices or teachings inconsistent with the Catholic religion, the religion of the custodial mother. There was evidence that the father's activities were having a deleterious effect upon the children and the order was narrowly tailored.[232] This case seems to illustrate the dangers of the unfettered discretion under the "best interest" test. "[I]mportant moral and constitutional rights, as well as a child's interest in a full relationship with his or her noncustodial parent, may be substantially eroded under the auspices of the discretionary rhetoric of 'best interest.'"[233] In Pennsylvania, on the other hand, the superior court held that it was error for a trial court to enforce a pre-nuptial oral agreement that the children shall be raised in the Jewish faith and to prohibit the Catholic father from taking them to his church meetings during visitation. The court held that parental authority to inculcate morality and religious upbringing "may be encroached upon only after a showing of a 'substantial threat' of 'physical or mental harm to the child, or to the public safety, peace, order, or welfare.'"[234] The Maine Supreme Court held that a trial court had given undue weight to the fact that, as a Jehovah's Witness, a mother seeking custody might not consent to a blood transfusion for the child. "If and only if the court is satisfied that an immediate and substantial threat to the child's well-being is posed by the religious practices in question" can the court proceed to balance the interests. Any custody or related order must cause the "least possible intrusion upon the constitutionally protected interests of the parent."[235] The Alaska Supreme Court held that a divorce court could decide whether a child has "actual religious

231. Cooper v. Louque, 551 So. 2d 732 (La. App. 1st Cir. 1989).

232. LeDoux v. LeDoux, 452 N.W.2d 1 (Neb. 1990); Mangrum, Exclusive Reliance on Best Interest may be Unconstitutional: Religion as a Factor in Child Custody Cases, 15 Creighton L. Rev. 25 (1981); Mangrum, Religious Constraints During Visitation: Under What Circumstances Are They Constitutional?, 24 Creighton L. Rev. 445 (1991).

233. Mangrum, supra note 232, at 446 (criticizing *LeDoux*).

234. Zummo v. Zummo, 574 A.2d 1130, 1138 (Pa. Super. Ct. 1990), citing, Wisconsin v. Yoder, 406 U.S. 205, 230, 92 S. Ct. 1526, 1540 (1972).

235. Osier v. Osier, 410 A.2d 1027, 1031 (Me. 1980); see also Krause, Family Law, Black Letter Series 193 (1988).

needs," for example, an expressed preference of a child mature enough to make a choice among or between religions.[236]

Moral Fitness of the Parent(s)

Custody actions are not designed to regulate the behavior of the parents. The moral fitness of the parties is relevant insofar as it affects the welfare of the child within the totality of the circumstances.[237] Today, sexual conduct, even an act of adultery, does not necessarily disqualify a parent from being awarded custody.[238] The second circuit recently held it was not clear error to award custody of a child from a prior marriage to a man who was living with a woman out of wedlock, with whom he had fathered another child, when there was no evidence in the record indicating this had a detrimental effect on the first child.[239] There has developed in Louisiana jurisprudence a "Reformation Rule" which provides that "when a parent terminates an adulterous relationship either by ceasing the immoral behavior or by marrying the paramour, that reformation obliterates that parent's previous indiscretion and can no longer be a factor in determining that parent's fitness for custody."[240]

Custody—Parents vs. Non-Parents

For a non-parent to be awarded custody over a parent, the court must find that the award to the parent would be *detrimental to the child and that the award to the non-parent is necessary for the best interests of the child.*[241] The term "detrimental" has been interpreted to mean that the child would suffer *positive and substantial harm*, if returned to the parent.[242] It also "includes parental unfitness, neglect, abuse, abandonment, and forfeiture of parental rights, and is broad

236. Bonjour v. Bonjour, 592 P.2d 1233, 1240 (Alaska 1979); see also Krause, supra note 235, at 193.

237. Petrovich v. Petrovich, 513 So. 2d 411, 418 (La. App. 4th Cir.), writ denied, 514 So. 2d 1179 (1987).

238. Cooper v. Cooper, 579 So. 2d 1159, 1163 (La. App. 2d Cir. 1991).

239. Id. at 1163.

240. Dykes v. Dykes, 488 So. 2d 368, 372 (La. App. 3d Cir.), writ denied, 489 So. 2d 1278 (1986), and cases cited therein; cf., Rogers v. Rogers, 577 So. 2d 761, 764 (La. App. 1st Cir. 1991).

241. See old La. Civ. Code art. 146(B), now La. Civ. Code art. 131(B). In re Interest of Minor Child Suzette Hulin, 543 So. 2d 1046, 1049 (La. App. 3d Cir. 1989); Pittman v. Jones, 559 So. 2d 990, 993 (La. App. 4th Cir.), writ denied, 565 So. 2d 451 (1990).

242. Merritt v. Merritt, 550 So. 2d 882, 889 (La. App. 2d Cir. 1989); see also Pittman v. Jones, 559 So. 2d 990, 993 (La. App. 4th Cir.), writ denied, 565 So. 2d 451 (1990); Hughes v. McKenzie, 539 So. 2d 965, 970 (La. App. 2d Cir.), writ denied, 542 So. 2d 1388 (1989); see generally Moreau & Ho, Child Custody Awards to Non-Parents Under Article 146(B), 33 Loy. L. Rev. 51, 59 (1987).

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."[243] Where appropriate, an award of joint custody between a parent and non-parent may be preferred.[244]

Does Civil Code article 131 apply to parent vs. non-parent custody disputes? Some courts have noted that by its own terms, Article 131 (old Article 146) does not cover a custody dispute not incidental to a divorce action. Rather, Article 131 covers custody of children pending divorce litigation and Article 134 covers custody of children in cases of divorce. Others have found that it does not apply directly, but it is a useful guideline to be applied by analogy.[245] Others hold it to be directly applicable.[246] It would appear that Civil Code article 131 applies when the litigation between parent and non-parent is over a modification of a custody order.[247] It is not necessary for a trial court to utilize the word "detrimental" in its order awarding custody to a non-parent.[248] The primary consideration is the best interest of the child,[249] and Civil Code article 131(B), if it applies, allows the trial court to consider a multitude of factors and to apply a totality of the circumstances in making its determination of "detriment" and "best interest."[250] It appears clear, however, that the legislature, by requiring a showing that custody to a parent would be "detrimental" to the child, wanted to control the discretion of the trial court and to support the parental right to custody, along with the notion that the child's best interest is best served when the child is with his or her parent, rather than a third party. It would be a mistake to limit the term "detriment" to the point

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243. *Hughes*, 539 So. 2d at 970, citing Moreau & Ho, supra note 242, at 59.

244. Schloegel v. Schloegel, 584 So. 2d 344, 347 (La. App. 4th Cir. 1991) (joint custody awarded between parent and child's maternal grandmother, with primary physical custody going to the child's grandmother).

245. E.g., Pittman v. Jones, 559 So. 2d 990, 993-94 (La. App. 4th Cir.), writ denied, 565 So. 2d 451 (1990). Where a child had been in the physical custody of her paternal aunt for twelve years, it was not an abuse of discretion for the trial court to decide that it would be detrimental to the child to be awarded to the custody of her mother.

246. *Schloegel*, 584 So. 2d at 345-46; *Pittman*, 559 So. 2d 990 (holding La. Civ. Code art. 146(B) (now 131(B)) to be applicable to a contest between a nonparent with whom the child had lived for a twelve year period of time and was seeking permanent custody from the biological mother); Hughes v. McKenzie, 539 So. 2d 965, 969 (La. App. 2d Cir.), writ denied, 542 So. 2d 1388 (1989).

247. See La. Civ. Code art. 134; La. Civ. Code art. 131(E); *Schloegel*, 584 So. 2d at 345-46.

248. *Schloegel*, 584 So. 2d at 346; Batiste v. Guillory, 479 So. 2d 1044, 1048 (La. App. 3d Cir. 1985).

249. See Schloegel v. Schloegel, 584 So. 2d 344, 346 (La. App. 4th Cir. 1991); Parker v. Payton, 511 So. 2d 868 (La. App. 4th Cir. 1987).

250. See *Schloegel*, 584 So. 2d at 346; *Batiste*, 479 So. 2d 1044; Bolding v. Bolding, 532 So. 2d 1199 (La. App. 2d Cir. 1988).

that it would be considered "detrimental" to the child, if it *is* in the best interest of the child to be with the non-parent.

Burden of Proof

The non-parent always bears the burden of proof in a custody contest with a parent. There is a paramount right to rear one's child with whom one has a relationship, sanctioned by the Constitution and by the "substantial harm to the child" standard, long required in Louisiana and elsewhere.[251] It is well settled that "a parent has a paramount right to custody of his or her child and may be deprived of such right only for compelling reasons. In accordance with this principle, "it is well recognized that when a parent competes with non-parents . . . the parent's right to custody must be recognized unless it is established by convincing proof that he or she is unfit or has forfeited the parental right of custody by action or omission."[252] The compelling reasons must be expressly determined and supported by convincing proof.[253]

Problems with the Best Interest Test

The *best interest standard* calls for the application of different factors and provides different weight to the factors, depending on what purpose or policies it is serving; a question of custody after divorce will be different from child custody modification, which, in turn will be different from adoptions.[254] No doubt, protecting the "best interests" of children is a noble goal, but the vagueness and subjectivity inherent in this standard make it difficult or "inappropriate as a guidepost."[255] Most

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251. In re B.G.S., 556 So. 2d 545 (La. 1990); Wood v. Beard, 290 So. 2d 675 (La. 1974); see Smith v. Cole, 553 So. 2d 847 (La. 1989). For national and comparative authority, both current and historical, see C. Blakesley, Chapter 1, Family Autonomy, in Wardle, Blakesley & Parker, supra note *; and C. Blakesley, Louisiana Family Law, supra note *. Justice Scalia's plurality opinion in Michael H. v. Gerald D., 491 U.S. 110, 109 S. Ct. 2333 (1989) indicates that more than biological parenthood and the establishment of a relationship is required.

252. Wood v. Beard, 290 So. 2d 675 (La. 1974); Love v. Love, 536 So. 2d 1278, 1280 (La. App. 3d Cir. 1988); *Schloegel*, 584 So. 2d 344; Gordy v. Langner, 502 So. 2d 583 (La. App. 3d Cir.), writ denied, 503 So. 2d 494 (1987).

253. *Schloegel*, 584 So. 2d 344; Hughes v. McKenzie, 539 So. 2d 965, 969 (La. App. 2d Cir.), writ denied, 542 So. 2d 1388 (1989); Pittman v. Jones, 559 So. 2d 990 (La. App. 4th Cir.), writ denied, 565 So. 2d 451 (1990), each citing *Wood*, 290 So. 2d 675.

254. In re J.M.P., 528 So. 2d 1002, 1015 (La. 1988) (regarding the best interests standard in the adoption setting and noting that the standard will apply differently in each of the noted situations).

255. Guggenheim, The Political and Legal Implications of the Psychological Parenting Theory, 12 N.Y.U. Rev. L. & Soc. Change 549, 553 (1983-84) (presenting several articles *rigorously criticizing the "best interest" standard and the psychological parent test*). See also Davis, Law, Science, and History: Reflections Upon "In the Best Interests of the Child," 86 Mich. L. Rev. 1096 (1988).

of the expansive literature on child custody is not very useful in formulating legal principles of general application.[256] Studies on the consequences of separation and the "broken home" are usually not sufficiently precise to provide guidance as to whether and under what circumstances a given child should be placed in the custody of the mother, the father, or some third party.[257] Those studies which are specific enough often present dogmatically held positions in disagreement with other specific, yet still dogmatically held positions.[258] Moreover, important moral and constitutional rights, as well as a child's interest in a full relationship with his or her noncustodial parent, may be substantially eroded under the auspices of the discretionary rhetoric of "best interest."[259] The United States Supreme Court has not spoken definitively as to whether the best interest test is constitutional.[260] In 1978, however, it noted: "We have little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[261]

Psychological Parent

What began as a vigorously and artfully argued theory relating to what certain psychoanalysts felt was the least detrimental alternative for children when their parental home breaks up, was promoted as the only proper basis upon which to award custody and soon developed a life of its own as a rule of law. The "psychological parent" concept became

256. H. Clark & C. Glowinsky, Domestic Relations: Cases & Problems 1009 (4th ed. 1990).

257. Id.

258. Compare J. Goldstein, A. Freud, A. Solnit & S. Goldstein, supra note 202, with J. Wallerstein & J. Kelly, Surviving the Breakup 310-11 (1980) and J. Wallerstein & S. Blakeslee, Second Chances: Men, Women, and Children a Decade After Divorce (1989), cited and discussed, in H. Clark & C. Glowinsky, supra note 256, at 1010.

259. LeDoux v. LeDoux, 452 N.W.2d 1 (Neb. 1990) (where a non-custodial father was ordered to "refrain from exposing or permitting any other person to expose his minor children to any religious practices or teachings inconsistent with the Catholic religion").

260. I. M. Ellman, P. Kurtz, & K. Bartlett, supra note 7, at 1228.

261. Quilloin v. Walcott, 434 U.S. 246, 255, 98 S. Ct. 549, 555 (1978) (nevertheless finding the best interest test appropriate, where the father had essentially forfeited his rights by not seeking a custodial relationship with his child), quoting Justice Stewart's concurring opinion in Smith v. Organization of Foster Families, 431 U.S. 816, 862-63, 97 S. Ct. 2094, 2119 (1977), as quoted in I. M. Ellman, P. Kurtz & K. Bartlett, supra note 7, at 1228.

the essence of the legal term: the best interest of the child.[262] The test, however, is not without significant detractors; it is controversial even within the social, behavioral, and medical sciences. Most of the dire consequences forecast by the psychoanalytical promoters of the theory are not supported by the data.[263] The Group for the Advancement of Psychiatry's prestigious Committee on the Family produced a volume on this subject, noting:

> The evidence and our own experience lead us to what can be called the family perspective on divorce and custody. Briefly, that perspective rests on the following concepts. A couple that comes together to form a family and raise children creates for those children something that is more than the sum of its parts—more than the dyadic relations one-on-one with mother and separately with father. We find no evidence for the existence of a single "psychological parent" with whom the tie is critically more important than with the rest of the network.
>
> The relationships with mother and father, and with grandparents and others as well, constitute an emotional universe that, especially in the early years, forms a pattern for the child's later relations.
>
> If, in the crisis of divorce, one part of that universe is cut off, labeled as bad, and becomes unavailable, there will be adverse consequences for the child's view of himself and of the people he will relate to later in life.
>
> Even if the person who is cut off is a very ambivalently held parent with whom contact is difficult and painful, our experience and the evidence convince us that the later ability to put that relationship in emotional perspective is better served through contact than through separation.[264]

Notwithstanding this challenge, courts have constantly applied this psychoanalytical theory as if it were true in order to restrict the con-

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262. See excellent analysis and critique of this development by Professor and former family law judge Peggy C. Davis, in her Harvard Law Review article, Davis, "There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539 (1987). The theory was first presented in the Yale Law Journal at Note, Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties, 73 Yale L.J. 151, and shortly thereafter in J. Goldstein, A. Freud, A. Solnit & S. Goldstein, supra note 202.

263. Waters & Noyes, Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks of Doing the Right Things for the Wrong Reasons, 12 N.Y.U. Rev. L. & Soc. Change 505 (1983-84).

264. Committee on the Family of the Group for the Advancement of Psychiatry, New Trends in Child Custody Determinations 80-81 (1980); Davis, Use and Abuse of the Power to Sever Family Bonds, 12 N.Y.U. Rev. L. & Soc. Change 557, 569 (1983-84).

stitutional interests of parents and children.[265] Professor Davis appropriately warns that while

> [a] controversial theory may appropriately serve as background for drawing factual conclusions in the course of applying an established rule of law, yet use of the same theory as a legislative fact may be entirely unwarranted. . . . In the context of announcing law, . . . the court should supplement [the evidence of experts who believe in psychological parenthood, etc.] . . . with close examination of the social function served by a tradition of assigning responsibility on the basis of biological parentage (and the social costs of diluting the effect of that assignment), and recognize that scientific consensus concerning the expert's causal judgment may be lacking or temporary.[266]

Justice Dennis, in his majority opinion in *In re J.M.P.*,[267] noted that "[t]he court should prefer a psychological parent (i.e., an adult who has a psychological relationship with the child from the *child's* perspective) over any claimant (including a natural parent) who, from the child's perspective, is not a psychological parent."[268] Justice Dennis also stated that "[t]o award custody to a person who is a 'stranger' to the child would unnecessarily risk harming the child where the other claimant has, on a continuing, day-to-day basis, fulfilled the child's psychological needs for a parent as well as his physical need."[269] This is a wholesale adoption of Goldstein, Freud, & Solnit's psychoanalytical vision of the psychological parent that, "Whether any adult becomes the psychological parent of a child is based on day-to-day interaction, companionship, and shared experiences. . . . Thus, neither the biological relation nor the fact of legal adoption is any guarantee that an adult will become the psychological parent of a child."[270]

Although Justice Dennis cites some judicial decisions and commentators[271] for the proposition that "[t]here is little disagreement within the profession of child psychology as to the existence of the phenomenon of the child-psychological parent relationship and its importance to the development of the child,"[272] in reality, it is essentially

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265. See Davis, Family Bonds, supra note 264, at 560-62; Davis, Judicial Absorption, supra note 262, at 1580.

266. Davis, Judicial Absorption, supra note 262, at 1602.

267. In re J.M.P., 528 So. 2d 1002, 1012-17 (La. 1988).

268. Id. at 1013.

269. Id.

270. Id. at 1013. On the subject in general, see discussion in C. Blakesley, Louisiana Family Law, supra note *; and L. Wardle, C. Blakesley, J. Parker, supra note *, at chs. 28 and 39.

271. E.g., Pikula v. Pikula, 374 N.W.2d 705, 711 (Minn. 1985) (citing J. Goldstein, A. Freud & A. Solnit, Before the Best Interest of the Child 31-35 (1979).

272. In re J.M.P., 528 So. 2d 1002, 1014 (La. 1988).

only within the psychoanalytic school of psychiatry itself that there is little disagreement. Still, there is not much doubt, as Justice Dennis indicates, that disruption of the parent-child relationship is at the very least detrimental.[273] The essential disagreement relates to how great the significant risks are in comparison with other factors influencing a child's mental and emotional growth.[274] It does not necessarily follow that the psychoanalytic vision of the psychological parent is accurate or so meaningful as to dominate the decision-making process relating to child custody, termination of parental authority, or adoption. Professor and former family law judge, Peggy Davis,[275] has noted, for example, "In sum, the inconclusiveness of separation research undermines the notion that the continuity of care is entitled to the nearly single-minded focus it has been given in our efforts to reform foster care systems."[276]

Justice Dennis limited his discussion of the psychological parent theory to the adoption context because, even though it may even be problematic in that context, it is more clearly controversial in other settings. He correctly emphasized that the psychological parent theory, or at least the guidelines that he distilled out of that theory in *J.M.P.*, *are not as meaningful in other settings relating to child rearing.*[277] He states that "[p]sychologists and psychiatrists can rather consistently differentiate between a situation where an adult and a child have a substantial psychological relationship and that where there is no relationship at all. But existing psychological theories do not provide the basis for choosing generally between two adults where the child has some relationship and psychological attachment to each."[278] The psychoanalytic theory of the psychological parent, however, may raise problems in any context.

Child Custody—Modification

The standard for modification of custody decrees is "the best interest of the child."[279] When a trial court has made a considered decree of permanent custody, the party seeking a change bears a heavy burden of proving that a material change in circumstances, which significantly affects the well-being of the child, has occurred since the original custody decree.[280] This *Bergeron* heavy burden rule and the appellate review

273. Id.

274. Id. at 1014.

275. Davis, Family Bonds, supra note 264 at 557.

276. Id. at 566.

277. In re J.M.P., 528 So. 2d 1002, 1015 (La. 1988).

278. Id.

279. La. Civ. Code art. 131(E); Lee v. Davis, 579 So. 2d 1130, 1132 (La. App. 2d Cir. 1991).

280. Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986); *Lee*, 579 So. 2d at 1132; Smith v. Smith, 559 So. 2d 48 (La. App. 4th Cir. 1990).

standard apply to any petition to modify custody, regardless of whether it is joint or sole custody.[281] The heart of the *Bergeron* heavy burden rule and the high standard of appellate review is the concern that a child's interest and welfare could be irreparably damaged by mistaken changes in custody or even by the effects of attempted or threatened change of custody on grounds that are less than imperative. Children need to be protected from the detrimental effects of standards for custody change that are too liberal.[282] This approach recognizes the possible harm done in continued litigation and relitigation, and it incorporates the need for stability of environment.[283] The Louisiana Supreme Court has incorporated this principle by requiring that to modify a *considered* custody decree, one must prove, by clear and convincing evidence, that the continuation of the present custody is so deleterious to the child as to justify a modification. The harm likely to be caused by the change in environment must be substantially outweighed by its advantages.[284] The great discretion of the trial court in custody matters should not be disturbed absent an abuse of discretion.[285]

Where there has been *no considered decree*, such as when the parties simply consented to the arrangement, or it was simply stipulated to and no evidence regarding the fitness of the parents for custody was admitted, the heavy burden of proof required by *Bergeron* is not applicable. The party seeking the modification still must prove that a change of circumstances has occurred since the original decree and that the modification is in the best interest of the child,[286] which includes consideration of the impact of instability due to the change and the loss of the current locus of authority.

Visitation

Civil Code article 132[287] provides that a parent who is not granted custody or joint custody of a child is entitled to reasonable visitation

281. Plunkett v. Plunkett, 576 So. 2d 100, 103 (La. App. 2d Cir. 1991).

282. Id.

283. Favaloro v. Cooper, 562 So. 2d 943 (La. App. 5th Cir. 1990).

284. Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986); Jackson v. Jackson, 573 So. 2d 217, 217-18 (La. App. 1st Cir. 1990); Cooper v. Cooper, 579 So. 2d 1159, 1162 (La. App. 2d Cir. 1991); McGee v. McGee, 552 So. 2d 576, 578 (La. App. 2d Cir. 1989); Palazzo v. Coe, 562 So. 2d 1137, 1139 (La. App. 4th Cir.), writ denied, 567 So. 2d 611 (1990); Parker v. Parker, 559 So. 2d 37, 38 (La. App. 4th Cir. 1990) (court must consider the elements of *Bergeron* in light of the best interest of the child); Favaloro v. Cooper, 562 So. 2d 943 (La. App. 5th Cir. 1990).

285. Jackson v. Jackson, 573 So. 2d 217, 218 (La. App. 1st Cir. 1990).

286. Linder v. Linder, 569 So. 2d 173, 175 (La. App. 1st Cir. 1990); Milligan v. Milligan, 559 So. 2d 6, 8 (La. App. 1st Cir. 1990); *Cooper*, 579 So. 2d at 1162; Lee v. Davis, 579 So. 2d 1130, 1133 (La. App. 2d Cir. 1991); *McGee*, 552 So. 2d at 578; Simmons v. Simmons, 554 So. 2d 238 (La. App. 3d Cir. 1989).

287. La. Civ. Code art. 132 was former article 146.1, added by 1988 La. Acts No.

rights, unless the court finds, after a hearing, that visitation would not be in the best interest of the child. Noncustodial parents have been held to have a constitutional right to visitation.[288] Any relative by blood or affinity not granted custody of the child may be granted reasonable visitation rights if the court finds that it is in the best interest of the child.[289]

The test for visitation was established by the leading decision on visitation.[290] It requires essentially that a parent not granted sole or joint custody of a child be entitled to reasonable visitation rights, unless the court determines that visitation would seriously endanger the physical, mental, moral, or emotional health of the child. Both the possible harm and the risk of its occurrence need to be substantial. That case also provided that this standard be applied to custody of legitimate and illegitimate children. It is error for a trial court to burden a father with restrictive visitation terms, including geographical limitations, when there is no evidence of danger to the child, even though the father is 1000 miles from the mother. The child's best interest requires significant contact with both parents, if there is no reason that such contact will be harmful. Fear of violation of custody rights is not enough to impinge upon the father's right to significant visitation privileges.[291] Where there is animosity and bickering between the parents, it may be necessary to establish a fixed visitation schedule which will have to be rigorously adhered to.[292] Louisiana Revised Statutes 9:573 provides:

> Upon presentation of a certified copy of a custody and visitation rights order rendered by a court of this state, together with the sworn affidavit of the custodial parent in which the custodial parent: (1) [a]ffirms that the custody and visitation rights order is true and correct; (2) [d]escribes the status of any pending custody proceeding; (3) [s]ets forth the facts of the removal of or failure to return the child in violation of the custody and

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817, § 1, effective, July 18, 1988. Article 146.1, has been redesignated as Article 132, by the Louisiana State Law Institute, pursuant to 1990 La. Acts No. 1008, § 8, and 1990 La. Acts No. 1009, § 10, both effective, January 1, 1991. Article 147, added by 1986 La. Acts No. 966, § 1, amended by 1989 La. Acts No. 546, § 1, was redesignated as La. Civ. Code art. 133, pursuant to 1990 La. Acts No. 1008, § 8, effective January 1, 1991, and 1990 La. Acts No. 1009, § 10, effective January 1, 1991.

288. See, e.g., Rufally v. Civilletti, 539 F. Supp. 949, 951-52 (W.D. Mo. 1982) (damages sought by non-custodial parent for violation of right to visitation by the federal protected witness program).

289. La. Civ. Code art. 132, see supra note 287. The UCCJA, La. R.S. 13:1700-1724 (1983 and Supp. 1991), and the PKPA, 28 U.S.C.A. § 1738A (West Supp. 1991), control issues of jurisdiction over custody matters.

290. Maxwell v. LeBlanc, 434 So. 2d 375 (La. 1983).

291. Schelldorf v. Schelldorf, 568 So. 2d 168, 171-72 (La. App. 2d Cir. 1990).

292. Id. at 172.

> visitation rights order; and (4) [d]eclares that the custodial parent desires the child returned; [t]he judge, who shall have jurisdiction for the limited purpose of effectuating the remedy provided by this Section by virtue of either the presence of the child or litigation pending before the court, may issue a civil warrant directed to law enforcement authorities to return the child to the custodial parent pending further order of the court having jurisdiction over the matter.

Children's Code articles 1264-1269 provide for grandparent visitation after the adoption of their grandchildren, where they prove that they have been unreasonably denied visitation rights and that limited visitation rights would be in the best interest of the children.[293] Visitation by individuals other than parents has depended on the degree of consanguinity with the child.[294]

Visitation—Abused Children[295]

When a court finds, by a preponderance of the evidence, that a parent has subjected his or her child to cruel physical abuse, or sexual abuse or exploitation, the court shall prohibit visitation between the abusive parent and the child, until that parent proves that visitation would not cause physical, emotional, or psychological damage to the child. If visitation is ever approved, the court shall order necessary restrictions and protections with all costs to the abusive parent. Also, after visitation has been prohibited and later reinstituted, the formerly prohibited parent shall not remove the child from the jurisdiction, except for good cause and with prior judicial approval.[296]

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293. La. Ch.C. art. 1267.

294. La. Civ. Code arts. 134(B) and 132 (old La. Civ. Code art. 157(B) was redesignated as Article 134, by the Louisiana State Law Institute pursuant to 1990 La. Acts No. 1008, § 8, and 1990 La. Acts No. 1009, § 10, effective Jan. 1, 1991); La. R.S. 9:572 (1987).

295. La. Civ. Code art. 133. La. Civ. Code art. 147, was redesignated as La. Civ. Code art. 133, by the Louisiana State Law Institute pursuant to 1990 La. Acts No. 1008, § 8, and 1990 La. Acts No. 1009, § 10, both effective January 1, 1991.

296. See also La. R.S. 9:574 (1991). For analysis of adoption and proof of paternity, see C. Blakesley, Louisiana Family Law, supra note *.