CHAPTER 5

LOUISIANA

FAMILY LAW PRACTICE

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About The Author

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1. INTRODUCTION

This manual provides information on the practice of family law in Louisiana. Many practice pointers are given. The manual is not a comprehensive family law treatise. In Louisiana, family court practices vary from parish to parish. About 70% of Louisiana’s district courts also have hearing officers who help the district judges with family law cases. In courts without hearing officers, the district judge hears the entire case. Hearing officer procedures can vary significantly from parish to parish and affect the procedures for presenting and litigating a family law case. Attorneys and self-represented litigants need to know their local court rules and practices. This manual focuses on the common rules and procedures for family court cases. It does not discuss the unique rules or practices that a particular court may use.

The plague of domestic violence in our society requires that family law practitioners consider domestic violence in all aspects of their representation. An attorney who handles family law cases should know how to identify domestic violence, the special laws that apply to domestic violence cases, and the basic principles of “safe lawyering” in domestic violence cases. See Chapter 3 on Domestic Violence Practice in Louisiana, supra.

2. FUNDAMENTALS

Family law is a very pleading oriented and procedurally driven practice. The first impression our courts and adversaries form of us comes from the quality of our letters and pleadings. Do not delegate proofreading to support staff. Thoroughly read all documents and correct all errors. Careful proofreading will also enable you to double-check the content of your document to insure the clear expression of argument. Make sure that the facts pled are sufficient to plead a cause of action and carry your burden of proof.

Prior to filing any pleading, one should understand the appropriate procedure to follow in each matter. The Louisiana Code of Civil Procedure and R.S. Title 9 (Ancillaries) contain a wealth of information that is often overlooked by practitioners. All too often, attorneys file for relief that they are not entitled to and use a process that is unavailable for the relief sought. If a family law statute does not address a specific process then look at Local Court Rules, Uniform Family Court Rules, Uniform District Court Rules, or the Code of Civil Procedure for what is in place for civil cases in general. Be sure your adversary is using procedure correctly. If not, file the proper exception(s) and a supporting memorandum as required by court rules. The exception may provide you with extra time or a strategic advantage.

Family courts may look at the larger picture and may excuse some procedural mistakes - either because nobody “did it that way” or for reasons of judicial economy. Depending on where you are in the case, “choose your battles” in deciding how hard you need to press on the issue in order to “win the war.”

Common mistakes include the improper cumulation of actions, failure to join parties “needed for just adjudication,” improper venue, failure to state a cause of action, improper service and seeking a result over which the court does not have

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Footnotes:
1 For more in-depth discussions of family law, see K. Triche, Handbook on Louisiana Family Law (2012) and R. Lowe, Louisiana Divorce (2012).
2 The Uniform Family Court Rules should be adopted by 2013.
jurisdiction. Thus, a good starting point is to review the Code of Civil Procedure. Pay particular attention to the articles on venue, exceptions, written motions, and discovery. Read the articles particularly relevant to family law. For example, Book VII –Special Proceedings, Title 4, Chapters 1 & 2 specifically address ex parte orders of custody, Civil Code article 102 divorces as well as other issues.

An example of an improper cumulation of actions is when a reconventional demand to a summary proceeding requests relief that must be instituted by ordinary proceeding. For example, client files for a protective order pursuant to La. R.S. 46:2131 et seq. The defendant files an Answer and Reconvension wherein he not only answers the protective order petition but also reconvenes against the client for divorce. Insofar as the divorce action must be by an ordinary proceeding and the protective order is a summary proceeding, the reconventional demand may be improper because the delays for these hearings differ.

☞ Under La. Code Civ. Proc. art. 464-65, courts have some discretion in such examples. Remind the court that the summary proceeding must be heard within the statutory delays and not just continued to accommodate the delays for the ordinary proceeding.

To summarize: (1) know the Code of Civil Procedure as it pertains to your particular cause of action, and (2) proofread all pleadings and letters before they are sent. Our courts are very quick to pass judgment on attorneys based upon their perception of that attorney’s competency and attention to detail. Thus, it is important that you know what to file, how to file it, where to file it, and when to file it. With the advent of technology, there is no reason why you should not be able to access relevant law and practice information with the click of a mouse.

We all can agree that legal services family law attorneys have demanding and challenging workloads. At least 50% of all case filings (a conservative estimate) in most of our State District Courts are in family law and that number keeps rising. A large number of these cases involve self-represented litigants and some courts see about 70% of all family cases with one or both sides representing themselves. Also, family law makes up over 50% of all cases cumulatively handled by our three Louisiana legal services programs. As family law changes and expands every year, it is crucial to maintain the highest standards of representation for our clients.

3. KNOW THE COURT STAFF

It is as important to know the people who can help you present your case as it is to know the law. There is an old saying, “a good lawyer knows the law, a great lawyer knows how the judge thinks.” That truism can be extended to: “a great lawyer knows and is friendly with the staff of the Clerk’s Office, the Judges, the District Attorney and DCFS/Support Enforcement Services.” Some attorneys are amazingly rude to employees of these offices. It takes no additional time to be cordial and friendly to these persons and they may be of tremendous help to you and your clients. If an opportunity to help them presents itself, you should do so. Many of our service areas include rural parishes and our client population overlaps with theirs. Clearly, what “goes around, will come around.”
The Clerk of Court is not a part of the Judge’s Office and vice-versa. There is some overlap of duties involving the Minute Clerk and the Court Reporter. In most cases, the database and access to information between the two offices do not exist on a real-time basis. This is especially true when dealing with a Judicial District Court that covers more than one parish. The judicial law clerk may not have the entire suit record when reviewing a Motion that you filed.

4. IN FORMA PAUPERIS

Most legal services’ clients cannot pay court costs. In some Louisiana parishes, the costs for a simple divorce, without any ancillary matters, can be more than $1,000 if a curator must be appointed for an absentee spouse. Fortunately, an indigent’s right to proceed without prepaying costs (filing fees) is protected by La. Code Civ. Proc. art. 5181 et seq. Common unlawful actions against pauper clients include:

- your client is prevented from filing a new suit or pleading because of unpaid court costs. See Hawkins v. Jennings, 709 So.2d 292 (La. App. 3 Cir. 1998);
- court costs are split even though your client prevailed and was granted pauper status. See Holloway v. Holloway, 787 So.2d 600 (La. App. 3 Cir. 2001); Yarls v. Yarls, 30 So.3d 1101 (La. App. 4 Cir. 2010);
- your pauper client is denied a certified copy of the divorce judgment. See Carline v. Carline, 644 So.2d 835 (La. App. 1 Cir. 1994); La. Code Civ. Proc. art. 5188, as amended by Act 741 of 2012;
- your domestic violence client is charged for a protective order or taxed with the costs. See Jimenez v. Jimenez, 922 So.2d 672 (La. App. 5 Cir. 2006); Valius v. Valius, 53 So.3d 655 (La. App. 4 Cir. 2010);
- curator fees required for a pauper divorce. See Atkins v. Atkins, 2001-583 (La. App. 3 Cir. 2001); Jones v. Jones, 297 So.2d 198 (La. 1974);
- contempt of court or penalties for failure to pay costs of court-ordered experts when client lacks financial ability to pay. See Rochon v. Roemer, 630 So.2d 247 (La. 1994); La. R.S. 13: 4206;
- Use of Civil Code art. 2362.1 to cast the pauper client with costs. While attorneys’ fees and court costs occurred before divorce is granted, are a community obligation, the claim can only be satisfied from community assets. See Malone v. Malone, 260 La. 759, So.2d 397 (La. 1972) and Civil Code art. 2357.

5. DIVORCE

5.1 WHAT ARE THE GROUNDS FOR DIVORCE IN LOUISIANA?

Articles 102 and 103 of the Louisiana Civil Code provide the grounds for no-fault and fault divorces in Louisiana. La. R.S. 9: 307 provides the grounds for divorce in covenant marriages. Most marriages are not covenant marriages. Sample pleadings for article 102 and 103 divorces are at the end of this chapter.

Most divorce suits ask for a “no-fault” divorce based on the spouses’ physical separation. Generally, the required separation period for 102 and 103 divorces is 365 days if there are minor children of the marriage and the marriage is not a
covenant marriage. Except in the case of a covenant marriage, the required separation period is only 180 days if:

1. there are no children of the marriage or
2. a protective order or injunction has issued to protect the divorce plaintiff or a child of one of the spouses from abuse or
3. a court finding of physical or sexual abuse of the divorce plaintiff or a child of one of the spouses.

If the divorce defendant is a domestic violence victim, she would have to reconvene for divorce to qualify for a divorce based on 180 days physical separation or that a child of one of the spouses was physically or sexually abused.

Article 103 divorces may also be granted for adultery or a felony conviction without the necessity of waiting for a separation period to elapse.

5.2 HOW TO DETERMINE THE SEPARATION PERIOD REQUIRED FOR A DIVORCE

Answer the following questions to determine (1) the applicable separation period for divorce and (2) whether the parties have been separated long enough for a divorce based on physical separation:

Is there a covenant marriage?
First, determine if the client’s marriage was a covenant marriage. Most marriages are not covenant marriages. If there is no covenant marriage, the required separation period is either 365 days or 180 days, as applicable.

Always ask clients whether they have contracted a covenant marriage. Proof that your client has contracted such a marriage can be established by the marriage certificate which will have a declaration of their intent to enter into a covenant marriage under La. R.S. 9:273. If previously married parties have opted into a covenant marriage, this fact can be determined from the marriage certificate. La. R.S. 9:275 requires a notation of the parties’ intent to enter into a covenant marriage on the marriage certificate. A copy of the parties’ signed declaration of intent is attached to the marriage certificate.

Are there minor children of the marriage?
Determine whether there are children of the marriage that may require a separation period of at least 365 days instead of 180 days. The issue of whether there are minor children of the marriage is determined on these dates:

- For an article 103 divorce, the date that the divorce petition is filed.
- For an article 102 divorce, when the Rule to Show Cause is filed.


A “child born of the marriage” is a child conceived or born during the marriage of his parents, adopted by them or filiated in the manner provided by law. La. Civ. Code art. 3506(8). In the Author’s opinion, a child who is legitimated by marriage in accordance with La. Civ. Code. art. 195 or La. R.S. 40.46(A), is a child of the marriage.

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If there are minor children, is there a protective order or court finding of abuse?

A protective order against domestic abuse, even if by consent motion, will allow spouses with minor children to obtain a divorce based on separation of only 180 days. A finding of physical or sexual abuse will also support divorce on separation of 180 days. La. Civ. Code art. 103.1 (1)(b)-(c).

Was there intent to be divorced?

In determining the separation period for a divorce with or without minor children, most practitioners incorrectly focus only on the physical separation period and overlook the need for also establishing an intent to be divorced. Letters or actions may constitute proof of intent. The “intent” may be questionable if the other spouse works offshore, is in a jail, the military or a hospital. The Supreme Court has held that “evidence that the parties have not resided under the same roof for the statutorily required period, without more, is not sufficient to obtain a divorce under the statute... From the point in time that a party evidences an intention to terminate the marital association, when coupled with actual physical separation, the statutorily required separation period begins to run.”

Did the spouses “reconcile” during the separation period?

An action for divorce is extinguished by the “reconciliation” of the parties. If reconciliation occurs, a divorce suit based on the prior separation period is defeated. Reconciliation is an affirmative defense to a divorce suit.

Reconciliation requires more than isolated incidents of sexual relations, cohabitation on a trial basis or vacations together. It requires both the mutual intent of both parties to reconcile and the actual resumption of living together as husband and wife. Mutual intent is a question of fact determined by the totality of the circumstances.

5.3 Which Courts Have Jurisdiction and Venue for a Divorce?

A Louisiana court has jurisdiction to grant a divorce if one party is domiciled in Louisiana. Unlike some states, there is no minimum residency requirement. There is a rebuttable presumption of domicile after six months residency. Domicile is physical presence plus present intent to reside. If your client has been in Louisiana for less than 6 months, ensure that other proof of domicile exists such as: driver’s license, voter’s registration, etc. A service member is considered a domiciliary of Louisiana and the parish of his residence if he has been stationed at a military installation in Louisiana for 6 months and has resided in the parish where the divorce action is filed for at least 90 days prior to the filing of the action. As a general rule, a spouse of a service member should sue for divorce

4 Adams v. Adams, 408 So.2d 1322, 1327 (La.1982).
6 Walkowiak v. Walkowiak, 749 So.2d 855, 858, n.2 (La. App. 2 Cir. 1999).
7 Millon v. Millon, 352 So.2d 325 (La. App. 4 Cir. 1977)(no reconciliation despite 6 acts of sexual intercourse); Woods v. Woods, 660 So.2d 134 (La. App. 2 Cir. 1995)(cohabitation on a trial basis); Noto v. Noto, 41 So.3d 1175 (La. App. 5 Cir. 2010)(vacation together).
and military pension division in the domicile state of the service member to avoid federal jurisdictional battles under 10 U.S.C. § 1408 and additional litigation expenses.\textsuperscript{12}

Venue for divorce is jurisdictional and may not be waived.\textsuperscript{13} A divorce obtained in a court of improper venue is an absolute nullity.\textsuperscript{14} A null divorce can render a second marriage invalid and affect community property and inheritance rights. An action for nullity based on a lack of jurisdictional venue may be brought at any time unless the defendant has acquiesced in the judgment.\textsuperscript{15} A verification of the venue facts by the client’s affidavit will help protect you against malpractice for filing a divorce in a court of improper venue.

Venue should be pleaded in the petition. Venue is proper in any of three parishes:

(1) parish where plaintiff is domiciled, or
(2) parish where defendant is domiciled, or
(3) parish of last matrimonial domicile.\textsuperscript{16}

If several courts have venue, consider which court may be better for resolution of your client’s various claims. Some courts are more expensive than others are, or have more onerous procedures than others have.

Note that, in some cases, there may be jurisdiction and venue in Louisiana for a divorce action, but not ancillary matters such as child custody, child support, spousal support or marital property division. If this is the case, those ancillary matters will generally need to be resolved in another state.

It is wise to double check the domicile of your client – especially in those parishes that overlap or zig-zag. The Author recommends that you include in your petition how long the petitioner has been domiciled in the parish. This forces you to check whether your client has met the requirements of domicile. Have the client verify the facts of venue. Caveat: the domicile rules for service members are very complex.

5.4 SHOULD THE CLIENT FILE FOR A 102 OR 103 DIVORCE?

Generally, an article 103 divorce will be simpler, faster, and cheaper. Both divorces require a petition. But, an article 102 divorce requires the extra step of a Rule to Show Cause when the required separation periods are met. By comparison, in most cases, an article 103 divorce can be obtained by a default judgment.

Factors that may weigh in favor of an article 102 divorce are:

- Domestic violence is involved \textsuperscript{17}
- Client needs interim relief for support or custody

\textsuperscript{12}See M. Sullivan, The Military Divorce Handbook 426-27 (ABA 2006). The 2012 edition will be released in August 2012. Note this general rule may be infeasible if the service member is domiciled in a state that does not allow pension division.
\textsuperscript{13}La. Code Civ. Proc. art. 44, 3941.
\textsuperscript{14}La. Code Civ. Proc. art. 44, 3941(B); In re Succession of Jones, 6 So.3d 331 (La. App. 3 Cir. 2009). However, a spouse acquiesces in the null divorce judgment if he remarries. Glover v. Glover, 38 So.3d 541 (La. App. 3 Cir. 2010).
\textsuperscript{15}La. Code Civ. Proc. art. 2002; Glover v. Glover, 38 So.3d 541 (La. App. 3 Cir. 2010).
\textsuperscript{17}A domestic violence victim may obtain interim relief for support, custody and use of marital home pursuant to a protective order action under La. R.S. 46: 2131 et seq.
- Client lives with spouse and needs exclusive use of marital home or property
- An article 102 divorce, depending on facts, may extend period for interim spousal support
- Risk of kidnapping and flight—immediate custody order needed
- Child removed from Louisiana and home state jurisdiction needs to be preserved
- An earlier termination of community property regime is sought

Factors that may weigh against an article 102 divorce are:
- Required separation period may be longer than for an article 103 divorce (e.g., a spouse who is close to meeting the separation period for an article 103 divorce will extend the required separation period by filing an article 102 divorce)
- Additional costs for filing and serving the final Rule to Show Cause
- The required service for the final Rule to Show Cause may be expensive or impossible and cause greater delays and costs to client (note: service on out-of-state defendants will require at least 30 days notice and may entail foreign state fees which can’t be waived for paupers)
- If the other spouse is convicted of a felony after the marriage, there may be immediate grounds for an article 103 divorce.

5.5 DIVORCE UNDER CIVIL CODE ARTICLE 102

5.5.1 Overview of article 102 divorces

An article 102 divorce petition may be filed if the client has not been separated long enough for an article 103 divorce. An article 102 divorce may be filed even if the parties are still living together. However, the petition must be personally served on the defendant if the parties still live together. The petitioner may not obtain an article 102 divorce judgment until the required period has elapsed, which is either 180 or 365 days from the service of the original divorce petition or execution of waiver of service. The divorce is obtained by filing a Rule to Show Cause after the required separation periods have elapsed from the divorce petition. The required periods for an article 102 divorce cannot be waived. A divorce suit under article 102 is abandoned (dismissed) if the Rule to Show Cause is not filed within two years of service of the original petition or execution of the waiver of service.

5.5.2 How do I get an article 102 divorce?

The requirements for an article 102 divorce are:

1. A divorce petition
2. Physical separation (without reconciliation) for either 180 or 365 days after service of the divorce petition
3. Physical separation (without reconciliation) for either 180 or 365 days before the final Rule to Show Cause is filed
4. A Rule to Show Cause, with required affidavits, filed within 2 years of the service of the original divorce petition or execution of the waiver of service
5.5.3 Pleading and notice requirements for an article 102 divorce petition

Petitions for divorce under Civil Code article 102 must contain allegations of jurisdiction and venue and that the plaintiff wants a divorce. The article 102 divorce petition must be verified by the plaintiff’s affidavit. An attorney’s affidavit will not suffice. La. Code Civ. Proc. art. 3957 provides that a defendant may expressly waive service of the article 102 divorce petition and accompanying notice by written waiver executed after the filing of the petition and made a part of the record. If there is such a waiver, the required periods for separation (180 or 365 days) and for abandonment (two years) will run from the date of execution of the waiver.

A notice of the divorce petition, along with certified copy of the divorce petition, must be served on the defendant. If the parties are still living together, the defendant must be personally served. This notice is prepared and signed by the clerk of court.

5.5.4 When does a defendant need to file a response to an article 102 divorce?

If your client is the defendant, an Answer to an article 102 divorce is not necessary. The 102 divorce can only be granted by a Rule to Show Cause which cannot be filed for at least 180 or 365 days after service of the article 102 divorce petition. However, if your client has a lis pendens exception or motion for stay if a prior divorce is pending in another state or parish, she may want to file appropriate responsive pleadings. Affirmative defenses and jurisdictional objections may be asserted at the trial of the Rule to Show Cause.

The standard res judicata rule that a party must raise all causes of action arising out of a transaction or occurrence that is the subject of litigation does not apply to actions for divorce under Civil Code art. 102 or 103, actions for determination of incidental matters such as custody, support or visitation and community property partition. Such claims historically have been assertable after the divorce action has been concluded by judgment. Of course, there are time limitations for the assertion of spousal support claims against the other spouse.

A defendant must file a Reconventional Demand to an article 102 divorce to obtain ancillary relief for child or spousal support where the date of judicial demand governs retroactivity. Also, a defendant may want to reconvene for divorce if she has a claim for a 180 day divorce as a domestic violence victim or because she has grounds for immediate divorce due the plaintiff’s felony conviction.

A spouse of a military service member may need to make an appearance in a divorce suit in order to protect her rights to division of a military pension. A divorce judgment that does not reserve the right to partition the community could

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18. This requirement means that an article 102 divorce plaintiff will have to incur the inconvenience of another trip to the office to verify under oath the petition.
20. In some cases, the defendant may have already obtained a divorce judgment from another parish or state. If so, an exception of res judicata may be appropriate.
21. La. Code Civ. Proc. art. 425(B); 1061 (B).
lead to the loss of the spouse's community share of the service member's military pension. In Louisiana, a spouse will have a right to part of her spouse's military pension if certain requirements are met.

5.5.5 Pleading requirements for the Rule to Show Cause to obtain an article 102 divorce

Under La. Code Civ. Proc. art. 3952, the Rule to Show Cause for an article 102 divorce must allege:

1. proper service of the original petition on the defendant,
2. that 180 or 365 days, as applicable, have elapsed since that service, and
3. the spouses have lived separate and apart continuously for the previous 180 or 365 days, as applicable.

The Rule to Show Cause should also state that the parties did not have a covenant marriage, if this is the case, that the parties have not reconciled and whether the parties have minor children at the time the Rule is filed. A verified pleading or affidavit attesting to the fact that the defendant is not a member of the military services of the United States or its allies is also required.

Either party can move for the Rule. The Rule must be verified by an affidavit executed by the mover and proper service made all over again. A party in a 102 divorce action may expressly waive service of the Rule to Show Cause why a divorce should not be granted and the accompanying notice. The waiver must be a written waiver that has to be executed after the filing of the Rule to Show Cause and made part of the record.

Caveat: If your client is the defendant and needs the initial filing date of the 102 divorce for termination of the community, you will need to complete the 102 divorce rather than reconvening for a 103 divorce. How else can you protect community property interests? If an interest in community property is “threatened to be diminished by fraud, fault, neglect”, a judgment decreeing separation of property can be obtained. Consider use of a Civil Code art. 2374 motion or petition if termination of the community regime is important.

5.5.6 Proof of article 102 divorce at Rule to Show Cause

An article 102 divorce requires proof that 180 or 365 days have elapsed from the service of the petition (or written waiver) and that the spouses have lived separate and apart continuously for at least 180 or 365 days prior to the rule to show cause.

These facts may be established by:

1. the divorce petition;
2. proof of service of the divorce petition;

In most states, failure to reserve the partition of community or marital property will waive those rights. Thus, even though Louisiana does not require express reservation of partition rights in a divorce judgments, failure to do so could lead to significant loss of property rights if a party or the parties move to other states. See Uniformed Services Former Spouses Protection Act (USFSPA), 10 U.S.C. § 1408(c)(1).

A spouse’s share of the military pension may be up to 50% depending on the length of the marriage and its overlap with the military service. The Sims formula is used to divide a military pension in Louisiana. See Defley v. Defley, 539 So.2d 928 (La. App. 2 Cir. 1989).


See Gray v. Gray, 463 So. 2d 14 (La. App. 5 Cir. 1985); Warner v. Warner, 859 So.2d 146 (La. App. 1 Cir. 2003), and La. Civ. Code art. 2375 (C) for retroactivity issues.
3. the Rule to Show Cause and the affidavit required by Code of Civil Procedure art. 3952;
4. the sheriff’s return of service of the rule or waiver of that service; and
5. the mover’s affidavit executed after the filing of the rule, stating that the parties have lived separate and apart continuously for at least 180 or 365 days prior to the filing of the Rule to Show Cause and are still living separate and apart and that the mover now desires to be divorced.\(^{27}\)

Note that an article 102 divorce will be an absolute nullity if the required periods (1) between service of the petition and the filing of the Rule to Show Cause or (2) between the separation date and the filing of the Rule to Show Cause are not met.\(^{28}\)

\(\text{☞ Use a checklist when finalizing the 102 divorce since its requirements are specific and mandatory. See East Baton Rouge Family Court’s Forms G-1 and G-2 for 102 divorces if your court does not have a checklist to ensure compliance with the requirements for a 102 divorce.}\)

### 5.6 DIVORCE UNDER CIVIL CODE ARTICLE 103

#### 5.6.1 Overview of article 103 divorce

Article 103 contains the “immediate causes for divorce” and the “no fault” cause for divorce based on 180 or 365 days of separation, without reconciliation, as applicable. Except in a covenant marriage, an article 103 divorce shall be granted on the petition of a spouse upon proof that:

1. the spouses have been living separate and apart, without reconciliation, for 180 or 365 days or more from the date the petition is filed; or
2. the other spouse has committed adultery; or
3. the other spouse has committed a felony and sentenced to death or imprisonment at hard labor.

#### 5.6.2 Felony conviction or adultery divorces

An adultery divorce is not practical given the difficult burden of proof.\(^{29}\) As a practical matter, felony conviction is the only immediate way to obtain an article 103 divorce for spouses who have not met the required separation period of 180 or 365 days. A divorce may be granted because of a spouse’s felony conviction even if the conviction is on appeal or the sentence is suspended.\(^{30}\) A guilty plea to a felony is a conviction that will entitle a spouse to an Art. 103(3) immediate divorce.\(^{31}\) A felony conviction that predates the marriage is not cause for an immediate divorce.\(^{32}\)


\(^{29}\)There does not appear to be any statutory basis for the jurisprudential rules on the heightened burden of proof for adultery established by the courts. However, the reality is that these jurisprudential rules make it very difficult to prove adultery for an article 103 divorce. See e.g., Ogea v. Ogea, 378 So.2d 984 (La. App. 3 Cir. 1979)(defendant’s admission insufficient); Poole v. Poole, 7 So.3d 806 (La. App. 3 Cir. 2009)(testimony of defendant’s sexual partner insufficient in this case); but compare, Cannatella v. Cannatella, 91 So.3d 393 (La. App. 5 Cir. 2012)(trial court should have granted adultery divorce based on admissions and investigator’s testimony).

\(^{30}\)Tauzier v. Tauzier, 666 So.2d 565 (La. App. 5 Cir. 1985); Kitcher v. Kitcher, 480 So.2d 494 (La. App. 5 Cir. 1985); Nickels v. Nickels, 347 So.2d 510 (La. App. 2 Cir. 1977).

\(^{31}\)Scheppf v. Scheppf, 430 So.2d 370 (La. App. 3 Cir. 1983).

\(^{32}\)McKee v. McKee, 262 So.2d 111 (La. App. 2 Cir. 1972).
5.6.3 Pleading requirements for an article 103 divorce petition

For a divorce, the petition for an article 103 divorce should allege jurisdiction, venue, domicile of the parties, the grounds for divorce (typically 180 or 365 days of physical separation or a felony conviction), non-reconciliation, lack of covenant marriage, whether or not the parties have minor children of the marriage, and their names. Ancillary matters such as child custody, child support, spousal support, use of marital home, protective orders or injunctions, request for return of personal property and community reservation or partition may also be alleged in the divorce petition.

☞ If your client seeks to obtain a divorce quickly, it may be in her interest to refrain from making any allegations that could incite opposition. If the parties agree on all or most of the issues or your client does not anticipate opposition, file a “plain vanilla” divorce petition. If the defendant does not file an answer, such inaction may permit your client to take up the divorce and the ancillary issues (e.g., joint custody) by default without having to go to court.

☞ It is always a good practice to include the specific issue on which the default is being taken in the Waiver as well as the fact that the defendant will be cast with all court costs. The address of the defendant is necessary since the Clerk of Court will need it to bill the defendant. See Forms.

5.6.4 Procedures to obtain an article 103 divorce judgment
5.6.4.1 If defendant fails to file an answer or responsive pleadings

Many defendants do not answer an article 103 divorce lawsuit. Since the 103 divorce is an ordinary proceeding, issues must be joined in order to finalize it. If they fail to answer, the steps to obtain a default judgment of divorce are:

1. a motion for entry of preliminary default (also called the “judgment of default” or “default judgment”) and
2. if no answer is filed after the preliminary default and “judgment of default”, confirmation of the default judgment by proof of a prima facie after two days, exclusive of holidays, from entry of the “judgment of default.”

Generally, the preliminary default is entered by an ex parte written motion after the expiration of 15 days from service of the petition. In an article 103(1) divorce based on physical separation, if the defendant has executed an affidavit waiving service and legal delays, the preliminary default may be entered on the same date but in the Author’s opinion, should be procedurally after this affidavit is filed.33 The defendant may execute his affidavit before any notary.34

A default judgment may be confirmed and a final divorce judgment entered in a suit for divorce based on physical separation under Civil Code art. 103 (1) even if the suit demands other ancillary or incidental relief.35 Confirmation of the default judgment may be made after two days, exclusive of legal holidays, from the entry of the default judgment (also called “preliminary default”).36 However, if the defendant made an appearance of record in the case, then the plaintiff must

send a “notice of the date of entry of the judgment” – I just send a copy of the default judgment to the defendant by certified mail and wait at least seven days, exclusive of legal holidays, before confirming the default judgment. Examples of an “appearance” include: a motion for time to plead, Answer, showed up at the Hearing Officer Conference, or signed a Consent Judgment. An affidavit or certificate of service of this seven days notice by certified mail should be filed into the suit record.

The default judgment may be confirmed by proof of a prima facie case by either (1) an affidavit attesting to the truth of all the factual allegations of the divorce petition or (2) by oral testimony of the plaintiff. Since the court has discretion whether to have a hearing or to allow a 1702(E) confirmation, it is best to check the local rule or with the court beforehand. Any concerns that a judge may have as to the court’s duty to review the best interest factors in custody cases can be addressed by making sure that the petition, prayer, and the affidavit of correctness, contain the relevant best interest factors as well as good cause for not having a custody implementation plan. Confirmation of an article 103(1) divorce by affidavit should include:

(1) affidavit attesting to truth of factual allegations of divorce petition
(2) two copies of proposed divorce judgment
(3) affidavit of non-military service
(4) affidavit that there are no minor children of the marriage and the wife is not pregnant
(5) affidavit of non-covenant marriage
(6) certification of the type of service, date of service, entry date of the preliminary default, and clerk’s certificate that defendant has not filed an answer or other responsive pleadings

Some courts will not allow a self-represented litigant to do a 1702(E) confirmation and will require a prima facie case at a hearing. Courts usually require a checklist or a certification form showing that the above requirements have been met. The affidavit attesting to the truth of the facts in the divorce petition needs to be executed as close as possible to the time when the divorce judgment is filed in order to assure that it is accurate. For example, the parties could have reconciled, opted into a covenant marriage or become pregnant. Some courts may require the testimony of two corroborating witnesses and most will not allow the other spouse to be a corroborating witness. If the affidavit attesting to the truth of the divorce facts is presented to the court, it must render a divorce judgment on the affidavit or direct that a hearing be held on the divorce.

As discussed, many defendants fail to answer the Petition for Divorce. Such is often the case when Support Enforcement Services is already handling the client’s claim for child support. Also, a defendant will often fail to file an answer in cases where custody is undisputed. In such cases, it is often better to defer the setting of a hearing on a Rule for support or other ancillary matters. But, if there are critical issues that need to be addressed immediately, e.g., a protective order, support or use of the family home, a Rule to Show Cause will need to be set.

In many jurisdictions, the delays for answering a petition will expire before the date scheduled for the Rule hearing. Most judges will not permit you to proceed with a confirmation of default for the divorce if the date for the Rule hearing has not passed. Thus, if no ancillary issues (custody, support, etc.) were set for hearing by a Rule to Show Cause, you may be able obtain a default judgment of divorce by oral testimony or the Code of Civil Procedure art. 1702(E) affidavit procedure. Generally, after interviewing your client, you will know whether the lawsuit will be contested or whether your client will benefit from a Rule hearing.

Note, that at least in the Fourth Circuit, the affidavit procedure (C.C.P. art. 1702E) for confirmation of default may not be used for child custody and child support. Confirmation of maiden name and any reservation of community partition rights should be granted in an affidavit procedure for confirmation of a default judgment since they do not require evidence. However, there are some judges who require an oral hearing in all divorce hearings with or without ancillary provisions.

Child support, sole custody, or permanent injunctive relief should require prima facie evidence that supports the relief sought. The use of the Hearing Officer Conference (depending on local court rules), may also require that the ancillary matters are set as a summary proceeding. Some Courts will not allow the ancillary matter of child custody in a divorce to be confirmed without a hearing. Absent an agreement, pleadings, affidavits and evidence must support an award of child custody being made in accordance with the best interest factors of Civil Code art. 133. Byrd v. Byrd, 621 So.2d 124 (La. App. 2 Cir.,1993). However, the Fourth Circuit requires evidence and testimony, rather than affidavits, to prove a prima facie case for purposes of confirming ancillary matters in a default. See Falcon v. Falcon, 929 So.2d 219 (La. App. 4 Cir. 2006).

5.6.4.2 If the defendant or curator files an answer:

If an Answer (does not have to raise an affirmative defense) has been filed, the divorce will have to be tried contradictorily against the defendant or the curator, as applicable. A standard motion for summary judgment may not be used to obtain a divorce judgment. However, there is one limited exception for divorces. A summary judgment or judgment on the pleadings may be granted in an article 103(1) divorce where both parties are represented by counsel, An Answer has been filed, counsel for each party file a written joint stipulation of facts, request for judgment, and sworn verification by each party and a proposed judgment with a certificate that counsel and each party agree to the terms of the judgment.

If a Hearing Officer Conference is set for the ancillary matters together with a Rule to Show Cause before the District Judge, you will not be able to finalize your divorce at the Rule unless the defendant is present at the Rule and joins the plaintiff in waiving rights to service of process, legal delays, and notice of trial. Another way to get the divorce without setting it for trial is to have the defendant - if he/she shows up at the Hearing Officer Conference - execute a waiver for the divorce issue and thus, allowing you to take it up by way of a confirmation of default after a default (also called “preliminary default”) has

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39 Falcon v. Falcon, 929 So.2d 219 (La. App. 4 Cir. 2006).
41 If you file a divorce petition that includes ancillary matters over which Louisiana does not have jurisdiction, you should expect the adverse party to file a responsive pleading, such as an exception or motion to dismiss.
been entered. Ask the Hearing Officer to notarize the Affidavit. Otherwise, if the defendant shows up at the Hearing Officer Conference or Rule or makes any appearance, the Code of Civil Procedure art. 1702(A) for confirmation of the default must be complied with.

5.6.4.3 Notice of Divorce Judgment by Default

If the defendant was not personally served with the divorce petition, notice of the judgment of divorce, which was obtained by default, must be served on the defendant by the sheriff.43 If the defendant was personally served with the divorce petition or the divorce was contested, the notice of judgment shall be mailed by the clerk of court.44 Long-arm service of non-residents by certified mail or commercial courier qualifies as “personal service” for this notice of judgment rule.45 The notice of judgment is required to start the 30 day appeal period running.46 However, notice of judgment is no longer required in article 103(1) divorces (those based on physical separation) when the defendant waived service.47

5.7 COVENANT MARRIAGE

“Covenant marriages” are governed by different divorce rules. See La. R.S. 9:272-275, 307-309. You must include in your petition for divorce whether the marriage entered into was/was not a covenant marriage. Few Louisiana citizens enter into such marriages. Therefore, discussion of such marriages will be brief.

A divorce procedure for “covenant marriage” couples is found in La. R.S. 9:307-309. The causes for divorce are (a) adultery, (b) commission of a felony by a spouse, (c) abandonment, (d) physical/sexual abuse of the spouse seeking the divorce or a child of one of the spouses, (e) living separate and apart without reconciliation for a period of two years, or (f) living separate and apart without reconciliation for one year from the date the judgment of separation of bed and board was signed. As a practical matter, the previously repealed cause of action denoted as Separation from Bed and Board has been resurrected in the Covenant Marriage Act. La. R.S. 9:307 (B).

Always ask clients whether they have contracted a covenant marriage. Proof that your client has contracted such a marriage can be established by obtaining a copy of the marriage license which will contain a declaration of their intent to enter into a covenant marriage pursuant to La. R.S. 9:273. If previously married parties have opted into a covenant marriage, this fact can be determined from the marriage certificate. La. R.S. 9:275 requires a notation of the parties’ intent to enter into a covenant marriage on the marriage certificate. A copy of the parties’ signed declaration of intent is attached to the marriage certificate.

5.8 BIGAMOUS MARRIAGE

If a marriage is bigamous, it must be terminated by a petition to annul, not a petition for divorce.

46 See La. Code Civ. Proc. art. 3942, 2087A, 1974. In most cases, the 30 day appeal period runs from the expiration of the delay period for a motion for new trial.
5.9 NAME CONFIRMATION

While marriage does not change a wife's name, the divorce judgment can confirm the name of a married woman.48 The confirmation is limited to her name at the time of the marriage, the name of her minor children, or her maiden name without having to comply with R.S. 13:4751 et seq. If it is not confirmed in the judgment, this will create problems when the time comes to change government issued identification cards such as driver's license, Social Security, etc. See Federal Intelligence Reform and Terrorism Prevention Act of 2004. (Pub. L. 108-458; 12/17/04).

5.10 DEFAULT DIVORCES INVOLVING SERVICE MEMBER OR EX-SERVICE MEMBER

There are some potential risks to the spouse of a service member or ex-service member in taking a default divorce judgment.49 If the court does not meet the federal requirements for jurisdiction, 10 U.S.C. § 1408(c)(4), the spouse may be left with an unenforceable order as to the military pension. If the state that does have jurisdiction does not allow partition, the spouse could be left without a remedy. Failure to expressly reserve jurisdiction over partition of the community may also cause problems for the spouse in the divorce jurisdiction or a foreign jurisdiction. If a service member files for a divorce, his spouse should make an appearance and either request a pension division or challenge jurisdiction.

5.11 CITATION AND SERVICE OF DIVORCE PETITION AND OTHER PLEADINGS

Citation and service of the divorce petition or service in general may be the most difficult task in many divorces and ancillary matters. Self-represented litigants often struggle with Louisiana rules for service of process and need an attorney’s help. You cannot confirm a default divorce or have a hearing on a Rule for custody, support, etc., unless there is proper service on the other party. Every time a Rule is continued for lack of service, the court costs increase—substantially in some courts.

☞ You should check that the Court has allowed for enough time for any Rule dates set. For example, service on prisoners and non-residents can easily take 45 days or more to complete. A hearing (other than protective orders) cannot be heard unless there is at least 30 days notice to a non-resident. If you need to subpoena third party witnesses for the Rule hearing, be aware that some judges will not enforce a subpoena unless it has been issued 30 days before the hearing.

☞ Service of the citation shall be requested on all named defendants within ninety days (90) of commencement of the action. La. Code Civ. Proc. art. 1201(C). The failure to do so may result in an involuntary dismissal “unless good cause is shown why service could not be requested.” La. Code Civ. Proc. art. 1672(C).

Citation and service of the divorce petition are made as follows. Similar rules apply for service of other pleadings.

5.11.1 Waiver of Citation and Service:

Citation is not required for article 102 divorces and summary proceedings. A defendant may expressly waive citation and service by written waiver.\textsuperscript{50} Citation and service of the petition are required for article 103 divorces. For a 103(1) divorce, the waiver must be by affidavit signed and filed after the petition is filed.\textsuperscript{51} The defendant must receive a certified copy of the petition. Check local court rules for any requirements for waivers of citation and service. If the matter is truly uncontested (adverse is cooperative), you may be able to get around other time consuming and costly methods of service, e.g., service of prisoners and non-residents.

5.11.2 Personal or Domiciliary Service by the Sheriff:

Service on persons may be personal or domiciliary.\textsuperscript{52} Personal service is most commonly made at home (specifically for 102 divorces when the parties are still living together) or work. Domiciliary service requires service on a person of suitable age and discretion who resides in the defendant’s house.\textsuperscript{53} Domiciliary service at a defendant’s former home, at a relative’s home or on someone who does not live in his home will be insufficient.\textsuperscript{54}

Incarcerated persons are served by personal service on the warden or his designee.\textsuperscript{55} The warden or his designee, in turn, must make personal service on the incarcerated person. Proof of service is made by filing the affidavit of the person serving the citation and pleadings on the incarcerated person. The affidavit should indicate that the server was the warden’s designee and that personal service was made.\textsuperscript{56} La. Code Civ. Proc. art. 1235.1 allows for an alternative procedure when the warden fails to return the affidavit of personal service. This alternative procedure can be common and the Author recommends that counsel should submit an affidavit to the court detailing the service process if the warden’s affidavit is not forthcoming. Domestic violence perpetrators can be difficult to serve. Therefore, you may want to serve such defendants while they are still in prison. But, to get them out of jail to any hearing on a rule or the merits, may require an order of the Court. See Forms.

If a hearing is required in a case against a prisoner, some judges will require and rely on the plaintiff or mover to supply the “Writ to Secure the Presence of the Defendant” or “Writ of Habeas Corpus Ad Prosequendum” for hearings.\textsuperscript{57} When setting court dates (Hearing Officer Conferences, Rules, or Trials) be mindful of the transportation expense involved (set all matters on one day after consulting the judicial law clerk) as some prisons can be across the State. See form provided.

\textsuperscript{58} Service of a defendant who is incarcerated in another state, should comply with the same due process safeguards as required by Code of Civ. Procedure art. 1235.1 or use the method for sheriff’s service under the other state’s law. See La. R.S. 13:3204(A). Call the local legal aid for guidance on their state’s laws

\textsuperscript{50}La. Code Civ. Proc. art. 1201 (B).
\textsuperscript{51}La. Code Civ. Proc. art. 1701 (B).
\textsuperscript{52}La. Code Civ. Proc. art. 1231.
\textsuperscript{55}La. Code Civ. Proc. art. 1235.1
\textsuperscript{56}Johnson v. East Carroll Detention Center, 658 So.2d 724, 727 (La. App. 2 Cir. 1995).
\textsuperscript{57}See discussion in Domestic Violence Practice in Louisiana, § 3.4.2.10, which argues that some judges’ practice of requiring a party to produce a prisoner is erroneous.
for service of prisoners. Most legal aid clients are paupers. Some sheriffs from
other states will graciously honor a Louisiana pauper order. Other states will
only honor a pauper order from their state courts, which as a practical matter,
will be impossible to obtain.

5.11.3 Certified Mail by Long-Arm Statute

If you know the address of an out-of-state divorce defendant, you must try to
serve him by certified mail under the Long-Arm Statute, La. R.S. 13: 3201 et seq.,
or by a method approved by the law of the non-resident’s state.58

A certified copy of the citation and petition in an article 103 divorce or the
notice, petition and rule to show cause in an article 102 divorce is sent by certified
mail or commercial courier to the out-of-state defendant by plaintiff’s counsel. 59
Many people no longer sign for certified mail. Delivery of process by an authorized
commercial courier may have a greater likelihood of success. A defendant’s fail-
ure to pick up certified mail delivered to his home does not defeat service.60

It appears that a private process server may also be used to effect long-arm
service if appointed by the Louisiana court.61 However, use of a private process
server for an out-of-state service may not be economically practical for two rea-
sons (1) the court is limited to appointing Louisiana residents and (2) oral testi-
mony may be required if there is a challenge of the service made by the process
server.62 Out-of-state defendants have 30 days, instead of 15 days, to answer a
divorce lawsuit. The 30 day delay for taking a default judgment (also called “pre-
liminary default”) does not begin to run until counsel files the required affidavit
of service under the Long-Arm Statute into the record.63

For custody cases, service of the custody rule or petition may be made on a
non-resident pursuant to the Uniform Child Custody Jurisdiction and Enforcement
Act (UCCJEA), La. R.S. 13: 1808. The UCCJEA allows for service of custody cases
in a manner prescribed by Louisiana law for service of process (generally long-
arm statute) or by “the law of the state in which service is made.”

☞ The Affidavit of Long-Arm Service should strictly comply with La. R.S. 13:
3205 (1)-(3).64 The person who actually mailed the citation and petition should
execute the Affidavit. If your secretary mailed the process, she will need to exe-
cute the Affidavit. Make sure that the Affidavit expressly states that a certified
copy was mailed or delivered and contains all the information required by sub-
section of R.S. 3205 under which service was effected. An Affidavit that merely
states that the citation and petition were mailed is insufficient since it does not
say that a certified copy was mailed.

58 Warren v. Warren, 622 So.2d 864 (La. App. 4 Cir. 1993)(long-arm statute for service of 103 divorce action on non-resi-
dent); Esposito v. Esposito, 2007 WL 3227186 (La. App. 1 Cir. 2007)(long-arm statute for service of article 102 divorce).
60 HTS, Inc. v. Seahawk Oil & Gas, Inc., 889 So.2d 442 (La. App. 3 Cir. 2004); Ainsworth v. Ainsworth, 860 So. 2d 164
(La. App. 4 Cir. 2003); Amin v. Bakhaty, 812 So.2d 12 (La. App. 1 Cir. 2001); McFarland v. Dippel, 756 So. 2d 618 (La.
App. 1 Cir. 2000) writ denied 770 So.2d 349 (La. 2000).
63 La. R.S. 13: 3205. The term, “default judgment” in R.S. 13:3205 refers to the “preliminary default” and not the confir-
64 For cases where the courts have found that Affidavit of Service did not comply with La. R.S. 13: 3205, see Downey v.
Downey, 2011 WL 2119753 (La. App. 1 Cir. 2011); Esposito v. Esposito, 2007 WL 3227186 (La. App. 1 Cir. 2007); Don-
nelly v. Quatrax, 866 So.2d 917 (La. App. 5 Cir. 2004); Corte v. Cash Technologies, Inc., 843 So.2d 1162, 1166 (La. App.
1 Cir. 2003); Rando v. Rando, 722 So.2d 1165 (La. App. 2 Cir. 1998).
5.11.4 Service by Private Process Server

On motion of a party, the court shall appoint a private process server when the sheriff does not make service within 10 days or is unable to make service.\textsuperscript{65} Proof of service may require oral testimony by the process server and/or an affidavit of service that states the place and method of service as would appear in a sheriff’s return.\textsuperscript{66} The court is limited to appointing non-party adult Louisiana residents as private process servers.

5.11.5 Service on Curator

If you cannot locate and serve a Louisiana defendant or serve a nonresident defendant by certified mail or other authorized means under the long-arm statute, what are your options? You will have to request appointment of a curator for the defendant under La. Code Civ. Proc. art. 5091 and make service on the curator. Note that you must try to serve a non-resident under the long-arm statute, La. R.S. 13:3201 \textit{et seq.}, before seeking appointment of a curator.\textsuperscript{67} Some clients will work harder to find an address for their spouse if you advise them as to the additional cost and delays for a curator divorce. A curator divorce can be void if the spouse is not an absentee or his whereabouts are known.

\textsuperscript{65} In Peschier v. Peschier, 419 So.2d 923 (La. 1982), the Supreme Court upheld annulment of a curator divorce 17 years after entry of the divorce judgment where the defendant was not an absentee and could have been readily located. Thus, a diligent search that includes: public records, the internet, telephone book, relatives, last known address should be documented in your Motion to Appoint Curator. You should use Westlaw or Google for “people search.” Include language that a diligent search was made. It may be good for your client to verify in the Motion that she has no knowledge of the defendant’s whereabouts and for how long.

A curator may waive citation and accept service of process. Generally, indigents cannot afford the publication fees or the curator’s attorney fees. Many courts will accommodate indigent plaintiffs by appointing a pro bono curator who will not charge attorney fees. However, the curator will expect his newspaper publication fees to be paid.

The divorce is tried contradictorily against the curator.\textsuperscript{68} Check with the judge’s law clerk as to the level of formality that the judge requires for taking up the divorce. By law, once the Answer has been filed and a reasonable amount of time elapsed (allowing for the curator to place ads, etc.) the matter should be set for trial. If the curator does not want to be present for the trial, ensure that the curator’s Waiver and “Note of Evidence” are in the suit record. The trial of a divorce against a curator usually consists of presenting a prima facie case for divorce by oral testimony as in a confirmation of a default.

While a default can be obtained against the Curator for failure to file an answer, this is usually not encouraged. All courtesies should be accorded to the Curator prior to this drastic action. A default judgment confirmed when the Curator has filed a responsive pleading will be a nullity.

\textsuperscript{66} La. Code Civ. Proc. art. 1293, which states that service of process “shall be proved like any other fact in the case.”
\textsuperscript{67} Rando v. Rando, 722 So.2d 1165 (La. App. 2 Cir. 1998)(service on a curator when plaintiff knows defendant’s out-of-state address violates statute and due process).
\textsuperscript{68} La. Code Civ. Proc. art. 5091 (B).
Some courts will cast the client with filing costs as well as curator costs – this is against the law. See Jones v. Jones, 297 So.2d 198 (La.1974). While as a practical matter the curator’s fees are usually paid by our clients or from litigation funds, the court costs should be cast to the absentee defendant. In some cases, the ability of the court to order “quasi in rem” decrees (costs) against the defendant who has had no minimum contacts with Louisiana and who has not subjected himself personally to the jurisdiction of the court, will not be possible. See La. Civ. Code art. 9. The requirement that the pauper has to pay for the curator fees is a potential issue for appellate court review. See e.g., Jones v. Jones, supra; Atkins v. Atkins, 2001-583 (La. App. 3 Cir. 2001).

5.12 ANCILLARY OR INCIDENTAL MATTERS TO A DIVORCE

In a divorce action, many ancillary issues may be decided by summary proceeding (rule to show cause) and a Hearing Officer Conference may be mandatory prior to the issue of obtaining the final judgment of divorce. La. Civil Code art. 105. Such issues may include injunctions against disposition or encumbrance of community property (La. R.S. 9:371), injunctions against abuse or harassment (La. R.S. 9:372, 9:372.1, 9:361), custody (La. Civil Code art. 131 et seq.), child support (La. Civil Code art. 141 et seq., La. R.S. 9:315 et seq), interim periodic spousal support (La. Civil Code art. 111 and 113), final periodic spousal support (La. Civil Code art. 111 and 112), use and occupancy of the family residence, use of community movables (La. R.S. 9:374), the right to remove personal property from the family residence (La. R.S. 9:373) as well as the right to seek a judgment of separation of property upon proof that the parties have lived separate and apart for 30 days or more. (La. Civil Code art. 2374). Divorce hearings may be conducted in chambers by Local Rule, upon good cause shown, or with the mutual consent of the parties. La. R.S. 9:302.

6. CHILD CUSTODY

6.1 INTRODUCTION

Generally, custody issues are litigated in (1) a divorce suit, (2) a stand alone custody suit or (3) a domestic violence protective order suit. The initial evaluation of a custody case should answer the following questions:

1. Which state and/or courts have jurisdiction and venue?
   Do not make the client wait for an appointment if Louisiana courts in your service area lack jurisdiction or venue. Determine jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and venue under the La. Code of Civil Procedure in the initial screening. Refer the client to the proper jurisdiction if necessary. Jurisdiction to modify another state’s custody determination was narrowed under the UCCJEA, which became effective in 2007.

2. Does the client have standing to seek custody?
   A nonparent without physical custody of the child may lack standing to seek custody in district court. Nonparent physical custodians may sue affirmatively for custody or defend habeas corpus actions.69

69 Wood v. Beard, 290 So.2d 675 (La. 1974).
3. **Which custody standard governs?**

The standard for obtaining custody varies depending on the parties and their litigation history.

**Parent v. Parent:** Custody disputes between parents are decided under the “best interest of the children” standard. Joint custody must be awarded to the parents unless there is a “history of family violence” or clear and convincing evidence that the children’s best interest requires an award of sole custody. In family violence cases, there is a statutory presumption that no parent who has a “history of family violence” shall be awarded joint or sole custody.

**Parent v. Non-Parent:** The best interest standard does not apply to a custody contest between a parent and a non-parent. Rather, the non-parent must show that parental custody will cause substantial harm to the child. The non-parent’s burden of proof is clear and convincing evidence.

**Modifications:** Modifications of custody decrees (whether considered or non-considered) require a burden of proof that at a minimum, will require a substantial change of circumstances since the prior custody decree before the best interest of the child considerations are applied.

4. **Can the client meet the applicable custody standard?**

To evaluate a client’s legal problem, get as much information as possible from the client. Engage the client in conversation. Find out what is going on with the family. Often, one will discover information helpful to a client just by talking with her. Women seeking a divorce may not volunteer that there has been family violence. Pry a bit. Ask questions, even ones outside the parameters of the particular problem for which you are consulted. Experienced attorneys will listen to what is said and what is not said.

5. **Is there a “history of family violence?”**

If there is a history of family violence, the victim may have a strong case for sole custody and supervised visitation. See La. R.S. 9: 364; see also § 5.6.4.2.3, infra, and Domestic Violence Practice in Louisiana, §3.6, supra.

With experience, an attorney will acquire one of the most important skills in family law practice – what is known as “sixth sense”. Being able to evaluate an applicant’s account of their case, requires knowledge of the law and the ability to zero in on what could make or break the case. All this needs to be done in an expedient but competent manner that still assures that each client gets the consideration she deserves.

Ask the client about witnesses who can support her version of the case facts. Get their names, addresses and phone numbers. Not only does this provide useful information for future proceedings, it allows you to verify your client’s version of the facts. Find out what the client thinks the other party and his witnesses will say about her. Most experienced attorneys know that the “truth” usually lies somewhere in the middle. It is better to know the facts at the front end than be surprised in court. Likewise, information about the client may be gleaned from the family’s contact with other organizations, i.e., Community Health Clinic, Child

73 To determine the standard for modification of a custody decree, you will need to determine whether the prior decree was “considered” or “non-considered.” Most consent or stipulated judgments will be “non-considered” decrees.
Protection, Support Enforcement Services, etc. Verify your client’s story with the child’s teachers and counselors. It is better to spend more time during intake or before you accept the client for services, than waste resources on a client whose case has little or no merit.

6.2 THE BEST INTEREST STANDARD

Civil Code art. 132 provides that if the parents do not agree on custody, the court usually awards joint custody. Joint custody must be awarded absent the parties’ consent to sole custody, a history of family violence or clear and convincing evidence that sole custody is in the child’s best interest. Proof of a “history of family violence” will generally preclude any custody award to the abuser.

Civil Code art. 133 allows a custody award to a non-parent only if parental custody would result in substantial harm to the child. In a custody dispute between a parent and non-parent, the best interest standard does not become an issue until there has been a threshold determination that custody to the parent would cause substantial harm to the child. The language of Civil Code art. 133 does not require or allow joint custody with or between non-parents. However, the courts have upheld joint custody to the parent and non-parents where sole custody with the parent would cause substantial harm to the child.

Civil Code art. 134 lists the relevant factors for a court to consider in determining “best interest” in a custody dispute between parents. For a discussion of these factors, see the “How to Try a Custody Case” section.

6.3 PLEADINGS FOR A CUSTODY CLAIM

6.3.1 What pleadings must be filed to bring a claim for custody?

A custody determination may be sought by an original action for custody or by a Rule for Custody within a divorce or paternity lawsuit. An original action for only custody may be started by filing a petition for custody, i.e., a “Petition for Custody: Ordinary Proceeding.” The pleadings caption should be used to “flag” the Court’s attention to treat it as an ordinary proceeding. If there is already a pending ordinary action such as divorce, paternity suit, etc., a Rule for Custody may be filed as a summary proceeding within the ordinary proceeding.

When just a custody action is instituted by a petition for custody, formal service and citation of the petition on the defendant is required (unless defendant signs a waiver). Thereafter, the defendant is required to answer the petition within 15 days. If the defendant does not answer, the plaintiff may move for a default judgment. Confirmation of the default will require proof of prima facie case. If, instead, a custody rule is filed, the court will set a date for hearing of the rule, and the plaintiff must appear and prove her claim for custody at the hearing. The default procedures (reserved for ordinary proceedings) may not be used to obtain a custody judgment that is sought by a custody rule (summary proceeding). Some courts, by Local Rule will require that ancillary matters be first set for a Hearing Officer Conference. It is best to contact the Hearing Officer’s office in the event there is a need to bypass the Conference or to make this request at the time of filing.

73The court shall order joint custody if the parties’ agreement for another custody arrangement is not in the child’s best interest or there is no clear and convincing evidence to the contrary. La. Civ. Code art. 132.
74Snowton v. Snowton, 22 So.3d 1111, 1113 (La. App. 4 Cir. 2009).
75La. R.S. 9:364 (C).
76McCormick v. Rider, 27 So.3d 277 (La. 2010); Whitman v. Williams, 6 So.3d 852 (La. App. 3 Cir. 2009); see also Revision Comment (c), La. Civ. Code art. 133 (joint custody between parent and non-parent is not precluded).
6.3.2 How should the custody claim be pleaded in the petition or rule?

Louisiana has “fact pleadings.” Thus, you must specifically plead those facts necessary to obtain the relief requested. Also, in family law matters, you generally cannot get what you do not pray for.\(^{78}\) If you are seeking sole custody for your client, you must plead specific facts, which if proven, would entitle your client to sole custody. You should pray for sole custody if the client has a case for sole custody and wants to pursue sole custody.\(^{79}\) Do not simply state that it is in the best interests of the children that your client be awarded sole custody. Rather, state the facts which clearly establish that an award of sole custody to your client is in the children’s best interest. If you seek a modification of custody, you must plead the grounds for modification. Failure to plead a change of circumstances subjects the custody pleading to a no cause of action exception.\(^{80}\)

An initial custody pleading should allege facts which establish custody jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJEA), La. R.S. 13:1801 \(\text{et seq.}\), and must attach an Affidavit that provides the information required by La. R.S. 13: 1821(A).

6.4 TRYING A CHILD CUSTODY CASE.

6.4.1 Burden of proof

6.4.1.1 Initial custody determination

First, identify the burden of proof applicable to your particular custody case. If a custody dispute between parents has never been heard by a court, the burden of proof will only be the “best interest of child.” Best interest for domiciliary parent status is determined by the preponderance of the evidence. Best interest for sole custody is governed by the clear and convincing evidence standard. If the case is an initial dispute between parents and non-parents, the burden of proof is substantial harm to the child by clear and convincing evidence.\(^{81}\)

6.4.1.2 Modification of considered decree

If a court receives evidence of parental fitness, any resulting judgment of permanent custody between parents will be a “considered decree” and subsequent modifications require a heavy burden of proof under the Bergeron standard.\(^{82}\) In Bergeron v. Bergeron, 492 So. 2d 1193 (La. 1986), the Supreme Court in reiterating jurisprudence constante, articulated the burden of proof necessary to modify a considered decree of “permanent” custody as follows:

> When a trial court has made a considered decree of permanent custody, the party seeking a change bears a heavy burden of proving that the continuation of the present custody is so deleterious to the child as to justify modification of the custody decree, or of proving by clear and convincing evidence that the harm likely to be caused by a change in environment is substantially outweighed by its advantages to the child.

While the heavy burden of proof is synonymous with Bergeron, the affirmation by the court of two other rules is often overlooked. These rules are: the change of

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\(^{78}\) Brantley v. Kale, 986 So.2d 188, 191-92 (La. App. 2 Cir. 2008); Verret v. Verret, 786 So.2d 944 (La. App. 2 Cir. 2001).

\(^{79}\) Griffith v. Latiolais, 48 So.3d 1058 (La. 2010)(sole custody should not be awarded if this relief is not prayed for).

\(^{80}\) Rome v. Bruce, 27 So.3d 885, (La. App. 5 Cir. 2009); Preuett v. Preuett, 4 So.3d 260, 264 (La. App. 3 Cir. 2009)


\(^{82}\) Trial courts often issue interim custody orders prior to the trial for permanent custody. Modification of an interim custody order is not governed by the Bergeron standard.
circumstances rule and the rule for appellate review where the determination of the trial judge in child custody matters is entitled to great weight, and his discretion will not be disturbed on review in the absence of a clear showing of abuse. Bergeron at 1203. It is from the change of circumstance rule that the rule for the burden of proof for a consent judgment evolved among the circuit courts and as articulated in Hensgens v. Hensgens, 653 So.2d 48 (La. App. 3 Cir. 2005) and recognized later by our supreme court in Evans v. Lungrin, 708 So.2d 731 (La. 1998). The need for the set of rules was summed up by the Bergeron court as follows:

“...more harm is done to children by custody litigation, custody changes, and interparental conflict, than by such factors as the custodial parent’s post divorce amours, remarriage, and residential changes, which more often precipitate custody battles under liberal custody modification rules than conduct that is obviously harmful to the child, such as abuse or serious neglect, which justifies intervention to protect the child....” 492 So.2d at 1199.

The Bergeron heavy burden of proof is difficult to overcome. As recently noted by the Supreme Court, Bergeron is applied sparingly to change considered custody decrees and is reserved for the most egregious offenses such as sexual molestation and physical abuse.

For other examples of what constitutes a change in circumstances, see Sibernagel v. Sibernagel, 65 So.3d 724, 728 (La. App. 5 Cir. 2011) (long drive between parents’ homes no longer manageable); Lemoine v. Lemoine, 27 So.3d 1062 (La. App. 3 Cir. 2009) (exacerbation of allergies by smoking and dogs was a change of circumstance); Beene v. Beene, 997 So. 2d 169 (La. App. 2 Cir. 2008) (impact on child’s emotional welfare from domestic violence against mother by her subsequent ex-husband); Kyle v. Leeth, 727 So. 2d 497 (La. App. 1 Cir. 1998) (absence of single mother from child’s home 75% of time was not a change of circumstance).

The courts have applied Bergeron to a parent’s motion to modify a considered decree of permanent custody to a non-parent. Bergeron does not apply to a temporary custody award to a non-parent.

6.4.1.3 Modification of consent judgment

A judgment reached by consent is a “stipulated judgment” and not a considered decree within the meaning of Bergeron. Therefore, modifications of consent judgments generally will not be governed by the Bergeron standard. Instead, modification of the consent judgment will only require proof of a material change in circumstances and the proposed modification is in the child’s best interest. See Evans v. Lungrin, 708 So.2d 731 (La. 1998). In some circuits, the parties may stipulate in a consent judgment to the application of the higher Bergeron burden of proof for custody modification. The circuits are also split as to whether the parties

84 Gray v. Gray, 65 So.2d 1247, 1261, n.16 (La. 2011). Gray found that unauthorized relocation to another state did not meet the Bergeron standard. There was no evidence that the relocation had a detrimental effect on the child.
85 See e.g., Bragg v. Horne, 764 So.2d 1177 (La. App. 2 Cir. 2000); Noe v. Noe, 640 So.2d 537 (La. App. 3 Cir. 1994); Miller v. Andrusko, 640 So.2d 368 (La. App. 1 Cir. 1994); Sheppard v. Hood, 605 So.2d 708 (La. App. 3 Cir. 1992).
86 Pounders v. Rouse, 528 So.2d 672 (La. App. 2 Cir. 1988).
87 Compare Adams v. Adams, 899 So.2d 726 (La. App. 2 Cir. 2005) (parties may stipulate to Bergeron for visitation); Reid v. Reid, 2011 WL 2120057 (La. App. 1 Cir. 2011) (trial court held that consent agreement for application of Bergeron to custody is enforceable) with Rodriguez v. Wyatt, 102 So.3d 109, 11-82, (La. App. 5 Cir. 2011) (stipulation that custody governed by Bergeron standard invalid absent a considered decree).
may stipulate in a consent judgment to a standard lower than the material change of circumstances recognized in *Evans*. 88 Note that a provision in a consent judgment stating that the custody arrangement may be reviewed in the future does not necessarily make the judgment an interlocutory or interim custody judgment.89

Sometimes, a consent judgment may be a “considered decree.” In *Cherry v. Cherry*, 894 So.2d 1208 (La. App. 4 Cir. 2005), the court found that a consent judgment entered after 3 days of trial testimony was a “considered” decree which required the *Bergeron* burden of proof for modification. However, in *Poole v. Poole*, 926 So. 2d 60 (La. App. 2 Cir. 2006), another court found that a consent judgment entered after the second day of trial was a stipulated judgment and not “considered decree” and, thus, governed by the *Evans* “material change in circumstances” test rather than the *Bergeron* test.90

The courts have struggled with the standard for a parent to modify a stipulated custody award to a non-parent. Some courts apply the *Evans* material change of circumstances test.91 Other courts have required the non-parent to prove that parental custody would cause substantial harm to the child.92 The conflict in the jurisprudence is reviewed in *Jones v. Coleman*, 18 So.3d 153 (La. App. 2 Cir. 2009). In *Jones*, the Second Circuit found that the considered vs. non-considered decree analysis of *Evans* and *Bergeron* should not apply to a parent’s motion to modify a non-parent’s custody award. Instead, the Second Circuit held that the non-parent who seeks to modify a stipulated custody judgment to a non-parent must show (1) his rehabilitation eliminates the “substantial harm” threat to the child at the time of the initial judgment and (2) the adequate environment in which the child was placed with the non-parent has materially changed.

What is the burden of proof if a non-parent seeks to modify a custody award to a parent? In *Matter of Landrum*, 704 So.2d 872 (La. App. 3 Cir. 1997), the court held that when the prior decree awarded joint custody to a parent and non-parent, the Civil Code art. 133 substantial harm burden of proof does not apply. However, *Landrum* required the non-parent, who was a joint custodian, to prove a material change of circumstances.

☞ Frequently, both trial and appellate courts get swayed by prior facts and concerns about the child’s safety without drawing a line that modification allegations and concerns have to be for events after the prior decree was rendered. Be aware to object or separate the two prong application of the *Bergeron* and *Evans* tests for modification.

### 6.4.2 Settlement and Pre-Trial Preparation

#### 6.4.2.1 Consider settlement

An attorney should never try a custody case without first pursuing settlement. Spend time with your client to insure that she understands that whatever

88 The First Circuit in *Perkins v. Perkins*, 747 So. 2d 785 (La. App. 1 Cir. 1999) and the Third Circuit in *Hensgens v. Hensgens*, 653 So. 2d 48, 49 (La. App. 3 Cir. 1995), do not allow it in light of the *Evans* rule that repeated custody litigation is harmful to minor children. On the other hand, the Fifth Circuit in *Ponze v. Ponze*, 614 So. 2d 720 (La. App. 5 Cir. 1993) writ denied, 617 So.2d 941 (La. 1993), allowed it.

89 *Silbernagel v. Sibernagel*, 65 So.3d 724, 728 (La. App. 3 Cir. 2011).

90 *See also*, LeBlanc v. LeBlanc, 953 So.2d 115 (La. App. 3 Cir. 2007)(consent judgment entered on pleadings and written stipulations is not a “considered decree”).

91 *Dalme v. Dalme*, 21 So.3d 477 (La. App. 3 Cir. 2009); *Miller v. Andrasko*, 640 So.2d 368 (La. App. 1 Cir. 1994).

92 *Cutts v. Cutts*, 931 So.2d 467 (La. App. 3 Cir. 2006); *Bracy v. Bracy*, 743 So.2d 930 (La. App. 2 Cir. 1999). But, *Bracy* is no longer followed by the Second Circuit.
result is truly in the children’s best interests will ultimately also end up being in the parents’ best interest. The client also faces the risk of having a stranger, the judge, decide what is in the children’s best interest and the result may be contrary to the children’s best interest.

Encourage your clients to be reasonable. Turn down, not up, the heat between the parties. You will not only become a better “family” lawyer, but a better human being. If appropriate, recommend mediation as an alternative method of settling disputes. Let your “word be your bond.”

In evaluating your client’s case, do not make the mistake of only believing your client’s version of the facts. There are always two sides to every story. Respect the objectives and concerns of both parties. The practice of family law is not so much about winning or losing. Rather, it is doing as little damage as possible to children who are in a difficult, often traumatic, situation not of their making.

6.4.2.2 Evaluate best interest under Civil Code art. 134 factors

After identifying the applicable burden of proof, review the 12 factors for determination of the child’s best interest in Civil Code art. 134 to prepare your case. The court is required to consider and weigh these factors based on the evidence presented.93 These factors for custody determinations should provide you with an outline for your case preparation. When interviewing your client regarding a possible custody action, refer to these 12 factors. Question your client and his/her witnesses on each factor and identify documentary evidence that supports each factor in your client’s favor.

6.4.2.3 Screen for “history of family violence”

It is critical to identify whether there is a “history of family violence” against your client. If there is, she will have a strong case for sole custody. If there is a history of family violence, R.S 9: 364, not Civil Code art. 134, will govern the custody determination. Under La. R.S. 9: 364 (C), a history of family violence mandates that the court award sole custody to the victim.94 La. R.S. 9: 364 creates a very high bar for the abuser to get any custodial rights other than visitation. After proving completion of a treatment program and freedom from substance abuse, the abuser must still prove that the child’s best interest requires his participation as a custodial parent because the other parent has abandoned the child, suffers from mental illness, substance abuse or “such other circumstances” which affect the child’s best interest. The phrase, “such other circumstances” refers to the preceding statutory terms in R.S. 9:364(C), which all involve circumstances on the magnitude of parental unfitness. Thus, under the rule of ejusdem generis, “such other circumstances” must be things similar to the preceding terms, “parental unfitness….”95 The term, “such other circumstances” must be more than the best interest standard.

Many family violence victims are traumatized and intimidated. At an initial interview, they may tell you that they only want joint custody. As attorneys, we must respect the client’s objective. However, many victims will later change their minds and want sole custody. When they change their mind, it may be too late to

93 Molony v. Harris, 60 So.3d 70 (La. App. 4 Cir. 2011).
94 Cf., Hicks v. Hicks, 733 So.2d 1261, 1266 (La. App. 3 Cir. 1999).
95 Under the statutory construction rule of ejusdem generis, general words are restricted to a sense analogous to the less general words. Pumphrey v. City of New Orleans, 925 So.2d 1202, 1211 (La. 2006).
amend the petition and it will require more filing fees and delay in the litigation. They may not remember that you told them about their right to sole custody. It is important to discuss with the client the advantages of sole custody. If they decide they only want joint custody, you should have them sign a statement acknowledging that you advised them of their right to sole custody and the various benefits of sole custody.\(^96\) It is well known that many abusers use custody litigation to continue their harassment of their victim.

6.4.3 Witnesses and documentary evidence

In many jurisdictions, teachers, principals or school counselors are persuasive witnesses. Our courts are invariably persuaded by disinterested third parties. Certainly, if a child is doing well in school and his teacher can testify that your client is involved in the child’s school activities and work, your client has a very good chance of being successful in court. Ask your client about his child’s school performance and school activities. Gather the names, phone numbers and addresses of potential witnesses. Note the specific areas of their anticipated testimony and how it relates to the Civil Code art. 134 factors. Also, obtain documentary evidence that supports your client’s case.

In child custody matters, the rules of evidence can be relaxed. See La. Code of Evidence art. 1101. Nonetheless, the judge may only allow proper evidence in order to assure fairness. Do not withhold testimony or documents you would like the court to hear or view just because they might be inadmissible under the normal rules in the Evidence Code. Submit to the court that the evidence is relevant, probative and admissible under the Code of Evidence art. 1101. Sharing such “improper” evidence in pre-trial scheduling orders (La. Code Civ. Proc. art. 1551) or discovery and giving an opportunity for the other side to refute it, bolsters your argument to the court for an art. 1101 admission of evidence.

Social media, particularly Facebook, have become a fertile source of evidence for custody litigation. Warn your client against the use of social media during custody litigation. Postings on Facebook, MySpace, Twitter and other social media may be discovered by the opposing party and used as evidence.\(^97\)

\(^96\) Wong v. Hoffman, 973 So.2d 4 (La. App. 4 Cir. 2007)(malpractice claim for advising client to agree to joint custody when there was physical abuse).

\(^97\) Olivier v. Olivier, 81 So.3d 22 (La. App.1 Cir. 2011).
parties may hire their own expert witnesses. Review each aspect of the expert’s anticipated testimony with him. Suggest areas of inquiry that opposing counsel may pursue in cross-examination. Be sure that you are both on the same page. The test for qualifying an expert is whether the expert has specialized knowledge, which can assist the court in understanding the evidence or in determining a fact in issue. La. Code of Evidence art. 702. Anticipate Daubert challenges to witnesses. If you are using a psychologist who has administered the MMPI-2 to the parties and/or the children, a good article to review is contained in the American Journal of Family Law, Vol. 10, 1-11 (1996) entitled, “The MMPI-2 in Child Custody Evaluations,” by Marc J. Ackerman, Ph.D. A good resource for cross examination of mental health professionals is Jay Ziskin’s Coping with Psychiatric and Psychological Testimony (Law and Psychology Press).


6.4.4 Civil Code art. 134 custody factors

You should know the custody factors upon which your judge places greater emphasis. There is a truism that “knowing the judge is better than knowing the law.” Therefore, it behooves an attorney to know what a specific judge wants in the way of testimony and evidence. However, the judge shall consider all relevant factors in determining the best interest of the child. It is legal error on the part of the court if the court’s decision does not articulate these or other factors relied upon. The factors provided by Civil Code art. 134 are:

Factor #1: The love, affection, and other emotional ties between each party and the child.

This factor often ties into Factor #12, prior responsibility for care of child. Evidence and testimony regarding the child’s relationship to your client should be presented. Witnesses can testify as to the character and quality of the interaction between the child and the parent based upon their personal observations. Review La. Code of Evidence art. 701 for opinion testimony by lay witnesses.

Factor #2: The capacity and disposition of each party to give the child love, affection, and spiritual guidance and to continue the education and rearing of the child.

Testimony by teachers can be very helpful to your case. Also, our society values regular church attendance. If a party is active in his church, this information should be presented to the court, particularly, if the child is also involved in church activities. Once again, know your judge. Church attendance may be more important to some judges than others.

Factor #3: The capacity and disposition of each party to provide the child with food, clothing, medical care and other material needs.

Our courts, as a general rule, do not decide custody based on a parent’s wealth. However, if a parent spends his available income on himself or frivolously at the expense of meeting the chil-

98 Bergeron v. Clark, 832 So.2d 327 (La. App. 3 Cir. 2002) writ denied 836 So.2d 54 (La. 2003).
99 Boyd v. Boyd, 647 So. 2d 414 (La. App. 2 Cir. 1994) (one parent’s greater material wealth and better home is not a factor for consideration where the other home is adequate); Page v. Page, 673 So. 2d 1517 (La. App. 3 Cir. 1996).
dren’s needs, this information should be presented to the court. Most judges are swayed by prompt and adequate medical treatment and care provided to a child – especially a child who has special medical needs.

Factor #4: The length of time the child has lived in a stable, adequate environment, and the desirability of maintaining continuity of that environment.

This is a strong factor. See Hobbs v. Hobbs 962 So. 2d 1148 (La.App. 2 Cir 2007); Lee v. Lee, 766 So. 2d 723 (La. App. 2 Cir. 2000).

Factor #5: The permanence, as a family unit, of the existing or proposed custodial home or homes.

This factor relates to the desire for stability and continuity in a child’s living environment. Thus, evidence regarding the length of time the child has been in one place, accessibility to extended family members, and the quality and safety of the child’s neighborhood are important to a custody case. A parent with a revolving door of significant others will be disadvantaged. Also, a parent’s frequent moves that disrupt the child’s education and social life should be brought out. Ask your client how long he has lived at his current address and where he has lived over the previous two years. Inquire about the residence(s) of the opposing party. Most judges will have concerns about a parent that has been moving from place to place.

Factor #6: The moral fitness of each party insofar as it affects the welfare of the child.

When evaluating the moral fitness of the parents, the primary consideration is the child’s welfare. Thus, our courts have upheld custody awards to a mother whose past adulterous behavior did not have a detrimental effect on the children. An award of custody is not a tool to regulate or punish human behavior. Its only object is the best interest of the child. One court has refused to modify a consent judgment provision that prohibited overnight visitation by a member of the opposite sex finding that the Evans standard for modification was not met. In Montgomery v. Marcantel, 591 So. 2d 1272 (La. App. 3 Cir. 1991), the court stated: “The moral fitness of the parties is only one of the eleven factors to be considered...A parent’s actions and attitudes toward sex outside of the marriage are but one aspect of moral fitness.” Noting that the girlfriend had no negative impact on the

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100 Cleeton v. Cleeton, 383 So. 2d 1231 (La.1980); Shivers v. Shivers, 16 So.3d 500 (La. App. 2 Cir. 2009); Lake v. Robertson, 452 So.2d 376 (La. App. 3 Cir. 1984). This also holds true for continuing immorality that does not harm the child.
101 Montgomery v. Marcantal, 591 So. 2d 1272 (La. App. 3 Cir. 1991); Peyon v. Peyton, 457 So. 2d 321 (La. App. 2 Cir. 1984).
102 Griffith v. Latiolais, 48 So.3d 1058, 1070 (La. 2010); see also Gray v. Gray, 65 So.3d 1247, 1261 (La. 2011)(child custody should not be changed to punish a parent for past conduct that has no detrimental effect on the child).
103 Crowson v. Crowson, 742 So.2d 107 (La. App. 2 Cir. 1999).
104 Kingston v. Kingston, 80 So.3d 774 (La. App. 1 Cir. 2011)(reversed trial court order granting modification because modification of restriction on overnight visitation not in children’s best interest).
child and was an accepted member of the family, the court continued, "We recognize that in today's society, conduct which would once have been scandalous is acceptable or perhaps even the norm... We are no longer willing to speculate on such matters." The Supreme Court has repeatedly held that custody determinations should not be made to regulate or punish a parent's behavior.

The courts have not used a parent's homosexuality or a homosexual relationship to deny custody or domiciliary parent status if there was no detrimental effect on the child.105 Another court, has articulated a standard when evaluating such cases. Peyton v. Peyton, 457 So. 2d 321 (La. App. 2 Cir. 1984) involved a gay parent. In Peyton, the court determined that there are four factors to consider in a sexual lifestyle case:

- Is the child aware of the relationship?
- Has sex play occurred in the child's presence?
- Is the sexual conduct notorious, bringing embarrassment to the child?
- What effect has the conduct had on family home life?

On the other hand, a court has found that an award of primary custody to a gay parent who is "openly living" with her partner, is rarely in the child's best interest.106

Factor # 7: The mental and physical health of each party.

This is a strong factor. La. R.S. 9:331 provides that for good cause shown, the court may order mental health evaluations of the parties, the child, or all of the family to be conducted by a qualified mental health care provider selected by the parties or the court. In Matthews v. Matthews, 633 So.2d 342 (La. App. 1 Cir. 1993), the trial court was reversed for denying joint custody based solely on the opinion of a single doctor. The court may assess the costs of the evaluations as it determines is equitable. La. R. S. 9:331.1 provides that for good cause shown, after a hearing, a party may be ordered to submit to drug testing.

Factor # 8: The home, school, and community history of the child.

Evidence and testimony regarding the child's involvement in school and extracurricular activities can be relevant to the issue of custody. For example, the circle of friends whom the child may have, the activities in which the child has participated, clubs of which the child is a member, exhibit to the court the child's connection to his current custodial placement. A failure to involve the child in age and gender appropriate activities can be used against a parent. Most judges are swayed by how the child is doing in school and which parent is responsible for the performance.

106 Scott v. Scott, 665 So. 2d 760 (La. App. 1 Cir. 1995).
Factor # 9: The reasonable preference of the child, if the court deems the child to be of sufficient age to express a preference.

Perhaps, the least persuasive art. 134 custody factor, particularly, when the child is under 14 years of age, is the child’s preference. Courts take notice of the fact that the parent who can promise the children the most things often secures the children’s preference. Thus, unless the child is a teenager, who expresses a distinct preference and the court can evaluate the basis for such preference, this factor is not given much probative value. The jurisprudence has held that a child’s preference alone is insufficient to change custody.\(^{107}\)

Often, a parent will be convinced that the children’s preference will determine the outcome of the case. Consequently, parents begin an emotional tug of war with the children in the middle. It is up to the attorney to provide sound legal guidance in such situations. Thus, an attorney should think long and hard before hauling the children up to the courthouse and placing them in the middle of an emotionally charged, hotly contested custody dispute. Be sure that there is extremely good reason to do so. I would caution the attorney who does not have the child for a client, against interviewing minor child(ren) or preparing the child to testify. If such a decision is made, have the children situated away from the courthouse on standby until such time as their testimony is required. A person’s age alone, is not the test of whether that person shall be allowed to appear and present testimony. Rather, the test is whether that person has “proper understanding.” Whether the minor child has proper understanding, such that he will be allowed to testify, is a matter within the trial judge’s discretion.\(^{108}\)

☞ See Watermeier v. Watermeier, 462 So.2d 1272 (La. App. 5 Cir. 1985) for the procedure that should be followed when a court interviews children. See also Weaver v. Weaver, 824 So.2d 438 (La. App. 3 Cir. 2002), where the Court reiterated that while counsel for the parties can stipulate to their absence during the testimonial taking by the judge in chambers, the waiver of the recordation of testimony is not permitted.

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

To many judges, this factor is of tremendous importance in determining the proper custodial placement of children. In fact, some judges have modified custody primarily due to the misconduct of the custodial parent and his attempt to undermine the child’s love and affection for the non-custodial parent. Our courts consider that changing custody from a non-cooperative, disruptive custodial parent to a blameless non-custodial parent can most surely be in the child’s best interest.

This factor presents the opportunity for counsel to discuss with his client the importance of co-parenting. Referring your client to

\(^{107}\) Jones v. Jones, 63 So.3d 1074 (La. App. 2 Cir. 2011); Thibodeaux v. O’Quain, 33 So.3d 1008 (La. App. 3 Cir. 2010).

a cooperative parenting program contemporaneously with or shortly after instituting an original custody action may provide you with a strategic advantage. Certainly, the information provided to your client through such a program can be helpful to the family and to your successful management of the case. At the very least, your client will be perceived by the court as positive and proactive.

Cases which discuss those problems arising when parties fail to cooperate include: Angelette v. Callais, 68 So.3d 1122 (La. App. 1 Cir. 2011) (no statutory requirement existed requiring a court to order mediation where parties cannot reach agreement on their own); Thibodeaux v. O’Quain, 33 So.3d 1008, (La.App. 3 Cir.2010) (“deliberate and willful alienation” of step-children by mother has a bearing on the weight given to this factor in the best interest analysis of her biological child).

Factor # 11: The distance between the respective residences of the parties.

In Stewart v. Stewart, 525 So. 2d 218 (La. App. 1 Cir. 1988) the court commented,

“While a great distance between the parents is not an absolute bar to joint custody, in this case the distance coupled with the animosity between the parties is sufficient to rebut the presumption that joint custody is in the best interest of the child.” Stewart was decided prior to the 1994 revision of Civil Code art. 133 which eliminated the presumption of joint custody. See also Lachney v. Lachney, 446 So. 2d 923 (La. App. 3 Cir. 1984) wherein the court concluded that a joint custody arrangement was unworkable insofar as one party resided in South Carolina and the other in Louisiana.

Factor # 12: The responsibility for care and rearing of the child previously exercised by each party.

This factor was added in 1994 to recognize what attorneys previously had always stressed in their case, that is, who has been the primary caretaker of the child. It is a strong factor for the custody determination. Thus, when meeting with your client, you should be concerned with your client’s history of caring for the child. In this regard, one should inquire as to who has been primarily responsible for such day to day activities as changing diapers, preparing meals, washing clothes, obtaining immunizations and medical and dental care, transporting the child to and from activities, disciplining the child, getting the child ready for bed, providing assistance with homework, etc. This has always been a very important consideration, despite being initially omitted from Article 134.

The importance placed upon the “primary” parent by our courts and legislature has been criticized. Psychologist, R.A. Thompson, observed: Basic maintenance tasks like meal preparation, dressing, bathing, and chauffeuring can be readily assumed by either parent regardless of the level of his or her predivorce responsibility for
these concerns. Many of these responsibilities are activities done for the child rather than with the child. The focus of a custody inquiry should properly be the meaning and significance of each parent’s relationship with the child. R.A. Thompson, *The Role of the Father After Divorce, The Future of Children*, 4, 210-35 (1994).

Such critics contend that the emphasis on the primary caretaker ignores the quality of the relationship between the child and the primary caretaker in favor of counting hours and rewarding many repetitive, concrete behaviors. Further in accordance with this line of thinking, critics contend that the most important emotional and interactive behaviors promoting children’s development and psychological, social, and academic adjustment, such as love, acceptance, respect, encouragement of autonomy, learning, and self-esteem, moral guidance, and absence of abusive interactions are not considered. *See* Kelly, J.B., *The Determination of Child Custody, The Future of Children*, 4, 121-42 (1994).

**Factor #13: Implicitly, the “catch-all” for any other factor(s) not addressed in Civil Code art. 134.**

### 6.4.5 Joint Custody Implementation Plan (JCIP)

If joint custody is awarded, *unless there is good cause*, a Joint Custody Implementation Plan (JCIP) must be submitted to the court. La. R.S. 9: 335. This requirement has to be addressed even in cases where an uncontested divorce in the nature of a 1702(E) or without a court hearing, is sought. How do you get around the JCIP when the defendant will not show up or file an answer? You should plead that good cause exists where the defendant is an absentee, incarcerated, out of state and the long arm statute is utilized, or where he has just been marginally (few visits a year) involved in the lives of the children. These facts should be crafted in your petition, prayer, affidavit of correctness, and the final judgment in support of a joint custody decree that contains the language of: “visitation as agreed to between the parties.”

Otherwise, the minimum requirements to qualify as an implementation order include: parental time periods for physical custody and the allocation of legal authority and responsibility of the parents. Unless the parties agree otherwise or good cause exists not to, one parent should be named as the domiciliary parent. Before the implementation plan is presented to the court for review and approval, it is important to know if the parents have discussed a shared custody arrangement with their children, if such an arrangement is practical. Parents, all too often, do not discuss their plans for shared custody with those family members most affected – the children. Parents may agree to a 50-50 joint custody shared arrangement because it suits their needs and schedules even though the children may absolutely hate such an arrangement. Get your client to check with the children about the proposed plans so that the attorney can provide guidance in shaping a plan that fits the family’s needs. Another recent development with custody plans is the non-designation of a domiciliary parent or designating co-domiciliary parents and close to a 50:50 shared physical custody plan (at least on paper). This shared plan would trigger Obligation Worksheet B and thus, a lower child support setting for the parent with the greater income. On good cause factors
dealing with the domiciliary status, See Griffith v. Latiolais, 48 So.3d 1058 (La. 2010) (trial court’s finding of good cause not to name domiciliary parent was reversed. Five years had passed since custody suit was filed, mother was making all decisions relative to child before suit was filed, and trial testimony indicated she was best suited for role). Wolfe v. Hanson, 991 So.2d 13 (La. App. 1 Cir. 2008), writ denied 983 So.2d 1292 (La.2008) (domiciliary parent should be named in a joint custody implementation plan where it is clear that the parents will likely disagree on important decisions about the children, such as recreational activity, school issues and discipline).

An example of a standard joint custody plan is provided. See below in “Other Helpful Forms”. It is imperative that all the parties sign off on the plan (making it an authentic act is not a bad idea) as it evidences the basis for an extrajudicial agreement between the parties.

☞ The JCIP by itself is not the judgment and the judgment must incorporate the JCIP. Rather than having two separate documents, it is okay to craft the judgment in such a manner so that the judgment and the JCIP are the same document.

☞ There are different forms of agreements. A stipulation in “open court” – where the court is conducting hearings and the judge is on the bench - has the effect of an approved judgment of the Court and is effective at the conclusion of that approval. Prompting the judge to “swear the parties in and to have them acquiesce to the agreement” that has been read into the record is always good practice. A contempt on violation(s) of this stipulated judgment (even though a written one has not been presented and signed) is permissible. Our law gives effect to the parties’ oral stipulation when it is “recited in open court and susceptible of being transcribed from the record of the proceedings.” See Melanson v. Melanson, 652 So.2d 114 (La.App. 5 Cir. 1995); McIntyre v. Becker, 918 So.2d 40 (La. App. 4 Cir.2005); La. Civ. Code art 3072.

But, many trial judges will not consider a contempt motion unless the consent judgment is reduced to writing. An extrajudicial agreement (outside open court) needs to be in writing and signed by all parties involved (attorneys included – if applicable). I will have the signature line of the pro se opposing party drawn up requiring that it be notarized (and not by me or my law firm). The agreement has to be approved and signed by the Court before it is adopted as the judgment of the Court and for it to be effective.

6.4.6 Custody to non-parents under La. Civil Code Art. 133

The burden of proof for a non-parent to obtain custody is much higher than the best interest standard that governs parental custody disputes. A parent has a paramount right to custody which can only be forfeited for compelling reasons. Wood v. Beard, 290 So.2d 675 (La. 1974). A non-parent must establish that the award of custody to “either parent would result in substantial harm to the child.” La. Civ. Code art. 133. The short-term distress of returning a child to a parent does not constitute the severe detriment required for a custody award to non-parents. Lewis v. Taylor, 554 So.2d 163 (La. App. 2 Cir. 1989) writ denied 554 So.2d 1237. Furthermore, a parent’s custodial rights should not be defeated by a non-parent’s litigation delays to withhold a child. State v. Weber, 161 So.2d 759, 766 (La. 1964). A parent’s poverty is not a reason to deny her custody. Creed v. Creed, 647 So.2d 1362 (La. App. 3 Cir. 1994).
If custody to the parents is denied, third parties with whom the child has lived in a wholesome and stable environment are preferred. However, if such a placement is not available, custody of the child may be awarded to a non-parent who meets both this higher burden of proof and can provide a stable and adequate environment for the child. Joint custody is not required. However, the court has discretion to order joint custody between a parent and non-parent.

If an illegitimate child’s mother dies before the father has acknowledged paternity, Civil Code art. 256 states that a court “shall give first consideration to appointment as tutor either of her parents or siblings who survive her, and secondly, the father, always taking into consideration the best interests of the child.” La. Code Civ. Proc. art. 4261 provides that the tutor shall have custody of the minor. See also In re Bogues, 236 So.2d 665 (La. App. 2 Cir. 1970). Thus, Civil Code art. 256 and Code of Civil Procedure art. 4261 combine to give a preference to the child’s maternal grandparents, uncles and aunts in the unique situation where an illegitimate child’s mother dies before his father acknowledges paternity.

Cases discussing parent vs. non-parent custody disputes include:

Gill v. Bennett, 82 So.3d 383 (La. App. 3 Cir. 2011) (grandmother was not entitled to custody of child born out of wedlock, even though she had acted as child’s primary caretaker for a period of time and had been afforded status as child’s permanent guardian in an Indiana court prior to the child’s relocation to Louisiana, absent a showing that an award of custody to mother and father would resulted in substantial harm to the child). Rupert v. Swinford, 671 So. 2d 502 (La. App. 1 Cir. 1995) (record supported finding that award of sole custody of child to father would cause substantial harm to child, and thus, trial court’s award of joint custody of father and maternal grandmother was not abuse of discretion, where there was testimony of father’s drug use, child had very close relationship with maternal grandmother with whom he had lived off and on for his entire life, and there was testimony that child had no regular meal times and kept late hours when staying with father). McKinley v. McKinley, 631 So.2d 45 (La. App. 2 Cir. 1994); In the Matter of Landrum, 704 So. 2d 872 (La. App. 3 Cir. 1997); Dalferes v. Dalferes, 724 So. 2d 805 (La. App. 4 Cir. 1998).

In re Melancon, 62 So.3d 759 (La. App. 1 Cir. 2010), the Court held that the nonparent failed to allege a cause of action under Civil Code art. 133 that allowed for an award of custody to a person other than a parent. Parent could not consent to joint custody with a non-parent. “In essence, the law today simply does not permit a parent to share custody with a non-parent without a showing of substantial harm to the child.” Id. at 764.

6.5 KINSHIP CARE SUBSIDY PROGRAM (KCSP) PAYMENTS

KCSP provides cash assistance of $222 per month for each eligible child who resides with a qualified relative other than a parent. The child must live in the home of one of the following qualified relatives (either biological or adoptive): grandfather or grandmother (extends to great-great-great), brother or sister (including half), uncle or aunt (extends to great-great), stepfather, stepmother, stepbrother, stepsister, first cousin, including first cousin once removed, and nephew or niece (extends to great-great), or the legal spouse of the above-listed
relatives. The qualified relative must possess or obtain within one year of certifica-
tion, either legal custody or guardianship or provisional custody by mandate of the eligible child who is living in the home. The State reserves the right to pursue child support against the parent(s) and this may be of some concern to a grand-
parent. The kinship program can substantially improve the economic welfare of the family. The availability of kinship payments put an even higher priority on legal custody for non-parent caretakers of neglected children. See DSS website at: http://www.dss.state.la.us/index.cfm?md=pagebuilder&tmp=home&pid=138

6.6 **EX PARTE CUSTODY**

Prior to La. Code Civ. Proc. art. 3945, *ex parte* orders of temporary custody were either routinely granted or denied depending upon the court and/or judge. Art. 3945 seeks to end the race to the courthouse by a parent who seeks the unfair advantage of gaining custody of the children prior to a hearing. Article 3945 sets out the procedures required for an ex parte grant of custody.

A party is not entitled to an *ex parte* order of temporary custody unless it is established from specific facts shown in a verified pleading or by a supporting affidavit that immediate and irreparable injury will result to a child or children before the adverse party or his counsel can be heard in opposition. The applicant’s attorney must certify in writing that either efforts have been made to give the adverse party reasonable notice of the date and time the *ex parte* order is to be presented to the court or the reasons supporting the applicant’s claim that notice should not be required.

These *ex parte* orders expire automatically within 30 days of the signing of the order, but they can be extended for good cause shown for one period not in excess of 15 days. Further, the *ex parte* order must provide specific provisions for temporary visitation to the adverse party for not less than 48 hours during a 15 day period unless the verified petition or supporting affidavit clearly exhibits that the child would suffer immediate and irreparable harm should such visitation be ordered.

The order shall be endorsed with the date on which the *ex parte* order is signed and the date and hour that the rule to show cause is set. The rule hearing cannot be set more than 30 days after the signing of the *ex parte* order of temporary custody. Most importantly, failure to adhere to the provisions of Article 3945 makes the *ex parte* order unenforceable.

If the *ex parte* order of temporary custody is denied, article 3945 (F) requires the court to allocate the child’s time between the parents unless irreparable and immediate injury would result to the child.

Article 3945 does not apply to custody orders requested in a verified petition under the Domestic Abuse Assistance Act, R.S. 46: 2131 *et seq.*, Children’s Code Art. 1564, *et seq.* or the Post Separation Family Violence Relief Act, R.S. 9: 361 *et seq.*

A word of warning: always be absolutely truthful and candid to the court, particularly, when requesting *ex parte* relief. Always provide the notice, necessary affidavits, and any other documents that support “irreparable injury” as required by Code of Civil Procedure art. 3945.
Do not rely on your client’s version of the facts or their certification of the petition. Here, as an officer of the court, you are required to search diligently for the truth – to the extent possible. Strictly comply with the law when seeking ex parte relief. Use an improper ex parte order obtained by the adverse party as an example of malice and proof that the adverse is unlikely to facilitate a joint custody relationship. See Civ. Code art. 134 factor 10 supra.

6.7 CUSTODY BY MANDATE OR POWER OF ATTORNEY

Parent(s) may grant a provisional custody by mandate to another person to take care of their child. La. R.S. 9: 951. These mandates (notarial acts) may be effective for up to one year. La. R.S. 9: 3861-62 provides a statutory form of power of attorney for military personnel to authorize another person to have custody. La. R.S. 9: 3879.1 also authorizes powers of attorney to another person for the custody of a child. La. R.S. 9: 975 authorizes non-legal custodians to give legal consent to medical or educational services by affidavit.

But, a mandate of provisional custody for the care, custody, and control of a minor child pursuant to R.S. 9:951 through 954 “shall in no way limit the authority and responsibility of a city or parish school board to provide for the assignment, transfer, and continuance of pupils among and within the public schools within its jurisdiction or on the authority of a board to prescribe rules and regulations pertaining to these functions, including but not limited to the determination of student residency for school attendance and school transportation purposes.” La R.S. 17:104.1

If a parent or a caregiver does not have legal custody, school districts where the demand for enrollment is great, will invariably reject the Custody by Mandate and deny school admission. In such cases, a Voluntary Transfer of Custody (VTOC) or a petition for custody may be necessary. The VTOC, while a juvenile court proceeding, can be filed either in Juvenile or District Court (concurrent jurisdiction). See Children’s Code art. 1510 et seq. If a VTOC is filed in Juvenile Court, any future modifications take place in that court unless the case is dismissed. Please note that the client is the parent or party who has legal custody - not the caregiver. The caregiver may be the client if he/she seeks to file a Petition for Custody against a parent. Obviously, the burden of proof would be much higher and parental unfitness must be shown (child faced with substantial harm, etc.) in a contradictory hearing. In the typical VTOC case, the parent and the caregiver are on “the same page”. Since the filing is voluntary, someone will have to pay the court costs (since the judgment is typically signed without a hearing, the costs are low) for the VTOC.

Caveat: It is important to know who your client is. The parties may have a “fall-out” down the road and want modifications. Also, if feasible, both parents (if no legal custody is in place) need to consent to the transfer. Sometimes the mother, under investigation by Office of Community Services will seek to transfer the child. It is wise (for your own peace of mind) to inquire into the suitability/fitness of the person who will receive the child.

(332)
6.8 RELOCATION OF A CHILD’S PRINCIPAL RESIDENCE

Act No. 627 of the 2012 Louisiana Legislative Session, made substantial amendments and reenactments to R.S. 9:355.1 et seq. Generally, in cases where the parties have equal physical custody (close to 50:50 and distinguished from shared custody. See Comment (b) of 2012 Revision), a parent may not relocate the child’s residence without either the other parent’s express written consent or the court authorization after a contradictory hearing.\textsuperscript{109} Under R.S. 9: 355.2(D), a parent must notify the other parent of the proposed relocation unless they have entered into an express written agreement for the relocation or a domestic violence protective order is in effect.\textsuperscript{110} The court may consider a relocation without prior notice as a factor in determining relocation and sufficient cause for paying reasonable expenses incurred by the person who is objecting.\textsuperscript{111} Be sure to advise clients of their duties to comply with the notice and approval requirements of La. R.S. 9: 355.5 should they decide to relocate. Relocation is defined as a change in the principal residence of a child for a period of sixty days or more, but does not include a temporary absence from the principal residence. La. R.S. 9:355.1(2).

In a custody case, you should always advise your client of her obligations under the relocation statute. Clients won’t know this law unless you tell them about it. The R.S. 9: 355.1 relocation procedures apply if any of the following exist:

- any intent to move out of state, regardless of the distance;
- there is no custody order and there is an intent to relocate the child’s principal residence to any Louisiana location that is more than 75 miles from the other parent’s domicile;
- there is a custody order and an intent to relocate the child’s principal residence to any Louisiana location that is more than 75 miles from the child’s principal residence at the time of the custody order.
- Where the parties have an equal physical custody order or the child has no principal residence and there is an intent to establish the child’s principal residence within the state that is more than 75 miles from the other party’s domicile.

Note that the duty to notify the other parent applies even if there is no custody order. Act 627 of 2012 amended the relocation statute to require notice to non-parents who have court ordered visitation. However, non-parents with only visitation orders may not object to the proposed relocation and may only seek a modification of the visitation schedule.

Notice of a proposed relocation must be given not later than (1) 60 days before the proposed relocation or (2) ten days after the relocating parent has knowledge of the information required for the relocation notice.\textsuperscript{112} Notice is by certified mail or commercial courier.

The other parent must object to the relocation within 30 days of receipt of the relocation notice.\textsuperscript{113} If an objection is made, the parent proposing relocation

\textsuperscript{109}La. R.S. 9: 355.4 (B).
\textsuperscript{110}Injunctions under La. R.S. 9: 372.1 do not exempt compliance with the relocation statute. Act. 627 of 2012.
\textsuperscript{111}La. R.S. 9: 355.6; See Gray v. Gray, 65 So.2d 1247, 1260 (La. 2011)(what was previously R.S. 9: 355.11 does not create an exception to the Bergeron standard for modification of custody orders).
\textsuperscript{112}La. R.S. 9: 355.5.
\textsuperscript{113}La. R.S. 9: 355.7.
must initiate a summary proceeding for court approval of the relocation within 30
days of the receipt of the objection.\textsuperscript{114} If an objection is filed, court approval may
only be granted after a contradictory hearing.

The relocating parent has the burden of proving that the relocation is (1)
made in good faith and (2) in the child’s best interest.\textsuperscript{115} The court must consider
the statutory factors in its determination of a motion to relocate. Citations to some
relocation cases include:

\begin{itemize}
  \item \textit{Gray v. Gray}, 65 So.2d 1247 (La. 2011) (in allowing the relocation:
    no reason to retreat from the heightened \textit{Bergeron} standard when a party
    seeks to modify a considered custody decree even in the context of a
    request for relocation);
  \item \textit{Trahan v. Kingrey}, 98 So.3d 347, 2011-1900 (La. App. 1 Cir. 2012)
    (relocation not allowed: since trial court failed to conduct any analysis
    of the mandatory factors, a \textit{de novo} review resulted in a change of domici-
    liary parent status as well);
  \item \textit{Smith v. Holtzclaw}, 62 So.3d 345 (La. App. 2 Cir, 2011) (court
    accepts parties’ agreement);
  \item \textit{Perez v. Perez}, 85 So.3d 273 (La. App. 3 Cir. 2012) \textit{writ denied}
    \textit{Perez v. Perez}, 89 So.3d 1195 (La. 2012) (relocation allowed: although trial
    court did not consider the relocation factors specifically, the findings
    were reasonable based upon the entire record); In the author’s opinion,
    the dissent by Judge Keaty was more on point.
  \item \textit{McLain v. McLain}, 974 So.2d 726 (La. App. 4 Cir. 2007) (relocation
    not allowed: good faith nor best interests burden met). This is a good
    case that discusses some legitimate reasons for good faith relocation.
  \item \textit{Quainoo v. Morelon-Quainoo}, 87 So.3d 364 (La. App. 5 Cir. 2012)
    (relocation allowed: underemployment of objecting parent, good faith
    and best interest of relocating parent required reversal of trial court).
\end{itemize}

\textit{Gathen v. Gathen}, 66 So.3d 1 (La. 2011) – evidentiary standards discussed
and the failure of the trial court to expressly analyze each factor in R.S.
9:355.12 was not legal error. But, how do we know whether the trial court has
considered all the mandatory factors? To insure that the trial court has consid-
ered these 12 factors, it is always best to ask the judge for written reasons for
judgments in all messy, complicated cases. The legislature, in taking its cue
from \textit{Gathen}, amended the previous R.S. 9:355.12, and added “all relevant

\section{6.9 UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT
ACT}

\subsection{6.9.1 Introduction}

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)
applies to interstate and international custody disputes.\textsuperscript{116} A court must have sub-
ject matter jurisdiction under the UCCJEA to make an initial child custody deter-
mination. The UCCJEA has been adopted by every state except Massachusetts,
where proposed UCCJEA legislation is pending. The UCCJEA also governs a court’s continuing jurisdiction over the custody dispute and jurisdiction to modify custody judgments.

The UCCJEA applies to all “child custody proceedings” in which legal custody, physical custody, or visitation with respect to a child is at issue. A “child custody proceeding includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights and protection from family violence, in which the custody or visitation issue may appear. A “child custody proceeding” does not include adoption, authorization for medical care, juvenile delinquency, contractual emancipation or Hague Convention enforcement actions.117

A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, is not subject to the UCCJEA to the extent that it is governed by the Indian Child Welfare Act.118 The federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, governs full faith and credit for custody determinations and will preempt the UCCJEA where variances exist.119

6.9.2 Overview of 2007 Amendments to Louisiana Child Custody Jurisdiction

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified at La. R.S. 13: 1801 et seq., became effective on August 15, 2007 in Louisiana. The UCCJEA made significant changes to the prior law, the Uniform Child Custody Jurisdiction Law (UCCJL), La. R.S. 13:1701 et seq. The more significant changes include:

1. Home state jurisdiction is prioritized
2. Clarification of temporary emergency jurisdiction
3. Exclusive continuing jurisdiction of state that made initial custody determination
4. Broader ban on modification of other states’ custody determinations
5. Inconvenient forum rule expanded to protect domestic violence victims
6. Adoption of local state law for notice and service of process
7. Simpler and swifter enforcement remedies
8. Mandatory attorney fees

6.9.3 Jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act

6.9.3.1 Understanding the interplay of UCCJEA and PKPA

Both the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A, are legislative responses to jurisdictional problems posed by interstate child custody disputes. Both acts govern interstate child custody disputes. A custody judgment is only enforceable if the issuing court has jurisdiction under state law and the UCCJEA and complied with the PKPA. Conceptually, the UCCJEA is a jurisdictional statute that seeks procedurally to implement the PKPA, which is the federal full faith and credit law for child custody determinations.

117 La. R.S. 13: 1802(d); 1803.
119 As of 2012, the Louisiana UCCJEA is virtually identical to the Parental Kidnapping Prevention Act (PKPA). It is possible that some states have UCCJEA statutes that vary somewhat from the PKPA.
The PKPA provides for (1) the home state to have exclusive jurisdiction and for (2) “continuing jurisdiction” by a court that made a child custody determination consistent with its provisions. 28 U.S.C. § 1738A(c)(2)(E). The UCCJEA, as amended in 2007, now provides for exclusive jurisdiction by the home state and exclusive “continuing jurisdiction” by the court that made an initial child custody determination consistent with the UCCJEA. The new UCCJEA overrules Louisiana cases under the prior UCCJL, R.S. 13: 1701 et seq. that had held that a court did not have to defer to the home state in every case.\(^{120}\)

### 6.9.3.2 Personal jurisdiction is not required for child custody

Personal jurisdiction is not required for the adjudication of child custody.\(^{121}\) The concept of personal jurisdiction is irrelevant to custody disputes. A court may decide custody without personal jurisdiction over a defendant.\(^{122}\) As amended in 2007, UCCJEA child custody jurisdiction is in the nature of subject matter jurisdiction, which can’t be waived. The lack of UCCJEA subject matter jurisdiction can’t be waived by an appearance.

### 6.9.3.3 Notice and service of process

The repealed UCCJL provided for notice of a custody suit to persons outside Louisiana by certified mail with at least 10 days notice. The new UCCJEA does not prescribe a special notice procedure for interstate custody disputes. Rather, it incorporates the Louisiana law on notice and service of process for non-residents or the law of the state where the non-resident lives.\(^{123}\) The result of this change is that non-residents will need to be notified and served under Louisiana’s long arm statute, R.S. 13: 3204-05, which generally involves service by certified mail and 30 days notice before a hearing on a custody motion or rule except for family violence protective order actions under La. R.S. 46: 2131 et seq.\(^{124}\)

### 6.9.3.4 Home state jurisdiction

La. R.S. 13: 1813 (A) provides the exclusive jurisdictional basis for a Louisiana court to make an initial child custody determination.\(^{125}\) Under La. R.S. 13: 1813 (A)(1), the child’s home state will have exclusive jurisdiction to make an initial child custody determination. Thus, the home state trumps all other states, even if the custody suit in the other state was filed first.

The home state is the state in which the child lived with a parent or a “person acting as a parent” for at least 6 consecutive months prior to the commencement of a child custody proceeding.\(^{126}\) Both the UCCJEA and Louisiana law define commencement as the filing of the first pleading in a proceeding.\(^{127}\) A “temporary

\(^{120}\) R.S. 13: 1813(A) repeals the UCCJL jurisdiction rules in R.S. 13: 1702 and legislatively overrules the Supreme Court’s holdings in Stelluto v. Stelluto, 914 So.2d 34 (La. 2005) and other cases that held that deference to the home state is not required in every case.

\(^{121}\) La. R.S. 13: 1813 (C); cf. Anderson v. Anderson, 718 So.2d 582 (La. App. 4 Cir. 1998); Lee v. Lee, 545 So.2d 1271 (La. App. 2 Cir. 1989).

\(^{122}\) It is possible that a court with UCCJEA subject matter jurisdiction may lack personal jurisdiction to decide child support or other issues that require personal jurisdiction.

\(^{123}\) La. R.S. 13: 1808.

\(^{124}\) La. R.S. 13: 3205 (A).

\(^{125}\) La. R.S. 13: 1813 (B).


\(^{127}\) La. R.S. 13: 1802(5); La. Code Civ. Proc. art. 421. Be careful to file in a Louisiana court of “competent jurisdiction” to avoid an adversary’s argument that art. 421 general definition supersedes the specific R.S. 13: 1802(5) definition of commencement. Also, promptly initiate service. It is possible that some states’ UCCJEA definitions of “commencement” may include service of the pleading.
absence" of the child, parent, or person acting as a parent when they are away from the home state does not take away from the computation of this 6 consecutive month period. In case of a child under 6 months old, home state means the state in which the child lived from birth with a parent or person acting as a parent. The Louisiana UCCJEA further extends this “temporary absence” window when the parent or person acting as a parent who has had to evacuate with the child due to a disaster, is unable to return to Louisiana for an extended period. Louisiana would still be considered the home state as long as they had lived in Louisiana for at least the prior 12 consecutive months to the initial custody proceeding.

The first step in any interstate custody dispute is to determine the home state, if any. Most cases should have a home state and exclusive jurisdiction will rest with the home state. The home state will have initial jurisdiction which will exist even if a custody determination has been made in another state.\(^{128}\)

The determination of home state status should be relatively easy. Each litigant’s first pleading should contain an affidavit that discloses facts relevant to the determination of UCCJEA jurisdiction.\(^{129}\) Possible issues may arise for cases that involve a child under 6 months old or a child’s temporary absences from a state. If a child was born in state A, lived there for 2 months with a parent and then relocated to state B for 3 months, state A would be the home state since state A is the only state where the child lived continuously from birth.\(^{130}\)

While the UCCJEA does not define “temporary absence,” it is the author’s opinion that a temporary absence that is greater than 6 months (unless there is a disaster exception, or clearly defined reasons for being away from the home state such as vacation, school, etc.) would divest Louisiana from being considered the home state. Clearly, the UCCJEA permits home state jurisdiction when the “temporary absence” is within the 6-month window of the custody proceeding. Other states’ courts have looked at whether a state was the home state at any time within the prior 6 months. Thus, for example, if the custody suit was filed on July 1, the issue would be whether the state was the “home state” on the prior January 1, when the temporary absence commenced.\(^{131}\)

**6.9.3.5 Significant connections/substantial evidence jurisdiction**

If there is no home state or if the home state has declined jurisdiction under R.S. 13: 1819 or 1820, you must determine which state had “significant connections” jurisdiction under R.S. 13: 1813 (A)(2).\(^{132}\) “Significant connections” jurisdiction will not provide a court with initial jurisdiction under the UCCJEA if there is a home state.


\(^{129}\) La. R.S. 13: 1821. These sworn facts should constitute judicial admissions that can be used in litigation of the jurisdictional issues. See e.g., La. Civ. Code 1853, Goina v. Goina, 989 So.2d 794, 797 (La. App. 5 Cir. 2008).

\(^{130}\) Stelluto v. Stelluto, 914 So.2d 34, 40 (La. 2005).

\(^{131}\) See e.g., Ogawa v. Ogawa, 221 P3d 699 (Nev. 2009) (Nevada was home state even though children in Japan for 8 months); Sarpel v. Ellani, 65 So.3d 1080 (Fla. App. 2011), review denied 86 So.3d 1114 (Fla. 2012) (Florida was home state even when children in Turkey for almost 8 months); Hammond v. Hammond, 708 S.E.2d 74 (N.C. App. 2011); Prizzia v. Prizzia, 707 S.E.2d 461 (Va. App. 2011).

\(^{132}\) See e.g., Marsalis v. Marsalis, 52 So.3d 295 (La. App. 3 Cir. 2010). In the Author’s opinion, the Third Circuit got it wrong in finding home state under R.S. 13:1813(A)(2). On the other hand, the trial court’s finding that Louisiana was the home state, while correctly based on the finding that the prior 6 month consecutive period was in Louisiana (temporary absence of 4 months in Texas), nevertheless confused the analysis with reference to significant connection. The Texas appellate court disagreed with our Third Circuit and affirmed the Texas trial court’s finding of home state on the basis of default jurisdiction - a Texas court has jurisdiction if no court of any other state would have jurisdiction. See In re Marriage of Marsalis, 338 S.W.3d 131, (Tex.App.-Texarkana 2011). This is not what the UCCJEA envisioned...
For “significant connections” jurisdiction to exist, (1) the child and his parents, or the child and at least one parent or person acting as a parent, must have a significant connection with the state other than mere physical presence and (2) substantial evidence must be available in the state on the child’s care, protection, training and personal relationships. The child’s physical presence is not required for significant connections jurisdiction. The focus is on which state has substantial evidence as to the child’s care, protection, training and relationships. If both states have “significant connections” jurisdiction, UCCJEA jurisdiction will lie with the first court in which a custody suit was filed.

6.9.3.6 Deferral jurisdiction

If all courts having jurisdiction under the UCCJEA have declined jurisdiction because Louisiana is the more appropriate forum, Louisiana could have UCCJEA jurisdiction under R.S. 13: 1803(A)(3).

6.9.3.7 Default or vacuum jurisdiction

The final jurisdictional basis is “default” or “vacuum” jurisdiction under R.S. 13: 1813(A)(4). It exists when no court of any other state would have jurisdiction under the other bases for UCCJEA, i.e., home state, significant connections or declination in favor of Louisiana.

6.9.3.8 Temporary emergency jurisdiction

The UCCJEA eliminates emergency jurisdiction as an alternative basis for initial subject matter jurisdiction. The UCCJEA significantly restricts the exercise of emergency jurisdiction compared to the UCCJL. The new law limits jurisdiction to emergencies such as abandonment or physical abuse of the child, his sibling or parent in a state other than the child’s home state. “Neglect” and “dependency” have been deleted from the prior UCCJL definition of “emergency.” The prior UCCJL case law holds that the circumstances of the case must be serious, significant, immediate, and based on credible evidence.

The new R.S. 13: 1816 is helpful because it clarifies a Louisiana court’s authority to issue temporary orders to protect family violence victims who may have fled to Louisiana. R.S. 13: 1816(A) expressly allows temporary emergency jurisdiction to protect a child, or a sibling or parent of the child who is subjected to or threatened with mistreatment or abuse. The prior UCCJL provision had only allowed emergency jurisdiction to protect the child.

If no prior custody order exists and no suit has been commenced in a state with § 1813 subject matter jurisdiction, a temporary emergency order will remain in effect until an order is obtained from the home state or a state that has proper § 1813 jurisdiction. See R.S. 13: 1816 (B).

If a prior custody order exists, the judge must confer with the other state’s judge. Then, the court with temporary emergency jurisdiction must specify a reasonable time limit for the plaintiff to obtain an order from the state with proper §§ 1813-15 jurisdiction. The temporary emergency order will remain in effect until an order is obtained from the other state or the time limit expires. See R.S. 13: 1816(C).

133 Kelly v. Gervais, 567 So.2d 593 (La. 1990); Reno v. Evans, 580 So. 2d 945 (La. App. 2 Cir. 1991).
There is a mandatory duty for a Louisiana court to communicate with the other state's judge if (1) the Louisiana court has been asked to make a custody determination under emergency jurisdiction and it is informed that a child custody proceeding or order exists in a state having §§ 1813-15 jurisdiction and (2) if the Louisiana court has §§ 1813-15 jurisdiction and it is informed that another state has exercised emergency jurisdiction. The purpose of the communication is to resolve the jurisdiction, protect the safety of the parties and child, and determine the duration of the temporary custody order. See R.S. 13: 1816 (D).

6.7.3.9 Simultaneous proceedings—R.S. 13: 1818 procedures to resolve jurisdiction dispute

How does the court resolve jurisdiction when there is a proceeding in another state? Except for temporary emergency jurisdiction cases under R.S. 13: 1816, the Louisiana court must examine the court documents and the parties' R.S. 13: 1821 affidavits to determine UCCJEA subject matter jurisdiction before hearing a custody case. This creates an independent, affirmative duty for the court to review and determine jurisdiction. If the Louisiana court finds that the other state's court had UCCJEA jurisdiction, the Louisiana court must stay the Louisiana proceedings and communicate with the other state's court. If the other state with UCCJEA jurisdiction does not determine that Louisiana is the more appropriate forum, the Louisiana court must dismiss the Louisiana proceeding.

6.9.3.10 Mandatory inter-court communications

Communications with another state's court are mandatory only when (1) there are simultaneous custody proceedings or (2) when a Louisiana court exercising temporary emergency jurisdiction under R.S. 13: 1816 learns that a proceeding exists in another state or (3) a Louisiana court with non-emergency UCCJEA jurisdiction learns that another state has assumed temporary emergency jurisdiction. A Louisiana court may communicate with another state on other jurisdictional matters, but it is not required to do so. As a practical matter, it would be difficult for a court to evaluate factors B(7) and B(8) of the R.S. 13: 1819 analysis of an inconvenient forum motion without communicating with the other court.

6.9.3.11 Motions to decline jurisdiction

Under R.S. 13: 1819, a Louisiana court may decline its UCCJEA jurisdiction at any time if it determines that it is an inconvenient forum and another state is a more appropriate forum. A motion to decline may be raised at any time by any party, by the court on its own motion or at the request of another court. Only the court with UCCJEA jurisdiction may decide if it is an inconvenient forum.

The first inquiry under R.S. 13:1819 is whether it is appropriate for the court of another state to exercise jurisdiction. The court must allow the parties to submit "information" on this issue and shall consider 8 specific statutory factors. The use of "information" instead of "evidence" suggests that this issue may be decided

134 La. R.S. 13 : 1818
136 See e.g., Marsalis v. Marsalis, 52 So.3d 295 (La. App. 3 Cir. 2010); Burst v. Schmolk, 62 So.3d 829 (La. App. 4 Cir. 2011).
137 Otwell v. Otwell, 56 So.3d 1232 (La. App. 3 Cir. 2011); Hughes v. Fabbio, 983 So.2d 946 (La. App. 5 Cir. 2008).
on briefs, affidavits and other information. There are few appellate opinions on this issue. One state has said that the issue can be decided on information. Another court has said that an evidentiary hearing is required. 138

Often, factors #1 and #2, domestic violence and the length of time that the child has resided outside of Louisiana, will be major factors in the § 1819 analysis as to whether the Louisiana court should decline its jurisdiction. The leading case on the domestic violence factor for an inconvenient forum analysis is Stoneman v. Drollinger, 64 P.3d 997 (Mont. 2003). 139 This new UCCJEA provision significantly altered the UCCJL inconvenient forum rules to enable courts to better protect family violence victims who flee to another state to escape violence. 140 Under R.S. 13: 1819, a Louisiana court with UCCJEA jurisdiction may decline in favor of the victim’s refuge state.

In Kovach v. McKenna, the Fourth Circuit ordered declination of Louisiana’s home state jurisdiction and dismissal of the Louisiana custody suit. The Fourth Circuit’s judgment was based on its conclusion that “domestic violence and residence of the child in another state for more than six months predominate over all other considerations in La. R.S. 13: 1819.” 141 As in Kovach, many trial courts may find an absence of 6 months or more to be a significant factor in determining a §1819 “inconvenient forum” motion. UCCJEA decisions from other states have upheld declination as inconvenient forum when the child has been absent for a lengthy time. 142 The ruling on a motion to decline as inconvenient forum is reviewable for abuse of discretion by supervisory writs. 143

The UCCJEA does not require a Louisiana court with proper UCCJEA jurisdiction to communicate with the court of another state before it decides to decline jurisdiction to that court as a more appropriate forum. However, if the Louisiana court communicates with the other state’s court on a substantive matter, it must make a record of the communication. Furthermore, the parties shall be informed of the communication and granted access to the record of the communication. Finally, if the parties are not able to participate in the inter-court communications, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made. 144


139 See also, Rainbow v. Rainbow, 990 A.2d 535 (Me. 2010)(declination of home state jurisdiction in favor of refuge state was appropriate where there was domestic violence).

140 Stoneman v. Drollinger, 64 P.3d 997, 1001-02 (Mont. 2003); Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11). In Kovach, the appellate court reversed a trial court’s denial of a motion to decline its home state jurisdiction in favor of the family violence victim’s refuge state. In its opinion, the Kovach court found that the "domestic violence and residence of the child in another state for more than six months predominate over all other considerations in La. R.S. 13: 1819.”

141 Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11). This unpublished opinion is available at www.probono.net/la.

142 See e.g., Fox v. Mina, 2011 WL 255557 (Ky. App. 2011)(3 years); Fickinger v. Fickinger, 182 P.3d 763 (Mont. 2008) (3½ years); Dillon v. Dillon, 37 Conn L. Rptr. 291 (Conn. Super. 2004)(2 years, 8 months)

143 Kovach v. McKenna, 2011-C-0228 (La. App. 4 Cir. 4/1/11); see also, Addington v. McGeehe, 698 So.2d 702, 704 (La. App. 2 Cir. 1997).

decree. R.S 13: 1820 says that mandatory declination of jurisdiction does not apply where domestic violence victim invoked temporary jurisdiction pursuant to R.S. 13:1816. In addition, the comments to § 208 of the model UCCJEA state that a domestic violence victim’s flight to another state, in violation of a custody decree, should not result in that state’s automatic dismissal of the victim’s custody suit. Rather, an inquiry should be made into whether the flight was justified under the circumstances.

6.9.3.12 Exclusive continuing jurisdiction of state that made initial custody determination

The new La. R.S. 13: 1814 provides for exclusive continuing jurisdiction for the court that made an initial custody determination consistent with the jurisdictional rules of R.S. 13: 1813-15. The new statute establishes a bright line test that should make it easy for courts to decide if continuing jurisdiction still exists.

If Louisiana had initial jurisdiction, its exclusive continuing jurisdiction lasts until a Louisiana court decides that neither the child nor the parent(s) and persons acting as parents have a significant connection with Louisiana or the foreign state determines that the child, parent(s) and persons acting as parents no longer reside in Louisiana.145 Similarly, Louisiana can’t assume jurisdiction if another state had initial jurisdiction consistent with R.S. 13: 1813-15 unless the other state declines jurisdiction or the Louisiana court finds that the child, parent(s) and persons acting as parents no longer reside in the state that had exclusive continuing jurisdiction under the UCCJEA.146

6.9.3.13 Modification of other states’ custody determinations

La. R.S. 13: 1815 significantly restricts when a court may modify a custody determination made by another state. The new law prohibits Louisiana from assuming jurisdiction to modify merely because Louisiana is the home state at the time of the motion to modify is filed.147 Preliminarily, it appears that Louisiana appellate courts have been correctly applying the new UCCJEA rules on jurisdiction to modify a foreign state’s custody determination.148

La. R.S. 13: 1815 provides that, except as authorized in R.S. 13:1816 (temporary emergency jurisdiction), a Louisiana court may not modify a custody determination made by another state unless:

1. a Louisiana court has home state or significant connections jurisdiction
2. the court of the other state determines that it no longer has exclusive, continuing jurisdiction or that a Louisiana court would be a more convenient forum, or
3. a Louisiana court or the other state’s court determines that the child, parents and persons acting as parents no longer reside in the other state.150

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145 Burst v. Schmolke, 62 So.3d 829 (La. App. 4 Cir. 2011)(Louisiana court as the initial jurisdiction ordered to decide whether it had continuing jurisdiction or would decline its jurisdiction).
146 Otwell v. Otwell, 56 So.3d 1232 (La. App. 3 Cir. 2011); Hughes v. Fabbio, 983 So.2d 946 (La. App. 5 Cir. 2008).
147 Under the prior UCCJL, Louisiana courts could modify if they were the home state at the time of the motion to modify. See e.g. Stanley v. Stanley, 720 So.2d 740 (La. App. 3 Cir. 1998).
148 See e.g., Brunt v. Abernathy, 79 So.3d 425 (La. App. 3 Cir. 2011) writ denied 83 So.3d 1050 (La. 2012); Hughes v. Fabio, 983 So.3d 946 (La. App. 5 Cir. 2008).
149 Gill v. Bennett, 82 So.3d 383 (La. App. 3 Cir. 2011)(Louisiana had significant connections jurisdiction where “home state” court declined its initial and continuing jurisdiction in favor of Louisiana).
150 Guzman v. Sartain, 31 So.3d 426, 431 (La. App. 1 Cir. 2009).
6.9.3.14 Enforcement remedies

The procedures for registering and enforcing another state’s custody determination in Louisiana have been simplified. The UCCJEA does not require a foreign decree to be registered in order to be enforced.\(^{151}\) This new law parallels the Uniform Interstate Family Support Act (UIFSA) and Violence Against Women Act (VAWA) processes for registration of child support and protective orders and intended to make it easier for pro se litigants to seek enforcement. La. R.S. 13: 1827 states that the other state’s decree may be registered in a Louisiana court by sending the Louisiana court a “letter or other document” along with copies of the foreign judgment and other information.\(^{152}\) On receipt of the documents, the Louisiana court is supposed to file the foreign judgment and serve notice on the opposing party advising him that the foreign judgment is immediately enforceable as a Louisiana judgment and that he has 20 days to request a hearing to contest the validity of the registered foreign judgment.

The grounds to contest the foreign judgment are (1) lack of UCCJEA jurisdiction, (2) the foreign judgment has been vacated, stayed or modified by a court with UCCJEA jurisdiction and (3) he was not given notice of the foreign court proceeding in accordance with the standards of R.S. 13: 1808. No other defenses are allowed. La. R.S. 13: 1828 further provides that a Louisiana court may grant any relief available under Louisiana law to enforce a registered child custody determination made by a court of another state.

R.S. 13: 1827 speaks of simply filing a “letter or other document” to register and confirm a foreign custody judgment or order. However, R.S. 13:1830 requires a verified petition for “expedited” enforcement of a foreign custody judgment or order when a party seeks immediate physical custody pursuant to the foreign custody decree. Interestingly, R.S. 13: 1830 (C) states that the hearing shall be heard on the next judicial day after service of the order directing the respondent to appear at a hearing.

R.S. 13: 1835 mandates that a Louisiana court accord full faith and credit or enforce another state’s custody order where jurisdiction was exercised in “substantial conformity” or is consistent with the UCCJEA. R.S. 13:1805 allows for international application of the UCCJEA and treats the foreign country as if it were a state of the USA. See Guzman v. Sartin, 31 So.3d 426 (La. App. 1 Cir. 2009).

Appeals from a final order in a proceeding to enforce a foreign custody determination must be expedited and the Louisiana trial court is prohibited from staying an order enforcing the child custody determination pending appeal. Only the appeal court may issue a stay. See La. R.S. 13: 1836. Also, the U.S. Supreme Court has ruled that the PKPA (and thus, the UCCJEA) do not create an implied cause of action in federal court. See Thompson v. Thompson, 484 U.S. 174 (1988). Rather, the federal full faith and credit clause must be enforced in the state courts.

6.9.3.15 Attorney fees

La. R.S. 13: 1834 strengthens and expands the prevailing party’s claims for attorney fees and other expenses in an UCCJEA enforcement proceeding. R.S. 13: 1834 mandates the award of attorney fees unless the party from whom fees are

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\(^{151}\) Guzman v. Sartain, 31 So.3d 426, 430 (La. App. 1 Cir. 2009).

\(^{152}\) Given that this law was only adopted in 2007, it is possible that many courts don’t have a form for this letter request or a set filing fee.
sought establishes that the award would be “clearly inappropriate.” The comments to the model UCCJEA state that attorney fees may be inappropriate if an award would cause a parent and child to seek public assistance. The same rule for attorney fees and costs applies under R.S. 13: 1820 for cases that are dismissed or stayed because a court declined jurisdiction because of a party’s unjustifiable conduct, e.g., removing the child to Louisiana to avoid the home state’s jurisdiction.

☞ A wonderful resource for interstate custody questions is the Legal Resource Center on Violence Against Women, where they provide technical assistance and training on interstate custody issues, including the UCCJEA. http://www.lrcvaw.org/ Also, www.uccjea.net has excellent resources for interstate custody disputes.

6.10 OTHER STATUTES GOVERNING INTERSTATE OR INTERNATIONAL CUSTODY DISPUTES

6.10.1 Indian Child Welfare Act

The Indian Child Welfare Act (ICWA), 25 U.S.C. §1901-1963, gives tribes a substantial role in matters concerning custody of Indian children. State courts must defer to tribal jurisdiction in child custody proceedings involving an Indian child for matters such as foster placement, termination of parental rights, and adoption. While the ICWA is not triggered for custody and divorce proceedings, it is nevertheless wise to be cautious –if a matter is pending in tribal court.

6.10.2 International Parental Kidnapping Act

The International Parental Kidnapping Act (IPKA), 18 U.S.C. § 1204 et seq., makes it a crime to remove a child from the United States or retain a child under the age of 16 years (who has been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights. The offender shall be fined under this title or jailed not more than 3 years, or both. Under the laws of the United States and many foreign countries, if there is no custody decree prior to abduction, both parents may be considered to have equal legal custody of their child. Even though both parents may have custody of a child, it still may be a crime for one parent to remove the child from the United States against the other parent’s wishes. If you are contemplating divorce or separation, or are divorced or separated, or even if you were never legally married to the other parent, ask your attorney, as soon as possible, if you should obtain a decree of sole custody or a decree that prohibits the travel of your child without your permission or that of the court. If you have or would prefer to have a joint custody decree, you may want to make certain that it prohibits your child from traveling abroad without your permission or that of the court. See http://travel.state.gov/abduction/abduction_580.htm for more information.

6.10.3 Uniform International Child Abduction Prevention Act


6.10.4 Hague Convention

The Hague Convention is a civil procedure for parents seeking the return of, or access to, their child. As a civil law mechanism, the parents, not the governments, are parties to the legal action. The countries that are parties to the Con-
vention have agreed that a child who is habitually resident in one party country, and who has been removed to or retained in another party country in violation of the left-behind parent’s custodial rights, shall be promptly returned to the country of habitual residence. The Convention can also help parents exercise visitation rights abroad.\textsuperscript{153}

There is a treaty obligation to return an abducted child below the age of 16 if application is made within one year from the date of the wrongful removal or retention, unless one of the exceptions to return apply. If the application for return is made after one year, the court may use its discretion to decide that the child has become resettled in his or her new country and refuse return of the child. In any case, a court may refuse to order a child returned if there is:

1. A grave risk that the child would be exposed to physical or psychological harm or otherwise placed in an intolerable situation in his or her country of habitual residence;
2. If the child objects to being returned and has reached an age and degree of maturity at which the court can take account of the child’s views (the treaty does not establish at what age children reach this level of maturity: that age and the degree of weight given to children’s views varies from country to country); or If the return would violate the fundamental principles of human rights and freedoms of the country where the child is being held.

Legal services attorneys may handle Hague Convention cases for a financially eligible person even if not a U.S. citizen or lawful alien.\textsuperscript{154} Attorney fees may be recoverable under Art. 26 of the Convention, \textsection{26 U.S.C. § 11607} or the UCCJEA. The United States Central Authority for the Hague Convention will support any attorney handling a Convention case with technical assistance and attorney mentoring.

\textbf{6.10.5 Uniform Enforcement of Domestic Violence Protective Orders Act}

The Uniform Enforcement of Domestic Violence Protective Orders Act seeks to make interstate enforcement of protective orders more uniform. As of 2012, about 20 states had enacted it. Louisiana has not.

\textbf{6.11 ADDITIONAL CUSTODY LAWS}

You should have a working knowledge of other custody related statutes:

\textbf{La. Civil Code art. 135} – provides for custody hearings to be closed to the public at the court’s discretion.

\textbf{La. R.S. 9:351} – provides access to a parent of a minor child’s medical, dental, and school records regardless of the custodial status of the parent.

\textbf{La. R.S. 9: 359}—Military Parent and Child Custody Protection Act, prohibits final order modifying custody or visitation order until 90 days after the termination of deployment, provides for service member to testify by affidavit or electronic means, and other matters.

\textsuperscript{153} See \url{http://travel.state.gov/abduction/abduction_580.html}

\textsuperscript{154} 45 C.F.R. § 1626.10(e).
La. R.S. 9:291 – allows suits between spouses for support and custody without a divorce being filed. Parties need to be living separate and apart. A custody order issued prior to a divorce would be void if the parties actually reconciled. See Dooley v. Dooley, 443 So.2d 630 (La. App. 3 Cir. 1983).

La. R.S. 9:341 – provides for restricted visitation for a parent where the parent has been guilty of physical abuse or sexual abuse or exploitation or has permitted such abuse/exploitation.

La. R.S. 9:342 – provides for the posting of a bond to secure compliance with a visitation order on motion of a party or on the court’s own motion.

La. R.S. 9:343 – provides a procedure for the issuance of a civil warrant directing law enforcement to return a child to a custodial parent when the non-custodial parent retains the child in violation of an existing custody/visitation order.

La. R.S. 9:345 - provides for the appointment of an attorney to represent a minor child in custody/visitation proceedings. Such appointment may be made by motion of the court, parent, any party or the child. Also sets forth those factors which the court should consider in determining if such an appointment serves the best interest of the child.

La. R.S. 9:346 – Action for failure to exercise or allow visitation, custody, or time rights pursuant to a court ordered schedule. See also R.S. 13:4611 (1)(d) and 1(e) – punishment for contempt of court.

In contested custody cases where there is protracted discovery, motions, evidentiary issues, a convoluted set of facts and issues – it may be essential to move for a "Pre-Trial and Scheduling Conference Order" pursuant to your Court’s Local Rule or La. Code Civ. Proc. art. 1551. This allows you to eliminate many of the “grey areas” and to address discovery material and other issues before the trial. It also gives you an opportunity to “educate the court” as well as to “narrow down” the issues in the case.

6.12 CUSTODY RESOURCE INFORMATION

The following books are suggested for practicing attorneys and their clients who need more information about developing a workable plan for custody following divorce:


Mom’s House/Dad’s House by Isolina Ricci.

Second Chances: Men, Women and Children A Decade After Divorce by Judith S. Wallerstein and Sandra Blakes Lee.

The Unexpected Legacy of Divorce: A 25 Year Landmark by Judith Wallerstein.
7. VISITATION RIGHTS

7.1 WHAT VISITATION ISSUES ARISE IN A LEGAL AID PRACTICE?

The common visitation issues are:

• initial establishment of visitation in a divorce, custody or paternity action
• supervision or restriction of visitation because of family violence, parental unfitness, physical or sexual abuse
• modification or change of visitation
• relocation of domiciliary parent and need to adjust visitation
• contempt for violation of visitation orders
• access of non-parent relatives to visitation

7.2 WHO HAS RIGHTS TO VISITATION?

Generally, a non-custodial parent has a right to visitation unless a court finds that visitation would not be in the child’s best interest. The parent’s right to visitation is more than a “species of custody.” It has an independent basis in Civil Code art. 136, revision comments 1993(b). A parent is entitled to reasonable visitation rights unless visitation would seriously endanger the child’s physical, mental, moral, or emotional health. The presumption in favor of a parent’s visitation rights may only be overcome by clear and convincing evidence. Non-parent relatives other than grandparents may be granted visitation in “extraordinary circumstances.” The term, “extraordinary circumstances” is not defined in the jurisprudence. However, Civil Code art. 136(C) does state that extraordinary circumstances may include a parent “abusing a controlled dangerous substance”. Grandparents and siblings of a child of the marriage where the parents have lived apart for a period of 6 months may have reasonable visitation rights in extraordinary circumstances and also need to comply with Civil Code art. 136(D).

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156 See e.g., W.M.E. v. E.J.E., 619 So. 2d 707 (La. App. 3 Cir. 1993)(visitation rights denied because of sexual abuse of child); Bennett v. Bennett, 657 So.2d 413 (La. App. 3 Cir. 1995). See also La. Civ. Code art. 136(A) which allows denial of a parent’s visitation rights if visitation would not be in the child’s best interest.
157 Bandy v. Bandy, 971 So.2d 456 (La. App. 3 Cir. 2007); cf. State in the Interest of AC, 643 So.2d 743 (La. 1994).
159 The provisions of C.C. art. 136 and R.S. 9:344(D) were amended and reenacted by Act 763 of 2012. C.C. art 136 (B) allows a grandparent to seek visitation without a showing of extraordinary circumstances but now requires a R.S. 9:345 contradictory hearing first.
7.3 WHEN CAN A COURT DECIDE VISITATION RIGHTS OR DISPUTES?

Generally, visitation is decided in a divorce or custody lawsuit. Interim visitation may be decided in a domestic violence protective order lawsuit. However, a visitation order in a protective order case is time-limited and will need to be finalized in a divorce or custody lawsuit. A court that has jurisdiction and venue to decide custody may set or restrict visitation at the trial or on the hearing of a motion to determine custody and visitation. Litigation costs can be minimized if the parties amicably work out a visitation schedule. In interstate custody disputes, a Louisiana court may not have UCCJEA jurisdiction to modify a custody (or visitation) determination of another state’s court. Nonetheless, a Louisiana court without UCCJEA jurisdiction to modify may issue a temporary order enforcing or implementing the visitation schedule or visitation provisions of a child custody determination made by another state.

7.4 THE COURTS MAY REGULATE, SUPERVISE AND ENFORCE VISITATION TO PROTECT CHILDREN

The courts have vast discretion to regulate and supervise visitation to protect a child’s best interest or a parent’s rights. In addition to a court’s general authority under Civil Code art. 136, there are other statutes that may restrict or affect visitation. Generally, these statutes involve family violence, physical abuse, sexual abuse, neglect, criminal misconduct, failure to visit a child or repeated interference with the other parent’s visitation. A court may order supervised visitation to protect the child even when a specific statutory restriction of visitation is not applicable. Drug use may justify supervised visitation until the using parent provides proof of drug rehabilitation.

For good cause shown, a court may require a party to post a bond to insure compliance with a visitation order and to indemnify the other party for any costs incurred. A bond may be proper when a party fails to comply with a court ordered visitation schedule or fails to return the child at the end of his visitation period. A court also has the power to order a bond to prevent international abduction.

Failure to comply with visitation orders may subject a party to contempt, attorney fee sanctions and even modification of custody or visitation orders. Absent good cause, neither parent may interfere with the other parent’s visitation, custody or time rights.

165 Richardson v. Richardson, 974 So.2d 761 (La. App. 4 Cir. 2007).
166 La. R.S. 9: 342.
167 Smith v. Pillow-Smith, 52 So.3d 264 (La. App. 4 Cir. 2010); Hodges v. Hodges, 827 So.2d 1271 (La. App. 3 Cir. 2002); Walet v. Caulfield, 858 So.2d 615 (La. App. 1 Cir. 2003).
168 La. R.S. 13: 1858 (D)(2).
169 La. R.S. 13: 4611(1)(e)
7.5 WHEN MAY A VISITATION ORDER BE CHANGED?

Generally, visitation may be changed if a change is in the children’s best interest and especially when the child is very young at the time of the original decree and subsequent changes are needed later. But, courts have not been consistent in articulating the distinction of visitation as a species of Civil Code art 136 and visitation [physical custody] that arises from joint custody, in R.S. 9:335(A)(2)(b). The term “custody” is usually broken down into two components: physical or “actual” custody and legal custody. Evans v. Lungrin, 708 So.2d 731, 737 (La. 1998). While for all intent and purpose, in the Author’s opinion, visitation and physical custody are synonymous in a joint custody decree, this classification of custody in Lungrin, has led to inconsistencies in applying the burden of proof for modifications of visitation/physical custodial periods contained in custody decrees.

It appears that the Bergeron higher burden of proof for modification of custody orders does not apply to changes to visitation in the custody order. Why visitation is sometimes considered as physical custody and sometimes as merely visitation by panels of the same appellate court is not apparent. In any case, Bergeron applies in some instances to changes in physical custody and where there is a request for increased visitation that changes physical custody, e.g., a change to shared physical custody. Similarly, a request for a substantial increase of summer visitation is a change in physical custody that must meet the Bergeron test. A court may not use “adjustment of visitation” to circumvent the Bergeron test for custody modification. The courts are also split as to whether the parties, in a consent judgment, can agree to the burden of proof that will be required in any modification of their custody decree.

7.6 HOW DOES FAMILY VIOLENCE AFFECT VISITATION RIGHTS?

Family violence is common in many divorce and custody actions handled by legal aid attorneys. Special laws apply to visitation in family violence cases to protect the victims. Visitation orders should be drafted to minimize harm to the abused parent and her children. Provisions should be specific and clear so that conflict between the parties is minimized. Specific times should be set for visitation. The term, “reasonable visitation” should never be used in family violence cases. Exchanges for visitation should be structured to minimize harm. Exchanges may need to be conducted by third parties and/or in public places including police stations.

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171 White v. Fetzer, 707 So. 2d 1377 (La. App. 3 Cir. 1998) writ denied 719 So.2d 466 (La. 1998)(if there is a consent decree for custody and visitation, Bergeron does not apply to a rule to increase visitation); Gerace v. Gerace, 927 So.2d 622 (La.App. 3 Cir. 4/5/06); Mosely v. Mosely, 499 So.2d 106 (La.App. 1 Cir.1986), writ denied, 505 So.2d 1138 (La.1987); Acklin v. Acklin, 690 So.2d 869 (La. App. 2 Cir. 1997); Reynier v. Reynier, 545 So.2d 663 (La. App. 5 Cir. 1989).

172 Schmidt v. Schmidt, 6 So.3d 197 (La. App. 4 Cir. 2009); DeSoto v. DeSoto, 893 So.2d 175 (La.App. 3 Cir. 2005); see Harang v. Ponder, 36 So.3d 954 (La.App. 1 Cir.2010).

173 Bonnecarrere v. Bonnecarrere, 37 So.3d 1038 (La. App. 1 Cir. 2010); Francois v. Leon, 834 So.2d 1109 (La. App. 3 Cir. 2002); Lee v. Lee, 766 So.2d 723 (La. App. 2 Cir. 2000) writ denied 744 So.2d 150 (La. 2000).

174 Davenport v. Manning, 675 So.2d 1230 (La. App. 4 Cir. 1996).


176 Compare, Adams v. Adams, 899 So.2d 726 (La. App. 2 Cir. 2005)(parties may stipulate to Bergeron for visitation); with Rodriguez v. Wyatt, ___ So.3d ___, 2011 WL 6187083 (La. App. 5 Cir. 2011)(stipulation that custody governed by Bergeron standard invalid absent a considered decree); Reid v. Reid, 2011 WL 2120057 (La. App. 1 Cir. 2011)(trial court held that consent agreement for application of Bergeron to visitation unenforceable since it violates public policy).

177 One study found that during visits, 5% of abusive fathers threaten to kill the mother. 34% threaten to kidnap the children and 25% threaten to hurt the children. J. Drue, The Silent Victims of Domestic Violence: Children Forgotten by the Judicial System, 34 Gonz. L. Rev. 229, 234 (1998-99).
La. R.S. 9: 364(C) of the Post-Separation Family Violence Prevention Act governs visitation where there is a “history of perpetrating family violence” against the child or the child’s parent. Family violence includes assault, stalking, physical and sexual abuse. “History of perpetrating family violence” means either more than one incident or one incident that results in serious bodily injury. In Ford v. Ford, 798 So. 2d 316 (La. App. 3 Cir. 2001), the court held that visitation could not be awarded until the “history of family violence” allegations under La. R.S. 9: 364 (C) were fully litigated.

A parent with a history of family violence (not sexual abuse) is only allowed supervised visitation, conditioned upon his participation in and completion of a treatment program for abusers. La. R.S. 9: 364 (C). There is some confusion in whether 9:364(C) prohibits visitation until the abuser has completed a treatment program. In Morrison v. Morrison, 699 So.2d 1124 (La. App. 1 Cir. 1997), the court held that no visitation may occur until the abuser has completed a treatment program. It is the Author’s view that the correct interpretation of La. R.S. 9:364(C) is that the supervised visitation is “conditioned upon the participation in and the completion” of a treatment program.” Otherwise, if supervised visitation cannot occur until completion of the treatment program, the use of the word “participation” becomes redundant. How can you complete a treatment without participating in it? This view is supported by the Third Circuit’s decision in Hicks v. Hicks, 733 So.2d 1261 (La. App. 3 Cir. 1999), which held that visitation would be supervised until the perpetrator could prove that he has satisfied all requirements of the Post-Separation Family Violence Prevention Act.178

While it appears that the supervised visitation awarded pursuant to R.S. 9:364(C) should only begin after the abusive parent has started to participate in a treatment program, as a matter of practice, you should be able bring the matter back into court to stop the supervised visitation if the abuser has stopped participating without completing the program. The type of treatment program that the perpetrator needs to enroll in, is a controversial issue. See D.O.H. v. T.L.H., 799 So.2d 714 (La. App. 3 Cir. 2001) for Judge Woodard’s excellent dissenting opinion.

Unsupervised visitation may be allowed only upon proof that the abuser (1) has completed a treatment program, (2) is not abusing alcohol and drugs, (3) poses no danger to the child, and (4) such visitation is in the child’s best interest. Ineffective treatment programs may be challenged in a hearing on a request for unsupervised visitation.179 The victim’s attorney fees in opposing unsupervised visitation must be paid by the abuser, whether the victim wins or loses her opposition to unsupervised visitation.180

Under La. R.S. 9: 366 (B), an abuser’s “court ordered visitation” must be terminated if he violates an injunction or protective order as defined in La. R.S. 9: 362(4). The legislative history of R.S. 9:366 (B) makes it clear that the legislature intended to eliminate the courts’ power to allow visitation for violators of injunctive orders. See e.g. Duhon v. Duhon, 801 So.2d 1263, 1265 (La. App. 3 Cir. 2001). In the Author’s opinion, this discretion highlights the confusion with R.S. 9:341(A).

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178 A trial court has the discretion to deny supervised visitation until completion of the treatment program. See e.g. Duhon v. Duhon, 801 So.2d 1263, 1265 (La. App. 3 Cir. 2001). In the Author’s opinion, this discretion highlights the confusion with R.S. 9:341(A).
tions. Compare Act 1091 of 1992 with Act 888 of 1995 and Act 750 of 2003. However, many trial courts will refuse to permanently terminate all visitation by the abuser despite this express statutory mandate.

7.7 ARE THERE OTHER STATUTES THAT RESTRICT OR PROHIBIT VISITATION?

Yes, in addition to Civil Code art. 136 (A) and the Post-Separation Family Violence Prevention Act, these statutes provide the court with additional authority to restrict or supervise visitation:

La. Civil Code art. 137

A natural father shall be denied visitation if his child was conceived by his felony rape of the mother. A family member shall be denied visitation if his intentional criminal misconduct caused the death of the child’s parent. The burden of proof for the criminal misconduct is preponderance of evidence.

La. R.S. 9:346

This statute creates an action for failure to exercise or to allow visitation, custody, or time rights pursuant to a court ordered schedule. See also La. Civ. Code art. 136.1. This is the legislature’s recent attempts to encourage the non-custodial parent to exercise visitation or face consequences, e.g., custody/visitation modification, contempt, costs, attorney fees, etc. The implementation of this concept is problematic. 181

La. R.S. 9:341

This statute applies to both physical and sexual abuse of a child by his parent. The R.S. 9:341 burden of proof for physical or sexual abuse is preponderance of evidence. This lower burden of proof is constitutional. 182 If the court finds physical or sexual abuse, the court must prohibit visitation between the abused parent and abused child until the parent proves that visitation would not cause physical, emotional or psychological damage to the child. R.S. 9:341 does not mandate a treatment program. However, the case law holds that the court may order the abuser to complete a treatment program under R.S. 9:341, even if R.S. 9:364(D) did not apply. 183 Also, even if R.S. 9:341 does not apply, a court may order supervised visitation when necessary to protect a child. 184

181 For an alternative approach, in Hennepin County, Minnesota, a 2012 pilot project addresses outcomes for children by helping unwed parents to co-parent, see http://www.mfsrc.org/Conferences_files/2010/211315B.pdf
182 Cf. In the Interest of A.C., 643 So.2d 719 (La. 1994).
183 Clark v. Clark, 550 So.2d 913 (La. App. 2 Cir. 1989); In the Interest of A.D., 628 So.2d 1288 (La. App. 3 Cir. 1993).
R.S. 9:341 and 9:364 (D) conflict as to the burden of proof in sexual abuse cases. Originally, both statutes only required proof of sexual abuse by a preponderance of evidence. In 1994, the Supreme Court found the preponderance of evidence rule in R.S. 9:364 (D) unconstitutional. In the Interest of A.C., 643 So.2d 719 (La. 1994). In 1995, the legislature amended R.S. 9:364 (D) to create a “clear and convincing evidence” standard for sexual abuse. However, the legislature did not amend the “preponderance of evidence” standard used in R.S. 9:341 which also governs restriction of visitation because of sexual abuse. R.S. 9:364 (D) is the later and more specific legislation. However, R.S. 9:368 provides that the remedies in R.S. 9:361 et seq. do not affect remedies found elsewhere in the law. One court has held that if the State (Dept. of Social Services) has custody, the R.S. 9:364(D) prohibition on visitation and all contact is inapplicable and therefore, the less restrictive provisions of R.S. 9:341 control. The legislature obviously needs to “clean up” this anomaly.

La. Children’s Code Art. 1570(F)
If sex abuse is proven, visitation shall be suspended until the child turns 18 years or a contradictory hearing to modify is had. 186

7.8 WHAT VISITATION RIGHTS DO RELATIVES HAVE?

Non-parent relatives, other than grandparents, may only be granted visitation in “extraordinary circumstances” and if the visitation is in the child’s best interest. Civil Code art. 136 and La. R.S. 9:344 provide for the award of visitation rights to non-parents. Civil Code art. 136(D) establishes factors for the court to consider in determining the child’s best interest. Under Civil Code art. 136(C), as amended by Act 763 of 2012, “abusing a controlled dangerous substance” determination by the court appears to be part of what constitutes “extraordinary circumstances” that would permit non-relative visitation. Children’s Code art. 1264 et seq. and 1269.1 et seq. allow for post-adoptive visitation rights by non-relatives.

In Troxel v. Granville, 530 U.S. 57 (2000), the United States Supreme Court held that a court must presume that “fit parents act in the best interests of their children” and therefore must accord “special weight to parents’ decisions and objections regarding request for third-party visitation.” Id. at 68-70.

La. Civil Code art. 136(B) does not violate Troxel or the federal constitution. See Broussard-Scher v. Legendre, 60 So.3d 1290 (La. App. 3 Cir. 2011).

La. R.S. 9:344 is constitutional on its face as the dictates of Troxel are met by deference to a fit parent’s fundamental right of privacy. The non-parent has the burden of proving that visitation or a modification of the visitation order would be reasonable and is in the child’s best interest. See Barry v. McDaniel, 934 So.2d 69 (La. App. 1 Cir. 2006).

185 In Interest of A.D., 628 So.2d 1288 (La. App. 3 Cir. 1993).
186 Buchanan v. Langston, 827 So.2d 1186 (La. App. 2 Cir. 2002); Teutsch v. Cordell, 15 So.3d 1272 (La. App. 2 Cir. 2009).
187 The “extraordinary circumstances” sufficient to warrant an award of grandparent visitation should be those that constitute a highly unusual set of facts not commonly associated with a particular thing or event. Shaw v. Dupuy, 961 So.2d 5 (La.App. 1 Cir. 2007), writ denied 951 So.2d 1092 (La. 2007). The provisions of C.C. art. 136 and R.S. 9:344(D) were amended and reenacted by Act 763 of 2012. See also prior discussion at § 5.7.2.
7.9 HOW HAVE THE COURTS APPLIED THE PRIOR CIVIL CODE ART. 136 (B) AND (C), BEST INTEREST ANALYSIS?

For a visitation request by non-parent relatives by blood or affinity, the Court must consider several factors to determine the child’s best interest:

- The length and quality of the prior relationship between the child and the relative;
- Whether the child is in need of guidance, enlightenment, or tutelage which can be provided by the relative;
- The child’s preference if he is mature enough;
- The willingness of the relatives to encourage a close relationship between the child and the parent;
- The mental and physical health of the child and the relative.

7.9.1 Cases granting visitation

In Broussard-Scher v. Legendre, 60 So.3d 1290 (La. App. 3 Cir. 2011), the grandmother was granted visitation where parents and child lived in grandmother’s house after leaving the birth hospital, parents returned to their apartment a week later and child stayed with grandmother, grandmother was the primary caregiver for child, and court-appointed expert testified that extraordinary circumstances existed and that it was in the best interest of child to award grandmother visitation.

In Ray v. Ray, 657 So.2d 171 (La. App. 3 Cir. 1995), the court granted visitation rights to paternal aunt based on facts that: father was dead, absence of paternal grandfather, child had lived with paternal aunt among other factors all of which presented “extraordinary circumstances.”

7.9.2 Cases denying visitation

In Shaw v. Dupuy, 961 So.2d 520 (La. App. 1 Cir. 2007), the court held that the parties’ inability to communicate or agree on many issues did not amount to the extraordinary circumstances required by Civil Code art. 136 (B) to support a visitation award to the non-custodial relatives.

In Flack v. Dickson, 843 So.2d 1261 (La. App. 3 Cir. 2003), the appellate court held that “extraordinary circumstances did not exist to support granting paternal grandparents visitation rights to minor child and there was no allegation or evidence that the child’s mother was unfit or did not adequately provide for the child, nor was there any showing that the mother’s decision regarding the paternal grandparents’ visitation was detrimental to the child and, in any event, record did not indicate that such visitation would serve child’s best interest.”

In McCarty v. McCarty, 559 So.2d 517 (La. App. 2 Cir. 1990), the grandmother was denied visitation rights where parents were married, not involved in divorce, custody or neglect litigation and child had not lived for an extended period of time with the grandmother.

In Lingo v. Kelsay, 651 So.2d 499 (La. App. 3 Cir. 1995), where maternal grandparents were denied visitation as parents were married, not involved in marital litigation and objected to the grandparents’ visitation.
7.10 HOW HAVE THE COURTS APPLIED LA. R.S. 9:344 TO GRANDPARENT OR SIBLING VISITATION?

La. R.S. 9:344 applies to visitation requests by grandparents and siblings where the parent(s) are deceased, incarcerated, or separated. Except for R.S. 9:344(B), this statute only applies to married parents. It may be grounds for challenge on the distinction between legitimate and illegitimate grandchildren.

7.10.1 Cases granting visitation

In Babin v. Babin, 854 So.2d 403 (La. App. 1 Cir. 2003), writ denied 854 So. 2d 338 (La. 2003), cert. denied 540 U.S. 1182 (2004), visitation was granted to the maternal grandmother, allowing her to spend four hours every three weeks with her deceased daughter's minor children. An issue on appeal was whether the trial court erred as a matter of constitutional law in its application of the Louisiana Grandparent Visitation Statute, R.S. 9:344(A), by refusing to require a threshold showing of "serious circumstances" to justify the court’s intervention in the parent/child relationship. The appellate court ruled that the grandmother did not have show extraordinary circumstances to get visitation. Rather, the special factors listed in the statute supplied the legal basis for visitation. The court held that the length and quality of the relationship enjoyed with her grandchildren prior to her daughter’s death; the fact that the visitation awarded was not significantly intrusive upon the children’s relationship with their father; the restriction that the grandmother was not to diminish the father's authority over the children or to undermine his ability to raise the children as he saw fit; all served to support the mandatory requirement under the statute that the visitation was “reasonable” and in the grandchildren’s “best interest.” See also Garner v. Thomas 13 So.3d 784 (La. App. 4 Cir. 2009).

In Vincent v. Vincent, 739 So.2d 920 (La. App. 1 Cir. 1999) the court found that the maternal grandmother has a cause of action for visitation where mother was incarcerated.

7.10.2 Cases denying visitation

In Galjour v. Harris, 795 So.2d 350 (La. App. 1 Cir. 2001), writ denied 793 So.2d 1229, 1230 (La. 2001), cert. denied 534 U.S. 1020 (2001), visitation was denied to the uncle and aunt since there were no extraordinary circumstances under Civil Code art. 136 and no right of action under R.S. 9:344. The court granted visitation to the maternal grandparents. The court held that grandparents don't have to prove “extraordinary circumstances” in order to obtain visitation with their grandchildren when their child is dead, interdicted, or incarcerated.

☞ When does R.S. 9:344 or Civil Code art. 136(B) apply? Civil Code art. 136(E) states that R.S. 9: 344 will apply when there is a conflict between the codal article and the statute. Also, in McMallin v. McMallin, 6 So.3d 464 (La. App. 3 Cir. 2009), the court held that 9:344 (a more specific statute) does not apply when the parents were not married. Civil Code art. 136(B) did. Thus, R.S. 9:344 is read more strictly whereas Civil Code art. 136(B) is the general "catch all" provision for all relatives.

7.10.3 La. Children’s Code art. 1264 and 1269.1 et seq. (Adoption provisions).

This statute allows grandparent visitation when one parent dies. It also allows grandparent visitation when both parents die and child is then adopted by one set of grandparents.188

188 O'Brient v. Shepley, 451 So.2d 82 (La. App. 5 Cir. 1984).
8. CHILD SUPPORT

8.1 INTRODUCTION

Child support is determined on the federally mandated child support guidelines found at La. R.S. 9: 315 et seq. The guidelines use the parents’ incomes to determine the appropriate amount of child support. La. R.S. 9: 315.20 prescribes worksheets A and B for the calculation of the support obligation. Worksheet A is for joint, sole or “split” custody. Worksheet B is for “shared custody.” A court may deviate from the child support guidelines if applying them would not be in the child’s best interest or would be inequitable to the parties. The party advocating for a deviation from the guidelines bears the burden of proof. If the court deviates from the presumptive guidelines, it must give reasons for the deviation. The reasons must include the amount required under a mechanical application of the guidelines. If the court reviews the parties’ stipulation for child support, it must review the adequacy of the stipulated amount under the child support guidelines.

La. Civil Code art. 141 provides that “in a proceeding for divorce or thereafter, the court may order either or both parents to provide an interim allowance or final support for a child based on the needs of the child and the ability of the parents to provide support. The court may award an interim allowance only when a demand for final support is pending.” An action for child support can also be brought if the parties are separated without the need for divorce to be pled.

After reading the child support statutes, you should read and understand the case law on these child support issues: voluntary underemployment or unemployment, extraordinary medical expenses, private school tuition, federal tax credit for daycare, assignment of the tax dependency deduction, expense sharing, adjustments to child support due to time spent with the non-domiciliary parent, extra judicial agreements, deviation from the guidelines, retroactivity, contempt, income assignment, and the calculation of gross income.

A custodial parent can get help from the Louisiana Department of Children and Family Services, Child Support Enforcement Services, in establishing and enforcing child support. If the custodial parent receives Medicaid, the Kinship Care Subsidy Grant or FITAP these services are free. Other custodial parents may receive these services for a $25 fee. Parents may apply for the state’s child support enforcement services on-line and can download a paper application from the webpage of the Department of Children and Family Services (DCFS)/Child Support Enforcement. They may also apply by calling Child Support Enforcement Services at 800-524-3578.

If the children or the client are receiving FITAP or the Kinship Care Subsidy Grant, the enforcement and collection of child support will have been assigned to the State by the custodial parent (usually our client). See La. R.S. 46:236.1.5. Thus, you are not able to pursue child support without getting the State to relinquish the assignment or to make them a party to the proceedings because the

189 La. R.S. 9: 315.1 (B); Dufresne v. Dufresne, 65 So.3d 749 (La. App. 5 Cir. 2011).
190 Guillot v. Munn, 756 So.2d 290 (La. 2000); State ex rel. A.F. v. Fennidy, 82 So.3d 421 (La. App. 5 Cir. 2011).
191 The requirement that the judge give reasons for a deviation also apply to a court’s approval of a stipulated agreement that deviates from the child support guidelines. Leger v. Leger, 808 So.2d 632 (La. App. 1 Cir. 2001).
192 Steinbach v. Steinbach, 957 So.2d 291, 302 (La. App. 3 Cir. 2007).
194 La. R.S. 9:291

(354)
Dept. of Family and Children, Support Enforcement Services, is a party in interest that is necessary for “just adjudication.” With backlogs in the DCFS/SES system, child support is a vital economic benefit to our clients and should not be overlooked as they are usually retroactive to the date of filing.

Either party may raise child support without it being specifically pled and the court may hear and determine the issue if all parties consent. R.S. 9:356.

8.2 THE CHILD SUPPORT WORKSHEET A (SOLE, JOINT OR SPLIT CUSTODY)

A step by step guide for properly filling out Obligation Worksheet A at R.S. 9:315.20 is discussed below. Worksheet A is for child support in custody arrangements defined in R.S. 9: 315.8 and 315.10. It does not apply to “shared custody” which is joint custody where each party has physical custody for approximately equal time. The Author has marked each section of Worksheet A with [A] through [P] and provided commentary and case citations for each section.

[A] - Monthly Gross Income (line item 1 on Worksheet A)

8.3 GROSS INCOME

As defined in R.S. 9:315 (C)(3), gross income includes, but is not limited to:

- Salaries
- Wages
- Commissions
- Bonuses
- Dividends
- Severance pay
- Pensions
- Interest
- Trust income
- Recurring monetary gifts
- Annuities
- Capital gains
- Social security benefits
- Worker’s compensation benefits
- Allowances for housing and subsistence from military pay and benefits
- Unemployment insurance benefits
- Disability insurance benefits
- Spousal support received from a pre-existing spousal support obligation.

Note that gifts and lottery proceeds are not included as “gross income.” Previously, lottery proceeds were specifically excluded from gross income. However, the law has been amended and lottery proceeds are no longer specifically excluded. Thus, such proceeds may be counted as income. Depending upon the size and character of gifts, they may be considered by the court under R.S. 9:315.1 as a basis for a deviation from the guidelines.


Gross income also includes expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business, if these reimbursements or payments are significant and reduce the parent’s personal living expenses. These types of payments may include, but are not limited to a company car, free housing or reimbursed meals.\textsuperscript{197} The court may also consider as income the benefits a party derives from expense sharing or other sources. In computing expense sharing with another spouse, it is inappropriate to consider the income of another spouse, except to the extent that such income is used directly to reduce the costs of a party’s actual expenses.\textsuperscript{198}

Gross income also includes gross receipts minus ordinary and necessary expenses required to produce income from self-employment, rent, royalties, proprietorship of a business or joint ownership or partnership or closely held corporation.\textsuperscript{199} Ordinary and necessary expenses shall not include amounts allowable by the IRS for the accelerated component of depreciation expenses or investment tax credits or any other business expenses determined by the court to be inappropriate for determining gross income for the purposes of calculating child support.

In determining gross income for calculating support, one may look at a party’s actual gross income if he is employed to full capacity or may look to potential income if he is voluntarily unemployed or underemployed.\textsuperscript{200} A party cannot be voluntarily unemployed or underemployed if he is absolutely unemployable or incapable of being employed or if the unemployment or underemployment results from no fault or neglect of the party.\textsuperscript{201}

### 8.4 EXCLUSIONS FROM GROSS INCOME

Gross income does not include:
- Child support received or
- Benefits received from public assistance programs including:
  - Family independence temporary assistance plan
  - Supplemental security income
  - Food stamps and
  - Disaster assistance benefits
- Per diem allowances which are not subject to federal income taxation.
- Extraordinary over-time or income attributed to seasonal work regardless of the percentage of gross income when, in the court’s discretion, inclusion would be inequitable.

### 8.5 VOLUNTARY UNDEREMPLOYMENT OR UNEMPLOYMENT (R.S. 9:315.11)

If a party is voluntarily underemployed or unemployed, child support shall be calculated based on his income earning potential, i.e., the amount of income a person is capable of earning based on his career choice, educational and skill level. In determining a party’s income earning potential, the court may use the most recently published Louisiana Occupational Employment Wage Survey for

\textsuperscript{197} La. R.S. 9: 315 (C)(3)(b).
\textsuperscript{198} La. R.S. 9: 315 (C)(5)(c).
\textsuperscript{199} La. R.S. 9: 315 (C)(3)(c).
\textsuperscript{200} La. R.S. 9: 315 (C)(3)(c).
\textsuperscript{201} La. R.S. 9: 315 (C)(5)(b).
calculations. See R.S. 9:315.1.1(B); but see R.S. 13:3712.1 which states that the court shall accept a copy of a self-authenticating report from the Department of Labor, or from any state or reporting agency, as prima facie proof of its contents.

The amount of the basic child support obligation obtained by use of R.S. 9:315.11 (voluntary unemployment or underpayment) shall not exceed that amount which the party paying child support would have owed had no determination of the other party's income potential been made. R.S. 9:315.9

The projection of an income for a voluntarily underemployed or unemployed individual is not applicable if:

- The party is unemployable;
- The party is incapable of employment;
- The unemployment exists without fault or neglect of the party;
- The party is physically or mentally incapacitated; and
- The party is actually caring for a child of the parties under the age of five. Note that the child must be a "child of the parties." Other children don't exempt a parent from being considered voluntarily underemployed or unemployed.

### 8.5.1. Cases on Voluntary Unemployment or Underemployment

#### 8.5.1.1 Cases finding no voluntary unemployment or underemployment

_Mayo v. Crazovich_, 621 So. 2d 120 (La. App. 2 Cir. 1993); see also _Lauve v. Lauve_, 6 So.3d 184 (La. App. 4 Cir. 2008).

The plaintiff obligor left his unstable cementing business to enter the upholstery business to improve his financial condition. The court determined that a voluntary change of circumstances must be reasonable, justified, and in good faith without the intent to avoid the child support obligation. If the court so finds, the obligor will not be deemed to be voluntarily underemployed even if he fails to make a profit in the new business despite working diligently to do so.

_Saussy v. Saussy_, 638 So. 2d 711 (La. App. 3 Cir. 1994); see also _Walden v. Walden_, 835 So.2d 513 (La. App. 1 Cir. 2002).

The child support obligor was fired from his employment through no fault or neglect of his own. Thereafter, he obtained another job which paid significantly less than his prior employment. His failure to apply for jobs within his previous earning potential was not deemed to be voluntary unemployment insofar as the loss of income was deemed temporary. Also, the father in this case testified and the court accepted his testimony that with the change of employment he had more time to spend with his children. The court stated that a father's children benefit not only by the money he is able to earn, but also by the presence of his company, and nowhere does the law require that a parent work 60 to 70 hours per week to the detriment of his children's right to the parent's company.

_Koch v. Koch_, 714 So. 2d 63 (La. App. 4 Cir. 1998); see also _State, Dept. of Social Services v. Swords_, 996 So.2d 1267 (La. App. 3 Cir. 2008).

The obligor sought to reduce his child support alleging that he had a significant decrease in income. The court determined that he was voluntarily
underemployed because he worked approximately 70 hours per week, without compensation, for a company of which he is a one-third owner. The court determined that he had made several voluntary choices regarding investments of assets which resulted in loss of income. He was not entitled to rely on his bad investment decisions to reduce his child support obligation.

Commentary: Voluntary unemployment or underemployment is generally a question of good faith. Good faith is a factual issue to be determined by the court. A parent whose change in circumstances is due to voluntary termination of employment may obtain reduction in his/her child support payments if he/she can show that:

- A change in circumstances occurred;
- The voluntary change in circumstances is reasonable and justified;
- He is in good faith and not attempting to avoid his obligation; and
- His action will not deprive the child of continued reasonable financial support. La. R.S. 9:315.1(A)

In virtually every case where a parent’s voluntary unemployment or underemployment was found to be in good faith, our courts have recognized extenuating circumstances beyond that parent’s control which influenced and necessitated the voluntary change of employment. Courts have generally allowed a reduction in child support where parents were returning to school with hopes of increasing their salary, or leaving employment due to a business’ financial difficulty or strained working relationship to find other employment or start a new business. In almost every case, our courts noted that the unemployment or underemployment was a short term sacrifice which could lead to a long term benefit.

In voluntary unemployment/underemployed cases, our courts will usually use the wage earned by the party prior to voluntary underemployment or unemployment as the best estimate of the obligated party’s potential income. Further, the courts may hold that an incarcerated payor is “voluntarily unemployed.” Also, this construction appears contrary to the plain language of La. R.S. 9:315(C)(5)(b) which expressly states that a party may not be deemed “voluntarily unemployed” if he is “incapable of being employed.”

8.5.1.2 Cases finding voluntary unemployment or underemployment

_Hutto v. Kneipp_, 627 So. 2d 802 (La. App. 2 Cir. 1993)

The obligor left full-time employment and a part-time job to enter the ministry. The court determined that Rev. Kneipp was in bad faith, noting the time frame in which he resigned from his prior employment coincided with the child support award made to the obligee. The court determined that the obligor was voluntarily underemployed and that his income earning potential must be considered in calculating his child support obligation. The court determined that it was appropriate to calculate Rev. Kneipp’s income based solely on his full-time position rather than holding him to a two job standard income.

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202 _Lowentritt v. Lowentritt_, 90 So.3d 1081 (La. App. 5 Cir. 2012).
203 _Massingill v. Massingill_, 564 So. 2d 770 (La. App. 2 Cir. 1990); _Hildebrand v. Hildebrand_, 626 So. 2d 578 (La. App. 3 Cir. 1993).
204 _Goodall v. Goodall_, 561 So.2d 867 (La. App. 2 Cir. 1990).
The court determined that the obligee was voluntarily underemployed insofar as she had quit her job in an attorney’s office to take a lower paying job so that she could spend more time at home with her children, all of whom were over the age of five years. The court concluded that the obligee’s higher rate of pay should be utilized in calculating the obligor’s child support.

Where a wife had a history of full-time employment, but at the time of trial, was only employed part-time by her current husband, it was proper to fix her gross income at her current part-time salary plus minimum wages up to full-time. Lewis v. Lewis, 616 So. 2d 744 (La. App. 1 Cir. 1993); see also Leonard v. Leonard, 615 So. 2d 909 (La. App. 1 Cir. 1993).

If a party is voluntarily unemployed or underemployed, his child support obligation shall be calculated based on a determination of his income earning potential. If a party has made only “token” job hunting efforts with few results, has applied only for work within his preferred field, and has not considered or pursued other career options, the courts are inclined to base the party’s income not on the lower amount of current earnings, but rather upon his income earning potential. See Glover v. Glover, 677 So.2d 659 (La. App. 2 Cir. 1996).

8.6 EXPENSE SHARING

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 re-marriage exists, except to the extent that such income is used directly to reduce the cost of a party’s personal expenses.206

Here is an example of how it could be done. Determine the net income of the spouse for whom expense sharing is to be calculated. Examine that spouse’s expenses for herself only. Thereafter, subtract the spouse’s net income from her expenses. The balance of her expenses not covered by her net income must be the amount “shared” by her current spouse. This amount would be added to her income.

In Greene v. Greene, 634 So.2d 1286 (La. App. 3 Cir. 1994), the court held that any contribution to expenses shared by the parties and their new spouses, such as a car loan, credit card debt, cable television, or rental insurance is includable as income. See also Kern v. Kern, 786 So.2d 193 (La. App. 4 Cir. 2011).

In Wollerson v. Wollerson, 687 So. 2d 663 (La. App. 2 Cir. 1997), the court addressed the issue of what information is discoverable from a second spouse. The court upheld an order compelling the second wife to disclose information from her personal checking account insofar as it is one of the few ways that a former wife can determine the second wife’s contribution to the husband’s expenditures. The appellate court ordered the trial court to conduct an in camera inspection of the checking account information to determine the relevancy of the records requested.

Preexisting child support/spousal support obligation
(lines 1 a-b of Worksheet A)

In computing monthly adjusted gross income on the child support worksheet, one should subtract any pre-existing child support obligations established by judgment from a litigant’s monthly gross income.

Monthly adjusted income (line 2 of Worksheet A)

After subtracting either or both of these pre-existing obligations from a litigant’s monthly gross income, one arrives at the monthly adjusted gross income represented as D on the Child Support Worksheet. The first child support/spousal support judgment obtained will always be pre-existing, even if it is subsequently modified. The modification does not change the “pre-existing” character of the judgment.

The combined total of each party’s monthly adjusted gross income
(line 3 of Worksheet A)

The percentage that each party’s monthly adjusted gross income bears to the total of the parties’ adjusted gross income (line 4 of Worksheet A)

To arrive at this percentage, divide each party’s monthly adjusted gross income by the total of the parties’ adjusted gross income.

The basic child support obligation (line 5 of Worksheet A)

This requires reference to the schedule of basic child support obligations contained in R.S. 9:315.14.

If the amount of the combined income falls between the guidelines, one would figure the exact child support amount as set forth below.

For example: Assume the combined income of the parties is $2,093. Thus, the income amount falls between $2,050 and $2,100. The child support for two children at $2,050 is $562. The child support for two children at $2,100 is $575. To arrive at the proper child support amount for $2,093, one should do the following calculations. $575 - $562 = $13. Subtract $2,050 from $2,093 = $43. Multiply 43 x 2 = 86. Now, multiply $13 x .86 = $11.18. Add $11.18 to $562 = $573.18. $573.18 is the basic child support obligation. This number should be placed in the space labeled “G”.

Net child care costs (LA. R.S. 9:315.3) (line 5 a on Worksheet A)

The net child care costs are determined by applying the Federal Credit for Child and Dependent Care Expenses provided in IRS Form 2441 to the total or actual child care costs. The form may be downloaded from http://www.irs.gov and is available for children aged 13 or younger. This is an addition to the basic child support obligation.

Child’s Health Insurance Premium Cost (La.R.S. 9:315.4)
(line 5 b on Worksheet A)

The Court may order one of the parties to maintain health insurance on the child/children. In determining which party should be required to maintain such insurance, the court shall consider each party’s insurance policy, his/her work history, personal income and other resources. A Qualified Medical Child Support
Orders (QMCSO) may also be sought—especially if the State is involved. See La. R.S. 46:236.8 and 29 U.S.C. § 1169. The QMCSO is an order of the court that provides for child support or health care benefit coverage to a qualified dependent (child) of a participant (parent) in a group health plan.

When health insurance is provided by the payor parent, a credit must be given to that parent in the amount of the premium. Thus, after one adds in the premium amount, this amount is then subtracted from the payor parent’s child support obligation, (N on Worksheet A), to obtain the Recommended Child Support Order.207 (P on Worksheet A). Child support by definition includes medical support.208

Health insurance premiums added to the Basic Child Support Obligation do not include any amount paid by an employee or any amounts paid for coverage of other persons. If more then one dependent is covered by health insurance which is paid through a lump sum dependent coverage premium, and not all such dependents are the subject of the guidelines calculation, the coverage shall be pro-rated among the dependents covered before being applied to the guidelines.209

☞ In all cases where the child is on a medical card, the Louisiana Department of Children and Family Services is an “indispensable party” to any Qualified Medical Child Support Order (QMCSO) being entered.

[J] - Extraordinary Medical Expenses (Unreimbursed) (line 5 c of Worksheet A) (La.R.S. 9:315.5)

By court order or consent of the parties, extraordinary expenses incurred on behalf of the child shall be added to the basic child support obligation. Most courts will impute in proportion to the parties share of gross income.

Extraordinary medical expenses are defined as “unreimbursed medical expenses which exceed two hundred fifty dollars per child per calendar year”. These expenses include, but are not limited to, reasonable and necessary costs for dental treatment, orthodontist, asthma treatments, physical therapy, uninsured chronic health problems and professional counseling or psychiatric therapy for diagnosed mental disorders not covered by medical insurance.210

[K] - Extraordinary Expenses (R.S. 9:315.6) (line 5 d of Worksheet A)

By court order or consent of the parties, the following expenses incurred on behalf of the child may be added to the basic child support obligation:

Private or special elementary or secondary school tuition, books and supplies which school are necessary to meet the needs of the child. Any transportation expenses of the child to get the child from one party to the other. In Guillory v. Ventre, 610 So. 2d 1056 (La. App. 3 Cir. 1992), the court compared what the private school can provide that is needed by the child to what can be provided by the public schools regarding the same educational need. Private school tuition can be added to the basic child support obligation where the children had always attended private school and the family always had adequate income to pay for such tuition.211

207 See McDaniel v. McDaniel, 670 So. 2d 767 (La. App. 3 Cir. 1996).
208 State, Dept. of Social Services, Office of Family Serv. v. Sensley, 63 So.3d 229 (La. App. 1 Cir. 2011).
209 Ola v. Ola, 985 So.2d 786 (La. App. 1 Cir. 2008); Timmons v. Timmons, 605 So. 2d 1162 (La. App. 2 Cir. 1992); Widman v. Widman, 619 So. 2d 632 (La. App. 3 Cir. 1993).
210 See Greene v. Greene, 634 S0.2d 1286 (La. App. 3 Cir. 1994) amended 638 S0.2d 1245 (La. App. 3 Cir. 1994).
211 Walden v. Walden, 835 So.2d 513 (La. App. 1 Cir. 2002); Corley v. Corley, 600 So. 2d 908 (La. App. 4 Cir. 1992); Schultz v. Schultz, 637 So. 2d 847 (La. App. 4 Cir. 1993).
“Other extraordinary expenses” do not include extracurricular recreational activities such as dancing lessons, baseball, or gymnastics. Only the domiciliary parent is entitled to be reimbursed for transportation costs to and from the residence of the parents. Where the mother moved to another state with the minor child due to her new spouse’s employment, the court assessed the child’s travel costs 50/50 between the parents.

The parent seeking to include the expense(s) has the burden of proof. See Basile v. Basile, 872 So.2d 1274 (La. App. 3 Cir. 2004).

[L] - Optional. Minus extraordinary adjustments (child’s income) (La. R.S. 9:315.7) (line 5e of Worksheet A)

A child’s income may be used to reduce that child’s basic needs, and thus, may be deducted from the basic child support obligation. However, this provision does not apply to income earned by a child while he/she is a full-time student, regardless of whether such income was earned during a summer or holiday break.

In Hall v. Hall, 617 So. 2d 204 (La. App. 3 Cir. 1993), the court concluded that Social Security survivor benefits payable to the mother as the children’s payee is income under La. R.S. 9:315.7. The trial court’s decision to only deduct 50% of such benefits from the basic child support obligation was within its discretion.

[M] - Calculation of Total Child support Obligation (La. R.S. 9:315.8) (line 6 of Worksheet A)

Total child support obligation is computed by adding together the basic child support amount (G), the net child care costs (H), the cost of health insurance premiums (I), extraordinary medical expenses (J), and other extraordinary expenses (K) less the child’s income (L), if applicable.

[N] - Each party’s child support obligation (La. R.S. 9:315.8 (C)) (line 7 of Worksheet A)

Each party’s child support obligation is determined by multiplying the total child support obligation by the percentage each party’s income bears to the combined monthly adjusted gross income.

[O] - Direct payments (La. R.S. 9:318.8(D)) (line 8 of Worksheet A)

Direct payments made by the noncustodial parent on behalf of the child for work-related net child care costs, health insurance premiums, extraordinary medical expenses, or extraordinary expenses provided as adjustments to the schedule. See also, sections related to health insurance costs, supra. The amount owed by the non-custodial parent after direct payments is deducted from his/her total child support obligation.

[P] - Recommended child support order (La. R.S. 9:315.8 (D)) (line 9 of Worksheet A)

The payor parent shall owe his total child support obligation less any court ordered direct payments in O.

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212 Lehr v. Lehr, 720 So. 2d 412 (La. App. 2 Cir. 1998); Valure v. Valure, 696 So. 2d 685 (La. App. 1 Cir. 1997).
214 Deshotels v. Deshotels, 638 So.2d 119 (La. App. 1 Cir. 1994).
215 See also, Corley v. Corley, 600 So. 2d 908 (La. App. 4 Cir. 1992); Armstrong v. Rayford, 902 So.2d 1214 (La. App. 2 Cir. 2005).
R.S. 9:315.14 requires a minimum child support award of $100 per month except in shared or split custody as provided in R.S. 9:315.9 and 315.10. In cases when the obligor has a medically documented disability that limits his ability to meet the mandatory minimum, the court may set an award of less than $100. But what if the obligor is on SSI? See R.S. 9:315(C)(3)(d)(i). In State v. Duncan, 2010 WL 4273103, 2010-0426 (La. App. 1 Cir. 2010), the Court recognized the statutory prohibition against counting SSI as income, but vacated the child support on other grounds.

8.7 ADJUSTMENTS TO CHILD SUPPORT DUE TO TIME SPENT WITH THE NON-DOMICILIARY PARENT

Joint custody means a joint custody order that is not shared custody as defined in La. R.S. 9:315.9. In cases of joint custody, the court “shall consider the period of time spent by the child with the non-domiciliary party as a basis for adjustments to the amount of child support to be paid during that period of time.” La. R.S. 9:315.8(E)(1) If under a joint custody order, the person ordered to pay child support has physical custody of the child for more than 73 days, the court may order a credit to the child support obligation. The burden of proof is on the person seeking the credit. A day for the purposes of this Paragraph shall be determined by the court. However, in no instance shall less than 4 hours of physical custody of the child constitute a day. La. R.S. 9:315.8(E)(2)

Do the Louisiana Child Support Guidelines automatically allow for a deviation based solely on the amount of time a non-domiciliary parent spends with a child? No. In Guillot v. Munn, 756 So.2d 290 (La. 2000), the Supreme Court ruled that an automatic deviation is not allowed. Rather, the party urging a reduction in the child support obligation based on the amount of time spent with the child must bear the burden of proving that he:

1. exercises shared custody or extraordinary visitation with the child,
2. that the extra time spent with the non-domiciliary parent results in a greater financial burden on that parent and a concomitant lesser financial burden on the domiciliary parent, and finally,
3. that the application of the guidelines would not be in the child’s best interest or would be inequitable to the parties.

In Nixon v Nixon, 631 So.2d 42 (La. App. 2 Cir. 1994), the court determined that where custody of two children was split between the parents with both children living with the father during the summer months, the support obligation should be first determined separately for the number of children in the domiciliary custody for each parent. The amount of child support each parent owes the other is next calculated by multiplying the owed support obligation by the parent’s proportionate share of the combined adjusted income. The amounts the parties owe each other is then offset. After Mr. Nixon’s support obligation was proportioned over 12 months, he owed only $98.47 per month. See also Jones v. Jones, 877 So.2d 1061 (La. App. 2 Cir. 2004) for a R.S. 9: 315.8 (E) consideration of relative time spent with each parent.

In Birkenstock v. Birkenstock, 666 So. 2d 1168 (La. App. 5 Cir. 1995), wherein the children spent 50% of the time with their mother and 50% of their time with the father, the father wanted his child support obligation reduced from $755 to
$377.50. The trial court reduced his obligation to $500 stating, “there is no hard and fast rule to determine just how much to reduce the child support obligation based on percentage of time the children live with either parent.”

In some jurisdictions, the so-called 11/12ths rule is applied. Thus, if the parents are joint custodians and one parent has the children for the nine months of the school year and the other parent has the children for the three month summer school vacation period, the court gives the non-primary domiciliary parent a break on his child support. At the same time, the court recognizes that the domiciliary parent’s expenses do not substantially decrease just because the children are not in the home during the summer. Thus, one would initially calculate monthly child support as usual for the payor parent. This amount is then multiplied by 11 months and then divided by 12. Thus, payor parent gets credit for one month of support in recognition of his summer custodial time with the children.

In Falterm an v. Falterm an, 702 So. 2d 781 (La. App. 3 Cir. 1997), the court held that adjustments to child support do not have to be made in proportion to the amount of time the children spend with the non-domiciliary parent. Here the children spent 40% of their time with their father during the school year and 60% of their time during the summer months. The court found that the children’s ongoing expenses provided by the mother were unaffected during the time the children were with their father and refused to reduce support for the time spent with their father.

In Temple v. Temple, 651 So. 2d 466 (La. App. 3 Cir. 1995), the court determined that “the statute…merely requires that the court consider time spent with the non-domiciliary parent, but does not require that the court make an adjustment for this time.”

8.8 EFFECT OF SHARED CUSTODIAL ARRANGEMENT (R.S. 9:315.9) (WORKSHEET B)

Shared custody means a joint custody order in which each parent has physical custody of the child for an approximately equal amount of time. Obligation Worksheet B at 9:315.20 is the form to use. The calculation is based on a formula that “first requires that the basic child support obligation be multiplied by 1.5 approximating the duplication of costs, such as housing, food, and transportation, incurred by both parents who have physical custody for approximately one-half of the year. Only after recognition of the duplication of costs in a shared custody arrangement is the adjusted basic child support obligation divided between the parents in proportion to their respective adjusted gross incomes. Secondly, each parent’s share of the basic support obligation shall be cross-multiplied by 50% or the actual percentage of time the child spends with the other parent and the parent owing the greater amount pays the difference to the other parent as support, after deducting each parent’s proportionate share of any direct payments made to third parties for the child.” A sharing of 45.5% of days with father and 54.5% with mother constituted shared custody, triggering R.S. 9:315.9. 216

8.9 EFFECT OF SPLIT CUSTODIAL ARRANGEMENT (R.S. 9:315.10) (WORKSHEET A)

Split custody means that each parent is the sole custodial or domiciliary parent of at least one child to whom support is due. Obligation Worksheet A is used.

216 Desoto v. Desoto, 893 So.2d 175 (La. App. 3 Cir. 2005).
Each parent theoretically “calculates the total child support obligation owed to the other parent… Then the parent owing the greater amount as reflected in the two work sheets, owes the difference as a child support obligation.”

8.10 DEVIATION FROM THE CHILD SUPPORT GUIDELINES (R.S. 315.1)

The guidelines are mandatory and apply to any action to establish or modify child support filed on or after October 1, 1999. The guidelines create a rebuttable presumption that the amount calculated under the guidelines is the proper amount for a child support award.

Courts may deviate from the guidelines if their application would not be in the children’s best interest or would be inequitable to the parties. The specific reasons for the deviation, as well as the amount required under a mechanical application of the guidelines, must be stated. See R.S. 315.1(C) for examples of some of the common reasons for a deviation. The court cannot deviate without evidence on the father’s alleged expenses for a child of a subsequent marriage.

8.11 AMOUNTS NOT SET FORTH IN OR THAT EXCEED THE CHILD SUPPORT GUIDELINES

Occasionally, you may have a case with an adverse party whose income is either “off the guidelines” or combined with your clients’ income results in an “off the guidelines” case. Extrapolation should not be used. The courts should review evidence of the actual needs and lifestyle of the children.

Recent cases in this area are as follows:

- Allie v. Allie, 80 So.3d 1349 (La. App. 3 Cir. 2011);
- Dejoie v. Guidry, 71 So.3d 1111 (La. App. 4 Cir. 2011);
- Harang v. Ponder, 36 So.3d 954 (La. App. 1 Cir. 2010);
- Earle v. Earle, 998 So.2d 828 (La. App. 2 Cir. 2008).

8.12 MODIFICATIONS OF CHILD SUPPORT

In Stogner v. Stogner, 739 So. 2d 762 (La. 1999), the Supreme Court issued a decision on modification of child support judgments. Stogner made two important findings. The first was that the appellate court had erred in requiring a “substantial change” in circumstances instead of a simple change as provided in the prior Louisiana Civil Code art. 142 and La. R.S. 9:311. The law was changed in 2001 to “a material change” thus overruling Stogner. The second Stogner finding was that even a stipulated or consent judgment regarding child support must be reviewed by the court for the adequacy of the stipulated amount in light of the child support guidelines. If a stipulated amount differs from the guidelines, the court must give specific oral or written reasons for deviating from the guidelines. This holding is still good law. Thus, to modify a prior judgment of child support, allege a “material change” in circumstances for your client from the previous award date to the new filing. If a consent judgment is reached, ensure that the child support amount is consistent with the child support guidelines and satisfies Stogner.

218 Hildebrand v. Hildebrand, 626 So.2d 578 (La. App. 3 Cir. 1993).
219 Miller v. Miller, 610 So. 2d 183 (La. App. 3 Cir. 1992).
What is a “material change” in circumstances of the parties? The statute says that the change must have occurred from the prior award to the time of filing the motion to modify. Otherwise, the statute and jurisprudence do not define “material change” for private child support actions. Parties typically argue a change in the parties’ income, increased expenses or a change in time spent with the child. If the state brought the child support action, a material change exists when strict application of the child support guidelines will result in a 25% change in the child support award.\footnote{La. R.S. 9: 311 (C); State ex rel. Groom v. Hauer, 2010 WL 1170261 (La. App. 1 Cir. 2010).} It is important that the record for the original award be supported by each party’s Obligation Worksheet. Without such documentation, it is difficult to determine whether a material change has occurred since the prior award.

Parties can temporarily modify child support extrajudicially by an agreement.\footnote{Buxton v. Buxton, 2012 WL 1070012 (La. App. 1 Cir. 2012).} The agreement must meet the requirements of a contract and the evidence must establish that the parties have agreed to waive or modify court ordered payments. Also, the agreement must foster continued support of the child and not interrupt his maintenance or otherwise work to his detriment.

\footnote{R. S. 9:315.1(D) states that the Court may require the parties to provide the proof that is otherwise mandated by R.S. 9:315.2(A)… which provides that “the parties shall provide to the Court a verified income statement…earnings.” The Author’s position is that in order to comply with Stogner, the mandatory review expected of the Court can only be meaningful if the consent judgment is submitted in compliance with R.S. 9:315.2(A), i.e., together with supporting documentation of the parties income and not just a worksheet. Otherwise, the absurd result of the parties’ colluded gross income would be self-serving in any amount that is submitted to the Court.}

8.13 RETROACTIVITY OF INTERIM CHILD SUPPORT JUDGMENT (R.S. 9:315.21)

Except for good cause shown, a judgment awarding, modifying or revoking an interim child support judgment is retroactive to the date of judicial demand.\footnote{La. R.S. 9: 315.21 (A).} A judgment that initially awards or denies final child support is effective as of the date the judgment is signed and terminates an interim child support judgment as of that date.\footnote{La. R.S. 9: 315.21 (B).}

Be sure to ensure that the interim support obtained is based on the correct amount that your client is owed based on substantiated income (see Stogner, supra). If a lower amount is obtained, then your client is “short changed” as the final child support judgment down the road is generally not retroactive to the date of judicial demand but effective when the final support judgment is signed unless good cause exists. Common examples of interim amounts that may sometimes not be based on verified income usually arise in the context of Hearing Officer Conferences or Protective Order Hearings.

Most of the circuit courts incorrectly read the statute strictly and have held that the signing of a judgment of final child support terminates an existing award of interim child support as of that date and a trial court’s determination that the final child support award be retroactive to the date of judicial demand is erroneous as a matter of law. This is despite the fact that the interim child support could have been erroneously set low. See Author’s query raised below in 2005.

\footnote{La. R.S. 9: 311 (Cl)}
But what if an interim child support is rendered at a lower amount – because it was based on insufficient documentation and then later, a “proper” higher final child support order is set at the Rule? Are you stuck with the interim support order which “shortchanged” your client? This would be inequitable. I would ensure that any interim order is correctly set based on levels of verified income. If the interim amount is estimated, then the interim order should provide for and be contingent upon a modification and retroactivity clause prior to the final support being set. This is allowed pursuant to R.S. 9:315.21(A). This modification of the interim order allows the client to be “reimbursed” as a result of it being retroactive to the date of original date of judicial demand ... and the good cause being that the interim order was only estimated and not set at the correct level. This two prong approach resolves the anomaly created by the various provisions and yet in the Author’s opinion, serves the practical intent and implementation of the retroactivity statute for interim support orders.

In 2010, the Louisiana Supreme Court provided the “common sense” approach needed to correct the anomaly that was raised by the Author above. In instances where the initial interim child support is not necessarily set at the correct level because of fraud, etc., the court stated: “[the obligee] correctly notes that the Court of Appeal opinion creates a perverse incentive for parties in divorce proceedings to falsely report their income and means in the hope of paying as little as possible in interim support. If good cause exists, the final judgment can be retroactive to the date of judicial demand even though there is an interim child support judgment in place.” See Vaccari v. Vaccari, 50 So.3d 139, 144 (La.2010). The burden of proving good cause is on the obligee (the party to whom support is owed). See Shaw v. Shaw, 87 So.3d 235 (La. App. 2 Cir. 2012).

The Hearing Officer statute, See R.S. 46:236.5(C), originally provided for the Hearing Officers to facilitate calculations (support matters) for the court. As a result of changes to the statute, by local rule, hearing officers now can play a greater role in all family law matters. They do this by making recommendations to the court in just about all family law matters. Attorneys must be very careful to ensure that if any recommendations are made, they are based on “findings of fact” which must be based on competent (sworn testimony, affidavits, etc.) evidence. Clients must participate in the process or at the very least, approve any stipulations to resolve the issues. Do not hesitate to appeal the “recommendations” by filing an objection within the delays allowed by your local rule.

8.14 TAX DEDUCTIONS RELATIVE TO CHILD SUPPORT ACTIONS

Federal and State tax dependency deductions are frequently just “handed out” to the non-domiciliary parent. They are governed by R.S. 9:315.18 and be sure to raise this if it is detrimental to your client. If granted, the domiciliary parent will need to sign IRS Form 8332, relinquishing the exemption. If it is not signed by the domiciliary parent, there is nothing that the IRS will do. A contempt action can be pursued in the child support proceedings to enforce compliance.224 The party seeking to have the dependent tax deduction taken away from a domiciliary parent has the burden of proving that no child support arrearages are owed and that it would substantially benefit the non-domiciliary party without signifi-

224 State v. Dept. of Social Services v. Mason, 44 So.3d 744 (La. App. 5 Cir. 2010).
cantly harming the domiciliary party. *State v. Landry*, 975 So.2d 157 (La. App. 3 Cir. 2008). Incorrectly, but as a practical matter, the onus and practice is usually placed on the domiciliary parent. So be ready to argue either significant harm to your client or that the obligor is in arrears.

The child tax credit, which is an offset against tax liability, goes with the dependency exemption and cannot be separately assigned by the court. See I.R.C. § 24(c)(1)(A). The Household and Dependent Care Credit, Head of Household, and the Earned Income Credit, are all defined and determined by the Internal Revenue Code. They follow the domiciliary parent and may not be reallocated by the court.

**8.15 ENFORCEMENT OF CHILD SUPPORT AWARDS**

Child support awards may be enforced by income assignment, contempt, motion for arrearages, recordation of judgment against motor vehicles, suspension of licenses, intercept of tax refunds, etc. The court must, except for good cause shown, award attorney fees when it renders an arrearages judgment. A judgment for arrearages due and made executory (not a mere child support order), shall be a judicial mortgage. An arrearages judgment may also be filed with the Office of Motor Vehicles to create a privilege on the payor’s motor vehicle.

Contempt of court for child support may involve punishment pursuant to R.S. 13:4611 and more specifically, incarceration. While La. R.S. 13:4206 does provide, that the inability to pay is a defense to contempt for failure to pay a money judgment – it was often overlooked. In *Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507 (2011), the U.S. Supreme Court held that due process requires “safeguards” for pro se indigents in civil contempt cases. These safeguards include clear notice that the ability to pay is a critical issue in a civil contempt hearing, a form or affidavit to elicit the indigent’s financial circumstances, and an express finding must be made by the Court on the ability to pay issue before ordering incarceration.

*Do not hesitate to use the administrative suspension of certain licenses if the other side plays “games” and does not pay child support. See La. R.S. 9:315.40 et seq. In many cases, you may want to advise the client to contact support enforcement – especially if tax refunds or interstate enforcement becomes necessary. An action to make child support arrearages executory has a prescriptive period of 10 years. See La. Civ.Code art. 3501.1.*

**8.16 INTERSTATE SUPPORT ORDERS (PARTIES OR ORDERS ACROSS STATE LINES).**

Interstate support (child and spousal) orders are governed by the Uniform Interstate Family Support Act (UIFSA) at La. Children’s Code art. 1301.1 et seq. and lays out the basis for a court to have subject matter jurisdiction for the enforcement and modification of support orders across state lines (either parties or orders are between states). The UIFSA attempts to limit modification jurisdiction to just one state at a time, once there is an existing child support award

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226 La. R.S. 9: 323.
228 Also, as a general rule, non-payment resulting from financial inability cannot support a contempt charge which requires a finding of willful disobedience. Lutke v. Lutke, 750 So.2d 512, 517-18 (La. App. 2 Cir. 2000). Testimony of non-payment alone is insufficient to prove willful disobedience. *Id.* at 518.
issued. See Jurado v. Brashear, 782 So. 2d 575 (La. 2001) for a discussion on UIFSA. Note also, that while personal jurisdiction is not necessary in divorce and custody matters, support matters on the other hand, require it for full faith and credit.

8.17 INTRASTATE SUPPORT ORDERS (PARTIES OR ORDERS IN DIFFERENT PARISHES).

Intrastate support (child and spousal) orders are governed by Code of Civil Procedure art. 2785 et seq. Surprisingly, this law is rarely invoked and there are no reported appellate decisions. The law mandates an elaborate registration and approval process before non-rendering courts of the support order can make modifications. Code of Civil Procedure art. 74.2 allows the party receiving the support to seek modification in the parish of his domicile. Therefore, it appears that in cases where the domicile is different from that of the rendering parish, the original order must be registered in the new parish prior to any modification action. The statute for intrastate registration of support orders for modification and enforcement are not venue provisions See Scurria v. Griggs, 917 So.2d 1215 (La. App. 2 Cir. 2005). Venue for support modification must be determined under Code of Civil Procedure art. 74.2.
OBLIGATION WORKSHEET A
(The worksheet for calculation of the total support obligation under R.S. 9:315.8 and 315.10)

President: ____________________________

Parish: ____________________________

Louisiana

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<table>
<thead>
<tr>
<th>Petitioner</th>
<th>Respondent</th>
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</table>

Children | Date of Birth | Children | Date of Birth |
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A. B. C.

<table>
<thead>
<tr>
<th>Petitioner</th>
<th>Respondent</th>
<th>Combined</th>
</tr>
</thead>
</table>

1. MONTHLY GROSS INCOME (R.S. 9:315.2(A))

   a. Preexisting child support payment
   
   b. Preexisting spousal support payment

2. MONTHLY ADJUSTED GROSS INCOME
   
   (Line 1 minus 1a and 1b)

3. COMBINED MONTHLY ADJUSTED GROSS INCOME
   
   (Line 2 column A plus line 2 column B). (R.S. 9:315.2(C))

4. PERCENTAGE SHARE OF INCOME
   
   (Line 2 divided by line 3). (R.S. 9:315.2(C))

5. BASIC CHILD SUPPORT OBLIGATION
   
   (Compare line 3 to Child Support Schedule). (R.S. 9:315.2(D))

   a. Net Child Care Costs (Cost Minus Federal Tax Credit)(R.S. 9:315.3)
   
   b. Child’s Health Insurance Premium Cost (R.S. 9:315.4)
   
   c. Extraordinary Medical Expenses (Uninsured Only)
      
   d. Extraordinary Expenses
      
   e. Optional, Minus extraordinary adjustments
      
6. TOTAL CHILD SUPPORT OBLIGATION
   
   (Add lines 5, 5a, 5b, 5c, and 5d. Subtract line 5e.) (R.S. 9:315.8)

7. EACH PARTY’S CHILD SUPPORT OBLIGATION
   
   (Multiply line 4 times line 6 for each parent.)

8. DIRECT PAYMENTS
   
   (Made by the noncustodial parent on behalf of the child for work-related net
   child care costs, health insurance premiums, extraordinary medical expenses
   or extraordinary expenses.)

9. RECOMMENDED CHILD SUPPORT ORDER
   
   (Bring down amount from line 6 for non-custodial or non-domiciliary party only.
   Leave custodial or domiciliary party column blank.)

Comments, calculations, or rebuttals to schedule or adjustments if made under 8 above or if ordering a credit
for a joint custodial arrangement.

Prepared by ____________________________

Date ________________________________

(370)
OBLIGATION WORKSHEET B
(The worksheet for calculation of the total child support obligation under R.S. 9:315.9)

<table>
<thead>
<tr>
<th>Court</th>
<th>Parish</th>
<th>Louisiana</th>
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<tbody>
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</table>

Case Number ________________________
Div/CtRm ____________________________
and _______________________________

Petitioner
Respondent

<table>
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<th>Children</th>
<th>Date of Birth</th>
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A. B. C.

<table>
<thead>
<tr>
<th>1. MONTHLY GROSS INCOME (R.S. 9:315.2(A))</th>
<th>$</th>
<th>$</th>
<th>//////////</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Preexisting child support payment</td>
<td>–</td>
<td>–</td>
<td>//////////</td>
</tr>
<tr>
<td>b. Preexisting spousal support payment</td>
<td>–</td>
<td>–</td>
<td>//////////</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2. MONTHLY ADJUSTED GROSS INCOME</th>
<th>$</th>
<th>$</th>
<th>//////////</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Line 1 minus 1a and 1b)</td>
<td></td>
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<td>-----------</td>
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<table>
<thead>
<tr>
<th>3. COMBINED MONTHLY ADJUSTED GROSS INCOME</th>
<th>//////////</th>
<th>//////////</th>
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</thead>
<tbody>
<tr>
<td>(Line 2 Column A plus Line 2 Column B)</td>
<td>(R.S. 9:315.2(C))</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>4. PERCENTAGE SHARE OF INCOME</th>
<th>%</th>
<th>%</th>
<th>//////////</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Line 2 divided by line 3)</td>
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<td>-----------</td>
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<tr>
<td>(R.S. 9:315.2(C))</td>
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<table>
<thead>
<tr>
<th>5. BASIC CHILD SUPPORT OBLIGATION</th>
<th>$</th>
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</thead>
<tbody>
<tr>
<td>(Compare Line 3 to Child Support Schedule)</td>
<td>(R.S. 9:315.2(D))</td>
<td></td>
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</table>

<table>
<thead>
<tr>
<th>6. SHARED CUSTODY BASIC OBLIGATION</th>
<th>$</th>
<th>$</th>
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<tbody>
<tr>
<td>(Line 5 times 1.5)</td>
<td></td>
<td></td>
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<tr>
<td>(R.S. 9:315.9(A)(2))</td>
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<table>
<thead>
<tr>
<th>7. EACH PARTY'S THEORETICAL CHILD SUPPORT OBLIGATION</th>
<th>$</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Multiply line 4 times 6 for each party)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(R.S. 9:315.9(A)(2))</td>
<td></td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>8. PERCENTAGE WITH EACH PARTY</th>
<th>%</th>
<th>%</th>
<th>//////////</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Use actual percentage of time spent with each party, if percentage is not 50% (R.S. 9:315.9(A)(3))</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NOTE: Lines forming an “X” connect rows 7 and 8 of columns A and B of this worksheet</td>
<td></td>
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<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>9. BASIC CHILD SUPPORT OBLIGATION FOR TIME WITH OTHER PARTY</th>
<th>$</th>
<th>$</th>
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</thead>
<tbody>
<tr>
<td>(Cross Multiply line 7 for each party times line 8</td>
<td></td>
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<tr>
<td>for the other party) (R.S. 9:315.9(A)(3))</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(For Line 9 Column A, multiply Line 7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Column A times Line 8 Column B)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(For Line 9 Column B, multiply Line 7 Column B times Line 8 Column A)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>a. Net Child Care Costs</th>
<th>(Cost Minus Federal Tax Credit)</th>
<th>$</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>(R.S. 9:315.3)</td>
<td>(R.S. 9:315.9(A)(3))</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(R.S. 9:315.9(A)(2))</td>
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</tbody>
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<table>
<thead>
<tr>
<th>b. Child’s Health Insurance Premium Cost</th>
<th>$</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td>(R.S. 9:315.4)</td>
<td></td>
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<table>
<thead>
<tr>
<th>c. Extraordinary Medical Expenses (Uninsured Only)</th>
<th>$</th>
<th>$</th>
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<tbody>
<tr>
<td>(Agreed to by parties or by order of the court)</td>
<td></td>
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<tr>
<td>(R.S. 9:315.5)</td>
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</table>

<table>
<thead>
<tr>
<th>d. Extraordinary Expenses</th>
<th>$</th>
<th>$</th>
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<tbody>
<tr>
<td>(Agreed to by parties or by order of the court)</td>
<td></td>
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<tr>
<td>(R.S. 9:315.6)</td>
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<tr>
<th>e. Optional. Minus extraordinary adjustments</th>
<th>$</th>
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<tbody>
<tr>
<td>(Child’s income if applicable.) (R.S. 9:315.7)</td>
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<thead>
<tr>
<th>10. TOTAL EXPENSES/EXTRAORDINARY ADJUSTMENTS</th>
<th>$</th>
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<tbody>
<tr>
<td>(Add lines 9a, 9b, 9c, and 9d; Subtract line 9e.)</td>
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<thead>
<tr>
<th>11. EACH PARTY’S PROPORTIONATE SHARE OF EXPENSES/EXTRAORDINARY ADJUSTMENTS</th>
<th>$</th>
<th>$</th>
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</thead>
<tbody>
<tr>
<td>(Line 4 times line 10) (R.S. 9:315.9(A)(4))</td>
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</table>

(371)
**12. DIRECT PAYMENTS**

made by either party on behalf of the child for work-related net child care costs, health insurance premiums, extraordinary medical expenses, or extraordinary expenses. Deduct each party’s proportionate share of an expense owed directly to a third party. If either parent’s proportionate share of an expense is owed to the other parent, enter zero. (R.S. 9:315.9(A)(5))

<table>
<thead>
<tr>
<th>Line</th>
<th>Coverage</th>
<th>Amount</th>
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<tbody>
<tr>
<td>12</td>
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</table>

**13. EACH PARTY’S CHILD SUPPORT OBLIGATION**

(Line 9 plus line 11 minus line 12) (R.S. 9:315.9(A)(4) and (5))

<p>| | |</p>
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**14. RECOMMENDED CHILD SUPPORT ORDER**

(Subtract lesser amount from greater amount in line 13 and place the difference in the appropriate column) (R.S. 9:315.9(A)(6))

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Comments, calculations, or rebuttals to schedule or adjustments:

Prepared by ___________________________      Date ________________________________

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**9. SPOUSAL SUPPORT**

La. Civil Code articles 111-117 govern spousal support.

**9.1 INTERIM SPOUSAL SUPPORT**

The purpose of interim spousal support is to maintain the status quo of the parties without unnecessary economic dislocation until final periodic spousal support can be determined or until 180 days after the divorce judgment, whichever occurs first. However, interim spousal support may extend beyond this period for good cause. “Good cause” has not been defined by our courts. “Good cause” must be determined on a case by case basis. An example of “good cause” might be the disability of a claimant or a situation where the claimant is prevented from seeking employment due to circumstances beyond her control. Another example might be where a spouse is unduly delaying the community property partition to starve the other spouse. Some courts automatically order interim spousal support to extend 180 days from the divorce judgment. However, one should specifically plead for an award of interim spousal support extending, at a minimum, for 180 days from the date of rendition of the divorce judgment.

A spouse may be awarded interim spousal support based on her needs, the other party’s ability to pay, and the parties’ standard of living during the marriage. There is a movement by some courts to rely on the parties standard of living during the marriage in determining the amount of support granted. The burden of proof for interim spousal support is on the claiming spouse. The claiming spouse must prove that she lacks sufficient income to maintain the standard of living that she enjoyed while residing with the payor spouse during the marriage. Fault is not an issue for interim spousal support.

For an award of interim spousal support, the court looks to the net incomes of the spouses and their reasonable expenses. Thus, if you are preparing an affidavit of income and expenses for your client (the claiming spouse), be sure that you list each and every expense she may have or had during the marriage. For example, if your client has been forced to move in with relatives due to the phys-

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230 Roan v. Roan, 870 So. 2d 626 (La. App. 2 Cir. 2004).
ical separation of the parties, be sure to include in his affidavit anticipated expenses for housing, utilities, food, tax on the support, etc., so that the court will fully appreciate your client’s actual expenses. Clearly, the standard of living during the marriage did not include the spouse living with relatives. An award of interim spousal support is within the trial court’s discretion and will not be disturbed on appeal absent a clear abuse of discretion.

One might not think it valuable to plead for spousal support for indigent clients. However, in doing so, you may well obtain additional financial help for your client. It may be minimal, but even an additional $25 per month can greatly help (negotiate medical insurance, car or house notes, etc.) a client with minor children during the divorce process.

9.2 TERMINATION OF INTERIM SPOUSAL SUPPORT

When a claim for final spousal support is pending, interim spousal support terminates not upon the rendition of the judgment of divorce, but upon the rendition of a judgment awarding or denying final spousal support or 180 days from the rendition of the judgment of divorce, whichever comes first. Often a payee will want to delay termination of interim spousal support because the award can be substantially higher than final spousal support and the payee may not win final support because of the fault issue. Thus, if your client is able to prove that she was not at fault, it is unwise to only ask for interim spousal support because then, if final spousal support is not before the court, the interim spousal support “shall terminate upon the rendition of a judgment of divorce.” There are other times when a client may want to get divorced irrespective of the spousal support ramifications. Document your client’s directive in the case file or have them “sign off” on their decision.

☞ If your client is on SSI, spousal support may be taxable income and may cause problems with her SSI and Medicaid eligibility.

9.3 FINAL PERIODIC SPOUSAL SUPPORT (CIVIL CODE ART. 112)

A spouse may be granted final periodic spousal support when that spouse has been free from fault in the dissolution of the marriage and does not possess sufficient means for support. “Fault” which precludes final periodic spousal support must arise to the level of a previously existing fault ground for legal separation or divorce. Also, the misconduct must not only be of a serious nature, but also, an independent contributing or proximate cause of the breakup of the marriage.

The most common types of fault include adultery, habitual intemperance, cruel treatment, abandonment and public defamation.

Civil Code art. 111 provides that a party must be free from fault “prior to the filing of a proceeding to terminate the marriage” as opposed to prior to the rendition of the divorce judgment. Thus, a party may file a Civil Code art. 102 divorce, and thereafter, commit adultery. Is the spouse who filed for the 102 divorce precluded from receiving final periodic spousal support on the basis of fault? Based

232 Roan v. Roan, 870 So. 2d 626 (La. App. 2 Cir. 2004); Bickham v. Bickham, 849 So. 2d 707 (La. App. 1 Cir. 2003); Speight v. Speight, 866 So. 2d 344 (La. App. 3 Cir. 2004).

233 Generally, a payee only wins final spousal support in about 40% of litigated cases.

234 Carr v. Carr, 756 So. 2d 639 (La. App. 2 Cir. 2000); Patton v. Patton, 856 So.2d 56 (La. App. 2 Cir. 2003); Bowes v. Bowes, 798 So. 2d 996 (La. App. 4 Cir. 2001).

235 Allen v. Allen, 648 So. 2d 359 (La. 1994); Ashworth v. Ashworth, 86 So.3d 134 (La. App. 3 Cir. 2012).

236 Carr v. Carr, 756 So. 2d 639 (La. App. 2 Cir. 2000).

237 Mayes v. Mayes, 743 So.2d 1257 (La. App. 1 Cir. 1999).
on the language of the statute, the answer is no. To defeat final periodic spousal support, “fault” must be a cause for the breakup of the marriage and must occur prior to the filing of a divorce action.

Reconciliation that follows misconduct which constitutes “fault” nullifies the prior fault. Conduct caused by mental illness is excused and will not bar final support. The mental illness must precede the misconduct. In these cases, expert medical testimony on the mental illness and the causal relationship to the misconduct is highly recommended, but not required.

The burden of proof in proving disqualifying fault should be with the non-claiming spouse because that would be his defense in not having to pay. But, courts have held that for a claimant spouse to prove entitlement to final support, that spouse must affirmatively prove freedom from fault. Thus, it appears that the claimant needs to put on some evidence that she was a “good” spouse and this appears to be the trend.

Our courts must consider all relevant factors when determining the entitlement, amount and duration of final support. Factors to consider in determining whether an ex-spouse is in need of post-divorce final periodic spousal support include his income, means, earning capacity, assets, the liquidity of those assets, his financial obligations, his health and age, the duration of the marriage and the tax consequences to the parties. These factors should be considered by the court whenever it makes or modifies a final spousal support award.

The principal factor to consider when making an award of final periodic spousal support is the relative financial positions of the parties. Final periodic support (previously permanent alimony) has been compared to a “pension” and courts have traditionally applied it conservatively to cover only the basic necessities of life. The spouse who proves that he is in “necessitous circumstances” is entitled to only an amount adequate for his “maintenance” which includes, food, shelter, clothing, reasonable and necessary transportation or automobile expenses, medical and drug expenses, utilities, household expenses and tax liability caused by the final support award.

Final spousal support cannot be set for an amount more than one-third the net income of the obligor spouse. See La. Civil Code art. 112(B). Also, pursuant to La. R.S. 13:3881, the maximum income that can be seized for spousal support is 60% of the disposable earnings while for child support, it is 50%. One would expect that children take priority over adult needs and that it would be the other way around.

There is a trend in our courts to award “rehabilitative support” which terminates after a specific period. Comment (c) to Article 112 explains that the word “duration” in the article “permits the court to accord rehabilitative support and forms of support that terminate after a set period of time.” Hence, factors of length of the marriage, education, ability to work; and health are important considerations.

238 Doane v. Benenate, 671 So.2d 523 (La. App. 4 Cir. 1996).
239 Doane v. Benenate, 671 So.2d 523 (La. App. 4 Cir. 1996).
241 Diggs v. Diggs, 6 So.3d 1030 (La. App. 3 Cir. 2009).
242 Thibodeaux v. Thibodeaux, 668 So. 2d 1269 (La. App. 5 Cir. 1987).
243 Preis v. Preis, 631 So. 2d 1349 (La. App. 3 Cir. 1994); Wascom v. Wascom, 713 So. 2d 1271 (La. App. 1 Cir. 1998); Brignac v. Brignac, 833 So.2d 373 (La. App. 5 Cir. 2002).
9.4 RETROACTIVITY OF SPOUSAL SUPPORT

See R.S. 9:321 for retroactivity of spousal support, which has the same rationale as the child support provisions at R.S. 9:315.21.

9.5 MODIFICATION AND INCOME ASSIGNMENT OF SPOUSAL SUPPORT

To seek a decrease or an increase in either interim spousal support or final support, the moving party must prove a “material” change in circumstances of the parties. Periodic support shall be terminated when it becomes unnecessary. Roberts v. Roberts, 700 So. 2d 1099 (La. App. 5 Cir. 1997). A final periodic spousal support award shall not exceed one-third of the payor’s net income. An Income Assignment Order is an appropriate enforcement vehicle for both spousal and child support awards. Ellefson v. Ellefson, 666 So. 2d 1112 (La. App. 5 Cir. 1995).

But, See January v. January, 649 So.2d 1133 (La. App. 3 Cir. 1995), where the definition of “support” does not cover spousal support in R.S. 9:303 and income assignment is excluded. Garnishment under fieri facias would apply. The author believes that the Third Circuit’s interpretation of the definition of support is incorrect because when the entire statutory scheme is read together, spousal support goes hand in hand with child support.

☞ The right to claim after divorce the obligation of spousal support is subject to a peremption of 3 years. See La. Civil Code art. 117. The right to obtain a judgment for arrearages for spousal support, has a prescriptive period of 5 years. See La. Civil Code art. 3497.1. If the obligation to pay was a conventional one, prescription for arrearages would be 10 years. See La. Civil Code art. 3499.

10. PATERNITY AND NAME CHANGES

See the web site for the Louisiana Dept. of Health and Hospitals – Office of Public Health for an informational packet on “Birth Registration and Louisiana Paternity Laws” at: http://www.oph.dhh.state.la.us. The request for services in this area of the law has increased greatly. It is important to have the necessary affidavits or information available for our clients. It requires a working knowledge of the various statutes to be able to know what options the client may have. Brief synopses of the provisions are provided herein.

R.S. 9:392 - Acknowledgment; requirements; content

A putative father who executed an authentic Act of Acknowledgement of Paternity may seek to revoke his acknowledgment. R.S. 9:392 (7)(a) provides the procedure for revocation. See also Civil Code art. 195. Although some may argue that the putative father’s plight may not be that great, the problem is magnified when the mother is unable to obtain child support because there are two fathers (one who has acknowledged the child but is not the biological father as a result of DNA tests) and the another person who needs to be tested. Does the first father need to revoke before the second is tested? How many “fathers” should be tested?

R.S. 9:396 and R.S. 9:398.2 — allows for blood or tissue test for determining paternity.

R.S. 13:4751 et seq. — allows for name change of a child or adult to be contradictorily tried against the District Attorney. A new birth certificate is issued.
**R.S. 9:464** – allows for the name of the adult adopted person to be changed in the act of adoption. A new birth certificate may be issued.

**R.S. 40:46** – was amended by Act 621 of the 2012 Louisiana legislative Session. Allows for a new birth certification to be issued when there is a judgment of filiation pursuant to Civil Code art. 197 (child’s action to establish paternity).

**La. Code Civ. Proc. art. 3947 (B)** – allows for the name confirmation of a wife in the context of a divorce proceeding. The birth certificate is not changed. This is important if the wife was using the married name of her husband. The *Federal Intelligence Reform and Terrorism Prevention Act of 2004* includes several new requirements for identification and changing names on documents such as: Driver’s Licenses, Personal Identification Cards, and Social Security cards. Specifically, the Federal and/or State agency requires that a new card will not be issued under a woman’s maiden name unless the divorce decree specifically states it.

**R.S. 40:34(B)(iv)** – An “illegitimate” child is now referred to as a “child born outside of marriage.” The mother controls the name of the child on the birth certificate. If both parents agree, a two party affidavit can be executed and most health units have the form.

**R.S. 40:34 (B)(vi)** – allows for the name change of a child born of the marriage but whose biological father is someone other than the husband. A new birth certificate is issued. This is also known as the three-party affidavit. The married parents need to have been separated for at least 180 days prior to the date of conception and not have reconciled after that period as well. The affidavit can be obtained from the local health unit or the Vital Records Office.

**R.S. 40:34(B)(vii)** – In cases where the child is born during the marriage (the husband is the legal father) but the child’s biological father is someone else, the surname of the child can be: the biological father’s if he has sole or joint custody and the husband is no longer married to the mother. The child’s mother, the husband, and the biological father are indispensable parties in any filiation or paternity proceeding.

**Civil Code art. 189** – The time limit for disavowal by the husband is subject to a liberative prescriptive period of one year and its commencement date is provided for in the article.

**Civil Code art. 198** – The judicially created avowal action is now codified. It enables a man to establish the paternity of a child presumed to be the child of another. Applies prospectively and retroactively and the peremptive time periods are provided for.

### 11. ADOPTION

A court exercising juvenile jurisdiction shall have exclusive original jurisdiction in adoption proceedings pursuant to Title XI or XII of the Louisiana Children’s Code. See La. Children’s Code art. 303.

There are several types of adoptions under Louisiana law. Our law recognizes agency adoptions, private adoptions, intrafamily adoptions, international adoptions, and adult adoptions. The laws governing adoptions differ depending...
on the type of adoption. Insofar as most adoptions handled by legal services attorneys are usually intrafamily adoptions, the discussion and forms herein will pertain to these adoptions.

There are two significant problems with most adoptions filed with our courts. First, attorneys fail to provide the type of notice to parents required by law within the time frames required by law. Second, attorneys fail to submit the necessary pleadings in proper form with content conforming to our adoption laws.

11.1 WHO MAY PETITION FOR ADOPTION?

The codal authority of intrafamily adoptions can be found in Louisiana Children’s Code articles 1243 et seq. Adoption statutes are interpreted strictly. Under La. Children’s Code art. 1243, the following persons may petition for an intrafamily adoption:

A. A stepparent, step-grandparent, great-grandparent, grandparent, aunt, great aunt, uncle, great uncle, sibling, or first cousin may petition if all of the following elements are met:
   1. The petitioner is related to the child by blood, adoption, or affinity through a parent recognized as having parental rights.
   2. The petitioner is a single person over the age of 18 or a married person whose spouse is a joint petitioner.
   3. The petitioner has had legal or physical custody of the child for at least 6 months prior to filing the petition for adoption.

B. When the spouse of the stepparent or one joint petitioner dies after the petition has been filed, the adoption proceedings may continue as though the survivor was a single original petitioner.

C. For purposes of this Chapter “parent recognized as having parental rights” includes not only an individual enumerated in Article 1193, but also:
   1. A father who has formally acknowledged the child with the written concurrence of the child’s mother.
   2. A father whose name or signature appears on the child’s birth certificate as the child’s father.
   3. A father, if a court of competent jurisdiction has rendered a judgment establishing his paternity of the child.

11.2 CONSENT OF PARENT(S) TO THE ADOPTION (LA. CHILDREN’S CODE ART. 1243)

A. A parent is free to execute an authentic act consenting to the adoption of his/her child;

B. If the parent of a “child born of the marriage” (legitimate) is married to the stepparent petitioner and executes an authentic act of consent, she need not join in the petition;

C. The parent of a “child born outside of marriage” who is married to the petitioning spouse shall join in the petition.
11.3 PARENTAL CONSENT NOT NECESSARY (LA. CHILDREN’S CODE
ART. 1245); CLEAR AND CONVINCING EVIDENCE IS REQUIRED.

A. The petitioner has been granted custody of the child by a court and any one
of the following situations exist:

1. A parent has refused or failed to comply with a court order of support
   for at least 6 months.

2. A parent has refused or failed to visit, communicate, or attempt to com-
   municate with the child without just cause for a period of at least 6
   months.

B. When a parent married to a stepparent (petitioner) has been granted sole or
joint custody of the child by a court with jurisdiction, or is lawfully exercising
actual custody of the child, and either of the following conditions exist:

1. The other parent has refused or failed to comply with a court order of
   support for a period of at least 6 months; or

2. The other parent has refused or failed to visit, communicate, or attempt
   to communicate with the child without just cause for a period of at least
   6 months. (La. Children’s Code art. 1245).

☞ Be wary of the client who states that since no father is listed on the birth cer-
tificate, she does not know who the father is. It may take “some prodding” and
an explanation of the inherent problems of due process before you get a nam(e(s).
It is always a safer practice to have a curator appointed when the biological
father’s identity is known but his whereabouts are unknown.

11.4 SERVICE REQUIREMENTS

La. Children’s Code art. 1247 referencing Children’s Code arts. 1133, 1134,
1136, and 1137-1143 sets forth the requirements for service on parents. Read
carefully and comply with these provisions to the letter. Even if one parent has
signed an Act of Consent to Adoption, the other parent must be served with a
Notice of the Filing of Petition of Adoption along with a copy of that petition,
unless it is waived.

☞ See Form on Notice of Filing of Petition for Adoption in Forms Section. Impor-
tant to note that as of August 1, 2012, the notice form reiterates that ONLY IF
the noticed person(s) file an answer in opposition of the adoption will he/she
have an opportunity to present his/her opposition to the court. All social security
numbers contained with the petition or its exhibits should be redacted from
copies sent to the person(s) served with notice. Act. 603 of 2012.

La. Children’s Code art. 1248 and 1249 provide specific methods and time
frames for service on resident and nonresident parents. The attorney for the adop-
tive parent must serve, either personally or domiciliary, on a resident parent no
later than 30 days prior to the hearing on the adoption petition. Whereas, for serv-
ice on the nonresident parent must be by registered mail return receipt requested,
postage prepaid, or by commercial carrier as defined in R.S. 13:3204(D), at the
address listed in the petition, not less than 30 days prior to the hearing on the
adoption petition.

La. Children’s Code art. 1250 provides for the appointment of a curator ad
hoc upon whom service shall be made if service cannot be made on the parent
under articles 1248 or 1249.
11.5 HEARING

A home study shall not be conducted for intrafamily adoptions unless ordered by the court. La. Children’s Code art. 1252. Most courts will want a home study in the Order. Check with the Department of Children and Family Services (DCFS) prior to your hearing date to ensure that the home study was completed.

There are specific time frames for the setting of the hearing on an adoption petition. La. Children’s Code art. 1253. Thus, it is helpful to the Clerk and the Court if your order complies with these time frames. The Court shall hear the petition within 60 days if there is no opposition or within 90 days if there is opposition. This time may be extended for good cause or reduced to a minimum of 15 days with written approval of DCFS department and petitioner.

At this hearing, the Court as per La. Children’s Code art. 1253 shall consider the following:

1. Any motions to intervene in the proceedings that have been filed.
2. Other issues in dispute.
3. The confidential report by OCS, if any.
4. The testimony of the parties.

Also, if the child is 12 years of age or older, the court shall solicit and consider his wishes regarding the adoption. Thus, remember to take the child(ren) with you. Most judges like the child(ren) present and a camera is also a good thing to take along as well. Of all the good work family law attorneys do in court, this may be one of the most fulfilling moments in court for everyone.

Intervention in the proceedings may be by Motion and a showing of good cause and is limited to persons having a substantial caretaking relationship with the child for one year or longer, or any other person that the court finds to be a party in interest. Intervention by a party in interest shall be for the limited purpose of presenting evidence as to the best interests of the child. La. Children’s Code art. 1254.

After the Adoption hearing, the Court may enter a final decree of adoption or it may deny the adoption. The basic consideration is the best interest of the child. There is a rebuttable presumption in intrafamily adoptions where the petitioner already has legal custody that the adoption is in the best interests of the child. La. Children’s Code art. 1255.

Included in these materials are the most current forms for completion of an intrafamily adoption with various scenarios. Note the different notices provided to an alleged father (where no formal acknowledgment, legitimation, filiation order, or presumption of paternity) versus an adjudicated legitimate father.

11.6 CASE LAW ON ADOPTIONS

Here are some cases to review:

  In the Matter of R.E., 645 So.2d 205 (La. 1994) – Sets out the notice requirements for natural fathers consistent with due process; discusses the burden of proof on natural fathers to affirmatively show efforts to preserve his opportunity to establish his parental rights; State must prove by clear and convincing evidence its allegations if seeking to terminate parental rights.
Miller v. Miller, 665 So. 2d 774 (La. App. 1 Cir. 1995) – Statutory presumption that stepparent adoption in the best interest of the child did not apply where natural father had joint custody.

In re Landry, 702 So. 2d 1092 (La. App. 3 Cir. 1997) – “Lawfully exercising actual custody” within the procedural rules governing intrafamily adoptions, means the parent who has actual, physical custody of the child where no custody decree exists. La. Ch.C. Art. 1245(C). But it does not apply if there is an ongoing custody dispute. See In C.D.J. v. B.C.A., 74 So.3d 300 (La.App. 3 Cir. 2011) where the petition was dismissed on an exception of no cause of action because custody was still being litigated. The party petitioning the court carries the burden of proving that a parent’s consent is not required under the law.

In re Bordelon, 670 So.2d 676 (La. App. 3 Cir. 1996) – Adoption of child over incarcerated mother’s objections.

Leger v. Coccaro, 714 So.2d 770 (La. App. 3 Cir. 1998) – Court held that adoption by stepfather was not in the child’s best interest. This appears to be a “bad” case where the appellate court engages in speculation about the mother’s current marriage and problems which may arise in that marriage. The appellate court noted the father’s failure to provide financially for the child, and curiously, seemed to be influenced more by the concern shown by the paternal relatives as opposed to the interest exhibited by the father.

Anderson v. Ramer, 661 So. 2d 584 (La. App. 2 Cir. 1995) – Concluded that father had failed to provide “significant” child support insofar as he was in arrears for about $10,000, exclusive of interest, at the time the adoption petition was filed.

While Children’s Code art. 1245’s provision of “refused or failed” does not state to what degree, the “significant” requirement in at least child support cases is as a result of Haynes v. Mangham, 375 So.2d 103 (La. 1979). See Myers v. Myers, 787 So.2d 546 (La. App. 2 Cir. 2001) where “significant” was not extended to non-support failures.

German v. Galley, 712 So.2d 1034 (La. App. 3 Cir. 1998) – Concluded that father’s payment of 21% of the child support owed in previous year was significant enough to prevent application of statute allowing for adoption of child without parental consent.

In Re G.E.T., 529 So.2d 524 (La. App. 1 Cir. 1988) – Grandparents sought to adopt. Court found that the grandparents failed to prove that natural parents presented a risk of physical or psychological harm to the child and failed to meet their burden of proving the adoption was in the best interest of the child.

Tutorship of Shea, 619 So.2d 1236 (La. App. 3 Cir. 1993) – Grandparent adoption permitted where grandparents were awarded the sole custody of the child in tutorship proceedings and father’s consent not needed as he failed to provide significant support for 1 year.

A child who is of Native American ancestry (Indian) may be subject to the Indian Child Welfare Act of 1978 (ICWA) and not subject to state court jurisdiction. Be careful!
12. COMMUNITY PROPERTY

12.1 INTRODUCTION

This section in no way seeks to cover the breadth of matrimonial regimes. While the typical legal services case may not involve representation in community property matters, the need to have some knowledge of the process is important. Domestic violence attorneys should consider representation in property matters as this is often a factor in helping victims to break out of the cycle of domestic violence. Obviously, some partitions may require accountants and/or tax attorneys and involve a Qualified Domestic Relation Order (“QDRO”). Thus, it is best not to get in “way over your head.” Local bar programs may have referral services that would enable our clients to get specialized representation, especially in matters where the marital regime is large.

La. R.S. 9: 374 (E) does provide a simple summary procedure for a court to grant use of the community property, including a home, car or bank accounts, pending a partition of the community. This issue may be heard by a rule to show cause. Your client may need the home or car for her financial independence and for care of the children. This can be accomplished without becoming involved in a complex partition proceeding.

Even if you don’t represent the client in community partition, including an appropriate request for community partition in the divorce suit may save the client significant court costs when she does seek partition. See Judge Blanchet’s suggested language for pleading community property partition infra.

12.2 SOME BASIC PRINCIPLES FOR COMMUNITY PROPERTY DIVISION AND SPOUSAL REIMBURSEMENT

Pension division will require a Qualified Domestic Relations Order. These should be sought promptly as complex problems may occur if a spouse dies before the QDRO is obtained.244 It is prudent to check with the pension company for a template of the QDRO form that they will require. In military pension cases, it is important to seek a military pension division order promptly as delay may adversely affect collection of her share of the pension by direct payments from the Department of Defense.245

A spouse may sue the other spouse for loss or damage to community property caused by the fraud or bad faith in managing the community property. Civil Code art. 2354. Upon termination of the community, a spouse may have a claim for reimbursement against the other spouse. Civil Code art. 2358. The right to reimbursement may exist if (1) community property was used to benefit separate property, (2) separate property was used to benefit community property, (3) community property was used to satisfy a separate debt, or (4) separate property was used to satisfy a community debt.246

The right to sue for reimbursement prescribes in 10 years.247 However, the right to sue for an accounting of the use of community property prescribes in 3

244 But see Gorham v. Gorham, 31 So.3d 421 (La. App. 1 Cir. 2009) (wife received entire interest in retirement plan).
245 Follow the Department of Defense regulations on contents for military pension division orders to ensure DOD recognition of the order for pension assignment to the non-service member.
247 Birch v. Birch, 55 So.3d 796 (La. App. 2 Cir. 2010); LeBlanc v. LeBlanc, 915 So.2d 966 (La. App. 3 Cir. 2005).
years from the date of termination of the community property regime.\textsuperscript{248} If a claim is in the nature of “conversion” rather than reimbursement, it may be subject to a 1 year prescription. There is no prescriptive period for the right of a co-owner to sue for partition of unpartitioned property.\textsuperscript{249}

Under the 2005 amendments to the Bankruptcy Code, a marital property debt, judgment or settlement is not dischargeable in bankruptcy.\textsuperscript{250} However, a spouse should consider timely filing an adversary complaint to contest the dischargeability of the debt. The notice of the creditors’ meeting should state the deadline for opposing the dischargeability of debts. To protect a spouse’s status as a “secured creditor”, marital property judgments should be promptly recorded.

12.3 COMMUNITY PROPERTY PARTITION PROCEDURES

The Author gives credit to the Hon. Judge David A. Blanchet, 15\textsuperscript{th} Judicial District Court, Div. “H” and thanks him for the use of his “primer” material. It serves as a great starting point for the proper procedure and pleadings necessary to accomplish a judicial partition of community. The judge’s unedited material is incorporated hereinafter.

1. A partition proceeding must be pending in order for the Court to judicially partition the former community of acquets and gains.

In other words, a pleading must have been filed that puts the partition of the community regime at issue. Otherwise, the Court is issuing an advisory opinion of what is actually an extrajudicial partition between the parties. Courts are without jurisdiction to issue advisory opinions and may only review matters that are justiciable.

A “justiciable controversy” connotes, in the present sense, an existing actual and substantial dispute, as distinguished from one that is merely hypothetical or abstract, and a dispute which involves the legal relations of the parties who have real adverse interests, and upon which the judgment of the court may effectively operate through a decree of a conclusive character.

The supreme court has instructed the lower courts to refrain from rendering declaratory judgments when the issue presented to the court is academic, theoretical or based on a contingency which may not arise. \textit{See} Retily \textit{v. State}, 864 So.2d 223 (La. App. 3 Cir. 2003).

In my opinion, the following allegation does not serve to put the partition of the community at issue:

The spouses have acquired community property during the existence of the marriage and they desire that a partition of the community of acquets and gains be relegated to such future proceedings as may be necessary.

Instead, this allegation should read substantially similar to the following:

The spouses have acquired community property during the existence of the marriage and they desire that the community of acquets and gains be partitioned in accordance with La. R.S. 9:2801.

\textsuperscript{248} La. Civ. Code art. 2369.
\textsuperscript{249} LeBlanc \textit{v.} LeBlanc, 915 So.2d 966 (La. App. 3 Cir. 2005).
\textsuperscript{250} 11 U.S.C. § 523 (a)(15).
Further, the prayer of the petition should seek a partition of the community of acquets and gains. It is not necessary that the Court issue an order requiring the parties to file their detailed descriptive lists in accordance with La. R.S. 9:2801(A)(1)(a) in order for the partition of the community to be at issue.

Further, La. R.S. 9:2801 allows that the partition action may be filed “as an incident of the action that would result in a termination of the matrimonial regime or upon termination of the matrimonial regime or thereafter.” There is no prohibition against a party praying for a judicial partition of the community in the initial petition for divorce.

Though not required, it would be wise for attorneys to also pray for an accounting pursuant to La. Civil Code art. 2369 since an obligation for an accounting prescribes in three years from the date of termination of the community property regime. This would prevent the obligation to account from prescribing in the event the partition matter is pending for more than three years from the date of termination of the community property regime. It would also be prudent for a spouse to assert in the prayer a claim for contributions to education or training of the other spouse in accordance with La. Civil Code art. 121 et seq., since this claim likewise prescribes three years from the date of signing of the judgment of divorce or declaration of nullity of the marriage.

Accordingly, the optimum prayer for partition and to settle the claims arising out of the marriage should be substantially similar to the following:

Petitioner prays that after due and proper proceedings had, that there be judgment herein partitioning the community of acquets and gains formerly existing between the parties, and adjudicating any and all other claims arising from the former community or the former matrimonial regime, including but not limited to claims for reimbursements, an accounting in accordance with La. C.C. Art. 2369, and for contributions to education or training of the defendant pursuant to La. C.C. Art. 121.

2. No Judgment of Partition shall be rendered unless it is rendered in conjunction with, or subsequent to, the Judgment which has the effect of terminating the matrimonial regime. See La. C.C. Art. 2336 and R.S. 9:2802.

Accordingly, it is recommended that a judgment partitioning the former community of acquets and gains contain a recitation that the community property regime has been terminated together with the date of termination. Though this is not required, attorneys should understand that if they fail to include this language in their judgment and/or stipulation, the execution of their partition judgment will be delayed since our office will have to request the file from the Clerk’s Office before the judgment can be rendered.

3. The partition judgment must be in proper form.

There are several ways for a judicial partition to be properly drafted. I have attached hereto a sample Judgment of Partition as Example 1, which sets forth a judgment of partition by joint stipulation of the parties. The
Court would also accept a separate written joint stipulation together with a partition judgment that mirrors that written stipulation. In addition, there are other ways to properly draft a partition judgment. For instance, a Community Property Partition Agreement can be attached to and made a part of a Judgment dismissing the partition action. See *Lapeyrouse v. Lapeyrouse*, 729 So. 2d 682 (La. App. 1 Cir. 1999). For an excellent discussion of the difference between an extrajudicial partition and a partition that constitutes a transaction or compromise not subject to lesion, see “*When is a Partition Just a Partition and Not a Compromise?: Hoover v. Hoover*”, 77 Tulane Law Review 1441, June 2003.

The Court will not sign any judgment that “approves and homologates” or “homologates as being fair and equitable to both parties” an attached community property partition, or that in any way homologates a community property partition.

La. R.S. 9:2801 is the exclusive procedure by which the former community of acquets and gains may be partitioned. This statute was originally enacted by the Legislature in 1982, more than 30 years ago, and contains no provisions concerning homologation. Homologation is found in the Louisiana Code of Civil Procedure under the heading “Partition Between Co-Owners”, art. 4601 et seq. Prior to 1982, this was the procedure to partition all co-owned property, including a former community of acquets and gains, and these articles provide for the appointment of a notary public by the Court to “make the partition in accordance with law.” When the partition has been completed by the notary, he is required to file his procés verbal of the partition, or a copy thereof, with the Court. Any party may then rule all the other parties into court to show cause why the partition should not be “homologated or rejected.” As you can see, homologation has to do with the acceptance or the rejection of the partition proposed by the court appointed notary public. There is no procedure by which a community property partition can be “homologated” by the Court since by definition the homologation is the acceptance by the Court of a partition proposed by the court appointed notary public.

Also, the Court will not sign a judgment with an attached community property partition where the judgment merely states that “the attached community property partition is made a judgment of the Court.” There must be language contained in the judgment or in the partition document stipulating that the community property partition shall be a judgment of the court. See attached Example 2.

Further, the Court will not sign the bottom of Community Property Partitions after the signature lines of the parties with language such as “Reviewed and Approved in Lafayette, Louisiana, on this ____ day of ____________, 2005.” The Court does not have the right to “review and approve” partitions. For the Court to enter a judicial partition without an actual adjudication resulting from a trial, there must be a stipulation of the parties. Otherwise, the Court is issuing an advisory opinion concerning what is actually an extrajudicial partition between the parties. Courts are without jurisdiction to issue advisory opinions and may only review matters that are
justiciable. See above discussion of *Reily v. State*, 864 So. 2d 223 (La. App. 3 Cir. 2003). Therefore, once a matter has been amicably settled by the parties as a private, extrajudicial agreement, the Court has no authority to review and approve the community property settlement.

The Court will refuse to execute a partition judgment that is not in proper form. For instance, *La. Code Civ. Proc. arts. 1919 and 2089* require that all judgments and decrees which affect title to immovable property shall describe the immovable property affected with particularity. The purpose of these articles is to insure that the public in general and title examiners, successful litigants, officials charged with executions of judgments and surveyors in particular, can accurately deal with the immovable property. See *Hurst v. Ricard*, 558 So.2d 1269 (La. App. 3 Cir. 1990). It is well settled that a municipal address is not a proper legal description of immovable property and the Court will not sign partition judgments unless appropriate immovable property descriptions are contained therein.

Further, the attorneys must understand that any sums of money owed under a judicial partition will constitute a judicial mortgage against the obligor spouse which encumbers any property received by that spouse. Upon the payment of the money portion of the partition judgment, the obligor spouse is entitled to receive from the obligee spouse an Act of Partial Cancellation of the Judgment that is to be recorded in the mortgage records of the Clerk of Court's office and which serves to partially cancel and erase the partition judgment insofar and only insofar as it pertains to the money judgment against the obligor.

**4. A Community Property Partition may be “extrajudicial”, that is a written agreement between the parties that is not made a judgment of the Court.**

The main reason parties seek to obtain a judicial partition, as opposed to an extrajudicial partition, is in an attempt to avoid lesion beyond moiety. If lesion is not a problem, then an extrajudicial partition will serve the parties just as well as a partition by judgment and it will save the parties on court costs. Also, an extrajudicial partition may be perfected by the parties at any time, even prior to the termination of the community regime. See *La. Civ. Code art. 2336*.

It should be noted that an extrajudicial partition which includes immovable property must be made by authentic act, or by act under private signature preferably acknowledged, and it must be recorded in the conveyance records to be effective against third parties. See *La. Civ. Code. art. 1839*. Also, the notary passing the extrajudicial partition should comply with the requirements of *La. R.S. 35:12*. After January 1, 2005, the Clerk of Court will not accept notarized documents which fail to contain the notary identification or bar roll number and the typed or printed name of the notary and the witnesses. The agreement should also contain a waiver of all liens, privileges, resolutory conditions, and the right of dissolution for non-payment of consideration. See *Sliman v. McBee*, 311 So.2d 248 (La. 1975) and *La. Civ. Code art. 2561*. 

(385)
EXAMPLE 1

PLAINTIFF 15th JUDICIAL DISTRICT COURT

VERSUS: DOCKET NO. ______________ Div. ___

DEFENDANT _______________ PARISH, LOUISIANA

JUDGMENT OF PARTITION

NOW INTO COURT come HUSBAND and WIFE, who upon suggesting to this Honorable Court that an action to partition the community of acquets and gains formerly existing between them and to adjudicate any and all other claims arising from the former community or the former matrimonial regime has been filed in the above captioned and numbered proceeding pursuant to La. R.S. 9:2801, et seq., that pursuant to La. R.S. 9:2802 the matrimonial regime was terminated by this proceeding by judgment dated ______________ (or, by judgment rendered in conjunction herewith), and upon further suggesting that the parties have reached a transaction or compromise pursuant to La. C.C. Art. 3071, as more fully stipulated in this Consent Judgment of Partition;

Accordingly, after considering the stipulations of the parties as set forth in this Consent Judgment, the law and stipulations being in favor thereof,

IT IS ORDERED, ADJUDGED AND DECREED that the assets and liabilities of the community of acquets and gains formerly existing between HUSBAND and WIFE, and any and all other claims arising from the former community or the former matrimonial regime, including but not limited to claims for reimbursements, accountings, contributions to education or training pursuant to La. C.C. Art. 121, et seq., be and they are hereby partitioned, allocated and assigned, as follows:

IT IS ORDERED, ADJUDGED AND DECREED that HUSBAND, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a one hundred (100%) percent interest, in and to the following described immovable property:

PROPERTY DESCRIPTION – mailing address is insufficient

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a one hundred (100%) percent interest, in and to the following described corporeal movable property which is currently in his possession:

DESCRIPTION OF CORPOREAL MOVABLES

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND shall take delivery of the above referenced items from the possession of WIFE (specify location) at a mutually convenient time and at his cost, together with his separate property which is in the possession of HUSBAND, more fully described as follows:

DESCRIPTION OF SEPARATE PROPERTY

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a hundred (100%) percent interest, in and to the following described incorporeal movable property which is currently in his possession:

DESCRIPTION OF INCORPOREAL MOVABLES

(386)
IT IS ORDERED, ADJUDGED AND DECREED that WIFE, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a one hundred (100%) percent interest, in and to the following described immovable property:

[PROPERTY DESCRIPTION – mailing address is insufficient]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a hundred (100%) percent interest, in and to the following described corporeal movable property which is currently in her possession:

[DESCRIPTION OF CORPOREAL MOVABLES]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE shall take delivery of the above referenced items from the possession of HUSBAND (specify location) at a mutually convenient time and at her cost, together with her separate property which is in the possession of HUSBAND, more fully described as follows:

[DESCRIPTION OF SEPARATE PROPERTY]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE, is hereby allocated, assigned and awarded the exclusive ownership of, and all right, title and interest, being a hundred (100%) percent interest, in and to the following described incorporeal movable property which is currently in her possession:

[DESCRIPTION OF INCORPOREAL MOVABLES]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that HUSBAND is allocated the following indebtedness, and HUSBAND, shall defend, indemnify and hold WIFE, harmless for the payment thereof:

[DESCRIPTION OF DEBT ASSUMED BY HUSBAND]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that WIFE is allocated the following indebtedness, and WIFE, shall indemnify and hold HUSBAND, harmless for the payment thereof:

[DESCRIPTION OF DEBT ASSUMED BY WIFE]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of WIFE/HUSBAND and against HUSBAND/WIFE, in the amount of $________________________, after taking into account all claims for reimbursements, accountings, contributions to education or training pursuant to La. C.C. Art. 121, et seq., and any and all other claims arising from the community of acquets and gains formerly existing between them. This equalizing sum shall be paid as follows:

[DESCRIPTION OF PAYMENT, i.e. PROMISSORY NOTE, CASH, ETC.]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties shall, at the other’s request and expense, at any time, and from time to time hereafter, take any and all steps, and execute any and all further documents, instruments and assurances that the other may reasonably require for the purpose of giving full force and effect to the provisions of this Judgment of Partition. Without in any way limiting the generality of the foregoing, the parties shall execute any and all documentation that may be necessary and/or requisite to transfer the property partitioned and/or conveyed herein in accordance with the terms and provisions contained herein, for any and all
purposes, including but not limited to the purposes of affecting recordation in the con-
veyance and/or mortgage records of the parish in which the properties are located, if
and when called upon to do so, by each other.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that no vendor’s
liens, resolutory conditions or rights to rescind this Judgment are created in favor of
the parties and, if for any reason any vendor’s liens, resolutory conditions or rights to
rescind should inadvertently be created by this Judgment, then and in that event, the
parties do hereby waive any vendor’s liens, resolutory conditions or rights to rescind.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary
restraining order issued against HUSBAND recorded under Act No. ________________ and the temporary restraining order issued against WIFE, recorded under Act No. ________________, are hereby lifted, canceled and erased from the mortgage records of the Clerk of Court of _________________ Parish, Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that reciprocal pre-
liminary injunction issued against both parties, restraining, enjoining and prohibiting
each of them, or any other persons, entities, firms, corporations or partnerships acting
or claiming to act in their behalf in any matter from alienating, encumbering or dis-
posing of any or all of the assets of the community of acquets and gains formerly
existing between them contained in that certain Judgment on Rules dated ________________ and recorded under Act No. ________________ be
and it is hereby lifted, canceled and erased from the records of the Clerk of Court of
_______________ Parish, Louisiana, and that the said Judgment on Rules shall
remain in full force and effect in all other respects.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that HUSBAND shall
pay ____% of the court costs and WIFE shall pay ____% of the court costs of this
proceeding.

JUDGMENT SIGNED in Chambers at ______________, Louisiana, this _____
day of ______________, 200__.

_________________________________
DISTRICT JUDGE

STIPULATED TO AND APPROVED AS TO FORM AND CONTENT:

_________________________________
Attorney for HUSBAND
Bar Roll No., Address & Phone No.

HUSBAND

_________________________________
Attorney for WIFE
Bar Roll No., Address & Phone No.

WIFE
EXAMPLE 2

PLAINTIFF 15th JUDICIAL DISTRICT COURT

VERSUS: DOCKET NO. ______________ Div. ___

DEFENDANT _______________ PARISH, LOUISIANA

JUDGMENT OF PARTITION

NOW INTO COURT come HUSBAND and WIFE, who upon suggesting to this Honorable Court that an action to partition the community of acquets and gains formerly existing between them and to adjudicate any and all other claims arising from the former community or the former matrimonial regime has been filed in the above captioned and numbered proceeding pursuant to La. R.S. 9:2801, et seq., that pursuant to La. R.S. 9:2802 the matrimonial regime was terminated by this proceeding by judgment dated ___________ (or, by judgment rendered in conjunction herewith), and upon further suggesting that the parties have stipulated to and reached a transaction or compromise pursuant to La. C.C. Art. 3071, as more fully set forth in the attached Community Property Partition;

Accordingly, after considering the stipulations of the parties as set forth in the attached Community Property Partition, the law and stipulations being in favor thereof,

IT IS ORDERED, ADJUDGED AND DECREED that the attached Community Property Partition is incorporated herein by reference thereto and is hereby made a judgment of this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the temporary restraining order issued against HUSBAND recorded under Act No. ______________ and the temporary restraining order issued against WIFE, recorded under Act No. ______________, are hereby lifted, canceled and erased from the mortgage records of the Clerk of Court of ______________ Parish, Louisiana.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that reciprocal preliminary injunction issued against both parties, restraining, enjoining and prohibiting each of them, or any other persons, entities, firms, corporations or partnerships acting or claiming to act in their behalf in any matter from alienating, encumbering or disposing of any or all of the assets of the community of acquets and gains formerly existing between them contained in that certain Judgment on Rules dated ______________ and recorded under Act No. ______________ be and it is hereby lifted, canceled and erased from the records of the Clerk of Court of ______________ Parish, Louisiana, and that the said Judgment on Rules shall remain in full force and effect in all other respects.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the partition proceeding filed in the above captioned and numbered proceeding is hereby dismissed, with prejudice, and HUSBAND shall pay _____% of the court costs and WIFE shall pay _____% of the court costs of this proceeding.

JUDGMENT SIGNED in Chambers at ______________, Louisiana, this _____ day of ______________, 200__.
STIPULATED TO AND APPROVED AS TO FORM AND CONTENT:

Attorney for HUSBAND
Bar Roll No., Address & Phone No.

HUSBAND

Attorney for WIFE
Bar Roll No., Address & Phone No.

WIFE

OTHER HELPFUL FORMS

Forms prepared by Acadiana Legal Service Corporation. These forms are for pro se purposes only. No representation or enrollment as counsel is implied or expressed. It is always best to retain the services of an attorney in any legal representation, as the law is complicated and may have changed.
CONSENT JUDGMENT AND PLAN FOR IMPLEMENTATION OF JOINT CUSTODY

This matter was set for Rule on the ___ day of _____, 2012. The parties’ in seeking to resolve their differences, have entered into a compromise that is incorporated and reflected herein.

A. **Physical Custody:** The care, custody and control of the minor children shall be awarded jointly to ______________________, (hereinafter “Mother”) and ______________________ (hereinafter “Father”), under the following plan, with Mother designated as the domiciliary parent. The children shall reside with the Mother at all times they are not in residence with the Father.

1. **WEEKEND AND WEEKDAY VISITATION:** Father shall have liberal and frequent custodial periods of the children including, but not limited to the following:
   a. Alternating weekends each month from Friday after daycare at 5:30 p.m. until Monday morning when he returns the children to daycare at the beginning of the daycare schedule between the hours of 8:00 a.m. and 9:00 a.m.;
   b. During the “off” weeks (weeks when Father does not have weekend visitation), Father shall have visitation Wednesday evening from approximately 5:30 p.m., when he picks up the children at daycare until 8:00 a.m. on Thursday when he returns the children to daycare;

2. **HOLIDAYS:** All holidays and holiday periods shall be defined in accordance with the school calendar in effect for the school which the minor child[ren] attend(s).
   a. **Thanksgiving** shall be defined as commencing at 6:00 p.m. on the last school day preceding the Thanksgiving school holiday period of the minor child[ren] and concluding at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
      i. In even-numbered years, the _____ shall be entitled to enjoy the entire Thanksgiving holiday period.
      ii. In odd-numbered years, the _____ shall be entitled to enjoy the entire Thanksgiving holiday period.
   b. The **Christmas** and **New Year’s** holiday period shall be defined in two parts: (1) the first half of said period shall commence at 6:00 p.m. on the last school day preceding the holiday period and concludes at 9:00 p.m. on Christmas Eve, and (2) the second half of said period shall commence at the conclusion of the first half and shall conclude at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
      i. In even-numbered years, the _____ shall be entitled to enjoy the first half of the Christmas and New Year’s holiday period, and the other parent shall be entitled to enjoy the second half of the Christmas and New Year’s holiday period.
      ii. In odd-numbered years, the _____ shall be entitled to enjoy the first half of the Christmas and New Year’s holiday period, and the other parent shall be entitled to enjoy the second half of the Christmas and New Year’s holiday period.
c. **Mardi Gras** shall be defined as commencing at 6:00 p.m. on the last school day preceding the Mardi Gras school holiday period of the minor child[ren] and concluding at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
   i. In even-numbered years, the _____ shall be entitled to enjoy the entire Mardi Gras holiday period.
   ii. In odd-numbered years, the _____ shall be entitled to enjoy the entire Mardi Gras holiday period.

d. **Easter** shall be defined as commencing at 6:00 p.m. on the last school day preceding the Easter school holiday period of the minor child[ren] and concluding at 6:00 p.m. on the day before the child[ren] return(s) to school following said holiday period.
   i. In even-numbered years, the _____ shall be entitled to enjoy the entire Easter holiday period.
   ii. In odd-numbered years, the _____ shall be entitled to enjoy the entire Easter holiday period.

3. **SPECIAL OCCASIONS:** Additional specific custodial rights which are to take precedence when in conflict with the recurring custodial periods set forth in Section A, hereinabove. Said additional specific visitation rights with the minor child[ren] and the times for the commencement and termination thereof are as follows:
   a. **Father’s Day:** The Father shall be entitled to every Father’s Day, from 6:00 p.m. on the day before Father’s Day until 6:00 p.m. on Father’s Day, regardless that this day does not happen to fall during his regular custodial/visitation time.
   b. **Mother’s Day:** The Mother shall be entitled to every Mother’s Day, from 6:00 p.m. on the day before Mother’s Day until 6:00 p.m. on Mother’s Day, regardless that this day does not happen to fall during her regular custodial/visitation time.

4. **VACATION PERIOD:**
   a. During the children’s summer vacation from school, the parties shall exercise custodial periods as follows: _______________________________.

5. **FIRST OPTION TO CARE FOR CHILD**
   a. Except for those periods of time when the parents are routinely working and the child[ren] is/are usually and customarily with a child care provider, in the event either of the parties is going to be unavailable to personally provide care and supervision of the minor child[ren] for a period of time in excess of _____ (___) hours, then the parent who will be unavailable shall give the other parent the first option to provide said care and supervision of the child[ren] from the beginning of the time of unavailability through the end of the period of unavailability.
   b. In the event that the parent to whom the first option is extended is unable to or does not accept said option, the parent who will be unavailable shall have the discretion to place the care and supervision of the minor child[ren] with another individual of suitable age and discretion, taking into account the age of the child[ren] to be cared for and the time of day and day of the week.

6. **GENERAL PROVISIONS**
   1. The parents are encouraged to communicate frequently in an effort to mutually agree in regard to the general health, welfare, education, and
development of the minor child[ren]. Each parent should not ignore the input of the other by the failure to communicate or use the child[ren] to inform each other of decisions on important matters.

2. Both parties shall provide each other with all relevant addresses (home and work) and telephone numbers (home, work, cellular, and pager) where the child[ren] may be contacted, including a geographical location and telephone number if the child[ren] is/are traveling with that parent outside of the State of Louisiana.

3. Neither parent shall attempt or condone any attempt whatsoever, directly or indirectly, by artifice or subterfuge, to estrange the minor child[ren] from the other party or injure or impair the mutual love and affection of the minor child[ren] for either parent. Further, neither party shall make any negative or condescending remarks, within the presence or within the hearing of either of the child[ren], about the child’s other parent, the spouse of the child’s other parent, the extended family of the child’s other parent or the extended family of the spouse of the child’s other parent.

4. At all times, the parents shall encourage and foster in the minor child[ren] sincere respect and affection for both parents and shall not hamper the natural affection for both parents or the natural development of the minor child[ren]’s love and respect for the other parent.

5. Except as provided herein, the child[ren] shall be subject to rules and regulations as agreed upon by the parents.

6. Each parent should maintain sufficient flexibility to allow for variations made necessary by the ebb and flow of social, educational, and recreational life.

7. Each parent shall maintain a sufficient day-to-day wardrobe for the child[ren], but it shall be the responsibility of the domiciliary parent to maintain and to provide to the non-domiciliary parent items of clothing for special circumstances (seasonal, social, and special occasion), unless the circumstances necessitating the special clothing are beyond the control of the domiciliary parent, and it shall be the responsibility of the non-domiciliary parent to return to the domiciliary parent any items of clothing at the conclusion of her/his custody/visitation period. It shall be the responsibility of each parent to return to the other parent any items of clothing which were sent with the child.

8. All information regarding school, report cards, conferences, trips, functions, meetings, etc. should be made available to the other parent as either parent receives same, but it shall be the responsibility of the non-domiciliary parent to take the steps necessary to procure copies of documents (report cards, progress reports, routine announcements, etc.) directly from the educational institution. The parents shall not communicate through the child[ren], or third parties, or use the child[ren] because they refuse to communicate.

9. Neither party shall have or be an overnight guest of the opposite sex to whom he or she is not related by blood or marriage while the child[ren] are in residence, nor shall either party permit the minor child[ren] to have or be an overnight guest of the opposite sex until he or she has reached the age of majority.

10. Each party shall keep the other fully advised of any and all extracurricular activities in which the child[ren] is/are participating, and shall give the other parent reasonable advance notice thereof, in order to permit the other parent to attend.
11. Neither party shall discuss or communicate about the child[ren] or legal proceedings between the parties within the presence or hearing of either of the minor child[ren], if such communication might estrange the minor child[ren] from the other party or injure or impair the mutual love and affection of the minor child[ren] for either party. Further, to the extent that the parties communicate between themselves regarding the child[ren] and/or the legal proceeding, neither of them shall allow the child[ren] any access to any written communication which is intended solely for the parties.

12. Neither party shall attempt to convince the child[ren] not to spend custodial time with the other parent, or to attempt to convince the child[ren] to terminate a custodial period with the other parent before said period is completed. Further, neither party shall denigrate the activities, nature or essence of the time spent with the other parent.

B. CHANGE OF RESIDENCE OF PARENT

Either parent may remove residence from the parish of their present domicile(s). Before or within sixty (60) days of such removal, the parent changing residence shall request a modification of this plan from the remaining parent. If agreement is reached, a joint motion for modification may be submitted to the Court. If no agreement is reached, the party changing residence shall request a modification from the Court.

In any event, each parent shall keep the other notified, at all times, of a current residential address, home telephone number, place of employment, work telephone, and, if applicable, cellular telephone and beeper numbers.

The residence of the child[ren] may be re-located only after compliance with the provisions of LSA-R. S. 9:355.1 et seq. This section shall not apply if either parent re-locates his or her residence in the Parish of _____________, State of Louisiana.

C. MARRIAGE OR REMARRIAGE

Upon marriage or remarriage, either party may seek a modification of custody or visitation, in accordance with the law.

D. EDUCATION

The domiciliary parent shall discuss educational issues with the other parent, and the parties shall attempt to reach mutual agreements regarding the education of the child[ren].

Pursuant to LSA RS 9:351, each parent is entitled to access to records and information pertaining to the minor child, and shall not be denied to a parent solely because s/he is not the child’s custodial or domiciliary parent.

E. TRANSPORTATION

Each parent is responsible for transportation of the child[ren] while in residence. Except as provided otherwise herein, and/or unless the parties reach a mutually acceptable alternative arrangement, the parent to whom the child[ren] is/are being transferred at the beginning or end of any custodial/visitation period, or his or her designee (which shall be an individual with a current driver’s license and insured in accordance with all Louisiana laws, and shall have legally required restraint systems and devices, including specifically seat/shoulder belts and child safety seats for children required to be so restrained), shall be responsible for picking up the child[ren] at the home of the other parent.

F. MEDICAL AND DENTAL

Except in emergencies, the domiciliary parent is responsible for all medical, psychiatric and dental treatment decisions for the minor child[ren], and shall discuss said treatment issues with the non-domiciliary parent. The domiciliary parent
shall advise the non-domiciliary parent of any and all appointments in advance of same and shall further advise the non-domiciliary parent of treatments rendered and anticipated treatments as soon as that information is received by the domiciliary parent. The non-domiciliary parent shall have the right to attend any and all appointments, but shall not be entitled to cancel or re-schedule any appointments except with the specific agreement of the domiciliary parent.

Pursuant to LSA RS 9:351, each parent is entitled to access to records and information pertaining to the minor child, and shall not be denied to a parent solely because s/he is not the child’s custodial or domiciliary parent.

The parties further agree that neither of them will be obligated to share in any of said expenses which are purely elective in nature unless the parties have mutually agreed on said expenses in advance of same. Cosmetic surgery or cosmetic dental treatment on the minor child[ren], unnecessary to the integrity of the dental structure, shall not be undertaken without the permission of both parents. Substance abuse treatment is deemed medical treatment.

G. COMMUNICATION BY AND WITH THE CHILD[REN]
The child[ren] shall have reasonable access to communication with each parent. No communication shall be intercepted, censored, or monitored. However, neither party shall badger the child[ren] regarding the nature and quality of the custodial periods spent with the other parent. Further, neither party shall deny the other parent telephone access to the child[ren] on his or her birthday.

Each party shall provide to the other all residential, work and cellular telephone numbers where each of them may be reached at any given point in time while the child[ren] is/are in that party’s physical custody. In addition, when a party is traveling away from home with the child[ren], specifically for vacation or out-of-state travel, that party shall provide a telephone number and physical location where the child[ren] may be contacted.

H. TUTORSHIP
The parents shall enjoy the natural co-tutorship of the child[ren] in accordance with Articles 250 and 258 of the Louisiana Civil Code, except as limited herein.

I. PROPERTY OF THE CHILD[REN]
The parents shall have administration of the property of the child[ren] provided by Article 4262 of the Louisiana Code of Civil Procedure.

J. MEDICAL EMERGENCY OR ACUTE ILLNESS
In the event of a medical emergency or serious acute illness, each parent shall afford reasonable custodial/visitation time to the other upon request, and both shall take said circumstances into consideration in deviating from the custody/visitation schedule, so long as any custody/visitation periods which are missed are made up as soon as possible thereafter.

K. PLAN MODIFICATION
Each party may seek judicial modification of this plan. In the event the parties reach a mutually agreeable modification, they shall furnish to the Court a joint motion which accurately summarizes the modification for implementation by the Court. The joint modification shall be effective after Court approval, but may be retroactive if agreed by the parties and/or approved by the Court.

APPROVED AS TO FORM AND CONTENT:

______________________________ ______________________________
Parent 1’s Signature Parent 2’s Signature

______________________________ ______________________________
Attorney 1’s Signature Attorney 2’s Signature

(395)
The Court, in reviewing the parties’ agreement above, finds it in accordance with the law and makes it the judgment of the Court.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the following Joint Custody Plan be implemented between the parties concerning the minor children, __________________, ____________________, and ____________________.

THUS, READ AND SIGNED, this ___ day of ______, 20__, at ____________, Louisiana.

_________________________________
_____ JDC JUDGE (name)

Notes:
☞ Judge’s signature page must have case caption at the top. Judges name (or line for his/her name) needs to be provided. See La. Uniform District Court Rule 9.5 (Court’s signature and circulation of proposed judgment requirements).
☞ General pointers in drafting pleadings.
  1. Petition: Caption; font size; spacing; clarity in paragraphs and grouping them so that they flow together. Main body consist of: Parties, Jurisdiction and venue; facts stating a cause of action and the relief therein; Prayer (that tracks and captures the relief being sought).
  2. Order: Caption; tracks and captures the relief that is being sought or that is to be granted.
  3. Judgment: Caption; preamble (how the case is before the court); who were present and the parties; the adjudication made by the court; the relief granted; signatures.
  4. Memorandum in family law matters:
     Keep it simple. You can lose yourself and the Court in the facts. Be specific. In most family law cases, the memorandum can be combined with your Motion to Set Trial.
  5. New trial: Seek written reasons from the court in anticipation of an appeal.
PETITION FOR DIVORCE (LA CIVIL CODE ARTICLE 102) AND DETERMINATION OF OTHER ANCILLARY MATTERS

The petition of________________________, a person of the full age of majority, who is domiciled in ________________ Parish, State of Louisiana, respectfully represents the following:

1. Made defendant herein is____________________________, a person of the full age of majority, who is domiciled in _____________ Parish, Louisiana.

2. This Court has subject matter jurisdiction over the status of the divorce as pursuant to Louisiana Code of Civil Procedure Article 10(A)(7), because one or both of the parties are domiciled in this state.

3. Pursuant to Louisiana Code of Civil Procedure Article 3941, this Court is a court of proper venue insofar as this parish was the parish of matrimonial domicile as well as the parish of residence for the petitioner.

4. The petitioner and her husband were married in 1998, in ___________________ Parish, Louisiana, and they last resided together in ___________________ Parish. The parties did not enter into a covenant marriage pursuant to R.S. 9:272 et seq.

5. The parties are living separate and apart as of the date this petition was filed and intend to live separate and apart continuously, and without reconciling with the intent to divorce, for a period of one hundred eighty days prior to a filing a rule to show cause why a divorce should not be granted.

6. Of the marriage between the parties, three children were born, namely: __________________, born _____; _____________________, born _____; and __________________, born ______. The minor children have been residing with the petitioner since the date of separation.

7. It is in the best interest of the minor children that joint custody be awarded to the parties, with the petitioner designated as the domiciliary parent, with specific visitation privileges to the defendant, as set forth in a joint custody implementation plan to be submitted to this Honorable Court.

8. Petitioner does not have sufficient income for the adequate support of the parties’ minor children, and is therefore entitled to receive child support of the children in accordance with the Louisiana Child Support Guidelines. In addition, petitioner asks that the defendant be ordered to maintain a policy of health and hospitalization insurance on the minor children.

9. Petitioner and defendant acquired certain community property during their marriage and petitioner is entitled as a result of the “disorder of the affairs of the defendant” to an order terminating the community property regime as per LSA-C.C. Art. 2374 and for a partition of the community property existing between the parties. Petitioner’s coun-
sel, in compliance with 45 CFR 1609 and the Rules of Professional Conduct, limits the scope of representation herein and excludes any representation or participation in any future community proceedings that may be conducted pursuant to R.S.9:2801 et seq.

10. The defendant has a history of harassment, intimidation and physical abuse against the petitioner. Most recently, on the ___ day of __________, 20___, the defendant battered and punched petitioner, causing petitioner to seek medical attention for the injuries.

11. Due to the defendant’s history of harassment, intimidation and physical abuse, petitioner desires and is entitled to a temporary restraining order, and in due course, a preliminary and permanent injunction, pursuant to Louisiana Revised Statute § 9:372 prohibiting the defendant, his agents or assigns, from any form of physical or sexual abuse.

12. Petitioner does not have sufficient income for her maintenance during the pendency of these proceedings and the Defendant has the ability to provide support. Therefore, pursuant to Louisiana Civil Code Articles 111-113, petitioner desires and is entitled to interim periodic spousal support, and in due course, final periodic spousal support, in an amount to be determined by this honorable Court. Petitioner was not at fault in the breakup of the parties’ marriage.

13. Petitioner has no place to live other than the family home. Therefore, petitioner desires and is entitled to use and occupancy of the family home and of its furnishings, pursuant to Louisiana Revised Statute § 9:374(B), pending further order of the court.

14. Petitioner must transport the children to and from school and/or daycare, and to their doctor’s appointments. Therefore, petitioner seeks use of the family vehicle, a 2002 Ford Escape, which is currently in the petitioner’s possession, pursuant to Louisiana Revised Statute § 9:374(B), pending further order of the court.

15. Petitioner requests that any right to bring other claims and/or actions incidental to this matter and for other relief based on any cause of action or issue arising out of the marriage, should be reserved unto her.

16. Petitioner is a citizen of this State and because of her poverty and want of means, she is unable to pay the costs of this petition in advance or as they accrue, or to give security thereof, and desires to file and prosecute this action under the provisions of La. C.C.P. Arts. 5181-5188.

WHEREFORE, petitioner prays that:

1. Defendant, _________________, be served with a copy of this Petition for Divorce, and that after the lapse of legal delays and due proceedings had, there be judgment herein in favor of petitioner and against defendant, decreeing a divorce a vinculo matrimonii between them; and

2. That a temporary restraining order issue herein, immediately and without bond, according to law, and in due course a preliminary and permanent injunction issue to the same effect, prohibiting the defendant, his agents or assigns from any form of physical or sexual abuse or harassment of the petitioner; and

3. Petitioner be allowed to file and prosecute this action under the provisions of La. C.C.P. Arts. 5181-5188; and
4. That a rule nisi issue, directed to the defendant, ________________, ordering him to show cause on a date and time to be set by this Honorable Court why:

A. A preliminary injunction/permanent injunction in the form and substance of the above Temporary Restraining Order should not issue herein; and

B. The parties should not be granted joint custody of the minor children with petitioner designated as the domiciliary parent, with specific visitation privileges to the defendant pursuant to a joint custody implementation plan to be submitted to the court; and

C. The defendant should not ordered to pay child support for the support and maintenance of the minor children of the marriage in an amount to be set by this court in accordance with the Louisiana Child Support Guidelines; and

D. The Petitioner should not be awarded periodic interim spousal support for her maintenance during the pendency of these proceedings, and in due course, final periodic spousal support, in an amount to be set by this Court; and

E. Petitioner should not be granted use of the family residence, and of its contents therein, and the family automobile pending further orders of the court; and

F. Petitioner should not be permitted to reserve her right to bring other actions incidental to or arising from the matrimonial regime, and for other relief based on any action or issue arising out of the marriage of the parties; and

G. The Defendant should not be assessed all costs of these proceedings; and

H. The community property regime should not be terminated in accordance with La. C.C.Art. 2374 as a result of the disorder of affairs of the Defendant; and

I. The Petitioner should not be entitled to all general and equitable relief.

Respectfully submitted,

By: ___________________________

Attorney for Petitioner
PLAINTIFF * _____ JUDICIAL DISTRICT COURT
VERSUS: * _____________ PARISH, LOUISIANA
DEFENDANT * DOCKET NO. _____________

VERIFICATION

BEFORE ME, notary public, personally came and appeared:

___________________________________

Petitioner in the foregoing “Petition for Divorce (La civil code article 102) and Determination of other Ancillary Matters” who, after being duly sworn, did depose and state that all of the allegations contained in the foregoing petition are true and correct to the best of her knowledge, information, and belief.

The minor children have been in her physical custody in this State since ______ and there are no prior custody decree(s) in this or any other state.* All interested parties in these proceedings have been named.

___________________________________

Affiant

SWORN TO AND SUBSCRIBED before me, this ______ day of __________, 20__.  

___________________________________

NOTARY PUBLIC

___________________________________

(print name)

*The need to state the substantive jurisdictional basis for the court to hear a “child custody proceeding” as defined by R.S. 13:1802(4) is necessary pursuant to R.S. 13:1821 (UCCJEA).
ORDER

Considering the above and foregoing verified petition and annexed affidavits:

IT IS HEREBY ORDERED that a R.S. 9:372 temporary restraining order issue herein immediately, without bond, according to law, directed to the defendant, restraining, enjoining, and prohibiting the defendant, his agents or assigns, from any form of physical or sexual abuse.

IT IS FURTHER ORDERED that petitioner is allowed to file and prosecute this action under the provisions of C.C.P. art. 5181-5188.

(Note that the IFP form provides for the Order but the judge may overlook it if s/he has orders to sign here).

IT IS FURTHER ORDERED that the parties shall appear for a Hearing Officer Conference on the ____ day of __________, 2004, in ____________ Parish, with all the necessary documentation required by the Hearing Officer, in order to address all contested matters before the court.

(Note that courts that have Hearing Officers, will set the ancillary matters for a Conference)

IT IS FURTHER ORDERED that in the event that the parties have not resolved the contested matter(s) or a timely objection has been filed by either party, the Defendant, ______________, shall show cause on the _____ day of _____________, 20__, at 10:00 a.m. at the _________________ Parish Courthouse, as a ______ fixing before the Hon. Judge ______________________, why there should not be judgment in favor of petitioner and against defendant, as follows:

(a) Ordering the issuance of preliminary/permanent injunctions in the form and substance of the temporary restraining orders prayed for herein.
(b) Awarding the joint custody of the minor children of the marriage to the parties with petitioner being named primary domiciliary parent and defendant having specific custodial rights as set forth in a Joint Custody Implementation Plan to be submitted to this Court.
(c) Ordering the defendant to pay to petitioner interim periodic spousal support in an amount to be set by this Court and in due course, final periodic spousal support.
(d) Ordering defendant to pay to petitioner child support for the support and maintenance of the minor children of the marriage in an amount set by this Court in accordance with the Louisiana Child Support Guidelines, and further, that defendant be ordered to maintain a policy of health and hospitalization insurance on the aforesaid minor children.
(e) Granting to petitioner the use and occupancy of the family residence located at _________________________, and the use of the contents located therein, and further, the use of the 2002 Ford Escape community vehicle, VIN #______________.
(f). Casting the defendant with all court costs.
THUS, READ AND SIGNED this ________ day of _________________, 20__,
in ____________________________, Louisiana.

_________________________________
JUDGE (NAME)

Clerk of Court:
PLEASE SERVE DEFENDANT PERSONALLY:
(Service info)

- The injunctions are tricky, especially when you need a permanent injunction pursuant to 9:362(4), 9:372, 9:372.1, etc. A permanent injunction is usually an ordinary proceeding and thus, cannot be resolved by a Rule Nisi. A preliminary injunction is a summary proceeding on the other hand and is set as a Rule. In cases where going back and forth to the court for numerous court dates is problematic, (long arm service cases, defendant is incarcerated, etc.), and where a divorce is being sought as well - it is best to get the TRO and if there are no Rules set for other ancillary matters, than plan on taking up the permanent injunction by way of a default at the confirmation of the divorce or at the trial if an answer was filed.

- You should not be able to get a permanent injunction granted by utilizing a C.C.P. Art.1702(E) divorce by pleadings. If issues are joined it should be set for trial. Some Courts may allow a R.S. 9:372.1 (if there is a prior protective order) without setting it for a hearing.

- The permanent injunctions of 9:372 and 9:361 must be on the Uniform Abuse Prevention Order Form (Louisiana Protective Order Registry Forms). In fact, even the TRO's and Preliminary Injunctions have to be on the LPOR forms. See La. C.C.P. art 3607.1. and R.S. 46:2136.2(C).

- Courts that have the Hearing Officer system may facilitate the initial hearing as the Preliminary/Permanent injunction …rolled into one. As long as the defendant is aware of it and agrees to it, it is okay. If an objection is filed by the Defendant, see if the judge will take up the permanent injunction as well. Otherwise, it needs to be finalized at the time of the divorce. A 9:372 injunction must be “instituted during the pendency of the divorce proceedings.” See Lawrence v. Lawrence, 839 So.2d 1201 (La.App. 3 Cir.,2003).
PETITION FOR DIVORCE UNDER CIVIL CODE ARTICLE 103(1)
(with no MINOR CHILDREN)

The petition of __________, a person of the full age of majority and domiciled since 20 May 1990, in the Parish of __________________, State of Louisiana, respectfully represents:

1. Made Defendant herein is ___________, her husband and a person of the full age of majority and domiciled in the Parish of ____________, State of Louisiana.

2. Plaintiff and Defendant were married on the ______ day of __________, 19______, in _________________ Parish, Louisiana, however, their last matrimonial domicile was in __________________ Parish.

3. Plaintiff and Defendant physically separated in August 2000 and Petitioner has voluntarily continued to live separate and apart with the intent to be divorced, without reconciliation, since that date.

4. Plaintiff now desires to obtain and is entitled to obtain a judgment of divorce a vinculo matrimonii on the bases of living separate and apart, without reconciliation, and with the intent to be divorced for one hundred and eighty days (180) days or more as per the provisions of C.C. Article 103(1). The parties did not enter into a covenant marriage pursuant to R.S. 9:272 et seq.

5. Of the marriage, two children were born, namely: __________________, and __________________, who are both of the age of majority. No children were adopted or legitimated nor is Plaintiff pregnant at this time.

6. Plaintiff is a citizen of this State and because of her poverty and want of means, she is unable to pay costs, either in advance, or as they accrue, or to give bond therefore, and requests that she be allowed to file and prosecute this action in in forma pauperis as per L.S.A. C.C.P. Article 5181-5188.

7. Petitioner desires to have her maiden name confirmed and requests that the court enter an order confirming her name as ________________, which is her maiden name.

8. Counsel for the plaintiff, Acadiana Legal Service Corporation and ATTORNEY seek to withdraw as counsel of record (for service purposes) pursuant to La. C.C.P. Art 1314 (A)(2b) after proceedings have been concluded, delays elapsed, and all parties advised.

WHEREFORE, plaintiff prays:

1. That the Defendant, ________________, be served with a copy of this petition and duly cited to appear and answer the same, and that after the lapse of all legal delays and due proceedings had, there be judgment herein in favor of Petitioner, ________________, and against Defendant, ________________, decreeing a divorce a vinculo matrimonii between them;
2. That the Plaintiff be allowed to file and prosecute this action in forma pauperis;

3. That the Defendant be assessed with all costs of these proceedings;

4. That Acadiana Legal Service Corporation and ATTORNEY be permitted to withdraw as counsel of record in accordance with La. C.C.P. Art 1314 (A)(2b) after proceedings have been concluded, delays elapsed, and all parties advised.

5. For an order confirming petitioner’s maiden name as _______ ________.

6. For all general and equitable relief.

Respectfully Submitted By:
ATTORNEY FOR PLAINTIFF
VERIFICATION

STATE OF LOUISIANA
PARISH OF ________________________

BEFORE ME, the undersigned authority, personally came and appeared,

__________________________________

who upon being duly sworn, did depose and say that:

He/she is the plaintiff in the above entitled matter, and all of the allegations contained in the petition are true and correct to the best of his/her knowledge, information and belief.

That there are no minor children born, legitimated, or adopted at the time of this filing in this State or any other State.*

__________________________________

PETITIONER

SWORN TO AND SUBSCRIBED before me, this _____ day of _____________, 20__.

__________________________________

NOTARY PUBLIC

__________________________________

(print name)

---

* See C.C. art. 103.1(1)(a)…no minor children of the marriage. C.C. art. 3506(8) defines children of the marriage as: born of the marriage (includes a child conceived during the marriage), those adopted, and those who have been filiated to the parent by law.
JUDGMENT of 103(1) DIVORCE

This cause was heard on the 1st day of February, 2012, pursuant to “PLAIN-TIFF’S PETITION FOR DIVORCE UNDER CIVIL CODE ARTICLE 103(1) (with NO MINOR CHILDREN). The divorce matter was taken up instanter at the request of the parties.

Present: PLAINTIFF: __________________ and her Attorney, ALSC;

DEFENDANT: __________________

The Court, after reviewing the record, the parties’ oral waivers in open court as to legal notices and trial delays for the divorce, testimony, and finding the law in accordance therein; for the oral reasons assigned in open court, rendered judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the PLAINTIFF, is granted an absolute divorce from the DEFENDANT, forever dissolving the bonds of matrimony that existed between them on the basis of the parties having lived separate and apart continuously and without reconciliation pursuant to La. Civil Code Article 103(1).

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that PLAINTIFF’S name be confirmed as _______________, which is PLAINTIFF’S maiden name.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that in accordance with C.C.P. Art 1314 (A)(2b), since this is a final judgment that terminate or disposes of all issues litigated and necessary notice having been given to all parties herein, counsel of record for petitioner ______ and ALSC shall be hereby withdrawn as Counsel of Record, upon the lapse of appeal delays herein.

IT IS HEREBY FINALLY ORDERED, ADJUDGED, AND DECREED that the defendant is cast with all costs in these proceedings.

JUDGMENT RENDERED in OPEN COURT on the 1st day of February 2012.

JUDGMENT READ AND SIGNED in St. Martinville, Louisiana on this _______ day of __________________, 20__.

____________________________________
__ Judicial District Court Judge (NAME)

*The judgment of divorce is effective when signed and not when rendered. Any re-marriage plans of the client should wait until the judgment is signed. The judgment above is taken when the normal delays of citation, default, and/or trial are waived in open court and the petitioner is entitled to the relief.*
FAMILY LAW

PLAINTIFF * ____ JUDICIAL DISTRICT COURT
VERSUS: * ____________ __ PARISH, LOUISIANA
DEFENDANT * DOCKET NO. _____________
FILED: ______________ * ________________ DEPUTY CLERK

AFFIDAVIT OF WAIVER OF SERVICE, CITATION, AND ALL DELAYS

STATE OF LOUISIANA
PARISH OF ________________________

BEFORE ME, the undersigned Notary Public, on the date mentioned below, personally came and appeared: DEFENDANT, affiant, who is domiciled at the address stated below; and who after being duly sworn, did depose and state:

1. He is the Defendant in the above-captioned suit for divorce which includes the matters of Divorce pursuant to La. C.C. Art 103(1) and Child Custody;

2. He has been furnished with a certified copy of this suit and hereby formally and expressly acknowledges and accepts service of the certified copy of the petition and waives formal Citation and service of process and the delays required by La. C.C.P Art. 1201(C);

3. He further waives the necessity of being given notice of any trial or hearing, all legal delays, and waives his appearance therein;

4. He further waives his right to respond pursuant to La. C.C.P. Arts. 928, 1001, & 1002.

5. He finally waives the necessity of being given notice of the signing of the Judgment, pursuant to La. C.C.P. Article 1913.

Affiant further stated that he understood that by executing this Affidavit, the petitioner would be allowed to go forward with the lawsuit in his absence and obtain the relief prayed for in her petition including all court costs. *

____________________________________
DEFENDANT

____________________________________
____________________________________
____________________________________
____________________________________
(Address of Defendant required)*

SWORN TO AND SUBSCRIBED before me, this ______ day of ______, 20__, in _________________, Louisiana.

____________________________________
NOTARY PUBLIC

Print Notary Name __________ Notary #

☞ Assists the Clerk of Court with collection efforts. It also thwarts any potential IFP problems when it is time to withdraw.
Grandparent Adoption with Alleged Father
Also use for aunt/uncle, first cousin, or sibling who are petitioners.

IN RE: GRAMPY MACINTOSH APPLE        *        ___ JUDICIAL DISTRICT COURT
AND GRAMMY ANNE SMITH APPLE        *        _________ PARISH, LOUISIANA
Applying for Intrafamily Adoption of
JONATHAN JAMES APPLE                       *        DOCKET NO. _______________
FILED:_____________________               *        _____________DEPUTY CLERK

GRANDPARENTS’ PETITION FOR INTRAFAMILY ADOPTION

The petition of GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH
APPLE, both of the full age of majority and domiciled in Acadia Parish, respectfully
represents:

I. Petitioners, GRAMPY MACINTOSH APPLE AND GRAMMY ANNE SMITH
APPLE, desire to adopt the child known to them as JONATHAN JAMES APPLE who
is under seventeen (17) years of age. All information required by Children’s Code
Article 1246 is attached to this petition as Exhibit A. A certified copy of the child’s birth
certificate is attached as Exhibit B.

II. Petitioners were married to one another on the 8th day of May, 1955 and are still
married as evidenced by the marriage certificate attached as Exhibit C.

III. The child was born out of wedlock to petitioners’ daughter, Candy Mandy Apple,
with no father listed on the birth certificate. Paul Walter Mellon is alleged to be the
biological father of JONATHAN JAMES APPLE. However, Paul Walter Mellon has
never formally acknowledged or legitimated the child, nor has any order of filiation
been issued by a court, nor is he presumed to be the father of the child under the
laws of Louisiana nor any other state. (See Exhibits D and E) Additionally, Paul Walter
Mellon has failed to provide substantial parental care and support to the child. There-
fore, under Children’s Code Article 1193 his consent or relinquishment are not neces-
sary. {But note he must be served with a Notice of Filing of Adoption}

IV. The mother of the child has consented to this adoption by Authentic Act of Con-
sent which is attached as Exhibit F.

V. The child has resided with petitioners for at least six (6) months prior to filing this
petition. Additionally, petitioners obtained legal custody of the child through the Juve-
nile Court in the matter entitled “State of Louisiana In the Interest of the Minor,
Jonathan James Apple”, at Docket J-1111, in Acadia Parish, Louisiana on October 31,
1999, a certified copy of which is attached as Exhibit G.

VI. Petitioners do not desire to change the name of the child. {or: desire to change
child’s name to ___________________________}

VII. It is in the best interest of the child that this adoption take place. {If twelve (12)
years old or older, state that child is aware of and wishes to be adopted by petitioners}

VIII. Pursuant to Children’s Code Article 1243.2 petitioners request that the Office of
Community Services be ordered to conduct a priority records check of any validated
complaints of child abuse or neglect by petitioners, and provide this Court with a cer-
tificate indicating all information discovered or that no such information has been found.

(408)
VIII.
Pursuant to Children's Code Article 1243.2, petitioners request that the BLANK Parish Sheriff’s Office be ordered to conduct a priority records check of all federal and state arrests and convictions as to petitioners in this state or any other in which petitioners have been domiciled since age of majority; and provide this Court with a certificate indicating all information discovered or that no such information has been found. {Some courts will want the State Police to do this}

IX.
Because of their poverty and want of means, petitioners are unable to pay in advance, present or future costs, or give bond, and wish to file this suit in forma pauperis. {Some jurisdictions will deny pauper status since this action is considered uncontested}

WHEREFORE, petitioners pray that:

A copy of a Notice of Filing of Petition be served {or if lives out of state by certified mail with return receipt or commercial courier} on the alleged father.

A copy of the petition and all exhibits be served by certified mail with return receipt on the Department of Social Services. {Pursuant to Children's Code Article 1252 an investigation by the department is not necessary unless ordered by the Court}

The Department of Social Services be ordered to conduct a priority records check of any validated complaints of child abuse or neglect by petitioners in this state and any other in which petitioners have been domiciled since the age of majority, and provide a certificate of all information discovered or that none was found.

A copy of the Order only be served on the BLANK Parish Sheriff’s Office to conduct a priority records check for all federal and state arrests and convictions, and provide a certificate of all information discovered or that none was found.

A date for a hearing be set within sixty (60) days (if there is no opposition) or within ninety (90) days (if there is opposition) after the filing of this petition.

After hearing, a final decree of adoption be entered pursuant to Children’s Code Article 1255.

Respectfully submitted,

By: ____________________________________  
ATTORNEY #  
1020 Surrey Street  
P. O. Box 4823  
Lafayette, LA  70502-4823  
Phone: (337) 237-4320  
Fax: (337) 237-8839
IN RE: GRAMPY MacINTOSH APPLE * JUDICIAL DISTRICT COURT AND GRAMMY ANNE SMITH APPLE * PARISH, LOUISIANA Applying for Intrafamily Adoption of * DOCKET NO. ___________________ JONATHAN JAMES APPLE * FILED:_____________________ * DTY. CLERK: ________________

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NOTICE OF FILING OF PETITION FOR ADOPTION (LA. CH.C.ART. 1247)*

Notice

Louisiana law provides that under certain circumstances your consent to the adoption of your child may be dispensed with and you can permanently lose your rights as a parent by final decree of adoption. An intrafamily adoption petition has been filed requesting the court to grant an adoption and terminate your parental rights to your child. A copy of the petition is attached to this notice. If you do not file a written answer stating your opposition to the adoption within fifteen days of receiving this notice you will lose the right to object to the adoption. If you choose to file a written answer stating your opposition to the adoption you must file it with the clerk of court at _________________. Only if you file an answer stating your opposition to the adoption will you have an opportunity to present your opposition to the adoption. If you file an answer stating your opposition, the court will set a hearing, and you will receive notice of the hearing of your opposition.

If you do not file an answer stating your opposition, and if the court at the adoption hearing finds that the facts set out in the petition are true and that adoption is in the best interest of your child, the court can enter a judgment ending your rights to your child. If the judgment terminates your parental rights, you will no longer have any rights to visit or to have custody of your child or make any decisions affecting your child, and your child will be legally freed to be adopted.

This is a very serious matter. You should contact an attorney immediately so that he or she can help you determine your rights. You have the right to hire an attorney and to have him or her represent you. If you cannot afford to hire an attorney and you oppose the adoption, your answer stating your opposition may request that the court determine if you have the right to have an attorney appointed. If you have filed an answer stating your opposition, whether or not you decide to hire an attorney, you will have the right to attend the hearing of your case, to call witnesses on your behalf, and to question those witnesses brought against you. You may call the telephone number on the attached form for information concerning legal aid. If you have any questions concerning this notice, you may call the telephone number of the clerk’s office which is __________.

☞*As amended by Act 603 of the 2012 Legislative Session. See Ch. C. Art. 1107.1 et seq. that allows for “Intent to Surrender for Adoption” for the purpose of facilitating “early planning for the child who may be surrendered by the mother for adoption and to provide due notice at the earliest possible time to any alleged or adjudicated father who may have an interest in the child’s custody.” The consequences to the father is provided for in Ch. C. Art. 1107.6.
IN RE: GRAMPY MACINTOSH APPLE * ___ JUDICIAL DISTRICT COURT
AND GRAMMY ANNE SMITH APPLE * _________ PARISH, LOUISIANA
Applying for Intrafamily Adoption of * *
JONATHAN JAMES APPLE * DOCKET NO. __________
FILED: __________________ * ___________DEPUTY CLERK
-----------------------------------------------------------------------------------------------------------------------

VERIFICATION

STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, the undersigned authority, personally came and appeared,

GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE

who upon being duly sworn, did depose and say that:

They are the petitioners in the above-entitled petition and all of the allegations contained in it are true and correct to the best of their knowledge, information and belief.

________________________
GRAMPY MACINTOSH APPLE

________________________
GRAMMY ANNE SMITH APPLE

SWORN TO AND SUBSCRIBED before me, this ____ day of ________________, 20__.

________________________
NOTARY PUBLIC

________________________
(print name)
I. FACTS CONCERNING PETITIONERS
   A. ADOPTIVE FATHER
      1. Father’s full name:
      2. Date of birth:
      3. Place of birth:
      4. Occupation:
      5. Marital status:
      6. Social Security No.:
         All parishes/counties and states where lived since 18 years old:
   B. ADOPTIVE MOTHER
      1. Mother’s full name:
      2. Date of birth:
      3. Place of birth:
      4. Occupation:
      5. Marital status:
      6. Social Security No.:
         All parishes/counties and states where lived since 18 years old:
   C. INFORMATION REGARDING MOTHER AND ADOPTIVE FATHER
      1. Current Address:
      2. Telephone numbers:
      3. Number of children born of the marriage:
      4. Number of adoptive children:
      5. Approximate annual income:

II. FACTS CONCERNING CHILD TO BE ADOPTED
   1. Birth registered in the name of:
   2. Name to be changed to:
   3. Date of birth:
   4. Place of birth:

III. FACTS CONCERNING MOTHER AND ALLEGED FATHER
   A. ALLEGED FATHER
      1. Father’s full name:
      2. Father’s mailing address:
      3. Social Security Number:
   B. MOTHER OF CHILD
      1. Father’s full name:
      2. Father’s mailing address:
      3. Social Security Number:

IV. OTHER INFORMATION
   A. Date and circumstances under which child entered petitioners’ home:
   B. Legal custodian of child:
   C. Relationship between petitioners and child:
AUTHENTIC ACT OF CONSENT TO ADOPTION

STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, Notary Public, and in the presence of the undersigned competent witnesses, personally appeared

CANDY MANDY APPLE DOE

who, after being duly sworn, did depose and state:

She is the daughter of GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE, petitioners in the above-captioned suit for adoption and continues to be domiciled in Louisiana since _________ (CH.C. Art. 1109 imposes a domiciliary of at least eight months).

She consents to the adoption of her child, JONATHAN JAMES APPLE, by GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE, {and consents to changing the child’s name to ___________________,}

The child was born of her non-marital union with Paul Walter Mellon. No father was listed on the birth certificate, and Paul Walter Mellon has never formally acknowledged or legitimated the child, nor has any order of filiation been issued by a Court, nor is he presumed to be the father of the child under neither the laws of Louisiana nor any other state. Additionally, Paul Walter Mellon has failed to provide substantial parental care and support to the child.

Affiant declares herein that she has no mental incapacity and is under no interdiction. She is not under any stress or duress that would affect her ability to make this consent. Further, that she is making this surrender and gives her consent freely and voluntarily as it is in the best interest of the minor children. She understands that this consent and surrender is final and irrevocable upon execution and that it is made more than five (5) days after the children’s birth.

Affiant states that she waives her right to the notice and service of the petition and all subsequent proceedings.

Affiant declares that she is aware of the provisions of the voluntary registration law, whereby contact may be established with the surrendered child upon the child’s reaching the age of eighteen years. Affiant further is aware of her right to consult an attorney prior to the execution of this act so that she is informed of the meaning of these declarations, the consequences of her consent, and the surrender of her parental rights herein, especially her rights and obligations. She executes this act knowingly.

Affiant further avers that she is aware that it is unlawful to make a false statement concerning biological paternity or the surrender of parental rights and of the applicable penalties for violations of $10,000 or imprisonment for not more than five years or both.

She finally waives the right to join in the petition and be served with a copy of the petition.
THUS DONE AND PASSED, in ______, Louisiana, on this _______ day of _____________________, 20__, and in the presence of the undersigned competent witnesses, _________________________ and _____________________________, who have signed their names with the appearer and me, Notary Public, after reading of the whole.

Witnesses:

____________________________________________

____________________________________________

____________________________________________

CANDY MANDY APPLE DOE

____________________________________________

NOTARY PUBLIC

____________________________________________

(print name)

EXHIBIT F
ORDER

Considering the petition and attached affidavits filed in this matter it is ordered that:

A copy of a Notice of Filing of Petition for Adoption be served {or if lives out of state use certified mail with return receipt or commercial courier} on the alleged father.

The Petition for Adoption be filed and that a copy of the petition together with all appropriate exhibits be served on the Department of Social Services by certified mail with return receipt.

The Department of Social Services shall not study the proposed adoption and submit a confidential report of its findings to this Court pursuant to Children’s Code Article 1252. {An investigation by the department is not necessary unless ordered by the Court}

This matter be heard in Chambers at ____________________, Louisiana, on the ______ day of ____________________, 20__, at ______ o’clock a.m. before the Honorable ______________________, presiding.

The Department of Social Services conduct a records check for any validated complaints of child abuse for neglect in the State of Louisiana or any other state in which the prospective adoptive parents have been domiciled since becoming majors for the following prospective adoptive parent; and the Acadia Parish Sheriff’s Office conduct a records check on the following prospective adoptive parents for all federal and state arrests and convictions:

GRAMPY MACINTOSH APPLE
Date of Birth: _______________________________
Social Security Number: _______________________
State(s) of Domicile: _________________________

GRAMMY ANNE SMITH APPLE
Date of Birth: _______________________________
Social Security Number: _______________________
State(s) of Domicile: _________________________

The Department of Social Services and Sheriff prioritize this records check, and provide a certificate to this Court indicating all information discovered or that no such information has been found.

SIGNED, __________________, Louisiana, this ______ day of __________________, 20__.

__________________________________
JUDGE
SERVE BY CERTIFIED MAIL w/ RETURN RECEIPT
A COPY OF PETITION AND EXHIBITS:
Lafayette Regional Office of Community Services
Brandywine 1, Room 218
825 Kaliste Saloom Road
Lafayette, LA  70508
{And any other County/Parish where petitioners resided since majority}

SERVE BY CERTIFIED MAIL w/ RETURN RECEIPT or {COMMERCIAL COURIER}
A NOTICE OF FILING ADOPTION:
Barry Bosc Pear
123 Harmony Lane
Houston, TX  10001

PLEASE SERVE
A COPY OF ORDER ONLY:
BLANK Parish Sheriff’s Office
MOTION TO TERMINATE PARENTAL RIGHTS

On Motion of GRAMPY MACINTOSH APPLE and GRAMMY ANNE SMITH APPLE, who suggest to the Court that:

I.
A Petition for Intrafamily Adoption was filed in this Court on ________________, 20__, in which Movers sought to adopt their grandchild, JONATHAN JAMES APPLE. All attachments required by law were filed with that petition.

II.
The minor child, JONATHAN JAMES APPLE, was born out of wedlock, with no father listed on his birth certificate. The alleged biological father of the child is Paul Walter Mellon. He has never acknowledged or legitimated the child, nor has any court order of filiation been entered, nor is he presumed to be the legal father of the child under Louisiana law or any other state’s law.

III.
A certified copy of the child’s birth certificate with no one indicated thereon as the father of the child was previously filed of record.

IV.
Attached to this Motion is a certificate from Louisiana Vital Records that no registration has been filed in the Putative Father Registry as to this child.

V.
Attached to this Motion is a certificate from the Clerk of Court in the parish where the child was born indicating that no Act of Acknowledgment, Legitimation or Judgment of Filiation has been recorded as to this child.

VI.
The alleged father of this child was served with the Notice of Filing of Petition for Adoption by certified mail, return receipt requested, which was received on ________________, 20__, as evidenced by the certificate of mailing notice and return receipt filed of record.

VII.
No opposition has been filed to this adoption specifically requesting a hearing to prove establishment of parental rights within the time allowed by law.

VIII.
The mother of the child, Candy Mandy Apple, consented to the proposed adoption by executing an Authentic Act of Consent on ________________, 20__, which was previously filed of record in this matter.

WHEREFORE, Movers pray that this Court issue an order declaring the parental rights of the alleged biological father, Paul Walter Mellon, and the biological mother, Candy Mandy Apple, terminated with respect to the minor child, JONATHAN JAMES APPLE.

Respectfully submitted,

By: _______________________________
ATTORNEY #
1020 Surrey Street
P. O. Box 4823
Lafayette, LA 70502-4823
Phone: (337) 237-4320
Fax: (337) 237-8839
ORDER TERMINATING PARENTAL RIGHTS

Considering the above motion with affidavits and attachments, and upon finding that:

The alleged father, Paul Walter Mellon, was served with Notice of Filing of Petition for Adoption and has not timely filed an opposition to the proposed adoption, and

The mother, Candy Mandy Apple, consented to the proposed adoption by Authentic Act of Consent,

IT IS ORDERED that the parental rights of the alleged biological father, Paul Walter Mellon and mother, Candy Mandy Apple are hereby terminated with respect to the minor child, JONATHAN JAMES APPLE.

ORDERED AND SIGNED, in _________________, Louisiana, on this __________ day of ________________, 20__.  

_________________________________
JUDGE
FINAL DECREES AND JUDGMENT OF ADOPTION

Considering the pleadings filed in this matter, the requirements of law having been met, the Court, upon considering the confidential report of the Louisiana Department of Social Services, and the records check and the testimony concerning the adoption, for the reasons orally assigned at the hearing held on the ______ day of ______________, 2012, and being satisfied that the adoption is in the best interests of the child:

IT IS ORDERED that: The child known to petitioners as JONATHAN JAMES APPLE be declared, for all legal purposes to be the child of petitioners to the same extent as if the child had been born of the petitioners’ marriage.

The name of the child remain unchanged. {or the name of the child be changed to ____________________________}

The Clerk of Court of this Parish comply with the requirements of Children’s Code Article 1182(B) and forward a certificate of this final decree to the state Registrar of Vital Records for entry of a certificate of live birth of Jonathan James Apple.

{All further contacts with the Department of Social Services be dispensed with accordingly.}

JUDGMENT RENDERED AND SIGNED in Chambers in ________________, Louisiana, this ______ day of ______________, 20__. 

_________________________________
JUDGE

If the parental rights of the parents were not terminated with a Motion to terminate the rights as in cases where the parents have executed an Act of Consent to the Adoption, the final decree must contain language that the parental rights are terminated.
PETITION FOR INTRAFAMILY ADOPTION

The petition of JOHN JAMES DOE, of the full age of majority, who is domiciled in Acadia Parish, respectfully represents:

I. Petitioner, JOHN JAMES DOE, desires to adopt his stepchild known to him as SAMUEL MICHAEL SMITH who is under seventeen (17) years of age. The child has resided with petitioner for at least six (6) months prior to filing this petition. All information required by Children’s Code Article 1246 is attached to this petition as Exhibit A. A certified copy of the child’s birth certificate is attached as Exhibit B.

II. Petitioner was married to Mary Jane Brown on the 11th day of May, 1993 and they are still married. (A copy of marriage certificate attached as Exhibit C)

III. The parents of this child, Mary Jane Brown and Peter Paul Smith, were divorced and sole custody awarded to Mary Jane Brown by Judgment signed on October 20, 1998 in the suit entitled “Mary Jane Brown Smith versus Peter Paul Smith”, bearing Docket No. 98-0000 in the 15th Judicial District Court, Acadia Parish, Louisiana. A certified copy of the judgment is attached to this petition as Exhibit D. {or no prior order of custody has been entered by this Court or any other. The mother of this child, Mary Jane Brown, has lawfully exercised physical custody of the child since…}

IV. Pursuant to Children’s Code Article 1244, Mary Jane Brown Doe has consented to this adoption by Authentic Act of Consent attached as Exhibit E.

V. The father of the child, Peter Paul Smith, has refused or failed to visit, communicate, or attempt to communicate with the child {or has refused or failed to comply with a court order of support} without just cause for a period of at least (6) months since the rendition of the judgment. Therefore, under Children’s Code Article 1245, his consent is not necessary. {or Peter Paul Smith is the father of this child who has consented to this adoption by Authentic Act of Consent which is attached to this petition as Exhibit F}

VI. Petitioner desires to change the name of the child to Samuel Michael Doe, thus making the surname of the child the same as petitioner’s.

VII. It is in the best interest of the child that this adoption take place. {If twelve (12) years old or older, state that child is aware of and wishes to be adopted by petitioner}

VIII. Pursuant to Children’s Code Article 1243.2 petitioner requests that the Office of Community Services be ordered to conduct a priority records check of any validated complaints of child abuse or neglect by petitioner in this state or any other in which petitioner has been domiciled since age of majority, and provide this Court with a certificate indicating all information discovered or that no such information has been found.
IX.

Pursuant to Children’s Code Article 1243.2 petitioner requests that the Acadia Parish Sheriff’s Office be ordered to conduct a priority records check of all federal and state arrests and convictions as to petitioner; and provide this Court with a certificate indicating all information discovered or that no such information has been found.

WHEREFORE, petitioner prays that:

A copy of the petition and all appropriate exhibits be served by certified mail with return receipt {or commercial courier if lives out of state} on the father of this child.

A copy of the petition and all appropriate exhibits be served by certified mail with return receipt on the Department of Social Services. {Pursuant to Children’s Code Article 1252, an investigation by the department is not necessary unless ordered by the Court}

The Department of Social Services be ordered to conduct a priority records check of any validated complaints of child abuse or neglect by petitioner in this state and any other in which petitioner has been domiciled since the age of majority, and provide a certificate of all information discovered or that none was found.

A copy of the Order only be served on the Acadia Parish Sheriff’s Office to conduct a priority records check for all federal and state arrests and convictions, and provide a certificate of all information discovered or that none was found.

A date for a hearing be set for not less than thirty (30) days or more than sixty (60) days after the filing of this petition.

The name of the child be changed to Samuel Michael Doe, thus making the surname of the child the same as petitioner's.

After hearing, a final decree of adoption be entered pursuant to Children’s Code Article 1255.

Respectfully submitted,

By: _________________________________

ATTORNEY #
1020 Surrey Street
P. O. Box 4823
Lafayette, LA  70502-4823
Phone: (337) 237-4320
Fax: (337) 237-8839
IN RE: JOHN JAMES DOE                         *        __th JUDICIAL DISTRICT COURT
Applying for Intrafamily Adoption of       *        DOCKET NO. _______________
SAMUEL MICHAEL SMITH                        *        __________ PARISH LOUISIANA
FILED:_____________________               *        Dty. Clerk___________________
-----------------------------------------------------------------------------------------------------------------------

VERIFICATION

STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, the undersigned authority, personally came and appeared,

JOHN JAMES DOE

who upon being duly sworn, did depose and say that:

He is the petitioner in the above-entitled petition and all of the allegations contained in it are true and correct to the best of his knowledge, information and belief.

----------------------------------------------------------

JOHN JAMES DOE

SWORN TO AND SUBSCRIBED before me, this _________________ day of ____________________, 20__.  

----------------------------------------------------------

N O T A R Y P U B L I C
(print name)
I. FACTS CONCERNING PETITIONER
   A. ADOPITIVE FATHER
      1. Father’s full name:
      2. Date of birth:
      3. Place of birth:
      4. Occupation:
      5. Marital status:
      6. Social Security No.:
         All parishes/counties and states where lived since 18 years old:

   B. INFORMATION REGARDING MOTHER AND ADOPITIVE FATHER
      1. Current Address:
      2. Telephone numbers:
      3. Number of children born of the marriage:
      4. Number of adoptive children:
      5. Approximate annual income:

II. FACTS CONCERNING CHILD TO BE ADOPTED
   1. Birth registered in the name of:
   2. Name to be changed to:
   3. Date of birth:
   4. Place of birth:

III. FACTS CONCERNING LEGITIMATE FATHER
   1. Father’s full name:
   2. Father’s mailing address:
   3. Social Security Number:

IV. OTHER INFORMATION
   A. Date and circumstances under which child entered petitioner’s home:
   B. Legal custodian of child:
   C. Relationship between petitioner and child:
STATE OF LOUISIANA
PARISH OF ACADIA

BEFORE ME, Notary Public, and in the presence of the undersigned competent witnesses, personally appeared

MARY JANE BROWN DOE

who, after being duly sworn, did depose and state:

She is married to and living with JOHN JAMES DOE, petitioner in the above-captioned suit for adoption.

She consents to the adoption of her child, SAMUEL MICHAEL SMITH, by JOHN JAMES DOE, and consents to changing the child’s name to Samuel Michael Doe.

The child was born of her prior marriage to Peter Paul Smith. She was divorced and sole custody granted to her on October 20, 1998 in the suit entitled “Mary Jane Brown Smith versus Peter Paul Smith” at Docket Number 98-0000, in the Fifteenth Judicial District Court, in Acadia Parish, Louisiana.

The father of the child, Peter Paul Smith, has refused or failed to visit, communicate, or attempt to communicate with the child without just cause for a period of at least six (6) months after the judgment signed October 20, 1998 awarding her sole custody of the child.

(See Children’s Code Article 1245 for alternate grounds.)

She also waives the right to join in the petition and be served with a copy of the petition.

THUS DONE AND PASSED, in __________, Louisiana, on this ______ day of __________, 20__, and in the presence of the undersigned competent witnesses, __________________ and __________________, who have signed their names with the appearer and me, Notary Public, after reading of the whole.

Witnesses:

________________________________________
Mary Jane Brown Doe

________________________________________

NOTARY PUBLIC
(print name)

EXHIBIT E
Considering the petition and attached affidavits filed in this matter it is ordered that:

The Petition for Adoption be filed and that a copy of the petition together with all appropriate exhibits be served on the father of this child and on the Department of Social Services by certified mail with return receipt.

The Department of Social Services study the proposed adoption and submit a confidential report of its findings to this Court pursuant to Children’s Code Article 1252. {An investigation by the department is not necessary unless ordered by the Court}

This matter be heard in Chambers at Crowley, Louisiana, on the _______ day of ____________________, 2012, at _______ o’clock a.m. before the Honorable ______________________, presiding.

The Department of Social Services conduct a records check for any validated complaints of child abuse for neglect in the State of Louisiana or any other state in which the prospective adoptive parent has been domiciled since becoming a major for the following prospective adoptive parent; and the Acadia Parish Sheriff’s Office conduct a records check on the following prospective adoptive parent for all federal and state arrests and convictions:

JOHN JAMES DOE

Date of Birth: _______________________________
Social Security Number: ______________________
State(s) of Domicile: _________________________

The Department of Social Services and Sheriff prioritize this records check, and each provide a certificate to this Court indicating all information discovered or that no such information has been found.

Crowley, Louisiana, this ________ day of ________________________, 20___.

__________________________________
JUVENILE COURT JUDGE

SERVE BY CERTIFIED MAIL w/ RETURN RECEIPT
A COPY OF PETITION AND EXHIBITS:
Lafayette Regional Office of Community Services
Brandywine 1, Room 218
825 Kaliste Saloom Road
Lafayette, LA 70508
{and any other county/parish where petitioner resided since majority}

SERVE PERSONALLY OR DOMICILIARY
A COPY OF PETITION AND EXHIBITS:
Peter Paul Smith
123 Harmony Lane
Opelousas, LA 70570

PLEASE SERVE
A COPY OF ORDER ONLY
Acadia Parish Sheriff’s Office
STATE OF LOUISIANA
PARISH OF ___________

CLERK’S CERTIFICATE OF NO ACKNOWLEDGMENT, LEGITIMATION,
OR JUDGMENT OF Filiation OF ILLegITIMATE CHILD

Pursuant to law, I, the undersigned Deputy Clerk of the Acadia Parish Court,
State of Louisiana, do hereby certify that upon diligent search of this Court’s records,
I find that there has been no authentic Act of Acknowledgment, Act of Legitimation, or
Judgment of Filiation filed in this Court by anyone acknowledging the minor child,
[NAME OF MINOR CHILD] born to [MAIDEN NAME OF MOTHER] in Acadia Parish
on _______________________, 19_____.

All records of requests for Certificates of Acknowledgment, Legitimation, and/or
Judgments of Filiation and copies thereof issued by this Court are strictly confidential
records and shall not be open to public inspection.

THUS DONE AND SIGNED in_____________________, ____________ Parish,
Louisiana, on this _________ day of _______________________, 20__.

________________________________
DEPUTY CLERK OF COURT

{Note: Prepare and submit this certificate to the Clerk’s office in the parish/county of
the child’s birth}

{Also need a Certificate from the Putative Father Registry of Vital Records (which they
generally prepare internally) to attach}

Exhibits D and E
EX PARTE CUSTODY
CERTIFICATION OF APPLICANT’S ATTORNEY (C.C.P. Art. 3945)

I ___________________, attorney representing _________________, petitioner herein, and applicant for temporary ex parte custody order, do certify to the court that:

1. (a) The following efforts have been made to give the respondent reasonable notice of the date and time the order is being presented to the court.

_____________________________________________________________

OR

(b) The reason(s) that such notice is not required

_____________________________________________________________

_____________________________________________________________

2. I have checked the civil suit records of this parish on the ______ day of ____________, 20___, in order to determine whether there is a prior custody order for the minor child(ren) involved in this matter and whether it affects the parties to this present proceeding. There is/is not a prior custody order. (Attach if there is one. If there is one in the same parish, the 3945 new filing should be in that suit and the cases may or may not need to be consolidated.).

____________________________
Attorney

PETITIONER’S SUPPORTING La. C.C. P. Art. 3945 AFFIDAVIT

STATE OF LOUISIANA
PARISH OF LAFAYETTE

BEFORE ME, the undersigned Notary Public, duly commissioned and qualified in this State and Parish, personally came and appeared,____________________, who, after being duly sworn, stated under oath that:

1. I have read the foregoing petition and all of the facts contained therein are true and correct to the best of my knowledge.

2. The other parent/party and I physically separated on ________________ (date).

3. Immediately prior to separating, my spouse and I resided together at _______________________.

4. For the last six (6) months the child(ren) have resided with ________________, at ________________________________.

5. The child(ren) are presently in the physical custody of ________________________, and have been since ________________ (date).

6. I/he/she obtained the child(ren) in the following manner: (Describe where, when, and how obtained, and other special circumstances.)

_____________________________________________________________

7. I desire immediate temporary custody of the child(ren) for the following reasons:

_____________________________________________________________

_____________________________________________________________

8. To my knowledge, there is/is not a prior custody order in existence. (If there is, please state when, and where obtained, and attach a copy of such custody order).

_____________________________________________________________
9. I agree to my child(ren)’s temporary visitation with the other parent/party as follows:

_______________________________________________________________

_______________________________________________________________

(Must not be less than forty-eight (48) hours during the fifteen-day period).

OR

I do not agree to a temporary visitation arrangement prior to the Rule to Show Cause for the following reasons:

_______________________________________________________________

_______________________________________________________________

(Must clearly demonstrate that immediate and irreparable injury will result to the child(ren) as a result of such visitation).

“I fully understand that this affidavit is made under oath and that if I have made any untruthful statements in it, I may be charged with perjury, tried in a criminal proceeding and subject to penalties of up to five years imprisonment and fines of up to $1000.00 or both.”

Affiant

THUS, SWORN TO AND SUBSCRIBED BEFORE ME this ________ day of __________________ 20____.

_______________________________________________________________

NOTARY PUBLIC

______________________________                                _______________

printed name                      Bar. No.
(SUBPOENA FOR A WITNESS)

Your Parish Clerk of Court
P.O. Box 123
St. Martinville, LA 70582

RE: Apple Orange vs Grape Orange
Docket Number: 12345-B, 00th JDC, Your Parish

Dear Clerk:

Please issue a subpoena for the following persons to be present for the Rule set before Judge ____________ on May 7, 2003 at 10:00 a.m. in the above captioned matter.

Grandpa Orange
112 Plum Street
St. Martinville, LA 70582

Neighbor Orange
123 Pear Street
St. Martinville, LA 70582

Or

In connection with these subpoenas, my client has been granted IN forma pauperis status in this case, therefore, she is not required by statute to pay the costs of filing the request for and issuance of subpoenas. Should you have any questions, please do not hesitate to contact my office. With kindest personal regards, I remain

Very truly yours,

______________________________
Attorney
TO: Mr. ________________
Supervisor, Office of Community Services
2729 Veterans Memorial Drive
P.O. Box 849
Abbeville, LA 70501

PLEASE TAKE NOTICE that Apple Orange, through the undersigned counsel, requests the following records from your Agency on the date, time, and place specified below:

DATE: Tuesday, February 19, 2002
TIME: 10.00 a.m.
PLACE: Before the Hon. Judge ____________, at the courthouse in Abbeville, Louisiana.

RECORDS: An entire copy of your investigation records in the ongoing juvenile matter entitled “State of Louisiana in the interests of Grape Orange Jr. “ Docket No. 1234 JU 123 in the 15th JDC for Vermilion Parish. These records include and are not limited to evaluations of all parties, home studies, and reports therein pertaining to this juvenile matter. Such records, if requested by you, may only be reviewed at the discretion of the court, by way of an in-camera inspection.

Respectfully submitted,

___________________________
Attorney
NOW INTO COURT, through undersigned counsel, comes petitioner, APPLE ORANGE, who respectfully represents that:

I.

Petitioner filed a Petition for Divorce in these proceedings on the 2nd day of January, 2002.

II.

Petitioner has attempted to serve the defendant, GRAPES ORANGE, at his last known address at 524 Fruit Street, Plum, LA 70570; however, petitioner has been unable to effectuate service of process after several attempts. See Exhibit “A” Petitioner does not have knowledge of defendants’ whereabouts and a search with relatives and the telephone directory has also been unproductive.

III.

Insofar as defendant, to the best of petitioner’s knowledge, is an absentee of the State of Louisiana, it is necessary that an attorney at law be appointed to represent him under the provisions of LSA – C.C.P. Art. 5091(1).

WHEREFORE, petitioner prays that an attorney at law be appointed to represent the absentee defendant, GRAPES ORANGE, upon whom service can be made in these proceedings conducted contradictorily.

Respectfully submitted,

By___________________________

Attorney
Considering the above and foregoing,

IT IS ORDERED that __________________________, Attorney at Law, upon whom service can be made and these proceedings conducted contradictorily, is hereby appointed to represent the interest of the absentee defendant, GRAPES ORANGE.

THUS, DONE AND SIGNED on this ________ day of ________________, 20__, at ______________________________, Louisiana.

____________________________
DISTRICT JUDGE

PLEASE SERVE:

CURATOR TO BE APPOINTED
BY THE DISTRICT JUDGE
Pro Se MOTION AND ORDER FOR CONTINUANCE

NOW INTO COURT, comes _________________________________, the Defendant, appearing in “proper person” in the above entitled and numbered cause, who respectfully provides that:

I. There is presently a Rule for Custody / Child Support / Visitation /__________, (circle applicable ones) scheduled for hearings as follows:
   (a). Before the Hearing Officer on the _____ day of ____________, 20___, at ______ a.m./p.m. and/or;
   (b). Before Judge___________________ on the ____ day of ____________, 20___, at ______ a.m./p.m.

II. That Defendant seeks a continuance of the hearings for the following reasons: (circle applicable one(s)).
   (a) He/she was served with the Rule on ___/___/____, and that additional time is needed to prepare and/or seek and retain counsel not necessarily limited to Legal Aid;
   (b). That he /she has a doctor’s appointment or other important prior engagement that can not be rescheduled without great disruption (provide proof if available).

III. That the opposing party/counsel (Name and telephone number of opposing party or counsel): _______________________________________ has/has not been contacted and does/does not have objection to the continuance of this matter (circle that which applies); Notwithstanding this, it is requested that this hearing be re-set on the next available hearing date(s) in order to allow mover to have meaningful access to justice.

WHEREFORE, the undersigned party moves this court to grant a continuance of the hearings presently scheduled above and further that this matter be re-set for the next available hearing date(s).

___________________________________
(Signature of mover)

___________________________________
(Address)

___________________________________

Tel. _______________________________
ORDER

CONSIDERING the above and foregoing Motion, IT IS HEREBY ORDERED that the hearings presently scheduled above, is/are hereby continued and re-set as follows:

(a). Before the Hearing Officer on the _____ day of ____________, 20___, at _______ a.m./p.m. and/or;

(b). Before Judge____________________ on the ____ day of ____________, 20___, at _________ a.m./p.m.

THUS READ AND SIGNED in ______________, Louisiana, this ____ day of ____________, 20__.

__________________________________________________________
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading was served upon ________________________________ (name of adverse or opposing counsel), by placing copy of the same in the U.S. mail, postage prepaid and properly addressed this ____ day of ____________, 20__, by me, ________________________________ (signature of mover).
IN RE: VOLUNTARY TRANSFER          *        00TH JUDICIAL DISTRICT COURT
OF CUSTODY OF MINOR CHILD           *        PARISH OF VERMILION
PEAR                                *        Case NO.________ DIV. _______
*        STATE OF LOUISIANA

PETITION FOR VOLUNTARY TRANSFER OF CUSTODY

The petition of MOTHER, a person of majority age, domiciled in Vermilion Parish, Louisiana, respectfully represents that:

I.

Petitioner resides at 123 Fruit, Lafayette, LA  70512.

II.

Petitioner is the mother and natural custodian of the minor child, namely PEAR, born outside of marriage, and whose date of birth is June 27, 1992, as more fully appears from the attached certificate of birth. (Exhibit A)

III.

This Court, pursuant to its juvenile jurisdiction, has subject matter jurisdiction and venue is appropriate pursuant to La Ch. C. Art. 1513(2).

IV.

Petitioner avers that there is no legal custody decree with reference to the minor child. The biological father, FATHER, resides at 123 ½ North Young Peach, Abbeville, LA  70510 and actively participates in the life of the child. He visits with her twice per week. He also desires to knowingly and voluntarily transfer custody of the above named minor child to GRANDMOTHER ANGEL. He will execute an “Affidavit of Acceptance of Service and Waiver of Citation and All Delays”. He has not acknowledged the child.

V.

That Petitioner desires to knowingly and voluntarily transfer custody of the above named minor child until the child reaches the age of majority or until this transfer is revoked, to GRANDMOTHER, ANGEL, who resides at 123 Fruit, Abbeville, LA 70570. ANGEL is the maternal grandmother of the minor child and she is a responsible adult of the age of majority. See “Affidavit of Acceptance.” child has been living with ANGEL since 1996 and Ms. ANGEL has a stable home environment. A transfer of custody is necessary in order that the minor child may receive adequate care, treatment and schooling. Petitioner maintains her right to visitation as agreed to between the parties.

VI.

The La. Dept. Of Social Services has not recommended that this petition be filed.

VII.

That GRANDMOTHER ANGEL has agreed to and does desire to accept custody of PEAR to the extent and under the terms and conditions stated in this petition, as more fully appears in the attached Affidavit of Acceptance.

WHEREFORE, petitioner prays that there be a judgment herein transferring legal custody of the child, PEAR to ANGEL, to the extent and under the terms and conditions set forth in this petition.

BY: _____________________________

Attorney
STATE OF LOUISIANA
PARISH OF ____________

BEFORE ME, the undersigned Notary Public, personally came and appeared:

GRANDMOTHER ANGEL
who, being first duly sworn, did depose and state that:

She is a person of the full age of majority and resides at 123 Fruit, in Abbeville, Louisiana 70510. She has had PEAR in her physical care since the petitioner, MOTHER, voluntarily placed the minor child with her in 1996.

She does knowingly and voluntarily accept legal custody of the minor child, PEAR, cognizant of her responsibilities therein, until she reaches the age of majority or the Voluntary Transfer of Custody is revoked. She understands that the petitioner will have visitation rights.

She avers that she has a stable home, is employed, and does not have a criminal or any other background or health problems that would affect her providing a wholesome and nurturing environment for the minor child, her granddaughter.

____________________________
GRANDMOTHER ANGEL

SWORN TO AND SUBSCRIBED before me on this the _____________ day of ________________, 20__. 

____________________________
NOTARY PUBLIC

(print name)
IN RE: VOLUNTARY TRANSFER OF CUSTODY OF MINOR CHILD PEAR | 00TH JUDICIAL DISTRICT COURT PARISH OF VERMILION | CASE NO.________ DIV. _______ | STATE OF LOUISIANA

JUDGMENT

This cause comes before the Court on a Petition for Voluntary Transfer of Custody. The Court, after considering the pleadings and the affidavits filed, waives the necessity of a hearing pursuant to La Ch. C. Art. 1519, recites and renders judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the biological father, FATHER, is cognizant of this proceeding and by his affidavit, has indicated his consent.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the filed record supports the Voluntary Transfer of Custody of the minor child as having been knowingly and voluntary undertaken by all necessary parties;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that there is a legitimate purpose to transfer custody and a factual basis to support that purpose herein.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the transfer of custody from PETITIONER to GRANDMOTHER ANGEL is in the best interest of the minor child, PEAR.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the legal custody of the minor child, PEAR, is hereby transferred from MOTHER to GRANDMOTHER ANGEL. MOTHER shall have visitation as agreed to between the parties.

IT IS FINALLY ORDERED, ADJUDGED, AND DECREED that all court costs of this proceeding shall be paid by MOTHER.

JUDGMENT READ, RENDERED, and SIGNED in Chambers, in ____________, Louisiana, on the ______ day of __________________, 20__.  

_____________________________________
DISTRICT JUDGE
EX-PARTE MOTION AND ORDER TO HAVE WARRANT ISSUED FOR RETURN OF CHILD TO CUSTODIAL PARENT*

The petition of ABC, a resident and domiciliary of St. Mary Parish, Louisiana, respectfully represents that:

I. ABC is the lawful custodial parent of CHILD, born ______________. Attached hereto is a copy of the Judgment signed by this Honorable Court on ____________. The aforesaid judgment in accordance with the court’s order, specifically grants to ABC, sole legal custody of the minor child.

II. The child is currently in the custody of her mother, XYZ who has refused to relinquish the child to the custody of ABC (you should insert any other applicable circumstances) as ordered by the aforementioned judgment.

III. Mover desires and is entitled to the return of the child to his custody in accordance with the referenced judgment.

IV. Mover is entitled to have this Court enter a Civil Warrant directed to the proper law enforcement authority ordering the return of the child to ABC pending further order of the Court.

WHEREFORE, Mover prays that this Court issue a Civil Warrant to the appropriate law enforcement authority ordering the return to ABC of his child, CHILD.

Respectfully submitted,
ACADIANA LEGAL SERVICE CORPORATION

BY: __________________________________
GOOD ATTORNEY
1020 Surrey Street
P.O. Box 4823
Lafayette, LA  70502-4823
(318) 237-4320
Bar Roll Number:

☞ It is advisable to always tread very cautiously when pursuing a remedy that has severe consequences. Injunctions, civil warrants, ex parte custody, area all examples. Use of the civil warrant is strictly being read to be limited to use by the custodial parent. It appears that domiciliary parent and custodial parent are not synonymous and thus, the civil warrant should not be used when there is a joint custody decree. What if there is no domiciliary parent designated, joint custody, or co-domiciliary parent and a parent wants physical custody or visitation to be enforced? An expedited hearing and/or a Rule for Contempt should be utilized.
* “After reviewing this matter, the disciplinary board determined that the hearing committee’s factual findings are not manifestly erroneous. The board found that respondent improperly obtained both the civil warrant and the arrest warrant on an ex parte basis. Respondent’s use of La. R.S. 9:343 to obtain the civil warrant was contrary to the dictates of the law. He relied upon the statute in circumstances involving parents with joint custody when the statute only applies to circumstances in which a custodial parent seeks to obtain the return of his or her children from a non-custodial parent. Furthermore, respondent failed to provide notice of the filing of the motion to Debra or her counsel, Ms. Clayton.”

In re Downing, 930 So.2d 897, 902-903, 2005-1553 (La. 5/17/06).

☞ If the Mover does not have sole custody, a La. C.C.P. Art. 3945 together with a Civil Warrant should be evaluated very, very carefully.

See R.S. 9:343 (return of child kept in violation of custody and visitation order); R.S. 14:451 (crime of interference with the custody of a child);

* The Third Circuit in Thibodeaux v. Thibodeaux, 104 So.3d 368, 771, 2012-752 (La. App. 3 Cir. 12/5/12), in the author’s opinion, rightfully disagreed with the footnote reference and analysis by the Supreme Court of R.S. 9:343 in In re Downing.
ORDER

Considering the foregoing Motion, Judgement annexed thereto, and finding the law in favor thereof;

IT IS ORDERED, that under the provisions of R.S. 9:343, a Civil Warrant be and is hereby issued and directed to the law enforcement officials of the St. Mary Parish Sheriff’s Office, to accompany the said ABC to any place within the jurisdiction of this Court where the said XYZ, may be located as well as the minor child, CHILD and to execute said Warrant by removing the child immediately and forthwith from XYZ or her agents and delivering the child into the custody of ABC. Said Warrant to be issued posthaste without further orders of this Court.

THUS, READ AND SIGNED at _____________________, Louisiana, this ______ day of _____________________, 20___, at ___________ o’clock ______.m.

_____________________________
DISTRICT JUDGE

CIVIL WARRANT

TO: The Honorable David Naquin
SHERIFF OF St. Mary Parish

YOU ARE HEREBY ORDERED to accompany the said ABC to any place within the jurisdiction of this Court, where the said XYZ or her agent(s) may be located as well as the minor child, CHILD and to execute said Warrant by removing the child immediately and forthwith to the custody of ABC, Said Warrant to be issued posthaste and without further orders of this Court.

____________________, Louisiana, this _____ day of __________________, 20__.

_____________________________
DEPUTY CLERK OF COURT
STATE OF LOUISIANA
PARISH OF____________

AFFIDAVIT OF CUSTODIAL PARENT SEEKING RETURN OF
CHILD KEPT IN VIOLATION OF COURT ORDER

BEFORE ME, the undersigned notary public, personally came and appeared
ABC, herein called affiant, who after being duly sworn did depose and say that affiant
is the custodial parent of CHILD by virtue of the judgment of the _______ Court,
Parish of ________________, State of Louisiana, bearing Docket Number __________,
in the matter entitled ____________________, a certified copy of which is attached to
this affidavit.

Affiant declares that the attached custody and visitation order is true and cor-
rect.

Affiant summarizes the status of any pending custody proceedings as follows:
_____________________.

The child is being held in this parish by XYZ who has [refused to return the
child/removed the child from the custodial parent] in violation of the attached custody
order. Affiant further declares that the following facts concerning the [removal of/failure
to return] the child are true to the best of affiant’s knowledge, information, and belief:
_____________________.

Affiant desires the return of the child and desires the issuance of a civil warrant
directed to law enforcement authorities to return the child to the custodial parent pend-
ing further order of the court having jurisdiction over the matter, as authorized by LSA–
R.S. 9:343.

The child is currently being held at ___________. A picture of the child is attached.

_____________________
Affiant

SWORN TO AND SUBSCRIBED, before me, this ____________ day of _____,
20___, in ____________________, Louisiana.

_____________________
Notary Public

_____________________
(print name)
PARISH OF __________________
STATE OF LOUISIANA

Pursuant to La. C.C.P. Art. 1235.1(D), the undersigned attests that the following was complied with:

1. That service was requested on the defendant to be made through personal service on the Warden or his designee who in turn was supposed to make personal service on the defendant. An affidavit was furnished to the Warden or his designee to be filled out and returned to the undersigned counsel stating that personal service had been accomplished on the defendant within ten (10) days.

2. While service was made on the Warden or his designee on ______________ as is contained in the suit records, no affidavit has been forthcoming from the warden or his designee nor any “note of their inability” to serve the citation or pleadings has been received.

3. Hence, since it has been at least ten (10) days since service was made upon the warden or his designee and in the absence of compliance by the warden or his designee as required in (1) or (2) above, service is now deemed to have been accomplished on the defendant in the above entitled matter, (10) days from the date the warden or his designee were personally served, or on the ____ day of ____________, 20___.

THUS, READ AND SIGNED on __________ day of __________________, 2012, in Lafayette, Louisiana.

______________________________
Good Attorney

LSBN:

SWORN TO AND SUBSCRIBED before me, this ______________ day of ______________, 20__, in __________________, Louisiana.

______________________________
NOTARY PUBLIC

Print Notary Name    Notary #
ORDER AUTHORIZING NEED FOR A WRIT OF HABEAS CORPUS
AD TESTIFICANDUM *

1. The above-entitled civil case is set for a Hearing Officer Conference on August 4, 2011 at 10:30 a.m. before Hearing Officer Josie Frank. The conference is to be held at 118 South Court Street, Suite 132, Opelousas, LA 70570. The Rule Date is scheduled to be heard, before the Honorable Judge Alonzo Harris, on August 26, 2011 at 9:00 a.m. at the 27th JDC Court for the Parish of St. Landry. DDS, the defendant herein, is now confined and in the care, custody, and control of the Richland Detention Center, Dorm I, at 956 Highway 15, Rayville, LA 71269.

2. THE COURT, ACTING ON ITS OWN DISCRETION, FINDS AND ORDERS as follows: (Please select one and initial)

________ The court finds that the testimony of the inmate is not required and/or that it is incumbent upon the inmate to seek to secure his presence in a timely manner; or

________ The testimony of the inmate shall be taken and the proceedings conducted by teleconference, video link, or other available remote technology, or by telephone if agreed to by all parties; or

________ The interests of justice require the presence of the inmate and no other methodology authorized hereunder is feasible. THEREFORE, IT IS ORDERED BY THE COURT, that a Writ of Habeas Corpus issue herein commanding the St. Landry Parish Sheriff’s Department to proceed to the Richland Detention Center and there take into custody, DDS, and bring him before this Court at the times and places specified above, then and there to defend himself; and upon completion of his testimony to return the defendant to the custody of the Richland Detention Center in Rayville, Louisiana, pursuant to La. R.S. 15:706(D).

THUS, READ AND SIGNED in ____________________, Louisiana, on this _____ day of __________________, 20___.

_____________________________
27th JDC DISTRICT JUDGE

PLEASE SERVE:
ST. LANDRY PARISH SHERIFF’S OFFICE;
108 S. MARKET STREET;
OPELOUSAS, LA 70570

In the case of a civil court proceeding, the party requesting the presence of the prisoner shall deposit into the registry of the court an amount set by the court to be sufficient to cover the costs of transporting the prisoner to the civil court proceeding and returning the prisoner to the parish in which he was incarcerated. Upon application of the transporting agency, the court shall pay the transporting agency the costs of transporting the prisoner. See LSA-R.S. 15:706.
RULE FOR MODIFICATION OF PRIOR CONSENT CUSTODY JUDGMENT

NOW INTO COURT, in proper person, comes the Mover, ____________________ (print your name), who respectfully avers to the Court that:

1. Made Respondent is _________________________, who is domiciled in the Parish of ___________________, Louisiana.

2. A Consent Judgment was entered in the above captioned and entitled case in this parish that was signed on the _____ day of ________________, 20___, by this Court. _________________________ (print name of custodial parent) was designated as the domiciliary parent in an award of joint custody of the following minor child(ren):

   ___________________________, DOB:________
   ___________________________, DOB:________
   ___________________________, DOB:________
   ___________________________, DOB:________

   The Physical custodial periods (visitation) were as follows:

   _____________________________________________________________________
   _____________________________________________________________________
   _____________________________________________________________________
   _____________________________________________________________________

3. Since the signing of the judgment, Mover believes that there has been a material change in circumstances warranting a modification. These events include but are not limited to: (describe what has happened that justifies a change of the judgment. These events must have occurred after the prior custody judgment was signed. Ongoing court proceedings may not be in the best interest of the child(ren) and thus, these events must not be petty. You also have to prove these events. Attaching Exhibits may help).

   _____________________________________________________________________
   _____________________________________________________________________
   _____________________________________________________________________
   _____________________________________________________________________

(444)
It is in the best interest of the above named minor child(ren) that the prior judgment be modified by: (check all that apply)

☐ Designating the Mover as the domiciliary parent; and/or
☐ Granting the Mover more specified and shared visitation; and/or
☐ Restricting the custodial periods (visitation) of the Respondent.

4. All costs of these proceedings should be assessed to the Respondent.

WHEREFORE, Mover prays that:

1. A Rule to Show Cause issue in the above captioned matter directed to the Respondent to show cause as to why the prior judgment should not be modified so that the Mover is: (check all that apply)

☐ Designated as the domiciliary parent; and/or
☐ Provided more specific visitation; and/or
☐ Allowed to restrict the physical custodial periods (visitation) of the Respondent.

2. All costs of these proceedings should be assessed to the defendant.

Respectfully submitted,

_______________________________________
(sign your name)

_______________________________________
(Print your name and address)

_______________________________________

(Print your telephone number)
FAMILY LAW

VERIFICATION

STATE OF LOUISIANA
PARISH OF _______________

BEFORE ME, the undersigned authority, personally came and appeared,

________________________________

who, upon being duly sworn, did depose and say that:

He/She is the Mover in the foregoing Rule for Modification of Prior Consent Custody Judgment and all of the allegations contained therein are true and correct to the best of the Mover’s knowledge, information and belief.

Mover understands that ongoing court proceedings may not be in the best interest of the minor child(ren) but that this modification is warranted.

________________________________
Mover

SWORN TO AND SUBSCRIBED before me, this ____________ day of ________________, 20__, in ______________________, Louisiana.

________________________________
NOTARY PUBLIC

Print Notary Name ___________________ Notary # ___________________
ORDER

Considering the foregoing verified petition and annexed affidavit:

IT IS ORDERED that the parties herein shall appear, with or without their respective counsel, before Hearing Officer, _______________________________ at the Parish Courthouse, Room No:_____ in _______________, Louisiana, on the _____ day of ______________, 20___, at the hour of ____ o'clock ___.m. to for a Hearing Officer Conference on the above contested issues.

IT IS FURTHER ORDERED that if the parties are unable to resolve the contested issues amicably or should an objection to the Hearing Officer's recommendations be timely made, then the parties shall appear for the Rule to Show Cause on the _____ day of ______________, 20___, at ____.m. before the Honorable Judge __________________________, to show cause why: (check all that apply)

(a). □ The Mover should not be designated as the domiciliary parent; and/or
    □ The Mover should not be granted more specific visitation; and/or
    □ The Respondent's custodial periods (visitation) should not be restricted.

(b). □ The Respondent should not be assessed court costs.

THUS, READ AND SIGNED, this _____ day of ______________, 20__, in _________________, Louisiana.

_______________________________________
_____ TH. JUDICIAL DISTRICT COURT JUDGE

Service Information:
PLEASE SERVE RESPONDENT:
_____________________________________
(Name)
_____________________________________
_____________________________________
_____________________________________
(Physical address)
RULE TO REDUCE CHILD SUPPORT (DCFS/SES not involved)

NOW INTO COURT comes ____________________, (print your name) who represents as follows:

I.
On ___________ (date of child support judgment) the above Court ordered mover to pay child support to __________________ (print the name of the custodial parent) in the amount of __________ per month.

II.
Since that date, a material change in circumstances has occurred, including but not limited to: _______________________________________________________
__________________________________________________________________
(describe material and substantial change in circumstances and attach any documents supporting your position).

III.
As a result of the change in circumstances described above, the Court should reduce the child support obligation to an amount to be established at trial.

IV.
Mover requests that the reduction awarded by the Court be made retroactive to the date of the filing of this Rule.

WHEREFORE MOVER, respectfully prays that the Court order ______________ (print the name of the custodial parent) to show cause why the child support obligation should not be reduced.

Respectfully submitted,

_______________________________________
(sign your name)

_______________________________________
(Print your name and address)

_______________________________________
_______________________________________
_______________________________________
(Print your telephone number)

(448)
ORDER

Considering the foregoing Rule to Reduce Child Support;

IT IS HEREBY ORDERED that a Hearing Officer’s Conference shall be held on the _______ day of __________, 20__ at ______o’clock in ____________________ Parish, Louisiana, before Hearing Officer __________________________________.

IT IS ORDERED that a rule to show cause issue in the above captioned matter directed to defendant, ______________________, on the _________ day of ___________________, 20__, at _________ o’clock, ____.m., why the child support obligation should not be reduced.

THUS, READ AND SIGNED, in ______________________, Louisiana, this __________ day of ______________, 20__.

________________________________________
DISTRICT JUDGE

PLEASE SERVE DEFENDANT:
(name and THE physical home or work address)

________________________________________
________________________________________
________________________________________
________________________________________

________________________________________
DISTRICT JUDGE

STATE OF LOUISIANA
PARISH OF ___________________

SWORN TO AND SUBSCRIBED BEFORE ME, THIS _______ DAY OF ____________________, 20__.

________________________________________
Notary Public

________________________________________
(print name)
MOTION AND ORDER TO AMEND JUDGMENT OF DIVORCE

ON MOTION of ____________________________, in proper person, and on suggesting to the Court that a Judgment of Divorce was granted by this Honorable Court on the _______ day of _________________, _________, in the above referenced docket number. However, the judgment was silent as to the resumption of the use of petitioner’s maiden name. Furthermore, Mover has not remarried nor changed her name in any way since the judgment of divorce was granted.

The federal Intelligence Reform and Terrorism Prevention Act of 2004 includes several new requirements for identification and changing names on documents such as: Driver’s Licenses, Personal Identification Cards, and Social Security cards. Specifically, the Federal and/or State agency requires that a new card will not be issued under a woman’s maiden name unless the divorce decree specifically states that her name is being changed.

On further suggesting to the Court, that the amendment does not seek to alter the substance of the judgment pursuant to La. C.C.P. Art. 1951 but seeks to confirm the Mover’s right to her maiden and legal name pursuant to La. C.C.P. Art. 3947(B).

Respectfully submitted,

_______________________________________
(print present name)

_______________________________________
(address)

_______________________________________

Tel. (      )____________________________

Considering the above:

IT IS ORDERED, ADJUDGED AND DECREED that the Judgment of Divorce is amended to specifically allow ____________________________________ to resume the use of her maiden and legal name, which is: ___________________________.

THUS READ AND SIGNED this _________ day of ________________, 20 ____, in _________________, Louisiana.

_______________________________________
____ TH. JUDICIAL DISTRICT COURT JUDGE
END NOTES

1). Proof of service includes the sheriff’s return of service (it must show personal service if the parties were living together at the time of the filing of the petition), return of receipt under R.S. 13:3204, or written waiver of service.

2). Note that claims other than divorce and custody may also require “minimum contacts” with Louisiana in order for Louisiana courts to have personal jurisdiction. Atkins v. Atkins, 588 So. 2d 407 (La. App. 2 Cir. 1991).

3). It is possible that some states may refuse to order a division of pension benefits if the divorce decree is silent as to property issues.

4). A Louisiana court with status jurisdiction to render a divorce may lack jurisdiction to decide custody, child support, spousal support or property division. Subject matter jurisdiction over Custody must exist under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Child support or money and property judgments (in rem) requires that the defendant have “minimum contacts” with the State of Louisiana or consent to jurisdiction in addition to jurisdiction pursuant to the Uniform Interstate Support Enforcement Act (UIFSA). La. Ch.C. art. 1301.1 et seq.

5). In re Custody of Landry, 662 So.2d 169 (La. App. 1st Cir. 1995); McKinley v. McKinley, 631 So.2d 45 (La. App. 2nd Cir. 1994); Lingo v. Kelsay, 651 So.2d 499 (La. App. 3rd Cir. 1995); Schloegel v. Schloegel, 584 So.2d 344 (La. App. 4th Cir. 1991); see also Moreau & Ho, Child Custody Awards to Nonparents Under Article 146 (B), 34 Loy. L. Rev. 51, 70-74 (1987).

6). This rule does not apply if a history of family violence exists. See La. R.S. 9: 364. In such cases, sole or joint custody may not be awarded to the perpetrator.

7). Note, however, that a habeas corpus action may be tried summarily even though it is filed as a petition.

8). Note that this requirement may pose problems for domestic violence victims who should not have to disclose their specific address. Consider options for protecting the confidentiality of the victim’s address if necessary.

9). The Supreme Court used the term, “permanent”, in Bergeron. Technically, however, there are no “permanent” custody decrees since they are always subject to modification.


11). Mediation should not be used in domestic violence cases. See La. R.S. 9: 363.

12). In cases involving family violence, the mental health evaluation costs must be paid by the perpetrator. La. R.S. 9: 367; 46: 2136.1.

13). For an overview of psychological literature on effects of separation, see Moreau & Ho, Child Custody Awards to Nonparents Under article 146(B), 34 Loy. L. Rev. 51, 66-70 (1987).
14). Only a prior action in an emergency jurisdiction state, which was otherwise consistent with the PKPA, would prime the home state. The PKPA definition of emergency jurisdiction supersedes any state law definition of emergency jurisdiction. Jones v. Jones, 456 So.2d 1109, 1112 (Ala.Civ. App. 1984).

15). See also La. R.S. 13: 1802(7)(a) and (b); 28 USC §§ 1738A(c)(2)(A)(ii); 1738A (b)(4). Home state status continues for six months if the child is absent because of his removal by a person claiming custody and a parent (or person acting as a parent) remains in the home state. As a practical matter, the home state parent should immediately file a custody action in his home state when there has been a removal or abduction.